

US SANCTIONS 101

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This article is the first in a seven-part series on the application of US sanctions to the shipping community.

It will focus on US sanctions generally, including the definition of “US persons,” the application of the facilitation rules, the difference between primary and secondary sanctions, the 50% rule and various maritime advisories. The article will conclude with a few frequently asked questions.

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US SANCTIONS OVERVIEW

Traditional US sanctions (sometimes referred to as “primary sanctions”) apply by “blocking” or “freezing” the assets of a “specially designated national” (“SDN”). This means that the SDN’s assets in the US are frozen, and cannot be retrieved without permission from the US Office of Foreign Assets Control (“OFAC”), and that US persons generally are not permitted to transact with SDNs. Also, certain sanctions target entire countries or geographic regions, so US persons generally cannot deal with these countries.

US PERSON/FACILITATION

Traditionally, US sanctions applied only to “US persons,” which generally means a US citizen or permanent resident; an entity organized in the US (including foreign branches); and anyone in the US (which generally includes US branches of foreign entities, as well as any individuals who are physically in the US). Some (but not all) sanctions programs also apply to non-US subsidiaries of US persons.

Although the sanctions appear limited in scope, they apply quite broadly due to “facilitation.” The facilitation rule generally means that a US person cannot “facilitate” a transaction by a non-US person that would be prohibited by sanctions if conducted by the US person. In addition, a non-US person that “causes” a US person to commit facilitation can be liable for the sanctions violation. This rule is most relevant for the use of US dollars. Because almost all wire transfers in US dollars are cleared through US banks, a US dollar payment to or from an SDN or a sanctioned country constitutes facilitation. As a result, transactions without any other US nexus can be caught in the US sanctions net if any payments are made in US dollars.

SECONDARY SANCTIONS

Unlike primary sanctions, secondary sanctions specifically target *non-US* persons. They generally apply by threatening non-US persons with various levels of exclusion from the US and US markets (e.g. inability to import US goods) if they engage in the specified targeted activities. In practice, the primary risk for non-US persons is being added to the SDN list. Secondary sanctions typically target economic sectors of the targeted country (e.g. the oil and gas or shipping sectors), and apply to transactions with SDNs in the targeted country. Even in countries subject to secondary sanctions, non-US persons can continue to operate, so long as they avoid the prohibited parties and sectors.

Although secondary sanctions have existed for decades, they had a relatively minor impact until 2010, when secondary sanctions against Iran were strengthened. The Trump Administration has dramatically expanded the use of secondary sanctions, re-imposing and adding to sanctions on Iran (which had been lifted in 2016 by the Iran nuclear deal), and targeting North Korea, Russia, Venezuela, Syria, terrorism, and most recently, Hong Kong with secondary sanctions.

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COMPREHENSIVE AND NONCOMPREHENSIVE SANCTIONS

Sanctions programs can be comprehensive or noncomprehensive.

Noncomprehensive sanctions target specific activities or areas, but do not generally target an entire geographic region. For example, Belarus and Somalia are subject to noncomprehensive sanctions, meaning that US persons cannot deal with SDNs targeted by the specified sanctions programs, but otherwise can generally deal with Belarus and Somalia. Noncomprehensive sanctions programs also target activities that are not confined to a country or area, such as drug trafficking and terrorism.

In contrast, comprehensive sanctions prohibit US persons from dealing with most transactions with a specified territory, whether or not an SDN is involved. Currently, there are four countries and one territory subject to comprehensive sanctions: Cuba, Iran, North Korea, Syria and Crimea. Venezuela is subject to extensive sanctions targeting its government, and may be thought of as subject to "quasi-comprehensive" sanctions, but it is technically permitted for US persons to deal with non-sanctioned private parties and business in Venezuela. Sanctions programs change frequently, and should be monitored closely. In recent years, Sudan and Myanmar were removed from the list of countries subject to comprehensive sanctions.

50% RULE

An entity that is owned 50% or more by one or more SDNs is itself treated as an SDN. There is no guidance on how to interpret the 50% test in complex ownership scenarios, but it is generally thought of as economic ownership. For example, if an entity is owned (by value) 60% by a non-sanctioned entity, but is "controlled" by a sanctioned person, the subsidiary is still not an SDN.

MARITIME ADVISORIES

OFAC has issued several advisories targeting the maritime industry for sanctions compliance. While the advisories are couched in the language of “suggestion,” they should be taken very seriously by the business community. Several ships were listed for trading with Syria and North Korea, or engaging in ship-to-ship transfers of oil that ended up in those countries. This list was not a “sanctions list”; it was a “name-and-shame” list, with no direct legal impact. Nevertheless, many people refused to do business with the ships that were listed. Perversely, in some ways, this is worse than having a ship designated as an SDN, since a designated ship can be de-listed, but there is no way to get off the “name-and-shame” list.

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In May 2020, OFAC issued a more comprehensive maritime advisory, which expanded on previous advisories. It included specific recommendations for multiple players in the maritime industry. The advisory focussed on ship-to-ship transfers and AIS transponders, which OFAC believes are issues in noncompliance.

FREQUENTLY ASKED QUESTIONS

Q: Does having a US branch or subsidiary cause a non-US company to be a “US person”?

A: No, only the US branch or subsidiary would be a US person. However, the more US ties there are, the easier it is to accidentally violate the prohibitions on facilitation, and the greater is the potential consequence of a violation. Therefore, many non-US companies with substantial US ties take the conservative position to treat themselves as if they were US persons.

Q: What is the real difference between “primary” and “secondary” sanctions? Do non-US persons only have to worry about secondary sanctions?

A: Both primary and secondary sanctions are relevant to non-US persons. Primary sanctions have a substantial extraterritorial effect (especially due to the prominence of the US dollar). The main difference is the “punishment” for a violation. A violation of primary sanctions (whether by a US or non-US person) can result in a fine; a violation of secondary sanctions by a non-US person results in the non-US person being barred from transacting with the US at varying levels.

Q: If a government official or business executive is designated as an SDN, is the individual designated in his/her personal or official capacity? Can US persons deal with this SDN’s government agency or company?

A: There is no difference between sanctions imposed in a personal and official capacity, so US persons generally cannot deal with SDNs in any capacity. That said, a company does not become an SDN just because its officers or directors are SDNs, and a foreign government is not an SDN just because some of its officials are SDNs.

Q: What is the extent of facilitation? To what extent can parties be held responsible for indirect sanctions violations that they did not know about?

A: There is no hard-and-fast rule. OFAC has frequently articulated a very broad reading of facilitation, finding sanctions violations even where the liable party did not know that a sanctioned party was involved.

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