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Sanctions 2021

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Second Edition

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Rising Risk: Recent Developments in Cryptocurrency Sanctions and Enforcement

Guidehouse

Adam Klauder

I. Introduction

Countries around the globe continue to use economic sanctions as a targeted means of implementing foreign policy objectives. By their nature, sanctions evolve continuously to address new threats and to advance a particular government's current foreign policy objectives. Due to its seamless peer-to-peer transfer capabilities, pseudo-anonymous qualities, and the still-maturing regulatory environment in which it exists, cryptocurrency has become an attractive alternative for criminals and other malign actors that seek to evade sanctions and move illicit funds across international borders.[1] Governments and regulators are responding to this rising risk through new guidance, regulation, and enforcement. This article will provide an overview of recent cryptocurrency developments, particularly as they relate to economic sanctions.

II. Cryptocurrency Background

Cryptocurrencies are digital representations of value that, unlike government-issued fiat currency, do not have any status as legal tender. Some digital assets are "centralised", meaning they have a central payment ledger that is run by a centralised administrator who issues currency. Cryptocurrencies, on the other hand, use "distributed" ledger technology (e.g., blockchain), to enable individual computers within peer-to-peer networks to record and share transactions in their respective electronic ledgers. Bitcoin, Ether, and Litecoin are some of the most well-known types of cryptocurrencies and are designed to function as a medium of exchange or payment for goods and services.[2]

Most cryptocurrencies use cryptographic protocols to both secure the ledger and make sure transactions that are recorded on the blockchain are public. Cryptocurrencies provide "pseudo-anonymity" to users because although a transaction can be associated with a specific cryptocurrency address, the name of the actual address holder is not visible on the blockchain and can remain anonymous.[3] Law enforcement and the commercial sector have developed forensic and monitoring tools to help identify illicit actors who are associated with particular cryptocurrency addresses, but technology that allows individuals to process financial transactions with any level of anonymity can create a significant risk that sanctions evaders could seek to exploit.

Virtual currency exchanges provide platforms for customers to either trade cryptocurrencies for other cryptocurrencies, or to trade cryptocurrencies for fiat currency. Similar to banks, many virtual currency exchanges also store cryptocurrency for their customers. Most jurisdictions regulate cryptocurrency exchanges as financial institutions, usually as money transmitters or payment services. Deemed to be money transmitters, virtual currency exchanges in the United States are required to comply with the Bank Secrecy Act (BSA) and its associated regulations, which involves conducting due diligence on customers and maintaining adequate anti-money laundering (AML) controls.[4]

III. U.S. Economic Sanctions and Cryptocurrency Developments

A. U.S. Economic Sanctions Overview

Economic sanctions are a tool that governments use to achieve foreign policy objectives by targeting specific individuals, entities, governments, and/or countries. In the United States, the Department of the Treasury's Office of Foreign Assets Control (OFAC) implements and administers economic sanctions under applicable U.S. laws.[5] Generally, U.S. economic sanctions seek to deprive targets of the use of their assets and/or to deny them the benefits of trade and commerce with the United States.

All "U.S. persons" must comply with U.S. economic sanctions. This includes any U.S. citizen, permanent resident alien, entity organised under the laws of the United States, or any person in the United States. In the case of some OFAC sanctions, the prohibitions also apply to non-U.S. entities that are owned or controlled by U.S. persons.

U.S. economic sanctions can take the form of primary sanctions, which include list-based blocking sanctions that prohibit U.S. persons from undertaking almost all transactions related to the individuals and entities found on the list of Specially Designated Nationals and Blocked Persons (SDN). In addition, country-based embargoes prohibit U.S. persons from undertaking almost all transactions with a listed jurisdiction. Finally, list-based sectoral sanctions prohibit U.S. persons from undertaking limited, specific transactions with listed entities. Secondary sanctions seek to deter non-U.S. persons from engaging in a range of activities even if they do not involve any U.S. elements.

B. OFAC Cryptocurrency Developments

In March 2018, OFAC took an initial public step to address how it will treat compliance obligations relating to cryptocurrency by publishing five frequently asked questions (FAQs).[6] These FAQs confirm that a U.S. person's OFAC compliance obligations remain the same, regardless of whether a transaction is denominated in digital currency or in traditional fiat currency, and recommend that U.S. technology companies, payment processors, and digital currency administrators, exchangers,

and users "develop a tailored, risk-based compliance program, which generally should include sanctions-list screening and other appropriate measures".[7] OFAC further signaled that it might include digital currency addresses associated with blocked persons as identifiers on the SDN List.[8] OFAC explained that parties who hold cryptocurrency and identify digital currency identifiers or wallets that they believe are owned by, or otherwise associated with, an SDN should take the necessary steps to block the relevant digital currency and file a report with OFAC that includes information about the wallet's or address's ownership, and any other relevant details.[9] Importantly, OFAC clarified that "persons that provide financial, material, or technological support for or to a designated person may be designated by OFAC under the relevant sanctions authority".[10] By publishing these FAQs, OFAC put the financial community on notice as to the level of compliance it expects from those who are engaged in cryptocurrency transactions.

In November 2018, OFAC added two additional FAQs, which addressed technical requirements relating to blocking digital currency.[11] Most notably, however, was OFAC's designation in the same action of two Iran-based individuals as SDNs for their involvement in financial transactions related to the "SamSam" ransomware scheme.[12] In the scheme, the illicit cyber actors required victims to pay a "ransom" in bitcoin to regain access to and control of their data. The two SDNs were digital currency exchangers who helped the cyber actors exchange the bitcoin into Iranian rial and deposit it into Iranian banks. In the SDN listing for these two individuals, OFAC for the first time listed digital currency addresses in the identifying information. OFAC highlighted the significance of this action in its press release, and stated that "[l]ike traditional identifiers, these digital currency addresses should assist those in the compliance and digital currency communities in identifying transactions and funds that must be blocked and investigating any connections to these addresses".[13] OFAC coordinated its designations with related law enforcement actions against two other Iranian criminal actors by the Department of Justice (DOJ) and the FBI.[14]

OFAC published digital currency addresses as identifiers again in August 2019 when it designated three individuals, one company, and the Zheng Drug Trafficking Organization (DTO) as significant foreign narcotics trafficker SDNs under the Foreign Narcotics Kingpin Designation Act.[15] The press release referenced a related indictment that was also unsealed, which noted that the Zheng DTO "laundered its drug proceeds in part by using digital currency such as bitcoin, transmitted drug proceeds into and out of bank accounts in China and Hong Kong, and bypassed currency restrictions and reporting requirements".[16] Almost a year later, OFAC designated four additional individuals as SDNs for providing support to the Zheng DTO, and one company for being owned or controlled by the Zheng DTO.[17]

C. State-sponsored Virtual Currencies

Many countries, including the United States, United Kingdom, and China, have explored creating state-sponsored or central bank cryptocurrencies. These efforts, which could create a means of transferring currency outside the traditional banking system, could pose a significant challenge to countering the sanctions evasion ambitions of countries such as Iran, Venezuela, Russia, and North Korea.

1. Iran

In July 2018, Iran announced that it intended to launch a national cryptocurrency, which would be pegged to the rial, its national fiat currency.[18] News reports indicated that the Iranian government has subsequently sought to ban any unapproved cryptocurrencies for payment purposes, but that it would permit individuals to hold small amounts of nongovernmental cryptocurrencies for personal (i.e., non-commercial) purposes.[19] Regardless of the obvious tension that exists in Iran between the regime's development of a centralised national cryptocurrency and the desire of Iranian citizens to utilise decentralised cryptocurrencies, Iranians in both the government and the private sector will likely continue to look for ways to use this new type of asset to mitigate the ongoing economic effects of international sanctions.

2. Venezuela

In December 2017, Venezuela announced its plans to launch a state-sponsored cryptocurrency backed by oil reserves and commodities (the petro).[20] In response, President Trump issued Executive Order 13827[21] and OFAC issued additional FAQs that prohibit U.S. persons from engaging in transactions involving petros.[22] In March 2019, OFAC also designated Evrofinance Mosnarbank, a Moscow-based bank that is jointly owned by Russian and Venezuelan state-owned companies, as an SDN. OFAC described the bank as "the primary international financial institution willing to finance the petro".[23]

Although the petro has struggled to gain widespread traction as a viable currency alternative, Venezuela has developed a growing peer-to-peer market for cryptocurrency to protect against rising inflation.[24] In a recent action that could further impact Venezuela's petro ambitions, the United States has placed Joselit de la Trinidad Ramirez Camacho, the superintendent of Venezuela's petro initiative, on its "Most Wanted List" due to his alleged involvement in narcotics trafficking.[25]

3. North Korea

News reports indicate that North Korea is also developing its own official cryptocurrency in a likely attempt to circumvent sanctions, though it appears to only be in the early stages of creation at the moment.[26] With respect to cryptocurrency, North Korea is more well known for its state-sponsored cyber campaigns to hack cryptocurrency exchanges and launch ransomware attacks, as well at its cryptocurrency mining efforts. For example, the North Korean-linked Lazarus Group has been implicated in the 2017 WannaCry ransomware attack, which affected hundreds of thousands of computers worldwide, including the United Kingdom's National Health Service.[27] In September 2018, the United States filed charges against Lazarus Group member Park Jin Hyok for his involvement in this ransomware attack, along with his involvement in "the 2016 theft of $81 million from Bangladesh Bank; the 2014 attack on Sony Pictures Entertainment; and numerous other attacks or intrusions on the entertainment, financial services, defense, technology, and virtual currency industries, academia, and electric utilities".[28]

4. Russia

Although Russia has shown some resistance to fully embracing the use of cryptocurrencies, it has begun exploring the development of a state-sponsored cryptocurrency, with Russian officials stating that the primary goal is to "settle accounts with our counterparties all over the world with no regard for sanctions".[29] In addition, news reports indicate that the Russian government was instrumental in helping Venezuela develop its state-sponsored petro cryptocurrency.[30] There had been a fear within Russia that all cryptocurrency activity would be banned as Russia and its central bank continue to work through how to maintain control over the cryptocurrency market without allowing its prevalence to erode the domestic markets and

currency. Recently, however, Russia enacted a new cryptocurrency law that, beginning in 2021, will permit Russians to mine, own, and trade cryptocurrencies on exchanges as long as the cryptocurrency is not used for domestic goods and services.[31]

IV. Sanctions and Regulatory Landscape

In addition to OFAC, other U.S. and global regulators such as the U.S. Treasury's Financial Crimes Enforcement Network (FinCEN), the Financial Action Task Force (FATF), and the UN have been involved in developing guidance to raise awareness around the use of cryptocurrency for illicit purposes.

A. FinCEN

FinCEN implements, administers, and enforces compliance with the BSA and its associated regulations. In March 2013, FinCEN clarified that administrators and exchangers of virtual currency are considered money services business (MSB) money transmitters and must register as such with FinCEN, as well as implement relevant AML recordkeeping, reporting, and compliance measures.[32] Since that time, FinCEN has been active in issuing guidance relating to cryptocurrencies and in helping financial institutions identify and address cryptocurrency compliance issues.

In October 2018, FinCEN issued an advisory on the Iranian regime's attempts to exploit the international financial system.[33] This advisory sought to help U.S. financial institutions (including virtual currency administrators and exchangers) better detect potentially illicit transactions involving Iran. The advisory cautioned that although cryptocurrency is not used widely in Iran, it is "an emerging payment system that may provide potential avenues for individuals and entities to evade sanctions". As such, FinCEN urged financial institutions to consider reviewing blockchain ledgers for activity that may originate or terminate in Iran and advised them to be aware of person-to-person exchangers (i.e., natural or legal persons who offer to buy, sell, or exchange virtual currency through online sites and in-person meetups) that may offer services in Iran. The advisory reminded financial institutions that a non-U.S.-based exchanger or virtual currency provider doing substantial business in the United States is subject to AML/Combating the Financing of Terrorism (CFT) obligations, as well as OFAC jurisdiction.

In May 2019, FinCEN issued an additional advisory on illicit activity such as money laundering and sanctions evasion involving "convertible virtual currencies" (CVCs).[34] Specifically, the advisory highlights prominent typologies such as darknet marketplaces, peer-to-peer exchangers, foreign-located MSBs, and CVC kiosks, along with associated red flags. FinCEN issued concurrent guidance on how its regulations apply to certain businesses that transact in CVCs, which consolidated FinCEN's previously issued guidance on this subject.[35] FinCEN reiterated its general position that any person engaging in the business of money transmission or the transfer of funds, including CVCs, must (1) maintain an effective written AML programme, and (2) register as an MSB. FinCEN also required money transmitters that engage in a "transmittal of funds" to comply with the "Funds Transfer Rule"[36] and "Funds Travel Rule".[37]

During a speech in December 2019, FinCEN Director Ken Blanco noted that shortly after FinCEN issued its May advisory on illicit activity involving CVCs there were over 2,100 unique suspicious activity report (SAR) filers that referenced the key terms from the advisory, many of whom had not filed SARs previously.[38] With respect to cryptocurrencies, Director Blanco stated, "I think it is important for all financial institutions to ask themselves whether they are reporting such suspicious activity. If the answer is no, they need to reevaluate whether their institutions are exposed to cryptocurrency".[39]

B. FATF

On June 21, 2019, FATF released new guidance governing virtual assets and virtual asset service providers.[40] The new FATF standards require all countries to regulate and supervise such service providers, including exchangers, and to mitigate against such risks when engaging in cryptocurrency transactions. This guidance represents a significant step toward strengthening international compliance standards around cryptocurrencies and recommends that the sector comply with the same AML/CFT requirements as traditional financial institutions. In June 2020, FATF issued a report that summarised its 12-month review of the industry's progress in implementing the new standards.[41] The report noted that 35 out of 54 reporting jurisdictions have implemented the revised FATF Standards and did not identify a clear need to amend the standards. It also acknowledged the progress that countries have made in implementing the "travel rule", which requires virtual asset service providers to obtain, hold and exchange information about the originators and beneficiaries of virtual asset transfers.[42]

C. United Nations

The UN has published two recent annual reports that detail the extent to which North Korea has violated international sanctions, from procuring weapons of mass destruction to evading sanctions through maritime transactions. These reports also detail some of the disruptive strategies that North Korea has been using to increase its financial position through both the theft and use of cryptocurrencies.

The August 2019 UN Panel of Experts Report listed 35 potential instances in which persons and/or entities affiliated with North Korea have attempted to generate revenue by engaging in cyber-related attacks on financial institutions, and stealing/mining cryptocurrency.[43] The report notes that a large number of targets in South Korea have come under attack by North Korea-affiliated entities, including the Bithub and Youbit cryptocurrency exchanges. In addition, the report describes how North Korea-affiliated actors have used cryptocurrency to launder bitcoin that was paid by victims of the WannaCry ransomware attacks.

The United Nations published a follow-up report in March 2020, where it highlighted additional ways in which North Korea has sought to generate illicit cryptocurrency revenue in contravention of international sanctions.[44] One unique way was by hosting a cryptocurrency conference in Pyongyang, which sought to involve experts from around the world. Virgil Griffith, a U.S. person who attended the 2019 conference, has been charged with violating U.S. sanctions. According to the pleadings, conference organisers instructed Griffith to explain how to use cryptocurrency and blockchain technology to evade sanctions and launder money.[45] In advance of the proposed February 2020 conference in North Korea there were press reports about the UN's warnings that attendance could constitute sanctions evasion.[46]

The March 2020 UN Panel of Experts Report also details an additional cyber-attack by North Korea-affiliated actors against a cryptocurrency exchange that utilised a "Trojan horse" malware application, which allowed the hackers to control their victims' computer systems and access and steal cryptocurrency.[47]

V. Recent Enforcement Actions

March 2020 – DOJ Criminal Action Against Two Chinese Nationals for Laundering Over $100 Million in Cryptocurrency from Exchange Hack

On March 2, 2020, the U.S. Department of Justice charged Chinese nationals Jiadong Li and Yinyin Tian with laundering over $100 million worth of cryptocurrency from a hack of a cryptocurrency exchange.[48] In a coordinated action, OFAC designated Li and Tian as SDNs and added 20 new bitcoin addresses associated with these two individuals to the SDN List.[49] The civil forfeiture complaint specifically names 113 virtual currency accounts and addresses that were used by the defendants and unnamed co-conspirators to launder funds.

According to the pleadings, Li and Tian stole approximately $250 million in cryptocurrency by hacking into a virtual currency exchange. To launder the funds, Li and Tian circumvented the compliance controls at various virtual currency exchanges by submitting falsified "know your customer" information and used "peel chains" to launder the stolen cryptocurrency and obscure the source of funds. In a peel chain, criminals "peel" off a small amount of cryptocurrency from a larger amount during a transaction. The process is repeated until all of the cryptocurrency has been sent to new addresses and it is often deposited into various virtual currency exchanges. Li and Tian spent several months using peel chains to transfer and convert much of the stolen cryptocurrency into regular currency at Chinese banks. The pleadings also indicate that Li and Tian sold some of the stolen cryptocurrency to U.S. customers and routed some of the funds through a U.S.-based cryptocurrency exchange.

On August 27, 2020, DOJ filed a civil forfeiture complaint to seize 280 cryptocurrency accounts containing funds that were laundered by the same group of Chinese actors.[50] This action also represents the first publicly announced case where North Korean hackers have targeted a U.S. virtual currency exchange.[51]

August 2020 – DOJ's "Global Disruption of Three Terror Finance Cyber-Enabled Campaigns"

On August 13, 2020, DOJ announced that it had dismantled three cyber-related terrorist financing campaigns involving the al-Qassam Brigades (Hamas's military wing), al-Qaeda, and Islamic State of Iraq and the Levant (ISIS).[52] DOJ noted that this coordinated operation was the U.S. government's largest-ever seizure of cryptocurrency in the terrorism context, involving millions of dollars and over 300 cryptocurrency accounts.

According to the pleadings, the al-Qassam Brigades, which along with Hamas is designated by OFAC as an SDN, sought to solicit bitcoin donations to fund terrorism. U.S. law enforcement worked covertly to monitor and operate al-Qassam Brigade websites, which led to the seizure of approximately 150 cryptocurrency accounts that contained these illicit donations. The al-Qaeda campaign also involved solicitation for bitcoin donations to fund terrorism and used layering techniques to launder and obscure the source of the funds. U.S. law enforcement is seeking the forfeiture of the 155 virtual currency assets tied to this terrorist campaign. Finally, in the separate ISIS campaign, an ISIS hacker set up a website (FaceMaskCenter.com) and four Facebook pages to sell N95 respirator masks that had not been approved by the U.S. Food and Drug Administration. DOJ officials noted separately that the complaints did not identify any financial crime control failures at the institutions and regulated exchanges that handled the illicit cryptocurrency at issue.[53]

VI. Looking Toward the Future

Even with increased guidance and law enforcement focus, illicit actors will likely continue attempting to exploit gaps in the regulatory framework and the ease of peer-to-peer transfer to use cryptocurrency to avoid economic sanctions. As a result, those who have cryptocurrency compliance obligations should review their compliance programmes to ensure that they are comprehensive and take current developments into account.

Consistent with OFAC's compliance guidance, firms should conduct a risk assessment to identify potential OFAC issues that might exist as the result of their involvement with cryptocurrencies. In addition, institutions should update their screening capabilities to incorporate the latest blockchain analytics solutions or engage with a vendor that can provide these services. Finally, firms should provide training to employees on blockchain technology, sanctions evasion typologies that are unique to cryptocurrencies, and recent developments in the cryptocurrency regulatory and enforcement area.

Endnotes

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