International Trade Alert

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Treasury Publishes U.S. Sanctions Policy Review and Framework for Future Action

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Key Points

- On October 18, 2021, the U.S. Treasury Department released a long awaited report on its first of its kind “top to bottom” review of U.S. economic and financial sanctions. The report does not make or recommend any immediate or concrete changes to existing sanctions programs. Rather, it provides a general framework for Treasury to use when considering imposition of new sanctions and recommendations for agency staffing enhancements to improve the near- and long-term effectiveness of sanctions measures.
- The report also identifies emerging challenges to the efficacy of U.S. sanctions, including the proliferation of alternative payment systems and digital currencies that can enable malign actors to circumvent U.S. sanctions through the transfer and holding of funds outside the traditional dollar-based financial system.
- The process for consideration, development and deployment of U.S. sanctions is ultimately an interagency process. The report was prepared and released by Treasury, with a nod to other key agencies, including the State Department and the National Security Council, which also have critical roles in the development and use of U.S. sanctions measures. Treasury has long advocated for many of the changes recommended in the report, largely on a nonpublic basis. Accordingly, the publication of this public report may increase pressure on officials at other agencies to improve interagency coordination in the future.
- It remains to be seen how the recommendations of this report may be implemented, what the practical impact of the review will be and whether members of the private sector with an interest in related issues will see any significant change in the way that sanctions development and implementation impact their commercial activities and interests over time.

The 2021 Sanctions Review

Background

At the end of last year, the incoming Biden-Harris administration announced that it was planning to conduct a comprehensive review of U.S. sanctions policy and implementation. In recent years, as designations have dramatically risen, sanctions executive orders and legislation proliferated, and the U.S. government took sanctions actions against increasingly complex, and globally integrated targets, many have raised concerns regarding whether the U.S. government has begun to rely too heavily on sanctions in lieu of other foreign policy and national security tools. Former Treasury Secretaries, among others, have cautioned that overuse of sanctions risks reducing the effectiveness and long-term viability of the sanctions tool by potentially eroding the leadership role of the United States in the global economy and risking the status of the U.S. dollar as the world's principal reserve currency, as our adversaries seek to create payment systems and mechanisms to avoid the use of the U.S. financial system (see, e.g., here).

In order to conduct this large-scale review, Deputy Treasury Secretary Wally Adeyemo and his team met with various stakeholder groups, including the private sector, nongovernmental organizations (NGOs), interagency partners, foreign governments, career Treasury sanctions personnel, congressional staff and academics, to gain perspectives on the impact of past sanctions actions and to explore key challenges in sanctions implementation, among other things. Throughout these engagements, Deputy Secretary Adeyemo continued to emphasize the importance of sanctions as a tool to advance U.S. national security interests and foreign policy objectives while seeking feedback on how to implement this tool more effectively.

The 2021 Sanctions Review ("Review") released on October 18 focuses specifically on the framework guiding the imposition of economic and financial sanctions, as well as potential operational, structural, and procedural changes that could be made on a going forward basis to improve Treasury's use and implementation of sanctions. In testimony before Congress's Senate Banking Committee on October 19, Deputy Secretary Adeyemo stressed that the goal of the review was not to individually assess each of the 37 existing sanctions programs administered and enforced by Treasury's Office of Foreign Assets Control ("OFAC"), nor did Treasury review sanctions implemented by the State Department or other U.S. agencies. Rather, Deputy Secretary Adeyemo made clear that the goal of the exercise was to more holistically evaluate the sanctions tool and how it has been used over the last two decades to glean insights as to key challenges—over time or newly emerging—and work to modernize and adjust the ways in which sanctions are utilized on a going forward basis to ensure that sanctions continue to remain a valuable and effective tool to address foreign policy and national security concerns in the future.

Challenges to the Efficacy of Sanctions as a National Security Tool

1. The Review highlights a number of specific challenges facing Treasury in its implementation of effective sanctions policy, including:
2. The innovative ways in which cybercriminals, economic competitors and malign actors are attempting to circumvent, or reduce reliance on, the dollar-based financial system to avoid the impact of sanctions, including through the use of cryptocurrencies.
3. Broader changes to the global financial infrastructure, including the proliferation of digital currencies, alternative payment platforms and new ways of engaging in cross-border business that could erode the reach and effectiveness of U.S. sanctions.

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4. A need to rapidly grow and modernize Treasury's workforce and technical infrastructure to keep pace with emerging technologies, increasing financial complexity, and increasing demands from both policy-makers and the private sector.
5. Supporting and enabling those conducting humanitarian activities through legitimate channels in heavily sanctioned jurisdictions while denying support to sanctioned governments and malign actors.

Each of these identified challenges present risks that could erode the effectiveness of the sanctions tool over time. The status of the U.S. dollar as the global reserve currency, and the centrality and dominant role of the U.S. financial system in conducting global business, are key drivers of sanctions effectiveness. As a result, the Review makes key recommendations to modernize the way Treasury utilizes and imposes sanctions, including to better determine when sanctions are the correct tool, and how to best impose sanctions in a nuanced manner that minimizes collateral impacts. As Deputy Secretary Adeyemo made clear in his testimony before Congress, Treasury proposes these steps with the objective of ensuring that sanctions will continue to be a powerful and effective tool for years to come.

Key Initiatives and Areas of Focus

The Review concludes that the "United States faces a changing world where financial innovation, shifts in global economic activity, and new geopolitical challenges are redefining how economic power can be used to support national security objectives," and that these "shifts are accompanied by new and rising threats for which sanctions may be a critical tool of U.S. policy."

To that end, the Review identifies five key initiatives and areas of focus that Treasury will undertake to modernize sanctions and ensure the long-term viability of the sanctions tool.

1. Adopting a structured policy framework that clearly links sanctions actions to a specific policy objective

Treasury stressed the importance of tying U.S. economic and financial sanctions to "clear, discrete objectives" that are consistent with the stated goals of a sanctions program, such as countering governments and persons that fuel regional conflict, preventing the persecution of minority groups, curtailing nuclear proliferation, or cutting off support to specific violent organizations. In order to achieve this, Treasury plans to adopt a structured policy framework which would articulate and reflect current policy objectives for a program, and would be used to assess whether a potential future sanctions action should be taken and how it should be implemented. The Review identifies several key questions that should be explored prior to a sanctions action being pursued:

- Does the sanctions action advance a clear policy objective consistent with a broader U.S. strategy for the program?
- Is the sanctions action the correct tool to advance the identified objective?
- Does the sanctions action account for any anticipated political and economic consequences for the sanctions target, the U.S., its allies and any third parties? Has the action been calibrated to adequately mitigate any unintended consequences?

- Does the sanctions action include multilateral coordination (e.g., shared intelligence and resources) and engagement with relevant stakeholders (e.g., industry, financial institutions, allies)? Is the sanctions action being taken in coordination with allies, where possible?
- Will the sanctions action be easily understood by the targets, allies and others such that it's clear what actions may result in an escalation or reversal of sanctions? Are the sanctions enforceable?

The stated goal of asking these questions is to ensure that there are clear criteria established for the implementation of future sanctions actions. As a complement to this forward-looking approach, the Review also underscores the importance of developing and implementing clear standards for assessing its sanctions actions and programs on a consistent basis. The Review notes that the results of these ongoing sanctions reviews should be utilized to calibrate sanctions programs and to determine whether and which future actions should be taken, whether authorities should be narrowed, augmented or eliminated, and whether adjustments must be made to sanctions policies to account for changing circumstances. Presumably the Review's recommendations were based in part on an identification of sanctions that were imposed without reliance on clear standards, or that otherwise did not satisfy the above conditions, though the report did not specifically call out any particular sanctions actions or programs where it found this to be the case, and Deputy Secretary Adeyemo declined to cite any examples when pressed on this question during his testimony before Congress.

2. Incorporating multilateral coordination, whenever possible

The Review concludes that enhanced coordination between the U.S. and its allies would bolster the credibility of shared policy and security goals, and would deepen the effectiveness and impact of U.S. sanctions actions. When actions are jointly taken by the U.S. and allies, this also reduces the likelihood that any economic impacts are solely borne by U.S. workers and businesses. The Review proposes achieving enhanced coordination with allies and partners through:

- The sharing of policy frameworks and other relevant information
- Efforts to harmonize sanctions requirements across jurisdictions
- Building sanctions coordination into existing multilateral arrangements.

The Review also notes that advocating for United Nations sanctions, when appropriate, and working through other multilateral organizations, would increase the relevance and impact of U.S. sanctions. In his testimony before Congress, Deputy Secretary Adeyemo focused extensively on the importance of this initiative to increase multilateral coordination and to take coordinated actions, whenever possible, noting that it is a lot more challenging for sanctioned governments and malign actors to avoid transactions involving not just the dollar, but also the euro, pound and yen.

3. Tailoring sanctions in a manner that mitigates unintended economic, political and humanitarian consequences

The Review stresses the importance of carefully calibrating sanctions actions such that any unintended consequences on U.S. persons, allies and nontargeted populations are accounted for and mitigated to the extent possible. It highlights that broad, noncalibrated actions may impose a disproportionate cost on small businesses that do not have the same resources to devote to compliance efforts as large, multinational companies. Avoiding these unintended consequences could improve support for U.S. sanctions policies by avoiding costs to U.S. businesses and ensuring that U.S. firms can stay competitive in the global market.

The Review also recommends that Treasury seek to more systemically address the challenges that are faced by those providing humanitarian aid to vulnerable populations through legitimate channels in heavily sanctioned jurisdictions. The Review emphasizes that, as new sanctions authorities are created and implemented, allowances should be made for the conduct of humanitarian activities, and this should be accompanied by clear guidance. In addition, the Review states that Treasury will continue to review existing sanctions authorities to determine whether sanctions are inhibiting the provision of humanitarian assistance in affected countries and whether additional authorizations or allowances are appropriate.

4. Increase and enhance public messaging and engagement to make sanctions easier to understand, enforce and adapt

The Review underscores the importance of having sanctions actions and programs be well understood by those stakeholders impacted by sanctions, and highlights the need for more effective communication and engagement with domestic and foreign stakeholders in the future. In addition to enhancing communication and engagement with historical stakeholders, the Review notes the need for better communication with those operating in emerging and rapidly growing industries, such as in the digital assets space. Treasury acknowledged that enhancing its messaging strategy will require close coordination with the State Department, which helps facilitate messaging for foreign actors. Treasury also recommends enhancing its website and using more plain language to make the intent and effect of sanctions easier to understand for all stakeholders.

5. Investing in modernizing Treasury's sanctions technology, workforce and infrastructure

The Review calls for investing in Treasury's technology, workforce and infrastructure, particularly its capabilities in the digital assets and services realm, in order to ensure that Treasury is able to develop and implement sanctions policies that account for new and emerging technologies, as well as the broader changes to the global financial infrastructure. It highlighted a desire to increase Treasury's use of technology to facilitate the dissemination of critical information to domestic and foreign stakeholders. The Review notes that numerous stakeholders that were consulted as a part of the review process highlighted a need for updates to Treasury's website to make it easier to navigate and to offer clearer guidance.

The Future of U.S. Sanctions

The Review provides a potential roadmap for U.S. officials to evaluate the potential utility and calibration of sanctions in future cases and highlights how more clearly setting out policy objectives and better coordination with stakeholders could aid in ensuring the long-term viability of the sanctions tool. It also notes several key areas where Treasury plans to continue to assess its existing authorities, programs and infrastructure, and to look for ways to modify or improve upon these programs in the future (e.g., in supporting the provision of legitimate humanitarian aid, making changes to the way sanctions information is communicated on its website, etc.). However, it remains to be seen to what extent this framework and these stated goals are followed in practice in future cases, and what meaningful change stakeholders can expect to see, if any, as a part of future actions and in the development of additional authorities.

While the Review notes that the Treasury team coordinated with the State Department and other interagency parties for certain aspects of the review, the October 18 report was solely issued by Treasury, and is not a "whole-of-government" report. While Treasury is a critical player in the development and implementation of sanctions, certain sanctions authorities are implemented by others, such as the State Department, and sanctions policy is developed through an interagency process where the State Department and the National Security Council (NSC) provide much of the policy direction for sanctions actions and for the development of new programs. Given that sanctions actions require the coordination of a broad interagency group of stakeholders, the extent to which meaningful changes can be made to the development and implementation of new sanctions actions will depend to a great extent on whether the State Department, the NSC, and other interagency partners agree with Treasury's recommendations and support its implementation of these proposals to modernize the use of sanctions.

Many of the changes that may be implemented as a result of this review may not be immediately apparent to the public. However, looking forward, there are a number of areas where we may see more noticeable change in response to this Review. First, it may be more common to see explicit humanitarian carveouts in future executive orders, or for humanitarian-related general licenses to be issued concurrently with new executive orders that are issued, even in more targeted programs. Given the significant focus on this issue in the Review, and in Deputy Secretary Adeyemo's testimony, we also expect that Treasury may be more open to expanding existing humanitarian authorizations in its current programs or considering applications for specific licenses where an activity does not fit within an existing exemption or authorization.

Further, as Treasury seeks to develop additional internal expertise in the digital assets and services space, hires more technical experts in this area, and dedicates increasing resources to these issues, we may begin to see the development of more guidance regarding how sanctions requirements apply in these areas and industry best practices for sanctions compliance. OFAC's recent Virtual Currency brochure, which was issued on October 15, 2021, was the first major guidance document focused entirely on dealings involving virtual currency, but the document did not delve into the very complex implementation questions that arise for those operating in this industry. As Treasury bolsters its expertise in this area, we may begin to see OFAC grappling on a more technical basis on these critical issues.

The Review, as well as Deputy Secretary Adeyemo's testimony, both underscore that sanctions will remain a key tool for addressing U.S. foreign policy and national security concerns. As a result, we do not expect a drastic reduction in the imposition of sanctions. However, the Review sets forth a number of meaningful steps that, if properly implemented, would have the dual benefits of helping stakeholders to understand and better implement sanctions while also ensuring that the sanctions tool can remain effective in addressing both current and future foreign policy and national security threats.