

UNITED STATES REGULATION OF FOREIGN TRANSACTIONS

BY THE OFFICE OF FOREIGN ASSET CONTROL

Economic sanctions as a tool of foreign policy have long been employed by the United States to further its national interests. For example, prior to the war of 1812, Congress enacted the Embargo Act and the Non-Intercourse Act in response to British harassment of American sailors. During the Civil War, World War I and World War II, Congress again enacted economic sanctions.

As the United States has increased its involvement in foreign relations and trade, economic sanctions as a tool for furthering the United States foreign policy and national security interests has grown. Businesses involved not only in the importation and exportation of goods and services, but those involved in banking and financial transactions, insurance, real estate, travel and other areas may find such restrictions impact upon their business activities. The regulations are complex and wide-ranging and the penalties can be substantial. It is essential that businesses consider the possibility of unintentionally transacting prohibited business and ensure procedures are in place to prevent such activities.

As an example of regulation, insurers are prohibited from issuing policies to residents of certain countries or paying benefits to insureds who reside in those countries even if the policies were purchased in the United States.¹ Credit bureaus are required to check lists kept by the Treasury's Office of Foreign Assets Control (OFAC) of

¹ See Dept. of Treasury "Foreign Asset Control Regulations & the Insurance Industry," April 29, 2004

sanctioned individuals and red-flag a credit report of any individual who has a name the same as or similar to those on the lists.²

Even when a country is subject to widespread sanctions, not all transactions are necessarily prohibited. For example, sometimes nongovernmental agencies can obtain licensing for humanitarian or religious activities. Transactions ordinarily and necessarily incident to publishing and marketing of books and periodicals are usually allowed, but even those transactions may be prohibited in certain cases.

There are a number of statutory schemes which apply to a business's international and domestic transactions. The International Emergency Economic Powers Act³, the Trading with the Enemy Act⁴, the Anti-Terrorism and Effective Death Penalty Act⁵, the United Nations Participation Act⁶, the USA Patriot Act⁷ and the Foreign Narcotics Kingpin Designation Act⁸ are but some of those legislative schemes. There are also specific sanctions targeting foreign countries such as Burma, Cuba, Iran, Libya, Iraq, Liberia, North Korea, Syria and Sudan as well as designated non-state actors such as international narcotics traffickers, "blood diamonds" purveyors of gems from Sierra Leone, persons threatening international stabilization efforts in the Western Balkans, certain Iraqi individuals and entities, and certain members of the government of Zimbabwe as well as terrorists. The complexity of the legislation is compounded by Federal regulations promulgated by the Department of the Treasury and Presidential

² See OFAC Frequently Asked Questions for Consumers with Information Appearing on Their Credit Report

³ 50 U.S.C. §§ 1701 *et seq.*

⁴ 12 U.S.C. 95a

⁵ S.U.S.C. 1189; 18 U.S.C. §§ 2339A & 2339B

⁶ 22 U.S.C. 287c

⁷ Public Law 107-56

⁸ 21 U.S.C. 1901 *et seq.*

Executive Orders. The individuals, groups and entities subject to economic sanctions are collectively known as Specially Designated Nationals, or SDNs. There are thousands of SDNs.

The controls over transactions vary depending upon the country or type of person and change from time to time depending upon different foreign policy and national security considerations. On August 2, 1990, after Iraq invaded Kuwait, President George H.W. Bush issued an Executive Order declaring a national emergency with respect to Iraq resulting in a complete trade embargo and other economic sanctions⁹. On July 30, 2004, President George W. Bush issued a new Executive Order effectively lifting the sanctions against Iraq¹⁰. Licenses must still be obtained for exports or re-exports to Iraq, but all financial transactions are allowed except for those individuals and entities appearing on OFAC's SDN list.

Penalties for violation of the sanctions can be substantial. For example, each violation of the International Emergency Economic Powers Act is subject to a civil penalty of \$11,000 or, if willful, a fine of \$50,000 and if a person, up to 10 years imprisonment¹¹. The Trading with the Enemy Act provides a corporation criminal penalty of up to \$1,000,000 and an individual criminal penalty of up to 10 years imprisonment or a fine of up to \$100,000, or both, or a civil penalty of up to \$50,000¹².

The federal agency charged with enforcing economic and trade sanctions is the Office of Foreign Assets Control of the Department of Treasury, or OFAC. OFAC's civil investigations of enforcement can lead to application of one or more of the following

⁹ Executive Order No. 12772

¹⁰ Executive Order No. 13360

¹¹ 50 U.S.C. § 1705, *e.g.*, 31 C.F.R. §537.701(a) [Burma]

¹² 50 U.S.C. Appendix, *War & National Defense Trading With the Enemy Act of 1917*, Sec. 16

enforcement vehicles: a cautionary letter, a warning letter, a requirement to furnish information, an order to cease and desist, or a civil penalty proceeding. In addition to or instead of such actions, if the party involved is currently acting pursuant to an OFAC license, that license may be suspended or revoked.

The most common types of violations resulting in civil penalties include prohibited dealing in blocked property or fund transfers, imports and exports, performance of a contract, and travel-related and record-keeping violations.

Generally, a fine is usually no more than the value of the transaction. For example, a box of Cuban cigars is generally valued at \$250 and the fine for importing a box is usually \$250.

In determining a penalty or settlement amount, OFAC evaluates mitigating and aggravating factors. Typical mitigating factors are voluntary disclosure, whether the violation is a first offense, whether a compliance program was in effect at the time of the violation, lack of relevant commercial experience, clerical error, inadvertence, or mistake of fact. Voluntary disclosure is an important mitigating factor. Aggravating factors can include willfulness, second or more offense, disregard of prior notice from the U.S. government concerning the subject transaction, lack of remedial measures, or attempt at concealment.

In most circumstances compliance with laws regulating transactions involving sanctioned countries are identifiable because of evidence of the particular country's involvement. Of course, one must be aware that a particular country is sanctioned. However, identifying SDNs can be much more difficult.

OFAC publishes lists of SDNs which can be accessed on OFAC's website. However, where a business handles a large number of transactions, checking OFAC's published list for each transaction may be impractical. Fortunately, there are programs and services which can be used to check whether a party to a transaction is an SDN, thereby automating the procedure. In addition, OFAC maintains a "hotline" for when a business has a concern about a specific transaction and the transaction is considered "hot," such as a wire transfer of funds.