

US Sanctions Update

IPBA Webinar: “Navigating A New Economic Sanctions Era”

Ali Burney, Partner, Hong Kong SAR

June 2, 2022

Agenda

1. Introduction to US Sanctions
2. Enforcement & Policy Trends
3. Compliance Challenges
4. New Russia Sanctions

Introduction | Overview of US Sanctions

- Restrictive financial measures and trade controls targeting individuals, entities, governments, and territories that are subject to US sanctions (“**Sanctions Targets**”)
- OFAC and other US agencies (State Department, Commerce Department, and DOJ) administer and enforce sanctions
- OFAC sanctions programs are of two types:
 - Country-based (currently, Crimea, Cuba, Iran, LNR/DNR, North Korea, and Syria)
 - Activity-based (e.g., counter-terrorism, non-proliferation, human rights, etc.)
- US sanctions can either be jurisdiction-based (i.e., primary) or extraterritorial (i.e., secondary)

Introduction | Who Must Comply with US Primary Sanctions?

- **“US persons”** must comply with US sanctions
 - US persons include US citizens, green card holders, anyone located in the United States, US incorporated entities, and in certain cases foreign subsidiaries of US companies
- Non-US persons must also comply if their transactions with Sanctions Targets involve US jurisdictional elements (e.g., US persons, US financial system, or US-origin goods)
- Civil and criminal penalties for violations of US sanctions

Introduction | What About Secondary Sanctions?

- Secondary sanctions apply to entirely non-US activity by non-US persons that the US government has determined to be against US foreign policy and national security interests (“**sanctionable activity**”)
- There is no “violation” of the law, but non-US person determined to have engaged in sanctionable activity may themselves be subject to sanctions or cut-off from US markets
- The threat of secondary sanctions is an effective tool in coercing non-US banks and companies to comply with US sanctions policy objectives
- Examples include secondary sanctions against Iran, North Korea, and certain Russian sanctions targets

Key Enforcement Trends

Looking at OFAC's 2021 and 2022 enforcement actions, we see the following trends that are of particular relevance to non-US financial institutions such as Macquarie:

1. Non-US banks still pay the biggest fines, e.g., UBAF, BOC, First Bank
2. Tech companies are targets, e.g., Airbnb Payments, Payoneer, BitGo, and BitPay
3. Non-US corporates trading with sanctioned countries, e.g. Sojitz HK, Toll Holdings, others
4. Compliance remediation is an important factor in the final penalty amount
5. OFAC looks to expand its jurisdiction and liability theories through settlements rather than regulatory changes

Biden Administration's Strategy

We see the following themes emerging from this administration strategy:

1. A more multilateral approach to working with allies to achieve broader objectives, as seen with the Russian sanctions
2. A potential escalation of Russian sanctions, including secondary sanctions on purchasing Russian crude oil
3. In practice, a continued hardline approach against China although a more nuanced use of regulatory and enforcement tools
4. DOJ's use of asset forfeiture as a sanctions enforcement tool
5. Officially trying to engage with allies and Iran on the JCPOA, but limited progress in negotiations

Practical Challenges for Compliance

Based on our experience, we see that the fast-changing sanctions landscape creates the following common compliance challenges:

1. Sanctions laws are changing, numerous, and technical
2. Bad actors now know how to avoid detection through standard due diligence processes
3. Expanding theories of US jurisdiction
4. A large part of the Eurasian continent (Russia, China, Iran, North Korea, and Afghanistan) is now sanctioned
5. Sanctions risk will now show up as AML risk, and financial institutions must now do a better job at identifying the source of funds for their investments

Russia-related Sanctions

- As a result of the Russian annexation of the Crimea region of Ukraine (“**Crimea**”) in 2014 and the current invasion of Ukraine, the United States, European Union, the United Kingdom, and other allied countries have introduced “sweeping” and complex sanctions and export controls against Russia
- There are currently no UN sanctions against Russia
- These sanctions are likely to increase
- Unlikely that a ceasefire will result in the lifting of the sanctions
- Sanctions will likely be lifted as part of a comprehensive peace deal after the cessation of hostilities

Types of Sanctions

US sanctions against Russia are of the following types:

- SDN or blocking sanctions against individuals and entities (“**persons**”) on the Specially Designated Nationals and Blocked Persons List (the “**SDN List**”)
- Non-SDN sanctions against persons on the Non-SDN Menu Based Sanctions (“**NS-MBS**”) List
- Sectoral sanctions against Russian entities on the Sectoral Sanctions Identification (“**SSI**”) List
- Embargoes against Crimea and the “**DNR/LNR**” (i.e., Donetsk and Luhansk People’s Republics)
- Other trade and investment restrictions against Russia
- Secondary sanctions against Russian sanctions targets

Russian Energy Sanctions | Next Round

US is considering the following secondary sanctions:

- Requiring foreign companies to pay a below-market price for Russian oil — or be subject to US sanctions
 - USG would assign a price for Russian oil that is well under the current market value, which is currently more than \$100 per barrel
 - Russia's last budget set a break-even price for its oil above \$40
- Cutting off most Russian access to payments for oil
 - USG would do this by issuing a regulation that requires foreign banks dealing in payments to put the money in an escrow account if they want to avoid sanctions
 - Russia would be able to access the money only to purchase essential goods like food and medicine

Ali Burney



Ali H Burney
Partner

aburney@step toe.com

Step toe

www.step toe.com

Step toe & Johnson HK LLP

31/F Alexandra House
18 Chater Road
Central, Hong Kong SAR
+852 3729 1805 (Direct)
+852 5998 8058 (Mobile)

Ali Burney's practice focuses on representing US and non-US clients in the Asia-Pacific region on matters related to US economic sanctions, export controls, the US Foreign Corrupt Practices Act (FCPA) and anti-money laundering (AML) laws.

Ali has extensive experience representing clients in front of the US Department of Justice, the US Department of the Treasury's Office of Foreign Assets Control (OFAC), and the US Department of Commerce's Bureau of Industry and Security (BIS). His experience includes conducting cross-border investigations, filing voluntary self-disclosures, responding to subpoenas, obtaining OFAC licenses, conducting risk assessments, and representing individuals and companies seeking removal from OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) and the BIS Entity List.

Ali is ranked in *Chambers – Greater China* for Corporate Investigations. Clients report that “Ali is a practical and thoughtful lawyer, and his experience with the US government is immensely valuable,” his “long track record in the commodities and financial services space has become timely, particularly over the past year” and that he is “very patient and diligent in his work”.

He also frequently advises companies investing in high-risk sectors and countries on sanctions, anti-bribery and corruption, and export control related pre-acquisition due diligence and post-acquisition compliance program implementation.