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Considering Sanctions Compliance in Light of UCC 4A

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CONSIDERING SANCTIONS COMPLIANCE IN LIGHT OF UCC 4A

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I. INTRODUCTION

As part of a bank's financial crime compliance program, it is increasingly common to screen and halt the processing of a payment order for compliance investigation where reference is made to a potential, but unconfirmed, target of United States economic sanctions. This essay discusses challenges under Article 4A of the Uniform Commercial Code concerning the timing of such an investigation and the creation of potential liability where a bank wrongly accepts by execution a previously halted payment order received from a sender following five funds transfer business days after the relevant execution date or payment date of that order. In Part II, this paper presents a brief overview of the use of funds transfers in the United States and reviews the application of Article 4A of the Uniform Commercial Code, including rejection, acceptance, cancellation, and amendment of a payment order. In Part III, the paper overviews United States economic sanctions, the implementation by banks of technology designed to identify and halt the processing of a payment order referencing a

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potential sanctions target, and the timeframe that may be required to investigate a halted payment order. In Part IV, the paper reviews application of Article 4A's automatic cancellation and "money back guarantee" provisions where a payment order under its purview is wrongly effected and loss allocation between funds transfer parties for such events. Part V describes possible contractual and legislative changes to address the balance of Article 4A's automatic cancellation of an unaccepted payment order after five funds transfer business days, sanctions compliance efforts undertaken by banks, and the policy goal of completing funds transfers efficiently.

II. United States Funds Transfer Environment and Article 4A

In 2019, 286 million transfers, valued at $1,113 trillion, were processed in the United States using either the electronic network of the Federal Reserve System, the Fedwire® Funds Service, or the funds transfer system of The Clearing House Payments Company, Clearing House Interbank Payments System ("CHIPS").[1] Collectively, these two systems represent the major funds transfer networks in the United States utilized to make "large-value" and "time-critical" transfers.[2] These networks are often used to make payments that are part of a larger series of payments known as a funds transfer.[3] CHIPS, for example, is primarily used to clear and settle the U.S. dollar component of an international funds transfer.[4]

It is, in fact, a series of discrete bilateral payment instructions that are generally formed and required to accomplish any funds transfer.[5] For customer payments, the first such segment begins between the payment originator and its bank, the originating bank, through the issuance of a payment order.[6] In some cases, the originating bank may be able to send a payment instruction directly to the beneficiary's bank.[7] In other cases, the originating bank may need to send

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1. Fed. Rsrv. Bank Servs., *Fedwire Funds Service - Annual Statistics*, https://www.frbservices.org/resources/financial-services/wires/volume-value-stats/annual-stats.html (last visited Aug. 17, 2020); The Clearing House, *CHIPS Annual Statistics from 1970 to 2020*, https://www.theclearinghouse.org/-/media/new/tch/documents/payment-systems/chips-volume-ytd-through-june-2020.pdf (last visited Aug. 17, 2020). Fedwire is a registered service mark of the Federal Reserve Banks. CHIPS is a registered service mark of The Clearing House Payments Company, LLC.

2. Bank for Int'l. Settlements, *Payment, Clearing and Settlement Systems in the CPSS Counties*, in Committee on Payment and Settlement Systems 487 (2012), https://www.bis.org/cpmi/publ/d105_us.pdf.

3. *See* Ernest T. Patrikis et al., Wire Transfers: A Guide to U.S. and International Laws Governing Funds Transfers 5 (1993).

4. The Clearing House, CHIPS Public Disclosure of Legal, Governance, Risk Management, and Operating Framework 5 (2020), https://www.theclearinghouse.org/-/media/new/tch/documents/payment-systems/chips_public_disclosure_june_2020.pdf.

5. *See* Patrikis et al., *supra* note 3, at 15.

6. *See id*.

7. *Id.* at 17.

its payment instruction to a third bank—an intermediary bank—which can then send a payment instruction to a further intermediary bank or the beneficiary bank.[8] A funds transfer is complete when the beneficiary bank accepts a payment instruction to pay the beneficiary.[9]

A. *Article 4A Overview*

Setting aside rules that may apply to the network or operational platform through which a funds transfer is accomplished, the primary law governing the use of funds transfers is Article 4A of the Uniform Commercial Code ("U.C.C." or "Article 4A") which has been adopted by all fifty states and the District of Columbia.[10] The provisions of Article 4A have also been broadly incorporated into transactions conducted through Fedwire[11] and CHIPS.[12] Article 4A is the culmination of a "careful and delicate balancing" of the competing interests involved in a funds transfer and, thus, it is not appropriate to "resort to principles of law or equity" for matters that are directly addressed by the Article.[13] However, for those matters not directly addressed by Article 4A, other doctrines of law such as those related to contract, tort, and mistake and restitution may be applicable.[14] Except as otherwise provided, the requirements of Article 4A may be varied by contract.[15]

A "funds transfer" in Article 4A is defined broadly[16] as "the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order."[17] This includes any payment order issued by an originator's bank or an intermediary bank that is intended to "carry out" a payment order issued by an originator.[18] As provided in Article 4A, "intermediary bank" includes any bank that receives a payment order that is not the originating bank or beneficiary bank.[19] If a bank is issuing a funds transfer on its own account and not acting for a client, when first issuing payment, that bank represents both the originator and originating bank under Arti-

8. *Id.*

9. U.C.C. § 4A-104(a) (AM. L. INST. & UNIF. L. COMM'N. 2018).

10. BENJAMIN GEVA, THE LAW OF ELECTRONIC FUNDS TRANSFERS §1.05 (2019).

11. *See* 12 C.F.R. § 210.25(b)(1) (2020).

12. *See* THE CLEARING HOUSE, CHIPS Rules and Administrative Procedures Effective March 8, 2021, 4 (2020), https://www.theclearinghouse.org/-/media/new/tch/documents/payment-systems/chips_rules_and_administrative_procedures_03-08-2021.pdf.

13. U.C.C. § 4A-102 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N. 2018).

14. Thomas C. Baxter & Raj Bhala, *The Interrelationship of Article 4A with Other Law*, BUS. LAW. 1485, 1485 (1990).

15. U.C.C. § 4A-501(a) (AM. L. INST. & UNIF. L. COMM'N. 2018).

16. PATRIKIS ET AL., *supra* note 3, at 30.

17. U.C.C. § 4A-104(a) (AM. L. INST. & UNIF. L. COMM'N. 2018).

18. *Id.*

19. U.C.C. § 4A-104(b) (AM. L. INST. & UNIF. L. COMM'N. 2018).

cle 4A.[20] Even where both the payment originator and payment beneficiary are the same person, Article 4A governs the transaction.[21] Completion of a funds transfer occurs when a payment order is accepted by the beneficiary bank for the benefit of the beneficiary (as intended to carry out the originator's payment order).[22] Each payment order within a U.C.C. funds transfer falls within the ambit of Article 4A.[23]

A "payment order"[24] is an instruction that may be transmitted orally, in writing, or electronically from a "sender" to a "receiving bank" to pay, or cause another bank to pay, a fixed or determinable amount of money to a beneficiary and of which further satisfies three distinct criteria.[25] That criteria is as follows: (i) the instruction must not apart from the time of payment set any condition of payment to the beneficiary; (ii) an account of the sender is debited, or the receiving bank otherwise receives payment from the sender in reimbursement; and (iii) the sender must transmit its instruction directly to the receiving bank "or to an agent, funds-transfer system, or communications system for transmittal to the receiving bank."[26] A "bank" for purposes of Article 4A extends to "any person in the business of banking"[27] and each branch of a bank is viewed as a separate bank.[28] The payment order may specify a "payment date" upon which the amount of the order is payable to the beneficiary;[29] it may also specify an "execution date" upon which the receiving bank may issue a payment order in execution of the order it received.[30]

Note that a "sender" is any person providing the receiving bank with the instruction[31] and the "receiving bank" is the bank where that instruction is addressed.[32] A "sender" may be the payment order originator or any later bank that issues a payment order to effectuate payment to the beneficiary until the beneficiary bank is reached.[33] An originating bank that sends a payment order to another bank serves as both a "sender" and "receiving bank" under Article 4A in the effectuation of a funds transfer.[34] Similarly, an intermediary bank

20. U.C.C. § 4A-104 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N. 2018).
21. *Id.*
22. U.C.C. § 4A-104(a) (AM. L. INST. & UNIF. L. COMM'N. 2018).
23. *See* PATRIKIS ET AL., *supra* note 3, at 30.
24. *See id.*, *supra* note 3, at 32.
25. U.C.C. § 4A-103(a)(1) (AM. L. INST. & UNIF. L. COMM'N. 2018).
26. *Id.*
27. U.C.C. § 4A-105(a)(2) (AM. L. INST. & UNIF. L. COMM'N. 2018).
28. *Id.*
29. U.C.C. § 4A-401 (AM. L. INST. & UNIF. L. COMM'N. 2018).
30. U.C.C. § 4A-301(b) (AM. L. INST. & UNIF. L. COMM'N. 2018).
31. U.C.C. § 4A-103(a)(5) (AM. L. INST. & UNIF. L. COMM'N. 2018).
32. U.C.C. § 4A-103(a)(4) (AM. L. INST. & UNIF. L. COMM'N. 2018).
33. *See* PATRIKIS ET AL., *supra* note 3, at 32.
34. *Id.*

will serve as both a sender and receiving bank. It is the instruction and execution of payment orders which define the roles of sender and receiving bank.[35]

B. *The Terms that Bind: Rejection, Acceptance, Cancellation, and Amendment of a Payment Order*

As a threshold matter, there is no duty requiring any receiving bank to agree to process forward a payment order that it receives from a sender.[36] Funds availability, risk, and internal bank policy are just a few of the litany of reasons that may underlie the decision by a receiving bank to not accept a payment order.[37] When a bank chooses to not accept a payment order, that payment order is "rejected" and such action is effective generally when notice is given to the sender.[38] That notice may be transmitted electronically, in writing, or orally and no set prescribed language is mandated by Article 4A for a transmittal to constitute rejection.[39] Language indicating the receiving bank simply will not pay the order is sufficient.[40] Where a receiving bank rejects a payment order, that payment order may not later be accepted.[41]

Should a bank choose instead to honor the instruction received, it may "accept" the payment order.[42] The official comments to Article 4A identify that "acceptance by the receiving bank of a payment order issued by the sender is comparable to acceptance of an offer under the law of contracts."[43] The action taken by a bank to manifest payment order acceptance is distinguished by whether the receiving bank is a bank other than the beneficiary bank, or the beneficiary bank.[44] In any setting where the receiving bank of the sender's payment order is not the beneficiary bank, acceptance occurs upon execution of that order.[45] Execution of a payment order, under Article 4A, arises when a bank issues its own payment order that carries out a payment order received from a sender.[46]

35. *Id.*

36. *See id.* at 53.

37. *See id.* at 66.

38. U.C.C. § 4A-210(a) (AM. L. INST. & UNIF. L. COMM'N. 2018).

39. *Id.*

40. *Id.*

41. U.C.C. § 4A-210(d) (AM. L. INST. & UNIF. L. COMM'N. 2018).

42. U.C.C. § 4A-209; *see also* PATRIKIS ET AL., *supra* note 3, at 66.

43. U.C.C. § 4A-211 cmt. 6 (AM. L. INST. & UNIF. L. COMM'N. 2018.

44. U.C.C. § 4A-209 (AM. L. INST. & UNIF. L. COMM'N. 2018).

45. U.C.C. § 4A-209(a) (AM. L. INST. & UNIF. L. COMM'N. 2018)*; but see* U.C.C. § 4A-209(d) (AM. L. INST. & UNIF. L. COMM'N. 2018) ("A payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or the execution date if the bank is not the beneficiary's bank.").

46. U.C.C. § 4A-301(a) (AM. L. INST. & UNIF. L. COMM'N. 2018).

A beneficiary bank receiving a payment order, however, accepts that order upon the earliest of four separate events.[47] In the first, acceptance occurs by the beneficiary bank making payment in accordance with the payment order to the beneficiary.[48] In the second, acceptance occurs by the beneficiary bank notifying the beneficiary that its account has been credited or that the payment order has been received, provided that notice does not condition withdrawal on receipt of actual payment from the sender.[49] In the third, the beneficiary bank receives the entire amount of funds associated with a payment order to the beneficiary from the sending bank.[50] The fourth and final event occurs at the opening of the next funds transfer business day for the beneficiary bank after the payment date of an order received where there is a withdrawable credit balance in an authorized account of the sender that fully covers the payment order or the beneficiary bank has otherwise been paid in full by the sender— unless the payment order is rejected in accordance within parameters of Article 4A.[51] In both the third and fourth situations described above, acceptance may not occur before the payment order itself is received by the beneficiary bank.[52] Additionally, acceptance does not occur under the second and third situation if the beneficiary does not have an account with the beneficiary bank, the account has been closed, or the beneficiary bank is not permitted by law to receive credits for the beneficiary's account.[53]

By operation of law, any unaccepted payment order is cancelled following the close of the fifth funds transfer business day of the receiving bank after the, as appropriate, execution date or payment date of that order.[54] Yet, within this five-day period, where a payment order is awaiting the receiving bank's decision as to acceptance, the sender may communicate notice that it seeks to cancel or amend the payment order.[55] A sender may also request cancellation or amendment of a payment order after its acceptance by the receiving bank.[56]

Where this communication is received and permits the receiving bank to reasonably act on the instruction to cancel or amend a payment order prior to its acceptance, the instruction is effective.[57] Where a sender communicates the cancellation or amendment of its payment order after acceptance by the receiving bank, the instruction is not effective unless either a funds transfer system

47. U.C.C. § 4A-209(b) (AM. L. INST. & UNIF. L. COMM'N. 2018).

48. U.C.C. § 4A-209(b)(1) (AM. L. INST. & UNIF. L. COMM'N. 2018).

49. *Id.*; *see also* PATRIKIS ET AL., *supra* note 3, at 18–20, 62 (suggesting that in certain circumstances a payment order may be received by a beneficiary bank before the payment itself).

50. U.C.C. § 4A-209(b)(2) (AM. L. INST. & UNIF. L. COMM'N. 2018).

51. U.C.C. § 4A-209(b)(3) (AM. L. INST. & UNIF. L. COMM'N. 2018).

52. U.C.C. § 4A-209(c) (AM. L. INST. & UNIF. L. COMM'N. 2018).

53. *Id.*

54. U.C.C. § 4A-211(d) (AM. L. INST. & UNIF. L. COMM'N. 2018).

55. U.C.C. § 4A-211 (AM. L. INST. & UNIF. L. COMM'N. 2018).

56. *Id.*

57. U.C.C. § 4A-211(b) (AM. L. INST. & UNIF. L. COMM'N. 2018).

rule permits cancellation without the agreement of the receiving bank or the receiving bank agrees to honor the communication in accordance with Article 4A provisions.[58] Once cancelled, by operation of law or otherwise, a payment order cannot be later accepted.[59]

Under the U.C.C., even where the receiving bank seeks to honor the sender's cancellation or amendment request, to be effective, if the receiving bank is a bank other than the beneficiary bank and has issued a payment order to another bank, it must itself issue a conforming cancellation or amendment of the payment order.[60] A beneficiary bank, on the other hand, is further limited under Article 4A to action the cancellation or amendment of an accepted payment order.[61] The U.C.C. provides that a beneficiary bank may only amend or cancel an accepted payment order where related to an unauthorized order or where a mistake of a sender in the funds transfer resulted in a payment order that: (i) is a duplicate; (ii) instructs payment to a beneficiary not entitled to payment from the originator; or (iii) instructs a payment amount greater than that ordered by the originator.[62]

C. *The Nonnegotiable Money Back Guarantee*

The sender of a payment order under Article 4A is excused from payment and entitled to a refund—if payment in satisfaction of that order has already been made—in cases where a funds transfer is not completed by a beneficiary bank's acceptance of a payment order instructing payment to the beneficiary in accordance with that sender's payment order.[63] Moreover, in any case, where the sender of a payment order makes payment for the order but was not obliged under Article 4A to make the payment, the sender is entitled to a refund from the receiving bank.[64] These U.C.C. requirements have come to be known as the "money back guarantee."[65] Notably, these provisions are not limited to the originator of the payment order, but any sender, including an intermediary bank.[66] No agreement may alter rights under the U.C.C. of the sender to be excused from payment or receive a refund in these circumstances.[67] In addition to

58. U.C.C. § 4A-211(c) (AM. L. INST. & UNIF. L. COMM'N. 2018).

59. U.C.C. § 4A-211(e) (AM. L. INST. & UNIF. L. COMM'N. 2018).

60. U.C.C. § 4A-211(c)(1) (AM. L. INST. & UNIF. L. COMM'N. 2018).

61. U.C.C. § 4A-211(c)(2) (AM. L. INST. & UNIF. L. COMM'N. 2018).

62. *Id., but see* U.C.C. § 4A-209(d) (AM. L. INST. & UNIF. L. COMM'N 2018) (explaining that the acceptance of a payment order by the originator's bank prior to the payment date, if the beneficiary's bank, or the execution date, if not the beneficiary's bank, is not effective and the payment order may subsequently be cancelled).

63. U.C.C. § 4A-402(c)–(d) (AM. L. INST. & UNIF. L. COMM'N. 2018).

64. U.C.C. § 4A-402(d) (AM. L. INST. & UNIF. L. COMM'N. 2018).

65. PATRIKIS ET AL., *supra* note 3, at 58.

66. U.C.C. § 4A-402(c)–(d) (AM. L. INST. & UNIF. L. COMM'N. 2018)*; see also* PATRIKIS ET AL., *supra* note 3, at 60.

67. U.C.C. § 4A-402(f) (AM. L. INST. & UNIF. L. COMM'N. 2018).

the return of principal, the sender may also be due interest on the refundable amount from the date of payment,[68] expenses in the funds transfer, incidental expenses, and reasonable attorney's fees.[69] Furthermore, if provided expressly by contract of the receiving bank, consequential damages may also be recoverable.[70]

As a technical point and in a somewhat more infrequent case, if an intermediary bank is mandated by the money back guarantee to refund payment associated with a payment order due to payment incompletion, but is unable to do so because of applicable law or other reasons specified by Article 4A, such as closure of the bank— a sender who executed a payment order in compliance with an instruction to route the order through that intermediary bank is permitted to receive or withhold payment from the party that issued the routing instruction.[71] The first sender who issued the routing instruction through the intermediary bank for the funds transfer is subrogated with respect to refund under the money back guarantee to the right of the bank that paid the intermediary bank.[72]

III. SANCTIONS COMPLIANCE

The Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury administers various economic sanctions programs of the United States.[73] The successor of the Office of Foreign Funds Control, following the entry of China into the Korean War, OFAC was first established in December 1950.[74] Requirements under U.S. economic sanctions generally include the freezing of assets (i.e. "blocking") or other commercial restrictions, such as those involving trade.[75] The individual sanctions regimes administered by OFAC are commonly "country-based," including those targeting Cuba, Iran, North Korea, and Syria, or "list-based," such as those targeting persons involved in acts of terrorism or narcotics trafficking.[76] Economic sanctions may be employed in concert with other related authorities, such as anti-money laundering measures, and are typically focused on those actions expected to gener-

68. U.C.C. § 4A-402(c)–(d) (AM. L. INST. & UNIF. L. COMM'N. 2018).

69. U.C.C. § 4A-305(b) (AM. L. INST. & UNIF. L. COMM'N. 2018).

70. U.C.C. § 4A-305(c) (AM. L. INST. & UNIF. L. COMM'N. 2018).

71. *See* U.C.C. § 4A-402(e) (AM. L. INST. & UNIF. L. COMM'N. 2018).

72. *Id.*

73. *Office of Foreign Assets Control,* U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information (last visited Jan. 24, 2021).

74. Press Release*, Office of Terrorism and Financial Intelligence,* U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/press-center/press-releases/Documents/tfi_factsheet.pdf (last visited Jan. 24, 2021).

75. *How OFAC Officers Pursue the OFAC Mission: Hearings on the Financing of Terrorism Before the S. Comm. on Housing Banking & Urban Affairs,* 108th Cong. 1 (2004) (Statement of R. Richard Newcomb, Director, Office of Foreign Assets Control).

76. *Id.*

ate the greatest impact in addressing events giving rise to the introduction of sanctions.[77] From January 2017 to March 2019 alone, OFAC issued in excess of 150 sanctions actions extending to over 2,000 targets.[78]

The jurisdictional reach of OFAC customarily extends to "U.S. persons," as defined to include United States citizens and permanent resident aliens wherever located, entities organized under the laws of the United States (including foreign branches), and persons within the United States.[79] Jurisdiction may also extend to non-U.S. subsidiaries of United States persons,[80] activity conducted within the United States,[81] that involving U.S. origin goods,[82] and any person causing a United States person to violate sanctions.[83] Even when OFAC may not exercise jurisdiction, non-U.S. persons may nevertheless choose to comply with U.S. sanctions because of the risk introduced by so-called "secondary sanctions" that can result in the imposition of blocking or other restrictions against a person for conducting or facilitating certain, generally significant, activity involving a target of OFAC sanctions—including where there exists no nexus to the United States.[84]

Enforcement actions associated with a violation of OFAC sanctions can be significant.[85] The enforcement actions may also be introduced based upon a theory of strict liability.[86] In 2019 alone, OFAC's enforcement actions exceed-

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77. *See Evaluating the Effectiveness of U.S. Sanctions Programs: Hearing Before the Subcomm. Monetary Policy & Trade of the H. Comm. on Fin. Servs.*, 115th Cong. (2017) (Statement of John E. Smith, Director, Office of Foreign Assets Control).

78. *Treasury's Role in Fighting Financial Crime: Hearing Before the Subcomm. of Fin. Servs. and Gen. Gov't of the H. Comm. on Appropriations*, 116th Cong. (2019) (Statement of Sigal Mandelker, Under Secretary for Terrorism and Financial Intelligence).

79. Thomas V. McVey, *U.S. Sanctions Laws: Dangers Ahead For Foreign Companies (Part I)*, WILLIAMS MULLEN (Feb. 25, 2019), https://www.williamsmullen.com/news/us-sanctions-laws-dangers-ahead-foreign-companies; *see also* 31 C.F.R. §§ 560.314, 570.313, 582.313, 589.312, 591.312 (2020).

80. *See* 31 C.F.R. §§ 510.214, 560.215 (2020).

81. *See* Exec. Order No. 13,808, 82 Fed. Reg. 41,155 (Aug. 29, 2017); Exec. Order No. 13,827, 83 Fed Reg. 12,469 (Mar. 21, 2018).

82. *See* 31 C.F.R. § 560.205 (2020).

83. *See* 50 U.S.C § 1705 (2018).

84. *See* Thomas V. McVey, U*.S. Sanctions Laws: Dangers Ahead For Foreign Companies (Part II)*, WILLIAMS MULLEN (Mar. 1, 2019), https://www.williamsmullen.com/news/us-sanctions-laws-dangers-ahead-foreign-companies-part-ii-0; *see also, e.g.*, Ukraine Freedom Support Act of 2014, Pub. L. No. 113-272, 128 Stat. 2952; Hizballah International Financing Prevention Act of 2015, Pub. L. No. 114-102, 129 Stat. 2205; Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886.

85. *Patterns of Abuse: Assessing Bank Secrecy Act Compliance and Enforcement Before the S. Comm. on Banking*, *Housing & Urban Affairs,* 113th Cong. 32–33 (2013) (statement of David S. Cohen, Under Secretary for Terrorism and Financial Intelligence) (describing significant financial penalties for violating OFAC regulations).

86. OFF. OF FOREIGN ASSETS CONTROL, OPENING SECURITIES AND FUTURES ACCOUNTS FROM AN OFAC PERSPECTIVE 2 (2008), https://www.treasury.gov/resource-center/international/standards-codes/Documents/securities_future_accounts_11052008.pdf.

ed $1.2 billion in value.[87] Under the International Emergency Economic Powers Act, the underlying statutory authority upon which most U.S. sanctions regimes existing today find their legal foundation,[88] each individual violation may give rise to a potential civil monetary penalty of $307,922 or twice the value of the transaction, whichever is larger.[89] The Foreign Narcotics Kingpin Designation Act, a separate statute under which certain other OFAC sanctions have been introduced, provides for a maximum civil monetary assessment of $1,529,991 for each violation.[90]

As part of its administration of economic sanctions, OFAC publishes the List of Specially Designated Nationals and Blocked Persons ("SDN List") that identifies various sanctions targets whose property and interests in property are blocked.[91] At any point in time, thousands of U.S. sanctions targets may appear on the SDN List.[92] OFAC further publishes a "Consolidated Sanctions List" of targets subject to various other sanctions.[93] As the name implies, the Consolidated Sanctions List aggregates various other U.S. sanctions lists, which are published by OFAC into a single resource.[94]

It is important to recognize that collectively, these publicly available lists published by OFAC are not representative of the totality of U.S. sanctions targets.[95] For example, an entity that is owned fifty percent or more by one or more OFAC blocking targets is itself to be treated as subject to blocking sanctions notwithstanding whether that entity appears on the SDN List.[96] Additionally, various governments and government actors have been targeted under U.S.

87. GIBSON DUNN, 2019 YEAR-END SANCTIONS UPDATE 1 (2020).

88. Brian O'Toole & Samantha Sultoon, *Sanctions Explained: How a Foreign Policy Problem Becomes a Sanctions Program*, ATLANTIC COUNCIL (Sept. 22, 2019), https://www.atlanticcouncil.org/commentary/feature/sanctions-explained-how-a-foreign-policy-problem-becomes-a-sanctions-program/.

89. 31 C.F.R. § 501 app. A (2020). In March 2021, the Office of Foreign Assets Control adjusted for inflation the maximum amount of the civil monetary penalties that may be assessed under relevant regulations. 31 C.F.R. § 501 (2020). This Comment uses the penalty amounts established in 2020.

90. *Id.*

91. Smith, *supra* note 77, at 8 (statement of John E. Smith, Director, Office of Foreign Assets Control).

92. *See id.*

93. *See Consolidated Sanctions List Data Files*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/consolidated-sanctions-list-data-files (last visited Jan. 1, 2021).

94. *See id.*

95. *See* OFF. OF FOREIGN ASSETS CONTROL, REVISED GUIDANCE ON ENTITIES OWNED BY PERSONS WHOSE PROPERTY AND INTERESTS IN PROPERTY ARE BLOCKED (2014); *see also* Exec. Order No. 13,599, 77 Fed. Reg. 6,659 (Feb. 8, 2012) (among other things, blocking the property and interests in property of Iranian financial institutions).

96. *See* OFF. OF FOREIGN ASSETS CONTROL, *supra* note 95.

sanctions, yet the names of these targets may not appear on sanctions-related lists published by OFAC.[97]

To address potential economic sanctions risk, OFAC strongly encourages the development of a risk-focused sanctions compliance program.[98] That program should incorporate five identified "essential components" of compliance: management commitment; risk assessment; internal controls; independent program testing; and training.[99] These components serve as a minimum baseline standard for an OFAC compliance program and organizations frequently will augment their sanctions compliance program to include additional elements.[100]

Commonly the deployment and use of specialized electronic tools containing the SDN List and other OFAC lists to screen customers, counterparties, and financial transactions will form part of a company's sanctions compliance program controls.[101] This specialized screening control is generally expected to flag names even when they are not an exact match to listed individuals and entities.[102] List enhancements, including alternative spellings of published sanctioned parties or industry-specific identifiers, for instance, those identifying large corporates and banks published by the Society for Worldwide Interbank Financial Telecommunication ("SWIFT"), may further be incorporated into an OFAC screening application.[103]

On a global basis, banks regularly screen for sanctions risk transactions (including funds transfers), prior to completion. This form of sanctions screening is known as that conducted on a "real-time" basis and is most prevalent for activities international in nature.[104] This is not to say that real-time screening occurs entirely with respect to cross-border financial activities, as that which is purely domestic may also be screened to the same standard (i.e., screening upon receipt of a payment order and prior to execution of payment).[105] Furthermore, for wire payments, there is no flag or other indicator that readily identifies whether the payment is international or domestic.[106] Hence, even if banks

97. *See* Exec. Order No. 13,884, 84 Fed. Reg. 38,843 (Aug. 7, 2019) (blocking property of the Government of Venezuela, including its agencies, instrumentalities, and controlled entities); Exec. Order No. 13,722, 81 Fed. Reg. 14,941 (Mar. 8, 2016) (blocking property of the Government of North Korea, including its agencies, instrumentalities, and controlled entities); Exec. Order No. 13,582, 76 Fed. Reg. 52,209 (Aug. 22, 2011) (blocking property of the Government of Syria, including its agencies, instrumentalities, and controlled entities).

98. *See* OFF. OF FOREIGN ASSETS CONTROL, A FRAMEWORK FOR OFAC COMPLIANCE COMMITMENTS 1 (2019).

99. *See id.*

100. *See id.*

101. *See id.* at 11.

102. *See id.*

103. *See id.*

104. WOLFSBURG GRP., WOLFSBURG GUIDANCE ON SANCTIONS SCREENING 1-2, 8 (2019).

105. *See id.*

106. In contrast, ACH payments have a specific message type, the IAT (developed with the Office of Foreign Assets Control), that is used to distinguish payments that are international from

wanted to apply different levels of screening to domestic wires and international wires, there would be limited practical means to distinguish the wires in their payment processing systems.

The return of a potential alert from the use of a specialized screening application is not itself determinative of sanctions risk.[107] An additional manual review is frequently required to make an initial determination as to whether the alert generated may be discounted as a clear false positive or is one requiring additional investigation.[108] The percentage of financial transactions halted in real-time for manual review may differ greatly between institutions based upon factors including screening settings and list enhancements.[109]

The exact percentage of payment orders being halted due to a potential sanctions-related alert can vary between a range as expansive as approximately one percent[110] and thirty-three percent of all transactions submitted for processing at a major U.S. bank.[111] Applying these percentages across the Fedwire and CHIPS payments landscape in 2019, this range would represent the pausing of approximately 2.9 million to 94 million payment orders across a twelve-month period conducted through the major U.S. funds transfer systems before execution for economic sanctions compliance review.[112] In fact, the number of payment orders paused is presumably somewhat higher, since some payment orders that are paused are determined to be prohibited and, thus, are never executed through Fedwire or CHIPS.[113] The vast majority of all transactions initially halted in real-time because of a sanctions-related alert are cleared for further processing within a matter of minutes.[114] However, a small percentage of transactions will require heightened investigation and cannot be actioned immediately.[115] In certain cases, these transactions requiring heightened investigation may even be escalated to OFAC for further review and consultation.[116]

To place sanctions screening statistics into further perspective, one major U.S. bank reported in 2015 that of 1.1 million financial transactions received

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those that are purely domestic. *See International ACH Transactions (IATs)*, NACHA (Apr. 23, 2019), https://www.nacha.org/content/international-ach-transactions-iats.

107. *See* WOLFSBURG GRP., *supra* note 104 at 2.

108. Angel Swift & Daniela Dekhtyar-McCarthy, *Challenging the Status Quo: Sanctions Screening*, ACAMS TODAY (Dec. 12, 2019), https://www.acamstoday.org/challenging-the-status-quo-sanctions-screening/.

109. *See* WOLFSBURG GRP., *supra* note 104 at 2.

110. David Cortright et al., *Targeted Financial Sanctions: Smart Sanctions That Do Work*, *in* SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 23, 34 (David Cortright & George A. Lopez eds., 2002).

111. Swift & Dekhtyar-McCarthy, *supra* note 108.

112. *See* FED. RSRV. BANK SERVS., *supra* note 1; THE CLEARING HOUSE, *supra* note 1.

113. *See generally* Newcomb, *supra* note 75 (describing the interdiction of prohibited transactions involving U.S. sanctions targets).

114. Swift & Dekhtyar-McCarthy, *supra* note 108.

115. Cortright et al., *supra* note 110, at 34.

116. *Id.*

daily, 35,000, or three percent, alerted due to a potential match in its sanctions screening tool.[117] Of this amount, 3,550 or ten percent of that alerting on a daily basis, required further investigation and could not be resolved the same day.[118] Utilizing various methods, but with "minimum investigation," 3,470 of those payments were later released for further processing, while the remaining 80 transactions were escalated to a central compliance function for appropriate action.[119]

Over a 30 business day period, these figures suggest that for one major U.S. bank, 106,500 financial transactions required at least what is described as "minimum investigation" to resolve the sanctions alert and may have been unable to process the same day—while 2,400 transactions required disposition by a central compliance function and something other than minimum investigation.[120] At an industry level, a research survey published by an organization active in addressing financial crime compliance requirements identified at a regional level that approximately five percent of all funds transfer sanctions alerts required in excess of six days to resolve, while an additional eleven percent of alerts required between three and five days for resolution.[121]

It is also notable that in more recent years, certain U.S. sanctions have imposed increasingly surgical restrictions on specific types of transactions (such as those related to new equity issuances or new debt of a sanctions target) with the aim of achieving specific policy goals while minimizing "disruptions to the 'plumbing' of the international financial system."[122] However, such restrictions can introduce more nuanced and complex reviews by banks into the purpose or commercial terms underlying a halted transfer of funds to determine permissibility of payment.[123] Such a review into the purpose or commercial terms underlying a halted transfer of funds may ordinarily be triggered only after it is first determined a payment order in fact involves a sanctions target which is the subject of a restriction focused on more narrow classes of transaction types.[124]

117. Aengus O' Connor, *Enhancing the Client Experience New Client Operations Models*, CITIBANK 6 (May 18, 2015). https://www.citibank.com/tts/sa/eSource_academy/docs/optimizing.pdf.

118. *Id.*

119. *Id.*

120. *See id.*

121. LEXISNEXIS, UNCOVER THE TRUE COST OF ANTI-MONEY LAUNDERING & KYC COMPLIANCE 12 (2017).

122. David S. Cohen, *The Evolution of U.S. Financial Power*, *in* U.S. DEP'T OF THE TREASURY PRESS CTR. (2014).

123. *See* Office of Foreign Assets Control, Enforcement Information for Apr. 25, 2019 (describing the rejection by financial institutions of certain funds transfers following a determination those transactions represented prohibited debt of greater than a specified maturity in accordance with Directive 2 under Exec. Order No. 13,662).

124. *See* O' Connor, *supra* note 117, at 6.

IV. Extended Compliance Reviews of Payment Orders, automatic five-day cancellation, and the Article 4A Money Back Guarantee

Article 4A is intended to be the exclusive means of determining rights, duties, and liabilities of the subject matter covered under its scope.[125] Claims under the common law that would impose liability inconsistent with Article 4A are generally precluded.[126] This is not to say that Article 4A is a "hermetic legal seal over funds transfers," as it is intended to "synergize" with other legal doctrines and resorting to principles of law and equity that are consistent with its provisions is acceptable.[127]

With technical precision, Article 4A provides that any payment order that is not accepted is cancelled by operation of law at the close of the fifth funds transfer business day following the, as appropriate, execution date or payment date of that order.[128] Once cancelled, a payment order cannot later be accepted by the bank receiving that order.[129] Cancellation of a payment order means that the funds transfer has not been completed.[130] In cases where the sender already paid for a payment order and was not obliged to pay because of non-acceptance of that order by the receiving bank or because the funds transfer was not completed, it is due a refund from the bank receiving payment.[131] This right to refund applies to each previous payment order in the funds transfer for which the sender paid the receiving bank.[132] Hence, to the extent that the originator paid the originating bank for its payment order, the originator has a right to be repaid when a funds transfer is not completed because one of the payment orders within the funds transfer is cancelled.[133] It would appear to follow by extension that this would include circumstances where a receiving bank takes more than five funds transfer business days to determine that a payment order does not violate

125. U.C.C. § 4A-102 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N. 2018).

126. *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 103 (2d Cir. 1998); *Receivers of Sabena SA v. Deutsche Bank A.G.*, 142 A.D.3d 242, 252 (N.Y. App. Div. 2016).

127. *See Sheerbonnet, Ltd. v. American Exp. Bank, Ltd.,* 951 F. Supp. 403, 408 (S.D.N.Y. 1995).

128. U.C.C. § 4A-211(d) (AM. L. INST. & UNIF. L. COMM'N. 2018).

129. U.C.C. § 4A-211(e) (AM. L. INST. & UNIF. L. COMM'N. 2018).

130. This is so because a funds transfer is comprised of a series of payment orders that carry out the originator's instruction to pay the beneficiary and is not complete until the beneficiary's bank accepts a payment order for the benefit of the beneficiary. *See* U.C.C. § 4A-104(a) (AM. L. INST. & UNIF. L. COMM'N. 2018). Given that under U.C.C. § 4A-211(e) a payment order cannot be accepted after it is cancelled, a cancellation of any payment order within the series of payment orders between the originator and the beneficiary's bank means that the funds transfer has stopped before the beneficiary bank has accepted a payment order for the benefit of the beneficiary. *See* U.C.C. § 4A-211(e) (AM. L. INST. & UNIF. L. COMM'N. 2018). Hence, under Article 4A's framework, a cancelled payment order results in an incomplete funds transfer.

131. U.C.C. § 4A-402(d) (AM. L. INST. & UNIF. L. COMM'N. 2018).

132. PATRIKIS ET AL., *supra* note 3, at 60.

133. *Id.*

U.S. sanctions laws and erroneously purports to "accept" the already cancelled payment order through issuance of its own payment order.[134]

Acceptance, again, for a bank other than the beneficiary bank generally occurs upon its own execution of the payment order received.[135] A beneficiary bank on the other hand accepts a payment order at the earliest of certain conditions (discussed *supra)* identified in Article 4A.[136] But a bank may not accept a cancelled payment order,[137] and the risk of automatic cancellation awaits where a payment is not properly accepted within five funds transfer business days.[138] Particularly where a payment order is selected for extended investigation by the originating bank or an intermediary bank due to a real-time sanctions screening alert, a determination subsequent to order cancellation by operation of law that the funds transfer did not implicate activity prohibited under U.S. sanctions requires that any funds received as payment for that order be returned to the sender.[139]

Improper execution following a sanctions compliance review by the receiving bank of a payment order cancelled by operation of law will introduce potential liability under the Article 4A money back guarantee provisions.[140] Where a situation is covered by Article 4A, its exclusive province endures.[141]

There is little debate that actions appropriate and necessary to comply with the extensive framework of federal laws and regulations governing U.S. economic sanctions are expected of persons subject to OFAC jurisdiction.[142] Notably, in connection with the administration of these programs, certain U.S. sanctions regimes preclude the holding of a person liable for actions or omissions in good faith in compliance with the requirements.[143] Notwithstanding a bank's actions to halt a payment order due to a real-time sanctions alert or succeeding decision to conduct an appropriate investigation to determine whether that transaction is in conformance with OFAC requirements— the shield of such a liability limitation very well may not extend beyond a finding that activity the subject of an inquiry is not implicated by U.S. sanctions.[144] At such time, the requirements of Article 4A, including the provision cancelling an unaccepted payment order by operation of law after five funds transfer business days would

134. *See* U.C.C. § 4A-402(d)–(e) (AM. L. INST. & UNIF. L. COMM'N. 2018). *See generally* U.C.C. § 4A-205 (AM. L. INST. & UNIF. L. COMM'N. 2018) (identifying payment obligations for certain properly accepted payment orders that are erroneously instructed or transmitted).

135. U.C.C. § 4A-209(a) (AM. L. INST. & UNIF. L. COMM'N 2018).

136. U.C.C. § 4A-209(b) (AM. L. INST. & UNIF. L. COMM'N. 2018).

137. U.C.C. § 4A-211(e) (AM. L. INST. & UNIF. L. COMM'N. 2018).

138. *See* U.C.C. § 4A-211(d) (AM. L. INST. & UNIF. L. COMM'N. 2018).

139. *See* U.C.C. §§ 4A-211(d)–(e), 4A-402(d) (AM. L. INST. & UNIF. L. COMM'N. 2018).

140. *See* U.C.C. § 4A-402(d) (AM. L. INST. & UNIF. L. COMM'N. 2018).

141. *Sheerbonnet*, 951 F. Supp. at 408 (quoting N.Y. U.C.C. 4A–102 official cmt.).

142. OFF. OF FOREIGN ASSETS CONTROL, *supra* note 98, at 1.

143. 50 U.S.C. § 1702(a)(3).

144. *See id.*

appear to be restored.[145] Hence, as a practical matter, there is a need for banks to keep track of the five funds transfer day period in their sanctions reviews in order to mitigate the risk that they might improperly execute a payment order that has been automatically cancelled under Article 4A.[146]

Another practical point to consider is that historically the sender of a payment order did not have visibility into how long it takes for the receiving bank to execute a payment order, and, thus, would not have necessarily known that a payment order was delayed more than five funds transfer days.[147] This is changing as payment systems, including wires, become more transparent between banks and even to originators and beneficiaries.[148] In addition, as legacy funds transfer systems consider 24x7 operating models and as certain low-value funds transfers can now be conducted over the RTP[149] System, which operates 24x7, weekends and holidays can be funds transfer days.[150] Hence, now is a good time for banks to consider the implications of extended sanctions reviews and Article 4A's automatic cancellation provision.

Litigation that has centered on Article 4A's automatic cancellation provision has arisen from competing claims to blocked funds, i.e., funds transfers in which the beneficiary never received payment.[151] For situations in which a receiving bank improperly executes a cancelled payment order following a sanc-

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145. *See* Receivers of Sabena SA v. Deutsche Bank A.G., 142 A.D.3d 242, 260 (N.Y. App. Div. 2016) (holding that upon the lifting of a federal block, an interrupted funds transfer cancelled by operation of law by Article 4A is to be refunded to the sender); *but see* Bank of New York v. Nickel*,* 14 A.D.3d 140, 147 (N.Y. App. Div. 2004) (holding that OFAC requirements do not preempt Article 4A requirements not in conflict upon the lifting of a federal block, but finding that in an interpleader action where U.C.C. provisions cancelling a payment order by operation of law had not been raised, in a contest between a payment beneficiary and creditor of the originator, funds should be transferred to the beneficiary); *see also* European American Bank v. Bank of Nova Scotia, 12 A.D.3d 189 (N.Y. App. Div. 2004) (upholding that an interrupted funds transfer following the vacating of a marshal's levy should be released to the beneficiary bank in a case that did not raise U.C.C. provisions cancelling a payment order by operation of law).

146. U.C.C. § 4A-211(d) (AM. L. INST. & UNIF. L. COMM'N. 2018).

147. Furthermore, if a sender inquired with a receiving bank about the status of a payment order and was told that the order was under regulatory or compliance review, the sender likely would assume that the receiving bank would be "immune" from any claims related to the delay. This is not an unreasonable assumption given that other laws do accommodate the time needed for sanctions reviews. For example, delays related to sanctions reviews are excused from certain consumer error claims under Regulation E's "remittance transfer rule". *See* 12 C.F.R. § 1005.33(a)(iv)(B) (2020).

148. For example, SWIFT has an initiative to make international wire payments that are conducted through correspondent banking faster and more transparent. *See generally The Digital Transformation of Cross-border Payments*, SWIFT (Aug. 18, 2020), https://www.swift.com/our-solutions/swift-gpi/about-swift-gpi.

149. RTP, Registration No. 5287247.

150. *See* Carl Slabicki, *Real-Time Payments Now a Reality*, THE CLEARING HOUSE, (2018), https://www.theclearinghouse.org/banking-perspectives/2018/2018-q2-banking-perspectives/articles/real-time-payments-now-a-reality.

151. *See* Receivers of Sabena SA v. Deutsche Bank A.G., 142 A.D.3d 242, 244 (N.Y. App. Div. 2016); Bank of New York v. Nickel*,* 14 A.D.3d 140, 142-45 (N.Y. App. Div. 2004).

tions review that extends beyond five funds transfer business days and the beneficiary is ultimately paid, litigation seems unlikely since the fundamental purpose of the funds transfer—payment from the originator to the beneficiary—has been fulfilled.[152] Hence, only in cases in which an originator later determines that it did not intend to pay the beneficiary—such as when the originator's payment order was unauthorized or the originator was fraudulently induced to send a payment order to an unintended beneficiary—is it foreseeable that an originator might seek a refund for a cancelled payment order.[153] However, because the right to refund is prefaced on the assumption that a cancelled payment order results in a failure to pay the beneficiary (i.e., the funds transfer is incomplete), then the fact that the beneficiary was in fact paid should mean in the ordinary course that refund is not appropriate even though there was a technical cancellation of the payment order.[154]

To the extent a court found an originating bank must refund the amount of a payment order to the originator because the funds transfer was deemed incomplete due to an improper acceptance of a payment order even though the beneficiary was in fact paid, the bank that ultimately sits with the loss[155] would presumably be able to pursue a common law claim against the beneficiary since Article 4A does not directly address such a circumstance.[156] Recovery from a party not entitled to retain funds under the governing law of mistake and restitution or other applicable law is not precluded by Article 4A.[157] The only restraint is that the principles of law and equity ought not be inconsistent with U.C.C. provisions.[158]

Article 4A also applies special rules concerning loss allocation related to three forms of "erroneous" payment orders and prescribes with detail appropriate remedies in such cases.[159] These cases involve funds transfers erroneously: (1) directed to a beneficiary not intended by the sender; (2) sent in an amount

152. *See* PATRIKIS ET AL., *supra* note 3, at 51 (discussing the common sense "no harm, no foul" principle in the context of mistaken payments and unauthorized transfers where a satisfactory result is obtained).

153. While Article 4A has provisions that directly addresses liability for unauthorized and fraudulently induced payment orders, an originator who is unsuccessful in shifting liability to the originating bank under these provisions might assert a claim for refund of its payment order if it appears that any payment order in the funds transfer chain was delayed beyond five funds transfer days. *See* U.C.C. §§ 4A-305(b), 4A-402(c)–(d) (AM. L. INST. & UNIF. L. COMM'N 2018).

154. *See* U.C.C. § 1-304 (AM. L. INST. & UNIF. L. COMM'N. 2018) (describing that every contract or duty under the Uniform Commercial Code imposes an obligation of good faith in both its performance and enforcement).

155. Since the money back guarantee provision would be available to each bank (originating and intermediary) that properly accepted and paid for its payment order, under Article 4A the bank that improperly accepted a payment order would likely sit with the loss. *See* PATRIKIS ET AL., *supra* note 3, at 71–72 (describing that any sender is entitled to the money-back guarantee).

156. *See* U.C.C. § 4A-104 cmt. 3 (AM. L. INST. & UNIF. L. COMM'N. 2018).

157. *See id.*

158. *Sheerbonnet*, 951 F. Supp. at 408 (quoting N.Y. U.C.C. 4A–102 cmt.).

159. *See* U.C.C. § 4A-205(a) (AM. L. INST. & UNIF. L. COMM'N. 1989).

greater than that intended by the sender; or (3) transmitted as a duplicate of a prior payment order sent by a sender.[160] If a sender is excused from payment of the entire funds transfer amount or a portion of the funds transfer amount under this provision of the U.C.C., the receiving bank is entitled to recover the erroneous amount transferred from the beneficiary "to the extent allowed by" the law governing mistake and restitution.[161] Importantly, a sender may lose its excusal from paying all or part of the payment under these specific provisions if it received notice that its order was accepted or its account was debited and ordinary care had not been taken to discover the error within ninety days of the notice received.[162] At a more general level, placing aside the special loss allocation rules in relation to particular types of erroneous payments, where a sender that is the customer of a receiving bank has paid for a payment order accepted by its bank (and received reasonable notice of that order), an assertion that the bank is not entitled to retain payment must be made within one year of the notification received.[163]

V. A PATH FORWARD

As noted above, given the important ongoing requirements of U.S. sanctions laws as well as the increasing speed, transparency, and 24x7 operations of payment systems it is an opportune time to consider implications of Article 4A's automatic cancellation provision. While the provision was intended to prevent unexpected acceptance of "stale" payment orders, in the context of sanctions reviews, is automatic cancellation the right policy outcome?

To mitigate potential liability for improper acceptance of a cancelled payment order, a bank subjecting a payment order to a real-time sanctions compliance review could steadfastly follow U.C.C. requirements upon a determination that U.S. sanctions do not implicate or otherwise require action to be taken under federal law.[164] That is, where a payment order is held for a period exceeding five funds transfer days because of a sanctions real-time compliance review and upon a finding that the transaction does not implicate activity prohibited by federal law, the bank could recognize the cancellation of the payment order and refund any funds received from the sender in satisfaction of that order.[165] Yet returning a significant volume of funds associated with payment orders cancelled by operation of law due to extended sanctions investigations may nevertheless run counter to the Article 4A policy goal of efficiency, including that of low cost where subsequent payment order resubmission occurs.[166]

160. *See id.*
161. *See id.*
162. U.C.C. § 4A-205(b) (AM. L. INST. & UNIF. L. COMM'N. 2018).
163. U.C.C. § 4A-505 (AM. L. INST. & UNIF. L. COMM'N. 2018).
164. *See Receivers of Sabena SA,* 142 A.D.3d at 106.
165. *See* U.C.C. §§ 4A-211(d), 4A-402(c)–(d) (AM. L. INST. & UNIF. L. COMM'N. 2018).
166. *See* PATRIKIS ET AL., *supra* note 3, at 23.

Article 4A in prescribing detailed and precise rules governing funds transfers leaves the door open for parties to vary by agreement its terms unless otherwise proscribed.[167] While the requirements related to the U.C.C. money back guarantee may not be varied by agreement,[168] notably, no similar restriction applies to the Article 4A provision cancelling an unaccepted payment order by operation of law after five funds transfer business days.[169] In this regard, a bank ostensibly by agreement could vary the terms of Article 4A such that an unaccepted payment order is only automatically cancelled after a period of time exceeding five funds transfer business days.[170] This approach may further the policy goal of "efficiency" in electronic funds transfers by recognizing that but for a review to verify compliance with U.S. sanctions law, the originator of a payment order would prefer to have the funds transfer completed rather than have funds returned and instruct a second payment order to the intended beneficiary.[171] However, the originator might rather that no change to Article 4A provisions occur in preventing an "unexpected delayed acceptance."[172]

Even if a sender and receiving bank agreed to vary the automatic cancellation provision of Article 4A, a funds transfer involves a series of separate payment orders between each pair of senders and receiving banks.[173] Hence, a contractual provision would need to be in place between each pair to ensure that no matter which payment order or orders were delayed beyond five funds transfer days due to sanctions review, none would be deemed cancelled.[174] While funds transfer system rules could potentially be revised to permit for longer sanctions reviews, such rules would only be effective between the banks participating in the systems and not to other parties to the funds transfer.[175]

There may exist a case for broader advocacy to amend the provision of Article 4A cancelling an unaccepted payment order following five funds transfer business days to better address the unique timing challenges introduced for funds transfers determined to require heightened review for sanctions compliance.[176] Here, the Permanent Editorial Board for the Uniform Commercial Code (a joint committee of the American Law Institute and the Uniform Law Commission)[177] could recommend an amendment to §4A-211 for the Uniform

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167. *See* U.C.C. § 4A-501 (AM. L. INST. & UNIF. L. COMM'N. 2018).

168. U.C.C. § 4A-402(f) (AM. L. INST. & UNIF. L. COMM'N. 2018).

169. U.C.C. § 4A-211(d) (AM. L. INST. & UNIF. L. COMM'N. 2018); *see also id*. § 4A-402(f).

170. *See id.*

171. *See* PATRIKIS ET AL., *supra* note 3, at 23.

172. *See* U.C.C. § 4A-211 cmt. 7 (AM. L. INST. & UNIF. L. COMM'N. 2018).

173. *See* PATRIKIS ET AL., *supra* note 3, at 30.

174. *See id.* at 128–29.

175. U.C.C. § 4A-501(b) (AM. L. INST. & UNIF. L. COMM'N. 2018).

176. *See generally* PATRIKIS ET AL., *supra* note 3, at 9 (describing that the drafting committee of Article 4A wanted wire transfers to be "fast, secure, and cheap" and that the rules introduced should foster these objectives).

177. AM. LAW. INST., *Uniform Commercial Code*, https://www.ali.org/publications/show/uniform-commercial-code/ (last visited June 2, 2020).

Law Commission's approval that would more consistently permit increased timing for banks to accept a payment order halted in real-time for a sanctions compliance review.[178] A change to the model Article 4A rules addressing the unique timing elements of OFAC compliance practices may help to further the wider policy objectives of funds transfer efficiency.[179]

There may also exist a case for considering the sanctions compliance side of the equation. Hence, it may also be appropriate for banks and policymakers to consider how the goals of U.S. sanctions laws can be more effectively addressed in a time when payments are becoming faster to meet the needs of U.S. consumers and businesses.

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178. *See* U.C.C. § 4A-211(d) (AM. L. INST. & UNIF. L. COMM'N 2018).

179. *See* PATRIKIS ET AL., *supra* note 3, at 9.