

Davis Polk

U.S. Sanctions and anti-money laundering developments

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Presenters



Uzo Asonye

Uzo is a partner in Davis Polk's Litigation Department, based in Washington, D.C. He has spent more than a decade prosecuting complex financial crimes and public corruption. He advises companies and individuals in connection with government, grand jury and internal investigations, and represents clients in criminal and civil trials. He has deep experience in matters involving insider trading, market manipulation, public corruption and other areas of financial fraud. He was previously the Acting Chief of the Financial Crimes and Public Corruption Unit in the U.S. Attorney's Office for the Eastern District of Virginia and served in the Office of Special Counsel Robert Mueller.



Margarita Clarens

Margarita is counsel in Davis Polk's Litigation Department, based in New York. Her practice focuses on internal investigations and criminal and regulatory enforcement matters, in areas such as sanctions, anti-money laundering, fraud, and the FCPA. She also advises clients on related governance and compliance matters.



Paul Marquardt

Paul is a partner in Davis Polk's Financial Institutions Group, based in Washington, D.C. He advises a wide range of clients around the world on the application of U.S. sanctions laws and in export control, anti-money laundering and anti-corruption matters. His practice includes diligence, advisory, compliance, internal investigations and enforcement matters. Paul has more than two decades of experience in national security reviews by CFIUS and other foreign direct investment regimes, and in related issues. He has broad transactional experience, including with respect to mergers and acquisitions, joint ventures, and general corporate matters.

Presenters (cont.)



Will Schisa

Will is counsel in Davis Polk's Financial Institutions Group and economic sanctions and national security practice, based in Washington, D.C. He has extensive experience with the economic sanctions laws and regulations administered by the Treasury Department's Office of Foreign Assets Control, having served for nearly 10 years as an attorney in the Office of the Chief Counsel, Foreign Assets Control, the legal office that supports OFAC.



Daniel Stipano

Dan is a partner in Davis Polk's Financial Institutions Group, based in Washington, D.C. His practice includes representing clients in state, federal and foreign regulatory enforcement actions, and providing assistance in establishing, maintaining and monitoring Bank Secrecy Act and anti-money laundering compliance programs. Dan's extensive regulatory and enforcement experience includes more than 30 years at the Office of the Comptroller of the Currency, where he served as Deputy Chief Counsel, and Director of the OCC's Enforcement and Compliance Division.

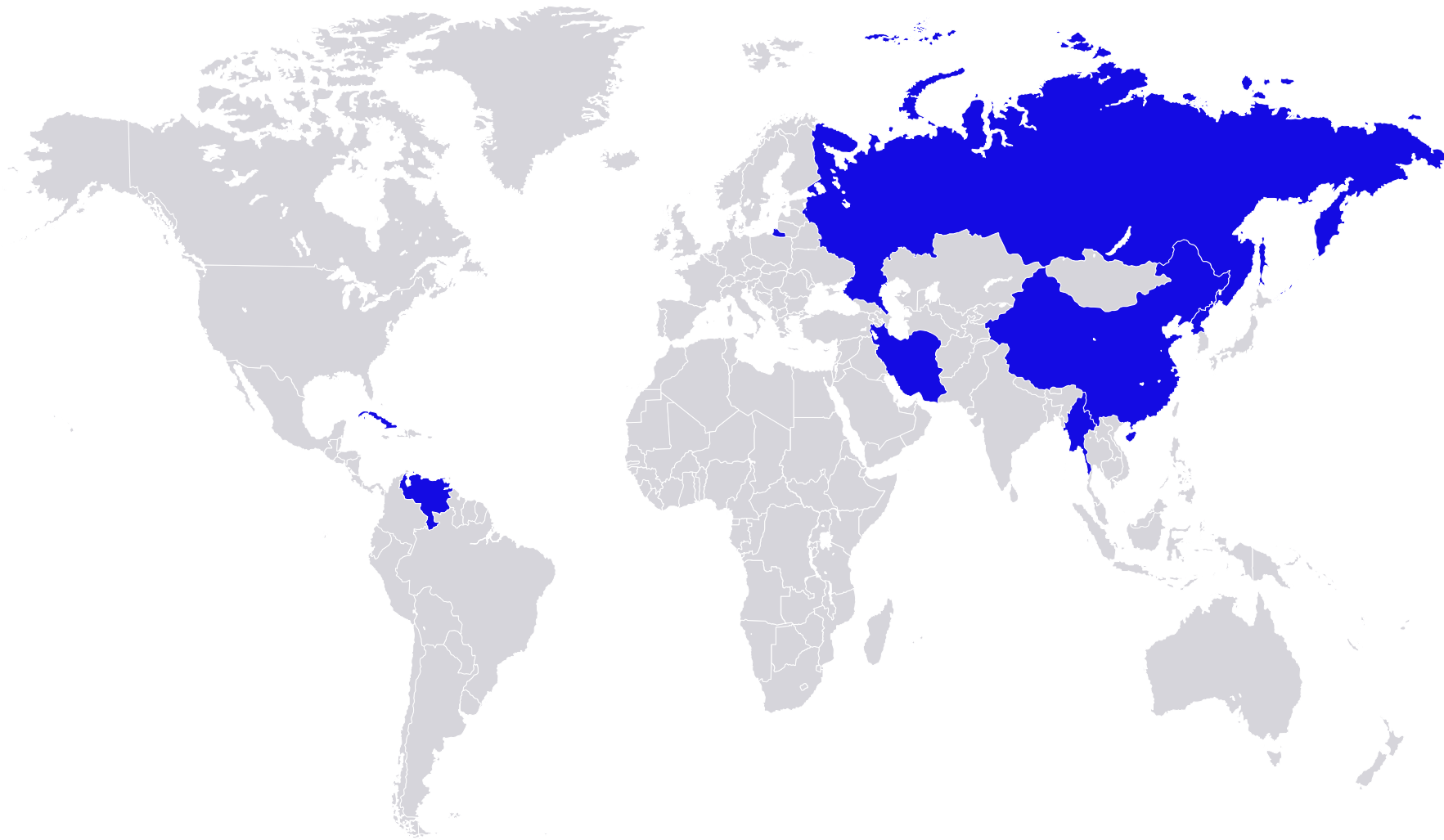
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Update on U.S. sanctions programs

01

Update on U.S. sanctions programs



Sanctions against Russia in response to its invasion of Ukraine

- The United States, United Kingdom, European Union, and other allies have imposed sweeping sanctions, export controls restrictions and other measures targeting Russia beginning in February 2022 in response to the invasion of Ukraine
 - However, Russia is not subject to comprehensive territorial sanctions—many activities are either not prohibited or authorized by general license
- The sanctions response to Russia's invasion of Ukraine is unprecedented in complexity, pace of change, and scope of multilateral coordination
- While the sanctions framework has become somewhat more stable, key compliance challenges remain:
 - Lack of complete alignment among measures in the US, EU, UK, and other jurisdictions
 - Novel prohibitions imposed without timely or sufficient guidance
 - De-risking and market conditions chilling even permissible activities

Russia

Overview of key E.U. and U.K. measures

- Trade and financial restrictions on separatist regions within Ukraine
- U.K. blocking sanctions against major Russian state-owned financial institutions, including VEB, Sberbank, and VTB Bank
- E.U. and U.K. blocking sanctions against a range of Russian companies, political and military leaders, and oligarchs
- Prohibition on transactions involving the Central Bank of Russia, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation
- U.K. restrictions on Russian sovereign debt placements in London and E.U. restrictions on trading in Russia government bonds
- Prohibitions on the importation of certain goods from Russia

Russia

Overview of key U.S. measures

- Territorial sanctions on separatist regions within Ukraine
- Blocking sanctions against major Russian state-owned financial institutions, including VEB, PSB, Sberbank, and VTB Bank, as well as a range of Russian companies, political and military leaders, and oligarchs
- Prohibition on transactions involving the Central Bank of Russia, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation
- Prohibitions on dealings in new Russian sovereign debt and new debt or equity of certain state-owned entities
- New export licensing requirements for most items listed on the Commerce Control List, as well as expansion of the Foreign Direct Product Rule to restrict Russian access to certain technologies, including, among other things, semiconductors, computers, telecommunications hardware, lasers, and sensors
- Prohibitions on the importation of certain goods from Russia

Overview of key U.S. measures – “new investment” restrictions

- First applied to Russia’s energy sector in March 2022, then expanded to all new investment in April
- Also extend to facilitation of transactions by non-U.S. persons
- June 2022 guidance significantly expanded the scope of the new investment prohibitions
- “New investments” are the commitment (after the effective date of the sanctions) of capital or other assets for the purpose of generating returns or appreciation and include:
 - The acquisition of debt or equity securities of any Russian company or the Russian sovereign, including secondary market transactions in which no funds flow to the issuer;
 - The purchase or acquisition of real estate in Russia, other than for noncommercial, personal use;
 - Entry into an agreement requiring the commitment of capital or other assets for the establishment or expansion of projects or operations in Russia, including the formation of joint ventures or other corporate entities in Russia;
 - Entry into an agreement providing for the participation in royalties or ongoing profits in Russia;
 - The lending of funds to persons located in Russia for commercial purposes, including when such funds are intended to be used to fund a new or expanded project or operation in Russia; and
 - The purchase or acquisition of rights to natural resources or exploitation thereof in Russia
- Divestment and “maintenance” of pre-sanctions investments is not prohibited, but significant interpretive questions remain

Overview of key U.S. measures – services determination

- Effective June 7, 2022, the Services Determination prohibits the exportation, reexportation, sale, or supply of accounting, trust and corporate formation, or management consulting services from the US or by a U.S. person to any person located in the Russian Federation
 - Provision to “any person located in the Russian Federation” includes provision outside of Russia where the benefit is received in Russia
 - Provision of services to a Russian employer or parent company by a U.S. person or within U.S. jurisdiction would be captured
- Carve-out for services provided to entities owned or controlled by U.S. persons, or in connection with the wind-down or divestment or a non-Russian controlled entity in Russia
- Prohibition does not apply to software related to accounting, management consulting, or trust and corporate formation, so long as it is not paired with prohibited services

Russia

Overview of key U.S. measures – broad definition for each category of services

- Accounting: services related to the measurement, processing, and evaluation of financial data about economic entities
 - Includes tax preparation and filing
- Trust and corporate formation: services related to assisting persons in forming or structuring legal persons, such as trusts and corporations; acting or arranging for other persons to act as directors, secretaries, administrative trustees, trust fiduciaries, registered agents, or nominee shareholders of legal persons; providing a registered office, business address, correspondence address, or administrative address for legal persons; and providing administrative services for trusts
 - Includes administration and maintenance of existing trusts, serving as voting trustees on behalf of Russian persons or for shares in Russian companies
- Management consulting: services related to strategic business advice; organizational and systems planning, evaluation, and selection; development or evaluation of marketing programs or implementation; mergers, acquisitions, and organizational structure; staff augmentation and human resources policies and practices; and brand management
 - Includes executive search and vetting services

Other sanctions developments

- Minimal changes in other sanctions programs over the past 12 months, reflective of OFAC focus and commitment of resources to Russia sanctions
 - CMIC Sanctions: Divestment period for initial tranche of CMIC companies named in EO 14032 expired in early June 2022, with new OFAC guidance confirming that holding such securities after the divestment date (as well as receipt of cash dividends and stock splits) remains permissible, but that dividend reinvestment is prohibited
 - Iran: Negotiations to bring Iran and the US back into compliance with the JCPOA remain at an impasse
 - Cuba: Minor relaxation of travel and remittance restrictions, with most Trump administration tightening remaining in place

Other sanctions developments: Virtual currency

- In October 2021, OFAC released its Sanctions Compliance Guidance for the Virtual Currency Industry
 - The Sanctions Compliance Guidance made clear that anyone engaging in convertible virtual currency (CVC) activities in the U.S., or that involve U.S. individuals or entities, should be aware of OFAC sanctions requirements
 - OFAC encourages all businesses in the convertible virtual currency industry, including technology companies, exchangers, administrators, miners, and wallet providers to develop, implement, and routinely update, a tailored, risk-based sanctions compliance program “prior to providing services to customers.” Such compliance programs generally should include sanctions list and geographic and IP screening and other appropriate measures as determined by the company’s unique risk profile.
- In September 2021, OFAC officials issued an advisory warning companies of potential sanctions risks associated with ransomware payments in connection with malicious cyberattacks and other cyber-related activities

Update on Anti-Money Laundering Act of 2020 and other AML initiatives

02

Anti-Money Laundering Act of 2020

The Anti-Money Laundering Act of 2020 (AMLA) was enacted as part of the National Defense Authorization Act for Fiscal Year 2020 and includes the most substantial changes to U.S. AML law since the USA PATRIOT Act. Among other things, the AMLA:

- Establishes new beneficial ownership reporting requirements for certain entities doing business in the US along with a beneficial ownership registry;
- Requires the U.S. Treasury to establish National AML and CFT Priorities;
- Modernizes the statutory definition of “financial institution” to include entities that provide services involving “value that substitutes for currency,” including stored value and virtual currency instruments;
- Streamlines and modernizes BSA and AML requirements and regulations;
- Improves coordination and cooperation among international, federal, state, and tribal AML law enforcement agencies; and
- Expands DOJ / Treasury investigative power, including the ability to subpoena non-U.S. banks

Significant AML rulemakings

Although FinCEN has not completed many of the rulemakings along the timelines prescribed in AMLA, it has made progress with respect to starting the rulemaking process for many key regulatory milestones

Real estate transactions

- On December 6, 2021, FinCEN announced an advanced notice of proposed rulemaking (ANPRM) to solicit public comment on a proposed rule that would address the vulnerability of the U.S. real estate market to money laundering and other illicit activity
- In the ANPRM, FinCEN considers, among other things, reporting requirements and broader regulations that would require certain persons involved in real estate transactions to file SARs and establish AML/CFT compliance programs

Beneficial ownership registry

- On December 7, 2021, FinCEN released a notice of proposed rulemaking (NPR) on beneficial ownership, which would require companies established in the United States, and foreign companies registered to do business in the United States, to report their beneficial owners to FinCEN
- Notably, the NPR provides a significantly broader definition of “beneficial owner” than the Customer Due Diligence Rule

Significant AML rulemakings

SAR sharing pilot program

- On January 24, 2022, FinCEN released an NPR that would establish a limited-duration pilot program that would allow financial institutions to share suspicious activity reports (SARs) with their foreign business units
- The BSA prohibits financial institutions (and their directors, officers, employees, and agents) from notifying any person involved in a suspicious transaction that a SAR was filed in connection with the transaction. FinCEN has construed this confidentiality provision as generally prohibiting a depository institution from disclosing a SAR, or any information that would reveal the existence of a SAR, to any person or entity, subject to certain narrow exceptions
- AMLA requires the Secretary of the Treasury to establish a pilot program that permits financial institutions to share SARs and related information with their foreign branches, subsidiaries, and affiliates for the purposes of combating illicit finance risks

Significant AML rulemakings

OCC SAR regulations

- On March 16, 2022, the OCC amended its SAR regulations to allow the OCC to issue exemptions from those regulations. Although neither the OCC's SAR regulations nor FinCEN's SAR regulations expressly address exemptions, FinCEN has the general authority to grant exemptions from the requirements of the BSA, which includes granting exemptions under its SAR reporting regulations.

No-action letters

- On June 30, 2021, FinCEN issued a report concluding that a no-action letter process concerning the application of BSA/AML to specific conduct would complement its current forms of regulatory guidance and relief
- On June 3, 2022, FinCEN issued an ANPRM to solicit comments on questions relating to the implementation of a no-action letter process

Significant AML developments

AML regulators, including FinCEN and the Financial Action Task Force, have also released major policy guidance over the last year

National AML/CFT priorities

- On June 30, 2021, FinCEN released the first AML/CFT Priorities, as required under the AMLA
- The Priorities are high-level, and reflect longstanding AML/CFT concerns that FinCEN and other AML/CFT regulators have previously identified
- The Priorities are: corruption, cybercrime, terrorist financing, fraud, transnational criminal organization activity, drug trafficking, organization activity, human trafficking and human smuggling, and proliferation financing
- Banks have until the effective date of the final implementing regulations to incorporate the Priorities, but regulators have encouraged financial institutions to begin preparing now

Significant AML developments

On October 1, 2021, the Financial Action Task Force (FATF) released updated guidance on the application of FATF's recommendations to virtual assets and virtual asset service providers (VASPs). The guidance reflects international standards and is not legally binding but will almost certainly influence U.S. and state regulators.

- The FATF's guidance on VASPs clarifies that:
 - When a central governance or developer body maintains control or influence over the administration and function of a stablecoin, that central body likely qualifies as a VASP, particularly if “the governance body carries out other functions in the stablecoin arrangement.”
 - Depending on their specific characteristics, FATF does not generally consider non-fungible tokens to be virtual assets, though the determination must be made on a case-by-case basis
 - Decentralized or distributed DeFi applications (DApps) do not qualify as VASPs because FATF's recommendations do not apply to underlying technology or software. Still, creators, owners, and operators who control or maintain influence in the arrangement of DApps may fall under the definition of VASP
 - The definition of VASP does not typically cover developers or providers of unhosted wallets, particularly when their only function is to develop and/or sell the software or hardware

Significant AML developments

Ransomware advisory

- On November 8, 2021, FinCEN updated and replaced its Advisory on Ransomware and the Use of the Financial System to Facilitate Ransom Payments (the Advisory)
- The Advisory notes that FinCEN has now designated ransomware attacks as “situations involving violations that require immediate attention,” which imposes heightened reporting requirements on financial institutions

RFI to modernize AML framework

- On December 14, 2021, FinCEN issued a request for information (RFI), seeking comments and suggestions on ways to streamline, modernize and update the U.S. AML/CFT regime
- The RFI is part of FinCEN’s review of BSA regulations and related guidance, as required by AMLA

Risk assessments

- On March 1, 2022, the Treasury Department published the 2022 National Risk Assessments on Money Laundering, Terrorist Financing and Proliferation Financing (together, the NRAs)
- The NRAs provide Treasury’s analysis of the most significant illicit finance threats, vulnerabilities and risks to the U.S. financial system

Significant AML developments

National illicit finance strategy

- On May 13, 2022, the Treasury Department published the 2022 National Strategy for Combatting Terrorist and Other Illicit Financing, which notes potential gaps in the U.S. AML framework with respect to real estate transactions, trusts, trusts and company service providers, attorneys, investment advisors and virtual asset-related activities
- Treasury has also stated its intent to revisit its 2015 proposed rule that would have imposed AML program requirements on investment advisors

Recent enforcement trends and developments

03

Recent enforcement actions at a glance

Sanctions actions in 2020 and 2021 to date

- OFAC continues to act as the primary sanctions enforcer
 - 2021: 20 civil penalties totaling over \$20 million
 - 2022 to date: 8 civil penalties, and 1 Finding of Violation, totaling over \$12 million
- DOJ has signaled that sanctions compliance will become a key Department priority

AML actions in 2020 and 2021 to date

- Variety of regulatory agencies are bringing enforcement actions
- DOJ actions have focused on individuals and crypto-related companies

Recent enforcement actions at a glance

Significant takeaways from recent enforcement actions

- Sanctions compliance emerging as key DOJ priority
- Emphasis on Russia-related sanctions evaders
- Effective compliance programs remain a key focus
- Expansive jurisdictional theories continue to be employed to non-U.S. companies and conduct
- Actions against individuals, including foreign individuals, remain prevalent
- Continued focus on crypto- and digital currency-related companies

Heightened focus on sanctions compliance

Increase in DOJ investigations

- As of October 2021, DOJ had about 150 open sanctions and export control investigations, which then-Principal Associate Deputy Attorney General John Carlin described as a “significant increase over the last couple of years” and to “expect that trend to continue”

Sanctions as the “new FCPA”

- In April 2022 speech, Deputy Attorney General Lisa Monaco noted the centrality of sanctions enforcement to DOJ’s priorities and its national security efforts, describing sanctions as being the “new FCPA”
- Parallels between FCPA and sanctions enforcement include:
 - Application to expanding number of industries
 - Increasingly multilateral enforcement regime
 - Reward to companies that identify and voluntarily disclose misconduct to DOJ

“We are pouring resources into sanctions enforcement, and you have seen and will continue to see results.”

- Lisa Monaco, Deputy Attorney General (June 16, 2022)

Emphasis on Russia-related sanctions

To date, DOJ efforts have generally focused on sanctioned individuals (e.g., oligarchs)

- Criminal charges brought against Russian SDN who allegedly transferred \$10 million in U.S. bank to business associate in Greece (Malofeyev)
- First seizure warrants based on commerce regulations governing the reexport of U.S. aircraft to Russia (Abramovich), as well as forfeiture actions brought to seize oligarchs' luxury assets alleged to have been supported and maintained using U.S. dollar payments (Kerimov, Vekselberg)

But we can expect DOJ will scrutinize individuals and companies providing or facilitating services for Russian sanctioned entities

- Mandate of new DOJ Task Force KleptoCapture includes investigating and prosecuting violations of Russia-related sanctions
- Criminal indictment brought against U.S. person for providing services to Russian oligarch SDN (Hanick)

Regulators continue to enforce pre-existing and new Russia-related sanctions

- April 2022 OFAC enforcement action against a company for dealing in new debt for a Russian state-owned company (S&P Global)

Importance of effective compliance programs continues

Enforcement actions continue to emphasize the need to test and monitor compliance-related software

- SEC: Following switch to new AML transaction monitoring system, which was not adequately implemented or monitored, broker-dealer failed to investigate suspicious activity and thereby failed to timely file SARs (Wells Fargo Advisors)
- OFAC: Deficiencies in sanctions screening system were not identified through testing and auditing (Payoneer)

But technical solutions need to be supported with adequate training and resources

- OFAC: Reviewer of sanctions screening alert did not escalate near-match, in contravention of bank procedure (TD Bank)
- OFAC: Company's lack of sanctions compliance training connected to incorrect sanctions interpretation (NewTek)
- FinCEN, OCC: Due to understaffing, AML compliance office was unable to review supporting documents underlying alerts generated by AML monitoring system (CommunityBank of Texas)

Relying on vendors may not be sufficient to mitigate compliance risk

- OFAC: Vendor-supplied PEP list did not include government employees of sanctioned countries (TD Bank)

Expansive theories of jurisdiction applied to non-U.S. companies and conduct

OFAC continues to employ expansive jurisdictional theories to bring enforcement actions against non-U.S. companies and/or extraterritorial conduct

- Causing U.S. companies to violate sanctions (Alfa Laval Middle East)
- Conduct of non-U.S. subsidiaries, including conduct that does not pass through the U.S. financial system (Newmont; JC Flowers & Co)
- Originating or receiving USD payments (Toll Holdings; Sojitz (Hong Kong))

Criminal actions against foreign individuals continue to be prevalent

DOJ continues to bring actions against individuals, with a focus on foreign individuals

- DPA against foreign CFO for bank fraud based in part on statements relating to sanctions compliance (Meng)
- Indictment brought against foreign individuals alleged to have conspired to provide cryptocurrency and blockchain services to North Korea (Benos and Emms); related conviction of U.S. co-conspirator (Griffith)
- Indictment brought against foreign individuals alleged to have helped two Venezuelan officials launder funds corruptly obtained from PdVSA using, in part, the U.S. financial system (Steinmann and Vuteff)

Crypto- and digital currency-related companies remain a focus

U.S. agencies continue to apply sanctions and AML laws to crypto- and digital currency-related companies

- OFAC: First designations of cryptocurrency exchanges (SUEX and Chatex) and virtual currency mixer (Blender.io)
- DOJ: Operator of Darknet-based Bitcoin mixer entered into guilty plea for laundering over \$300 million (Helix)
- DOJ: Founders of Seychelles-incorporated cryptocurrency futures trading platform pleaded guilty to Bank Secrecy Act violations for willfully failing to implement AML and KYC programs (BitMEX)

Appendix: Further reading

Appendix: Further reading

Webinars

U.S. Sanctions and AML Regulation and Enforcement (July 15, 2021),

<https://www.davispolk.com/insights/webinar/recent-developments-us-sanctions-and-aml-regulation-and-enforcement-2021>

2022 FCPA midyear review and looking ahead: Anti-corruption developments and trends (July 20, 2022), <https://www.davispolk.com/insights/webinar/2022-fcpa-midyear-review-and-looking-ahead-anti-corruption-developments-and-trends>

Davis Polk's Resource for Financial Regulatory Reform

<http://www.finregreform.com/>

Related client memoranda and publications

U.S. issues guidance on the bans on new investments in and provision of certain services to Russia (June 27, 2022), <https://www.davispolk.com/insights/client-update/us-issues-guidance-bans-new-investments-and-provision-certain-services>

Appendix: Further reading

Related client memoranda and publications

United States expected to block U.S. dollar payments on Russian sovereign debt (May 20, 2022), <https://www.davispolk.com/insights/client-update/united-states-expected-block-us-dollar-payments-russian-sovereign-debt>

Treasury Department publishes national strategy for combating terrorist and other illicit financing (May 20, 2022), <https://www.davispolk.com/insights/client-update/treasury-department-publishes-national-strategy-combating-terrorist-and>

Sanctions are the new FCPA according to DAG Lisa Monaco (May 9, 2022), <https://www.davispolk.com/insights/client-update/sanctions-are-new-fcpa-according-dag-lisa-monaco>

DOJ announces compliance certifications to be considered as part of corporate criminal resolutions (Mar. 31, 2022), <https://www.davispolk.com/insights/client-update/doj-announces-compliance-certifications-be-considered-part-corporate>

Russia sanctions update - March 21, 2022 (Mar. 21, 2022), <https://www.davispolk.com/insights/client-update/russia-sanctions-update-march-21-2022>

Appendix: Further reading

Related client memoranda and publications

Treasury publishes national risk assessments on illicit finance risks (Mar. 9, 2022),

<https://www.davispolk.com/insights/client-update/treasury-publishes-national-risk-assessments-illicit-finance-risks>

Russia sanctions update - March 4, 2022 (Mar. 4, 2022), <https://www.davispolk.com/insights/client-update/russia-sanctions-update-march-4-2022>

United States escalates sanctions and export controls in response to Russian invasion of Ukraine (Mar. 1, 2022), <https://www.davispolk.com/insights/client-update/united-states-escalates-sanctions-and-export-controls-response-russian>

United States releases first tranche of sanctions in response to Russian actions in Eastern Ukraine (Feb. 23, 2022), <https://www.davispolk.com/insights/client-update/united-states-releases-first-tranche-sanctions-response-russian-actions>

FinCEN releases proposed rule on suspicious activity report sharing pilot program (Jan. 31, 2022), <https://www.davispolk.com/insights/client-update/fincen-releases-proposed-rule-suspicious-activity-report-sharing-pilot>

Appendix: Further reading

Related client memoranda and publications

FinCEN requests comments on modernization of AML/CFT framework (Dec. 21, 2021),

<https://www.davispolk.com/insights/client-update/fincen-requests-comments-modernization-amlcft-framework>

FinCEN releases proposed rule on beneficial ownership (Dec. 14, 2021),

<https://www.davispolk.com/insights/client-update/fincen-releases-proposed-rule-beneficial-ownership>

FinCEN updates its ransomware advisory for financial institutions (Nov. 12, 2021),

<https://www.davispolk.com/insights/client-update/fincen-updates-its-ransomware-advisory-financial-institutions>

U.S. regulators speak on stablecoin and crypto regulation (Nov. 12, 2021),

<https://www.davispolk.com/insights/client-update/us-regulators-speak-stablecoin-and-crypto-regulation>

Financial Action Task Force issues updated guidance for virtual assets (Nov. 1, 2021),

<https://www.davispolk.com/insights/client-update/financial-action-task-force-issues-updated-guidance-virtual-assets>

Appendix: Further reading

Related client memoranda and publications

OFAC publishes sanctions compliance guidance for the virtual currency industry (Oct. 20, 2021), <https://www.davispolk.com/insights/client-update/ofac-publishes-sanctions-compliance-guidance-virtual-currency-industry>

Carlin speech signals DOJ white collar enforcement priorities (Oct. 20, 2021), <https://www.davispolk.com/insights/client-update/carlin-speech-signals-doj-white-collar-enforcement-priorities>

FinCEN and CFTC assess \$100 million penalty on cryptocurrency derivatives exchange (Aug. 17, 2021), <https://www.davispolk.com/insights/client-update/fincen-and-cftc-assess-100-million-penalty-cryptocurrency-derivatives>