

非美国金融机构与其他机构同受美国与欧盟制裁的俄
罗斯实体交易中面临的最新挑战

Non-US financial and other institutions that engage in transactions with sanctioned businesses, persons and countries expose themselves to increased risk of violating US and EU sanctions. For years, the US has imposed comprehensive sanctions against Cuba, Iran, and Sudan, as well as designated organizations and individuals. A new sanctions regime against Russia not only prohibits US and EU persons and entities from certain dealings with sanctioned Russian businesses, but also creates risks for non-US financial institutions and other entities if they are alleged to have “caused” US persons and entities to violate the sanctions, for example, by facilitating transactions that are alleged to evade the sanctions.

非美国金融机构与其他机构在同受制裁的公司、个人及国家进行交易时将面临更大的违反美国与欧盟制裁的风险。多年来,美国持续对古巴、伊朗、苏丹以及某些组织和个人施加全方位的制裁措施。针对俄罗斯的新一轮制裁措施不仅禁止美国及欧盟个人和实体与受制裁的俄罗斯公司进行某些往来,并且当非美国金融机构与其他机构被认定其“导致”美国个人和实体违反了制裁,例如促成被认定为逃避制裁的交易,该制裁措施增加了该等机构的风险。

These risks are real and evolving in both the US and the EU. In 2010, Lloyds TSB paid US\$350 million to settle charges that it had violated US sanctions by causing US banks to process funds transfers involving Iranian banks. This was the first of a series of ever larger settlements, culminating in a guilty plea in June 2014 by BNP Paribas and a US\$8.9 billion settlement. In the BNP Paribas case, the plea documents stipulated that the company had structured, processed, and concealed billions of dollars of USD-denominated transactions using the US financial system on behalf of banks and other entities located in, or controlled by, Sudan, Iran and Cuba. This month, OFAC representatives traveled to Europe, the Middle East and Asia to warn foreign financial institutions about their dealings with sanctioned entities. In the EU, enforcement actions are also increasing, prompted by intelligence sharing between EU member states. In the UK, the Financial Conduct Authority recently investigated breaches of financial sanctions as part of its broader mandate to regulate and oversee all UK-based financial services firms.

上述提到的风险是真实有效的并且在美国和欧盟正在不断完善。在2010年,劳埃德银行(Lloyds TSB)因其促使一些美国银行进行涉及伊朗银行的资金划转而违反美国制裁规定,因而支付3.5亿美元作为和解费。在此之后产生了一系列庞大金额的和解,其中包括2014年6月法国巴黎银行(BNP Paribas)的高达89亿美元的和解。在法国巴黎银行事件中,法院的答辩文件显示该公司设计、运作并利用美国金融系统为位于苏丹、伊朗和古巴(或由该等国家控制)的银行和非银行实体隐瞒了价值超过数十亿美元的美金交易。OFAC的代表在本月分别访问了欧洲、中东与亚洲,警告当地的境外金融机构要慎重处理他们与受制裁俄罗斯实体的往来。在欧盟,由于欧盟成员国之间的情报共享,执行力度也日渐加剧。在英国,金融市场行为监管局利用其监管所有英国金融服务公司的权力在近期对违反金融制裁的行为进行了调查。

Whereas, prior to cases like Lloyds TSB and BNP Paribas, many non-US financial institutions believed their non-US activity fell outside the scope of US sanctions laws—and thus outside the jurisdiction of US criminal and regulatory authorities—those and similar cases demonstrate that the relevant US enforcement authorities are aggressively targeting non-US financial institutions doing business with sanctioned countries, using novel and expansive theories of jurisdiction for transactions denominated in USD. The essence of the US authorities’ jurisdictional theory is that all USD-denominated transactions must pass through the US financial system in the clearing process, and thus non-US banks engaging in USD transactions involving sanctioned parties or countries violate US law by causing the US clearing banks to process transactions in breach of the sanctions (or even by “indirectly” exporting US financial services to sanctioned parties and countries). Though the theories are novel and evolving, US authorities have used them successfully to obtain billions of dollars in fines and penalties from non-US financial institutions.

尽管在劳埃德银行和法国巴黎银行等事件发酵之前有许多非美国金融机构自认为其在美国境外的活动不会受制于美国制裁法规,所以也不会受制于美国刑事和监管机关的管辖,但该等事件和其它类似事件清楚地表明相关的美国执行机构事实上将利用针对美元结算交易的新型、宽泛的管辖权法律依据严厉打击与受制裁国家进行往来的非美国金融机构。依照美国机构的管辖权原理,所有以美元结算的交易在结算过程中必须通过美国金融系统,所以非美国银行办理涉及受制裁实体或国家的美元交易的行为将违反美国法律,只要该行为导致美国的清算银行因经手该等交易而违反制裁规定(或者“间接”向受制裁实体和国家提供美国金融服务)。尽管该原理仍然处于萌芽阶段并有待进一步发展,美国机构已经成功利用它从非美国金融机构获取超过几十亿的罚金和罚款。

Regulatory scrutiny is mounting as still more sanctions are being developed in Washington and Brussels.

华盛顿和布鲁塞尔正在进一步研究制裁措施, 监管审查力度将随之逐渐增加。

What is the Current Sanctions Regime with Respect to Russia?

In 2014, the US and EU have implemented parallel – but not identical – sanctions regimes against Russia that include the following key restrictions:

- Prohibitions and restrictions on dealing in new equity or new debt related to sanctioned Russian banks.
- Prohibitions and restrictions on dealing in new debt for certain sanctioned Russian energy companies.
- Prohibitions and restrictions on dealing in new debt for sanctioned Russian defense companies.
- Prohibitions and restrictions on providing drilling and pipeline equipment to Russia; goods or services to certain sanctioned Russian energy companies conducting Arctic, deepwater, or shale oil exploration and production; and providing dual use goods or technology if such items are or may be intended for military use or for a military end-user in Russia.
- Prohibitions on transacting any business with any individual or any entity on the US list of Specially Designated Nationals (57 individuals and 36 entities added under the Russian sanctions to date) or the EU Consolidated List of Sanctions (131 individuals and 34 entities added to date).

现有的制裁制度

美国和欧盟在2014年针对俄罗斯推出了类似但不同的制裁措施, 包含下列主要限制:

- 禁止及限制与受制裁的俄罗斯银行经销新股权或新债权。
- 禁止及限制与某些受制裁的俄罗斯能源公司经销新债权。
- 禁止及限制与受制裁的俄罗斯国防公司经销新债权。
- 禁止及限制向俄罗斯提供挖掘和管道设备; 向某些经营北极圈、深海或页岩的石油勘探及生产的受制裁的俄罗斯能源公司提供物资和服务; 以及提供将在俄罗斯作为军事用途的军民两用物资或技术或向俄罗斯的终端军方提供该等物资或技术。
- 禁止与被列在美国特定国民名单(至今在俄罗斯制裁项下有57名个人和36个实体)或欧盟制裁统一名单(至今有131名个人和34个实体)上的任何实体进行任何商业往来。

US sanctions violations can trigger criminal penalties of up to US\$1 million and up to 20 years' imprisonment per violation. Violations can also trigger civil administrative penalties of up to the greater of US\$250,000 per violation or twice the amount of the transaction that is the basis of the violation. Likewise in the EU, enforcement for breaches of financial sanctions can lead to significant prison sentences and/or fines.

违反美国制裁规定可触发最高一百万美元和每次违规最高20年监禁的刑事处罚, 同时也可触发民事行政处罚, 其金额为每次违规25万美元或违规交易的双倍金额(以较多者为准)。与欧盟类似, 对违反金融制裁的执行可导致严重的监禁刑罚及/或罚金。

What Further Changes May Be Coming?

On September 18, the US Senate Committee on Foreign Relations unanimously passed the Ukraine Freedom Support Act of 2014. The bill is now pending full Senate consideration. If enacted into law, the bill would create new risks for non-US financial institutions servicing sanctioned Russian persons or businesses, or Russian businesses undertaking certain activities in the defense and energy sectors. Importantly, while the existing US sanctions regime against Russia restricts only US entities' ability to do business with sanctioned Russian entities, the new bill would extend those prohibitions to non-US financial institutions through so-called "secondary sanctions." Specifically, the bill would require the US President to impose sanctions against:

- Any person or entity that makes a significant investment in certain types of Russian oil projects.
- Any person or entity that: (1) is owned by the government of the Russian Federation or controlled by Russian nationals; and (2) manufactures, sells, transfers, brokers, or otherwise assists in the transfer of defense articles into Syria or certain former Soviet bloc states.
- Any non-US financial institution determined to have engaged in significant transactions involving: (1) entities sanctioned pursuant to the defense sector and energy sector sanctions; or (2) sanctionable activities related to the defense sector and energy sector.
- Any non-US financial institution determined to have facilitated a significant financial transaction on behalf of an individual sanctioned pursuant to the US sanctions regime.

对未来变化的预测

美国参议院外交关系委员会在9月18日一致通过了2014年乌克兰自由支持法案。该法案正在等待整个参议院的讨论。如果该法案成为法律, 其将对向受制裁俄罗斯个人或公司提供服务的非美国金融机构, 或在国防和能源领域经营的俄罗斯公司产生新的风险。重要的是, 虽然美国针对俄罗斯的现有制裁制度仅限制了美国实体与受制裁的俄罗斯实体进行商业往来的能力, 新法案的实行将通过所谓的“二级制裁”将该限制延伸至非美国金融机构。尤其该法案将要求美国总统针对如下个人或实体进行制裁:

- 对某些类型的俄罗斯石油项目作出巨大投资的任何个人或实体。
- 1) 俄罗斯联邦政府拥有的或俄罗斯国民控制的任何个人或实体; 或2) 向叙利亚或前苏联集团成员生产、销售、转移、经销或以其他方式协助转移国防物资的任何个人或实体。
- 被认定为参与了涉及以下方面的重大交易的任何非美国金融机构: 1) 涉及在国防和能源领域受制裁实体, 或2) 涉及国防和能源领域相关的受制裁行为。
- 任何被认定代表受美国制裁的个人促进了重大金融交易的非美国金融机构。

The bill would also require the President to prohibit any non-US financial institution found to have violated these prohibitions from opening or maintaining a correspondent or payable-through account in the US, thereby cutting off a foreign bank's access to the US financial system.

该法案同时将要求美国总统禁止任何被发现违反了该等禁令的非美国金融机构在美国开立或维持代理账户或应付款往来账户, 以切断境外银行进入美国金融系统的渠道。

Why Choose Squire Patton Boggs?

To protect their businesses, non-US financial institutions must secure effective counsel with the skills and experience necessary to identify and counteract the risk of an enforcement action, defend against enforcement actions that are initiated, and help implement a compliance framework designed to protect against potential future violations. Moreover, the transnational nature of these sanctions regimes requires a law firm that operates in all the relevant jurisdictions. Effective counsel must have a keen understanding of – and experience dealing with – the relevant geopolitical conditions that are shaping the current sanctions regime.

选择翰宇国际的原因

为保障自身的业务, 非美国金融机构必须配备有足够技能和经验的律师, 以识别及规避强制执行措施的风险、应对已启动的强制执行措施并且建立完善的合规制度来避免未来潜在的违规。此外, 该等制裁制度的跨国性质也要求一家律师事务所能够在所有相关管辖区内执业。高效的律师必须对影响现有制裁制度的相关地域政治环境拥有敏锐的洞察力及经验。

With a market-leading, global presence of 44 offices in 21 countries on five continents, Squire Patton Boggs operates at the crossroads of law, government and business around the world. We are actively engaged in all aspects of US and EU sanctions regulations and policies, and we understand the challenges that exist for non-US financial and other institutions as they face heightened scrutiny from regulators.

作为一家业内领先, 在五大洲21个国家拥有44间办公室的律师事务所, 美国翰宇国际律师事务所在全球的法律、政府和商业领域具有丰富的经验。我们积极地从事有关美国和欧盟制裁法规和政策的各个方面, 并且充分了解非美国金融机构与其他机构所面临的监管者高级别审查的挑战。

Our colleagues in Washington and Brussels maintain strong relationships with key US and EU lawmakers and regulators, and we offer foreign financial institutions and businesses a “one-stop” solution for economic sanctions and policy advice. Our lawyers assist foreign banks and businesses to establish and implement compliance and risk mitigation regimes, monitor legislative and regulatory action for the imposition of additional sanctions, defend against enforcement actions, and develop and deploy public policy strategies to engage the US administration and Congress, the European Commission, and EU member states. We assist in several key areas:

我们在华盛顿与布鲁塞尔的律师团队与美国和欧盟的核心立法者与监管者保持着紧密的关系, 并且向境外金融机构和公司针对经济制裁和政策建议提供“一站式”解决方案。我们的律师团队帮助境外银行和公司建立并执行合规及风险规避的制度, 密切监测法律和法规层面进一步制裁措施的实施, 为制裁措施的执行进行辩护, 并且构建公共政策战略以与美国监管部门、美国国会、欧盟委员会及欧盟成员国紧密结合。我们提供协助的几个主要方面包括:

Compliance: Our team audits current compliance procedures, designs and implements updated compliance policies where needed, and conducts employee and leadership compliance training. Our objective is to identify and counteract potential violations before they occur.

合规: 我们的团队审查现有的合规制度、在必要时设计并实行更新后的合规政策并且向员工及管理層提供合规训练。我们的目标是在潜在违规的发生前识别并规避它们。

Enforcement: We counsel non-US financial institutions and businesses in responding to OFAC and other inquiries. If sanctionable conduct is alleged or if an enforcement action is in fact initiated, our Trade & Sanctions, Investigations & White Collar, and Litigation departments rapidly deploy as one team to defend against such actions.

执行: 我们为非美国金融机构和公司在应对OFAC和其他机构讯问的过程中提供法律建议。当涉嫌违规行为时, 或一项执行措施被启动时, 我们的贸易与制裁、调查与商业罪案以及诉讼团队会迅速作出联合部署, 以应对该等措施。

Monitoring: Our Washington, London, Brussels, and Moscow offices stay one step ahead of evolving sanctions regimes in part by closely monitoring executive and legislative developments. We see changes before they occur, and help our clients prepare.

监测: 我们在华盛顿、伦敦、布鲁塞尔和莫斯科的办公室通过密切关注行政和立法动态, 往往在最新制裁制度出台之前就预测到了事态的变化并帮助客户作出了针对性的准备。

Public Policy Advocacy: Our sanctions team is complemented by a deep bench of former government officials from capitals around the world where they learned how to navigate the government decision-making process. They include former Members of Congress, congressional staff, ambassadors, officials from the US Departments of the Treasury, State, Justice and Commerce; Ministers, European Commission staff, and WTO officials. Our public policy teams design and implement policy strategies to mitigate potentially damaging legislative provisions before they become law.

公共政策倡导: 我们的制裁事务团队拥有来自全球各地首都的前政府要员, 他们充分掌握如何引导政府决策程序。这些成员包括前国会成员、国会雇员、大使、美国财政部、司法部和商务部官员; 以及部长、欧盟委员会成员和WTO官员。我们的公共政策团队所设计并执行的政策方针可在一项法案成为法律之前减少其中潜在的具有破坏性的法律条文。

Squire Patton Boggs can help. Our combination of substantive legal expertise, sophisticated policy acumen and global platform results in an unrivaled ability to help financial institutions and businesses effectively anticipate and defend against sanctions.

美国翰宇国际律师事务所能充分地帮助阁下。我们专业的法律技能、对政策的敏锐嗅觉, 结合全球化的平台使得我们具备帮助金融机构和公司有效预见并应对制裁的能力。

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