

The story so far: U.S. sanctions developments in 2015



Four months into 2015 and sanctions lawyers are burning the midnight oil to keep their clients on top of developments in U.S. trade regulation. Thad McBride and Cheryl Palmeri review the U.S. sanctions year to date and examine the way in which the U.S. government is using sanctions as a foreign policy tool.

In the first (almost) four months of 2015, the U.S. government has been – as usual – quite busy on the sanctions front. The United States has eased sanctions on Cuba, expanded sanctions on North Korea, Russia, and Venezuela, and introduced sanctions against cyber criminals. And that does not even include Iran (with which preliminary agreement was reached on 2 April) or the slow expansion of restrictions on Yemen, nor the government's continued, aggressive enforcement against sanctions violators.

What follows is our effort to briefly summarise key sanctions developments since the beginning of the year, and to offer predictions about potential new developments in the coming months.

CUBA

Last December, to the surprise of many, President Obama announced plans to ease the comprehensive economic sanctions the United States has maintained against Cuba for the past, well, forever. This announcement was followed in January by the Treasury Department (and the Commerce Department separately) issuing amended regulations to begin implementing changes the President had announced.

Under the amended regulations, many previously restricted types of activity are now permitted, including:

- Broader authorisation to engage in professional research and meetings in Cuba;
- Activities in Cuba in support of official business of, and contracts with, the U.S. and non-U.S. governments and certain intergovernmental organisations;
- Exports of certain goods, including consumer communications devices, building materials and equipment for private sector construction, and goods and technology in support of scientific, ecological, sporting and other cultural activities; and
- Certain financial services, including authorisation for U.S. banks to maintain correspondent accounts at Cuban financial institutions.

In addition, at the end of March, Treasury announced that it had removed 59 Cuban parties from the List of Specially Designated Nationals ('SDNs') and Blocked Persons. (As readers will know, the SDN List is maintained by the Treasury Department's Office of Foreign Assets Control (OFAC), which administers

most U.S. sanctions programmes. U.S. individuals and companies are prohibited from conducting virtually any transaction with an SDN.) Perhaps this action was largely symbolic, but it also evidences a means by which the Obama Administration may further seek to ease sanctions on Cuba without Congressional action.

Likewise, following a meeting between President Obama and Cuban President Raul Castro, the United States is poised to remove Cuba from the U.S. List of State Sponsors of Terrorism ('SST'). This should lead to looser restrictions on U.S. foreign assistance, defence exports and sales, exports of dual-use items, and miscellaneous financial and other transactions.

Our view

There are some new opportunities related to Cuba, and there is broad authorisation to conduct many types of business development activities in and with Cuba. But it is still too soon for most U.S. businesses to engage Cuba as a viable commercial partner. That said, we think the train has left the station, and it is merely a matter of time (though maybe a long time) until sanctions are eliminated entirely. It is hard to imagine that the



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steps taken to ease sanctions on Cuba so far will be reversed.

IRAN

There was no lack of action or news about Iran during the first quarter of the year. Nor was there a deal to extend the existing Joint Plan of Action – under which the United States has maintained a slightly more permissive sanctions regime with respect to Iran since late 2013.

And while an agreement was reached on 2 April, as OFAC announced on its website the next day:

- The parameters announced on 2 April 2015 for a Joint Comprehensive Plan of Action ('JCPOA') by the P5+1 and Iran do not immediately relieve, suspend, or terminate any sanctions on Iran. The only sanctions relief in force is the relief provided pursuant to the Joint Plan of Action ('JPOA') reached on 24 November 2013 and extended through 30 June 2015.
- The parameters announced on 2 April 2015 provide a path for sanctions on Iran to be suspended and eventually terminated in exchange for International Atomic Energy Agency-verified implementation by Iran of its key nuclear commitments.
- As of today and until the JCPOA is concluded, other than the sanctions relief provided under the JPOA, all U.S. sanctions remain in place and will continue to be vigorously enforced.
- The sanctions relief provided for under the JPOA reached on 24 November 2013 remains in effect, as described on Treasury's website.

Our view

It is really hard to predict what, if anything, will happen in the next month, two, or more – probably little, as the United States has no obligation to ease sanctions further until inspections of Iran's nuclear facilities are completed. And there is, of course, the small matter of a recalcitrant U.S. Congress.

Nonetheless, we think that OFAC could take tentative steps to support easing sanctions through approving licence applications – for example, for activities permitted under the JPOA. We can also envision OFAC removing certain Iranian parties from the SDN List, as the agency has done with respect to Cuba. With business with

Iran still largely off limits, the fact an Iranian is (or is not) an SDN is not that relevant to a U.S. company. But as with Cuba, such symbolic steps may signify the Obama Administration's efforts to work around an uncooperative Congress.

NORTH KOREA

On 2 January, barely 24 hours after clocks turned to 2015, President Obama issued Executive Order 13687, which expanded sanctions on North Korea. Under the Order, the President authorised OFAC to block the property of any official, agency, or other controlled entity of the government of North Korea or the Workers' Party of Korea, any person providing support to or acting on behalf of the government of North Korea, or any person owned or controlled by a blocked party. There are also U.S. entry restrictions on individuals designated under the order.

About the same time, OFAC announced that it had designated 10 individuals and three entities under the order. Those parties, each of which has been added to the SDN List, are basically off limits to U.S. companies and individuals – to the extent U.S. companies or individuals previously wanted to do business with such parties.

Our view

Read on through this summary and a pattern will appear: the President issues a broad executive order that authorises OFAC to introduce sanctions against a wide array of targets, then a limited number of parties is initially designated. This approach allows the United States to tighten sanctions methodically and as needed; just as has happened with Russia/Ukraine, and as we expect with respect to Venezuela, this is what we anticipate will happen with North Korea.

RUSSIA/UKRAINE

In some ways, the most notable development in the first quarter of 2015 with respect to Russia and Ukraine was the lack of developments – especially compared to the first quarter of 2014, when Treasury was prolific. But there was some action.

First, in January, OFAC issued three general licences, including one to authorise certain transactions related to telecommunications in the Crimea region of Ukraine. (In December 2014, the United States imposed a comprehensive embargo on Crimea;

these general licences authorise certain transactions in and with Crimea.) Then, in March, OFAC designated another 14 individuals and one entity as SDNs for their activities in de-stabilising Ukraine. At the same time, OFAC also designated one entity as an SDN for its activities in Crimea.

Our view

We think the U.S. government will continue to slowly ratchet up pressure on Russia through the designation of additional individuals and entities on the SDN List or the Sectoral Sanctions Identifications List. The authority to make such designations, as established by the executive orders issued by President Obama during 2014, is very broad. We expect the Obama Administration to keep using that authority on a targeted basis for the foreseeable future.

We also expect, perhaps overly optimistically, that compliance with U.S. sanctions on Russia and Ukraine may get a little easier for U.S. companies. With a year underfoot, OFAC has gained experience about the types of issues companies are encountering, and has issued a considerable amount of guidance on its website to address many of those issues. U.S. companies may be starting to develop patterns of conduct that they know to be permissible, and that too may ease the compliance burden.

VENEZUELA

Towards the end of 2014, the Obama Administration introduced new restrictions on exports to, and transactions with, Venezuela. First, in November, the Export Administration Regulations were amended to restrict exports to Venezuela for 'a military end use or end user'. Then, in December, President Obama signed into law the Venezuela Defense of Human Rights and Civil Society Act of 2014.

There was no meaningful action in the first quarter of 2015 until March, when President Obama issued Executive Order 13692. That order imposed asset-blocking and exclusion sanctions against persons found to have committed acts to restrict the freedom of, or otherwise harm, the Venezuelan people. The order also authorised the President to designate any current or former Venezuelan government official, as well as any individual or entity controlled or owned by, or acting on behalf of, a designated person.

While only a few individuals have been designated to date, the order establishes a broad framework pursuant to which other individuals and entities can be designated.

Our view

We think the U.S. approach to Venezuela may mirror the U.S. approach to Russia. Having established the broad authority to sanction Venezuelan parties, the Obama Administration is likely to introduce sanctions against new parties periodically in the hopes of slowly squeezing the Maduro government.

We are less confident that Canada, Europe, or other U.S. allies will join the effort against Venezuela (and we are quite confident that Venezuela's fellow South American nations will not follow the U.S. lead). Even if U.S. sanctions are expanded, therefore, this unilateral sanctions regime may not be very successful.

ENFORCEMENT

There were a few notable enforcement resolutions announced in the last three months.

In March, Treasury announced its settlement with Commerzbank AG, a German bank, over alleged violations of U.S. sanctions on Cuba, Iran, Sudan, and other U.S. sanctions programmes. The Commerzbank settlement appears to be the latest in the line of enforcement actions against non-U.S. banks; as in other such cases, the Treasury Department settled the matter at the same time that New York City and the State of New York settled with Commerzbank. In total, Commerzbank paid fines totaling more than \$700 million, \$260 million of which was paid to the Treasury Department.

Later in March, Treasury announced that it had settled with PayPal for approximately \$7.66 million over alleged violations of U.S. sanctions on Cuba, Iran, and Sudan, as well as U.S. sanctions on designated global terrorists. In announcing the settlement, Treasury asserted that PayPal had

[F]ailed to employ adequate screening technology and procedures to identify the potential involvement of U.S. sanctions targets in transactions that PayPal processed. As a result of this failure, PayPal did not screen in-process transactions in order to reject or block prohibited transactions pursuant to

Cyber sanctions

We are not even sure what to call this sanctions regime: it was only on 1 April that President Obama issued Executive Order 13694 establishing these new sanctions. Pursuant to the Order, property blocking and entry restrictions may be imposed against persons directly engaged in, or otherwise supporting, any of the following:

- Efforts to harm a network that supports, or has the ability to provide services to, a critical infrastructure sector;
- Causing a significant disruption of a computer network;
- Causing a misappropriation of economic resources, trade secrets, or personal information; or
- Receipt of or use for commercial gain of misappropriated trade secrets.

Likewise, anyone owned or

controlled by or acting on behalf of a designated party is subject to property blocking and entry restrictions. For the moment, no party has been designated under these cyber sanctions. Thus, as Treasury noted in guidance posted on its website on 1 April (specifically, Frequently Asked Question Number 445), there are 'no specific steps that U.S. persons need to take right now in order to comply with' this new order.

Our view

This is yet another situation where the U.S. government has created the infrastructure to designate and block the property of a wide array of sanctions targets – in this case, cyber mischief makers. We expect designations will be forthcoming. This sanctions regime could get interesting depending on who is designated, especially if government parties – in China, for example – are targeted.

applicable U.S. economic sanctions program requirements.'

Interestingly, as part of the settlement, Treasury required PayPal to provide – within six months of the date of settlement – a presentation to OFAC 'summarizing [the company's] current policies and procedures as they relate to screening transactions and/or customers for the purpose of compliance with the regulations administered by OFAC.' We do not recall seeing a similar requirement in past OFAC settlements.

Our view

We expect aggressive enforcement to continue. We are aware that other non-U.S. banks are under investigation currently, so more settlements with such banks are likely. And U.S. financial institutions like PayPal must be careful about screening customers, especially from outside the United States, to ensure transactions do not fall afoul of U.S. sanctions. In the absence of such screening, fines will be levied and other obligations – such as the requirement to provide a compliance presentation to OFAC – may also be imposed. Proactive compliance measures are essential to protect

against inadvertent transactions with SDNs, particularly given the ease of screening transaction partners against the SDN List.

CONCLUSION

The early months of 2015 were eventful, and the coming months are likely to be similar even if we cannot guess what is going to happen. Perhaps the recently expanded restrictions on Yemen – OFAC announced new SDN designations and the United Nations imposed a targeted arms embargo – will be extended further? Progress on Iran may be rolled back, or maybe sanctions will be re-introduced on Burma? Or of course some new sanctions target may emerge. The only thing that seems certain is that the U.S. government will continue to use U.S. sanctions to achieve its policy objectives.

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