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# Navigating sanctions due diligence – an overview of best practice

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24 November 2020

# Introduction

- Shipping is in the sanctions spotlight
- Perceived lax approach to sanctions compliance in shipping
- But what of the difficulties with due diligence in the shipping context? Why is it so difficult to navigate sanctions?
- There are some positive developments in the approach of the relevant regulatory bodies
- That said, it remains the case that fairly stringent compliance procedures are required

# Recent guidance

- Increased focus on maritime sector
- Recent designations and publication
- OFAC: “Sanctions Advisory for the Maritime Industry, Energy and Metals Sectors, and Related Communities” – May 2020
  - Maritime focussed
  - Due diligence requirements
  - Deceptive shipping practices

*“It is critical that private sector entities appropriately assess their sanctions risk and, as necessary, implement compliance controls to address any identified gaps in their compliance programs...”*

...

*As industry actors implement appropriate due diligence and compliance programs based on their risk assessments, we recommend that they continually adopt business practices to address red flags and other anomalies that may indicate illicit or sanctionable behavior”*

- Office of Financial Sanctions Implementation (OFSI) - “Financial sanctions guidance for entities and individuals operating within the maritime shipping sector” – July 2020
  - Aimed at maritime sector
  - Illicit shipping practices
  - Due diligence guidance

*“Each organisation should assess its own risks and put due diligence measures in place to manage these risks. OFSI does not mandate specific measures to be taken. OFSI can provide guidance as to what measures may be helpful... but the onus is on the organisation to ensure that it has put in place sufficient measures to ensure it does not breach financial sanctions.”*

- Higher burden of due diligence

# Enforcement reach

- Why is the guidance relevant to me?
- Primary sanctions apply to:
  - US persons and
  - Non- US persons with a US nexus
- Secondary sanctions aimed at Non-US persons with no US nexus
  - Prohibit providing direct support or benefit
  - Materially assistance, support, or services to sanctioned persons/entities
- Exposure to multiple regimes (UN, EU, UK and US)
  - Are you a UN, EU, UK entity?
  - Do you trade in UN, EU, UK territory?

# Sanctions Compliance Program

- A formal SCP is not obligatory. However, parties that engage in international trade are encouraged to adopt a formal SCP
- Lack of a SCP is one of the root causes of sanctions violations
- One size does not fit all
- A SCP acts as a statement of your compliance commitment:
  - (1) to regulate sanctions compliance by way of the implementation of internal controls; and
  - (2) holds you in good stead in the event of a sanctions breach

# Sanctions Compliance Program

The key is a “Culture of Compliance”:

- (1) management commitment by providing adequate resources to sanctions compliance
- (2) ensuring that sanctions compliance is fully integrated into the Company’s procedures
- (3) to provide adequate compliance guidance to all personnel
- (4) to give adequate support to the SCO in the implementation and monitoring of policy and procedures
- (5) the screening of obligations under trade sanctions laws
- (6) the consequences in case of non-compliance with the SCP



# Sanctions Compliance Program

## Some Specifics:

- Periodically reviewing the Company SCP
- Appointing a SCO
- Committing relevant resources
- Training
- Internal meetings to evaluate new sanctions/trading limitations / risk management
- Encourage personnel to report to the SCO any sanctions concerns
- Demonstrate recognition of seriousness of apparent violations of sanctions through e.g. investigations
- Appropriate legal support

# Sanctions Compliance Program

- The more difficult task is risk assessment
- Grade the Company as low, moderate or high risk
- Generally shipping is 'high risk'
- Once graded, to implement an appropriate program
- The key is mitigation measures to reduce the risk

# Sanctions Compliance Program

The scope of the SCP is not just internal, and so the same type of risk analysis is also implemented for any transaction or business

The 4 questions:

- 1) What? (what is the transaction)
- 2) Where? (to determine what sanctions regimes might apply)
- 3) Who? (checks on companies and individuals in the transaction)
- 4) Why? (what is the purpose of the transaction)?

# Sanctions Compliance Program

Some specifics:

- Verification on the various sanctions lists of all new, temporary or occasional Customers, Charterers, Suppliers and other parties
- Quarterly checks (at least) of those same parties
  - Note: update your sanctions screening software*
- Prompt implementation of new, amended, or updated sanctions programs
- Internal/External Audits
- Periodical review of SCP (at least yearly)
- Communication of SCP to all employees, as well as stakeholders and business partners
- Training

# Know you counterparty

- Sanctions lists – US, EU, UN and UK
- Perform checks at the start and monitor status of counterparty throughout trade / transaction
- Searches should be carried out on direct and indirect parties – “funds, economic services or activities **directly or indirectly** to or for the benefit of a sanctioned entity or person”
- More in-depth checks may be needed – 50% Rule
- How far do checks have to go? – Risk based approach

# Cargo and activity checks

- No equivalent sanctions lists available
- Consider the applicable laws and regulations
- Sanctions are broadly drafted:
  - Sale, supply, transfer, import or export and to the provision of services, directly or indirectly received or for the benefit of a sanctioned entity
- Best practice includes:
  - Vessel history
  - Consider the relevant shipping documents
  - Routes/destinations and monitor AIS
  - Parties should be aware of their sanctions obligations
- Mere assurances are not enough
- Someone is always watching

# Contractual clauses

- Check your sanctions clause
- It needs to cater for a changing landscape, which is a key a in long-term contract
- There are a number of standard sanctions clauses e.g. BIMCO
- Note that these clauses are not bullet-proof
  - Issue of “reasonable judgment”
  - Is it in fact an exposure?
- You are still not protected where the sanctions legislation is vague

# Conclusion

- Good due diligence will hold you in good stead in the event of an inadvertent breach
- Matters have progressed in the last couple of years:
  - General Licences;
  - Delisting applications
- It is all about a ‘Culture of Compliance’



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**For further assistance...**

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