

FINANCIAL AND TRADE SANCTIONS BRIEFING III**U.S. sanctions and how they can apply to UK institutions
and/or U.S. employees working within those institutions.****Introduction**

1. In our previous sanctions briefing, we gave an introduction to UK and EU financial sanctions regimes and then explored a number of issues in more depth. In this third briefing, we aim to set out the position in the United States and examine how U.S. sanctions can apply directly to UK institutions as well as to U.S. employees working within those institutions. This briefing considers:
 - A. The aim of U.S. trade and economic sanctions
 - B. Enforcement agencies and the legal basis for U.S. sanctions
 - C. Who U.S. sanctions apply to
 - D. What types of restrictions are imposed by U.S. sanctions
 - E. U.S. sanctions jurisdiction over foreign entities
 - F. How U.S. sanctions are enforced
 - G. EU-U.S. conflict
 - H. Recent U.S. sanctions enforcement actions against foreign entities
 - I. Conclusion

A. The Aim of U.S. Sanctions

2. The stated aim of U.S. sanctions authorities is “*to enforce economic and trade sanctions based on U.S. foreign policy and national security goals 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 the country*”.¹ Thus, U.S. sanctions embody U.S. national security concerns, foreign policy goals and U.S. economic interests.

B. Enforcement Agencies and the Legal Basis for U.S. Sanctions

3. The U.S. Department of the Treasury Office of Foreign Assets Control (‘OFAC’), administers and enforces U.S. sanctions. OFAC acts pursuant to presidential orders issued under national emergency powers granted by specific legislation, including the

¹ Department of the Treasury, OFAC.

International Emergency Economic Powers Act 1977 ('IEEPA') and the Trading with the Enemy Act 1917 ('TWEA'), to impose controls on transactions and freeze assets under U.S. jurisdiction. Many U.S. sanctions are based on United Nations and other international mandates; they are multilateral in scope and involve close cooperation with allied governments. The U.S. Commerce Department's Bureau of Industry and Security ('BIS'), the District Attorney of New York ('DANY') and the Federal Reserve also enforce some aspects of U.S. sanctions.

C. Who U.S. Sanctions Apply to

4. U.S. sanctions apply whenever activity takes place in the United States and when a 'U.S. person' is involved. When there is involvement with Cuba or Iran, the foreign subsidiaries of U.S. companies are also covered.

Who is a 'U.S. person'

5. OFAC regulations define a 'U.S. person' very widely to include companies operating in the U.S., wherever they are registered, and the non-U.S. branches of U.S. companies organized under U.S. laws. The exact definition is set out below:

"any citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person (i.e. individual or entity) in the United States".

A U.S. person would therefore include the following:

- all individuals and companies in the U.S.
- U.S. citizens or permanent residents (*i.e.*, green card holders)
- companies organized under U.S. law, including their non-U.S. branches (even when operating outside the U.S.)
- U.S. offices or branches of non-U.S. companies.

D. What Types of Restrictions Are Imposed by U.S. Sanctions

Comprehensive Trade Embargoes

6. These prohibit virtually all trade and transactions with a specific country, its nationals and entities. Currently, Cuba, Iran, Sudan and Syria are subject to comprehensive trade embargoes. For example, U.S. sanctions prohibit dealing with any item in or transported from or through Cuba.

Targeted Sanctions - Blocking the Assets of Individuals and Entities

7. U.S. sanctions require individuals and entities to avoid any transactions with a listed entity or individual, including entities that are owned or controlled by a listed entity or individual, and block any 'assets'. The definition of 'asset' is a very wide one and includes 'services of any nature and all tangible and intangible property'. There is a further requirement to make a report to OFAC if the assets are in the possession or

control of a U.S. person. On February 14, 2008, OFAC issued guidance stating that the property and interests in property of an entity will be blocked if 50% or more of the entity is owned, directly or indirectly, by a person whose property and interests in property are blocked pursuant to an Executive Order or regulations administered by OFAC.

8. Targeted sanctions have been used against ‘problem countries’ such as the Balkans, Belarus, the Congo, the Ivory Coast, Iraq, Lebanon, Libya, Somalia, Yemen and Zimbabwe. They have also been used to target narcotics traffickers, terrorist organizations and individuals within those organizations, proliferators of weapons of mass destruction, international criminal organizations, and human rights abusers.

Targeted Individuals: Specifically Designated Nationals (‘SDNs’)

9. Various OFAC sanctions programmes target individuals. There are over 6,000 SDNs (individuals and entities) designated, from all over the world. Transactions between U.S. persons and SDNs are prohibited. Even facilitating a transaction between a U.S. person and an SDN is prohibited. U.S. persons should generally block (seize) any property in which an SDN has an interest, even indirect, that comes into their ownership or control. An SDN can be identified by reference to the OFAC SDN List (<http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>).

What Does ‘Facilitation’ Mean?

10. U.S. trade sanctions not only prohibit direct transactions, they also prohibit facilitation and approval of transactions. Prohibited conduct may include voting on, managing, approving, facilitating, brokering, administering, financing, or guaranteeing.
11. Prohibited facilitation or approval also occurs when a U.S. Person:
 - a) “Alters its operating policies or procedures, or those of a foreign affiliate, to permit a foreign affiliate to accept or perform a specific contract, engagement or transaction involving [sanctioned entities] without the approval of the [U.S.] person, where such transaction previously required approval by the [U.S.] person and such transaction by the foreign affiliate would be prohibited...if performed directly by a [U.S.] person or from the [U.S.]”.²
 - b) “Changes the operating policies and procedures of a particular affiliate with the specific purpose of facilitating transactions that would be prohibited...if performed by a [U.S.] person or from the [U.S.]”.³

² See, e.g., 31 CFR 560.417.

³ *Id.*

- c) “Refers to a foreign person purchase orders, requests for bids, or similar business opportunities involving [sanctioned entities] to which the United States person could not directly respond”.⁴
12. Each sanctions program may also have its own definition of ‘facilitating’, but the interpretation made by the regulator will normally be the most inclusive. We have listed below a number of sanctions to illustrate the wide scope of facilitation.
13. Iran Regulations: An individual (or entity) may not “approve, finance, facilitate, or guarantee any transaction by a foreign person where the transaction by that foreign person would be prohibited...if performed by a [U.S.] person or within the United States.” 31 C.F.R. 560.208 (*see also* 560.417).
14. Sudan Regulations: Facilitation is defined as any unlicensed action by a U.S. Person that ‘assists or supports’ transactions by or with a sanctioned party. *See* 31 C.F.R. 538.407 (*see also* 538.206). “Activity of a purely clerical or reporting nature that does not further trade or financial transactions with [sanctioned parties] is not considered prohibited facilitation”. For example, reporting on the results of a subsidiary’s trade with Sudan is not prohibited, while financing or insuring that trade or warranting the quality of goods sold by a subsidiary to the Government of Sudan constitutes prohibited facilitation.
15. The Cuban Regulations do not have a ‘facilitation’ clause, but it is generally understood that the evasion prohibition contained in 31 C.F.R. 515.201(c) has the same effect.

Re-export Restrictions on Foreign Persons

16. The re-export of U.S. origin goods by non-U.S. persons to Cuba, Iran, Sudan and Syria is generally prohibited under the Export Administration Regulations unless licensed by OFAC or BIS.
17. In relation to Iran:⁵ “[T]he re-exportation from a third country, directly or indirectly, by a person other than a U.S. person, of any goods, technology or services that have been exported from the United States is prohibited if [the goods are export controlled]”.
18. In relation to Sudan:⁶ “The re-exportation to Sudan or the Government of Sudan by a non-U.S. person of any goods or technology exported from the U.S., the exportation of which to Sudan is subject to export or re-export license application requirements, is authorized under this section provided that the goods or technology [are not export-controlled]”.
19. Similar restrictions are imposed in relation to Cuba and North Korea.

⁴ *Id.*

⁵ 31 C.F.R. 560.205.

⁶ 31 C.F.R. 538.507.

20. For Syria, no exports or re-exports of any U.S. origin item (with certain limited exceptions, such as food and medicine) are permitted unless a license from BIS is obtained.

E. Jurisdiction over Foreign Entities

21. The U.S. sanctions regime casts a very wide extra-jurisdictional net for U.S. enforcement authorities. Offending companies with segments of their business operating even temporarily in the U.S. may be caught. Equally, U.S. companies with foreign branches operating outside the U.S. would be liable under U.S. sanctions law for the acts of their foreign branches. Non-U.S. persons may also be apprehended if they become involved in re-export of export-controlled items.
22. It is worth noting that foreign persons who 'cause' a U.S. person to violate U.S. law are subject to prosecution under U.S. jurisdiction under Section 206(a) of the IEEPA Enhancement Act of 2007.

F. How U.S. Sanctions Are Enforced

Strict Liability

23. A violation occurs (and liability for penalties arises) if a prohibited transaction simply takes place. The reason for the violation, or lack of knowledge of the violation, is considered irrelevant. U.S. enforcement authorities have considerable discretion in exercising this executive power. A company's compliance procedures, and/or lack of knowledge thereof, would be relevant only to mitigation of the penalty.
24. The fines for violations can be substantial. Depending on the program, criminal penalties can range from \$50,000 to \$10,000,000 per violation and imprisonment can range from 10 to 30 years for wilful violations. Depending on the program, civil penalties can range from \$250,000 per violation or twice the amount of each underlying transaction to \$1,075,000 for each violation.
25. In October 2007, IEEPA was amended to state that any person who 'causes' a violation of OFAC sanctions can be held liable for both civil and criminal penalties.

Licenses, Exemptions and Approvals

26. There are exceptions to U.S. sanctions that permit certain activities. Each specific sanctions program should be checked prior to undertaking the activity. An activity may be exempt or require a license from OFAC. Information and informational materials are exempt from most U.S. sanctions programs. In addition, the following activities may be exempt activities: non-commercial personal remittances, humanitarian donations, personal communications and travel.

G. EU-U.S. Conflict

27. On 29 November 1996, the European Council adopted Council Regulation (EC) 2271/96, often referred to as the 'Blocking' regulation. The regulation was the EU's response to a U.S. attempt to increase its territorial reach into EU trade with Cuba (and other countries). The EU regulation made it illegal to comply with a

U.S. sanction listed in the regulation unless non-compliance would seriously damage the interests of the persons involved. The EU regulation states:

*“No person referred to in Article 11 shall comply, whether directly or through a subsidiary other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex”.*⁷

Therefore, any EU-incorporated entity and any U.S. person operating in the EU may be committing an offence in the EU by complying with U.S. sanctions law. Whether an offence is committed depends on how the EU regulation has been implemented under local law, for example, some European countries have not taken any steps to adopt specific enforcement legislation (including Belgium, Luxembourg and France). Other countries have adopted transposition measures by creating what amounts to an administrative infringement (Netherlands and Spain).

28. The UK created an offence of complying with U.S. legislation by implementing the Extraterritorial U.S. legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996. Despite the order’s being implemented by the order mentioned above, we are not aware of any prosecution by English authorities. The only reported EU-U.S. sanction conflict arose out of the purchase of an Austrian bank by a U.S. private equity firm.
29. Bawag P.S.K. was one of Austria’s larger banks. In 2007, a U.S. private equity firm, Cerberus Capital, sought to buy the bank. It soon became apparent that Bawag P.S.K. operated bank accounts for Cuban nationals. In order to complete the transaction, Bawag P.S.K. closed the accounts, citing compliance with the U.S. Helms Burton Act 1996 (Cuba) as the reason. The Austrian government initiated proceedings against Bawag P.S.K. for breaching the European ‘Blocking’ Regulation 2271/96 by complying with U.S. sanctions law. Cerberus Capital responded by approaching the U.S. authorities to obtain a licence to allow the acquisition to proceed with the Cuban accounts reinstated. Once the licence was obtained (less than two months from the date of initiation of the Austrian proceedings) and the accounts reinstated, the Austrian prosecutor dropped the prosecution.
30. The resolution of the Austrian Bawag P.S.K. case demonstrates the approach likely to be taken should a conflict arise in the future. The lack of enforcement action by European authorities under the ‘Blocking’ regulation suggests that other methods have been found to resolve this legal conflict. It may well be that companies or individuals faced with this legal conundrum will have sought a licence from OFAC to continue with their previously prohibited activity.

⁷ EU Council Regulation (EC) 2271/96, Article 5.

H. Recent U.S. Sanction Enforcement Against Foreign Entities

- 31. There have been some recent high-profile examples of UK financial institutions falling foul of U.S. sanctions programmes. On 10 December 2012, UK banks HSBC and Standard Chartered Bank ('SCB') entered into agreements with U.S. enforcement authorities to settle civil and criminal charges relating to U.S. economic sanctions, the Bank Secrecy Act, and the Foreign Narcotics Kingpin Sanctions Regulations. HSBC forfeited \$1.9 billion to U.S. authorities, while SCB agreed to pay \$327 million. Both banks agreed to institute various compliance measures in their management and operations.
- 32. On 12 December 2012, the Bank of Tokyo-Mitsubishi UFJ, Ltd. ('BTMU') agreed to pay \$8,571,634 to settle potential civil liability for apparent violations of U.S. trade sanctions.
- 33. These coordinated, multi-agency U.S. enforcement actions highlight the ability of U.S. enforcement authorities to prosecute and fine foreign entities. They also demonstrate the range of fines that can be imposed and the civil liability that can arise.

I. Conclusion

- 34. U.S. sanctions apply to individuals and entities well outside the normal reach of U.S. law enforcement. Individuals and entities operating from the UK but also designated as a 'U.S. person' will need to ensure that their sanctions screening processes are robust enough to comply with both UK and U.S. sanctions programmes.

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If you have any questions regarding this memorandum, please contact Peter Burrell (+44 207 153 1206, pburrell@willkie.com), Miriam A. Bishop (202-303-1126, mbishop@willkie.com), Paul Feldberg (+44 207 153 1217, pfeldberg@willkie.com) or the Willkie attorney with whom you regularly work.

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April 26, 2013

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