

8 DECEMBER 2021

CORPORATE INVESTIGATIONS SECTOR ALERT

IN THIS ISSUE >

Rather safe than sanctioned: Mitigating your organisational risk of transacting with sanctioned entities and individuals

In October 2021, the US Department of Treasury released a report detailing the global trends and challenges identified by the US in enforcing sanctions (US report). The identified challenges are not unique to the US and are likely to be experienced in jurisdictions in which a comprehensive sanctions framework is implemented.

FOR MORE INSIGHT INTO OUR
EXPERTISE AND SERVICES

[CLICK HERE](#) 



INCORPORATING
KIETI LAW LLP, KENYA

Rather safe than sanctioned: Mitigating your organisational risk of transacting with sanctioned entities and individuals

Sanctions impose restrictions on activities that relate to a particular country's goods and services, or persons and entities.

In October 2021, the US Department of Treasury released a report detailing the global trends and challenges identified by the US in enforcing sanctions (US report). The identified challenges are not unique to the US and are likely to be experienced in jurisdictions in which a comprehensive sanctions framework is implemented.

As some of the challenges raised in the report may affect how your business negotiates its corporate and commercial agreements, in this article we unpack the South African sanctions regime and advance measures to mitigate your organisational risk in transacting with sanctioned entities or individuals.

South Africa's sanctions regime

South Africa has ratified several international conventions and treaties and participates in forums that require the country to implement measures to prevent and combat corrupt activities. These conventions include the United Nations Convention Against Corruption (2003), the Organisation for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), the African Union's Convention on Preventing and Combating Corruption (2003), the Southern African

Development Community's Protocol against Corruption (2001), and the United Nations Convention against Transnational Organised Crime (2000) and its associated protocols.

Sanctions impose restrictions on activities that relate to a particular country's goods and services, or persons and entities.

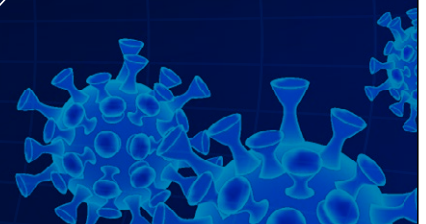
The targeted financial sanction measures which apply in South Africa generally restrict sanctioned persons and entities from having access to funds and property under their control and from receiving financial services in relation to such funds and property. The term "*targeted financial sanctions*" refers to both asset freezing and further prohibitions in the form of sanctions.

South Africa's targeted financial sanctions regime is regulated through the country's anti-money laundering and counter terrorism financing legislative framework comprising of, amongst others, the Financial Intelligence Centre Act 38 of 2001 (FICA).

The Targeted Financial Sanctions List (TFS List) contemplated in section 26A(1) of FICA refers to natural persons or entities identified by the United Nations, that are involved in terrorist acts and/or are connected to the proliferation of weapons of mass destruction. This provision

**CDH'S COVID-19
RESOURCE HUB**

Click here for more information 



South Africa's targeted financial sanctions regime is regulated through the country's anti-money laundering and counter terrorism financing legislative framework comprising of, amongst others, the Financial Intelligence Centre Act 38 of 2001.

Rather safe than sanctioned: Mitigating your organisational risk of transacting with sanctioned entities and individuals...*continued*

aims to enforce the South African legal requirement for the implementation of TFS and applicable TFS regimes under Chapter VII, Article 41 of the United Nations Charter.

Read with FICA, the TFS List, which is published by the Financial Intelligence Centre and is publicly available, requires accountable institutions listed in FICA to determine whether they have a sanctioned person or entity as a client or whether a prospective client is a sanctioned person or entity so as to determine their exposure to money laundering and terrorist financing risks.

Selected global sanction regimes

The US report acknowledges that sanctions should be directed at certain objectives such as countering forces that fuel regional conflict, curtailing nuclear proliferation activities and ceasing specific instances of national atrocities.

The United Nations Security Council can take action to maintain or restore international peace and security. This action may take the form of resolutions by the United Nations Security Council to impose sanctions against countries, companies or persons.

Companies and persons sanctioned by the US appear on the US Treasury's Office of Foreign Assets Control (OFAC) List of Specially Designated Nationals and Blocked Persons (SDN List).

Trade and other business activities with persons or in jurisdictions appearing on the SDN List is a criminal offence in the US and the penalties are enforced against those who the American Code of Federal Regulations defines as "US persons" while secondary sanctions are enforced extraterritorially against "non-US persons".

Secondary sanctions may be imposed by the US on non-US persons that trade or engage in other activities with persons/entities appearing on the SDN List, even though there may be no nexus between the transaction and the US.

The purpose and aim of these types of sanctions is to deter non-US persons from engaging in certain dealings, deemed to be contrary to US national security and foreign policy interests, by restricting their access to US markets.

Thus, entities incorporated in African countries would have exposure to secondary sanctions enforced by the OFAC in relation to any transactions with those appearing on the SDN List. Secondary sanctions appear to include various levels of exclusion from the US financial system, including (but not limited to) an entity being placed on the SDN List as a consequence of transacting with entities or individuals appearing on the SDN List.

Challenges facing the enforcement of sanctions

The US report states that some of the challenges in enforcing sanctions include the prevalence of cybercriminals and growing pressures on the workforce and policymaker demands. The US report further acknowledges that the OFAC should aim to mitigate unintended consequences of sanctions on domestic workers, businesses, allies and non-targeted populations.

A further need to publicly communicate messages related to sanctions and engage with key stakeholders has been highlighted in the US report as critical in the enforcement of secondary sanctions.

Rather safe than sanctioned: Mitigating your organisational risk of transacting with sanctioned entities and individuals...continued

When drafting the contractual terms, the counterparty should warrant that they are not a sanctioned entity, and the agreement should provide cancellation provisions to allow for the innocent party to terminate a contract without incurring damages if the counterparty is or becomes sanctioned during the business relationship.

Analysis

Failure to comply with targeted financial sanction obligations is an offence under FICA. The fact that an accountable institution relies on commercially available screening capabilities or considers the risk of being exposed to obligations relating to targeted financial sanctions to be low, is not a defence against conducting business with a person or entity that appears on the TFS List.

Non-compliance with the provisions of FICA may attract penalties including, amongst others, a reprimand, a restriction or suspension of certain specified business activities or financial penalties for a business up to an amount of R50 million.

The necessity to undertake due diligences on counterparties becomes prevalent before entering into a corporate or commercial agreement, specifically where there is uncertainty if the counterparty has been sanctioned or where counterparty's exposure to targeted financial sanctions appears to be low. When considering the increasing ways in which persons and entities are circumventing the enforcement of sanctions, as noted in the US report.

When drafting the contractual terms, the counterparty should warrant that they are not a sanctioned entity, and the agreement should provide cancellation provisions to allow for the innocent party to terminate a contract without incurring damages if the counterparty is or becomes sanctioned during the business relationship.

*Corné Lewis, Krevania Pillay
and Akhona Mdunge*



OUR TEAM

For more information about our Corporate Investigations team and services in South Africa and Kenya, please contact:



Tim Fletcher
Practice Head
Director
Dispute Resolution
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com



Anja Hofmeyr
Director
Dispute Resolution
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com



Aadil Patel
Practice Head
Director
Employment
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Gasant Orrie
Cape Managing Partner
Director
Corporate & Commercial
T +27 (0)21 405 6044
E gasant.orrie@cdhlegal.com



Corné Lewis
Director
Dispute Resolution
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com



Lucinde Rhoodie
Director
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com



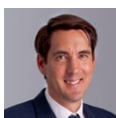
Eugene Bester
Director
Dispute Resolution
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com



Richard Marcus
Director
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com



Belinda Scriba
Director
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com



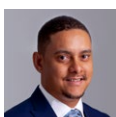
Chris Charter
Practice Head
Director
Competition
T +27 (0)11 562 1053
E chris.charter@cdhlegal.com



Burton Meyer
Director
Dispute Resolution
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com



Krevania Pillay
Associate
Dispute Resolution
T +27 (0)11 562 1317
E krevania.pillay@cdhlegal.com



Jackwell Feris
Director
Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com



Rishaban Moodley
Director
Dispute Resolution
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2021 10685/DEC



INCORPORATING
KIETI LAW LLP, KENYA



CORPORATE INVESTIGATIONS SECTOR | cliffedekkerhofmeyr.com