Australian Banking Association

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Review of Australia's Autonomous Sanctions Framework
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Review of Australia's Autonomous Sanctions Framework – Issues Paper

The Australian Banking Association (**ABA**) welcomes the opportunity to comment on the Australian Sanctions Office (**ASO**) *Issues Paper on the Review of Australia's Autonomous Sanctions Framework.*

The ABA and industry members collectively acknowledge the significance of autonomous sanctions as a framework in supporting the Australian government in its implementation of foreign policy.

Equally, the current structure of Autonomous Sanctions legislation, including the Autonomous Sanctions Act 2011, Autonomous Sanctions Regulations 2011 and subordinate instruments (**Autonomous Sanctions Framework**), can cause challenges to members when interpreting and complying with the Autonomous Sanctions Framework.

This consultation presents opportunities where the ASO may consider industry feedback to identify administrative and regulatory efficiencies in improving the Autonomous Sanctions Framework.

Finally, the following Key Recommendations respond to, and have been segregated by each of the seven Issues raised in the Issues Paper.

- Issue 1: Streamlining the legal framework
- Issue 2: Scope of sanctions measures
- Issue 3: Permit powers
- Issue 4: Humanitarian exemption
- Issue 5: Sanctions offences and enforcement
- Issue 6: Review of mechanism for designation and declarations
- Issue 7: Regulatory functions of the ASO

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Key recommendations

- **Issue 1: Streamlining the legal framework**

A. How could the Autonomous Sanctions Framework be made more clear and easy to navigate?

The industry supports initiatives to streamline regulation, specifically introducing a two-tiered legislative structure which involves moving parts of the Regulations to the Act (including the offence prohibitions), whilst maintaining separate regulations covering each sanctions regime (e.g., Russia, Myanmar, etc.). This proposal is similar to the recently established (post-Brexit) United Kingdom (**UK**) model of regulation.

The UK implements a range of sanctions regimes through regulations made under the *Sanctions and Anti-Money Laundering Act* 2018 (**SAMLA**). The SAMLA provides the main legal basis for the UK to impose, update, and lift sanctions, whereas the regulations set out the sanctions measures with respect to each regime.[1] The industry further recommends that a single regulation is adopted for each regime, meaning that regimes subject to both United Nations and autonomous sanctions are contained within a single regulatory instrument. The industry notes that this will require amendment to both the *Charter of the United Nations Act 1945* (**COTUNA**) and the *Autonomous Sanctions Act 2011* (**ASA**).

The industry believes it will be easier for the regulated community to identify the applicable restrictions (e.g., do not export product A to country C) if:

- The Autonomous Sanctions Regulations 2011 (**ASR**) is split with a separate regulation published for each sanction's regime. Navigating the tables in Part 2 is the most complicated part of the ASR and will no longer be required if regime specific regulatory instruments are published.

- The prohibitions are set out in separate sections without the requirement for the user to cross-reference against multiple definitions, including 'sanctioned supply'.

Where additional restrictions are required, such as oil exploration goods or import restrictions, it is recommended that a separate section(s) is added with related restrictions concerning financial and technical assistance. Similarly, if additional restrictions are required beyond import/export and related financial and technical assistance, it is recommended that these restrictions (e.g., prohibitions on investment, joint ventures, lending, etc.) are set out in separate sections with limited cross-referencing to defined terms, such as sanctioned commercial activity.

Part 2 of the ASR sets out, among other things, conduct that would cause a person to make or provide a sanctioned supply, sanctioned import, and sanctioned commercial activity. However, Part 2 does not include a requirement that the conduct has a nexus to Australia (e.g., that it occurs in Australia or is engaged in overseas by an Australian person or body corporate, or a body corporate controlled by such a body corporate).

[1] See e.g., Russia: The Russia (Sanctions) (EU Exit) Regulations 2019 (legislation.gov.uk) and OFSI Guidance: Russia_guidance_December_2022.pdf (publishing.service.gov.uk)

The industry considers that one consequence of Part 2 being structured in that way is that on its face it applies to conduct by any person, anywhere in the world. This has ramifications particularly for regulation 13 (i.e., Prohibitions relating to the provision of sanctioned services). That is, a person who is subject to Australian jurisdiction can breach that prohibition by providing a sanctioned service to a person who is not subject to Australian jurisdiction (and therefore not required to comply with Australian sanctions legislation).

Part 2 has also been updated in ways that may have caused unintended consequences. When the concept of "sanctioned imports" were added to the ASR in 2012, a new Regulation 12A ensured that making a sanctioned import contravened the ASR if it was not authorised. However, it did not create a new Regulation 13A to ensure that a sanctioned service provided in respect of an authorised import did not result in a contravention of the ASR. It is currently unclear whether or not someone is breaching the ASR if they provide services in relation to a sanctioned import that itself has been permitted by DFAT.

The industry considers that it would be useful for the ASO to confirm if that is how Part 2 is intended to operate, and if not, the industry considers that the ASR could be amended to make it explicit that a person subject to Australian jurisdiction cannot breach regulation 13 of the ASR by providing a sanctioned service to a person who has no nexus to Australia.

An additional benefit of a two-tiered approach is the reduced navigation of subordinate instruments. Current state of regulatory framework does not reference the Specifications, Lists, and Instruments that a particular regulation restricts or prohibits. This requires the participant to have an extensive level of legal instruments knowledge to be able to comply. The proposed approach of a UK or EU like framework would internally reference to annexes or schedules within the regulation, making it a single point of reference.

B. What challenges have you experienced in navigating the Autonomous Sanctions Framework? How could these be addressed?

The recent updates to the ASO Sanctions Page, including the 'Snapshot' guides, have aided in navigating the Autonomous Sanctions Framework. The industry encourages the ASO to take this work a step further and provide guidance that is structured around the restrictions, rather than directly following the structure of the regulations. The potential structure for the guidance could be:

- Who must comply with these sanctions.
- Restrictions: e.g., asset freeze, what cannot be exported to X, what cannot be imported from X, etc.
- Exceptions and Permits.
- Additional resources - the industry also encourages the ASO to publish further case studies and FAQs, perhaps utilising recent examples from requests for interpretation associated with the Russian sanctions regime, as the case studies that have been published are very helpful.

It is also recommended that the ASO further leverage the explanatory statements that accompany the regulatory amendments to explain to the regulated community the intent and scope of the newly introduced prohibitions. The technical nature of the regulations has resulted in explanatory

statements becoming increasingly focussed on explaining the legal or drafting reason for the change, rather than explaining the substantive provisions.

Where no permit allowing for the orderly winddown of existing business activities and contractual obligations is issued, the Australian financial industry as partners in efforts with the ASO would benefit from increased notice of any sanctioned measures in advance of implementation or alternatively future effective dates provided for. This is discussed in further detail under **Issue 3 – Permit Powers**.

C. How would reducing the number of pieces of legislation that apply sanctions measures better assist you? Could this help with managing your administrative burden?

The industry does not believe that reducing the number of pieces of legislation will reduce the administrative burden. The industry's preference is that the complexity of the ASR is reduced, potentially in line with the recommendation in responses *A* and *B* above on this Issue.

However, the industry does agree that there is an opportunity to remove certain pieces of regulation, such as the Autonomous Sanctions (Russia, Crimea and Sevastopol) Specification 2015, the Declared Persons List, Import Sanctions Goods List, if individual regulations are published for each sanctions regime.

The ASO should further consider the publication of a sectoral sanctions list, containing list entities subject to capital market restrictions (like the Office of Foreign Assets Control (**OFAC**) and the Office of Financial Sanctions (**OFSI**), etc.,) rather than only publishing these entities within regulations. In the industry's view, this would make the list more accessible and readily utilised in automated compliance solutions.

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➢ Issue 2: Scope of sanctions measures

A. Are the sanctions measures under the Autonomous Sanctions Framework fit-for-purpose? Are there other sanctions measures that would support Australia's foreign policy objectives?

While the question of foreign policy objectives lies ultimately with government, industry considers that the Autonomous Sanctions Framework administered by the ASO may be improved upon in a number of ways. This is exemplified in the interactions between the ASO representatives and ABA members before the implementation of multilateral Western sanctions targeting Russia for its invasion of Ukraine in 2022.

In the months preceding Russia's invasion of Ukraine, it was clearly articulated by ABA members to the ASO that, if Australia implemented a sanctions regime similar to those being broadcast by Western allies, there were a number of foreseeable consequences arising as a result of the Autonomous Sanctions Framework that would adversely impact the Australian financial services sector and the economy as a whole (including ABA members and their customers). Additionally, a number of different parties, both domestic and abroad, themselves not directly the target of the Australian sanctions were impacted.

It was also noted by ABA members at that time that, to the extent the Autonomous Sanctions Framework diverged from its allies and/or there was ambiguity in the Australian regulations, Australian financial institutions and bodies corporate operating globally would potentially be at a disadvantage.

In the view of ABA members:

- they would prefer a more cohesive strategy by the authorities to better understand the potential for adverse impacts of the Autonomous Sanctions Framework on Australia's own financial institutions, corporate bodies, or persons in advance of implementation of new sanctions.
- multilateral coordination with Australia's foreign allies in advance of the implementation of the Russia sanctions would mitigate these impacts (as seen in both 2022 and 2014 when administering targeted capital market restrictions).
- the present mechanism for the ASO to administer immediate relief for unintended targets of Australian sanctions is a permit process impeded by constraints of the current regulatory regime and can take significant time to obtain.
- such unintended and adverse consequences may be successfully pre-empted through proactive outreach by government and meaningful dialogue with the financial industry before and after sanctions are implemented.

The ABA notes industry may request information, seek an indicative assessment, or request a sanctions permit from the ASO through the ASO's secure PAX portal (as noted in paragraph 34 of the Issues Paper). With that said, ABA members would appreciate more certainty from the ASO in terms of the legal status of their response when operating under a strict liability regime.

In the view of ABA members, the Autonomous Sanctions Framework should allow for the ASO to issue an assessment (e.g., non-prohibition letter) where no permit is required that industry may place reliance on (e.g., supporting reasonable grounds for non-enforcement). To benefit the industry in general, it is

also recommended that guidance be published by ASO around common themes identified from indicative assessment requests and responses.

As noted in Section 1.A. above, industry considers that there is a strong need for clarification within the Autonomous Sanctions Framework over the extraterritorial reach of Australian sanctions, in particular to clarify:

- when an Australian financial institution, including its employees, may be held responsible for activities undertaking on behalf or to the benefit of its Australian or foreign corporate clients in relation to activities prohibited under Australia sanctions but performed outside Australian jurisdiction.

- when an Australian financial institution, including its employees, would be held responsible for breaches by a foreign subsidiary or affiliate, or an individual employed by a foreign subsidiary or affiliate.

There is also a need for further guidance from the ASO as to what reasonable precautions and appropriate due diligence looks like, in order to allow industry members to understand whether they are able to rely on defences within the Autonomous Sanctions Framework (including section 16(7) of the ASA). Industry would also benefit from guidance from the ASO as to what constitutes best practice in connection with the Autonomous Sanctions Framework generally.

In addition, the ABA recommends that the ASO provide clear definitions for key terms within the Autonomous Sanctions Framework. This may be done either within the regulations themselves and/or through written guidance and/or FAQs issued by the ASO under delegated authority of the Minister, which ABA members may reliably depend upon (noting the strict liability regime).

The Autonomous Sanctions Framework may also be enhanced by expanding the scope of restrictions available under the Magnitsky-style thematic sanctions to further align with Western allies and allow for specific restrictions on imports and/or exports as a step before asset freeze sanctions. Under the current regulations, thematic sanctions are limited to visa restrictions and asset freeze sanctions being imposed on designated individuals and entities.

Should Australia choose to designate major foreign entities under thematic sanctions under currently available asset freeze sanctions, the lack of more tailored approaches may lead to significant detrimental effects on the Australian and global economy (including, for example, disruptions to wind and solar projects and chip manufacturing supply chains worldwide).

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B. Have the below terms, or any other terms, in the Autonomous Sanctions Framework presented you with any challenges in understanding whether an activity you wish to undertake is sanctioned? For example:

- **Directly or indirectly**
- **Assets; and**
- **Controlled asset.**

In the view of the ABA's members, the complexity of the Autonomous Sanctions Framework has at times, presented the financial industry with challenges and a costly legal burden when seeking to understand the prohibitions in place and their applicability to transactions and relationships involving parties or activities that may be subject to sanctions.

This means ABA members must seek legal advice from external counsel and, where there is still no clarity, ABA members must seek an indicative assessment and/or permit from ASO, without clarity on how long that process may take. This burden could be eased through better defined or clearly understood terms within the regulations themselves.

The ABA recommends that commonly used terms within the Autonomous Sanctions Framework are more clearly defined within the regulations or that further guidance is provided by the ASO. Further, such definitions and guidance should, where possible, be consistent with definitions provided by the sanctions regulators of Australia's allies, including specifically the U.S., U.K., and EU.

ABA members note that cross-border transactions (which are routed through the correspondent banking relationships of the aforementioned regions), will be subject to the sanctions regimes administered by those regions. As such, adopting an approach that is consistent with key allies will ensure payments from or, to Australian persons are processed more efficiently, benefitting Australian financial institutions, their clients, and the broader Australian economy.

Taking an approach that aligns with Australia's allies when defining terms or concepts would also be consistent with the intention and plain English meaning of the ASR and would act to resolve the paradoxical situations that the ASO guidance letter creates.

Examples of terms and concepts requiring further definition, clarification, and/or guidance are set out below in **Appendix 1**.

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C. Would having a uniform concept of sanctioned commercial activity assist you in understanding sanctions obligations for this measure? If not, what might?

It is the position of the ABA that a uniform concept of "**sanctioned commercial activity**" would ***not*** be beneficial to the Autonomous Sanctions Framework. This assessment is made in the context of differing sanctions objectives and restrictions, where an adaptive approach to the concept of "sanctioned commercial activity" allows flexibility for government to apply measured sanctions that may become more or less restrictive as necessary to meet foreign policy objectives.

➢ Issue 3: Permit powers

A. Are there situations which you think would warrant a standing general permit being issued? If so, what is the justification?

The Minister has the power to grant a general permit authorising a particular class of persons to undertake a particular class of activities. The industry considers that there should be a greater focus on issuing general permits by the Minister.

Particularly in relation to financial institutions, sanctions issues will generally have a consistent impact across the broad industry not just individual financial institutions requiring specific permits. This may equally be said of participants in impacted industry sectors (e.g., sanctioned commodities).

The use of general permits has to date been very limited in Australia. In the recent past we have seen the use of a general permit in relation to the Russian oil price cap but very little else with the emphasis from the ASO on specific permits considered for and issued to, individual applicants.

In other jurisdictions such as the U.S. and the U.K., sanctions authorities will regularly issue numerous public general licences/licenses in connection with the implementation of relevant sanctions.

OFAC general licences, for example, will cover winddown periods to enable financial institutions and others to extract themselves from transactions and dealings with recently sanctioned persons and entities. The U.K. (through OFSI) has similarly issued general licences to manage winddowns through management of "prior [legal] obligations".

An effective permit process assists financial institutions and other entities (including their customers), in addition to regulators and government, to manage the impact of sanctions risk appropriately and in an orderly manner without unduly undermining the effectiveness of the sanctions. An effective permit process is recognition that sanctions will inadvertently impact parties that have established legal obligations sometimes months and years before events trigger rapid implementation of sanctions.

In Australia there has generally been no utilisation of the general permit mechanism like that in the U.S., U.K. etc. As soon as Australian sanctions are implemented financial institutions, entities, and individuals are inadvertently caught with having to deal with controlled assets and frozen funds etc. There appears to be a mechanism provided for, given "contractual dealing" is a basis upon which to grant a permit (reg. 20, ASR), under Australian sanctions regulations, but they have not been utilised as yet to provide for general winddown periods of existing obligations.

The use of general permits is to mitigate unintended consequences or the adverse impact on domestic persons, the industry, and the economy, as well as those of allies. Not only do they allow orderly and appropriate winddown of existing business activities and contractual obligations, but they also provide time within which to assess the real impact of certain sanctions.

For example, when designating a Russian oligarch who may have global and Australian interests, the real impact of sanctions may not be appreciated or understood by government in advance of designation. The Russian oligarch may own or control commercial entities that are critical to the global

commodities market and the concurrent issuance of a general winddown permit with the designation allows for the orderly exit from activities prohibited by the new sanctions.

Such general permits also assist government and regulators to mitigate unforeseen impacts, noting that the granting of such a general permit would be specific in its authorisations. It should be noted that consultation with industry in advance of the implementation of new sanctions will assist government in evaluating potential impacts on the domestic economy and assessing whether a general permit is needed.

B. Are there other permit-related matters you wish to raise?

The industry considers that it is appropriate the ASR confers powers on the Minister to issue permits that facilitate conduct that may otherwise be unlawful and recommends that those powers are maintained. However, the industry considers that there is scope for the Minister and the ASO to enhance the administration of the permits regime by making it more transparent.

Public Notification

The industry understands that at present, there is no process in place by which the Minister notifies the public of the fact of having issued a permit. For example, by publishing permits on the DFAT website. That appears to apply equally to both:

i) instances where the Minister issues a permit that applies to a specific person or cohort of people (**specific permit**), and
ii) instances where the Minister issues a permit of general application applying to a specified activity but not limited to a specified person or cohort of people (**general permit**)[2].

The industry considers that the practice of issuing permits without notifying the public of that having occurred is not transparent and is inconsistent with comparable legislative schemes that confer powers on public officials to modify regulatory regimes.[3] Accordingly, the industry recommends that the ASR be amended to require the Minister to publish general permits when they are made, and that in the interim the Minister and DFAT/ASO voluntarily adopt a process for notifying the grant of permits. However, such a proposed framework must contain appropriate safeguards to protect privacy rights of applicants and recipients of individual permits, including sensitive or proprietary information, the release of which could adversely affect the commercial interests and reputations of such applicants.

The industry considers that this would have the following benefits.

- It would enhance competitive neutrality, for example, as between firms that may want to engage in the same conduct. Where one obtains the benefit of a permit, that firm may gain a competitive advantage. If the second firm knew of the grant of the permit to the first firm, it may be motivated to consider applying for a permit for its benefit. Equally, where the Minister issues

[2] For example, the actual permit the Minister issued on 4 December 2022 known as the "Permit authorising the provision of financial assistance and financial services in respect of Russian oil purchased at or below the price cap" does not appear to have been published online.
[3] For example, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* confers a power on the AUSTRAC CEO to exempt a person from having to comply with aspects of the legislative scheme or modify the extent to which the legislative scheme applies to a person. However, where that occurs, the Act requires the AUSTRAC CEO to make a copy of such an exemption or modification available on the AUSTRAC website.

a permit of general application, it would allow all firms that are potentially affected to have access to the same notice of a permit having been issued and have equal opportunity to consider whether to start or resume activities covered by the permit.

- It would enhance transparency by enabling the industry and members of the public to understand more precisely the current state of the Australian sanctions regime, and how and why the Minister is modifying it.

- It would improve operational efficiency of compliance with the Australian sanctions regime and in so doing, reduce the cost of compliance across Australian industries and communities.

There should be a more effective administrative mechanism to issue general permits in a reasonable time and orderly manner. The application for a Ministerial permit is generally caveated with the fact that they are granted by exception, if at all. This process can also incur significant time and cost (e.g., legal costs and deferred or suspended commercial activities) for the applicant.

There are challenges with making arguments that satisfy the Minister that the granting of a permit will be in the "national interest". There are immediate questions of what is in the "national interest" and what will satisfy that test. It is unclear what the Minister will entertain and when, nor whether it is a political or legal process.

Delegated Authority

Currently, the Minister has power to delegate powers (including the power to issue permits) under the ASR (Regulations 26 – Delegations by Minister). The industry believes that some consideration should be given to allowing ASO greater delegations to issue permits as opposed to relying on the Minister for general permits (e.g., Russian price cap). A process that can be inflexible and slow. In the U.S., OFAC is delegated to issue general licences in an effective and timely fashion. Similarly, the OFSI in the U.K. has the power to issue general licences. The general permit issuing mechanism needs to be efficient and fast when rapid sanctions implementation necessitates immediate actions (e.g., winddown periods).

Unlike some sanctions regulators overseas (e.g., OFAC) Australian permits have generally required notification provisions that require a permit holder to notify ASO each time they intend to rely on the permit. This is an additional burden on the permit process and it is not exactly clear what the purpose of these notifications are and who manages and reviews the notifications. Industry understands that the U.K. has a similar notification mechanism, but perhaps there should be more transparency and administrative efficiency around this process.

Ancillary Authorisations

Given that permits are issued for the benefit of a named permit holder or holders, a permit allowing a named permit holder to enter a transaction should consistently extend for the benefit of third parties involved in that same transaction who are also subject to Australian sanctions. Otherwise, non-named third parties would necessarily need to seek their own permit adding to the administrative burden of non-named third parties, the ASO and the Minister.

These third parties can include:

(a) staff members (whether Australian or foreign) of the permit holder.
(b) affiliates of the permit holder.

(c) counterparties of the permit holder (e.g., suppliers, offtakers, financiers, transporters, vessels, etc.) and their staff.

Section 16 of the ASA creates offences for individuals and bodies corporate if they "engage in conduct" that contravenes a sanction law, and it is not clear whether actions taken by these third parties in connection with a transaction may be seen as contravening a sanction law.

As noted in Part 1.A above, regulation 13 is limited in what protection it grants within the Autonomous Sanctions Framework for ancillary services that would (but for the permit holder's permit) otherwise be "sanctioned services". In any event, the fact that permits are issued to permit holders creates a level of uncertainty about what protection exists for third parties involved in a transaction.

At present, ABA members are faced with a dilemma that, where a specific (or general) permit has been issued to a client or another ABA member, neither Australian financial institutions nor their staff may consistently rely on that permit as allowing them to finance or otherwise facilitate the permitted activities of the permit holder. Operating under strict liability, ABA members may therefore be required to decline or participate in transactions and other financial services necessary to effect the activities authorised by the permit. As authorised activities have been determined by the Minister to be in the national interest, industry feels this may be an inadvertent oversight of government.

In other words, industry is seeking to clarify that where a permit has been issued to an individual, corporate body or financial institution (or class thereof) subject to the jurisdiction of Australian sanctions, that clients and counterparties of the permit holder also subject to the jurisdiction of Australian sanctions:

i) may rely on the authorisations of that permit and engage in otherwise prohibited ancillary activities that are ordinarily incident and necessary to effect the permitted activity; and
ii) would not themselves be in breach of sanctions for engaging in such ancillary activities without themselves holding a permit to do so.

Industry recommends that this issue is clearly addressed, including by issuing clarifying guidance. To the extent helpful, industry notes that other sanctions authorities (e.g., OFAC) include secondary authorisations within permits, explicitly covering ancillary activities that are ordinarily incident to, and necessary to give effect to a permitted transaction.

The ABA recommends that this issue is prioritized for consideration within government.

➢ Issue 4: Humanitarian exemption

A. In what circumstance would you support the introduction of a humanitarian exemption for a set group humanitarian actors?

The ABA supports inclusion of a humanitarian exemption within the Autonomous Sanctions Framework, which may be enacted broadly through exemptions within the Act and/or through country-/program-specific regulations, further supplemented by the issuance of public general permits issued by the Minister or delegate, with additional guidance issued by the ASO as necessary.

The ABA recommends that a humanitarian exemption that supports the processing of transactions that have been identified by Member clients, customers or third parties, provided there are no new legal obligations, such as reporting requirements, imposed on Australian financial institutions. We further recommend any need for reporting be through inter-agency co-operation between the ASO and AUSTRAC.

The ABA also recommends that, when considering strict liability, where Australian financial institutions are able to place legal reliance on the declarations or other evidence provided by third parties, that they are themselves in compliance with all Australian regulatory obligations. This will encourage greater willingness to process transactions authorised under humanitarian exemptions.

The recommended approach is based upon that of the U.S. Sanctions Program, which in the case of its Syrian Sanctions Regulations (**SySR**)[4] contains such humanitarian exemptions in the form of general licenses (permits) embedded in the regulations and supplemental general licenses issued by OFAC that are supported with practical guidance issued by OFAC, as detailed below.

I. Exemptions within the regulations authorising otherwise prohibited transactions and activities:

- **United Nations**[5]: involving the Government of Syria in relation to the official business of the United Nations, its Specialized Agencies, Programmes, Funds, and Related Organizations by employees (collectively, "the UN"), or its contractors or grantees thereof.

- **Nongovernmental organizations**[6]: involving the Government of Syria, including not-for-profit activities to support:
  - humanitarian projects to meet basic human needs in Syria, including, but not limited to, drought relief, assistance to refugees, internally displaced persons, and conflict victims, food and medicine distribution, and the provision of health services.
  - democracy building in Syria, including, but not limited to, rule of law, citizen participation, government accountability, and civil society development projects.
  - education in Syria, including, but not limited to, combating illiteracy, increasing access to education, and assisting education reform projects.
  - non-commercial development projects directly benefiting the Syrian people, including, but not limited to, preventing infectious disease and promoting maternal/child health, sustainable agriculture, and clean water assistance.

[4] Syrian Sanctions Regulations, 31 CFR § 542, https://www.ecfr.gov/current/title-31/subtitle-B/chapter-V/part-542.
[5] Syrian Sanctions Regulations, 31 CFR § 542.513, Official activities of certain international organizations authorized.
[6] Syrian Sanctions Regulations, 31 CFR § 542.516, Certain services in support of nongovernmental organizations' activities authorized.

- the preservation and protection of cultural heritage sites in Syria, including, but not limited to, museums, historic buildings, and archaeological sites.

- **Necessary and incidental transactions**: For both of the above general licenses, persons availing themselves of the general license authorisations are also allowed to purchase oil product from the Government of Syria that is otherwise prohibited by the SySR, as being necessary and incidental to authorised humanitarian activities in Syria.

The ABA recommends the inclusion of regulatory exemptions for specified humanitarian activities within the Autonomous Sanctions Framework.

II. Supplemental public general permits:

In addition to the above authorisations contained within the SySR, OFAC has issued supplemental general licenses covering specified transactions and activities:

- **Syria General License 21A** - *Authorizing Certain Activities to Respond to the Coronavirus Disease 2019 (COVID-19) Pandemic.*[7]
- **Syria General License 22** - *Authorizing Activities in Certain Economic Sectors in Non-Regime Held Areas of Northeast and Northwest Syria.*[8]
- **Syria General License 23** - *Authorizing Transactions Related to Earthquake Relief Efforts in Syria.*[9]

The ABA recommends integrating such supplemental public general permits into the Autonomous Sanctions Framework, which allows the Australian government and Minister to take a timely and adaptive approach when responding to unforeseen scenarios and more easily facilitate activities that align with Australian foreign policy objectives and community expectations.

Such public general permits issued in the national interest should be made available on the ASO website alongside any related guidance, allowing for persons that wish to avail themselves of such authorisations to do so in an efficient and timely manner.

III. Guidance issued on authorisations of general licenses

Following the issuance of *Syria General License 23*, OFAC issued a guidance paper titled "*Guidance on Authorized Transactions Related to Earthquake Relief Efforts in Syria*"[10], which for persons wishing to assist in the disaster relief effort clarified a number of points and provided additional details as to what was permitted or remained prohibited.

The ABA recommends that the ASO takes a similar approach to humanitarian exemptions by providing clarifying guidance and additional details in regards to what is or is not permitted within the Autonomous Sanctions Framework so that financial institutions, bodies corporate, humanitarian organisations and

[7] Syria General License 21A , Document (treasury.gov)
[8] Syria General License 22, Document (treasury.gov)
[9] Syria General License 23, Document (treasury.gov)
[10] *Guidance on Authorized Transactions Related to Earthquake Relief Efforts in Syria*, Document (treasury.gov)

other persons or entities wishing to participate in humanitarian activities or donate to humanitarian actors or otherwise support permitted activities are more easily able to do so with comfort they are not doing so in a manner that violates applicable sanctions.

IV. Further observations

The ABA envisions a similar framework as the above-detailed SySR being integrated into the Autonomous Sanctions Framework, where such authorised transactions and activities within the U.S. Syrian sanctions program's general licenses covering the UN and nongovernmental humanitarian organisations may be further expanded upon within the Act or regulations, through public general permits, and guidance from the ASO.

ABA also recommends that any humanitarian exemptions within the Autonomous Sanctions Framework are aligned wherever possible with the COTUNA sanctions framework. Where there are differences between the regulatory regime of either, the ASO's guidance should clearly note such differences across permits, licenses, guidance, and FAQs.

B. What safeguards would be necessary to ensure such an exemption is not misused, for example to facilitate proliferation financing or sanctions evasion?

The ABA recommends a number of safeguards embedded within the Autonomous Sanctions Framework to ensure compliance with sanctions prohibitions, while authorising humanitarian activities:

Restrictions on specified parties – For the above examples of general licenses embedded in the SySR, U.S., financial institutions are authorised to process transfers of funds on behalf the UN or non-governmental organisations to or from Syria in support of authorised activities, provided that the transfer is not by, to, or through any person whose property and interests in property are subject to asset freeze designations other than persons who meet the definition of the term Government of Syria, as defined within the SySR.

The ABA recommends a similar approach being adopted for the Autonomous Sanctions Framework.

Disclosure of contract – In the case of U.S. general license covering the UN in Syria, contractors or grantees of the UN conducting transactions authorised pursuant to the UN general license must provide a copy of their contract or grant with the UN to a U.S. person before the U.S. person engages in or facilitates any otherwise transaction or activity by the Syria Sanctions Regulations. If the contract or grant contains any sensitive or proprietary information, such information may be redacted or removed from the copy given to the U.S. person, provided that the information is not necessary to demonstrate that the transaction is authorised pursuant to the UN general license.

The ABA recommends similar requirements, which are especially important to financial institutions processing such transactions while operating under a strict liability sanctions regime.

Reporting requirements: U.S. persons engaging in transactions or processing transfers of funds to or from Syria in support of authorised activities of this section are required to file quarterly reports no later than 30 days following the end of the calendar quarter with OFAC. The reports should include complete

information on all activities and transactions undertaken pursuant to the general license detailing the activities that took place during the reporting period, including the parties involved, the value of the transactions, the services provided, and the dates of the transactions.

The ABA does not recommend a reporting requirement be imposed on Australian financial institutions, but only on Australian humanitarian organisations or entities or persons within Australia acting in the humanitarian space that are accepting funds or assets from Australian persons and that wish to avail themselves of such an exemption. See earlier recommendation for interagency co-operation between the ASO and AUSTRAC.

Preapproved organisations: Although the SySR do not contain a specified group of actors that may avail themselves of the humanitarian exemptions other than the UN, the ABA supports an Autonomous Sanctions Framework that authorises humanitarian activities of:

i) the UN (as defined above in the SySR), the IMF, World Bank, and others, and contractors or grantees thereof.
ii) well-established international organisations with or without diplomatic status (e.g., the International Red Cross or Red Crescent, the World Food Programme, Doctors Without Borders, etc.)
iii) persons or entities accredited by the department under the Australian NGO Cooperation Program with whom the department has entered into a grant or partnership agreement.

Additionally, the ABA recommends the Minister should not be limited in any way from preapproving on an *ad hoc* basis any other entities through the issuance of a public general permit.

Remaining prohibitions – For U.S. persons utilizing the Syrian sanctions general licenses, certain transactions and activities remain prohibited. For instance, in the case of the humanitarian general license within the SySR, the importation into the United States of petroleum or petroleum products of Syrian origin or any transactions or dealings in or related to petroleum or petroleum products of Syrian origin other than to support authorised humanitarian activities in Syria, remain prohibited.

The ABA recommends a similar approach being adopted by the Autonomous Sanctions Framework as to safeguard legitimate foreign policy interests.

Additional safeguards may be considered as appropriate, which the ABA is happy to discuss further with members in consultation with the ASO.

C. If an exemption for 'humanitarian assistance' were to be included in the legislation, what types of activities would it be important to capture?

Please reference the above response to Issue 4, question A for examples of humanitarian activities permitted within OFAC's Syrian sanctions programme, both embedded within the SySR and as supplementary general licenses, as well as OFAC's earthquake relief guidance document.

The ABA feels that at a minimum the provision of the following services should be covered: medical supplies and services; paediatric care; shelter; financial support; provision of food, water, and sanitation; education; refugee care; evacuation; and military protection.

Additionally, the ABA recommends that strong consideration should be given to relief provided during famine, war, civil war, agricultural crisis, and other disasters.

However, the ABA also welcomes the recommendations of humanitarian organisations that may hold additional views and wish to provide further input on this specific topic.

➢ Issue 5: Sanctions offences and enforcement

A. Would civil penalties be a suitable enforcement tool in the sanctions context?

The industry acknowledges that criminal prosecution is a resource-intensive process that requires ASO to discharge the high criminal burden of proof. However, the industry recommends that a civil penalty regime is ***not*** introduced until the ASA and the ASR are updated following this consultation process and the ASO has adequate resources to respond to indicative assessments, implement a more transparent permits process, and routinely provide guidance/FAQs, all of which are necessary to support compliance with the Australian sanctions regime.

In addition, the industry further recommends that the defence that is available to corporations (See subsection 16(7) of the ASA – that the corporation took reasonable precautions and exercised due diligence to avoid contravening a sanction law) is extended to individuals. The industry notes that section 16(8) makes this a strict liability regime for corporations only, but it is the view of industry that the defence should also be available to individuals. This is especially important as actions taken by individuals employed by or acting for corporations may still impact the corporations themselves. It is further recommended that reasonable precautions and due diligence defence is also made available for the civil penalty regime, should it be introduced.

When considering the development of a civil penalty regime, it is recommended the ASO considers the approach adopted by OFAC. OFAC has a range of enforcement options set out below. Our Members recommend this be incorporated with an additional recommendation that voluntary disclosures be incorporated as mitigating factors that reduce penalties when they are applied.

OFAC Response	Description
No action	If OFAC determines there is insufficient evidence to conclude a violation has occurred and/or, based on an analysis of the General Factors outlined in OFAC Enforcement Guidelines, concludes that the conduct does not rise to a level warranting an administrative response, then no action will be taken.
Cautionary letter	If OFAC determines there is insufficient evidence to conclude a violation has occurred or a Finding of Violation or a civil monetary penalty is not warranted under the circumstances, but believes the underlying conduct could lead to a violation in other circumstances and/or that a Subject Person does not appear to be exercising due diligence in assuring compliance with the regulations that OFAC enforces, OFAC may issue a cautionary letter.
Finding of violation	If OFAC determines a violation has occurred and considers it important to document the occurrence of a violation and, based on an analysis of the General Factors outlined in the Enforcement Guidelines, concludes that the Subject Person's conduct warrants an administrative response but a civil monetary penalty is not the most appropriate response, OFAC may issue a Finding of Violation.

OFAC Response	Description
Civil penalty	If OFAC determines that a violation has occurred and, based on an analysis of the General Factors outlined in Enforcement Guidelines, concludes that the Subject Person's conduct warrants the imposition of a monetary penalty, OFAC may impose a civil monetary penalty. Refer to Section V of Enforcement Guidelines for additional detail on the calculation of the amount of applicable civil penalty.
Criminal referral	In appropriate circumstances, OFAC may refer the matter to appropriate law enforcement agencies for criminal investigation and/or prosecution.

OFAC has published enforcement guidelines[11] that outline the factors that drive OFAC's response to an apparent violation of U.S. sanctions law. Industry suggests that any future enforcement regime consider allowing for a range of enforcement options that is modelled on the above and supported by clear legislation and timely responses from the regulator.

If the ASO introduces a civil penalty regime, the ASO may wish to consider comparable 'protection from liability provisions' for the regulated community which are provided for in similar legislation.

For example, s 235 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) which provides for protection from liability for good faith actions undertaken in compliance with the Act. Section 235 provides protection in any action, suit or proceedings (whether criminal or civil) in relation to anything done or omitted to be done in good faith by reporting entities or people acting on their behalf, in carrying out an applicable customer identification procedure under the Act or in fulfilment or purported fulfilment of a requirement under the Act. Such a provision allows statutory protection for the implementation of a risk-based approach to compliance, which is advocated for by several sanctions regulators.[12]

To further support compliance with Australia's sanctions regulations, the industry recommends the inclusion of an anti-circumvention provision. For example, article 12 of the Council Regulation (EU) No 833/2014 (EU Russia regulations)[13] prohibits the intentional participation in activities that are designed to circumvent the prohibitions in the Regulation.

Such a clause, would in industry's view, support our compliance procedures, which require requesting certain high-risk clients to confirm the countries they deal with and their compliance with sanctions law. A clear anti-circumvention provision would further encourage compliance with the undertakings these clients provide pursuant to the industry's due diligence.

[11] OFAC, Enforcement Guidelines *Document (treasury.gov)*
[12] See. E.g.,OFAC framework_ofac_cc.pdf (treasury.gov)
[13] Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

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➢ Issue 6: Review mechanism for designations and declarations

A. What risks or benefits do you see in replacing relisting mechanism with a requirement that every five years the ASO undertakes a public notification process that would provide listees with the opportunity to make submissions that the Minister would be required to consider?

Members agree the mechanism for designations and declarations is the responsibility of Government. However, we recommend Government consider more closely the use of explicit designations rather than rely on implicit sanctions, in some instances. For example, in relation to Russia sanctions, noting the sensitivity of such matters, some entities are implicitly sanctioned through ownership but, in one instance, only through one degree of separation and with large percentage holdings.

The need to consider whether implicit sanctions apply could be alleviated if the entity had simply been sanctioned, as was the case with other like-minded regulators. This would reduce the risk of non-compliance, and operational and administrative burden.

There is an opportunity to synchronise with like-minded governments so that industry can streamline implementation and operational solutions whilst minimising the need for duplicate due diligence which arises where the same entity is designated by multiple regulators on different dates.

Similarly, when designations are repealed, if the ASO is not removing names from the Consolidated List in a timely manner, Members will need to continue to treat that entity as sanctioned long after the intent of the listing has been achieved. More information regarding the Consolidated List is set out under the response to Issue 7.

➢ Issue 7: Regulatory functions of the ASO

A. Do you support aligning the existing injunction power with those set out in Part 7 of the Regulatory Powers (Standard Provisions) Act 2014?

The ABA supports aligning the existing injunction power with those set out in Part 7 of the Regulatory Powers (Standard Provisions) Act 2014.

B. How could changes to the Autonomous Sanctions Framework better assist you in applying for an indicative assessment or a permit through Pax, the Australian Sanctions Portal?

Permits – Currently the framework requires individual applications for permits or indicative assessments, creating substantial administrative burden on both the applicant (individuals and representatives across all industries, not just the banking sector), and the ASO. This can have significant impact on business continuity, for banks and their customers and is contrary to the national interest. Cases may take significant time to be reviewed, in some instances as much as 8-12 weeks or longer. We think there are a few ways to modify the framework to address this.

We recommend the use of General Licences [related to Issue 3] that authorise a particular 'type of transaction' for a class of persons, removing the need for individual permit applications. For example, the use of a General Licence or Permit with recent implementation of the Russian Oil Price Cap, in keeping with the approach adopted by other global regulators, would have greatly assisted the banking sector. Similarly, more recently, the same approach applied to the crisis in Syria would assist financial institutions in supporting global humanitarian efforts[14]. An approach as proposed would also improve operational efficiencies and reduce impact on ASO resources [related to Issue 3].

Maintenance and Winddown – The incorporation of a maintenance and winddown period in relation to commercial activities is essential to minimising unintended consequences of sanctions measures. Commercial arrangements can be long dated and complex, making it particularly difficult, in some instances, subject to prohibition, unless a specific permit is granted. Measures resulting in commercial impact, need to be applied in a way that addresses the intent of laws but with respect to the commercial impacts to Australian businesses and the national interest.

Guidance and FAQs – In keeping with earlier recommendations to align the Autonomous Sanctions Framework with those of like-minded nations, it naturally follows that ABA Members encourage the introduction of a framework of guidance and FAQs, subject to routine and ongoing updates and

[14] See OFAC Syrian Sanctions Regulations 31 CFR part 542 GL No. 23 syria_gl23.pdf

maturing over time. For example, it would be helpful if the ASO would set out best practice guidance as to 'reasonable precautions' associated with the design and implementation of a sanctions compliance programme.

Education – We also think there is a role for the ASO to increase and expand efforts to educate the broader community on the Australian Sanctions Framework and obligations on individuals and entities. ABA Members often respond to tension in the banker/customer relationship due to a lack of awareness in the community (at both a personal and business level) and this could be reduced with upfront campaigns of awareness and more meaningful and plain English examples of how sanctions measures may impact on different types of transactions, services and/or activities.

PAX - Members have previously provided feedback that the PAX two-factor authentication requirement is not fit for purpose and inhibits entity record keeping obligations (across multiple regulatory regimes), business continuity in the event the person who has submitted a PAX enquiry is absent from work and requires individuals to use personal credentials to perform their duties, a potentially inconvenient outcome. Practically, the two-factor authentication only allows the use of one telephone number for the purposes of the second factor of the authentication process, making it particularly problematic when employees are not working at the same location.

C. What costs, financial or otherwise, that are outside of ordinary business-as-usual costs, have you incurred in complying with Australian autonomous sanctions (in particular, in seeking an indicative assessment or permit through Pax)? How many times a year do you seek an indicative assessment or permit?

It is important the ASO and DFAT continue to improve alignment with likeminded governments' sanctions regulators to minimise the need for complex solutions designed to comply with disparate sanctions obligations.

Where Members operate in jurisdictions outside Australia, it is essential to have a sanctions compliance programme that is designed to comply with obligations for all relevant jurisdictions. This requires a framework that supports globally aligned assessments and decision making, requiring compliance with regulatory obligations of the highest order. This increases complexity and cost in designing and implementing policy positions, operational processes, and technology solutions.

The need to seek a permit for individual transactions is administratively burdensome and time consuming, diverting resources from actively working in the business to manage sanctions risks. The inherent delays within the process have commercial implications for businesses and customers.

Legal costs may be extensive due to the need to seek independent legal advice as indicative assessments are not legally binding, or where terminology/concepts are not defined or consistent across regulatory frameworks.

D. Do you have any suggestions for reducing the costs associated with compliance with autonomous sanctions laws?

Article 25 of the Vienna Convention on Diplomatic Relations 1961[15], sets out the requirement for a receiving State to support embassy functions of a sending State. This obligation on Australia, as a Member State of the United Nations, places significant compliance risk and burden on banks. This is particularly so for banks operating across multiple jurisdictions, where global obligations prohibit or restrict the provision of banking services to, or dealings with certain proscribed governments, agencies/ instrumentalities and associated representatives and employees. In some instances, there are also publicly notifiable reporting obligations associated with certain dealings with those proscribed governments.

The risks are material, carry potential for reputation damage and increased oversight from international regulators and financial institutions, particularly those providing correspondent banking services to Australian banks. The correlated reputation risk, cost of compliance and administrative complexity is naturally very high resulting in reluctance within the financial services industry to have any dealings with such proscribed governments. This may present consequential diplomatic challenges for the Australian Government and cause reputation damage for government and industry.

Members believe it possible to develop ways in which Australia can both honour its Vienna Convention commitments relating to proscribed governments whilst minimising risk and harm to the Australian financial system and Australia's reputation. Members recommend direct engagement between the ASO and ABA Members to discuss and develop solutions to this ongoing risk and regulatory burden.

Consistent with earlier recommendations, global alignment in determining sanctioned activity, including whether assets are subject to blocking or rejecting obligations, is encouraged.

Whilst broader than the remit of the ASO, but related to the broader Australian regulatory landscape, ABA Members recommend continued focus on the development of and access to beneficial ownership registers. This will greatly assist in completing sanctions related due diligence and the consistent and efficient assessment of 'ownership and control' requirements [related issue 2].

Recommendations associated with education, guidance, and outreach and more targeted at specific industries and the broader community will uplift awareness, improve compliance outcomes, and strengthen Australia's compliance response to support foreign policy objectives.

We recommend reviewing the relationship/overlap of AML/CTF legislation, including the AML/CTF Act, with regards to Terrorism Financing and Proscribed Countries with Australia's Sanctions regulatory framework and, where appropriate, aligning these obligations. Criticism from other Australian regulatory agencies of risk-based decisions (sometime referred to as de-risking) may not consider the potential sanctions concerns; joint advisories from applicable regulatory agencies (as is the practice in the U.S.) would ensure alignment across regulatory frameworks with which Members need to comply.

Compliance with export control restrictions including dual-use goods, controlled/strategic goods is complex coupled with the financial crime risk associated with Proliferation Financing. Greater guidance

[15] Vienna Convention on Diplomatic Relations, 1961 (un.org).

on the expectations on financial institutions as compared with *those of importers and exporters* will provide transparency as to responsibilities, assist in minimising duplicated due diligence activities across the end-to-end supply/transaction chain and support efficiency within the economy.

E. What is your experience navigating the DFAT Consolidated List?

The Consolidated List presents multiple difficulties for Members, particularly those with large, automated solutions designed to detect sanctions risks across complex customer and transaction processing systems. There are opportunities to reduce negative impacts caused through the update and maintenance of the list and to improve the quality of the data.

We understand the Consolidated List is still managed as a spreadsheet, maintained by the limited resources available to the ASO. Given the maturity of the Autonomous Sanctions Framework over recent years and the increasing application of foreign policy in response to matters of international concern, more human and technological resource would prove beneficial. With the resolution of resource constraints, the following recommendations are supported by ABA Members and will benefit all users of the list.

- Assignation of a program name to each designation so that the nature of the listing and associated restrictions can be more readily identified, supporting operational efficiency in assessing sanctions risks. For example, is the listed entity subject to a full asset freeze or only listed in relation to certain export activities?

- Introduction of the concept of Weak Aliases, one step further than simply identifying alternate spellings. This concept is utilised across the U.S. sanctions programme and set out in their guidance.[16] Weak alias "*…is a relatively broad or generic alias that may generate a large volume of false positive hits when such names are run through a computer-based screening system…".* The guidance, in conjunction with OFAC's application of it to the publication of details of sanctioned entities, makes it possible for Members to fine tune screening systems to increase the opportunity to identify potential risks whilst minimising false positives and therefore operational impacts.

- Coordination of the timing of addition, update, or removal of listed entities with other like-minded governments and regulatory agencies will greatly assist in minimising the generation of multiple alerts generated through automated screening. Where listings are not coordinated across jurisdictions financial institutions are required to assess the same risks multiple times, increasing the risk of a true sanctioned person or activity being identified and managed and costs. Names can also remain on the Consolidated List for some time after they have been removed from other regulator lists and the intent of the initial listing has been achieved, requiring Members continue to treat the entity as sanctioned, albeit the purpose of the listing has long passed and, notably this can be for extended periods of time, further frustrating operational efficiencies, and customer relationships.

[16] U.S. Department of the Treasury - Frequently Asked Questions.

- We recommend more guidance that can be relied upon by industry in relation to the use and treatment of Native Language/alternative spellings in automated screening solutions. This is integrally linked to due diligence expectations and the application of 'reasonable precautions' defence.

- We are aware of issues with the translation of the UNSC List into the Consolidated List that impact negatively on automated screening solutions. This may be in the form of characters such as punctuation marks, field delimiters or native characters, with these being lost or corrupted or transposed to other characters. This may impact on the ability of automated detection to operate as intended and identify sanctions risk and may also result in duplicated alert generation and due diligence activities.

Closing remarks

The ABA and members fully appreciate the challenges the ASO maintains in balancing its operations across several legislative, regulatory, subordinate instruments, while cooperating with the broader international sanctions community's requirements.

We also recognise, the ASO is an important regulator that provides invaluable support and assistance to Australia, and the Australian government's foreign policy objectives.

The ABA and its Members remain committed to supporting the ASO through this next phase in uplifting the Australian Sanctions Framework.

To ensure this momentum does not lose valuable traction, the ABA and industry look forward to working closely together with the ASO to clearly support it through proactive and transparent dialogue to ensure the implementation of an improved sanctions framework. Members are committed to mitigating financial crime risks and stemming the flow of illicit finance through the Australian financial system and broader economy.

As such, the ABA and members look forward to further collaboration with the ASO in the future. The ABA and members are happy to provide expertise, training, and support to the ASO including workshops and deep dives, on various thematic issues covering correspondent banking, trade finance, technology solutions, sanctions compliance program design, etc.

Thank you for the opportunity to provide feedback. If you would like to discuss further, please do not hesitate to contact me at christos.fragias@ausbanking.org.au

Yours sincerely,

Christos Fragias
Policy Director,
Australian Banking Association

Appendix 1
Terms requiring further definition, clarification and/or guidance.

Assets – While the meaning of "tangible" assets is relatively clear, it would benefit industry to have a clear definition of "**intangible**" assets. This definition could align with the definitions provided by other agencies of the Australian government and/or other sanctions authorities, including the U.S., EU, and U.K. Additional language within the regulations or further guidance from ASO detailing examples of intangible assets would also assist those navigating the Autonomous Sanctions Framework.

Circumvention – There is currently no concept of "circumvention" within the Autonomous Sanctions Framework. The term is referenced in Section 7 of the *ABA Sanctions Guidelines - a guide for industry practice* issued in December 2021, which may be considered for inclusion in the Autonomous Sanctions Framework.

Comingling - There is currently no concept of "comingling" within the Autonomous Sanctions Framework. Comingling occurs where a negligible or *de minimis* quantity of a prohibited commodity becomes mixed with a non-prohibited commodity. This is related to, but separate from, "blending" (i.e., intentionally mixing products without a substantive transformation occurring).

- **Example**: Comingling of non-Russian products with Russian product (e.g. non-Russian oil that becomes mixed with remnants of Russian oil, via transmix in pipelines or tank heels in storage containers) remain subject to the prohibitions without consideration within the Autonomous Sanctions Framework, which makes Australia an outlier from its allies, including the U.S., EU, and U.K. that have provided guidance on this subject in conjunction with the principle of "***de minimis***" as discussed below.[17]

Control: Further definition or guidance regarding the concept of "**control**" is required. ASO may model that clarity after the above regimes or may consider leveraging definitions within existing Australian laws, including specifically the section 50AA and 910B of the Corporations Act 2001 (Cth). (Please reference **Appendix 2**.)

Controlled asset – There are no clear definitions or guidance from ASO about how the industry should approach the concepts of "**ownership**" or "**control**".

Dealing – There is currently no definition of "dealing" within the ASR, and while it is commonly interpreted by plain English meaning, there should be some guidance around what constitutes a dealing that would be contrary to the Regulations (or exempt from Regulations). This is particularly necessary for assets that are held in products that are not basic transactional/holding accounts, such as superannuation, mortgages, and automatic rollover term deposits, etc.

Additional guidance should be provided on treatment and management of frozen assets. OFAC requires such assets to be held in an interest-bearing account, with reasonable/practical interest rate applied and accrued interest compounded or rolled over. This type of approach would be beneficial for the industry, as financial institutions have performance obligation, and the intention of holding such funds is to release them once sanctions are lifted (at reasonable market value).

[17] See, e.g., EU Consolidated FAQs Consolidated version - Frequently asked questions concerning sanctions adopted following Russia's military aggression against Ukraine and Belarus' involvement in it. (europa.eu), question 8 Price Cap Setting & Questions 8 & 9, Oil Imports

Other regulators have legislated derogations on fees related to account maintenance and/or upkeep legislated in their sanctions frameworks (e.g., New Zealand Russia Sanctions Regulations 2022: dealing is allowed "for the purpose of preserving, or maintaining the value of, a restricted asset").

De minimis – There is currently no concept of "*de minimis*" within the Autonomous Sanctions Framework, which has been adopted and conceptually applied by:

- the U.S.:
    - within paragraph 5 of Section II - "*When does a price cap "start" and "stop"?* of the *OFAC Guidance on Implementation of the Price Cap Policy for Crude Oil and Petroleum Products of Russian Federation Origin*;
    - determined to be *below* 10% when in relation to the prohibited Re-exportation by non-U.S. persons of certain foreign-made products containing U.S.-origin goods or technology to Iran (31 CFR § 560.420);
    - determined to be 10% when considering for the passive ownership of Naftiran Intertrade Company (NICO) – a designated person under OFAC sanctions – in the Shah Deniz consortium. (OFAC Industry Guidance - Shah Deniz Consortium);
    - determined to be up to 10% 25% in relation to U.S.-origin items incorporated into non-U.S. manufactured items sold to export control restricted countries (De minimis Rules and Guidelines).
- the EU and UK: The EU and UK have also published guidance to supplement their sanctions regulations and empower industry to implement sanctions with increased certainty. [18] For example, EU guidance covers:
    - *When does a price cap "start" and "stop"* in similar terms to OFAC's guidance.
    - *De-minimis amount of Russian oil (tank heeling/commingling), etc.*
- **Example 1 – in context of Russian energy commodities**: When Australia sanctioned Russian energy commodities in April 2022, it prohibited any Australian individual or entity from purchasing oil or gas of non-Russian origin, including if that commodity had even a single molecule of Russian hydrocarbons (including, for example, through commingling via tank heels or transmix).
- **Example 2 – as applied to funds and ETFs**: Under their respective sanctions programs, Australian, EU and U.K. persons are prohibited from transacting in securities subject to 2014 capital market restrictions (aka. sectoral sanctions). Additionally, prohibitions apply to funds composed of such sanctioned securities that are either linked to or involves the purchase or sale of or any other dealing in the underlying sanctioned asset, regardless of percentage. Comparatively, while U.S. persons are also prohibited from transacting in securities subject to sectoral sanctions, trading in funds that are composed of such sanctioned securities *is* permissible for U.S. persons as long as the composition of the fund does not exceed a *de minimis* percentage of such sanctioned

[18] Noting that ambiguity does still remain in relation to certain aspects of the UK and EU regimes, particularly concerning the 'control' test, see e.g., the recent case PJSC National Bank Trust and another v Mints and others [2023] EWHC 118 (Comm). This is one of the first judgments in the English courts to consider certain key elements of the post-Brexit autonomous UK sanctions regimes and the substantive impact of sanctions on litigation following the Russian invasion of Ukraine in March 2022.

securities. In contrast to the U.S. position adopted towards sectoral sanctions, 2020 sanctions targeting securities issued by CMIC do not apply the same *de minimis* concept and it is prohibited for U.S. persons to buy or sell a fund if that fund is composed of even of a single share of securities issued by a CMIC.

The ABA recommends that the Autonomous Sanctions Framework incorporate a concept of *de minimis* given practical implications of sanctions compliance. If left unaddressed, the result is Australian financial institutions, bodies corporate, and persons being in technical breach (under a strict liability regime) or needing to exit activities or relationships urgently where ring-fencing identified risks is not feasible. Such an exit of otherwise legally permissible activities critical to the economy of Australia and its key allies does not align with the national interest.

Directly and indirectly – While "directly" is fairly well understood, how "indirectly" applies in context of prohibitions restricting the activities of an Australian person is less clear:

- **Example 1 - financing**: An Australian financial institution provides general purpose financing to a body corporate that is incorporated in the U.K. That U.K. body corporate owns a foreign incorporated subsidiary operating in a jurisdiction which lacks sanctions prohibitions that exist in Australia. That subsidiary has a local client that engages in legally permissible transactions with an Australian designated person or in transactions otherwise prohibited for Australian persons under Australian sanctions law. On a technical reading, the financing provided by the Australian financial institution may indirectly benefit the foreign incorporated subsidiary and hence the Australian financial institution is breaching Australian sanctions law. This occurred in 2022 when Australia designated Gazprom as a sanctioned entity. Australian businesses leasing assets to UK subsidiaries of Gazprom had no forewarning to try to exit those relationships before it became sanctioned to do so. See recommendations under Issue 7 in relation to Maintenance and Winddown.

- **Example 2 – making an asset or funds available**: An Australian financial institution manages an Australian superfund that invests in both Australian and non-Australian securities. The Australian financial institution custodies its foreign securities with a U.S. custodial bank that in turn sub-custodies its non-sanctioned Russian securities at a financial institution in Russia. That Russian financial institution is majority owned by a Russian body corporate which is entirely owned by a trust that solely benefits a Russian oligarch that is an Australian designated person. The Australian financial institution pays fees to its U.S. custodial bank that in turn pays fees to its Russian sub-custodial bank. It is unclear whether the custodial fees paid by the Australian financial institution would be considered as indirectly making funds or an asset available to the Australian designated person.

  For more clarity surrounding the provision of a definition for "indirectly" within the regulations or through other guidance from ASO, please refer to the *EU's Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy*, specifically paragraphs 55d and 55e.

Equity – Regulation 5B(1) includes new equity as a financial instrument subject to restriction if it is issued by a specified entity AND has a maturity date. However, it is generally understood by industry that equity does not have a maturity date. A specific definition is required within the ASF to clarify the scope of the restriction to either introduce a class of restriction to prohibit trade in equities without a

maturity date issued by a specified entity, or to provide a narrow definition of equity that is captured by this regulation (or define exclusions such as shares, depository receipts, etc).
Facilitation - There is no definition within the Autonomous Sanctions Framework or other guidance provided by ASO as to what constitutes facilitation, which is a term used by the sanctions regimes of allies including the U.S., EU, and U.K., but does not have a consistent meaning application across regulators.

For instance, the U.S. generally prohibits third-party transactions that would be prohibited by U.S. sanctions if conducted by a U.S. person. OFAC interprets "facilitation" very broadly to include all instances in which a U.S. person "assists" or "supports" a non-US person in transactions directly or indirectly involving comprehensively sanctioned jurisdictions, parties or activities subject to U.S. sanctions. U.S. persons are effectively prohibited from business and legal planning, decision-making, approvals, designing, ordering or transporting goods, or providing financial or insurance assistance in connection with sanctioned jurisdictions, parties, or activities.

U.S. persons also are generally prohibited from approving, reviewing or commenting on the terms of a transaction or deal documents, engaging in negotiations, or otherwise assisting a foreign entity or individual in planning for or moving a transaction forward that would breach sanctions for a U.S. person. OFAC has provided guidance to industry over the years that for transactions involving comprehensively sanctioned jurisdictions, parties or activities, foreign entities or individuals must ensure that they provide their goods or services independently of U.S. persons.

Comparatively, the EU and U.K. do not specifically refer to the activities of a non-EU or non-U.K. person, and facilitation is implied to mean enabling or promoting activities prohibited for the EU or U.K. persons.[19]

Import sanctioned good – The current definition does not include practical, real-world considerations that the industry faces in a global market, including secondary trading of goods, transformation of goods and country of origin vs country of exportation:

- **Example 1 – Financing a project**: An Australian financial institution is interested in financing a new project to manufacture electric vehicles batteries in Australia. The project will import competitively priced rare earth metals from a trusted European company that are evidenced as being produced in and exported from Donetsk *before* it became a specified Ukraine region. However, the regulations indicate that *all goods* from Donetsk are an import sanctioned good and the regulations do *not* disambiguate or consider the point in time that those goods were produced (i.e., *before* or *after* sanctions implementation). As such, the Australian financial institution does not finance the project as they identify the cost and time delay to attain legal advice from external counsel and apply for an indicative assessment from ASO or permit from the Minister are too great. Without further clarification provided in the regulations or from ASO at present, the economic interests of the Australian financial institution, the European company, and the broader Australian economy are harmed.

- **Example 2 – CPC oil transhipped through Russia**: As considered below in the context of "transhipment", Kazakhstan-origin crude oil is exported via a pipeline running from Kazakhstan, traversing Russia to a loading terminal at Novorossiysk on the Black Sea in Russia, owned by the Caspian Pipeline Consortium ("**CPC**"). Kazakh-origin oil is marketed and loaded with a certificate of origin verifying that the crude is of Kazakh origin, whereas any crude oil that is primarily of Russian

[19] The UK Russia (Sanctions (EU Exit) Regulations 2019 section 19 'the anti-circumvention' provision, which refers to facilitating a contravention of the Act.

Federation origin is marketed and loaded separately and certified as Russian origin. Whereas the U.S., EU, and U.K. allow for the import of Kazakh origin oil exported via the CPC pipeline, it is not clear whether or not Australian regulations would capture such Kazakh-origin oil as something exported from Russia and hence an import sanctioned good.

Note: For the *Australian sanctions prohibiting the import of gold exported from Russia*, prohibitions were delineated as applying *only* to gold that was exported from Russia *after* the sanctions came into effect. The Autonomous Sanctions Framework should consider being amended so that this is specified for all import sanctioned goods. There should be regulations or ASO guidance to assist Australian individuals and entities in considering what level of evidence and proof is required to confirm whether a good has been exported before or after the relevant sanctions came into effect, and whether a due diligence defence is available.

Ownership: In the absence of a clear definition or additional guidance, it is not clear how the industry should treat minority ownership positions. ABA members request clarification within the regulations or through ASO guidance whether industry may rely on the ***50% ownership rule*** adopted by:

- the U.S. (referring to OFAC's "*Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked*" and related FAQs);
- the EU (referring to definitions of Ownership and Control in section VIIII, "Ownership and control" of the Council's "*Restrictive measures (Sanctions) - Update of the EU Best Practices for the effective implementation of restrictive measures (27 June 2022)*; and
- the U.K. (referring to Chapter 4 - Ownership and control, of *UK Financial Sanctions - General guidance for financial sanctions under the Sanctions and Anti-Money Laundering Act 2018*)

In clarifying these concepts, the ASO should consider the concept of aggregated ownership, which has been applied by OFAC in the U.S. but not the EU or U.K., and whether the concept will be considered differently across different sanctions programs.

For example, in the U.S.:

- OFAC considers that where there is 50% individual or aggregate ownership of an entity by one or more Specially Designated National (**SDN**) subject to asset freeze sanctions, that entity is also subject to the same asset freeze sanctions as the SDN(s).
- Comparatively, it has been clarified by OFAC that in the case of a Sectoral Sanctions Identifications (**SSI**) entities, subject to capital market restrictions, the aggregated ownership restrictions apply only to 50% owned entities by one or more SSI entities subject to the same Directive (e.g., targeting financial institutions) but not between different Directives (e.g., targeting financial institutions and energy companies).
- Finally, in the case of a Chinese Military Industrial-Complex Company (**CMIC**) subject to securities restrictions, OFAC has clarified subsidiary entities owned 50% or more by one or more CMIC are not subject to the same restrictions that are only applicable to OFAC-listed CMICs.

Predominance – There is currently no concept of "predominance" within the Autonomous Sanctions Framework, which although not explicitly defined as a percentage by OFAC, it has generally been understood by industry to mean 50% or greater, which is derived from a common definition, "having superior strength, influence, or authority".

- **U.S. example:** Please reference OFAC's *FAQ 653* that refers to the concept of "predominance" and its application to synthetic ETFs.

Sanctioned imports – The industry would benefit from clarification as to whether the prohibitions on the import, purchase, and transport of goods applies only to imports into Australia or encompasses imports to anywhere in the world.

- **Example**: An Australian person is prohibited from importing Russian-origin petroleum product into Australia. However, the regulations as written also appear to prohibit Australian persons from importing or transporting Russian petroleum product into another country that does not have similar prohibitions in place. Without clarification, an Australian person is prohibited from importing or transporting these goods anywhere in the world, including to Australian allies that do not have similar prohibitions in place and may depend on such imports.

Services – The industry would benefit from clarification on what "**another service**" means, includes or excludes with examples provided for clarification.

Secondary trading of securities – ASO has previously provided informal guidance to ABA members that (in line with industry guidance issued by the EU [20]and U.K.[21] secondary market trading of securities issued by a designated person *before* the date of designation and owned or controlled by persons are not themselves the target of sanctions (e.g., securities owned on behalf of Australian persons through superfunds) is not a prohibited activity as such trading does not make any assets or funds available to a designed person. However, there is nothing within the regulations confirming this stance, and it should be noted comparatively that the U.S. views all securities issued by a designated person to be blocked property subject to an asset freeze and reporting requirements to OFAC. Noting the U.S. prohibition on secondary market trading of such securities inflicts significant collateral injury on non-sanctioned investors, it is the view of ABA members that the Autonomous Sanctions Framework should formally incorporate the position adopted by the EU and U.K. into the regulations or otherwise issue written public guidance to that effect.

Substantial transformation – There is currently no concept of "substantial transformation" that would clarify whether sanctioned goods that have been exported or imported to another country and subsequently refined or transformed (including in creation of a new good with a new customs classification code or integrated into another product) are still considered sanctioned goods under the Autonomous Sanctions Framework.

- **Example 1 – refined petroleum product**: An Australian person is prohibited from importing Russian-origin petroleum product. However, it is unclear whether Russian-origin petroleum product

[20] EU consolidated Russia sanctions FAQs
[21] OFSI Russia Guidance: Russia_guidance_December_2022.pdf (publishing.service.gov.uk).

that has been refined or transformed (whether chemically or physically) in a non-Russian country is still considered a sanctioned good under the Autonomous Sanctions Framework. Contrast this to the approach taken by Australia's key allies:

- the U.S.: The US does not impose sanctions in relation to "any Russian Federation origin good that has been incorporated … into a foreign-made product"[22].
- the EU: Specifically looking at oil (given wholly offshore trading is not restricted for other energy commodities), the EU's FAQs include a question "*Does Article 3m prohibit the import into the EU of petroleum products falling under HS 2710 which have been produced using crude oil originating in Russia?*". The EU response is: "*As regards petroleum products under HS 2710, only those which originate in Russia or are exported from Russia fall under the general prohibition set out in Article 3m paragraph 1. An analysis of the production process and proportion of the components used is needed to determine the origin. For example, refined petroleum products obtained in a third country falling under HS 2710 from Russian crude oil falling in HS 2709 and exported from that country or another third country would not be subject to the sanctions as it is not of Russian origin. Petroleum products falling under HS 2710 obtained in a third country mixing Russian oil falling under HS 2710 and locally produced oil exported from that third country could be subject to the sanction depending on the proportion of the Russian component. A case-by-case analysis is needed to see if the rule of origin is satisfied.*" [23].
- the U.K.: Specifically looking at oil (given wholly offshore trading is not restricted for other energy commodities), the U.K. has published guidance that *"Oil and oil products are to be regarded as originating from a country or territory if they are wholly obtained in the country or territory."*[24] The U.K. has also issued further guidance clarifying product that has been substantially transformed in a third country is not considered sanctioned. [25]

- **Example 2 – integration**: An Australian person is prohibited from importing all goods from a specified Ukraine region, which is clearly understood. However, a Chinese company operating in the Russia-occupied region of Donetsk is exporting mined lithium to China for use in its electric vehicle battery production facility. This lithium is comingled at that production facility with lithium from a variety of other mines around the globe and within China. These batteries are then sold onwards to a number of global car manufacturers that integrate them into vehicles sold around the world. It is unclear whether an Australian person may import those vehicles to Australia or whether the vehicles are defined as a sanctioned import by virtue of the batteries containing lithium that was mined in Donetsk. (The concept of ***de minimis*** would also apply to this example.)

Transhipment – There is currently no concept of "transhipment" within the Autonomous Sanctions Framework, which has been adopted and conceptually applied by:

- the U.S.:
  - generally, as the prohibited movement of goods across or through a comprehensively sanctioned jurisdiction (e.g., *31 CFR § 560.403*)

[22] Frequently Asked Questions: *Russian Harmful Foreign Activities Sanctions: 1019. For the purposes of Executive Order (E.O.) 14066, what is meant by the term "Russian Federation origin"?:* https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1019
[23] Oil Imports, Related Provision: Article 3m and Article 3n of Council Regulation 833/2014. Frequently Asked Questions – as of 4 February 2023: https://finance.ec.europa.eu/system/files/2023-02/faqs-sanctions-russia-oil-imports_en.pdf
[24] *Guidance: UK ban on Russian oil and oil products* issued by the UK Department for Business, Energy & Industrial Strategy and updated 2 December 2022: https://www.gov.uk/government/publications/uk-ban-on-russian-oil-and-oil-products/uk-ban-on-russian-oil-and-oil-products
[25] HMT/OFSI *UK Maritime Services Prohibition and Oil Price Cap Industry Guidance, p.12.*

- comparatively, as a specific exception for legally permissible import of Caspian Pipeline Consortium ("CPC") pipeline oil that originates in Kazakhstan and transverses Russia, for which OFAC has declared *CPC oil is excluded from the U.S. import ban* (see also OFAC *FAQ 1020*).

- the EU:
  - **pursuant to Article 3m(3)(c)** provides explicit exceptions to permit transhipment of oil across Russia in relation to: "the purchase, import or transfer of seaborne crude oil and of petroleum products listed in Annex XXV where those goods originate in a third country and are only being loaded in, departing from or transiting through Russia, provided that both the origin and the owner of those goods are non-Russian".

- the U.K.:
  - **Russia Regulation 60H** contains a specific exemption for certain oil and oil products, that unavoidably transit, are loaded in or depart from Russia (see Regulation 60H). This means that the ban is not contravened where oil and oil products that originate in a third country, and are not Russian owned, are only transiting through Russia.

Transport – An Australian person is prohibited from transporting sanctioned goods. However, it is unclear as to how such transport prohibitions apply to an Australian person that may facilitate or arrange for the domestic and/or international transport, storage, or the unloading or offloading of goods subject to sanctions on behalf of a person not subject to Australian sanctions.

Australian Banking Association

Appendix 2

Section 50AA and 910B of the *Corporations Act 2001 (Cth)*

- **50AA: Control**[26]

(1) For the purposes of this Act, an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.

(2) In determining whether the first entity has this capacity:

(a) the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and

(b) any practice or pattern of behaviour affecting the second entity's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).

(3) The first entity does not control the second entity merely because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entity's financial and operating policies.

(4) If the first entity:

(a) has the capacity to influence decisions about the second entity's financial and operating policies; and

(b) is under a legal obligation to exercise that capacity for the benefit of someone other than the first entity's members;

the first entity is taken not to control the second entity.

- **910B: Meaning of *control***[27]

(1) ***Control***, of a body corporate, is:

(a) having the capacity to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the body corporate; or

(b) directly or indirectly holding more than one half of the issued share capital of the body corporate (not including any part of the issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital, and not including MCIs); or

(c) having the capacity to control the composition of the body corporate's board or governing body; or

(d) having the capacity to determine the outcome of decisions about the body corporate's financial and operating policies, taking into account:

(i) the practical influence that can be exerted (rather than the rights that can be enforced); and

(ii) any practice or pattern of behaviour affecting the body corporate's financial or operating policies (whether or not it involves a breach of an agreement or a breach of trust).

[26] Corporations Act 2001 - SECT 50AA
[27] Corporations Act 2001 - SECT 910B

(2) ***Control***, of an entity other than a body corporate, is:

(a) having the capacity to control the composition of the entity's board or governing body (if any); or

(b) having the capacity to determine the outcome of decisions about the entity's financial and operating policies, taking into account:

(i) the practical influence that can be exerted (rather than the rights that can be enforced); and

(ii) any practice or pattern of behaviour affecting the entity's financial or operating policies (whether or not it involves a breach of an agreement or a breach of trust).