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**U.S. Regulators Emphasize Pursuit of Enforcement Actions Against Non-U.S. Persons and Entities**

The guidance mirrors the recent, broader impulse among U.S. prosecutors and regulatory agencies to extend application of U.S. law to foreign persons and entities, even when those persons and entities have only threadbare connections to the U.S.

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**By Harry Sandick**

Partner

**By Sarah Hardtke**

**What You Need to Know**

- U.S. regulators recently issued a Tri-Seal Compliance Note emphasizing that non-U.S. persons and entities must comply with U.S. sanctions and export controls law, and cautioning that they could be subject to civil and criminal liability for a failure to do so.
- The Tri-Seal Compliance Note makes clear that OFAC's sanctions enforcement dovetails with the country's broader national security and foreign policy interests.
- The trend of global enforcement of OFAC sanctions seems unlikely to slow or reverse, making it essential that non-U.S. companies take steps outlined in the Compliance Note and in this article.

On March 6, 2024, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), the U.S. Department of Commerce's Bureau of Industry and Security (BIS), and the U.S. Department of Justice (DOJ) collectively issued a Tri-Seal Compliance Note emphasizing that non-U.S. persons and entities must comply with U.S. sanctions and export controls law, and cautioning that they could be subject to civil and criminal liability for a failure to do so. See, U.S. Dep't of Com., U.S. Dep't of the Treasury & U.S. Dep't of Justice, [Tri-Seal Compliance Note: Obligations of Foreign-based Persons to Comply with US Sanctions and Export Control Laws](#) (Mar. 6, 2024) (Compliance Note). Tri-Seal Compliance Notes are not frequently issued, and practitioners should take note when all three sanctions regulators speak on an issue with a single voice.

The guidance mirrors the recent, broader impulse among U.S. prosecutors and regulatory agencies to extend application of U.S. law to foreign persons and entities, even when those persons and entities have only threadbare connections to the U.S. As discussed below, almost 40% of OFAC's publicly announced settlements over the past three years have been against non-U.S. actors, including some settlements that involved the payments of hundreds of millions of dollars in penalties.

The Tri-Seal Compliance Note makes clear that OFAC's sanctions enforcement dovetails with the country's broader national security and foreign policy interests, including the

U.S.'s interest in preventing "malign regimes and other bad actors" from "misus[ing] the commercial and financial channels that facilitate foreign trade." (See, [Compliance Note](#) at 1). Foreign companies should brace themselves for legal exposure on multiple fronts, with DOJ, BIS, and OFAC likely to coordinate their efforts against non-U.S. persons. In this article, we discuss the increased trend of global enforcement, examine some of the high-profile cases, and consider what non-U.S. companies and individuals can do to prevent becoming the next target of OFAC or DOJ enforcement of U.S. sanctions programs.

### **An Increased Focus On Global Enforcement**

OFAC, the body responsible for enforcing U.S. trade sanctions, more often brings enforcement actions against U.S. persons, such as U.S. citizens, permanent resident aliens, and U.S. incorporated entities and their foreign branches. Certain OFAC sanctions programs, such as the Iran, Cuba, and North Korea sanctions regimes, also apply to foreign entities owned or controlled by U.S. persons. OFAC's enforcement authority is distinct from its designation authority, which does not depend on a U.S. nexus. Non-U.S. persons can be designated as "Specially Designated Nationals" (SDN) if they are found to have materially assisted, sponsored, or provided financial, material, technological or other support for sanctioned persons or sanctionable activities. Designation as an SDN prohibits any transactions with U.S. persons or entities.

In recent years, however, DOJ and OFAC have increasingly targeted non-U.S. persons and entities transacting with sanctioned jurisdictions, even when those parties have little to no nexus to the U.S. OFAC brings these enforcement actions on a "causation theory," whereby non-U.S. persons can be held liable for causing or conspiring to cause U.S. persons to "wittingly or unwittingly" violate U.S. sanctions law. (See, [Compliance Note](#) at 2.) OFAC plainly endorses this theory in the latest Tri-Seal Note, and provides various examples of violative conduct that might be penalized on this basis, including: 1) obscuring or omitting reference to the involvement of a sanctioned party or jurisdiction in a financial transaction involving a U.S. person in transaction documentation; 2) misleading a person into exporting goods ultimately destined for a sanctioned jurisdiction; or 3) routing a prohibited transaction through the U.S. or the U.S. financial system, resulting in a U.S. financial institution processing the payment in violation of OFAC sanctions. (See, [Compliance Note](#) at 3.) In all of these instances, the legal theory is that the non-U.S. person has "caused" a U.S. actor to violate OFAC sanctions (often unknowingly).

Although OFAC first focused on enforcing sanctions against foreign financial institutions processing sanctionable activity, its dragnet has since expanded to include non-financial institutions that are causing U.S. persons to engage in sanctionable transactions. The result has been an upward trend in enforcement activity against foreign persons and companies: of 40 actions brought by OFAC since May 2021, 15 were against foreign persons or entities. Many of those enforcement actions involve the U.S. asserting authority over non-U.S. persons having little or no contact to the U.S., other than transacting in U.S. dollars. (The vast majority of such payments are made through correspondent accounts in the U.S., which provide U.S. dollar services to

non-U.S. financial institutions.) This represents an increase in non-U.S. enforcement activity compared to the data that we described in a prior article, where we observed that 23 of the 67 settlements and enforcement actions OFAC has brought between May 2017 and May 2021 – more than one-third of OFAC's announced cases – targeted non-U.S. companies. See, Harry Sandick and Gautam Rao, "[OFAC Asks Non-U.S. Persons to Advance U.S. Foreign Policy](#)," 28 Law Journal Newsletters No. 10 (June 2021).

### **Enforcement Actions Confirm This Trend**

Several high-profile enforcement actions in recent years have involved OFAC and in some cases DOJ holding non-U.S. actors responsible for sanctions violations. One example of the application of the causation theory to an entity outside of the financial services sector is OFAC's recent settlement with British American Tobacco (BAT) and its subsidiary, British American Tobacco Marketing Singapore (BATMS). BAT and BATMS paid \$629 million in criminal fines to resolve charges of, inter alia, sanctions violations. (See, [Press Release](#), U.S. D.O.J., Apr. 25, 2023.) This is one of the largest OFAC penalties in recent years. In addition to paying fines, BATMS was required to plead guilty to criminal conspiracy to commit bank fraud and conspiracy to commit sanctions violations. BAT entered into a deferred prosecution with respect to similar charges.

BAT is one of the world's largest manufacturers of tobacco products and it is based in the United Kingdom. The OFAC charges arose from an alleged multi-year scheme in which BAT and BATMS used front companies to cause U.S. banks to process upward of 200 wire transfers with North Korean state-owned cigarette manufacturers. As such, BAT caused U.S. financial institutions to process transactions that would have been blocked, investigated, or declined had the banks known of Korea's involvement. In an accompanying press release, OFAC emphasized that the alleged scheme generated extensive revenue for North Korea's Weapons of Mass Destructions Programs. This demonstrates the close interrelationship between U.S. national security policy and OFAC's sanctions enforcement.

In another example, in April 2022, Toll Holdings Limited ("Toll"), an Australian-based international freight forwarding and logistics company, paid \$6,131,855 in a settlement for over 2,000 violations of multiple OFAC sanctions programs. (See, [Press Release](#), OFAC Enforcement Release, Apr. 25, 2022.) Toll was penalized on a theory that it caused U.S. financial institutions to transact with blocked persons and to export financial services to sanctioned jurisdictions. Specifically, Toll originated and/or received payments in connection with sea, air, and rail shipments made by the company and its affiliates or suppliers through the Democratic People's Republic of Korea, Iran, and Syria. The payments were processed through at least four financial institutions in the U.S. or foreign branches of financial institutions incorporated in the U.S. OFAC noted Toll's failure to adopt or implement appropriate sanctions compliance policy and controls, despite the company's rapidly expanding global operations. This sends a message that even non-U.S. companies need to have robust sanctions compliance programs if their business touches, even indirectly, on U.S. markets or involves U.S. currency.

Two recent enforcement actions against non-U.S. financial sector firms are also worth noting. In November 2023, OFAC applied the causation rationale to secure a \$968,618,825 settlement against Binance Holdings, Ltd. (Binance), a Cayman Islands virtual exchange company. (See, [OFAC Enforcement Release](#), Nov. 21, 2023.) This is another of the largest OFAC settlements in the recent past. Binance was charged with 1,677,163 violations of sanctions programs based on its execution of virtual currency trades between U.S. persons and users in sanctioned jurisdictions. Senior Binance management "knew of and permitted" both U.S.-based users and sanctioned area users to operate on its virtual currency platform. Separately, in June 2023, OFAC settled with Swedbank Latvia, an international financial institution headquartered in Stockholm, Sweden, for \$3,430,900, in connection with a customer using the company's e-banking platform from an IP address in Crimea to send payments to persons in Crimea through U.S. correspondent banks. (See, [OFAC Enforcement Release](#), June 20, 2023.)

Both the Binance and Swedbank enforcement actions reiterate the importance of entities maintaining up-to-date and accurate "Know Your Customer" information (including passports, phone numbers, nationalities, and addresses), as well as ensuring that geolocation and IP data are appropriately integrated into screening protocols. Even if these entities are not directly subject to the Bank Secrecy Act and the PATRIOT Act, these types of programs will be essential in avoiding OFAC scrutiny.

### **Ramifications of OFAC's Global Enforcement Trend**

The expansion of OFAC's enforcement arm to individuals and entities with virtually no ties to the U.S. imposes substantial burdens on foreign businesses and corporations. Those entities might not be apprised of changes in the ever-shifting landscape of U.S. sanctions, introducing substantial uncertainty. The potential hardship for foreign companies is only compounded by the OFAC's liberal "strict liability" standard: OFAC need not show that foreign persons knowingly violated a trade sanction. A violation by itself is sufficient to expose foreign corporations to up to millions of dollars in civil fines.

Moreover, OFAC's liberal application of the "causation" theory to transactions between foreign actors in foreign countries, where the only nexus to the U.S. is that the parties are dealing in U.S. dollars, threatens to result in no principled limitation to OFAC's jurisdictional reach. In today's "increasingly interconnected global market," businesses often transact in U.S. dollars. (See, [Compliance Note](#) at 1.) In fact, foreigners often resort to the U.S. dollar because of its stability and reputation. See, e.g., U.S. Federal Reserve, "[The International Role of the U.S. Dollar, Post-COVID Edition](#)," June 23, 2023 (describing the role of the dollar as the "dominant global currency"). The U.S. Federal Reserve estimates that, as of the end of 2022, roughly half of the total number of U.S. dollar banknotes that are outstanding are held by foreigners. *Id.* The OFAC's aggressive enforcement tactics may therefore dissuade foreign companies from transacting in U.S. dollars all together – something that might jeopardize the dollar's special status as a global currency.

### **What Can Non-U.S. Companies Do To Avoid Enforcement Actions?**

The Tripartite Compliance Note offers some advice to foreign-based entities and persons participating in the global marketplace about various key "compliance considerations" that can help avoid being the subject of significant penalties including:

- Employing a risk-based approach to sanctions compliance by developing, implementing, and routinely updating a U.S. sanctions compliance program;
- Making sure that the company's senior leadership and Board of Directors make sanctions compliance a priority throughout the company;
- Establishing strong internal controls and procedures to govern payments and movement of goods;
- Training subsidiaries and affiliates on U.S. sanctions and export control requirements;
- Taking immediate and effective action when compliance issues are identified to identify and implement compensating controls until the root cause of the issue can be determined;
- Identifying and implementing measures to mitigate sanctions risks prior to merging with or acquiring other enterprises;
- Considering voluntary self-disclosure to the relevant agency if a party believes that it may have violated sanctions or export control laws. (See, [Compliance Note](#) at 10.)

Through these steps, a non-U.S. company can reduce the risk of being the focus of a major enforcement action, such as the ones discussed in this article. Even if there is a violation of U.S. sanctions, demonstrating to the regulators that substantial efforts were taken to avoid such violations will reduce the penalty that OFAC seeks to impose, and will also discourage DOJ from pressing criminal charges. As the Tri-Seal Compliance Note makes clear, the trend of global enforcement of OFAC sanctions seems unlikely to slow or reverse, making it essential that non-U.S. companies take steps outlined in the Compliance Note and in this article.

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**Harry Sandick**, a member of *Business Crimes Bulletin's* Board of Editors, is a partner in the Litigation Department of Patterson Belknap Webb & Tyler LLP and a member of the firm's White Collar Defense and Investigations team. He can be reached at [hsandick@pbwt.com](mailto:hsandick@pbwt.com).

**Sarah Hardtke** is an Associate in the firm's Litigation department. She can be reached at [shardtke@pbwt.com](mailto:shardtke@pbwt.com).

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