



THE GUIDE TO SANCTIONS

THIRD EDITION

Editors

Rachel Barnes QC, Paul Feldberg, Nicholas Turner,
Anna Bradshaw, David Mortlock, Anahita Thoms and
Rachel Alpert

The Guide to Sanctions

Third Edition

Editors

Rachel Barnes QC

Paul Feldberg

Nicholas Turner

Anna Bradshaw

David Mortlock

Anahita Thoms

Rachel Alpert

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2022
For further information please contact insight@globalinvestigationsreview.com

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK
© 2022 Law Business Research Ltd
www.globalinvestigationsreview.com

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as at June 2022, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to: insight@globalinvestigationsreview.com.
Enquiries concerning editorial content should be directed to the Publisher –
david.samuels@lbresearch.com

ISBN 978-1-83862-874-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

Akrivis Law Group, PLLC

Baker & Hostetler LLP

Baker McKenzie

Barnes & Thornburg LLP

BDO USA LLP

Carter-Ruck

Cravath, Swaine & Moore LLP

Eversheds Sutherland

Fangda Partners

Forensic Risk Alliance

Global Law Office

Jenner & Block LLP

McGuireWoods LLP

Mayer Brown

Miller & Chevalier Chartered

Navacelle

Peters & Peters Solicitors LLP

Seward & Kissel

Simmons & Simmons LLP

Steptoe & Johnson

Stewarts

Three Raymond Buildings

White & Case LLP

Willkie Farr & Gallagher LLP

Publisher's Note

The Guide to Sanctions is published by Global Investigations Review – the online home for everyone who specialises in investigating and resolving suspected corporate wrongdoing.

When this guide was launched, I wrote that we were living in a new era for sanctions: more and more countries were using them, with greater creativity and (sometimes) self-centredness. I had no idea how true this statement would prove. Recent events have supercharged their use, to the point where, as our editors write in their introduction, ‘sanctions never sleep’. And then Russia invaded Ukraine ...

Sanctions have truly become a go-to tool. And little wonder. They are powerful; they reach people who would otherwise be beyond our reach. They are easy – you can impose or change them at a stroke, without legislative scrutiny. And they are cheap (in the simplest sense)! It's up to others once they're in place to do all the heavy lifting.

The heavy lifting part is where this book can help. The pullulation of sanctions regimes, and sanctions, has resulted in more and more day-to-day issues for business and their advisers.

Hitherto, no book has addressed this complicated picture in a structured way. *The Guide to Sanctions* corrects that by breaking down the main sanctions regimes and some of the practical problems they create.

For newcomers, it will provide an accessible introduction to the territory. For experienced practitioners, it will help them stress-test their own approach. And for those charged with running compliance programmes, it should help them to do so even better. Whoever you are, we are confident this book has something for you.

The guide is part of the GIR technical library, which has developed around the fabulous *Practitioner's Guide to Global Investigations* (now in its fifth edition). *The Practitioner's Guide* tracks the life cycle of any internal investigation, from

discovery of a potential problem to its resolution, telling the reader what to think about at every stage. You should have both books in your library, as well as the other volumes in GIR's growing library – particularly our *Guide to Monitorships*.

We supply copies of all our guides to GIR subscribers, gratis, as part of their subscription. Non-subscribers can read an e-version at www.globalinvestigationsreview.com.

I would like to thank the editors of *The Guide to Sanctions* for shaping our vision (in particular Paul Feldberg, who suggested the idea), and the authors and my colleagues for the elan with which it has been brought to life.

We hope you find the book enjoyable and useful. And we welcome all suggestions on how to make it better. Please write to us at insight@globalinvestigationsreview.com.

David Samuels

Publisher, GIR

June 2022

Contents

Foreword.....xiii
Neil Whiley

Introduction1
Rachel Barnes QC, Paul Feldberg and Nicholas Turner

PART I: SANCTIONS AND EXPORT CONTROL REGIMES AROUND THE WORLD

1 UN Sanctions..... 11
Guy Martin and Charles Enderby Smith

2 EU Restrictive Measures 40
Genevra Forwood, Sara Nordin, Matthias Vangenechten, Tobias Zuber,
Julia Marssola and Fabienne Vermeeren

3 EU Sanctions Enforcement..... 59
David Savage

4 UK Sanctions..... 79
Paul Feldberg, Robert Dalling, Karam Jardaneh and Matthew Worby

5 UK Sanctions Enforcement 102
Rachel Barnes QC, Saba Naqshbandi, Patrick Hill and Genevieve Woods

6 US Sanctions..... 137
John D Buretta and Megan Y Lew

7 US Sanctions Enforcement by OFAC and the DOJ 160
David Mortlock, Britt Mosman, Nikki Cronin and Ahmad El-Gamal

8	Export Controls in the European Union	187
	Anahita Thoms	
9	Export Controls in the United Kingdom	201
	Tristan Grimmer and Ben Smith	
10	Export Controls in the United States	208
	Meredith Rathbone and Hena Schommer	
11	Sanctions and Export Controls in the Asia-Pacific Region	229
	Wendy Wysong, Ali Burney and Nicholas Turner	
12	Developments in Mainland China and Hong Kong	246
	Qing Ren, Deming Zhao and Ningxin Huo	
13	Sizing up China's Anti-Foreign Sanctions Law and Other Countermeasures	269
	Kate Yin and Derrick Zhao	
14	Practical Applications of International Sanctions and Export Controls in France	285
	Stéphane de Navacelle, Julie Zorrilla and Thomas Lapierre	

PART II: COMPLIANCE PROGRAMMES

15	Principled Guide to Sanctions Compliance Programmes	301
	Zia Ullah and Victoria Turner	
16	Sanctions Screening: Challenges and Control Considerations	317
	Charlie Steele, Gerben Schreurs, Sarah Wrigley, Deborah Luskin and Jona Boscolo Cappon	

PART III: SANCTIONS IN PRACTICE

17	Navigating Conflicting Sanctions Regimes	335
	Cherie Spinks and Bruce G Paulsen	

18 Sanctions Issues Arising in Corporate Transactions 358
Barbara D Linney and Orga Cadet

19 Key Sanctions Issues in Civil Litigation and Arbitration..... 376
Claire A DeLelle and Nicole Erb

**20 Issues Arising for Financial Institutions and Regulated
Entities 407**
Jason Hungerford, Ori Lev, Tamer Soliman and James Ford

21 Impacts of Sanctions and Export Controls on Supply Chains..... 430
Alex J Brackett, J Patrick Rowan, Jason H Cowley, Laura C Marshall,
Edwin O Childs, Jr and Elissa N Baur

22 Practical Issues in Cyber-Related Sanctions..... 442
Brian Fleming, Timothy O'Toole, Christopher Stagg, Caroline Watson,
Manuel Levitt and Mary Mikhaeel

23 The Role of Forensics in Sanctions Investigations 460
Nate Giarnese, Tianyu You, Kristen McCannon Krishnamurthy,
Soyoung Yang and Luis F Arandia, Jr

**24 Representing Designated Persons: A UK Lawyer's
Perspective..... 477**
Anna Bradshaw and Alistair Jones

**25 Representing Designated Persons: A US Lawyer's
Perspective..... 491**
Farhad Alavi and Sam Amir Toossi

Appendix 1: Comparison of Select Sanctions Regimes..... 509
Appendix 2: About the Authors 513
Appendix 3: Contributors' Contact Details 555

Foreword

I am delighted to welcome you to this third edition of Global Investigations Review's *The Guide to Sanctions*. The international, geographical, political, criminal, legal and regulatory elements that make up sanctions programmes ensure that this will remain one of the most complex compliance areas facing practitioners. The following chapters contain important information, advice and best practice for sanctions and export controls as a compliance discipline, courtesy of some of the world's leading legal, forensic and compliance specialists. The daily change to the international regimes requires practitioners and businesses to be constantly monitoring and horizon-scanning across all relevant jurisdictions, and the Guide is packed full of resources that will enable readers to do just that.

The current sanctions environment makes this Guide a must read for any practitioner who manages or advises on sanctions compliance. This Guide is the work of leading industry specialists who have all given their time and expertise to produce a resource that should be on every bookshelf. At a time of growing complexity, readers may find the Guide worthy of being constantly consulted as a valuable reference resource, not only in its own right, but also for the treasure trove of links and references to information and guidance provided by the regulators who guide industry in implementing sanctions policy.

Sanctions never sleep, and since the previous version of this Guide, we have seen the UK settle into an autonomous programme and increased international coordination with major countries and blocs looking to align as closely as possible. The US is no longer the only major player.

The sanctions regimes in place for countries such as Iran, Syria, North Korea and Yemen, to name just a few, have continued to evolve, but the focus since August 2021 has been squarely on Russia and Belarus. This Guide will bring you

up to date with the significant changes in those regimes, as at the time of writing, covering both the sanctions and export controls, as well as updating you on the developments in other regimes, including China and Hong Kong.

As with earlier editions, this third edition covers the major sanctions programmes from the United Nations, the United States, the European Union, the United Kingdom and the Asia-Pacific region, including the types of prohibitions imposed by the relevant programmes, the licence procedures and the measures that are available to challenge listings. Each of the major jurisdictions has an enforcement section that details the process and elements of enforcement from the relevant jurisdiction. The Guide also covers the re-emergence of thematic sanctions programmes; no longer limited to terrorism and narcotics, these programmes have seen a significant growth over the past few years. The third edition welcomes new authors who share their experiences representing sanctioned clients, among others.

The section on compliance programmes will enable readers to review their own programmes against best practice and improve and enhance their own controls if required. The final section covers sanctions and export controls in practice, giving good advice on how to navigate international, extraterritorial and often conflicting requirements of global sanctions and export control rules.

It is important to remember that financial crime is not a competition and that we make the biggest impact when we work together across industry and governments. The partnerships and collaboration across the globe play an important part in managing international sanctions. Part of my role at UK Finance is to liaise with industry and governments to help promote public-private partnerships and ensure that we are all fighting financial crime, especially in the sanctions space, as a coordinated and collaborative network of specialists, in the UK and elsewhere.

The Guide to Sanctions is intended to enable readers to be a valuable part of the sanctions and export controls community, dedicated to fighting financial crime and helping to protect our wider society from the impacts of those that seek to cause harm on the international stage.

Neil Whiley

Director of Sanctions, UK Finance

June 2022

Part I

Sanctions and Export Control Regimes Around the World

CHAPTER 6

US Sanctions

John D Buretta and Megan Y Lew¹

This chapter surveys US economic and trade sanctions, with a particular focus on the authorities underlying US sanctions and the processes by which the US Department of the Treasury's Office of Foreign Assets Control (OFAC) regulates sanctions and exemptions thereto.

US economic and trade sanctions are long-standing US foreign policy tools directed at specific jurisdictions, such as Cuba, Iran and North Korea, and specific governments, government officials, companies or individuals determined to have acted contrary to US foreign policy and national security objectives, such as with respect to nuclear weapons proliferation or narcotics trafficking.

Authorities for US sanctions

In the ordinary course, Congress passes statutes that authorise the President to promulgate sanctions through executive orders. OFAC then issues and enforces those sanctions regulations as published in the Code of Federal Regulations (CFR). The constitutional authority for these interwoven powers stems from Article II, Section 3 (that the Executive shall 'take Care that the Laws be faithfully executed') and Article I, Section 8 (Congress' legislative power in respect of foreign commerce). The key legislative authorities underpinning US sanctions are the Trading with the Enemy Act (TWEA), the International Emergency Economic Powers Act (IEEPA) and the United Nations Participation Act (UNPA).

¹ John D Buretta is a partner and Megan Y Lew is an attorney at Cravath, Swaine & Moore LLP. The authors would like to thank William S Janover, an associate at the firm, and Andrea J Xu, previously an associate at the firm, for contributing to the chapter.

TWEA

Congress passed TWEA² in 1917, at the time of the United States' entry into the first world war, to 'define, regulate, and punish trading with the enemy'. This statute conferred on the President wide-ranging powers to restrict trade between the United States and foreigners or countries considered enemies during wartime. Currently, TWEA remains the underlying legislation only for sanctions against Cuba.

IEEPA

The most common legislative authority the President relies on to impose sanctions today is IEEPA,³ which Congress passed in 1977 in an effort to demarcate more clearly the President's emergency powers. With IEEPA, the focus shifted from wartime powers under TWEA to address more broadly 'any unusual and extraordinary threat' to US national security, foreign policy or economic stability.⁴ Pursuant to IEEPA, the President can declare a national emergency and issue executive orders to address that national emergency by, among other things, freezing the assets of and prohibiting financial transactions with any country, entity or person determined to be a threat to the United States.⁵ Typically, the prohibitions found in the executive orders become codified in Title 31, Chapter V of the CFR.

UNPA

Another source of legislative authority for the President to issue economic sanctions is the UNPA,⁶ which empowers the President to impose economic sanctions when mandated by the United Nations Security Council pursuant to Article 41 of the UN Charter. Through any agency he or she may designate, the President can investigate, regulate and prohibit in whole or in part economic relations between any country or national thereof, and the United States, any US person or any property interest subject to US jurisdiction. Some examples of the President's exercise of power under the UNPA include President Reagan's imposition of sanctions in response to apartheid in South Africa in 1985 and President Clinton's imposition of sanctions prohibiting specific financial transactions with Rwanda in 1994.

2 50 USC § 4301 et seq.

3 50 USC § 1701 et seq.

4 See 50 USC §§ 1701, 1702.

5 *id.*

6 22 USC § 287(c).

Other legislation

In addition to the above statutes, Congress has from time to time issued additional legislation with respect to sanctions and foreign policy that either authorises or mandates the President or the US Department of the Treasury to impose certain sanctions. Some examples are the North Korean Sanctions and Policy Enhancement Act of 2016 (NKSPEA),⁷ the Countering America's Adversaries Through Sanctions Act (CAATSA),⁸ the Sanctioning the Use of Civilians as Defenceless Shields Act (SUCDSA),⁹ the Caesar Syria Civilian Protection Act of 2019 (the Caesar Act)¹⁰ and the Protecting Europe's Energy Security Clarification Act (PEESCA).¹¹ Section 104 of the NKSPEA mandates that the President shall sanction any persons found to, among other things, knowingly directly or indirectly import, export or re-export into North Korea any goods, services or technology relating to nuclear weapons proliferation. Section 104 of CAATSA likewise mandates that the President shall sanction any persons found knowingly to engage in any activity that materially contributes to the activities of the government of Iran with respect to its ballistic missile programme, whereas Section 232 stipulates that the President may impose sanctions on certain persons found to have made specific investments in the Russian Federation. Section 3 of SUCDSA provides for both mandatory and permissive designations of persons found to use civilians to shield military targets from attack, including, but not limited to, members of Hezbollah or Hamas. The Caesar Act requires the President to impose sanctions on any persons found to have, among other things:

- engaged in a significant transaction with the government of Syria;
- provided aircraft or spare aircraft parts for military use to Syria; or
- provided significant construction or engineering services to the government of Syria.

Last, PEESCA, which was passed in January 2021 and amends the Protecting Europe's Energy Security Act of 2019 (PEESA), mandates sanctions for certain conduct that supports the Nord Stream 2 and TurkStream 2 pipeline construction

7 Public Law 114-122 (18 February 2016), 22 USC § 9201 et seq.

8 Public Law 115-44 (2 August 2017); 22 USC § 9401 et seq.; 22 USC § 9501 et seq.

9 Public Law 115-348 (21 December 2018) 132 Stat 5055.

10 Public Law 116-92, §§ 7401-7438 (20 December 2019); 133 Stat. 2291-2300.

11 Public Law 116-283, § 1242 (1 January 2021); 134 Stat. 3945-47.

projects that were planned to transport natural gas from Russia to Europe. In February 2022, after Russia invaded Ukraine, OFAC designated Nord Stream 2 AG and its chief executive officer under PEESA.¹²

Because both Congress and the Executive Branch can issue sanctions, tensions can sometimes arise between these branches of government. It may be that the sanctions prescribed by Congress do not directly align with the Executive Branch's foreign policy goals. At other times, Congress will enact mandatory sanctions or require ongoing congressional review of certain sanctions programmes in the event it believes the Executive Branch has failed to take a sufficiently forceful stance on a particular issue. CAATSA is an example of this kind of tension as it includes mandatory sanctions and a requirement that Congress review any decision from the Executive Branch to lift certain sanctions against Russia.¹³ Although President Trump signed CAATSA into law, he also issued a statement expressing his view that ongoing congressional review of the sanctions against Russia was unconstitutional, but that he expected to honour the statute's requirements.¹⁴

Design and implementation

The key motivation for US economic and trade sanctions is to impose economic pressure on specific governments, companies or individuals for acting in contravention of US foreign policy and national security objectives. US sanctions in effect cut off sanctioned jurisdictions and sanctioned persons from accessing US dollars and the US financial system, which can have significant repercussions.

12 See US Department of the Treasury's Office of Foreign Assets Control (OFAC), 'PEESA Designations' (23 February 2022), at https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20220223_33; The White House, 'Statement by President Biden on Nord Stream 2' (23 February 2022) at www.whitehouse.gov/briefing-room/statements-releases/2022/02/23/statement-by-president-biden-on-nord-stream-2/; Dep't of State, 'Sanctioning NS2AG, Matthias Warnig, and NS2AG's Corporate Officers' (23 February 2022) at www.state.gov/sanctioning-ns2ag-matthias-warnig-and-ns2ags-corporate-officers/.

13 See 22 USC § 9511; CAATSA § 231, 22 USC § 9525 (against persons found to have knowingly operated for or on behalf of the defence or intelligence sectors of the government of the Russian Federation); see also Benjamin Alter, 'Sanctions Are Congress's Path Back to Foreign Policy Relevance', *Lawfare* (27 March 2018), at www.lawfareblog.com/sanctions-are-congresss-path-back-foreign-policy-relevance; Jordan Tama, 'So Congress is challenging the president about sanctions? That has a long history', *Washington Post* (16 June 2017), at www.washingtonpost.com/news/monkey-cage/wp/2017/06/16/so-congress-is-challenging-the-president-about-sanctions-that-has-a-long-history/.

14 'Statement by President Donald J. Trump on the Signing of H.R. 3364' (2 August 2017).

Given that foreign policy and national security objectives have changed over time and financial transactions have grown in complexity, US sanctions have evolved from more broad embargoes to more targeted sanctions programmes.

There are three basic types of US sanctions: comprehensive embargoes against countries or regions, list-based asset-blocking sanctions and list-based non-blocking sanctions. OFAC currently maintains comprehensive embargoes against Cuba, Iran, North Korea, Syria and the Crimea and so-called 'Donetsk People's Republic' and 'Luhansk People's Republic' regions of Ukraine.¹⁵ These embargoes generally prohibit dealings by US persons with these jurisdictions, including financial transactions, exports and imports. Interestingly, Venezuela is an example of a jurisdiction in which the government, members of the government and persons acting on behalf of the government are subject to blocking sanctions but the country has not been targeted by a comprehensive embargo.¹⁶

OFAC's list-based sanctions consist of numerous different lists, designating as sanctioned specific governments, government entities, government officials, companies, individuals or property such as vessels and aircraft. These lists include the Specially Designated Nationals (SDNs) and Blocked Persons List and the Specially Designated Global Terrorist (SDGT) List, and are collectively referred to in this chapter, for simplicity, as the SDN List. Persons or property on the SDN List are subject to asset-blocking sanctions. US persons are prohibited from directly or indirectly dealing with anyone on the SDN List or their property, and all assets and property interests subject to US jurisdiction, whether tangible or intangible, direct or indirect, are frozen.

OFAC maintains several 'non-blocking' sanctions lists that implement targeted forms of sanctions against certain persons that are less restrictive than asset-blocking sanctions. Persons subject to these sanctions programmes are identified on separate lists maintained by OFAC, and the scope of the restrictions depends upon the legal authority implementing the sanctions. OFAC has discretion to designate a person to one or more asset-blocking or non-blocking sanctions lists if the applicable designation criteria are met. In other words, the lists are not mutually exclusive, and a person may be found on more than one list.

15 31 Code of Federal Regulations (CFR) Parts 510 (North Korea), 515 (Cuba), 560 (Iran), 569 (Syria), 589 (Crimea); Executive Order 14065 (21 February 2022) (so called 'Donetsk People's Republic' and 'Luhansk People's Republic' regions of Ukraine).

16 Executive Order 13884 (5 August 2019).

A few examples of OFAC's non-blocking sanctions lists are given below.

- Non-SDN Chinese Military-Industrial Complex Companies List (the NS-CMIC List): in November 2020, the United States announced a ban on transactions involving publicly traded securities, or derivatives of any such securities, and of Chinese military companies by US persons.¹⁷ The NS-CMIC List identifies the companies that are subject to this prohibition.¹⁸
- Non-SDN Menu-Based Sanctions List (the NS-MBS List): the NS-MBS List includes persons who are subject to targeted, non-blocking sanctions selected from a 'menu' of options. The menu of sanctions options includes prohibitions on obtaining assistance from the Export-Import Bank of the United States, obtaining export licences from other US government agencies, obtaining loans from US financial institutions, entering into procurement contracts with the US government and engaging in transactions with US persons involving the debt or equity of the sanctioned person.¹⁹ The exact prohibitions applicable to each person on the NS-MBS List are described in the list. Dozens of persons were added to the NS-MBS List in February and March 2022, as a result of Russia's invasion of Ukraine.²⁰
- Foreign Sanctions Evaders List (the FSE List): the FSE List identifies non-US persons who have 'violated, attempted to violate, conspired to violate, or caused a violation of' certain sanctions against Syria or Iran.²¹ In addition, the FSE List includes non-US persons who have 'facilitated deceptive transactions for or on behalf of persons subject to US sanctions'.²² Persons on the FSE List are prohibited from engaging in transactions with US persons or within the United States.²³

17 Executive Order 13959 (12 November 2020).

18 'Non-SDN Communist Chinese Military Companies List', US Dep't of Treasury (last updated 16 December 2021), at www.treasury.gov/ofac/downloads/ccmc/nscmiclist.pdf.

19 'Non-SDN Menu-Based Sanctions List (NS-MBS List)', US Dep't of Treasury (last updated 28 February 2022). The 'menu' of sanctions is derived from several statutory authorities including Section 235 of CAATSA. Pub. L. 115-44, 131 Stat. 886, 919 (2 August 2017); 22 US Code (USC) § 9529.

20 See, e.g., US Dep't of Treasury press release, 'U.S. Treasury Announces Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs' (24 February 2022), <https://home.treasury.gov/news/press-releases/jy0608>.

21 'Foreign Sanctions Evaders (FSE) List', US Dep't of Treasury (last updated 11 May 2021).

22 id.

23 id.

- List of Foreign Financial Institutions Subject to Correspondent Account or Payable-Through Account Sanctions (the CAPTA List): the CAPTA List identifies non-US financial institutions that face restrictions on having a correspondent account or payable-through account in the United States.²⁴ Non-US financial institutions that are on the CAPTA List have been designated under sanctions authorities targeting North Korea, Iran, Russia and Hezbollah.²⁵
- Sectoral Sanctions Identifications List (the SSI List): sectoral sanctions have been used by OFAC to impose limited sanctions on certain sectors of a country's economy. Sectoral sanctions were first developed in response to Russia's annexation of Crimea in 2014 and those sanctions take the form of four directives, each bearing its own prohibitions. Three of the four directives prohibit designated entities operating in the 'financial services, energy, metals and mining, engineering, defence and related materiel' sectors of the Russian economy from raising equity or debt of certain tenures in the United States or involving US persons. The fourth directive prohibits designated entities from engaging in oil exploration or production for deepwater, Arctic offshore or shale projects that involve US persons.²⁶ Entities subject to these sanctions are designated under one or more of the four directives and can be found on OFAC's SSI List.²⁷ Sectoral sanctions have also been used in the Venezuela sanctions programme by prohibiting US persons from engaging in transactions involving certain debt issued by the government of Venezuela or state-owned entities.²⁸

24 'List of Foreign Financial Institutions Subject to Correspondent Account or Payable-Through Account Sanctions (CAPTA List)', US Dep't of Treasury (last updated 24 February 2022) at <https://home.treasury.gov/policy-issues/financial-sanctions/consolidated-sanctions-list-non-sdn-lists/list-of-foreign-financial-institutions-subject-to-correspondent-account-or-payable-through-account-sanctions-capta-list>.

25 *id.*

26 Executive Order 13662 (20 March 2014); see also OFAC, 'Ukraine/Russia-Related Sanctions Program' (last updated 16 June 2016), at https://home.treasury.gov/system/files/126/ukraine_overview_of_sanctions.pdf.

27 Although OFAC's Specially Designated Nationals and Blocked Persons List and Specially Designated Global Terrorist List (the SDN List) and Sectoral Sanctions Identifications List (the SSI List) serve different purposes, certain persons are on both lists.

28 Executive Order 13808 (24 August 2017).

In 2022, the US government implemented stricter and more complex sanctions to address Russia's invasion of Ukraine. These include traditional forms of sanctions, such as embargoes against areas in Ukraine that Russia purportedly recognised as 'independent',²⁹ the addition of hundreds of Russian persons to the SDN List³⁰ and the imposition of export and import bans on certain types of goods.³¹ Non-blocking sanctions have been widely used as well, ranging from prohibiting certain Russian banks from processing payments using US financial institutions to restricting US persons' ability to engage in transactions with the Central Bank of Russia.³²

In addition, traditional and non-traditional forms of sanctions have been used to address national security concerns arising from the potential risk that the Chinese government could use social media apps owned by Chinese companies to collect personal information about users. Relying on IEEPA and related national security authorities, President Trump issued a series of executive orders in August 2020 that prohibited US persons from transacting with ByteDance Ltd³³ (owner of TikTok Inc, a video-sharing app) and Tencent Holdings³⁴ (owner of WeChat, a messaging, social media and payment app) and required the sale of TikTok Inc to a US company.³⁵ However, the executive orders have been challenged in US federal courts and judges presiding over those cases issued orders temporarily enjoining their implementation.³⁶ After initially requesting

29 Executive Order 14065 (21 February 2022).

30 See, e.g., US Dep't of Treasury press release, 'U.S. Treasury Announces Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs' (24 February 2022), <https://home.treasury.gov/news/press-releases/jy0608>; US Dep't of Treasury press release, 'Treasury Sanctions Kremlin Elites, Leaders, Oligarchs, and Family for Enabling Putin's War Against Ukraine' (11 March 2022), <https://home.treasury.gov/news/press-releases/jy0650>; US Dep't of Treasury press release, 'U.S. Treasury Sanctions Russia's Defense-Industrial Base, the Russian Duma and Its Members, and Sberbank CEO' (24 March 2022), <https://home.treasury.gov/news/press-releases/jy0677>.

31 Executive Order 14068 (11 March 2022).

32 Directive 2 to Executive Order 14024 (24 February 2022); Directive 4 to Executive Order 14024 (28 February 2022).

33 Executive Order 13942 (6 August 2020).

34 Executive Order 13943 (6 August 2020) (prohibiting transactions with Tencent Holdings that relate to WeChat).

35 Executive Order of 14 August 2020, 85 Fed Reg 51297 (19 August 2020).

36 Order, *TikTok Inc. v. Trump*, 20-cv-2658 (CJN) (DDC 27 September 2020); Order, *TikTok Inc. v. Trump*, 20-cv-2658 (CJN) (DDC 7 December 2020); Order Granting Motion for Preliminary Injunction, *U.S. WeChat Users Alliance v. Trump*, 20-cv-5910-LB (ND Cal 19 September 2020); Order, *U.S. WeChat Users Alliance v. Trump*, 20-16908 (9th Cir. 26 October 2020).

to stay those cases to re-evaluate the executive orders,³⁷ the Biden administration rescinded the executive orders on 9 June 2021.³⁸ The following month, the district court granted ByteDance's motions to voluntarily dismiss the case,³⁹ and the Tencent plaintiffs informed the court that they anticipated no further litigation on the matter beyond attorneys' fees.⁴⁰

Designation process

Required information

In undertaking an investigation as to whether to designate a person or entity, OFAC relies on information and intelligence compiled from US government agencies, foreign governments, UN expert panels, press and open source reporting.⁴¹ OFAC's investigators review the totality of information available, documenting their findings and conclusions in a memorandum describing the evidence to support designation under relevant sanctions authority.⁴² Before OFAC makes a final determination on designation, proposed listings are subject to inter-agency review by the US Departments of the Treasury, Justice, State 'and other US agencies as warranted'.⁴³ Additionally, OFAC will use the criteria in presidential executive orders or congressional statutes to impose designations.

The US Department of State may also issue sanctions designations under authorities focused on terrorism, proliferation activities, Iran and Russia. OFAC implements the sanctions restrictions associated with the Department of State's designations.⁴⁴

37 See Joint Status Report, *U.S. WeChat Users Alliance v. Biden*, 20-cv-5910-LB (ND Cal 12 April 2021); Joint Status Report, *TikTok Inc. v. Biden*, 20-cv-2658 (CJN) (DDC 12 April 2021).

38 Executive Order 14034 (9 June 2021) (rescinding Executive Orders 13942, 13943 and 13971).

39 Order, *TikTok v. Trump*, 20-cv-2658 (CJN) (DDC 20 July 2021).

40 Case Management Statement, *U.S. WeChat Users Alliance v. Trump*, 20-cv-5910-LB (ND Cal 29 July 2021).

41 'Filing a Petition for Removal from an OFAC List', US Dep't of Treasury, at <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list>.

42 *id.*

43 *id.*

44 See, e.g., Exec. Order 13949 (21 September 2020) (authorising the US Department of State to identify sanctions targets who engaged in arms transactions with Iran); Executive Order 13382 (28 June 2005) (authorising the US Department of State to identify sanctions targets who engaged in activities relating to proliferation of weapons of mass destruction).

Challenging designations or delisting

A designated entity or individual can petition for removal from any OFAC sanctions list by sending either hard copy or electronic applications to OFAC.⁴⁵ Per OFAC's guidance, petitions for removal should include the listed person's name and the contact person's name and mailing address, the date of the relevant listing action, and a request for reconsideration of OFAC's determination, accompanied by a detailed description of why the listing should be removed.⁴⁶

Petitioners may submit additional information to OFAC, including evidence that an insufficient basis exists for designation or a change in circumstances rendering the designation moot. Specifically, 31 CFR Section 501.807 codifies procedures for delisting persons and OFAC has included the following as examples of sufficient grounds for removal:

- a positive change in behaviour;
- the death of an SDN;
- the basis for designation no longer exists; or
- the designation was based on mistaken identity.

Section 501.807 provides the opportunity for a designated entity or individual to affirmatively propose remedial actions – such as corporate reorganisation – to negate the designation. For example, this was successfully done in the case of En+ Group plc, UC Rusal plc and JSC EuroSibEnergo, three corporate entities that were designated in April 2018 because they were indirectly owned by Oleg Deripaska, who was designated for operating in the energy sector of the Russian economy and acting on behalf of senior officials in the Russian government.⁴⁷ After lengthy negotiations with OFAC, these three entities were delisted in January 2019 as a result of Deripaska's agreement to sell his majority stake in those entities and relinquish control over them.⁴⁸ Deripaska remained on the

45 Petitions can be made out to: Office of Foreign Assets Control, Office of the Director, US Department of the Treasury, 1500 Pennsylvania Avenue, NW, Washington, DC 20220; or to OFAC.Reconsideration@treasury.gov.

46 US Dep't of Treasury, 'Filing a Petition for Removal from an OFAC List' (last updated 2 May 2017), <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list>.

47 US Dep't of Treasury press release, 'Treasury Designates Russian Oligarchs, Officials, and Entities in Response to Worldwide Malign Activity' (6 April 2018), at <https://home.treasury.gov/news/press-releases/sm0338>.

48 US Dep't of Treasury press release, 'OFAC Delists En+, Rusal, and EuroSibEnergo' (27 January 2019), <https://home.treasury.gov/news/press-releases/sm592>.

SDN List, but these three entities were removed because there was no longer a basis for their designations given the corporate restructuring and dilution of Deripaska's shareholding stake in each.⁴⁹

There is no set amount of time established for the delisting process to be concluded. Typically, the process takes months, if not years, and requires designated parties to answer multiple questionnaires and provide extensive documentary evidence.

In the event that a petition for removal fails, judicial review of OFAC's determination is available under the Administrative Procedure Act (APA). Although a US district court's review would be highly deferential to OFAC, reversal is possible if the court finds that a designation was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. For example, one ground for removal of a designation is a failure by OFAC to provide timely or sufficient notice of its rationale or evidence. In *Al Haramain Islamic Foundation, Inc v. US Department of Treasury*,⁵⁰ the US Court of Appeals for the Ninth Circuit found that the petitioner's due process rights had been violated when OFAC had failed to mitigate the petitioner's inability to review classified information underlying the designation at issue. However, the Court ultimately ruled that the due process violations were harmless in light of the whole record, and the petitioner remained designated.⁵¹ It is rare for designated persons to file lawsuits against OFAC challenging their designation. In recent years, however, several Russian individuals on the SDN List have done so. For instance, Deripaska, who was designated for operating in the energy sector of the Russian economy and acting on behalf of senior officials of the Russian government, filed suit against the US Department of the Treasury and OFAC after his designation in April 2018. In June 2021, the US District Court for the District of Columbia dismissed Deripaska's suit, concluding that OFAC's decision to designate him, and its decision not to de-list him, did not violate the APA.⁵² Deripaska appealed the District Court's ruling to the US Court of Appeals for the District of Columbia, which upheld the dismissal on 29 March 2022.⁵³

49 *id.*

50 686 F.3d 965, 984 (9th Cir 2011).

51 686 F.3d at 990.

52 *Deripaska v. Yellen*, No. 1:19-cv-00727-APM, 2021 WL 2417425 (DDC 13 June 2021).

53 *Deripaska v. Yellen*, No. 21-5157 (DC Cir. 29 March 2022).

Application of sanctions

Entities subject to sanctions measures

OFAC issued guidance on 14 February 2008 that any property or interests in property of an entity⁵⁴ are blocked if the entity is 50 per cent or more owned, directly or indirectly, by a designated person. This is known as the 50 Percent Rule.

On 13 August 2014, OFAC issued further detailed guidance about the 50 Percent Rule. Designated persons are considered to have an interest in all property and interests in property of an entity in which the designated person owns, whether individually or in the aggregate, directly or indirectly, a 50 per cent or greater interest. The significance of this is that any entity directly or indirectly owned individually or in the aggregate 50 per cent or more by one or more designated persons is itself considered designated. This is the case whether or not the designated entity is actually placed on the SDN List.

With respect to indirect ownership of an entity, OFAC provided further guidance addressing indirect beneficial ownership, providing that one or more designated persons' ownership of shares of an entity through another entity or entities that are 50 per cent or more owned in aggregate by the designated persons. The consequence of this is a cascading effect of designation. For instance, if designated Person A owns in aggregate 50 per cent or more of Company X, Company X owns in aggregate 50 per cent or more of Company Y and Company Y owns in aggregate 50 per cent or more of Company Z, companies X, Y and Z are each considered designated by virtue of Person A's indirect ownership of each.⁵⁵

As for entities that are controlled but not 50 per cent owned by an SDN, the analysis is more complicated; if an SDN controls another entity, that entity is not presumptively an SDN according to the 50 Percent Rule.⁵⁶ Rather, OFAC cautions that it may designate these types of entities pursuant to statutes or executive orders that empower OFAC to do so for entities over which a blocked person exercises control.⁵⁷ OFAC further cautions that SDN-controlled entities may be the subject of future OFAC enforcement actions, and advises that persons

54 This was subsequently broadly defined to include any direct or indirect property or interest in property, tangible or intangible, including present, future or contingent interests. See US Dep't of Treasury, 'Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked' (13 August 2014), at <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20140813>.

55 For additional ownership examples, see OFAC FAQ 401 (last updated 13 August 2014), at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/401>.

56 OFAC FAQ 398 (last updated 11 August 2020), at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/398>.

57 *id.*

exercise caution when dealing with non-blocked persons who are controlled by blocked persons. In addition, OFAC prohibits dealings with blocked persons who conduct business on behalf of non-blocked entities. For example, since OFAC sanctions generally prohibit direct or indirect dealings with blocked persons, a US person may not enter into a contract signed by a blocked person – even on behalf of a non-blocked entity.⁵⁸

The 50 Percent Rule applies to persons on the SSI List,⁵⁹ but generally does not apply to other persons who are subject to non-blocking sanctions, such as those persons identified on the NS-MBS List or the NS-CMIC List.⁶⁰ OFAC may also carve out certain sanctions programmes from the 50 Percent Rule, which it did in the context of certain sanctions authorised in September 2021 in relation to the humanitarian and human rights crisis in Ethiopia⁶¹ and sanctions against Alisher Usmanov, a Russian oligarch, in March 2022.⁶²

Application to non-US persons

Under the sanctions regulations, US persons must comply with sanctions that prohibit transactions with sanctioned countries or sanctioned persons. Known as ‘primary sanctions’, these apply to US persons, defined to include all US citizens and permanent resident aliens wherever located, all persons and entities within the United States, all US-incorporated entities and their foreign branches.⁶³ Foreign subsidiaries owned or controlled by US companies are not required to

⁵⁸ *id.*

⁵⁹ When applying the 50 Percent Rule to persons on the SSI List, ownership interests are aggregated for each directive to determine whether an entity is subject to a particular directive. However, ownership interests are not aggregated across directives.

⁶⁰ OFAC FAQ 869 (last updated 5 January 2021), at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/869>; OFAC FAQ 857 (last updated 3 June 2021), at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/857>; OFAC FAQ 943 (last updated 2 December 2021) at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/943>.

⁶¹ OFAC FAQ 923 (last updated 17 September 2021), at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/923>.

⁶² See OFAC General License No. 15, ‘Authorizing Transactions Involving Certain Blocked Entities Owned by Alisher Burhanovich Usmanov’ (3 March 2022), at https://home.treasury.gov/system/files/126/russia_gl15.pdf.

⁶³ See, e.g., 31 CFR §§ 536.201, 536.316. See also OFAC FAQ 11 (last updated 15 January 2015), at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/11>. For indicia of control, OFAC looks to whether a US person holds an equity interest of 50 per cent or more by vote or value in the entity, holds a majority of seats on the board of directors of the entity or otherwise controls the actions or policies of the entity.

comply with primary sanctions, except in relation to the sanctions programmes for Cuba and Iran, and those applicable to financial institutions in relation to North Korea sanctions.⁶⁴

IEEPA and the sanctions regulations also prohibit activities that 'cause' a violation of sanctions.⁶⁵ While both US and non-US persons may face liability under a causing theory, most enforcement actions relying on this theory have been brought against non-US persons. Thus, even if a non-US person is not directly prohibited from engaging in sanctioned conduct, that person could be exposed to primary sanctions liability for engaging in transactions with a sanctioned country or a sanctioned person that causes a US person to violate primary sanctions. This theory has been used frequently to prosecute non-US financial institutions that processed US-dollar-denominated transactions through US banks for the benefit of a sanctioned person, thereby causing the US banks (i.e., US persons) to violate sanctions by exporting financial services from the United States to a sanctioned person or jurisdiction.⁶⁶ Non-US financial institutions have faced OFAC enforcement actions under these circumstances even when they were not aware that the US-dollar-denominated transactions were transiting through the US financial system.⁶⁷

By contrast, secondary sanctions directly apply to non-US persons and allow the US Department of the Treasury to designate non-US persons for certain types of behaviour depending on the sanctions programme, even absent a US nexus to the activity. Non-US entities should be aware of the secondary sanctions that might apply to their business activities. If any do apply and OFAC imposes sanctions, then the designated non-US entity would effectively be cut off from

64 31 CFR §§ 560.204, 560.215, 560.314 (Iran); 31 CFR § 515.329 (Cuba); 31 CFR § 510.214 (North Korea).

65 See, e.g., 50 USC § 1705(a) (under IEEPA, '[i]t shall be unlawful for a person to . . . cause a violation of any . . . prohibition issued under this chapter'); 31 CFR § 510.212.

66 For example, in 2019, Standard Chartered Bank and UniCredit Bank AG, both non-US banks, resolved civil and criminal charges that were brought under a theory of causing liability. See US Dep't of Justice press release, 'UniCredit Bank AG Agrees to Plead Guilty for Illegally Processing Transactions in Violation of Iranian Sanctions' (15 April 2019), at www.justice.gov/opa/pr/unicredit-bank-ag-agrees-plead-guilty-illegally-processing-transactions-violation-iranian; US Dep't of Justice press release, 'Standard Chartered Bank Admits to Illegally Processing Transactions in Violation of Iranian Sanctions and Agrees to Pay More than \$1 Billion' (9 April 2019), at www.justice.gov/opa/pr/standard-chartered-bank-admits-illegally-processing-transactions-violation-iranian-sanctions.

67 See US Dep't of Treasury, 'British Arab Commercial Bank plc Settles Potential Liability for Apparent Violations of the Sudanese Sanctions Regulations' (17 September 2019), at https://home.treasury.gov/system/files/126/20190917_bacb.pdf.

the US financial system, with a deleterious economic and reputational impact for the non-US entity. Last, even if a designated entity does not want to access the US financial system, many non-US banks maintain their own sanctions policies barring dealings with SDNs.

Exemptions

The statutory framework that gives rise to US sanctions includes a number of exempted activities, which, by definition, fall outside the scope of the regulations. For example, IEEPA contains exceptions for humanitarian activities such as donating food, clothing and medicine to relieve human suffering; the import and export of informational materials and communications; and postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value.⁶⁸ These statutory exceptions are typically reflected in exemptions implemented by OFAC in its sanctions regulations. The Iranian Transactions and Sanctions Regulations, for instance, contain specific exemptions for all the activities exempted under IEEPA.⁶⁹

OFAC has provided further guidance regarding authorised humanitarian activities in connection to the covid-19 pandemic, specifically in relation to its Iran, Venezuela, North Korea, Syria, Cuba and Ukraine/Russia sanctions programmes.⁷⁰ While most medicine and medical devices (including certain personal protective equipment (PPE)) used for covid-19-related treatment are already exempted under IEEPA's humanitarian aid exception, other items (such as oxygen generators and certain decontamination equipment) require a specific licence for individuals and entities to provide to sanctioned countries. To help combat the spread of covid-19, OFAC issued three general licences in June 2021 'to provide authorizations for certain covid-19-related transactions and activities' involving Iran, Syria and Venezuela.⁷¹ Generally, these general licences authorise the exportation or sale of goods 'related to the prevention, diagnosis, or treatment of covid-19 (including research or clinical studies relating to covid-19)'

⁶⁸ 50 USC § 1702(b).

⁶⁹ See, e.g., 31 CFR § 560.210.

⁷⁰ OFAC, 'Fact Sheet: Provision of Humanitarian Assistance and Trade to Combat COVID-19' (16 April 2020, updated 17 June 2021), at https://home.treasury.gov/system/files/126/covid19_factsheet_20200416.pdf.

⁷¹ *id.*

to Iran, Syria or the government of Venezuela, as well as any related financial transactions.⁷²

Despite many commonalities of the exemptions discussed above, there are some differences across the sanctions programmes that stem from the policy objectives that the sanctions are intended to advance, as opposed to any differences in the authority granted by legislation or regulations underlying the sanctions programmes. For example, the goal of the Syria sanctions is to ‘disrupt the Assad regime’s ability to finance its campaign of violence against the Syrian people’.⁷³ With this goal in mind, OFAC has prohibited transactions that have the potential to fund the Assad regime, while still permitting personal remittances and donations of humanitarian goods.

In contrast, the animating concerns behind SDGT-based sanctions dictate exemptions that are more narrowly drawn. For example, Executive Order 13324, issued in the wake of the September 11 terror attacks and which identified persons who posed a threat to US national security, does not permit as expansive humanitarian activities, and prohibits donations of the kind otherwise permitted by IEEPA, on the grounds that the donations would seriously impair the President’s ‘ability to deal with the national emergency declared in this order, and would endanger Armed Forces’.⁷⁴

Licensing

Types of licences

Apart from statutory exceptions and regulatory exemptions, other activities may be authorised by OFAC, which has the authority to issue general and specific licences.

General licences authorise a class of persons subject to OFAC’s jurisdiction to engage in categories of activities that would otherwise be prohibited by the applicable sanctions programme.⁷⁵ Under general licensing programmes, there is no need to apply for an authorisation case by case.⁷⁶ General licences for different

72 See General License No. 21 (17 June 2021) at https://home.treasury.gov/system/files/126/syria_gl21.pdf; General License No. 39 (17 June 2021) at https://home.treasury.gov/system/files/126/venezuela_gl39.pdf; General License N (17 June 2021) at https://home.treasury.gov/system/files/126/iran_gln.pdf.

73 OFAC FAQ 225, at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/225>.

74 Executive Order 13224 (23 September 2001).

75 OFAC FAQ 74 (last updated 16 June 2016), at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/74>.

76 Prosecutions for Violations of U.S. Export Controls and Trade Sanctions, § 16:2.1[E], White Collar Issues Deskbook (November 2019).

sanctions programmes can be found in the CFR⁷⁷ or as separate guidance documents on OFAC's website. Common examples of general licences include the provision of legal services, financial institutions debiting blocked accounts for normal service charges owed by the account owner and, in certain cases, companies winding down of their businesses with sanctioned persons after newly imposed or expanded sanctions. Persons who rely on general licences may be required to file reports and statements with OFAC in accordance with the instructions specified in those licences, and failure to do so may nullify the authorisation and result in an enforcement action by OFAC.⁷⁸

Specific licences are issued case by case, normally by OFAC, but on occasion by the Secretary of Treasury directly.⁷⁹ They authorise a specific person to conduct a certain transaction or set of transactions that would otherwise be prohibited by a sanctions programme.⁸⁰ Examples include the release of blocked funds, receipt of payment for legal services using blocked funds, or exportation of medical devices or agricultural commodities that are not otherwise exempted or covered by a general licence. A specific licence typically is granted for a set period; however, an applicant may seek a licence renewal. Last, like general licences, OFAC may also require reports and statements from the grantee.⁸¹

The application process

A person or entity seeking to obtain a specific licence may file an application via OFAC's website. Applicants should provide as much detail as possible about the transaction for which a licence is being sought, including the names and addresses of all parties involved or interested in the transaction, the applicant's taxpayer identification number and any other information deemed necessary by OFAC per the specific sanctions programme.⁸² Upon review of the application and possible inter-agency consultation,⁸³ OFAC may request additional information or documentation and the process may take several weeks to more than a year, depending on the volume of applications and the complexity of the transaction involved.

77 31 CFR Chapter V.

78 31 CFR § 501.801(a).

79 31 CFR § 501.801(b)(3).

80 31 CFR § 501.801(b).

81 31 CFR § 501.801(b)(4).

82 OFAC FAQ 75 (last updated 8 October 2013), at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/75>.

83 OFAC FAQ 58 (last updated 10 September 2002), at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/58>.

Refusal to grant a licence

A denial by OFAC of a licence application constitutes final agency action and there is no formal process of administrative appeal.⁸⁴ OFAC's regulations, however, do not preclude the reconsideration of an application or the filing of a further application, should there be new facts or changed circumstances that warrant a review.⁸⁵

Nonetheless, parties can rely on the APA and seek judicial review of OFAC's licensing determination where, for instance, the determination is claimed to be arbitrary, capricious or contrary to law. However, in conducting their review, US courts typically defer to the agency's decision,⁸⁶ provided that there is a rational basis for it.⁸⁷ When it comes to decisions based on foreign policy, courts exercise an even higher degree of deference.⁸⁸ To this date, courts have, at most, remanded cases to OFAC and directed it to consider certain legal and regulatory aspects, but have not made a determination on whether to require OFAC to grant a specific licence.⁸⁹

Legal services licensing

OFAC has long noted its 'willingness to remove persons from the SDN List consistent with the law' and its goal to 'bring about a positive change in behaviour'.⁹⁰ To achieve these goals, OFAC has issued general licences allowing SDNs to obtain legal services that would enable them to navigate the idiosyncrasies of each sanctions programme and obtain, for instance, legal representation

84 OFAC FAQ 76 (last updated 10 September 2002), at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/76>.

85 31 CFR § 501.801(b)(5).

86 See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 416 (1971).

87 See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983).

88 See *Regan v. Wald*, 468 U.S. 222, 242 (1984) ('Matters relating "to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or inference"') (citation omitted); see also *Walsh v. Brady*, 729 F.Supp. 118, 120 (DDC 1989) ('However, it is obviously not this Court's function to usurp the authority of the Secretary in this area [granting a licence or not]').

89 See *Pac. Solar Energy, S.A. de C.V. v. U.S. Dep't of the Treasury*, Civil Action No. 18-48 (RDM) (DDC 26 March 2019); see also *World Fuel Corp. v. Geithner*, 568 F.3d 1345 (11th Cir 2009).

90 US Dep't of Treasury, Filing a Petition for Removal from an OFAC List, at <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list>.

related to the challenging of a designation.⁹¹ The licences for the provision of legal services, however, do not automatically entail an authorisation for the payment of such services with blocked funds. Payment for legal services with blocked funds is highly dependent on the rules of each sanctions programme and the nationality of the SDN seeking counsel, but must rely on either a general or a specific licence.

With regard to non-US persons, OFAC's general licences allowing the provision of legal services often contain an authorisation for the SDNs to pay for legal services using funds located outside the United States. This authorisation is accompanied by certain reporting requirements to OFAC by the US person providing the services and receiving payment.⁹² The funds used for payment must not originate from the United States or from any entity, wherever located, that is controlled by a US person. In addition to these requirements, OFAC's general licences also typically allow a third party to make the payment on behalf of the SDN seeking legal services, provided that the funds used are not blocked by any sanctions.⁹³ In the absence of a general licence authorising payment of legal services, or if the general licence is inapplicable in a given set of circumstances, the US counsel providing legal services must obtain a specific licence to receive payment.⁹⁴

As regards blocked US persons, OFAC has issued a legal fee guide containing the requirements and documentation necessary to release limited amounts of blocked funds for payment of legal fees and costs incurred in challenging their

91 The Code of Federal Regulations contains numerous licences for legal services under different US sanctions programmes. See, e.g., 31 CFR §§ 510.507, 515.512, 560.525, 576.507, 589.506 for licences for legal services relating to the country-specific sanctions programmes targeting North Korea, Cuba, Iran, Iraq and Ukraine, respectively; see also 31 CFR §§ 594.506, 544.507, 590.506 and 530.506 for licences for legal services relating to sanctions programmes targeting terrorism, proliferators of weapons of mass destruction [WMD], transnational criminal organisations and narcotics trafficking.

92 See, e.g., 31 CFR §§ 560.553, 579.507, 589.507, detailing the requirements US persons must fulfil to receive payment for legal services from funds originating outside the United States in the Iran, Foreign Interference in the US Elections and Ukraine sanctions programmes, respectively.

93 US Dep't of Treasury, Filing a Petition for Removal from an OFAC List, at <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list>.

94 See, e.g., 31 CFR § 544.507(a) of the WMD Proliferators sanctions programme, which does not contain a general licence and requires all legal services providers to obtain a specific licence for payment; see also US Dep't of Treasury, Filing a Petition for Removal from an OFAC List, at <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list>.

blocking in administrative or civil proceedings.⁹⁵ This route is only available if there are no other funding options for the blocked US person⁹⁶ and it does not ensure payment of legal fees in their entirety.⁹⁷

Incidental transactions

Most sanctions programmes provide that transactions ordinarily incident to and necessary to a licensed transaction are permitted, provided that the transaction does not involve a blocked person or blocked property.⁹⁸ Although OFAC has not issued a comprehensive list of the types of activities that are considered ordinarily incident to and necessary to a licensed transaction, certain general licences and guidance from OFAC provide insight into this authorisation, the scope of which is dependent on the underlying permitted activity. Described below are a few examples from OFAC's country-wide sanctions programmes.

Travel

US sanctions against Cuba impose restrictions on travel by US persons to Cuba; the purpose of any such travel must fall within one of OFAC's authorised categories.⁹⁹ Activities that are ordinarily incident to and necessary to such travel are also authorised and include activities such as the exportation of accompanied baggage for personal use,¹⁰⁰ payment of living expenses, purchase of goods for personal consumption, purchase of health insurance, life insurance and travel insurance, including paying for any emergency medical services.¹⁰¹

95 US Dep't of Treasury, 'Guidance on the release of limited amounts of blocked funds for payment of legal fees and costs incurred in challenging the blocking of US persons in administrative or civil proceedings' (23 July 2010), at https://home.treasury.gov/system/files/126/legal_fee_guide.pdf.

96 *id.*, at Introduction.

97 *id.*, at Part III, explaining that the Guidance follows fee rates and caps established by the Criminal Justice Act and the Equal Access to Justice Act.

98 See, e.g., 31 CFR § 510.404 (North Korea); 31 CFR § 515.421 (Cuba); 31 CFR § 560.405 (Iran); 31 CFR § 589.404 (Ukraine). Most commonly, any ordinarily incident or necessary transaction with a blocked person is not permitted under these provisions, among other exceptions.

99 31 CFR § 515.560.

100 OFAC FAQ 730 (last updated 14 October 2016), at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/730>.

101 31 CFR § 515.560(c)(2) and Note 2.

Import/export

When licences permit exports or imports of certain goods to or from a sanctioned country, OFAC has provided examples of ordinarily incident transactions that are permitted. For example, in the context of a general licence permitting imports of certain goods from Cuban entrepreneurs, ordinarily incident transactions include payments for said goods made using online payment platforms.¹⁰²

Publishing

Under numerous sanctions programmes, transactions that are necessary and ordinarily incident to ‘the publishing and marketing of manuscripts, books, journals, and newspapers in paper or electronic format’ are authorised.¹⁰³ These types of authorised transactions include commissioning and making advance payment for future written publications, collaboration to create and enhance such works, substantive editing, payment of royalties, implementing a marketing campaign for promotional purposes, and any other ‘transactions necessary and ordinarily incident to the publishing and marketing of written publications’.¹⁰⁴ The publishing authorisations are also supported by the ‘informational materials’ exception that permits the exportation and importation of publications and other types of media to or from sanctioned countries.¹⁰⁵ The publishing authorisations, however, do not confer general permission to engage in business activities that are ‘delivered through the use of information and informational materials’, such as accounting, legal, design and consulting services, that do not involve publishing activities.¹⁰⁶ Likewise these provisions do not generally authorise activities such as marketing products other than written publications, importing and exporting goods other than certain software used to support written publications in electronic format, engaging in transactions relating to travel to and from the sanctioned country, or operating a publishing house or sales outlet within the sanctioned country.¹⁰⁷

102 80 Fed Reg 56918 (21 September 2015).

103 See, e.g., 31 CFR §§ 515.577, 542.532, 560.538, detailing the various transactions that qualify as necessary and incidental to publishing written publications under the Cuba, Syria and Iran sanctions programmes, respectively.

104 31 CFR § 515.577(a); see also 31 CFR §§ 542.532(a), 560.538(a).

105 31 CFR §§ 515.206(a), 515.332(a); see also 31 CFR §§ 510.213(c), 560.210(c).

106 31 CFR § 515.577(b)(1); see also 31 CFR §§ 542.532(b)(1), 560.538(b)(1). However, as discussed above, the provision of legal services may be authorised under a separate general licence.

107 31 CFR §§ 515.577(b)(2) to (b)(5); see also 31 CFR §§ 542.532(b)(2) to (b)(4), 560.538(b)(2) to (b)(4).

Export administration regulations

In addition to the sanctions imposed by OFAC, the US Department of Commerce's Bureau of Industry and Security (BIS) enforces the Export Administration Regulations (EAR) codified at 15 CFR Part 730 et seq. in respect of exports, re-exports and transfers of goods of US origin, technology and software to destinations outside the United States and to non-US citizens. The EAR impose limitations on the unlicensed export, re-export or transfers of goods, technology or software of US origin, including transit through or to sanctioned jurisdictions such as Cuba, North Korea, Crimea, Iran and Syria, among others. The EAR generally apply to commodities with a minimum of 10 per cent US-origin content for exportation to sanctioned jurisdictions, and 25 per cent US-origin content for exportation to all other countries, so it is important for businesses properly to screen exports in compliance with the EAR.

BIS maintains its own lists of prohibited or restricted individuals, separate from OFAC's sanctions lists. It can therefore be important for companies with components or products of US origin to consult both OFAC and BIS designations to understand applicable restrictions.¹⁰⁸

Termination of US sanctions

Considering that the underlying goal of US economic and trade sanctions is to advance the United States' foreign policy and national security objectives, it is natural that these objectives may change or be accomplished, leading to the termination of sanctions programmes.

For example, the only remaining sanctions programme based on the authority of TWEA is the Cuban Asset Control Regulations.¹⁰⁹ Previous sanctions programmes supported by TWEA have been rescinded.

In many cases, the President may lift sanctions by issuing an executive order. For example, in 2016, President Obama terminated comprehensive sanctions against Myanmar by an executive order in light of advances in promotion of democracy, the release of political prisoners and greater enjoyment of human

¹⁰⁸ As regards defence articles, the State Department's Bureau of Political Military Affairs Directorate of Defence Trade Controls likewise maintains its own designation lists and restrictions, in connection with its enforcement of the International Traffic in Arms Regulations.

¹⁰⁹ 'The US Economic Sanctions Regime at II.B(2)' in *Sanctions Enforcement and Compliance: A Practitioner's Guide to OFAC*, Bloomberg BNA Banking Practice Portfolio Series (2019). See also 85 Fed. Reg. 67988 (27 October 2020) (noting that US sanctions against Cuba are promulgated pursuant to TWEA).

rights and fundamental freedoms.¹¹⁰ However, in 2021, President Biden issued an executive order imposing targeted, non-comprehensive sanctions against Myanmar in response to the February 2021 coup that overthrew the democratically elected civilian government.¹¹¹ Throughout 2021, President Biden imposed asset-blocking sanctions against persons involved in repressing the pro-democracy movement in Myanmar. In 2017, President Obama terminated sanctions against Sudan through an executive order because of the country's reduction in offensive military activity, improved humanitarian access and cooperation with the United States on addressing regional conflicts and the threat of terrorism.¹¹²

Under certain statutes authorising sanctions, the President may not unilaterally lift sanctions without approval from Congress. For example, CAATSA prohibits the President from lifting sanctions against a person designated under certain Russia-related sanctions authorities if Congress issues a joint resolution of disapproval.¹¹³ With respect to Cuba, the US embargo is mandated by statute and likely would require congressional action to be repealed; however, the President has the authority to issue executive orders or OFAC policies to loosen certain aspects of the sanctions programme against Cuba, as President Obama did during his presidency.¹¹⁴

110 Executive Order 13742 (7 October 2016).

111 Executive Order 14014 (10 February 2021).

112 Executive Order 13761 (13 January 2017).

113 CAATSA § 216(b)(6); Pub. L. 115-4, 131 Stat. 886, 902 (2 August 2017); 22 USC § 9511(b)(6).

114 See, e.g., The White House, 'Presidential Policy Directive – United States–Cuba Normalization' (14 October 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/10/14/presidential-policy-directive-united-states-cuba-normalization>.

APPENDIX 2

About the Authors

John D Buretta

Cravath, Swaine & Moore LLP

John D Buretta, a former senior US Department of Justice (DOJ) official, focuses his practice on advising corporations, board members and senior executives with respect to internal investigations, criminal defence, regulatory compliance and related civil litigation. His clients have included global companies, boards of directors, audit committees, individual board members, company owners, senior management of public and private companies, general counsels and other in-house counsel of public companies, law firms and former US and foreign government officials. Mr Buretta has handled a variety of sensitive investigative matters concerning the Foreign Corrupt Practices Act (FCPA), antitrust laws, securities fraud and disclosure regulations, money laundering and anti-money laundering controls, trade sanctions, export controls, cyber intrusion and tax compliance. Mr Buretta completed his time at the DOJ as the number two ranking official in the Criminal Division as Principal Deputy Assistant Attorney General and Chief of Staff.

Mr Buretta also served as Deputy Assistant Attorney General for the DOJ Criminal Division, when he oversaw the Criminal Division's Fraud Section, among others, including the DOJ's FCPA Unit. In 2011, Mr Buretta was appointed Director of the Deepwater Horizon Task Force. Prior to joining the Criminal Division, Mr Buretta served for eight years as an Assistant US Attorney in the US Attorney's Office for the Eastern District of New York, and was Chief of the Office's Organized Crime and Racketeering Section from 2008 to 2011.

Megan Y Lew

Of counsel, Cravath, Swaine & Moore LLP

Megan Y Lew is a Of counsel in Cravath's litigation department. Her practice focuses on internal and government investigations, civil litigation and regulatory compliance, including matters concerning the Foreign Corrupt Practices Act, fraud, money laundering and anti-money laundering controls, trade sanctions and export controls. Ms Lew has represented a wide range of clients, including AerCap Holdings NV, American Express, Computer Sciences Corporation, Mylan NV and Credit Suisse AG. She has also served on the attorney team supporting partner John D Buretta in his role as compliance monitor for TK Holdings, Inc (Takata) in connection with the recall of certain of Takata's airbag inflators.

She received a BS magna cum laude from Cornell University in 2004 and a JD cum laude from New York University School of Law in 2010, where she was a notes editor of the Law Review. Following her graduation, Ms Lew served as a law clerk to the Honourable Frank Maas of the US District Court for the Southern District of New York.

Cravath, Swaine & Moore LLP

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
United States
Tel: +1 212 474 1000
jburetta@cravath.com
mlew@cravath.com
www.cravath.com

We live in a new era for sanctions, more than ever, it seems. More states are using them, in more creative (and often unilateral) ways. They've become many states' first line of response.

This, alas, creates a degree of complication for everyone else. Hitherto no book has addressed those issues and the proliferation of sanctions regimes and investigations in a structured way. GIR's *The Guide to Sanctions* solves that. Written by contributors from the small but expanding field of sanctions enforcement, it dissects the topic in a practical fashion, from every stakeholder's perspective, and is an invaluable resource.

Visit globalinvestigationsreview.com
Follow @GIRalerts on Twitter
Find us on LinkedIn

ISBN 978-1-83862-874-1