OFAC EASES BURMA SANCTIONS, BUT RISKS REMAIN

by Jeremy P. Paner, *Law360,* New York (June 6, 2016, 11:23 AM ET)

The U.S. Department of the Treasury's Office of Foreign Assets Control administers and enforces economic sanctions programs that range from broad embargoes against entire countries to list-based prohibitions against entities and individuals. The President's National Security Council staff and OFAC increasingly favor targeted, list-based sanctions to address threats to the national security, foreign policy and economy of the United States. Although the embargo on the Crimea region of the Ukraine may seem to contradict this trend, the implementation of sectoral sanctions and the recent list-based sanctions against certain named Russian, Venezuelan and Burundi government officials reflect this preferred targeted approach.

Last month, OFAC continued the transition of the Burmese sanctions program from comprehensive prohibitions to targeted, limited so-called "smart sanctions." This transition in the sanctions program began four years ago in response to meaningful political and economic reforms in Burma. Beginning in 2012, a series of general licenses authorized certain financial ties and permitted the importation of Burmese origin goods, with the exception of jadeite and rubies. These modifications to the sanctions program facilitated increased trade between Burma and the West as an incentive for further reforms.

Unintended Consequences of Vigilant Compliance

In November 2015 Burma held elections which resulted in a resounding victory for the National League for Democracy, the political party of Aung San Suu Kyi and her Burmese democratic movement. Although the junta-drafted constitution guarantees the military 25 percent of the parliamentary seats, this election marks the first democratically elected civilian-led Burmese government in 50 years. In an unfortunate sequence of events, U.S. trade with Burma nearly came to a halt concurrently with this nascent democratic transition. Significant difficulties arose after several major financial institutions refused to engage in trade finance involving a Yangon port associated with Asia World Co. Ltd. Banks that recently paid tens, if not hundreds of millions of dollars in sanctions violations penalties refused to conduct or facilitate potentially risky financial transactions.

Designation of Asia World Co. Ltd.

OFAC designated Asia World Co. Ltd. and its subsidiaries, including Asia World Port Management, in 2008 and 2010. According to the press release announcing these designations, OFAC alleges that Asia World Co. Ltd. "has provided critical support to the Burmese regime and has received numerous lucrative government concessions, including the construction of ports, highways and government facilities." Lo Hsing Han, a now deceased but still designated junta financier known as the "Godfather of Heroin,"

For more information, please contact:

Jeremy Paner
202.654.6912
jppaner@hollandhart.com

Jeremy Paner is of counsel in Holland & Hart's Washington, D.C, office, and previously worked in the U.S. Department of the Treasury's Office of Foreign Assets Control.

founded Asia World Co. Ltd. in 1992, according to OFAC. The agency describes his son, Steven Law (Tun Myint Naing), as a "junta crony" who serves as the managing director of the Burmese conglomerate.

OFAC General Licenses

General licenses authorize the performance of certain categories of transactions that would otherwise be prohibited. OFAC recently issued general licenses to significantly modify statutory prohibitions on transactions involving Cuba and Iran. OFAC also issues temporary general licenses to permit certain wind-down transactions following particularly consequential designations. For example, OFAC issued a two-month license in 2011 to permit certain exports through ports operated by a designated Iranian entity. General licenses also grant flexible, responsive options to changing circumstances. A temporary, renewable general license in the Belarus sanctions program currently authorizes transactions with each of the nine entities designated under that authority. This authorization may be revoked if its underlying policy is no longer operative.

OFAC responded to the impractical Burmese trade conditions described above by issuing General License 20 in December 2015. This temporary general license was set to expire on June 7, 2016, absent withdrawal or extension. The license facilitates trade with Burma by authorizing certain transactions ordinarily incident to exports of goods, technology or nonfinancial services to or from Burma involving designated persons and the entities they own. This license permits U.S. businesses to export authorized goods and technology to and from Burma through infrastructure such as ports, toll roads and airports, and pay associated fees that would otherwise be prohibited. As a result of this authorization, U.S. companies may transact with Asia World Co. Ltd. infrastructure to export certain goods, technology or services to or from Burma.

Revised Burmese Sanctions Program

Burma formed its new parliament in February 2016. The parliament inaugurated National League for Democracy member Htin Kyaw as president one month later. Upon formation, the new government demonstrated its commitment to human rights by releasing political prisoners, including journalists and student activists.

The United States government revised the Burmese Sanctions Regulations last month to spur additional trade in response to these positive developments. OFAC maintained certain restrictions on trade, including the importation of jadeite and rubies, and identified additional blocked Asia World companies to encourage further economic and political reforms. The U.S. government seems to have identified Asia World Co. Ltd. as the junta's main pressure point.

The revised Burmese Sanctions Regulations contain several new general licenses to facilitate trade. U.S. persons are now authorized to reside in Burma, and the regulations incorporate General License 20. This made the authorization to export to and from Asia World Co. Ltd. ports permanent and not dependent upon extensions. Lastly, OFAC further encouraged trade by licensing certain transactions incident to the movement of goods within Burma.

In addition to the regulatory amendments and new designations, OFAC removed seven state-owned enterprises and three state-owned banks from the list of Specially Designated Nationals. Along with the bank de-listings, OFAC issued a general license authorizing most transactions involving the four remaining designated Burmese banks. The designation removals in conjunction with this general license allow U.S. financial institutions to provide Burmese banks with correspondent and payable through accounts, irrespective of the USA Patriot Act Section 311 special measures that remain imposed against Burma.

Required Enhanced Due Diligence Procedures to Combat Money Laundering

In May 2004, the Financial Crimes Enforcement Network issued a final rule imposing special measures against Burma from its designation as a jurisdiction of primary money laundering concern under 31 U.S.C. §5318A. Although the actual prohibitions of this rule are no longer applicable, the 311 designation against Burma requires certain financial institutions that provide banking services to Burmese banks to establish minimum enhanced due diligence procedures set forth in 31 C.F.R. §103.176(b).

The United States is not alone in its concerns about the money laundering risks emanating from Burma. The Financial Action Task Force (FATF), the intergovernmental anti-money laundering and combating the financing of terrorism policymaking body, identified Burma as a jurisdiction with “strategic AML/CFT deficiencies” in its most recent compliance report. Burma’s successful implementation of reforms to address these deficiencies would likely result in removal from both the FATF and 311 designations.

Burma-North Korea Ties

Last November, OFAC designated two Burma-based North Korean governmental officials involved with weapons proliferation, including the North Korean ambassador to Burma. According to the press release announcing these designations, both individuals have close ties to Korea Mining Development Trading Corporation (KOMID), an entity designated by the United States and United Nations for its alleged role in North Korean weapons proliferation. KOMID is North Korea’s primary arms dealer and main exporter of goods and equipment related to ballistic missiles and conventional weapons, according to the United Nations.

Burma’s governmental and commercial ties with North Korea will likely cause U.S. financial institutions to perform enhanced due diligence procedures that greatly exceed the regulatory minimum standards. U.S. banks will likely take extra precautions to ensure that North Korean banks do not “nest” in Burmese correspondent accounts. The enhanced due diligence procedures to mitigate this “nesting” risk require “reasonable steps to ... determine whether the foreign bank for which the correspondent account is established or maintained in turn maintains correspondent accounts for other foreign banks that use the foreign correspondent account established or maintained by the covered financial institution and, if so, take reasonable steps to obtain information relevant to assess and mitigate money laundering risks associated with the foreign bank’s correspondent accounts for other foreign banks, including, as appropriate, the identity of those foreign banks.”(31 C.F.R. §103.176(b)).

Continued normalization of relations with Burma will likely bring removal of the 311 designation and accompanying enhanced due diligence requirements. However, even in that scenario, U.S. financial institutions will make individual determinations whether to provide account services to Burma. Practical realities may therefore continue to restrict banking ties far beyond any remaining legal prohibitions.

—By Jeremy P. Paner, Holland & Hart LLP

Jeremy Paner is of counsel in Holland & Hart’s Washington, D.C, office, and previously worked in the U.S. Department of the Treasury’s Office of Foreign Assets Control.

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