

*Presenting a live 90-minute webinar with interactive Q&A*

# OFAC Compliance: Meeting Evolving U.S. Sanctions Requirements, Minimizing Risk of Sanctions

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WEDNESDAY, OCTOBER 19, 2022

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Today's faculty features:

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**OFAC Compliance: Meeting Evolving U.S. Sanctions Requirements,  
Minimizing Risk of Sanctions Liability**

A Live 90-Minute Teleconference Program with Interactive Q&A

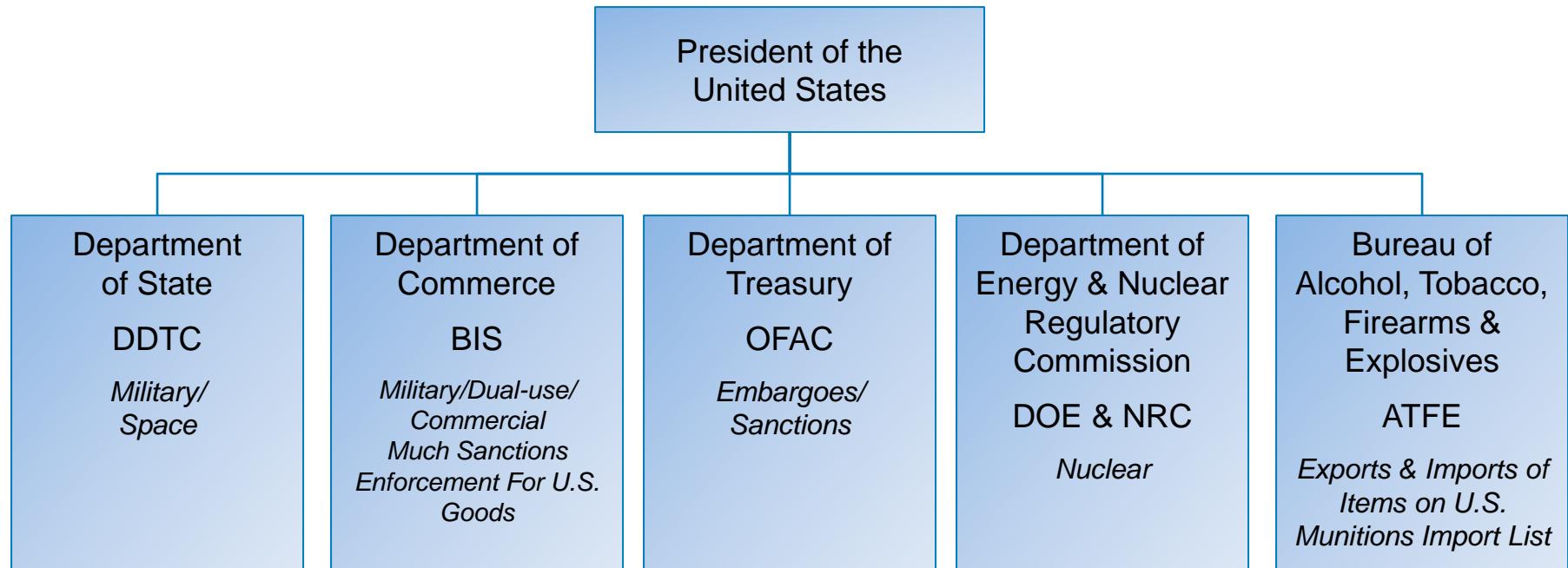
October 19, 2022

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# U.S. SANCTIONS OVERVIEW

# The Trade Control and Sanctions Agencies of the U.S. Government

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# OFAC Sanctions Programs

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- Comprehensive: Iran, Cuba, North Korea, Syria, Crimea/DNR/LNR (regions)
- Broad but Targeted: **Russia**, Venezuela
- List-Based: Over 30, including geographic (e.g., Belarus, Nicaragua) and subject matter (e.g., Global Magnitsky, Cyber)

# How OFAC Obtains U.S. Jurisdiction Outside U.S.

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- Sanctions Jurisdiction = U.S. nexus
  - U.S. persons **or**
  - U.S goods/services **or**
  - U.S. financial system
- Secondary sanctions – by definition, no U.S. connection
  - Tool of U.S. foreign policy to dissuade non-U.S. persons from dealing with certain countries or parties

# U.S. Persons: Any Involvement Creates Sanctions Risk

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- Under most U.S. sanctions programs, “United States person” or “U.S. person” includes any:
  - U.S. citizen
  - Permanent resident alien
  - Entity organized under U.S. laws or any jurisdiction within the U.S. (including foreign branches)
  - Any person in the U.S.
  - See 31 C.F.R. § 560.314.
- A transaction denominated in U.S. dollars almost always entails participation by U.S. person
  - If the transaction is subject to a U.S. embargo, because, for example, it involves Iran, the U.S. person violates U.S. sanctions laws by processing the transaction. Under U.S. law, the non-U.S. company that generated the transaction also violates U.S. sanctions laws by "causing" this violation by the U.S. person.
  - This is true even if the transaction is simply a wire between two overseas countries, such as a payment from the U.A.E. to Kuwait related to an Iranian shipment. If the U.S. financial system is used, the transaction likely has U.S. sanctions implications.
  - See the recent Zoltek settlement (U.S. office approved Hungarian subsidiary’s purchases from Belarus SDN)

# Facilitation and Causing Theories

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- U.S. law strictly forbids U.S. persons from “facilitating” conduct by foreign persons that would be a violation if engaged in by a U.S. person
  - Facilitation provisions must always be considered when a U.S. person has any potential involvement in an entity considering engaging in a transaction involving a country or party under U.S. sanctions
  - Many programs prohibit “any approval, financing, **facilitation**, or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited if performed by a United States person or within the United States.”
- The U.S. also takes the position that a non-U.S. person can unlawfully “cause” a sanctions violation by participating in a U.S. dollar transaction that “causes” a U.S. person to provide financial services

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## CORPORATE AND PERSONAL FINES AND PENALTIES



# OFAC Civil Fines

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- OFAC has a base penalty matrix to determine the presumptive penalty, which looks at two factors: VSD and egregious/non-egregious nature of case
  - Presumptive penalty is lowest when have both VSD and non-egregious case
  - Presumptive penalty is highest when have no VSD and egregious case
- Aggravating and mitigating factors can alter the range of penalties
- OFAC maximum civil penalties depend on applicable statutory basis for violation. For example, for a violation of:
  - A regulation issued pursuant to IEEPA (*i.e.*, most OFAC regulations), the maximum civil penalty is \$330,947 per violation or twice the amount of the underlying transaction
  - A regulation issued pursuant to TWEA (*i.e.*, Cuba regulations), the maximum civil penalty is \$97,529
  - The Narcotics Kingpin Designation Act (Kingpin Act), the maximum penalty is \$1,644,396

# Criminal Penalties upon Referral by OFAC

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- DOJ prosecution by own initiation or referral from OFAC
- Willfulness is required
- Maximum criminal penalties:
  - IEEPA (OFAC referral): \$1,000,000 and 20 years imprisonment per violation
  - TWEA (OFAC referral): \$1,000,000 and 20 years imprisonment per violation
  - Kingpin Act (OFAC referral): \$10,000,000 (entity), \$5,000,000 (individual) and 30 years imprisonment per violation
  - Criminal forfeiture provisions

## Other Penalties

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- Placement on SDN List and/or other U.S. government lists
  - SDN: Blocking sanctions = No dealing in property for U.S. persons, meaning cut off from U.S. financial system
  - Various other lists indicating imposition of sanctions that are less than blocking
    - List of Foreign Financial Institutions Subject to Correspondent Account or Payable-Through Account Sanctions (CAPTA List)
    - Non-SDN Menu-Based Sanctions List (NS-MBS List)
    - Non-SDN Chinese Military-Industrial Complex Companies List (NS-CMIC List)
- Loss of travel privileges to U.S. is also common

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# PREVENTING VIOLATIONS

# Examine and Mitigate Diversion Risks

- Diversion to embargoed countries and/or persons is a serious risk
  - China is a significant, multi-agency enforcement priority
- These risks must be monitored and mitigated proactively
- Specifically, identify and address:
  - Sanctions risks posed by involvement of U.S. person and/or U.S. goods in export transactions
  - Business sectors that face the greatest current enforcement risks
  - Risks posed by SDNs and other listed persons or entities
  - Compliance by foreign subsidiaries subject to U.S. sanctions restrictions



The recent Yantai Jereh enforcement action involved U.S. components integrated into nitrogen pumbers shipped to Iran.

# Be Sensitive to Any U.S. Touch Points in Transaction with U.S.-Sanctioned Countries

- Multi-lateral non-U.S. companies engaging in trade with U.S.-sanctioned countries must be very careful
- U.S. sanctions extend very broadly
- To the extent that multi-national companies choose to do lawful business in Iran, Cuba, or other U.S.-sanctioned countries, they must be aware of any U.S. touch points
  - U.S. persons (e.g., owners, officers, employees, U.S. subsidiaries or parent companies)
  - U.S.-origin goods in the supply chain
  - Use of the U.S. financial system for transactions
- Be especially sensitive to diversion of U.S.-origin goods

COMMERCIAL INVOICE				
<b>Shipper/Exporter</b> ABC Limited		<b>No. &amp; date of invoice</b> BX0906 APR.10TH,2009		
<b>For Account &amp; risk of Messrs</b> H Limited ROOM R13, 8 <sup>TH</sup> FLOOR, HOLLYWOOD PLAZA 610 NATHAN ROAD, KOWLOON, HONG KONG TEL: FAX: E-MAIL:		<b>No. &amp; date of B/L</b> EGLV14295011523 APR.17TH,2009		
<b>Notify Party</b> SAME AS CONSIGNEE		<b>Remarks</b> LOT NO.: 3-E		
<b>Port of loading</b> SHANGHAI	<b>Final destination</b> SOKHNA			
<b>Carrier</b> ITAL GARLAND	<b>Sailing on or about</b> 17/04/2009			
Marks and Numbers	Description of goods and/or services:	Quantity	Unit Price	Amount
V/M	100% SPUN POLYESTER YARN NE 30/1 RAW WHITE WAXED FOR KNITTING	1000 KGS	USD1.5 KG	USD 1500

Payment in U.S. dollars can give OFAC jurisdiction over an otherwise non-U.S. transaction.

# Know Your Supply Chain

- The ELF enforcement action is a wake-up call
- Certain types of supply chains can create significant sanctions risk
- Even unknowing violations (*i.e.*, if the U.S. company has no actual knowledge of an embargoed product entering the supply chain) can be penalized
- Companies must know their supply chains thoroughly, and if those supply chains involve relatively high-risk locations, must take steps (*e.g.*, audits, contractual clauses, revision of procedures, training) to mitigate U.S. sanctions risk



North Korea's established animation industry may have indirectly provided some animation services incorporated into major U.S. films, according to media reports

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# FRAMEWORK FOR OFAC COMPLIANCE COMMITMENTS



# Summary

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- Five essential elements:
  - Management Commitment
  - Risk Assessment
  - Internal Controls
  - Testing and Auditing
  - Training Action
- OFAC Enforcement will examine each element as part of remedial plan in case where violation has occurred
- Appendix outlines frequent root causes of violations

## Why Does It Matter?

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- These are the “teacher’s notes” OFAC will use to grade programs in the event of violations
- The root causes are a helpful guide to risk identification and management
- Familiarity with this framework can help guide discussions with regulators

## Pillar One: Management Commitment

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- Review and Approval of Sanctions Compliance Plan (SCP)
- Empowers Compliance
- Provides Adequate Resources To Compliance
- Culture of Compliance
- Takes potential violations seriously through investigation and effective, prompt remediation

## Pillar Two: Risk Assessment

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- Conducted In a manner and frequency that is tailored to risk-profile of business
- Updated to address new information, including violations or systemic deficiencies
- Based on systemic methodology that evolves based on new information

## Pillar Three: Internal Controls

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- Written policies and procedures outlining SCP: Capture day to day operations, easy to follow, and designed to prevent misconduct
- Tailored to risk profile, incorporate adequate technology and periodically tested
- Enforced through internal and external audits
- Sufficient to ensure compliance with sanctions laws
- Weaknesses are immediately remedied when identified
- Communicated to relevant personnel and external parties
- Dedicated personnel responsible for incorporating into business

## Pillar Four: Testing and Auditing

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- Testing and Auditing function accountable to senior management, independent and has sufficient authority, skills and resources
- Geared to risk profile in terms of level and sophistication
- Negative testing results are identified and remediated

## Pillar Five: Training

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- Scope appropriate to business
- Frequency appropriate to business
- Remedial training provided in the event of a negative testing or audit result
- Resources sufficient

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## APPENDIX OF ROOT CAUSES

# List of Root Causes

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- Lack of a Formal SCP
- Misinterpreting OFAC regulations
- Failing to recognize U.S. touchpoints:
  - Facilitation (foreign subs and affiliates)
  - U.S. origin goods
  - U.S. financial system
- Software inadequacy
- Lack of sufficient due diligences on customers/clients
- Failure to follow or enforce SCP
- Unusual Payment of Commercial Practices
- Rogue Actors

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## SCREENING, RECEIVING PAYMENTS, BLOCKING

# Screening Processes

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- Identify Risks
- Purchase Appropriate Screening Software for Your Business
- Tune and Update
- Monitor for new risks and for errors

# Receiving Payments

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- No Dealing in Property of SDN
- Banks Reject?
- KYC, Especially Locations

## Blocking

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- US Persons Must “Block” Property of Sanctioned Parties if and when they encounter
- Can’t Return
- Likely Cannot Destroy
- Interest
- Message: Be Careful

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## WHAT TO DO IF YOU DISCOVER A VIOLATION

# Identifying the Need for an Investigation

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- Examples:
  - Sales with or dealing with SDN
  - Exports without license that required license
  - Transactions with forbidden countries
  - Diversion of goods to forbidden countries
  - Foreign subsidiaries dealing with SDNs or forbidden countries
  - Use of U.S. financial system in otherwise foreign transactions
  - Deemed exports
- Amount of exposure
  - Guidelines
  - Forfeiture
  - Multiple Enforcers
  - Cockroaches
- Likelihood of discovery?
  - Reporting requirements
  - Inquiries
  - Arrests
  - Whistleblowers
  - Subpoenas
  - M&A



# When is Outside Counsel Needed?

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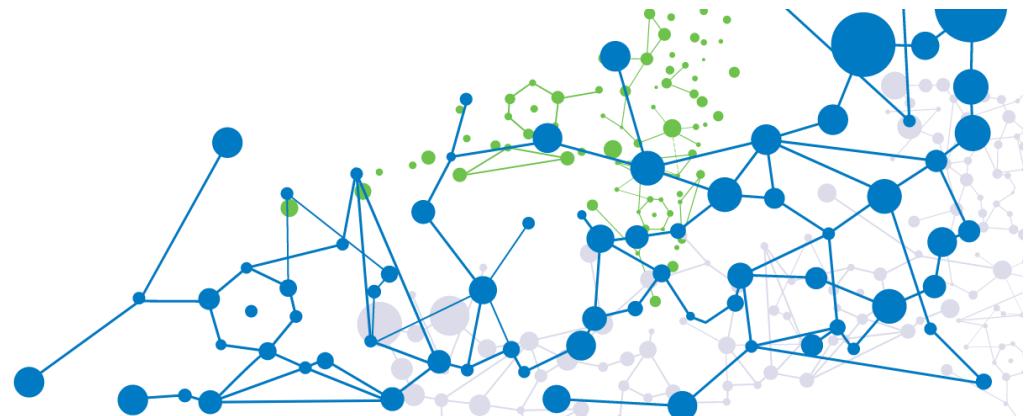
- Interacting with regulators, DOJ
- Interacting with counsel for employees
- Compliance function at issue
- C-suite at issue
- Multi-jurisdictional challenges
- Scope and exposure
- Expertise
- Privilege issues, particularly internationally



# Scoping the Investigation

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- Reporting and clearing issues with regulators
- Boiling the ocean?
- Going too small
  - Years
  - Similar transactions
  - Systemic issues



# Key Issues For Any Investigation

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- Preserving Privileges
- Preserving, Identifying, Collecting and Reviewing Documents
- Witness Interviews
- Voluntary Disclosure?

# The Voluntary Disclosure Decision

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- Do you know enough?
- Race to the regulator?
- Skeletons?
- Size of exposure and value of leniency
- Criminal v. civil
  - How to factor in current DOJ posture



## Remediation

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- Critical, whether disclosure made or not
- Difficult, falls off to-do list
- Clearing with regulators
- Follow-up
- Second time

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## FINAL THOUGHTS ON RECENT TRENDS

# Recent and Emerging OFAC Program Trends

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- Russia, Russia, Russia
- Virtual Currency + Crypto
- Iran/JCPOA 2.0
- Relief for Venezuela Coming?
- Where Political Turmoil Boils Over, Sanctions Tend to Follow (e.g., Burma)

## Recent and Emerging OFAC Enforcement Trends

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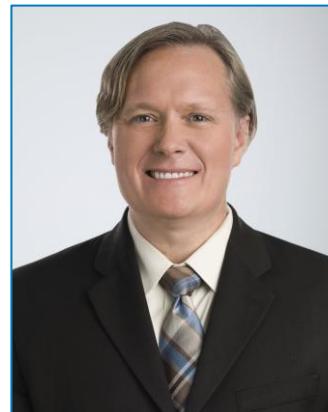
- Evidence that newly imposed Russia sanctions will be an enforcement priority
- Bittrex + Tornado Cash (Virtual Currency)
- No large financial institution settlements since 2019
- Compliance messages in web notices are worth tracking

## Q&A + Contact Information

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