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FinTech Law and Sanctions

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Federal Agency Sanctions Jurisdiction

- Department of Treasury/Office Foreign Assets Control (OFAC)
- Department of State/Defense Directorate of Trade Controls (DDTC)
- Department of Commerce/Bureau of Industry and Security (BIS)
- Department of Justice

Financial Services and FinTech Law

- FinTech partnerships in financial services industries
- Commercial financing
- Buy Now Pay Later (BNPL)
- Cryptocurrency
- International trade and commerce

Federal Regulators

- Federal Deposit Insurance Corporation (FDIC)
- Office of the Comptroller of the Currency (OCC)
- Federal Reserve Board (FRB)
- Securities and Exchange Commission (SEC)
- Consumer Financial Protection Bureau (CFPB)
- Federal Trade Commission (FTC)
- Commodity Futures Trading Commission (CFTC)
- Financial Crimes Enforcement Network (FinCEN)
- Financial Industry Regulatory Authority (FINRA)
- Treasury Department Office of Foreign Assets Control (OFAC)
- State Department Defense Directorate Trade Controls (DDTC/ITAR)
- Commerce Department Bureau of Industry and Security (BIS/EAR)
- Homeland Security Department (US CBP/Customs and US ICE/Customs/Immigration)

U.S. Government Sanctions

The Treasury Department Office of Foreign Assets Control (OFAC) is the principal U.S. government agency with territorial jurisdiction and extra-territorial authorization to impose sanctions on foreign persons, entities or governments through its regulations, orders, directives and determinations. See the Foreign Assets Control Regulations (31 CFR 500 et seq).

These regulations interact with regulations of other federal agencies such as the State Department, Homeland Security Department, and the Commerce Department.

Foreign Asset Control Regulations - 31 CFR Part 500

Sanctioned Country and Region Regulations

North Korea, Cuba, Burma, Iran, Zimbabwe, Syria, Darfur, Democratic Republic of Congo, Belarus, Lebanon, Ethiopia, Yemen, Central African Republic, Mali, South Sudan, Libya, Iraq, Nicaragua, Hong Kong, Russian Western Balkans, Ukraine, and Venezuela

Program and Policy Sanction Regulations

Narcotics Trafficking, Weapons of Mass Destruction, Cyber Related Sanctions, Foreign Interference in US elections, Global Magnitsky Regulations, Chinese Military Industrial Complex Regulations, Russian Harmful Foreign Activities Regulations, Ukraine-Russian Related Sanctions Regulations, Transnational Criminal Organizations, Rough Diamonds Control Regulations, Global Terrorism, Terrorism List Governments, Foreign Terrorist Organizations, Foreign Narcotics Kingpin

Sanctions Types

Primary - sanctions are designed to freeze assets or impose trade embargoes on countries or persons imposed on an industrial sector, foreign government and its officials , “blocked persons”, or “blocked” entities/persons, whether independent or controlled by U.S. persons or “permanent residents” of the U.S. wherever located

Secondary - sanctions are designed to uphold U.S. policy and national security interests and may be imposed on persons without a jurisdictional connection to the U.S. which persons are conducting transactions with other sanctioned persons/entities from such countries identified by OFAC such as Russia, Iran, Cuba, North Korea, Syria, Hong Kong

Persons Subject to U.S. Jurisdiction - 31 CFR §500.329

Persons subject to the jurisdiction of the United States includes:

(a) Any individual, wherever located, who is a citizen or resident of the U.S.;

(b) Any person within the United States as defined in §500.330;

(c) Any corporation organized under the laws of the United States or of any state, territory, possession, or district of the U.S.; and

(d) Any corporation, partnership, or association, wherever organized or doing business, that is owned or controlled by persons specified in paragraph (a) or (c) of this section.

General Financial Provisions of a Sanction Regulation on Designated Foreign Countries/Nationals - 31 CFR §500.201

- Transfers of credit and payments through or between banks subject to U.S. jurisdiction
- Transactions in foreign exchange
- Export or withdrawal of gold, silver, currency or securities by person in the U.S.
- Transfers, withdrawals, exports or property or evidences of ownership or indebtedness by any person subject to jurisdiction of the U.S.
- All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States
- Any transaction the purpose or result of which evades or avoids program prohibitions

OFAC Due Diligence

- Foreign Transaction Licensing and Reporting
- Maintain OFAC Sanctions lists
  - Specially Designated Nationals list
  - Consolidated Sanctions List
  - Sectoral Sanctions List
  - Foreign Sanctions Evaders List
  - Non-SDN Palestinian Legislative Councils List
  - Non SDN Iranian Sanctions List
  - Part 561 Foreign Financial Institutions List (Iran)
- Sanction regulations govern export, import, services, financial transactions and investment
- Records governed 31 CFR 501.601 to kept for 5 years
- See https://ofac.treasury.gov/

Financial Sanctions Provisions: Principal and Agent Rule -31 CFR §500.404

Transactions between principal and agent.

A transaction between any person within the United States and any principal, agent, home office, branch, or correspondent, outside the United States of such person is a transaction prohibited by §500.201 to the same extent as if the parties to the transaction were in no way affiliated or associated with each other.

Reports on Blocked Property - 31 CFR §§ 501.603; 606

- **Reports on blocked property**. (a) Who must report—(1) Holders of blocked property. Any person, including a financial institution, holding property blocked pursuant to this chapter must report. The requirement includes financial institutions that receive and block payments or transfers. This requirement is mandatory and applies to all U.S. persons (or persons subject to U.S. jurisdiction in the case of parts 500 and 515 of this chapter) who have in their possession or control any property or interests in property blocked pursuant to this chapter.
- The reporting and recordkeeping requirements set forth in this subpart are applicable to economic sanctions programs for which implementation and administration have been delegated to the Office of Foreign Assets Control.

Payments to Designated Foreign Countries and Nationals - 31 CFR § 500.409

- Prohibits any request or authorization made by or on behalf of a bank or other person within the United States to a bank or other person outside of the United States as a result of which request or authorization such foreign bank or person makes a payment or transfer of credit either directly or indirectly to a designated foreign country or designated foreign national.

"Facilitation" of a Violation

- Facilitation Prohibition: "No United States person, wherever located may approve, finance or facilitate, or guarantee any transaction by a foreign person where the transaction by that person would have been prohibited by this part if performed by a United States person or within the United States (31 CFR §560.208)
- *EXAMPLES of Facilitation:*
  - Alter policies or procedures to allow acceptance of a transaction without approval of a U.S. person
  - Foreign incorporated companies which engage U.S. banks to process transactions can be in violation (OFAC/Lloyd's Bank Settlement Agreement www.treasurt.gov/resource-center/sanctions/OFAC-Enforcement/Documents/lloyds_agreement.pdf)

Liability Issues

- Failure to do due diligence on customer
- Failure to consult OFAC resources on blocked persons and sanctions programs
- Violation of the Principal–Agent rule
- Failure to keep proper records

Enforceability Scope

- Governs conduct of "U.S. Persons":
- *"Any U.S. citizen, permanent resident alien, entity organized under the laws of the U.S. (including foreign branches) or any person in the U.S."*
- U.S. companies with foreign subsidiaries may be exposed to liability of involvement in decisions which rise to "facilitation"
- Any person causing a U.S. person to violate a U.S. law is also subject to U.S. sanctions (IEEPA)

Department of Justice Agreements

- DOJ Plea and Prosecution Agreements
  - Information charging elements
  - Statement of Facts
- Sample Mandatory Reforms and Remedial Actions
  - Assign direct supervisor
  - Amendments to policy
  - Establish monitoring council, coordinators and plan
  - Identify articles, goods, services subject to risk
  - Standardize new procedures
  - Install specialized software and create databases
  - Insure reporting and disclosure system operational
  - Engage frequent training
  - Conduct compliance audits
  - Expand expert legal services

Legal Intersections and Cross-Over Issues

- Federal agency and bureau concurrent jurisdiction
- Licensing and permit schemes
- Red Flag due diligence
- Voluntary self disclosures regulations
- Internal audit and Remediation protocols

Conclusion: Best Practices

- Clear Organizational protocol for transaction review that accounts for preliminary and continuing due diligence needed to qualify customer
- On-going review while transaction being implemented through documentation collected and updated
- Internal cross checks to validate regulatory compliance
- Random internal inspection per protocol

Presenter Biographies

HENRY “BUZZ” BURWELL

Buzz is a senior partner of the corporate/securities/tax division and co-leader of the International Practice Group, Sanctions Practice Group, and the Defense Industry Practice Group. He is a member of the additional firm practice groups including automotive, manufacturing, aviation, business immigration, government contracts and grants, foreign direct investment, and customs and international trade.

Moderator Biography

RICHARD B. LEVIN

Richard is chair of the FinTech and Regulation Practice and was one of the first lawyers to focus on the regulation of blockchain and digital assets. He is considered a thought leader in the FinTech space. Richard brings his experience as a senior legal and compliance officer on Wall Street and in London to bear in advising clients on corporate, FinTech, securities, and regulatory issues. A problem-solver by nature, he has been advising FinTech clients on legal and regulatory issues since the start of electronic trading in the late 1990s. His practice focuses on helping financial services and technology clients identify and address regulatory issues as they build their businesses.

Richard's practice focuses on the representation of early stage and publicly traded companies in the FinTech space, including investment banks, broker-dealers, investment advisers, peer-to-peer lending platforms, digital currency trading platforms, alternative trading systems (ATSs), exchanges, and custodians. He represents these firms before the U.S. Securities and Exchange Commission (SEC), the U.S. Commodity Futures Trading Commission (CFTC), the Financial Industry Regulatory Authority (FINRA), the U.S. Department of the Treasury, Office of the Comptroller of the Currency (OCC), state regulators, and Congress. Richard has represented clients before regulators in Australia, Canada, France, Germany, Hong Kong, Ireland, Japan, Singapore, South Korea, and the United Kingdom. His current and past clients include leading national financial institutions, multinational financial services holding companies, leading firms in the FinTech space, and institutions engaging in global investment banking, investment management, securities, and other financial services with institutional clients.

Richard has been identified by Chambers and Partners as one of the leading lawyers in the Blockchain and Cryptocurrencies category since the inception of the category. He has been recognized by Chambers for his knowledge on regulatory matters, great relationships with regulators, for helping clients push the boundaries of the FinTech sector, and for his advice on matters such as broker-dealer licensing and alternative trading systems. Richard is routinely quoted by leading publications including Bloomberg, the New York Times, Reuters, and the Wall Street Journal and is a frequent speaker at conferences around the world on the regulation of FinTech, blockchain, and digital assets.

Contact Details

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