Threading the Needle: Complying with the Hong Kong-related Sanctions Imposed by the US Government

兩難的任務：遵守美國政府有關香港的制裁措施

In response to the People's Republic of China (PRC) announcement of a National Security Law (NSL) for Hong Kong in May 2020, the US Congress introduced and passed the Hong Kong Autonomy Act of 2020 (HKAA), which was signed into law by the US president on 14 July 2020. At the same time, the president issued Executive Order (EO) 13936, which ordered US agencies to take steps to suspend or revoke Hong Kong's special status under US law and authorised sanctions against individuals and entities responsible for the NSL's implementation.

因應中華人民共和國（內地）在2020年5月頒布香港特別行政區維護國家安全法（港區國安法），美國國會提出並通過2020年香港自治法案，2020年7月14日經美國總統簽署成為法律。同時，總統發出13936號行政命令，下令美國機構採取行動暫停或取消香港在美國法律下的特殊地位，並授權對負責實施港區國安法的個人及實體實施制裁。

Taken together, the sanctions provisions in the HKAA and EO 13936 impose compliance obligations not just on "US persons,"[1] but also threaten non-US financial institutions with the possibility of secondary sanctions. Because these sanctions target senior officials in the Hong Kong and PRC governments, banks in Hong Kong and elsewhere must carefully assess their compliance strategies to ensure that they strike the right balance between compliance with US sanctions and any potential application of the NSL. Given the politically sensitive nature of these issues, banks may not be able to engage in broad-based "de-risking" of customers as is the case with other US sanctions programs. Compliance strategies should be reviewed in the context of the challenges posed by these new sanctions.

This article summarises the Hong Kong-related sanctions and how they apply to non-US banks and discusses some of the implications arising from various compliance strategies that banks may decide to adopt. The bottom line is that non-US banks have some room to continue engaging in activities that would be off limits for US banks.

What are the US sanctions?

Section 5(a) of the HKAA requires the US Secretary of State to submit a report to Congress within 90 days of the law's enactment (i.e., 12 October 2020) identifying "foreign persons" (i.e., non-US individuals and entities) determined to have materially contributed to "the failure of the Government of China to meet its obligations under the Joint Declaration or the Basic Law." Once a foreign person is included in the 5(a) report, the US president may impose sanctions on property transactions and visa restrictions on such persons. Within one year of the date when a foreign person is included in the 5(a) report, the president must impose sanctions on such a person. As of the date of this article, the State Department has not issued any public notice as to whether it has submitted the 5(a) report to Congress and, if not, when it intends to do so.

Section 5(b) of the HKAA requires the US Secretary of the Treasury to submit a report to Congress, not earlier than 30 days and not later than 60 days after the 5(a) report is submitted to Congress, identifying foreign financial institutions (i.e., non-US financial institutions) that knowingly conduct significant transactions with any foreign persons identified in the 5(a) report. The HKAA does not define the terms "foreign financial institution" or "significant transaction." However, by reference to other US sanctions programs, these terms are broadly defined to provide the Treasury Department with the greatest amount of discretion in interpreting whether a person or an activity is covered under the sanctions.[2] The term "knowingly" is defined in the HKAA as actual knowledge.

Section 7 provides a menu of ten sanctions to be used against foreign financial institutions identified in the 5(b) report. The US president must impose five of the sanctions within one year of the date when the foreign financial institution was first included in the report. The US president must impose the remaining five sanctions within two years. The menu includes, among others, prohibitions on US persons, including US banks, from engaging in certain banking or foreign exchange transactions with the foreign financial institutions included in the 5(b) report. The specific scope of the sanctions would be defined by the Treasury Department.

"The primary consideration for banks with exposure to persons sanctioned under EO 13936 or, later, identified under Section 5(a) of the HKAA, will be to make sure that they do not engage in any transactions involving SDNs or entities owned 50 percent or more by them where the transaction also involves the US financial system."

香港自治法案和13936號行政命令的制裁條款，不僅「美國人士」[1]須予遵守，非美國金融機構因有可能受到次級制裁，因而也會受影響。這些制裁的對象，是香港和內地政府的高層人員，香港和其他地區的銀行必須小心評估其合規策略，適當衡量遵守美國制裁規定的需要和港區國安法可能適用的範圍。鑑於這些事宜的政治敏感性質，銀行可能不能像遵守其他美國制裁計劃一樣，以概括的手法去除客戶風險，而須因應這些新制裁措施的具體情況，檢視合規策略。

本文概述與香港有關的制裁措施，說明這些措施如何適用於非美國銀行，並探討銀行採用不同合規策略的影響。結論是，一些對美國銀行來說是越界的業務，非美國銀行卻有繼續經營的空間。

美國制裁的內容

香港自治法案第5(a)條要求美國國務卿在法案通過後90天內（即2020年10月12日）向國會提交報告，列明實質上導致「中國政府未能履行其在中英聯合聲明或香港基本法下的義務」的「外國人」（即非美國個人及實體）。美國總統可向5(a)報告所列的外國人實施財產交易及簽證限制等制裁。外國人列入5(a)報告後一年內，總統必須向該人士實施制裁。在執筆撰寫本文時，美國國務院仍未發出公告說明是否已向國會提交5(a)報告，或是否準備提交5(a)報告。

香港自治法案第5(b)條要求美國財政部長在5(a)報告提交予國會後30天到60天內，向國會提交報告，列明在明知的情況下與5(a)報告中列明的任何外國人進行重大交易的外國金融機構（即非美國金融機構）。香港自治法案沒有為「外國金融機構」或「重大交易」下定義，但根據其他美國制裁計劃，這些詞語通常定義廣闊，讓財政部有最大酌情權決定某人或某項交易是否屬於制裁範圍內[2]。根據香港自治法案，「明知」一詞指實際知悉。

第7條列出10項可向5(b)報告列明的外國金融機構實施的制裁措施。在該外國金融機構被列明在報告後一年內，美國總統必須實施其中最少五項制裁，然後在兩年內實施其餘五項制裁。該10項措施包括禁止美國人士（包括美國銀行）與5(b)報告列明的外國金融機構進行若干銀行或外匯交易。制裁的具體範疇由財政部界定。

凍結制裁

13936號行政命令相關條文授權美國財政部長與美國國務卿商討後，向斷定為曾從事13936號行政命令第4(a)條註明的行為的外國人實施凍結制裁（即凍結其資產）。根據此項授權，外國資產管制辦公室於2020年8月7日指定11名香港及內地官員為特別指定國民（即受制裁人士）。因應該項指定，美國人士必須凍結這些受制裁人士的所有財產及財產利益，並且不得直接或間接與這些受制裁人士進行交易，或促進有關交易。此外，非美國人士（包括非美國銀行）亦不得與受制裁人士進行涉及美國人士或美國金融體系的任何交易。根據外國資產管制辦公室的50%規定，凍結制裁適用於受制裁人士，以及由一名或多名受制裁人士共同擁有50%或以上的任何實體。

與香港自治法案不一樣，13936號行政命令沒有列明以外國金融機構為對象的次級制裁，但有一項全面性條文，授權指定任何「實質上協助、資助，或提供經濟、物質或技術支援，或提供貨品或服務」予任何13936號行政命令下受制裁人士的人士。這條文未必會用以指定非美國財務機構，但並非不可能。

儘管外國資產管制辦公室並沒有就13936號行政命令發出任何指引，也沒有說明指定受制裁人士之舉可對香港自治法案下以外國金融機構為對象的次級制裁有何影響，但美國政府官員已表示，他們認為香港自治法案第5條的報告規定，與外國資產管制辦公室指定的受制裁人士並無關連。換句話說，外國資產管制辦公室指定受制裁人士後，並不觸發香港自治法案第5(b)條的報告規定（但可合理假定受制裁人士也可能在5(a)報告的範圍內）。因此，在執筆撰寫本文時，香港自治法案第5(b)條的報告時限尚未開始計算。

Blocking sanctions

In relevant part, EO 13936 authorises the US Secretary of the Treasury, in consultation with the US Secretary of State, to impose blocking sanctions (i.e., asset freezes) on any foreign person determined to have engaged in certain proscribed acts described under Section 4(a) of EO 13936. Pursuant to this authorisation, on 7 August 2020, the Office of Foreign Assets Control (OFAC) designated 11 Hong Kong and PRC government officials as Specially Designated Nationals (SDNs). As a result of the designation, US persons must block (freeze) all property and property interests of these SDNs and are prohibited from directly or indirectly engaging or facilitating any transactions involving them. In addition, non-US persons including non-US banks are also prohibited from engaging in any transactions with the SDNs if the transactions involve US persons or the US financial system. Under OFAC's 50 Percent Rule, the blocking sanctions apply to the SDNs as well as any entities that are 50% or more owned by one or more SDNs in the aggregate.

Unlike the HKAA, EO 13936 does not contain specific secondary sanctions targeting foreign financial institutions. However, it does contain a catch-all provision authorising the designation of any person determined to have "materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of" any persons that are subject to sanctions pursuant to EO 13936. It is unlikely, but not impossible, that this provision could be used to designate a non-US financial institution.

Although OFAC has not published any guidance on EO 13936 and how the designations may impact the secondary sanctions targeting foreign financial institutions under the HKAA, US government officials have indicated that they view the reporting requirements under Section 5 of the HKAA as separate and distinct from OFAC's designation. This means that the OFAC designations do not trigger the reporting requirements under Section 5(b) of the HKAA (although it would be reasonable to assume that the SDNs may also be included in the 5(a) report). As a result, the reporting window under Section 5(b) of the HKAA has not yet begun as of this writing.

Considerations for non-US banks

The primary consideration for banks with exposure to persons sanctioned under EO 13936 or, later, identified under Section 5(a) of the HKAA, will be to make sure that they do not engage in any transactions involving SDNs or entities owned 50 percent or more by them where the transaction also involves the US financial system (e.g., clearing funds through US correspondent accounts). This will require due diligence to identify not only accounts held in the name of the SDNs, but also entities owned directly or indirectly by the SDNs. In this context, indirect ownership refers to ownership held through an intermediary company.

Beyond obvious transactions involving the US financial system, non-US banks will need to make sure that transactions with individuals or entities subject to these sanctions do not have any other nexus to the United States. Many financial transactions can have a hidden touchpoint to the US financial system that is not always obvious. For example, non-US securities firms may use US-based broker dealers or clearing firms to execute and settle securities transactions. Also, if the non-US bank has US person employees, these US persons are prohibited under OFAC regulations from facilitating any business with an SDN. Therefore, if a non-US bank decides to continue its relationship with a person subject to sanctions, it will need to (a) identify all related accounts, (b) make sure that the transactions in those accounts do not have a US nexus, and (c) insulate US persons from tasks involving those accounts and transactions.

The most manual and labour intensive of these steps will be the identification of related accounts and investment products. Therefore, banks will need to make sure that they have sufficient resources (including access to due diligence technology and databases) to manage the extra workload. Fortunately, as many of the SDNs would already have been tagged as Politically Exposed Persons, their accounts should be relatively easier to spot.

"若有客戶受13936號行政命令制裁，或稍後成為根據香港自治法案第5(a)條列明的人士，銀行最主要的考慮，是確保不參與牽涉受制裁人士或由受制裁人士擁有50%或以上的實體，同時涉及美國金融體系的任何交易。"

非美國銀行的考慮

若有客戶受13936號行政命令制裁，或稍後成為根據香港自治法案第5(a)條列明的人士，銀行最主要的考慮，是確保不參與牽涉受制裁人士或由受制裁人士擁有50%或以上的實體，同時涉及美國金融體系的任何交易（例如透過美國代理帳戶清算資金）。為此，銀行須進行盡職審查，不僅要識別以受制裁人士名稱開立的帳戶，也要識別由受制裁人士直接或間接擁有的實體開立的帳戶。間接擁有是指透過中介公司持有。

除了明確涉及美國金融體系的交易外，非美國銀行亦須確保與受制裁個人或實體的交易與美國並無其他關連。許多財務交易可能隱藏與美國金融體系的接觸點，例如非美國證券公司可能透過設於美國的經紀或清算公司執行及結算證券交易。此外，假如非美國銀行的僱員是美國人士，根據外國資產管制辦公室的規定，這些美國人士不得促進與受制裁人士的任何業務。因此，假如非美國銀行決定維持與受制裁人士的業務關係，便須(a)識別所有相關帳戶，(b)確保該等帳戶的交易與美國並無關連，及(c)不讓美國人士參與處理與該等帳戶及交易有關的工作。

上述步驟中，最耗費大量人手處理的，是識別相關帳戶及投資產品。因此，銀行須確保有充足資源（包括訂購盡職審查技術與數據庫），以管理額外的工作。幸好許多受制裁人士均已標簽為政治人物，他們的帳戶應較容易識別得到。

根據香港自治法案提交5(a)報告列明外國人名單，是向外國金融機構實施次級制裁的先決條件。由於美國政府尚未公布該名單，現在非美國銀行考慮主動消減任何人士或帳戶的風險，未免為時過早。現階段的工作重點，應是識別相關的帳戶，確保銀行設有內部管控措施，停止可能牽涉美國關係的交易。

"Many financial transactions can have a hidden touchpoint to the US financial system that is not always obvious. For example, non-US securities firms may use US-based broker dealers or clearing firms to execute and settle securities transactions."

Because the US government has yet to publish a list of foreign persons included in the 5(a) report under the HKAA, which is a prerequisite for the imposition of any secondary sanctions against foreign financial institutions, it may be too early for non-US banks to consider proactively de-risking any persons or accounts. At this stage, the focus should be on identifying related accounts and making sure that the bank has in place internal controls to stop transactions that could involve a US nexus.

Some commentators have suggested that there is a potential conflict between banks sanctions compliance obligations under US sanctions and Article 29(4) of the NSL. As of this writing, no Hong Kong or PRC government agencies have stated that such a conflict exists or provided specific guidance on financial institutions' obligations, if any, under Article 29(4). On 8 August 2020, the Hong Kong Monetary Authority (HKMA) issued a letter reminding Authorised Institutions (AIs) that "unilateral sanctions imposed by foreign governments" outside of the United Nations framework create "no obligation ... for AIs under Hong Kong law." At the same time, HKMA's letter appears to acknowledge that banks may have potentially conflicting compliance obligations and may curtail activities with designated persons. In this regard, the letter states that: "In assessing whether to continue to provide banking services to an individual or entity designated under a unilateral sanction which does not create an obligation under Hong Kong law, boards and senior management of AIs should have particular regard to the treat customers fairly principles." Although the HKMA does not provide specific guidance on what fair treatment is in this context, it appears that the HKMA favours a nuanced approach to sanctions compliance rather than a blunt and overly broad de-risking strategy, particularly one that disregards the limited applicability of US sanctions to non-US banks, as summarised above.

Concluding remarks

Ultimately, non-US banks will need to "thread the needle" of complying with US sanctions that apply to them from time to time while acknowledging tensions with local law. The US sanctions, as summarized above, provide some room for non-US banks to continue engaging in business with SDNs and their majority-owned companies; provided banks take measures to ensure that the transactions do not directly or indirectly involve any US nexus and are not of a type that could trigger secondary sanctions. Banks that decide to go for a broader de-risking strategy should be prepared to explain the necessity of doing so to their local regulators or other stakeholders.

[1] The terms "US person" means: "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." Note that non-US subsidiaries of US banks are not US persons under the HKAA or EO 13936, although most US banks treat their non-US subsidiaries as US persons for compliance purposes.

[2] For example, with reference to another sanctions program, OFAC has stated that it will consider the following list of seven broad factors in determining whether a transaction is significant: "(1) the size, number, and frequency of the transaction(s); (2) the nature of the transaction(s); (3) the level of awareness of management and whether the transaction(s) are part of a pattern of conduct; (4) the nexus between the transaction(s) and a blocked person; (5) the impact of the transaction(s) on statutory objectives; (6) whether the transaction(s) involve deceptive practices; and (7) such other factors that the Secretary of the Treasury deems relevant on a case-by-case basis." See OFAC' s Frequently Asked Questions (FAQs) Nos. 542 and 545.

有論者認為銀行遵守美國制裁的責任，可能與港區國安法第29(4)條相抵觸。執筆之際，尚未有香港或內地政府機構指出有這方面的抵觸，或就財務機構在第29(4)條之下的責任（如有）提供具體指引。2020年8月8日，香港金融管理局（金管局）發信提醒認可機構，在聯合國框架以外的「外國政府單方面制裁舉動」「並不向認可機構產生法律責任」。同時，金管局的信件似乎亦承認銀行可能有互相抵觸的合規責任，並且可能減少與指定人士有關的業務。就此，信件指出「認可機構在評估是否繼續向在香港沒有法律約束力的單方面制裁舉動中所指定個人或實體提供銀行服務時，其董事會和高級管理人員應要注意考慮公平對待客戶的原則。」金管局雖然對於這情況下何謂公平待遇並無提供具體指引，但似乎贊成在遵守制裁規定時採取有差別的做法，而非一刀切地採用過於概括的消減風險策略，無視（如上文所述）美國制裁不太適用於非美國銀行的事實。

結語

非美國銀行最終須肩負艱難的任務，遵守不時適用於它們的美國制裁措施，同時留意制裁措施與本地法律是否有抵觸。如上文所述，在美國制裁措施下，非美國銀行有空間繼續與受制裁人士及其擁有控制權的公司保持業務往來，惟銀行須確保有關交易並非直接或間接與美國有關，而且屬於不會觸發次級制裁的類別。如決定採用較概括的消減風險策略，銀行應準備向本地監管機構或其他持份者解釋這種做法的必要性。

[1] 「美國人士」指：「任何美國公民、永久居民外國人、根據美國法律或美國任何司法管轄區的法律組織的實體（包括海外分公司），或美國境內任何人士。請注意，在香港自治法案或13936號行政命令下，美國銀行的非美國附屬公司並非美國人士，但為合規目的，大部分美國銀行均視其非美國附屬公司為美國人士。

[2] 例如參考另一制裁計劃，外國資產管制辦公室註明，在斷定某項交易是否重大時，會考慮以下七大類因素：「(1)交易的規模、數量及頻密程度；(2)交易的性質；(3)管理層知悉該項交易的程度，以及該項交易是否一種行為模式的一部分；(4)該項交易與受限制人士的關係；(5)該項交易對法定目的的影響；(6)該項交易是否牽涉欺騙性的做法；及(7)財政部長按個別情況認為適用的其他因素。」見外國資產管制辦公室常見問題第542及545題。

"許多財務交易可能隱藏與美國金融體系的接觸點，例如非美國證券公司可能透過設於美國的經紀或清算公司執行及結算證券交易。"

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