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Guiding Principles for Sanctions Issues Related to Shipping and Financial Products

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The BAFT/TCH Sanctions Working Group

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About the BAFT/TCH Sanctions Working Group

This document is the product of, and represents the collective views of, the BAFT/TCH Sanctions Working Group, which is comprised of sanctions experts in the world's leading U.S. and international financial institutions regulated in the United States. This working group was convened by the BAFT (The Bankers Association for Finance and Trade) and The Clearing House Association L.L.C. (TCH). Special thanks go to the members who participated in the BAFT TCH Sanctions Working Group, without whose participation and dedication this project could not have been completed.

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INTRODUCTION

The purpose of this paper is to address sanctions-related issues with financial transactions related to shipment of goods, specifically as those issues affect the processing of wire transfers and trade finance. This paper may be helpful in the context of other sanctions regimes, though it is intended only to address issues arising from sanctions regulations administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury.¹ The paper addresses issues involving OFAC's comprehensive sanctions programs² which, as more fully detailed below, generally prohibit U.S. persons from importing or exporting, directly or indirectly, goods, technology or services to or from a sanctioned country, region, government, individual or entity, as well as from dealing in most goods and services originating in a sanctioned country. These programs further prohibit U.S. persons from facilitating transactions for non-U.S. persons if the U.S. person could not conduct the transactions themselves due to U.S. sanctions regulations. Most of these programs also require U.S. persons to block (freeze) property of sanctioned parties.

It is understood across programs that direct transactions with parties sanctioned by OFAC are prohibited, and in most cases property associated with sanctioned parties must be blocked. It is further understood that direct and indirect exports and reexports to sanctioned territories is prohibited. The BAFT/TCH Sanctions Working Group (Working Group) seeks to assist financial institutions and help identify common practices with respect to addressing the less clear-cut cases involving financial transactions related to the movement of goods through the shipping industry by exporters and importers, and consignors and consignees, by identifying commonly accepted definitions of shipping terms and comparing these definitions to the terms and definitions used in OFAC regulations as supplemented by formal and informal guidance issued by OFAC.

This paper was developed by, and represents the collective views of, the Working Group, which is comprised of sanctions experts in the world's leading U.S. and international financial institutions regulated in the United States. This Working Group was convened by the BAFT (The Bankers Association for Finance and Trade) and The Clearing House LLC (TCH).³

¹ In some cases export licensing authority falls on the U.S. Commerce Department's Bureau of Industry and Security (BIS). In other cases OFAC has sole licensing authority. In other cases there may be dual licensing authorities depending on the goods involved.

² At the time of publication of this document these programs relate to Iran, Cuba, Syria, Sudan, North Korea and Crimea.

³ Please see trade descriptions for BAFT and TCH at the end of this paper.

I. Background and Purpose

The President is granted broad authority to impose economic sanctions against countries and parties which threaten the national security, foreign policy and/or the economy of the United States under the International Emergency Economic Powers Act⁴ and other statutes. These sanctions, which are imposed by Executive Order (EO), are often broad and some key terms are not defined in either the underlying EOs or in the implementing regulations.

For financial institutions that often serve as the “front lines” in implementing economic sanctions, this absence of definition can cause uncertainty as to what their compliance obligations are and lead to interpretative deviations across financial institutions, which impact their ensuing compliance controls. The working group has found that in some instances compliance controls that stem from unclear definitions and uncertain compliance obligations may be beyond, if not contrary to, regulatory intent. For example, and specific to the focus of this paper, there are instances in which payments and trade transactions are placed on hold for significant periods of time or indefinitely, even though supporting trade documentation shows that the ports of loading and discharge are not in countries which are the target of sanctions. These payments and transactions are held while financial institutions attempt to track the movements of non-sanctioned ships in an attempt to ascertain if the ship had stopped in a sanctioned port, was destined for a sanctioned port, or whether cargo had been offloaded and/or “transshipped” in a sanctioned port or country. If it is discovered that any of these actions took place, some financial institutions reject and report these transactions to OFAC.

This paper seeks to assist financial institutions in clarifying which types of shipment-related transactions that have some kind of nexus to sanctioned countries or ports are indeed prohibited by OFAC regulations and to recommend practical compliance practices that may be applied consistently across financial institutions or transactions subject to OFAC regulations. This will be done by (i) reviewing OFAC regulations and guidance, (ii) identifying certain terms as they are generally used in commerce, (iii) relating those definitions to definitions in OFAC regulations and guidance, and (iv) outlining practical guidance with regard to these issues.

⁴ 50 U.S.C. 1701 *et seq.*

II. OFAC Regulations and Guidance

While each sanctions program is unique, OFAC's comprehensive sanctions programs generally prohibit U.S. persons from importing or exporting, directly or indirectly, goods, technology or services to or from a sanctioned country/region/government/person/entity, as well as dealing in most goods originating in a sanctioned country. The regulations further prohibit U.S. persons from facilitating transactions for non-U.S. persons if the U.S. person could not conduct the transaction themselves.⁵ These prohibitions are relatively consistent across OFAC regulations. This paper uses the provisions of the Iranian Transactions and Sanctions Regulations (ITSR)⁶ as the base sanctions regime for its analysis. The ITSR was chosen because the Working Group concluded that taking the "highest common denominator" applicable to the strictest sanctions regime was a prudent approach in analyzing the shipment-related sanctions issues addressed in this paper. The ITSR broadly prohibits trade and, as compared to other sanctions regulations, includes more references to shipping terms. Recent amendments to the ITSR and related Frequently Asked Questions also provide greater clarity on the issues addressed in this paper.⁷ For these reasons, the Working Group believes that ITSR concepts and the conclusions made in this paper are useful generally across OFAC sanctions programs.

The relevant ITSR prohibitions are outlined below.

§560.201 Prohibited importation of goods or services from Iran.

Except as otherwise authorized pursuant to this part, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, the importation into the United States of any goods or services of Iranian origin or owned or controlled by the Government of Iran, other than information and informational materials within the meaning of section 203(b)(3) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)(3)), is prohibited.

§560.204 Prohibited exportation, reexportation, sale, or supply of goods, technology, or services to Iran.

Except as otherwise authorized pursuant to this part, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any goods, technology, or services to Iran or the Government of Iran is prohibited,

⁵ For example, see 31 CFR §560.208 (Prohibited facilitation by United States persons of transactions by foreign persons). Available at http://www.ecfr.gov/cgi-bin/text-idx?SID=b088633f45ae9b69f275f2c100bb0a38&mc=true&node=se31.3.560_1208&rgn=div8

⁶ 31 CFR Part 560

⁷ See U.S. Treasury Bulletin "Publication of Updated Iranian Transactions and Sanctions Regulations" (December 22, 2016), available at <https://content.govdelivery.com/accounts/USTREAS/bulletins/17b9224>.

including the exportation, reexportation, sale, or supply of any goods, technology, or services to a person in a third country undertaken with knowledge or reason to know that:

- (a) Such goods, technology, or services are intended specifically for supply, transshipment, or reexportation, directly or indirectly, to Iran or the Government of Iran; or*
- (b) Such goods, technology, or services are intended specifically for use in the production of, for commingling with, or for incorporation into goods, technology, or services to be directly or indirectly supplied, transshipped, or reexported exclusively or predominantly to Iran or the Government of Iran.*

§560.206 Prohibited trade-related transactions with Iran; goods, technology, or services.

- (a) Except as otherwise authorized pursuant to this part, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, no United States person, wherever located, may engage in any transaction or dealing in or related to:*
 - (1) Goods or services of Iranian origin or owned or controlled by the Government of Iran; or*
 - (2) Goods, technology, or services for exportation, reexportation, sale or supply, directly or indirectly, to Iran or the Government of Iran.*
- (b) For purposes of paragraph (a) of this section, the term transaction or dealing includes but is not limited to purchasing, selling, transporting, swapping, brokering, approving, financing, facilitating, or guaranteeing.*

§560.208 Prohibited facilitation by United States persons of transactions by foreign persons.

Except as otherwise authorized pursuant to this part, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, no United States person, wherever located, may approve, finance, facilitate, or guarantee any transaction by a foreign person where the transaction by that foreign person would be prohibited by this part if performed by a United States person or within the United States.

§560.306 Iranian-origin goods or services; goods or services owned or controlled by the Government of Iran.

- (a) Except as provided in paragraph (b) of this section, the terms goods of Iranian origin and Iranian-origin goods include:*
 - (1) Goods grown, produced, manufactured, extracted, or processed in Iran; and*

(2) Goods that have entered into Iranian commerce.

(b) The terms goods of Iranian origin and Iranian-origin goods do not include the following categories of goods, provided that such goods were not grown, produced, manufactured, extracted, or processed in Iran:

(1) Goods exported or reexported to Iran under an authorization issued pursuant to this part and that have subsequently been reexported from and are located outside of Iran; or

(2) Goods transported on a vessel or aircraft, as well as the vessel or aircraft itself⁸, that passed through Iranian territorial waters or stopped at a port or place in Iran en route to a destination outside of Iran and that have not otherwise come into contact with Iran.

Note to paragraph (b)(2) of § 560.306: Pursuant to this section, goods that are temporarily offloaded from a vessel in Iranian territorial waters or at a port or place in Iran and reloaded onto the same vessel or another vessel in the same location en route to a destination outside of Iran and that have not otherwise come into contact with Iran are not considered goods of Iranian origin. Similarly, goods that are offloaded from an aircraft at a place in Iran and reloaded onto the same aircraft or another aircraft in the same location en route to a destination outside of Iran and that have not otherwise come into contact with Iran are not considered goods of Iranian origin.

§560.308 Importation of goods.

With respect to goods (including software), the term importation means the bringing of any goods into the United States, except that in the case of goods transported by vessel, importation means the bringing of any goods into the United States with the intent to unlade them.

§560.403 Transshipment or transit through Iran.

The prohibitions in §§560.204, 560.206, and 560.208 apply to export, reexport or supply transactions which require a transshipment or transit of goods or technology through Iran to third countries.

As a supplement to these ITSR provisions, OFAC has issued guidance reiterating the ITSR prohibitions, including the explanation from §560.403 that “the prohibitions on the export of goods to Iran and engaging in any transaction or dealing in or related to such goods apply to export transactions which

⁸ It is reasonable to include in this reference to “the vessel or aircraft itself” shipping containers, pallets, and other means of containing goods while onboard vessels and aircraft.

require a transshipment or transit of goods through Iran to third countries.”⁹ The guidance further explains that goods which are transshipped through Iran become "goods of Iranian origin." Such goods are prohibited from importation into the United States and U.S. persons are prohibited from engaging in transactions or dealings in or related to those goods unless authorized by an OFAC general or specific license. Examples provided in the guidance include Afghan-origin carpets or foodstuffs that require transshipment or transit through Iran, as the main corridor to certain third countries, such as Turkey and Saudi Arabia.

OFAC’s recent amendment to the definition of “goods of Iranian-origin,” which was issued to “address inquiries from the regulated public, including with regard to the status of goods on vessels and aircraft,”¹⁰ makes clear that goods which pass through territorial waters, stop at an Iranian port, or are moved from one vessel to another while stopped at an Iranian port, will not be considered goods of Iranian origin, so long as such goods do not “come into contact” with Iran. OFAC issued guidance, through a new Frequently Asked Question (FAQ), explaining that with respect to goods on vessels and aircraft, such goods “come into contact with Iran, if, for example, they are removed from a port or airport in Iran or are processed through Iranian customs, or if they transit Iran by truck or train en route to a destination outside of Iran.”¹¹ Another FAQ explains that goods unloaded from a ship in an Iranian port, moved within the boundaries of the port, and loaded onto a second ship en route to a destination outside of Iran, without ever leaving the port do not come into contact with Iran and are not considered to be Iranian-origin goods.¹²

Thus, while §560.403 interprets goods that “require transshipment or transit . . . through Iran,” to be subject to the §560.206 prohibition on trade-related transactions,¹³ the revised definition of “goods of Iranian-origin” makes clear that the kind of transshipment or transit that makes goods prohibited involves “contact with Iran,” which OFAC has described by FAQ as goods being removed from a port or airport in Iran or being processed through Iranian customs or being moved through Iran by truck or train en route to a destination outside of Iran.

In summary, the ITSR and related guidance prohibit financial transactions relating to a cargo when the cargo (i) is being exported or reexported directly or indirectly to Iran or (ii) has come into “contact” with Iran by being removed from a port or airport in Iran, being processed through Iranian customs, or by transiting Iran by truck or train en route to a destination outside of Iran.

⁹ Guidance on Transshipments through Iran and Related Issues (March 10, 2010). See Attachment 1.

¹⁰ 81 Fed. Reg. 94254, 94257.

¹¹ OFAC FAQs: Iran Sanctions, Number 486, *available at* https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx#lic_agmed.

¹² *Id.*, Number 487.

¹³ §560.403 also interprets such goods to be prohibited under §560.204 (exportation, reexportation, sale) and §560.208 (facilitation by U.S. persons). However, “goods of Iranian-origin” are only relevant to the §560.206 prohibition.

III. Definitions: Developing a Common Understanding of Shipment Terminology

This section identifies definitions of certain relevant shipping terms as commonly understood in commerce or as defined in the ITSr. These definitions are useful in establishing a baseline of what is and is not prohibited by ITSr, and help form the basis for the Working Group’s recommendations and guidance to financial institutions that must interpret those regulations and related reporting requirements.¹⁴

“Transshipment”

Under maritime law transshipment refers to the act of taking cargo from one vessel and loading it onto another.¹⁵ Similarly in the *International Chamber of Commerce Uniform Customs and Practice for Documentary Credits*, transshipment in the context of a non-negotiable sea waybill is defined as the “unloading from one vessel and reloading to another vessel during the carriage from the port of loading to the port of discharge stated in the credit.”¹⁶ Because transshipment exposes the shipment to a higher probability of damage or loss, some purchase orders or letters of credit specifically prohibit it.

It should be noted that a shipping company generally determines the use and locations of transshipments based on the most economical (lowest cost) and/or efficient means of delivering cargo to a given destination. This may require the shipping company to consider factors such as the lack of any direct air, land, or sea link between the consignor’s and consignee’s countries, and available access to the intended port of entry.

Based on the sources above, “transshipment” is defined as moving cargo from one means of transport to another. Such movement may take place in the context of maritime, air or land shipments. This term refers to movements of cargo covered in one and the same transport document from one means of conveyance to another, for example from vessel to another vessel or from truck to truck, and in some

¹⁴ It is understood that financial institutions have different risk appetites. Nothing in this paper is meant to imply that a bank must process any transaction; rather, it only seeks to assist them in their efforts to determine what is prohibited and reportable to OFAC.

¹⁵ TRANSHIPMENT, mar. law. The act of taking the cargo out of one ship and loading it in another. When this is done from necessity, it does not affect the liability of an insurer on the goods. 1 Marsh. Ins. 166; Abbott on Ship. 240. But when the master tranships goods without necessity, he is answerable for the loss of them by capture by public enemies. 1 Gallis. R. 443. A Law Dictionary, Adapted to the Constitution and Laws of the United States. By John Bouvier. Published 1856.

¹⁶ ICC Uniform Customs and Practice for Documentary Credits (UCP), Article 21 (b). Available at <http://finotax.com/fx/ucp5>. Also UCP Article 24 (d) (Road, Rail, or Inland Waterway Transport Documents) defines transshipment as “unloading from one means of conveyance and reloading to another means of conveyance, within the same mode of transport, during the carriage from the place of shipment, dispatch or carriage to the place of destination stated in the credit.”

cases the term is used to refer to movements from one mode of transport to another (e.g., vessel to truck).

“Transit”

The word “transit” has broad connotations in everyday discourse as the “act of moving people or things from one place to another.”¹⁷ In the context of shipping, the term ¹⁸means moving goods from one place to another, at times across the waters and geographic borders of physical territories of different countries.

“Importation of Goods”

“Import” generally means to bring goods into one country from another country.¹⁹

As stated above, the ITSR definition of “Importation of goods” is “the bringing of any goods into the United States, except that in the case of goods transported by vessel, importation means the bringing of any goods into the United States **with the intent to unlade them.**”²⁰

“Exportation of Goods”

“Exportation of Goods” means to transport goods from one country to another in the course of trade.²¹

¹⁷ Simple Definition of Transit, Merriam-Webster. Available at <http://www.merriam-webster.com/dictionary/transit>.

¹⁸ See, descriptions of In-Bond for Transportation, Transit entries. To move through or transit through a territory entry is required. Available at, <https://www.bnsf.com/customers/pdf/northbound-customs.pdf> . See also, ICC Report “Controlling the Zone” Section 1.2 Transit and transshipment (“Transit goods move from a port of entry to a port of departure.”) See also, Shipping and Freight Resource, Difference between transshipment and cargo. (“Cargo in Transit is the movement of cargo that is discharged at a gateway seaport . . . across international borders to another country where the final destination is (generally) a landlocked country.”) Available at <http://shippingandfreightresource.com/transshipment-and-cargo-in-transit/>. See also, <http://www.businessdictionary.com/definition/customs-entry.html>

¹⁹ <http://thelawdictionary.org/import/>

²⁰ 31 CFR 560.308

²¹ <http://thelawdictionary.org/export/>

“Goods of Sanctioned Country Origin”

“Goods of sanctioned country origin” may be defined using the expansive ITSR definition of “Iranian Origin Goods,” stated above which is “(1) Goods grown, produced, manufactured, extracted, or processed in Iran; and (2) Goods that have entered into Iranian commerce.”²²

“Entry into Commerce”

“Entry into commerce” means goods have come into contact with Iran, for example if they (i) move by truck or train through Iran en route to a destination outside of Iran or (ii) have been discharged from the vessel (or other form of conveyance) and have gone through some customs entry procedure pursuant to Iranian law, whether or not for distribution to a particular country and are moved away from the port (for the purpose of this paper “Customs Entry”). This definition is consistent with regulatory regimes in both the U.S. and overseas.²³ For goods to “enter into commerce” they must minimally make some form of customs entry. When cargo simply moves from one vessel to another in a port (i.e. is transshipped in port) and is never discharged and does not undergo any type of customs processing, the Working Group believes such cargo should not be considered to have entered into commerce.²⁴

IV. Meaning of “Transshipment or Transit through Iran” and ITSR Prohibitions

As made clear in the revised definition of “goods of Iranian-origin,” the term “transshipment or transit through Iran” does not include “goods transported on a vessel or aircraft that passed through Iranian territorial waters or stopped at a port or place in Iran en route to a destination outside of Iran and that have not otherwise come into contact with Iran.”²⁵ Goods are considered “to come into contact with Iran” when they are removed from a port or airport in Iran or are processed through Iranian customs, or if they transit Iran by truck or train through Iran en route to a destination outside of Iran.²⁶ Hence,

²² 31 CFR 560.306(a)

²³ For example, U.S. Customs and Border Protection, in its “Importing into the United States” guide states that when a shipment reaches the United States, “the importer of record (i.e., the owner, purchaser, or licensed customs broker designated by the owner, purchaser, or consignee) will file entry documents for the goods with the port director at the goods’ port of entry. Imported goods are not legally entered until after the shipment has arrived within the port of entry, delivery of the merchandise has been authorized by CBP, and estimated duties have been paid.” The guide explains that “[g]oods may be entered for consumption, entered for warehouse at the port of arrival, or they may be transported in-bond to another port of entry and entered there under the same conditions as at the port of arrival.” Entry of Goods, Importing into the United States.

See also, <http://www.businessdictionary.com/definition/customs-entry.html>

²⁴ This is similar to an individual simply transiting through an airport in a country en route to another country without ever having gone through the immigration process in that country.

²⁵ 31 CFR 560.306(b)(2).

²⁶ OFAC FAQs: Iran Sanctions, Number 486.

goods unloaded from a ship in an Iranian port, moved within the boundaries of the port, and loaded onto a second ship en route to a destination outside of Iran, without ever leaving the port should not come into contact with Iran and should not be considered to be Iranian-origin goods.

Based upon (i) the recently amended ITSR definition of “goods of Iranian-origin” and related guidance, (ii) the shipping definitions above, and (iii) the language of §560.403 that effectively prohibits transactions which require a transshipment or transit of goods or technology through Iran to third countries, the Working Group believes that the phrase “transshipment or transit through Iran” should mean more than goods moving from one mode of transportation to another, which is the common commercial meaning. Transshipment or transit through Iran in the context of the ITSR prohibitions means that goods have both been moved from one mode of transit to another and have had contact with Iran such as having undergone Customs Entry or otherwise being moved through Iran by truck or train en route to another country. In contrast, transshipment at an Iranian port without Customs Entry is not prohibited by OFAC regulations because the goods involved are not Iranian origin goods or exports or reexports to Iran. If such goods do undergo Customs Entry or are otherwise moved through Iran by truck or train en route to another country, the goods would become “Iranian origin”. Any transactions or dealings in these goods would therefore be prohibited for U.S. persons.

The Working Group believes that the phrase “transshipment or transit through Iran” prohibits trade related transactions involving goods which are transported by truck or other means through Iran before being loaded on vessels or other modes of transportation en-route to third countries, or where goods are discharged from vessels or aircraft in Iran and loaded on trucks for transit through Iran en-route to third countries. Such a scenario should fall within the example of “contact with Iran” provided in FAQ 486 and therefore the goods should become “Iranian origin”.

V. Application of Definitions to OFAC Prohibitions

As summarized in Section II, the ITSR and related guidance prohibit financial transactions relating to a cargo when the cargo (i) is being exported or reexported directly or indirectly to Iran, (ii) includes a transshipment or transit of goods through Iran to other countries, or (iii) contains goods of Iranian origin, including goods that are deemed to be of Iranian origin due to having undergone some form of Customs Entry in Iran or otherwise having been moved by truck or train through Iran en route to another country.

Specific to the issue posed at the beginning of this paper regarding ships that may stop in ports of sanctioned countries, for cargo to have “transited or transshipped through Iran,” it would therefore need to (i) be removed or discharged from that vessel and make customs entry for transit in Iran, or otherwise (ii) move from the Iranian port into or through Iran en-route to another country by land. The Working Group’s interpretation is reinforced by provisions in the Export Administration Regulations (EAR), which while not the controlling authority in this context, do shed light on how related agencies view movements in territorial waters. The EAR provides that goods shipped on board a vessel or aircraft and passing through the United States from one foreign country to another may be exported without a

license provided that (a) while passing in transit through the United States, the goods have not been unladen from the vessel or aircraft on which they entered, and (b) the United States is not the original final destination for the goods.²⁷ Analogously with regard to shipping containers, pursuant to the Customs Convention on Containers, under international law shipping containers are not deemed to be “imported” into a country for Customs purposes when they are used solely for the transport of goods.²⁸

Additionally, financial transactions relating to cargo onboard vessels should not become subject to the OFAC blocking requirement by virtue of any incidental movement of that vessel near or to port or shipment infrastructure owned by a Specially Designated National (SDN). Examples of these types of SDNs might be port terminals owned or operated by SDNs, such as port terminals operated by Tidewater, targeted government instrumentalities, or for Crimea, passage through the Strait of Kerch [Ukraine 13685]. Based on the Working Group’s conversations with shipping industry experts, cargo onboard vessels passing through these ports and their infrastructure does not incur duties, or charges for passage through the relevant territorial waters, port calls or simple transshipments. Hence, it stands to reason that duties and charges only apply to cargo when goods make Customs Entry, even if only temporarily. In other words, cargo must be unloaded or discharged at a port for there to possibly be any blockable interest in trade documents handled by the bank. In the case of related transactions such as payments, intermediary banks should not be required to gain additional information or block absent a clear reference to a blocked party on the face of the payment. Therefore, a financial transaction relating to cargo onboard a vessel that only moves through the sanctioned port’s territorial waters, calls at the port or transships through the port should not be subject to OFAC blocking requirements, as there is no property or interest in property of an SDN that is subject to blocking.

This view that transiting through a territory involves more than moving through territorial waters or calling on a port is consistent with both the recent ITSR amendment to the definition of “goods of Iranian-origin” and with previous informal guidance OFAC has provided to banks participating in the Working Group. For example, OFAC recently informally advised that discounting of a trade loan was permissible when it involved goods transported onboard a vessel that called on Bandar-Abbas, at the time that this port was deemed by OFAC to be owned by an SDN, when the goods were not from Iran, of Iranian origin or destined to Iran. OFAC confirmed that there is no issue with payments related to the financing of goods if the goods stay on board the vessel while moving from one country to another and the vessel stops in Iran. Similarly, OFAC recently provided informal guidance to a bank that held a payment for a shipment between two non-sanctioned countries when the ship stopped at a port in Syria

²⁷ See EAR 15 CFR § 740.9 TEMPORARY IMPORTS, EXPORTS, REEXPORTS, AND TRANSFERS (IN-COUNTRY) (TMP), pg. 16 et seq, available at https://www.bis.doc.gov/index.php/forms-documents/doc_view/986-740, .

²⁸ See Customs Convention of Containers, 1972 available at http://www.unece.org/fileadmin/DAM/trans/conventn/ccc_1972e.pdf. See also EAR 15 CFR §740.9 Temporary imports, exports, reexports, and transfers (in-country) (TMP) (a)(7).

that appeared to be owned by the Syrian government. OFAC stated that there was no need to block or reject the payment to the extent the payment was not a commercial transaction with Syria or involved an interest of the Government of Syria.

VI. Conclusion

Based on the above, the Working Group believes that there should be no violation of ITSR, other comprehensive sanctions regimes, or blocking requirements for port or shipment infrastructure owned by a blocked person in any scenario involving cargo onboard a vessel that transits through territorial waters or even calls on a port in a sanctioned territory unless there is some sort of Customs Entry into the sanctioned country. If the goods have never entered the sanctioned country's commerce, there should be no violation of OFAC regulations, even if the vessel on which the goods are shipped stops in a sanctioned port, and even if the goods are moved from one vessel to another while in that port, but did not otherwise come in "contact with" the sanctioned country.

Recognizing that financial institutions may have different risk tolerances and controls, the Working Group recommends that when a financial institution refuses to process transactions relating to cargo onboard a vessel solely by virtue of a vessel's movement sightings or port of call, where there is no actual OFAC violation, that the institution's return of the transaction should state that the return is being made as a compliance cancellation and not as a sanctions-mandated rejection.

To summarize, to determine whether a financial transaction relating to a shipment is or is not prohibited, it should not be relevant to draw distinctions based on whether a vessel calls on a port or merely enters the port's territorial waters. Nexus to a port or other shipping instrumentality should merely be evidence that the shipment may be considered prohibited commerce, not that the transaction itself is prohibited.

Determining whether a financial transaction related to a shipment of cargo is prohibited under OFAC regulations should therefore rest on:

- 1) Whether a shipment involves exports or reexports to a sanctioned territory;
- 2) Whether a transaction involves goods manufactured, produced or processed in a sanctioned territory; or
- 3) Whether a shipment "enters into commerce" of a sanctioned territory by virtue of having been processed for some form of Customs Entry or otherwise being moved over land through the country en route to a third country.

Further clarification is found in the Common Scenarios and Practical Considerations Annexes to this paper.

ANNEXES

Annex A: Common Scenarios

All the scenarios below assume that there are no sanctioned entities that are parties to or have an interest in the transaction.

Financing

A) *Port Call Scenario 1: A financial institution has financed a shipment between two non-sanctioned countries. The goods are shipped on a vessel which stops in a sanctioned country en route to its destination. The goods never leave the vessel while in the sanctioned country port and never undergo any sort of Customs Entry in the sanctioned country.*

This scenario should not constitute a violation of OFAC regulations by the importer, exporter, or the financial institution financing or processing the underlying trade. As the goods never left the vessel, they were not removed from a port or airport in the sanctioned country, nor did they undergo any sort of Customs Entry. Therefore, the financial institution has not facilitated the export of goods to the sanctioned country, nor was it dealing in goods of the sanctioned country's origin.

The Working Group believes there should be no violation of OFAC regulations in this scenario.

B) *Port Call Scenario 2: A financial institution has financed a cross-border trade transaction between third parties. It discovers that the vessel that is transporting the goods has in the past (or is planning to make a stop in the future) in a sanctioned port, but the goods it has financed were not/will not be on the vessel at the time the stop in the sanctioned port was/will be made.*

Prior vessel movements should have no bearing on the transaction in question. The transaction in question does not involve exports from or imports to, or even a nexus to a sanctioned country.

The Working Group believes there should be no violation of OFAC regulations in this scenario.

C) *Vessel Transshipment: A financial institution has financed a shipment between two non-sanctioned countries. The goods are shipped on a vessel which stops in a sanctioned country en route to its destination. The goods are moved from one vessel to another while in the sanctioned country port, but the goods never undergo any sort of customs clearance in the sanctioned country.*

While this scenario does constitute "transshipment" in the commercial sense, this transshipment should not transform the goods into goods of the sanctioned country's origin. This is because the transshipment is not "required" to happen in order for the goods to make it to their destination, nor

are the goods transited through the sanctioned country because they never entered into the commerce of the sanctioned country (i.e. never underwent Customs Entry.)

The Working Group believes there should be no violation of OFAC regulations in this scenario.

- D) Entry into Commerce: A financial institution has financed a shipment between two non-sanctioned countries. The goods are shipped on a vessel which stops in a sanctioned country, where the goods are discharged from the vessel, go through customs processing, and are transported by truck through the sanctioned country in order to reach their destination.**

In this case, the goods should become goods of the sanctioned country's origin and the shipment should be an export to the sanctioned country. The financial institution should not finance this shipment as that would appear to be both facilitating an export to a sanctioned country and dealing in goods of the sanctioned country's origin.

The Working Group believes there should be a violation of OFAC regulations in this scenario.

- E) Strait of Hormuz: A financial institution acting as beneficiary's bank in an export collection relating to goods, when commercial checks of vessel movements detect a sighting in the Strait of Hormuz. The financial institution receives a bill of lading indicating the goods were loaded in Mumbai and discharged in Jeddah.**

The Strait of Hormuz is part of Iran's territorial waters. Passing through the territorial waters of Iran is not prohibited. Financing goods onboard a vessel that passes through the territory of Iran is also not prohibited.

The Working Group believes there should be no violation of OFAC regulations in this scenario. The same concept can be applied to vessels which have transited the Strait of Kerch.

- F) SDN Vessel: A financial institution is acting as confirming bank on a letter of credit involving exports of crude oil. Upon inspecting the trade documents at presentation, the bill of lading reveals that the cargo is loaded on the MV SEASTAR (IMO 9569205), which is E.O. 13599 designated vessel purported to be linked to National Iranian Tanker Company. There are no other sanctions references in the documents.**

Transactions involving cargo on an SDN vessel are prohibited, as they would involve an indirect interest in blocked property. The institution should block the documents.

The Working Group believes there should be a violation of OFAC regulations in this scenario.

- G) Exports to Syria: A U.S. financial institution is involved in an export collection. Upon receiving documents it discovers that the underlying trade involves exports of military aircraft replacement**

parts from China. While performing some commercial checks, the financial institution discovers the cargo was discharged at Port Tartus, Syria, which appears to be Russian controlled.

U.S. persons cannot engage in this transaction as it involves impermissible exports to Syria. While blocking should not be required because there is no SDN involvement, the trade transaction would involve a prohibited service and prohibited facilitation of a prohibited export to Syria. The transaction should not be processed.

The Working Group believes there should be a violation of OFAC regulations in this scenario.

Payments

H) Port Call Scenario 1: A financial institution acting as an intermediary bank in a payment that the financial institution has interdicted learns that the purpose of the payment is for goods onboard a vessel that calls at an Iranian port after the goods have been discharged at another port.

A subsequent port stop in the vessel's voyage should have no relevance in this transaction, and there is no nexus to Iran in this transaction.

The Working Group believes there should be no violation of OFAC regulations in this scenario.

I) Port Call Scenario 2: A financial institution acting as an intermediary bank in a payment that the financial institution has interdicted learns that the purpose of the payment is for goods onboard a vessel that calls at Imam Khomeini (BIK) Port, Iran before the goods are discharged in their port of destination in Rotterdam. The financial institution receives confirmation from the remitting bank that the goods were loaded in Shanghai and discharged in Rotterdam.

A port call in a sanctioned jurisdiction and even involving a port that is an SDN should not render all goods onboard of the vessel at the time of the port call tainted. Payments relating to cargo that remains on board the vessel should not be prohibited, nor require blocking.

The Working Group believes there should be no violation of OFAC regulations in this scenario.

J) Port Call Scenario 3: A financial institution initiates a payment indicating it is for the sale of purification equipment in the notes and also includes a vessel and vessel route in field; it shows remitter in Dubai and Beneficiary in Germany. The financial institution does not track vessel movements but receives a request for additional information from the intermediary bank that has tracked the vessel and detected a stop in Bandar Abbas, which incidentally was not on the vessel's normal route. The intermediary bank refuses to process. The remitting bank receives confirmation from its client that the goods are to be discharged in Dubai.

Vessel tracking is neither required nor dispositive in evidencing ports of delivery, even if the intermediary bank that is refusing to process it is doing so as a matter of internal policy.

The Working Group believes there should be no violation of OFAC regulations in this scenario.

- K) Port Call Scenario 4: A financial institution processing a payment for shipping/freight costs associated with shipping goods from one non-sanctioned location to another (e.g. Shanghai to Rotterdam) learns that the vessel carrying the goods made a stop en route at a sanctioned location (e.g. Port Sudan or Bandar Abbas). The financial institution receives confirmation that the goods were loaded in Shanghai and discharged in Rotterdam.***

A port call in a sanctioned jurisdiction and even involving a port that is an SDN should not render all goods onboard of the vessel at the time of the port call tainted. Any payment for freight/shipping costs for the underlying goods are not paid to the sanctioned port during a port call, but instead are paid at the port of discharge. Payments relating to shipping cargo that remains on board the vessel should not be prohibited, nor do they require blocking.

The Working Group believes there should be no violation of OFAC regulations in this scenario.

- L) Vessel Transshipment: A financial institution is an intermediary in a payment for goods. In the course of performing diligence documentation is requested. A bill of lading shows port of loading as Shanghai and port of discharge as Barcelona. The financial institution also learns that the cargo was transshipped in Singapore onto another vessel and the vessel stopped in Bandar Abbas en route to Europe. The financial institution processes the payment based on the bill of lading without other evidence.***

The Working Group believes that the transshipment in Singapore is not relevant nor is the stop in Bandar Abbas, because the goods were discharged in Barcelona. Even if the vessel stopped in Bandar Abbas and in the unlikely event that the cargo was again moved from one vessel to another in Iran, these goods would not appear to have been removed from the port, have made Customs Entry, or have otherwise come into contact with Iran.

The Working Group believes there should be no violation of OFAC regulations in this scenario.

Annex B: Practical Considerations

Evidence of entry into commerce (including transshipment, customs entry) should derive from the information contained in the transaction documents. There is generally a difference in the duty of care between payment transactions on the one hand and trade transactions on the other (e.g.; letters of credit, standby letters of credit, syndicated loans), based on the information received by the financial institution in the ordinary course of the transaction. Payment instructions only sporadically refer to vessels or provide trade transaction details with or into a country. Furthermore, references to a vessel (unless an SDN) within transaction documents involving export or import (unless to a sanctioned target country), should not connote a heightened risk that requires the transaction to be placed on hold, in order to request additional documentation and/or to track vessel movements. While ports and vessel details should be included in supporting trade documents, the Working Group believes it is reasonable for financial institutions to rely on the transactional documentation included in the ordinary course of processing the payments.

To the extent there is a need to prove that a transaction has not entered into commerce of a sanctioned territory, the Working Group believes it is reasonable to rely on the information normally obtained in shipping documents, customs (import/export) declarations, shipping company tracking records, and attestations of counterparties of ports of loading and discharge.

It should also be noted, while financial institutions generally maintain screening lists of vessels subject to sanctions, the Working Group strongly discourages including vessels in such lists solely because of evidence of occasional, prior movements, sightings or port calls related to sanctioned countries, regions or ports. It is the view of the Working Group that vessels are subject to sanctions when SDN designated or by virtue of their ownership and in some cases controlled by a sanctioned party. Vessels do not become subject to sanctions by virtue of their movements through sanctioned territories.

Additionally, in the context of screening financial transactions, the Working Group believes that the tracking of vessel movements is not a necessary or even a helpful measure to detect and mitigate sanctions risks. While movement history may be indicative of some potential nexus to a sanctioned territory, movement to a territory or territorial waters should not, on its own, demonstrate that goods have been exported to or entered into commerce of a territory. Nonetheless some institutions have taken the position that when there is indication of such movement they will not process transactions absent definitive evidence demonstrating goods are not exported and moved into the sanctioned territory. However, movement to a port should not define a violation. Hence, in the Working Group's view, tracking vessel movement creates an unclear and in-actionable flag which cannot be readily disproved. In contrast to vessel tracking, port of loading and discharge of cargo from a vessel and entry into commerce of the relevant jurisdiction should be apparent on the face of shipping documents and should be determinative in deciding whether the transaction is permissible.

The Working Group believes that the tracking of vessels carrying cargo related to underlying financial transactions is neither necessary nor a useful practice, given that movement in territorial waters, or port

calls do not involve blocked property when there are no SDN instrumentalities. Nor should there be a presumption that goods are entering into commerce merely due to movement in territorial waters or port calls. This practice leads to confusion and delay and also imposes an undue burden on the transactional screening process, when stopping and screening transactions should be reserved only for true sanctions risks. Vessel tracking may also prevent permissible transactions if a bank incorrectly determines that permissible activity is prohibited under OFAC regulations. Unnecessary rejection or blocking of trade related transactions not only negatively impacts U.S. commerce but also stresses compliance resources.

While performing ordinary commercial checks or even compliance diligence, if incidental knowledge of vessel movements in sanctions target territories or ports is discovered, the Working Group believes that this knowledge in and of itself should not connote a violation of sanctions regulations. This precludes the scenario in which an institution discovers an actual SDN involvement, for example, which would connote a violation. Accordingly, absent other information pointing to a violation apparent in the transaction, the transaction should not need to be rejected nor reported to OFAC because of knowledge of a sighting or port call in a sanctions target territory. Recognizing that institutions may have different risk tolerances and controls, the Working Group recommends that when a bank refuses to process transactions relating to cargo onboard a vessel solely by virtue of a vessel's movement sightings or port calls, where there is no actual OFAC violation, that the bank's return of that transaction should indicate that the return is being made as a compliance cancellation based on that bank's risk based approach and not as a sanctions-mandated rejection.

Description of Trade Associations

BAFT

BAFT (The Bankers Association for Finance and Trade) is an international financial services trade association whose membership includes a broad range of financial institutions throughout the global community. As a worldwide forum for analysis, discussion, and advocacy in international financial services, BAFT member banks provide leadership to build consensus in preserving the safe and efficient conduct of the financial system worldwide.

The Clearing House

The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Clearing House Payments Company L.L.C. owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume. Its affiliate, The Clearing House Association L.L.C., is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system.