



Criminal enforcement of US economic sanctions against non-US entities

US economic sanctions can have broad and unexpected applications to non-US entities, particularly those with US affiliates or that do substantial business in or with the US. In recent years, the US government has sought substantial criminal penalties against non-US banks and companies that deal with Iran and other targets of US economic sanctions. The prosecutors who bring these cases have broadly asserted US jurisdiction over non-US persons based on limited and indirect contacts with the US. Non-US financial institutions and companies should be aware of these cases if they or their affiliates do business both with the US and with Iran, Iranian state banks or other countries or persons targeted by US sanctions.

Introduction

The Office of Foreign Assets Control (OFAC) is the lead US government agency responsible for promulgating and administering US economic sanctions. OFAC handles civil enforcement of the sanctions and may refer particularly serious cases to the US Department of Justice (DOJ) for the institution of criminal proceedings. In addition to federal prosecutors in the DOJ and the US attorneys in each federal judicial district, state and local prosecutors may also initiate parallel criminal proceedings, applying state criminal law to address the same conduct. The New York County District Attorney has taken a lead role in the criminal investigation of non-US banks for conduct violative of the sanctions.

The US has currently sanctions in place against, among others, Myanmar, Cuba, Iran, North Korea and Sudan, and also sanctions targeting specific persons involved with certain political organisations, eg Hamas and the Taliban, or those otherwise involved with terrorism, narcotics trafficking or the proliferation of weapons of mass destruction. In general terms, US economic sanctions prohibit most financial transactions or dealings with the following individuals, entities, governments and countries:

- persons located within or doing business from Myanmar, Cuba, Iran or Sudan;
- several thousand individuals and entities (wherever located) included in the list of Specially Designated Nationals;
- the governments of Cuba, Iran or Sudan, any entity owned or controlled thereby and their agents; and

- Cuban nationals and companies, their controlled entities, Cuban branches of non-Cuban companies and their agents.

The sanctions also require US persons to block (freeze), upon receipt, any property of persons of types (ii), (iii) or (iv) defined below¹. In addition, no US person may approve, assist, finance, guarantee or otherwise 'facilitate' any transaction that would, if engaged in by a US person, violate the sanctions.

Who must comply?

All US persons must comply with US economic sanctions. 'US person' is defined to include:

- i any US citizen or permanent resident alien (ie, a 'green card' holder), wherever located;
- ii the worldwide operations of any entity organised under US law, but generally excluding subsidiaries formed under non-US law; and
- iii any person located within or operating from the US.

As a result, US employees, officers and directors of non-US companies are fully required to comply, and their involvement with any transaction or dealing with targeted persons could expose them and the company to enforcement risk.

Non-US persons located outside the US are not generally required to comply with US sanctions regulations.

¹ Note that, with respect to Iran, blocking only applies to designated Iranian government entities, while all Cuban and Sudanese governmental persons are blocked even if not specifically designated.

However, there are exceptions. The Cuba sanctions apply to any entity, wherever organised, that is 'owned or controlled' by a US person. The Iran sanctions regulations contain a 're-export' provision that expressly seeks to prohibit non-US persons from exporting certain US-origin goods, technology and services to Iran. Two separate US economic sanctions statutes are directed specifically at non-US persons; these are the Helms-Burton Act and the Iran Sanctions Act. While these statutes are not being actively enforced, legislation pending in US Congress would seek to require the US president to enforce the Iran Sanctions Act.

Going further, as discussed below, criminal enforcement actions have been brought against non-US persons for causing US banks or exporters to take actions that ultimately benefitted persons in Iran.

Available penalties

For any violation, OFAC may impose a civil penalty up to the greater of \$250,000 and twice the 'amount of the transaction that is the basis of the violation'. Civil penalties are imposed on a strict liability basis. There is no requirement for OFAC to allege or show that the penalised person had any knowledge of the violation (except for a few prohibitions that are worded so as to require knowledge).

Available criminal penalties include a fine up to the greater of \$1m and twice the 'pecuniary gain or loss', and up to 20 years in prison for convicted individuals². For a court to impose criminal penalties, prosecutors must establish that the court has jurisdiction over the charged company or individual and that there was the required degree of knowledge of the violation. However, companies will typically seek to settle criminal enforcement actions and, in a settlement, prosecutors will not have to carry the burden of proving jurisdiction and knowledge. A five-year statute of limitations applies to enforcement actions based on violations of the OFAC sanctions regulations, although OFAC or prosecutors may demand that persons subject to investigation waive the running of this period.

² In addition, federal prosecutors have the power to seek the forfeiture of 'any property, real or personal, which constitutes or is derived from proceeds traceable to' any OFAC sanctions violation.

Extraterritorial criminal enforcement

In recent criminal sanctions enforcement actions against non-US banks and non-US import-export companies, prosecutors have asserted an increasingly broad authority to prosecute, pursuing non-US persons who have acted entirely outside the US. The cases can be broadly broken down into those against non-US banks and those against companies that deal in US-origin goods. In the first set of cases, non-US banks have been criminally charged for having caused US dollar funds transfers to be made for the benefit of targeted persons. In the second set of cases, non-US export companies have been charged for purchasing goods from the US with the intention of 're-exporting' them to targeted persons or countries.

Moreover, similar to the approach adopted on the extraterritorial application of the US Foreign Corrupt Practices Act, prosecutors have used charges of criminal 'conspiracy' to increase their territorial reach. On this theory, law applicable to US persons may be applied to non-US persons if at least one person involved with an alleged violation of sanctions regulations is a US person. For example, an indictment filed in September 2008 charged both US and non-US persons, including Iranian nationals located in Dubai, Malaysia, the UK and Iran, with a criminal conspiracy to export US-origin items to Iran.

These novel and expansive approaches to assertion of jurisdiction are a cause for concern to all multinational financial institutions and corporates. It appears that non-US financial institutions and companies are at risk of sanctions enforcement if they take or cause any action in the US in connection with transactions involving persons or states that are the target of US sanctions.

Enforcement against non-US banks

Large penalties have been imposed on financial institutions found to have violated the sanctions, including on ABN Amro, which in December 2005 was required to pay a \$40m civil penalty for sanctions and anti-money laundering violations. On 9 January 2009, the DOJ and the New York County District Attorney's Office announced a \$350m criminal forfeiture penalty imposed on Lloyds TSB as part of deferred prosecution agreements with those authorities.

In the Lloyds TSB case, the prosecutors apparently took the position that the bank was subject to US territorial jurisdiction as a result of the actions of its non-US employees, located outside the US. The asserted basis for jurisdiction was that Lloyds TSB had indirectly caused the export of financial services to Iran, in violation of US economic sanctions, by causing its correspondent banks in the US to (unwittingly) process US dollar funds transfers for Iranian and Sudanese persons. With the announcement of this penalty, the New York County District Attorney, Robert Morgenthau, stated to the press that investigations of nine other non-US financial institutions continued, based on similar alleged acts.

Since the announcement of the Lloyds TSB settlement, OFAC has indicated that it was not directly involved in these criminal enforcement actions and has its own ongoing investigations of these factual matters. OFAC director Adam Szubin and other senior OFAC officials³ have made clear, however, that OFAC agrees with the broad jurisdictional approach employed by the prosecutors. In remarks delivered at a conference in London in late February 2009, Szubin indicated that in OFAC's view it is a legitimate application of US territorial jurisdiction to enforce US sanctions against non-US banks that strip out information on sanctioned persons before submitting instructions for US dollar funds transfers to be made. That OFAC has taken this position is significant because OFAC has the authority to impose civil penalties on a strict liability basis without having to establish knowledge of the violation or personal jurisdiction over the penalised person, as would be necessary in a criminal prosecution.

Enforcement against non-US exporters

In September 2007 the DOJ announced that a criminal complaint had been filed against a Dutch aviation services company, Aviation Services International, BV, and other Dutch persons for violations of OFAC prohibitions on exports of US-origin goods to Iran. The defendants were not US persons as defined under the US sanctions regulations under which they were charged, and they apparently were never present in the US. It appears that jurisdiction was based solely on their

allegedly having caused US persons to export the relevant articles from the US to the Netherlands. In March 2009, an indictment was unsealed against an Irish company called Mac Aviation Group, its owner and two employees based on a similar set of facts and charging criminal violations of the Iran sanctions regulations.

An indictment based on a similar set of facts and jurisdictional approach was filed in February 2009 against Schneider GMBH and two German citizens. As in the Aviation Services International case, these defendants were indicted for having conspired, from outside the US, to cause the export of certain articles from the US to another country (in this case Germany) for onward export to Iran. In this case, the prosecutors also cited the unusual 're-export' provision of the Iran sanctions regulations, referred to above, that expressly applies to non-US persons.

While there has been a sharply increased number of such cases in the last two years, there are earlier instances of US prosecutors using this broad approach to enforcing US sanctions against non-US persons. For example, in 1992, Hossein Alikhani and George Christoforou, neither of whom were US nationals, were charged with criminal violations of the US sanctions then in place against Libya. Neither was alleged to have taken any action within the US; rather, they were charged with causing, and conspiring with US persons to cause, the violation of provisions of the Libya sanctions regulations that were generally understood to apply only to US persons.

Enforcement going forward

One of the main drivers underlying these and other efforts at broad extraterritorial enforcement of US economic sanctions is the US government's ongoing effort to increase pressure on Iran to respond positively to US and multilateral nuclear proliferation and anti-terrorism concerns. If, as expected, the Obama administration continues to emphasise the use of sanctions for this purpose, we will likely see further examples of extraterritorial enforcement of the Iran regulations against non-US persons. Multinational financial institutions and companies should be alert to an increasing risk of enforcement and would be well-advised to take steps to assess and manage that risk as an essential part of their global regulatory compliance programmes.

³ Including J Robert McBrien, OFAC associate director for investigations and enforcement and the former acting director of OFAC.

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