



The Guide to Sanctions - Fifth Edition

**Sanctions considerations for
non-governmental organisations**

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As the geopolitical landscape continues to be unsettled, sanctions are becoming the go-to response from many states and are being applied in ever more innovative ways. This naturally creates a host of issues from the perspective of international businesses – and the practitioners who advise them.

Edited by Rachel Barnes of Three Raymond Buildings, Anna Bradshaw of Peters and Peters, Paul Feldberg of Brown Rudnick, David Mortlock of Willkie Farr & Gallagher, Anahita Thoms of Baker & McKenzie and Wendy Wysong of Steptoe, the fifth edition of The Guide to Sanctions is an invaluable resource as it dissects the topic in a practical fashion from every stakeholder's perspective.

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Sanctions considerations for non-governmental organisations

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The continued and evolving use of economic and financial sanctions by a growing number of jurisdictions and government authorities, the exponential increase in the sheer number of sanctions targets and the increasing level of complexity of sanctions programmes has resulted in a panoply of regulations and restrictions creating significant operational and risk challenges. Although policymakers often seek to craft sanctions laws and regulations in an effort to minimise unintended consequences, overcompliance, regulatory misinterpretation and risk aversion by counterparties and intermediaries can often frustrate the ability of parties to engage in legal, non-sanctioned activities in jurisdictions targeted or affected by these sanctions.

These issues become particularly acute for many international non-governmental organisations (NGOs) operating in affected jurisdictions, the missions of which involve the provision of humanitarian assistance and other activities designed to benefit civilian populations. This is the case even where those activities are not only not restricted but also where they may be specifically authorised pursuant to regulatory exemption of licence. Compounding this issue even further are sanctions that target governments or quasi-governmental organisations that may exercise de facto control over, or have broad economic interests running through, a particular region or jurisdiction.

NGOs have long voiced concerns to individual governments and intergovernmental organisations regarding the impact of sanctions on their ability to deliver aid to the world's most vulnerable populations. In recent years, these calls have been met by efforts of the United Nations, the United States and others to more directly address these unintended consequences, through the standardisation of humanitarian licences and greater guidance to financial institutions and other organisations that are critical to the work of NGOs on the ground. Although challenges still remain, these efforts represent an increased recognition by those administering sanctions regimes of the critical importance of carefully tailoring sanctions to mitigate the harm to humanitarian operations.

This chapter surveys the impact of sanctions on international NGOs, discusses emerging trends in this space and provides practical compliance considerations.

OVERVIEW OF KEY PROHIBITIONS AFFECTING NON-GOVERNMENTAL ORGANISATIONS

Given the sheer number, scope and complexity of various sanctions targets and programmes, as well as the extraterritorial reach of some regulations, such as those administered by the US Department of the Treasury's Office of Foreign Assets Control (OFAC), the work of many NGOs faces some unique and increasingly difficult challenges. With more than 10,000 parties currently listed on OFAC's Specially Designated Nationals and Blocked Persons (SDN) List, and with listed parties located in nearly every country, NGOs may encounter US sanctions restrictions in whichever region they operate around the world. While this chapter focuses primarily on the implications and challenges under US sanctions as a primary case study, these challenges exist in regard to NGO compliance with sanctions promulgated by the United Nations, the European Union, the United Kingdom and many other jurisdictions.

The challenges faced by NGOs are particularly pronounced in two contexts, both of which often call for the greatest need of humanitarian aid: (1) operations in embargoed jurisdictions where the sanctions restrictions are particularly comprehensive; and (2) operations in

regions that are controlled by designated government entities or quasi-governmental entities, particularly where these entities may be designated as terrorist organisations.

Before exploring these two categories of restrictions, we note as a threshold matter that the impact of US sanctions may be felt by both US and non-US NGOs. Although the legal obligation to comply with US sanctions rests primarily with US persons,^[2] non-US persons may be subject to US 'primary sanctions' liability if they engage in activity that involves a US nexus,^[3] or that seeks to evade, or causes another party (typically a US person) to violate, US sanctions.^[4] OFAC's sanctions programmes broadly fall into two categories: (1) 'comprehensive' sanctions (or embargoes) that presumptively restrict essentially all transactions between 'US persons' and parties in targeted jurisdictions; and (2) 'list-based' sanctions that may restrict essentially all transactions between US persons and listed parties (in the case of SDNs), or that restrict US persons from engaging in a more narrow set of activities with listed parties or targeted countries ('sectoral' sanctions).

Additionally, even in the absence of a US nexus, non-US persons risk being subject to US sanctions where the US government deems such persons to have engaged in certain types of conduct. This can involve any of the numerous activities that the United States has targeted for sanctions designation under various sanctions programmes, such as terrorism, drug trafficking and human rights violations. And all US executive orders (EOs) providing for SDN designation under an OFAC sanctions programme also provide as a basis for designation the provision of 'material support' to a sanctioned person. Finally, we note that under certain US sanctions programmes – such as those targeting Iran, North Korea, Russia and Syria – persons outside US jurisdiction who knowingly engage in significant transactions with certain targeted persons or sectors, including transactions with no ostensible US nexus, risk becoming subject to more traditionally named US 'secondary sanctions'.

CHALLENGES WITH EMBARGOED JURISDICTIONS

The sweeping restrictions imposed by the United States on comprehensively embargoed jurisdictions, which generally prohibit almost all trade with the United States, create a particularly challenging environment for NGOs. Where OFAC maintains embargoes (at the time of publication, with Cuba, Iran, North Korea, Syria, the Crimea and the 'Donetsk People's Republic' and 'Luhansk People's Republic' regions of Ukraine^[5]), US persons are generally prohibited from engaging in or facilitating dealings with these jurisdictions, including not only financial transactions but also the exports of goods and services. And, as discussed below, although exemptions authorise certain dealings relating to humanitarian assistance (for example, the export of food and medicine), the breadth of the sanctions coupled with the narrow exemptions means the export of items necessary for the implementation of humanitarian programmes in a sanctioned jurisdiction may be severely restricted.

Moreover, even where certain activity is authorised under OFAC's regulations, separate authorisation may be necessary under the Export Administration Regulations administered by the Bureau of Industry and Security (BIS) at the Department of Commerce. BIS maintains, administers and enforces controls regulating the export of designated items (commodities, software and technology) to various jurisdictions. In some cases, these export controls can be more restrictive than sanctions restrictions imposed by OFAC.^[6] As the lines between economic sanctions and export controls continue to blur, any analysis of 'sanctions' prohibitions should factor in appropriate export controls restrictions as well.

Because of the broad-based restrictions imposed on an embargoed country or jurisdiction, most organisations with exposure to the United States, and particularly global financial institutions, will employ strict screening and compliance protocols designed to identify and prohibit engaging in or facilitating any activity connected to these jurisdictions. As discussed in further detail below, even in instances where the activity in question may ultimately be authorised (e.g., pursuant to a general licence or exemption), it may be difficult for an NGO to overcome this baseline refusal by banks and other intermediaries to process or support a transaction. This creates significant commercial and logistical challenges and costs.

SANCTIONED GOVERNMENTS, QUASI-GOVERNMENTAL ORGANISATIONS AND HEIGHTENED RISKS OF TERRORISM-RELATED DESIGNEES

In addition to the sanctions on embargoed countries, OFAC imposes broad primary and secondary liability and risks when it comes to dealings with SDNs, entities of which 50 per cent or more is owned by SDNs, or the respective property or interests in property of such entities. Notably, the humanitarian assistance-based general licences discussed below generally do not apply to authorise activity where such activity is for the benefit of such a sanctioned entity. As with the embargoed country sanctions, banks and other organisations will impose strict controls to ensure they are not dealing with or facilitating activity that is connected with these sanctioned parties.

These sanctions and resulting risk-averse compliance controls create particular problems for NGOs seeking to provide humanitarian assistance in regions where a government, government entities or quasi-governmental organisations, such as the Taliban, Houthis or Hamas, have been designated as SDNs, as it becomes difficult to demonstrate clearly that activity in the region does not involve these designated entities.

In addition, US counter-terrorism sanctions authorities provide for two primary designations of foreign individuals, groups or entities determined to be engaged in terrorism – either as a specially designated global terrorist (SDGT) or a foreign terrorist organisation (FTO). Depending on the type of designation, dealings with these parties can trigger other US laws that carry the risk of criminal liability above and beyond the risks directly attendant with violating US sanctions, being designated for providing material support to an SDN or otherwise being subject to secondary sanctions.

Specifically, Section 302 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) authorises the US Secretary of State to designate an entity as an FTO based on a finding that the ‘organisation engages in terrorist activity’ that threatens US national security.^[7] Significantly raising the stakes for the FTO designation, however, is AEDPA’s creation of criminal liability for ‘knowingly provid[ing] material support or resources to a[n] FTO’.^[8] Material support in this context is defined broadly to include ‘any property, tangible or intangible, or service’.^[9] This Section focuses on supporting terrorist organisations, rather than terrorists themselves, and it applies even to benign aid that is not intended for terroristic ends. Section 2339B requires ‘that the aid be intentional, and that the defendant know the organisation he is aiding is a terrorist organisation or engages in acts of terrorism’.^[10]

Although the provision of material support to an SDGT may also result in criminal liability under Section 2339A of US Code Title 18 (18 USC), the threshold for a finding of criminal liability is significantly lower for an FTO under Section 2339B. In contrast to the FTO-specific provision, 18 USC Section 2339A prohibits ‘provid[ing] material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out’ various

terrorist activities.^[11] Notably, a person violates this provision only if the person does so knowing and intending that ‘the provision of material support or resources would be used in preparation for, or in carrying out’, such terrorist activities.^[12] In other words, one must intend to aid an SDGT in the SDGT’s terrorist activities in order to violate Section 2339A – indirect aid alone, such as providing humanitarian resources that defray costs and allow for separate arms purchases, would not appear to violate this provision.

The practical implication of an FTO designation is dramatic. The lower threshold for criminal liability generally results in significant overcompliance, notwithstanding any available licences. Within the humanitarian context, this means that much-needed aid and other support is generally foregone for fear that interactions with the FTO to facilitate the delivery of aid could constitute ‘material support’. The humanitarian situation risks becoming especially dire where the FTO controls, exercises significant influence or otherwise exercises jurisdiction over specific territory.

These risks have almost certainly been a driver in the evolving approach to certain organisations, such as Ansarallah. In January 2021, the Trump administration designated Ansarallah, also known as the Houthis, as an FTO as well as an SDGT.^[13] The resulting concern about the deterioration of the humanitarian situation in Yemen prompted the incoming Biden administration to indicate that it would promptly review the merits of the FTO designation; for example, on 16 January 2021, the incoming National Security Advisor Jake Sullivan noted his disagreement with the late designation of the Houthi movement as an FTO: ‘Houthi commanders need to be held accountable, but designating the whole organisation will only inflict more suffering on Yemeni people and impede diplomacy critical to end the war.’^[14] Likewise, during his confirmation hearing before the Senate Foreign Relations Committee, the then nominee Antony Blinken expressed ‘deep concern’ about the designation of the Houthi movement as an FTO and proposed reviewing that designation ‘immediately’ to ensure ‘that what we are doing is not impeding the provision of humanitarian assistance’.^[15] Finally, on 25 January 2021, less than a week after the initial designations, OFAC issued General License 13 suspending the designation of Ansarallah under the Global Terrorism Sanctions Regulations, the Foreign Terrorist Organizations Sanctions Regulations and EO 13224 for a 30-day period.^[16] Notably, when the Biden administration redesignated Ansarallah in February 2024, it did so as an SDGT only.

Even when FTOs may be involved, the US government has shown some flexibility to make allowances for humanitarian aid. Hamas has been designated as an FTO since October 1997. Yet, recognising the potential for this designation to impact much-needed humanitarian aid in Gaza following the events of October 2023, OFAC issued a Compliance Communiqué in November 2023 to clarify ‘that US sanctions do not stand in the way of legitimate humanitarian assistance to the Palestinian people’ and that the NGO general licences^[17] ‘authorise all transactions that may otherwise be prohibited in support of certain NGO non-commercial, humanitarian-related activities, subject to certain conditions’, including provision of life-saving medical assistance to civilians in Gaza at a hospital staffed or occupied by Hamas.^[18]

CHALLENGES EXACERBATED BY ‘DE-RISKING’

As highlighted above, NGOs operating around the world must navigate a complex and ever-expanding web of sanctions restrictions. Even where an NGO’s work is permitted, either because the activity is outside the scope of relevant sanctions or is eligible for

various exemptions and licences (described further below), organisations face significant challenges as a result of the continued trend of compliance and ‘de-risking’.

In the fourth edition of *The Guide to Sanctions*, the United Nations’ special rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights, Alena Douhan, highlighted the negative effects of de-risking and overcompliance on humanitarian aid. Per the special rapporteur’s definition, the term overcompliance encompasses ‘self-imposed restraints beyond the restrictions mandated by sanctions, applied as a part of the de-risking process (to minimise the potential for inadvertent violations or to avoid reputational or other business risks)’.^[19] In the sanctions world, de-risking is most often discussed in the context of financial institutions terminating or restricting business relationships for broad categories of clients, as opposed to a more targeted, risk-based approach. Examples of de-risking may include where a financial institution blocks all transactions with a sanctioned jurisdiction, entity or individual, even where humanitarian exemptions would authorise certain transactions.^[20]

The factors driving de-risking by financial institutions are multi-faceted and cannot be easily boiled down to any one consideration. From a regulatory risk perspective, the fact that US sanctions can carry significant civil penalties on a strict liability basis (i.e., without requiring any culpable mental state such as knowledge) is likely a significant contributor. Moreover, foreign financial institutions may risk liability under traditional US ‘secondary sanctions’ for engaging in enumerated transactions with certain targeted persons or sectors, including transactions with no ostensible US nexus. As sanctions proliferate at an unprecedented pace, and where the jurisdictional reach of these restrictions continues to extend, the cost associated with maintaining a programme that can take a more nuanced approach to sanctions compliance may be deemed too high by financial institutions as a matter of profitability or risk appetite. Beyond enforcement risk, financial institutions are faced with reputational risks for conducting business with sanctioned parties or in sanctioned jurisdictions.

The special rapporteur and NGOs have warned of significant consequences that overcompliance measures can have on the effective and timely delivery of humanitarian support. The special rapporteur has described how such measures may prevent, delay or increase the costs associated with the supply of humanitarian goods and services to sanctioned jurisdictions, including food and medicine.^[21] These measures can also impede NGOs’ ability to transfer funds to sanctioned jurisdictions, including to pay employees on the ground in those regions.^[22] Human Rights Watch reported, for example, that one aid organisation had 12 bank accounts closed, seemingly because the group had ‘Syria’ in its name.^[23] A 2017 study found that an estimated two-thirds of US non-profit organisations working internationally experience banking problems, including delays of wire transfers, documentation requests and increased fees.^[24] Moreover, a US Government Accountability Office survey found that even implementing partners of State Department and the US Agency for International Development humanitarian assistance projects faced financial access issues, despite having the backing of the US government.^[25]

EXPANDED LICENSING AND OTHER EFFORTS TO COUNTERACT OVER-COMPLIANCE

The US Department of the Treasury’s 2023 De-Risking Strategy is in many ways the culmination of the work of NGOs and others who have continued to shine a spotlight on the adverse impact of overcompliance. In the De-Risking Strategy, the US Treasury acknowledged how de-risking undermines several US government policy objectives,

including by preventing NGOs 'from carrying out activities critical to the provision of legitimate humanitarian assistance'.^[26] The US Treasury has emphasised in various publications that US sanctions are not intended to stand in the way of humanitarian aid. In 2021, the US Treasury conducted a review to identify steps to 'modernize' sanctions, aimed at ensuring they remain an effective national security and foreign policy tool.^[27] Among the key recommendations coming out of the review was that the US Treasury should calibrate sanctions to mitigate unintended consequences, including by addressing 'more systematically the challenges associated with conducting humanitarian activities through legitimate channels in heavily sanctioned jurisdictions'.^[28]

As the trend of de-risking has continued and the US government has recognised the range of potential detrimental effects, the US Treasury has increasingly undertaken efforts to counteract the impact of overcompliance on humanitarian assistance. Central to these efforts, as described below, have been the expansion of general licences and increased guidance and advisories on how these licensing regimes are intended to facilitate the work of NGOs.

IMPLEMENTATION OF UN SECURITY COUNCIL RESOLUTION 2664

The development and implementation of UN Security Council Resolution (UNSCR) 2664, has been a key component of these measures. In December 2022, the UN Security Council adopted UNSCR 2664, which provided a humanitarian activities exemption to the asset freeze measures imposed by the UN sanctions regimes.^[29] Specifically, the Resolution provided that the provision, processing or payment of funds, other financial assets or economic resources or the provision of goods and services necessary to ensure the timely delivery of humanitarian assistance or to support other activities that support basic human needs are permitted and are not a violation of the UN-imposed asset freezes.^[30]

The United States and Ireland co-led the development of UNSCR 2664. Prior to its implementation, most US sanctions programmes contained stand-alone general licences authorising certain NGO activities. Implementation of UNSCR 2664 provided OFAC with an opportunity to consolidate these general licences across US sanctions programmes. In December 2022, OFAC issued or amended general licences across 30 sanctions programmes to ease the delivery of humanitarian aid and to ensure a baseline of authorisations for the provision of humanitarian support across many sanctions programmes. The general licences issued or amended provided authorisations in four categories:

- the official business of the US government;
- the official business of certain international organisations and entities, such as the United Nations or the International Red Cross;
- certain humanitarian transactions in support of NGOs' activities, such as disaster relief, health services, and activities to support democracy, education, environmental protection and peacebuilding; and
- the provision of agricultural commodities, medicine and medical devices, as well as replacement parts and components and software updates for medical devices, for personal, non-commercial use.

OFAC general licences are self-executing, meaning that persons who determine that their activities are within the scope of the authorised activities described in the general licences

may proceed without further assurance from OFAC. Following the publication of the general licences, NGOs may provide humanitarian assistance in environments that are affected by targeted sanctions programmes (including Nicaragua, Iraq, Somalia, South Sudan and Yemen, among others) without the need for a specific licence from OFAC, so long as they are not knowingly transferring funds to blocked persons or any entity of which 50 per cent or more is owned by blocked persons, or engaging in other specifically prohibited activities, except for payments for taxes, fees or import duties, or the purchase or receipt of permits, licences or public utility services if ordinarily incident and necessary to activities authorised by the general licences.

Moreover, OFAC authorised US financial institutions to operate accounts, including processing funds transfers, for persons engaging in activities authorised by the general licences. In assessing whether a particular transaction is in compliance with such general licences, OFAC authorised financial institutions to reasonably rely on the information available to them in the ordinary course of business, provided that the financial institution does not know or have reason to know that the transaction is outside the scope of the applicable general licence.^[31] OFAC emphasised that non-US persons, including NGOs and other entities, as well as foreign financial institutions facilitating or assisting these activities, do not risk exposure to US sanctions for engaging in or facilitating transactions that are otherwise exempt or authorised for US persons pursuant to these general licences.^[32]

Providing a baseline humanitarian exemption that applies broadly across sanctions programmes could help decrease the burden on financial institutions looking to understand their regulatory obligations in processing transactions on behalf of NGOs. In addition to the baseline humanitarian licences, OFAC has also issued additional, temporary licences to respond to specific disasters. For example, in 2023, OFAC issued a general licence to facilitate humanitarian efforts in response to the devastating earthquake in Syria, along with corresponding guidance.^[33]

INCREASED GUIDANCE ON PROVISION OF HUMANITARIAN ASSISTANCE

OFAC has also published a range of guidance on the provision of humanitarian assistance to regions that are heavily sanctioned, to provide greater clarity to NGOs, financial institutions and other parties as to which activity is authorised under different sanctions regimes. This guidance includes, for example, a 2023 Fact Sheet regarding the general licences issued in response to UNSCR 2664, along with corresponding frequently asked questions (FAQs) published by OFAC.^[34]

In this guidance, OFAC emphasises that its long-standing policy is to issue general licences authorising transactions in support of humanitarian relief efforts.^[35] Where transactions are not authorised pursuant to a general licence or otherwise exempt, OFAC notes that it has long had a favourable specific licensing policy supporting the provision of humanitarian assistance notwithstanding economic sanctions, and prioritises requests for licences to provide humanitarian assistance and endeavours to review such applications expeditiously.^[36]

OFAC acknowledges that some areas may be dominated by armed groups under circumstances where the group's leaders have been designated by OFAC but the group as a whole has not been designated, and clarified that an entity that is commanded or controlled by an individual designated by OFAC is not considered blocked by operation of law. Therefore,

payments made to non-designated individuals or entities under the command or control of an SDN do not, in and of themselves, constitute prohibited activity.^[37]

In areas dominated by designated armed entities, for example those listed as SDGTs, OFAC cautions not to provide financial, material, technological or other services to or in support of the designated entity. In circumstances involving a dangerous and highly unstable environment combined with urgent humanitarian need, OFAC recognises that some humanitarian assistance may unwittingly end up in the hands of members of a designated group. OFAC clarified that such incidental benefits are not a focus for OFAC sanctions enforcement.^[38]

Finally, OFAC notes that if an NGO is confronted with a situation in which, in order to provide urgently needed humanitarian assistance, the NGO learns that it must provide funds or material support directly or indirectly to an SDN group that is necessary and incidental to the provision of humanitarian assistance, the NGO should reach out to OFAC directly. OFAC and its interagency partners will work with the NGO to address any such issues on a case-by-case basis in an expeditious manner.^[39]

In addition to this overarching guidance, OFAC has increasingly published guidance to detail the various general licences that authorise the flow of humanitarian assistance in the context of specific emergencies. Recent examples include OFAC's February 2024 guidance, issued after the designation of Ansarallah, in light of the humanitarian crisis in Yemen.^[40] With respect to certain authorised transactions between NGOs and sanctioned parties, the guidance explicitly notes that US financial institutions 'may rely on the statements of their customers that such transactions are authorised unless they know or have reason to know a transaction is not authorised'.^[41] Such statements appear designed to provide comfort to financial institutions and to discourage de-risking.

ROLE OF NGOS IN IDENTIFYING SANCTIONS TARGETS

Despite the numerous challenges that sanctions pose to the work of NGOs, as outlined in this chapter, it is worth noting that sanctions can also present an opportunity for NGOs to advance their missions and advocate for certain policy goals. The identification of OFAC's sanctions targets is the result of a thorough interagency process, bringing together information and perspectives from various corners of the US government. Further, OFAC may look to 'open source' information from external actors with expertise in a certain region or subject matter area for input on potential sanctions designations.

The ability of NGOs to influence this process has become particularly pronounced since the advent of the Global Magnitsky Sanctions programme. Enacted in 2016, the Global Magnitsky Human Rights Accountability Act authorises the US President to impose sanctions on those identified as engaging in human rights violations or corruption.^[42] The statute itself requires that NGOs are given the opportunity to participate in the implementation, directing the US President to consider 'credible information obtained by . . . [NGOs] that monitor violations of human rights' in identifying sanctions targets.^[43] Since the issuance of EO 13818 and the creation of OFAC's corresponding Global Magnitsky Sanctions programme in 2017, NGOs appear to be playing a key role in identifying sanctions targets. In 2021 testimony before the US Congress, Human Rights First president and chief executive Michael Breen described how his organisation had worked with a network of NGOs to submit documentation to the US Treasury and US State Department concerning more than 400 individuals or entities responsible for human rights abuses or corruption.^[44] Mr Breen

asserted that approximately one-third of Global Magnitsky sanctions designations at that time had 'a basis in recommendations' from that NGO coalition.^[45] This statistic highlights how sanctions may provide an avenue for NGOs to further their human rights missions, rather than only presenting a roadblock to their work.

PRACTICAL CONSIDERATIONS FOR COMPLIANCE

The US government has repeatedly emphasised that sanctions are not targeted at innocent civilians or otherwise designed to prevent legitimate humanitarian assistance. Despite this emphasis, the proliferation of sanctions restrictions has created a complicated compliance environment for NGOs and the institutions on which NGOs rely to carry out humanitarian-related activities. The standardisation of general licences authorising humanitarian work across OFAC sanctions programme, along with an increase in guidance regarding the availability of such authorisations, are necessary efforts to counteract the trend of de-risking and its negative impact on the ability of NGOs to go about their business. Developments for several years have reflected an increase in attention and sensitivity to the significant, unintended consequences sanctions may pose to NGOs operating in high-risk jurisdictions around the world.

Even with the expansion of available licences and exemptions, however, NGOs subject to US jurisdiction must comply with US sanctions and there are limitations to these authorisations. Under the general licences amended and added in 2022, for example, NGOs are not generally authorised to knowingly transfer funds to sanctioned persons, except with respect to certain categories of payments. Accordingly, risk-based sanctions compliance procedures are still necessary to ensure any transactions and other activity fall within the scope of the relevant authorisations. Such procedures include, for example, restricted party screening and due diligence on third parties to identify any counterparties that are subject to blocking sanctions or other restrictions that would make the NGO ineligible for a licence or exemption. Where an activity falls outside the scope of available authorisations, NGOs may also request a specific licence from OFAC on a case-by-case basis. Although specific licence requests can be a time-consuming process, OFAC has made clear that its policy is to prioritise licence applications that are related to humanitarian activity.

Further, OFAC's guidance to NGOs acknowledges that, due to the unpredictable environments in which NGOs often operate and the urgent nature of humanitarian work, there may be occasions where humanitarian assistance unintentionally ends up in the hands of a sanctioned party.^[46] OFAC has emphasised that these 'incidental benefits' are not a sanctions enforcement priority.^[47] Where NGOs are confronted with situations where there is an urgent need to engage in activity that may be prohibited by US sanctions and not subject to authorisation, OFAC guidance encourages organisations to contact it directly and commits to working towards a swift resolution.^[48]

ENDNOTES

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^[2] 'US persons' is a term defined fairly universally by US Department of the Treasury's Office of Foreign Assets Control (OFAC) to include 'any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States'. See, e.g.,

Code of Federal Regulations (CFR), Title 31, § 585.313; 31 CFR § 536.316. The US Cuba sanctions programme and certain limited provisions of the Iran sanctions programme also extend OFAC jurisdiction to foreign entities owned or controlled by US persons (i.e., foreign subsidiaries). See 31 CFR, § 515.329; § 560.215.

[3] A US nexus can be found where activity involves a US person, the United States or the US financial system (including transactions denominated in US dollars that require clearing or settlement in the US financial system) or, in some programmes, goods or services of US origin.

[4] See United States Code (USC), Title 50, § 1705(a). The International Emergency Economic Powers Act makes it unlawful for any 'person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under this [the statute]'.

[5] See 31 CFR parts 515 (Cuba), 560 (Iran), 510 (North Korea), 569 (Syria), 589 (Crimea), and Executive Order 14065 (Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts To Undermine the Sovereignty and Territorial Integrity of Ukraine).

[6] See, e.g., 15 CFR 746.9.

[7] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, Title III, Subtitle A – Prohibition on International Terrorist Fundraising (Apr. 24, 1996), §§ 302–303; AEDPA § 302, 18 USC § 2339B(c)(4).

[8] 18 USC § 2339B(a)(1).

[9] 18 USC § 2339B(g)(4).

[10] United States v. Al Kassar, 660 F.3d 108, 129 (2d Cir. 2011).

[11] 18 USC § 2339A(a).

[12] United States v. Hassan, 742 F.3d 104, 112 (4th Cir. 2014).

[13] See US Dep't of State, Press Statement, 'Terrorist Designation of Ansarallah in Yemen' (10 January 2021), available at <https://2017-2021.state.gov/terrorist-designation-of-ansarallah-in-yemen/index.html>; see also OFAC, Recent Actions, Yemen-related Designations Updates 19 January 2021), available at <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210119>.

[14] Jake Sullivan (@jakejsullivan), Twitter (now known as 'X') (16 January 2021, 4:07 PM), <https://twitter.com/jakejsullivan/status/1350550304333438981>.

[15] Antony Blinken, Nominee for US Sec'y of State, Remarks before the Senate Foreign Relations Comm., C-SPAN (Jan. 19, 2021), <https://www.c-span.org/video/?507953-1/secretary-state-nominee-antony-blinken-testifies-confirmation-hearing>.

[16] GL 13, OFAC (Jan. 25, 2021), available at: https://home.treasury.gov/system/files/126/ct_gl13.pdf.

[17] 31 CFR §§ 594.520, 597.516.

[18] OFAC, Compliance Communiqué, 'Guidance for the Provision of Humanitarian Assistance to the Palestinian People' (14 November 2023), available at <https://ofac.treasury.gov/media/932311/download?inline>.

[19] Alena Douhan (Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights), 'Secondary sanctions, overcompliance and human rights', UN Doc. A/78/196 (4 September 2023).

[20] See Alena Douhan (Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights), 'Guidance Note on Overcompliance with Unilateral Sanctions and its Harmful Effects on Human Rights', <https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures/resources-unilateral-coercive-measures/guidance-note-overcompliance-unilateral-sanctions-and-its-harmful-effects-human-rights>.

[21] *ibid.*

[22] *ibid.*

[23] 'Questions and Answers: How Sanctions Affect the Humanitarian Response in Syria', Human Rights Watch (June 22, 2023), <https://www.hrw.org/news/2023/06/22/questions-and-answers-how-sanctions-affect-humanitarian-response-syria>.

[24] See Sue E Eckert, Kay Guinane and Andrea Hall, 'Financial Access for US Nonprofits', Charity & Security Network (February 2017), [https://www.charityandsecurity.org/system/files/FinancialAccessFullReport_21_per_cent20\(2\).pdf](https://www.charityandsecurity.org/system/files/FinancialAccessFullReport_21_per_cent20(2).pdf).

[25] US Government Accountability Office, 'Humanitarian Assistance: USAID Should Improve Information Collection and Communication to Help Mitigate Implementers' Banking Challenges', GAO-18-669 (September 2018), <https://www.gao.gov/products/gao-18-669>.

[26] US Dep't of the Treasury, 'De-Risking Strategy' (April 2023), https://home.treasury.gov/system/files/136/Treasury_AMLA_23_508.pdf.

[27] US Dep't of the Treasury, 'The Treasury 2021 Sanctions Review' (October 2021), <https://home.treasury.gov/system/files/136/Treasury-2021-sanctions-review.pdf>.

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