

Global Investigations Review

The Guide to Sanctions

Editors

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

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Rachel Barnes

Anna Bradshaw

Paul Feldberg

David Mortlock

Anahita Thoms

Nicholas Turner

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For further information please contact Natalie.Clarke@lbresearch.com

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Enquiries concerning editorial content should be directed to the Publisher:
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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.

As this book goes to press, sanctions are again in the news. Hong Kong is now a sanctioned territory, and the United Kingdom has been forced to banish Huawei from its telecommunications network as a result of US sanctions.

We live, it seems, in a new era for sanctions: more and more countries are using them, with greater creativity and (sometimes) selfishness.

And little wonder. They are powerful tools. They reach people who are otherwise beyond our jurisdiction; they can be imposed or changed at a stroke, without legislative scrutiny; and they are cheap! Others do all the heavy lifting once they are in place.

That heavy lifting is where this book comes in. The pullulation of 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 in different spheres of activity.

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 will help them do so better. Whoever you are, we are confident you will learn something new.

The guide is part of the GIR technical library, which has developed around the fabulous *Practitioner's Guide to Global Investigations* (now in its fourth 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*.

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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.

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Foreword

I am pleased to welcome you to the *Global Investigations Review* guide to economic sanctions. In the following pages, you'll read in detail about sanctions programmes, best practices for sanctions compliance, enforcement cases, and the unique challenges created in corporate transactions and litigation by sanctions laws. This volume will be a helpful and important resource for anyone striving to maintain compliance and understand the consequences of economic sanctions.

As Under Secretary of the US Department of the Treasury's Office of Terrorism and Financial Intelligence from 2017 to 2019, I had the honour of leading incredibly dedicated professionals strategically implementing US sanctions, overseeing the United States' anti-money laundering (AML) programme, protecting the United States' financial system from abuse, and countering some of the greatest national security threats of our time. We did all of this while working closely with allies and partners around the world. Perhaps most importantly, we greatly appreciated our work with the private sector, providing guidance to financial institutions and companies regarding compliance with US law, typologies of illicit behaviour, and implementing mechanisms to protect the global financial system. Conversely, from my work in the private sector, I have appreciated efforts by the government to promote compliance through guidance and collaboration.

The compliance work conducted by the private sector is critically important to stopping the flow of funds to weapons proliferators such as North Korea and Iran, terrorist organisations like ISIS and Hezbollah, countering Russia's continued aggressive behaviour, targeting human rights violators and corrupt actors, and disrupting drug traffickers such as the Sinaloa Cartel. I strongly believe that we are much more effective in protecting our financial system when government works collaboratively with the private sector.

Accordingly, one of my top priorities as Under Secretary was to provide the private sector with the tools and information necessary to maintain compliance with sanctions and AML laws and to play its role in the fight against illicit finance. The Treasury has provided increasingly detailed guidance on compliance in the form of advisories, hundreds of FAQs, press

releases announcing actions that detail typologies, and the recent OFAC framework to guide companies on the design of their sanctions compliance programmes. Advisories range from detailed guidance from OFAC and our interagency partners for the maritime, energy and insurance sectors, to sanctions press releases that provided greater detail on the means that illicit actors use to try to exploit the financial system, to FinCEN advisories providing typologies relating to a wide range of illicit activity.

Whether it was for the Iran, North Korea or Venezuela programmes, or in connection with human rights abuses and corrupt actors around the globe, the US Treasury has been dedicated to educating the private sector so that they in turn can further protect themselves. The objective is not only to disrupt illicit activity but also to provide greater confidence in the integrity of the financial system, so we can likewise open up new opportunities and access to financial services across the globe. That guidance is particularly important today with the increased use of sanctions and other economic measures across a broader spectrum of jurisdictions and programmes.

As you read this publication, I encourage you to notice the array of guidance, authorities and other materials provided by the US Treasury and other authorities cited and discussed by the authors. This material, provided first-hand from those charged with writing and enforcing sanctions laws, gives us a critical understanding of these laws and how the private sector should respond to them. By understanding and using that guidance, private companies can help to protect US and global financial systems against nefarious actors, as well as avoid unwanted enforcement actions.

Thank you for your interest in these subjects, your dedication to understanding this important area of the law, and your efforts to protect the financial system from abuse.

Sigal Mandelker

Former Under Secretary of the Treasury for Terrorism and Financial Intelligence
July 2020

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US Sanctions

John D Buretta, Megan Y Lew and Michael Ardeljan¹

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).

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

1 John D Buretta is a partner, Megan Y Lew is an attorney and Michael Ardeljan is an associate at Cravath, Swaine & Moore LLP.

2 50 USC § 4301 et seq.

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 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 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.

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 and the Sanctioning the Use of Civilians as Defenceless Shields Act (SUCDSA).⁹ Section 104 of the NKSPEA mandates that the President 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 sanction any persons found knowingly to engage in any activity that materially

3 50 USC § 1701 et seq.

4 See 50 USC §§ 1701, 1702.

5 *id.*

6 22 USC § 287(c).

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

8 Public Law 115-44 (2 August 2017) 22 USC § 9201 et seq.; 22 USC § 9401 et seq.; 22 USC § 9501 et seq.

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

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. Last, 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.

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.¹⁰ 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.¹¹

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. 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, sectoral and list-based. OFAC currently maintains comprehensive embargoes against Crimea, Cuba, Iran, North Korea and Syria. 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 is subject to blocking sanctions but the country has not been targeted by a comprehensive embargo.

OFAC's list-based sanctions consist of numerous different lists, designating as sanctioned specific governments, government officials, companies and individuals. These lists include, among others, the Specially Designated Nationals and Blocked Persons List and the Specially Designated Global Terrorist List, and are collectively referred to in this chapter, for simplicity,

10 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 <https://www.lawfareblog.com/sanctions-are-congress-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 <https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/16/so-congress-is-challenging-the-president-about-sanctions-that-has-a-long-history/>.

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

as the SDN List. US persons are prohibited from dealing with listed persons or their property, and all assets and property interests subject to US jurisdiction, whether tangible or intangible, direct or indirect, are frozen.

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 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.¹² Entities subject to these sanctions are designated under one or more of the four directives and can be found on OFAC's Sectoral Sanctions Identifications List (SSI List), which is distinct from the SDN List.¹³ Sectoral sanctions have been used most recently 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.¹⁴

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.¹⁵ 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.¹⁶ Before OFAC makes a final determination on designation, proposed listings are subject to interagency review by the US Departments of Treasury, Justice, State 'and other US agencies as warranted'.¹⁷ Additionally, OFAC will use the criteria in presidential executive orders or congressional statutes to impose designations.

12 Executive Order 13662 (20 March 2014); see also US Department of the Treasury's Office of Foreign Assets Control [OFAC], 'Ukraine/Russia-Related Sanctions Program' (last updated 16 June 2016), at <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine.pdf>.

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

14 Executive Order 13808 (24 August 2017).

15 'Filing a Petition for Removal from an OFAC List', US Dep't of Treasury (last updated 2 May 2017), at <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/petitions.aspx>.

16 *id.*

17 *id.*

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.¹⁸ 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.¹⁹

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 includes 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 EuroSibEnerg, 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.²⁰ 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.²¹ Deripaska remained on the 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.²²

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. 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 Dep't of Treasury*,²³ 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.

18 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.

19 US Dep't of Treasury, 'Filing a Petition for Removal from an OFAC List' (last updated 2 May 2017), <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/petitions.aspx>.

20 US Dept 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>.

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

22 id.

23 686 F.3d 965, 983 (9th Cir 2011).

However, the Court ultimately ruled that the due process violations were harmless in light of the whole record, and the petitioner remained designated.²⁴ 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. The lawsuit remains pending.²⁵

Application of sanctions

Entities subject to sanctions measures

OFAC issued guidance on 14 February 2008 that any property or interests in property of an entity²⁶ 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.²⁷

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.²⁸

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

24 686 F.3d 990.

25 Second Am Compl, *Deripaska v. Mnuchin et al*, No. 1:19-cv-00727-APM (DDC 16 April 2020).

26 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://www.treasury.gov/resource-center/sanctions/Documents/licensing_guidance.pdf.

27 The 50 Percent Rule also applies to persons on the SSI List. In the context of the Russia sectoral sanctions, 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.

28 For additional ownership examples, see OFAC FAQs: General Questions, Entities Owned by Persons Whose Property and Interest in Property are Blocked (50% Rule), Question 401 (last updated 13 August 2014), at https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#50_percent.

according to the 50 Percent Rule.²⁹ 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.³⁰ OFAC further cautions that SDN-controlled entities may be the subject of future OFAC enforcement actions, and advises that persons be cautious that they do not engage in business dealings with blocked persons that conduct business on behalf of non-blocked controlled 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.³¹

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.³² Foreign subsidiaries owned or controlled by US companies are not required to 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.³³

IEEPA and the sanctions regulations also prohibit activities that ‘cause’ a violation of sanctions.³⁴ 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

29 OFAC FAQs: General Questions, Entities Owned by Persons Whose Property and Interest in Property are Blocked (50% Rule), Question 398 (last updated 13 August 2014), https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#50_percent.

30 *id.*

31 *id.*

32 See, e.g., 31 CFR §§ 536.201, 536.316. See also OFAC FAQs: General Questions, Basic Information on OFAC and Sanctions, Question 11 (last updated 15 January 2015), at https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic. 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 or the entity.

33 31 CFR §§ 560.204, 560.215, 560.314 (Iran); 31 CFR § 515.329 (Cuba); 31 CFR § 510.214 (North Korea).

34 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.

exporting financial services from the United States to a sanctioned person or jurisdiction.³⁵ 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.³⁶

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 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.³⁷ 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.³⁸

Differences in exemptions across the sanctions programmes relate to 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. 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'.³⁹ With this goal in mind, OFAC has prohibited transactions that

35 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 Agrees to Plead Guilty for Illegally Processing Transactions in Violation of Iranian Sanctions, (15 April 2019), at <https://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), <https://www.justice.gov/opa/pr/standard-chartered-bank-admits-illegally-processing-transactions-violation-iranian-sanctions>.

36 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://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190917_bacb.pdf.

37 50 USC § 1702(b).

38 See, e.g., 31 CFR § 560.210.

39 US Dep't of Treasury, Basic Information on OFAC and Sanctions, Question 225, at https://www.treasury.gov/resource-center/faqs/Sanctions/Documents/faq_all.html.

have the potential to fund the Assad regime, while still permitting personal remittances and donations of humanitarian goods.

In contrast, the animating concerns behind Specially Designated Global Terrorist (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'.⁴⁰

Licensing

Types of licences

Apart from statutory exceptions and regulatory exemptions, other activities may be authorized 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.⁴¹ Under general licensing programmes, there is no need to apply for an authorisation case by case.⁴² General licences for different sanctions programmes can be found in the CFR⁴³ 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.⁴⁴

Specific licences are issued case by case, normally by OFAC, but on occasion by the Secretary of Treasury directly.⁴⁵ They authorise a specific person to conduct a certain transaction or set of transactions that would otherwise be prohibited by a sanctions programme.⁴⁶ 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.⁴⁷

40 Executive Order 13224 (23 September 2001).

41 US Dep't of Treasury, Basic Information on OFAC and Sanctions, Question 74, at https://www.treasury.gov/resource-center/faqs/Sanctions/Documents/faq_all.html.

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

43 31 CFR Chapter V.

44 31 CFR § 501.801(a).

45 31 CFR § 501.801(b)(3).

46 31 CFR § 501.801(b).

47 31 CFR § 501.801(b)(4).

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 sanction programme.⁴⁸ Upon review of the application and possible inter-agency consultation,⁴⁹ OFAC may request additional information or documentation and the process may take several months to more than a year, depending on the volume of applications and the complexity of the transaction involved.

Refusal to grant a licence

A denial by OFAC of a licence application constitutes final agency action and there is no process of administrative appeal.⁵⁰ 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.⁵¹

Nonetheless, parties can rely on the US Administrative Procedure Act 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,⁵² provided that there is a rational basis for it.⁵³ When it comes to decisions based on foreign policy, courts exercise an even higher degree of deference.⁵⁴ 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.⁵⁵

Legal services licensing

OFAC has long noted its 'willingness to remove persons from the SDN List consistent with the law'⁵⁶ and its goal to 'bring about a positive change in behaviour'.⁵⁷ To achieve these goals,

48 US Dep't of Treasury, Basic Information on OFAC and Sanctions, Question 75, at https://www.treasury.gov/resource-center/faqs/Sanctions/Documents/faq_all.html.

49 US Dep't of Treasury, Basic Information on OFAC and Sanctions, Question 58, at https://www.treasury.gov/resource-center/faqs/Sanctions/Documents/faq_all.html.

50 US Dep't of Treasury, Basic Information on OFAC and Sanctions, Question 76, at https://www.treasury.gov/resource-center/faqs/Sanctions/Documents/faq_all.html.

51 31 CFR § 501.801(b)(5).

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

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

54 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"); 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]').

55 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).

56 US Dep't of Treasury, Filing a Petition for Removal from an OFAC List (last updated 2 May 2017), at <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/petitions.aspx>.

57 *id.*

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 related to the challenging of a designation.⁵⁸ 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.⁵⁹ 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.⁶⁰ 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.⁶¹

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 blocking in administrative or civil proceedings.⁶² This route is only available if there are no other funding options for the blocked US person⁶³ and it does not ensure payment of legal fees in their entirety.⁶⁴

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

58 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.

59 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.

60 US Dept of Treasury, Filing a Petition for Removal from an OFAC List, (last updated 2 May 2017), at <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/petitions.aspx>.

61 See, e.g., 31 CFR §§ 544.507(d) 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.

62 US Dept 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://www.treasury.gov/resource-center/sanctions/Documents/legal_fee_guide.pdf.

63 *id.*, at Introduction.

64 *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.

person or blocked property.⁶⁵ 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.⁶⁶ 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,⁶⁷ 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.⁶⁸

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.⁶⁹

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.⁷⁰ 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'.⁷¹ These provisions 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.⁷² Likewise these provisions do not generally authorise marketing products other than written publications, importing and exporting goods, engaging in

65 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.

66 31 CFR § 515.560.

67 US Dep't of Treasury, Basic Information on OFAC and Sanctions, Question 730, at https://www.treasury.gov/resource-center/faqs/Sanctions/Documents/faq_all.html.

68 31 CFR § 515.560(c)(2) & Note 2.

69 80 Fed Reg 56918 (21 September 2015).

70 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.

71 31 CFR § 515.577(a); see also 31 CFR §§ 542.532(a), 560.538(a).

72 31 CFR § 515.577(b)(1); see also 31 CFR §§ 542.532(b)(1), 560.538(b)(1).

transactions relating to travel to and from the sanctioned country, or operating a publishing house or sales outlet within the sanctioned country.⁷³

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 and re-exports of goods of US origin, technology and software both within and without the United States. The EAR impose limitations on the unlicensed export or re-export 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, 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 SDN List. 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.⁷⁴

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.⁷⁵ Previous sanctions programmes supported by TWEA have been rescinded.

Likewise, in 2016, President Obama terminated the Burmese sanctions by an executive order in light of advances in promotion of democracy, the release of political prisoners and greater enjoyment of human rights and fundamental freedoms.⁷⁶ In 2017, President Obama also terminated the Sudanese sanctions 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.⁷⁷

73 31 CFR §§ 515.577(b)(2) to (b)(5); see also 31 CFR §§ 542.532(b)(2) to (b)(5), 560.538(b)(2) to (b)(5).

74 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.

75 '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 J Daniel Chapman et al, 'U.S. Economic Sanctions Law' in *Handbook of Export Controls & Economic Sanctions 2* (2013).

76 Executive Order 13742 (7 October 2016).

77 Executive Order 13761 (13 January 2017).

Appendix 1

About the Authors

John D Buretta

Cravath, Swaine & Moore LLP

John D Buretta, a former senior US Department of Justice 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 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

Cravath, Swaine & Moore LLP

Megan Y Lew is a practice area attorney in Cravath's litigation department. Her practice focuses on internal and government investigations, civil litigation and regulatory compliance, including matters concerning the FCPA, 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.

Michael Ardeljan

Cravath, Swaine & Moore LLP

Michael Ardeljan is an associate in Cravath's litigation department. He received an *AB summa cum laude* from Harvard University in 2013 and a *JD* from the New York University School of Law in 2017.

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

mardeljan@cravath.com

www.cravath.com

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