

Fire and Fury: The Sanctions Landscape in the Trump Administration

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The scope and reach of the sanctions unleashed by the Trump administration have unsettled the global business environment and raise new concerns for both U.S. and non-U.S. entities. To help clarify some of these issues, the Debevoise team held a series of seminars in the United States, the United Kingdom, France, Russia and Cyprus for executives from a range of industries, providing a closer look at the changing sanctions and requirements for companies and individuals. Highlights of the discussion include:

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Sanctions are tied to foreign policy—which makes for a bumpy ride. Sanctions have always been an extension of foreign policy, but that connection is a vivid one in the Trump administration. Just as with its foreign policy, the administration's use of sanctions has been unpredictable. And President Trump's "America first" stance means little of the coordination with other jurisdictions that was a hallmark of his predecessor. With entities facing dramatically different rules from the United States and the European Union and the prospect of rapid change depending on the day's Twitter feed, compliance burdens and challenges abound.

Untangling corporate structure is key. Independent non-U.S. subsidiaries of U.S. companies are generally not covered by sanctions (except for sanctions against Iran and Cuba). However, establishing independence may require close analysis of ownership structure and the operating relationship between the subsidiary and the U.S. parent. Similar diligence needs to be applied to the "50 percent rule," which blocks dealings with entities that are owned 50 percent or more, directly or indirectly, by one or more blocked persons. While mapping such ownership may be relatively straightforward if the entities involved issue shares, determining ownership when trusts and other vehicles are involved can be challenging—if the necessary information is even available. Industry lists of blocked entities have emerged but are unwieldy. Ultimately, it comes down to risk-based judgment.

There are plenty of gray areas. Numerous U.S. sanctions impose consequences for involvement in or facilitation of "significant transactions" of various kinds. However, most of the Office of Foreign Assets Control's ("OFAC") FAQs on those transactions are qualitative, which can be difficult to apply, especially in industries like financial services

that rely on quantitative measures. In the absence of more specific direction, evolving norms may serve as the most practical guidance.

U.S. citizens working abroad need to stay informed. A U.S. citizen or permanent resident working abroad for a non-U.S. company is still covered by U.S. sanctions. Those individuals should keep themselves informed and maintain a “do’s and don’ts” list to help steer clear of potentially problematic activity.

Due diligence takes on new dimensions. In December 2017, OFAC and the U.S. State Department announced the first iteration of Global Magnitsky sanctions, targeting 13 individuals for human rights abuses or corruption. Because those sanctions are global in reach and explicitly involve human rights organizations in identifying potential targets, the list of sanctioned persons is likely to expand over time. This means that U.S. entities should incorporate corruption and human rights issues into their due diligence of foreign customers and business partners.

Secondary sanctions on Iran may put the United States and the European Union on a collision course. Enforcing U.S. secondary sanctions is at discretion of the U.S. government, and it rarely did so before the Joint Comprehensive Plan of Action (“JCPOA”) suspended most of them. Similarly, EU legislation that effectively forbids EU companies from complying with U.S. sanctions on Iran was essentially a cover for EU entities that might have faced those sanctions. But President Trump made rolling back the Iran deal a key campaign promise, while the European Union is working to salvage an agreement that has led to a trade relationship with Iran that has grown from €7.7 billion in 2015 to €20.9 billion in 2017. As a result, both jurisdictions have signaled much tougher enforcement, which could put EU entities between a rock and a hard place.

Sanctions on Russia invoke the Law of Unintended Consequences. While there were earlier blocking sanctions on Russia, those announced on April 6 were notable for both the accompanying rhetoric citing Russia’s “worldwide malign activity” and the inclusion of publicly traded, globally significant companies such as RUSAL. In the wake of the disruption and confusion that followed, OFAC has issued an unprecedented number of wind-down licenses and FAQs, suggesting to some that blocking high-profile entities may have effects that the government did not foresee.

Brexit may further reshape the sanctions landscape. While there have been no significant changes to EU sanctions against Russia since 2014, there have been indications of a rift among member states, with some pushing to lift sanctions. The United Kingdom, however, has moved in the opposite direction following the poisoning of Sergei and Yulia Skripal. As a member of the European Union, the United Kingdom is prohibited from establishing its own sanctions regimes. Once Brexit goes into effect,

however, the United Kingdom will be free to do so, and various actions of the House of Commons suggest this is a distinct possibility.

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