



AML and U.S. Sanctions Laws— Recent Developments

**Anti-Money Laundering Seminar
January 24, 2018
Beijing, PRC**

Joseph T. Lynyak III, Partner, Washington, DC
Lanier Saperstein, Partner, New York

Agenda

- Overview of FinCEN and OFAC
- U.S. Sanctions Laws
- North Korea Sanctions
- Recent Foreign Bank Enforcement Actions by the U.S Government
- Compliance Advice and Recommendations

FinCEN and OFAC

- The Financial Crimes and Enforcement Network (“FinCEN”) and the Office of Foreign Assets Control (“OFAC”) are the principal federal agencies responsible for implementing U.S. rules for anti-money laundering (“AML”) and the U.S. Sanctions Program (“Sanctions Program”)
- Both FinCEN and OFAC are offices of the U.S. Department of the Treasury
 - FinCEN is responsible for AML compliance
 - OFAC is responsible for the Sanctions Program



The US Sanctions Program

- The Sanctions Program is comprised of economic and trade sanctions against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States

Importantly: A Violation of the U.S. Sanctions Program will Almost Always be a Violation of AML Prohibitions

The Role of OFAC

- OFAC administers and enforces economic sanctions against targeted:
 - **Foreign governments** (*e.g.*, *North Korea*, Iran, Sudan, Cuba)
 - **Individuals** (*e.g.*, terrorists, international drug traffickers)
 - **Entities** (*e.g.*, **targeted financial institutions**, drug front companies, charities that send money to terrorist groups)
 - **Practices** (*e.g.*, assisting in the proliferation of weapons of mass destruction)
- OFAC acts under Presidential national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze assets under U.S. jurisdiction
- Importance of the “SDN List”—Specially Designated Nationals (“SDNs”) and Blocked Persons

Legal Authority for U.S. Sanctions

- The authority for the Sanctions Program is complicated:
 - The Sovereign Power of the U.S. under its Constitution
 - Specific Federal Statutes—primarily:
 - Trading with the Enemy Act (“TWEA”)
 - International Emergency Economic Powers Act (“IEEPA”)
 - International Treaties
 - United Nations Resolutions
 - Other International Agreements
 - Executive Orders
 - Federal Regulations
 - Official and Unofficial Administrative Agency Interpretations

Actually—The List is Much Longer

- Trading with the Enemy Act
- International Emergency Economic Powers Act
- Antiterrorism and Effective Death Penalty Act
- The Arms Export Control Act
- Burmese Freedom and Democracy Act
- Clean Diamond Trade Act
- Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010
- Cuban Democracy Act of 1992
- Cuban Liberty and Democratic Solidarity Act of 1996
- Darfur Peace and Accountability Act
- Foreign Narcotics Kingpin Designation Act
- Foreign Operations, Export Financing and Related Programs Appropriations Act of 1997
- International Security and Development Cooperation Act of 1985
- Iran Freedom Support Act
- National Defense Authorization Act for Fiscal Year 2012
- National Emergencies Act
- Tom Lantos Block Burmese JADE Act of 2008
- Trade Sanctions Reform and Export Enhancement Act of 2000
- United Nations Participation Act of 1945
- Patriot Act
- Iran Threat Reduction and Syria Human Rights Act of 2012

U.S. Sanctions Rule Applies to “U.S. Persons”

- **Individuals:**
 - American citizens and permanent resident aliens anywhere they are located
 - Any individual, regardless of citizenship, who is physically located in the United States
- **Businesses:**
 - Corporations organized under U.S. law, including foreign branches of U.S. companies
 - Any corporation or company physically located in the United States
 - U.S. branches, agencies and representative offices of foreign banks and U.S. bank subsidiaries of foreign banks

General OFAC Sanctions Rules

- No direct exports of goods or services by U.S. person to any embargoed country or SDN
 - Whether a U.S. foreign subsidiary is affected is determined on a case by case basis
- No re-exports to embargoed country or SDN with knowledge of final end-user location
 - Subject to *de minimis* “substantial transformation” exception
- No imports of embargoed goods or services
- No dealings in embargoed goods or services
- No evasion, avoidance, facilitation of barred transactions
- No dealings in “blocked property” or with “blocked person”
- For banks as covered U.S. Persons—the obligation is to refuse to do business with all sanctions targets or to seize assets and funds if available

Specially Designated Nationals

- SDNs
 - Individuals and entities all over the globe
 - Owned, controlled by or acting on behalf of targeted governments or groups
 - May be front companies, parastatals, high-ranking officials or specifically identified persons
 - Designated terrorists or narcotics traffickers
- A “parastatal” is a company or agency owned or controlled wholly or partly by the government
 - Includes mining and government-controlled oil and gas companies

Specially Designated Nationals

- Over 5,000 unique SDNs and blocked persons identified by OFAC
- Published and accessible on:
 - Federal Register
 - www.treas.gov/offices/eotffc/ofac/sdn/index.html
- Ownership or control:
 - An SDN is considered to have an interest in all property and interests in property of an entity in which it owns, directly or indirectly, a 50% or greater interest.

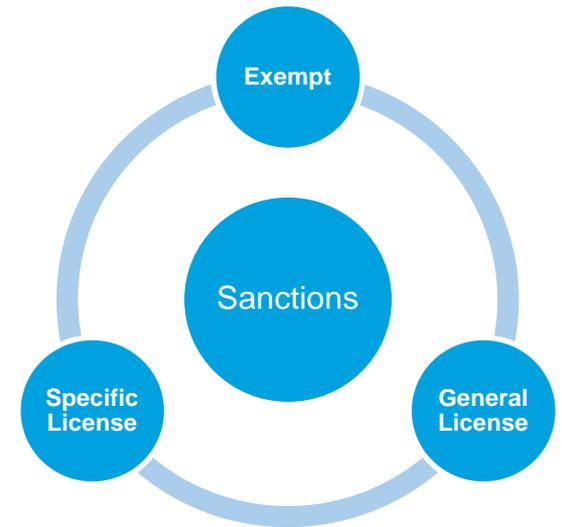
Tip: The property and interests in property of such an entity are blocked regardless of whether the entity itself is listed in the annex to an Executive Order or otherwise placed on OFAC's SDN List—this means that due diligence is required to verify ownership of corporate entities

Can a U.S. Person Do Business with a Blocked Person or Entity?

- An OFAC license is needed—
 - A license is an authorization from OFAC to engage in a transaction that otherwise would be prohibited—there are two types of licenses:
 - General licenses, and
 - Specific licenses
- A **general license** authorizes a particular type of transaction for a class of persons without the need to apply for a license
- A **specific license** is a written document issued by OFAC to a particular person or entity, authorizing a particular transaction in response to a written license application
- Persons engaging in transactions pursuant to general or specific licenses must make sure that all conditions of the licenses are strictly observed
- OFAC rarely grants a specific license when a general license has been issued

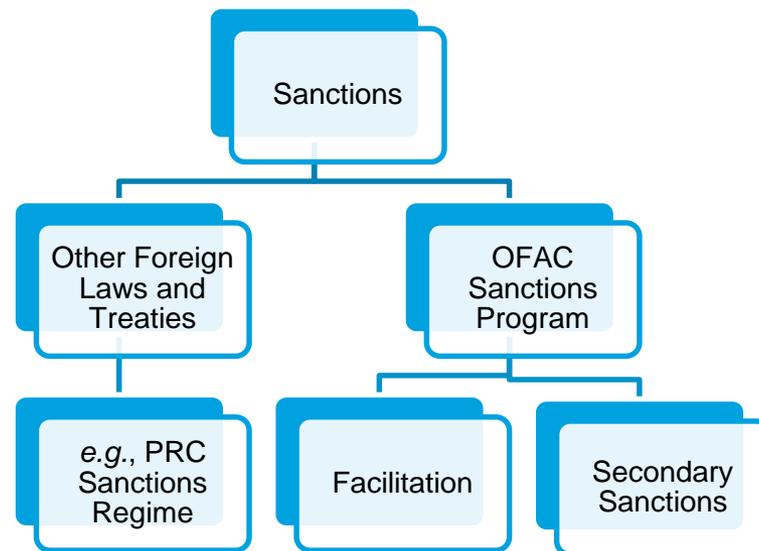
OFAC Exemptions and Licensing

- Most sanctions “exempt” some U.S. personal activities—
 - Personal communications
 - “Information and informational materials”
 - Humanitarian donations
 - In IEEPA-based sanctions, travel
- Even if an activity is not “exempt,” it may still be lawful under a “general license” (*e.g.*, “publishing” general license)
- Even if an activity is not subject to “general license,” a bank can still apply in writing for “specific license”



Important Concepts—Facilitation and Secondary Sanctions

- The general rule is that non-U.S. operations of a foreign corporation or entity are not covered by the Sanctions
 - However, other foreign laws and treaties may apply
 - Such as the PRC’s sanctions regime
- OFAC has greatly expanded the coverage of the Sanctions Program by the concepts of “Facilitation” and “Secondary Sanctions”



Facilitation

- Facilitation means that OFAC will impose the Sanctions requirements on any Non-U.S. Person **that uses any of its U.S. offices, U.S. personnel or other U.S.-based operations to assist a transaction** that would be prohibited if done directly by the U.S. offices, U.S. personnel or U.S.-based operations
- Examples of Facilitation include—
 - Clearing of payments or securities
 - Supplying of banking services
 - All forms of financing, including underwriting, issuing guarantees and warranties
 - Sale or supply of products, services or technology
 - Providing approvals or directions for non-U.S. transactions
 - Negotiation, drafting or review of contracts and other commercial agreements
 - Referral of business to non-U.S. Persons
 - Strategizing business opportunities or plans
 - Importing
 - Exporting
 - Specified IT services
 - Providing other forms of support, including technical advice, legal support, etc.

Secondary Sanctions

- In September of 2017, OFAC announced a new series of Sanctions against the government of North Korea and North Korean designated SDNs
- OFAC also indicated that it is considering imposing Secondary Sanctions against non-U.S. persons lawfully doing business with North Korea
- Secondary Sanctions means that OFAC and FinCEN may elect to treat a PRC Chinese bank as if it was covered by the Sanctions program directly
 - A PRC bank may be in legal jeopardy should it choose to do business with a sanctioned North Korean person or entity, even if no transaction touches the U.S.
 - While to date OFAC has not applied Secondary Sanctions to PRC banks, the active threat remains.
 - On November 21, 2017, OFAC added four Chinese companies based in Dandong as SDNs.

Penalties and Consequences

- Criminal Penalties
- Civil Money Penalties
- Blocked funds and seized goods
- Reputational risk
- Blocked access to the U.S. payments system

AML and Sanctions Enforcement Actions

- HSBC—\$1.9 Billion
- BNP Paribas SA—\$900 Million
- Credit Agricole—\$787.3 Million
- Bank of Tokyo Mitsubishi UFJ—\$565 Million
- Western Union—\$586 Million
- Deutchbank—\$258 Million
- J.P Morgan Chase—\$264 Million
- Agricultural Bank of China—\$215 Million
- Citibank—\$70 Million

Compliance Recommendations

- OFAC’s Regulations indicate—

“...every person shall keep a full and complete record of each transaction engaged in...and such records shall be available for examination for at least 5 years after the date of such transaction”
- OFAC’s Enforcement Guidelines include considerations of the following:
 - Willful or Reckless Violation of Law
 - Awareness of Conduct at Issue
 - Harm to Sanctions Program Objectives
 - Individual Characteristics
 - Existence and Effectiveness of a Compliance Program
 - Remedial Response
 - Cooperation with OFAC
 - Timing of Apparent Violation in Relation to Imposition of Sanctions
 - Other Enforcement Action
 - Future Compliance/Deterrence Effect
 - https://www.treasury.gov/resource-center/sanctions/Documents/fr74_57593.pdf

Compliance Recommendations

- Establish a comprehensive U.S and Non-U.S Sanctions compliance program for Sanctions and AML
 - The compliance program should include
 - Internal audit and reporting,
 - Identification of correspondent relationships, and
 - The capability of providing a description of the effectiveness of the compliance program should OFAC initiate an investigation
- Should a FinCEN or OFAC investigation be initiated
 - Commence an internal investigation using experienced counsel and bank consultants immediately

QUESTIONS?

Contacts



Joseph T. Lynyak III is the head of Dorsey & Whitney’s Financial Services Regulatory Practice. Focusing his practice on the regulation and operation of financial service intermediaries, he provides counsel on strategic planning, application and licensing, legislative strategy, commercial and consumer lending, examination, supervision and enforcement and general corporate matters. He has extensive expertise across a comprehensive range of issues before federal and state regulatory agencies such as the Federal Reserve Board, DOJ, OFAC, FinCEN, FDIC, OCC, SEC, FTC and California and New York Banking Departments. Mr. Lynyak’s representative clients include foreign and domestic banks, savings associations, holding companies and mortgage banking companies. He can be contacted via email at Lynyak.joseph@Dorsey.com or at +1 310.386.5554.



Lanier Saperstein is the Co-Chair of Dorsey & Whitney’s U.S.-China Practice Group. He represents Chinese and other foreign financial institutions in U.S. disputes and regulatory matters. He has extensive experience in a wide array of matters impacting Chinese banks and other non-U.S. banks, including those arising under the Bank Secrecy Act, USA PATRIOT Act, Antiterrorism Act, federal securities laws, and U.S. Bankruptcy Code, as well as responding to U.S. subpoenas, asset restraints and judgments that conflict with the bank confidentiality laws of foreign nations. He frequently writes on legal issues impacting banks, and his articles have appeared in *The Wall Street Journal*, *The New York Law Journal*, *Quartz*, *CFO Magazine*, and the *Notre Dame Law Review*. He also is an adjunct professor of law at Fordham University School of Law, where he teaches a class on banking litigation. Lanier can be reached by email at saperstein.lanier@dorsey.com, WeChat (ID: laniersaperstein) or by phone (+1 212-415-9385).