

ALERTS

Sanctions Update: OFAC Re-Emphasizes Applicability of Sanctions to Non-US Persons

April 4, 2024

On March 6, 2024, the US Department of the Treasury's Office of Foreign Assets Control ("OFAC"), the US Department of Justice ("DOJ") and the US Department of Commerce (collectively, the "Agencies") published their latest in a series of Tri-Seal Compliance Notes in which they emphasized that foreign-based persons have an obligation to comply with US sanctions and export controls.^[1] The Compliance Note does not reflect any policy change, but serves as a reminder that the Agencies have enforced sanctions and export controls against non-US persons, and highlights that non-US firms should implement measures to mitigate their risk of violating US laws. The Compliance Note also comes just a few months after the issuance of Executive Order ("E.O.") 14114, which authorizes OFAC to sanction foreign financial institutions that engage in significant transactions with Russia's military-industrial sector.^[2] Below, we focus on the Compliance Note's description of transactions in which OFAC has asserted authority to bring enforcement actions against non-US persons for sanctions violations and summarize some key implications for non-US fund managers.

OFAC's Policy on Enforcement of US Sanctions Against Non-US Persons

OFAC administers a variety of economic and trade sanctions measures that target foreign governments, private entities and individuals engaged in conduct that is adverse to the national security and foreign policy interests of the United States. OFAC sanctions may require US persons

to “block” or freeze the property of designated persons, or refrain from transactions involving certain countries or territories or specific activities, such as dealing in the equity securities of a sanctioned target or providing designated services to persons located in certain jurisdictions. Importantly, OFAC sanctions are based on strict liability, and OFAC may impose a civil penalty for even an unknowing or inadvertent violation.[3]

Typically, the obligations arising from OFAC sanctions apply to US persons.[4] However, the Compliance Note explains that OFAC’s enforcement authority extends to any non-US person that causes or conspires to cause a US person to “wittingly or unwittingly violate US sanctions,” or engages in evading US sanctions.[5]

The Compliance Note summarizes the types of violative conduct which will cause OFAC to actively employ its enforcement authority as follows: the obscuring or omitting of a reference to the involvement of a sanctioned party or jurisdiction in a financial transaction involving a US person; misleading US persons into exporting goods to a sanctioned jurisdiction; and routing a prohibited transaction through the United States or the US financial system.[6] To highlight the types of conduct that OFAC may seek to penalize, the Compliance Note describes three recent enforcement actions:

- Toll Holdings Limited (“Toll”), an international freight forwarding and logistics company headquartered in Australia, settled with OFAC for \$6,131,855 for apparent violations of multiple OFAC sanctions programs arising from Toll’s originating or receiving payments through the US financial system in connection with its shipping business that involved North Korea, Iran and Syria — three jurisdictions subject to broad OFAC sanctions — as well as blocked entities.[7] According to OFAC, this action highlights that foreign companies who use the US financial system to engage in commercial activity must take care to avoid transactions with OFAC-sanctioned countries and persons.
- Alfa Laval Middle East Ltd. (“Alfa Laval”), a UAE-based entity, settled with OFAC for \$415,695 for apparent violations of the Iran sanctions program. Alfa Laval procured US-origin storage tank cleaning units on behalf of Iran-based companies, falsely listed a Dubai company as the end-user of the units on export documentation to conceal the ultimate destination of the tanks, and thereby caused a US company to indirectly export the tanks to Iran in violation of sanctions.[8]

- Swedbank Latvia AS (“Swedbank”), a Latvian-based subsidiary of a Swedish financial institution, settled with OFAC for \$3,430,900 for apparent violations of OFAC sanctions on Crimea, relating to Swedbank’s customer’s use of Swedbank’s e-banking platform to send payments to persons located in a sanctioned jurisdiction through US correspondent banks.[9]

Recent Enforcement Action Against Swiss Financial Institution

Separately, on March 14, 2024, shortly after publishing the Compliance Note, OFAC announced another enforcement action against EFG International AG (“EFG”), a non-US private banking group based in Switzerland with numerous subsidiaries located throughout the world (including Miami, FL). EFG settled with OFAC for \$3.7 million for apparent violations of multiple OFAC sanctions programs.[10] EFG’s subsidiaries processed numerous securities-related transactions and funds transfers through omnibus accounts at US custodians or involving US persons, where those omnibus accounts held sub-accounts for persons located in Cuba or that were beneficially owned by Cuban nationals, or were designated under the Narcotics Trafficking Kingpin or the Russian Harmful Foreign Activities sanctions programs. EFG knew or had reason to know that the sub-account holders were sanctioned under US law, and caused US persons, including its own Miami-based subsidiary, to violate OFAC sanctions by processing the violative transactions without disclosing to their US custodians and other US securities firms that some of the omnibus accounts’ underlying beneficiaries were sanctioned. In some instances, EFG had implemented internal restrictions meant to comply with US sanctions, but failed to notify its US custodians and securities firms about the sanctioned beneficiaries.[11] This recent action against EFG serves as a reminder of the risks inherent in transacting with omnibus accounts where the underlying sub-account holders are undisclosed.

Criminal Liability

The above violations of OFAC sanctions resulted in civil monetary penalties. However, where the conduct constitutes a “willful” violation of US sanctions, the DOJ may bring criminal charges. The Compliance Note explains that the conduct prohibited under the International Emergency Economic Powers Act (“IEEPA”), which authorizes imposition of sanctions,

includes “caus[ing] a violation of any license, order, regulation, or prohibition issued” pursuant to IEEPA, and that willful violations are punishable by imprisonment of up to 20 years and a \$1 million fine.[12] As an example of a recent criminal action for sanctions violations, among other charges, the Compliance Note references a criminal action brought by the DOJ in which Binance Holdings Limited (“Binance”), a non-US entity registered in the Cayman Islands that operated a large international cryptocurrency exchange, pled guilty to, among other charges, violations of IEEPA. Binance admitted that it had numerous users located in comprehensively sanctioned jurisdictions, including Iran, and that its cryptocurrency exchange system would cause US users to transact with the users in sanctioned jurisdictions and that it failed to implement controls to prevent such transactions.[13] Binance incurred financial penalties of \$4.3 billion for these and other Bank Secrecy Act violations, of which the DOJ credited nearly one billion dollars towards Binance’s settlement with OFAC for violating multiple sanctions programs.[14]

Foreign nationals may also be subject to criminal prosecution for aiding sanctioned persons in the evasion of US sanctions. In 2022, the DOJ charged a U.K. national, Graham Bonham-Carter, with violations of IEEPA and wire fraud in connection with transactions he conducted in the United States on behalf of an individual who was sanctioned by OFAC.[15] The DOJ alleges that Bonham-Carter was employed by Oleg Deripaska and continued to work for him even after Deripaska was sanctioned by OFAC. Bonham-Carter arranged to make payments for the upkeep of Deripaska’s real estate holdings in the United States and attempted to ship artwork owned by Deripaska from a New York auction house to the UK by misrepresenting the identity of the artwork’s owner.[16] According to the indictment, Bonham-Carter violated Section 1705 of IEEPA, in that his conduct constituted the “[provision of] funds, goods, and services to and for the benefit” of a sanctioned person, as well as the evasion and avoidance of “the requirements of United States law with respect to [OFAC sanctions].”[17] Bonham-Carter was arrested in the U.K. but has not been extradited as of the date of this publication.

E.O. 14114 Authorizes Secondary Sanctions on Non-US Persons

In addition to OFAC’s and DOJ’s inherent authority to take enforcement action against non-US persons, the Russian sanctions program was also

recently expanded to enable OFAC to sanction foreign financial institutions (“FFIs”) that engage in certain transactions with companies in the Russian military-industrial base. E.O. 14114, issued on Dec. 22, 2023, authorizes OFAC to impose “secondary sanctions” on FFIs that facilitate significant transactions on behalf of designated persons operating in key sectors of the Russian economy that support Russia’s military capability, or that facilitate significant transactions or provide services involving Russia’s military-industrial base.[18] Foreign financial institutions that engage in such transactions may either be prohibited from opening or subject to strict conditions in maintaining correspondent accounts or payable-through accounts in the United States or may be subject to full blocking sanctions.[19] For FFIs that OFAC blocks, “all property and interests in property of those FFIs that are in the United States or in the possession or control of US persons are blocked and must be reported to OFAC.”[20]

Compliance Considerations

The Compliance Note provides several key compliance considerations for foreign-based persons, including employing a risk-based sanctions compliance program; establishing strong internal controls for payments involving affiliates, subsidiaries, agents or counterparties to detect “linkages to sanctioned persons or jurisdictions that may otherwise be obscured”; integrating know-your-customer information into sanctions screening protocols; ensuring personnel, subsidiaries and affiliates are trained on US sanctions requirements and can effectively identify red flags and will escalate any potential sanctions violations to management; and taking immediate and effective action when sanctions issues are identified and amending compliance policies to address weaknesses.[21]

Consistent with OFAC’s recommendations, and in light of recent enforcement actions, a robust compliance program should include screening all investors against OFAC’s sanctions lists prior to onboarding and periodically thereafter, implementing controls to ensure the manager has up-to-date information on the sanctions status of any beneficiaries to omnibus accounts invested in their funds, and taking appropriate measures to ensure no transactions of the fund that are processed through the US financial institution will benefit, directly or indirectly, a sanctioned person.

Takeaways

OFAC has made clear that non-US persons cannot assume that US sanctions do not apply to them. Non-US fund managers must be aware that if they interact with the US financial system or take on US investors, they could be subject to an OFAC enforcement action if they cause a US person to violate OFAC sanctions, even inadvertently. Moreover, under the Russian sanctions program, non-US persons that transact with Russian companies operating defense-related industries could be subject to OFAC sanctions themselves. Accordingly, non-US fund managers should implement policies and procedures that are designed to ensure compliance with the Executive Orders, statutes, programs and regulations administered by OFAC, as well as those sanctions programs administered by the authorities of the jurisdictions in which they are located or registered.

When undertaking any proposed activity or transaction, fund managers should consider the following:

- Whether the activity will involve US investors by, among other things, requiring their approval or using their assets to make a particular investment;
- Whether the activity will involve US personnel or US-based third-party service providers;
- Whether any part of a transaction will be conducted in US dollars, routed through the US financial system, or otherwise involve US-based banks, brokers, or custodians; and
- Whether the fund, its investors, or its personnel are subject to the sanctions regimes of another jurisdiction.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] US Dep't of Com., US Dep't of the Treasury & US 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), available at <https://ofac.treasury.gov/media/932746/download?inline> ("Compliance Note"). For information on a prior Tri-Seal Compliance Note, see Schulte

Alert, Sanctions Update: OFAC Encourages Voluntary Self-Disclosure for Sanctions Violations (Aug. 2, 2023), available at https://www.srz.com/en/news_and_insights/alerts/ofac-encourages-voluntary-self-disclosure-for-sanctions.

[2] Executive Order 14114 of Dec. 22, 2023, available at <https://ofac.treasury.gov/media/932441/download?inline>.

[3] Compliance Note, at 2.

[4] For OFAC sanctions purposes, “US person” means all US citizens and permanent resident aliens wherever located, all persons within the United States, and all US-incorporated entities and foreign branches. Compliance Note, at 2. Certain OFAC sanctions programs also apply to foreign persons that are owned or controlled by a US person, including the Iran, Cuba and North Korea sanctions programs. *Id.* at 2 n.1.

[5] Compliance Note, at 2.

[6] Compliance Note, at 3.

[7] Department of the Treasury, Enforcement Release, “OFAC Settles with Toll Holdings Limited for \$6,131,855 Related to Apparent Violations of Multiple Sanctions Programs” (Apr. 25, 2022), available at <https://ofac.treasury.gov/media/922441/download?inline>.

[8] Department of the Treasury, Enforcement Release, “Alfa Laval Middle East Ltd. Settles Potential Civil Liability for Apparent Violations of the Iranian Transactions and Sanctions Regulations” (July 19, 2021), available at <https://ofac.treasury.gov/media/911521/download?inline>.

[9] Department of the Treasury, Enforcement Release, “OFAC Settles with Swedbank Latvia for \$3,430,900 Related to Apparent Violations of Sanctions on Crimea” (June 20, 2023), available at <https://ofac.treasury.gov/media/931911/download?inline>.

[10] Department of the Treasury, Enforcement Release, “EFG Settles with OFAC for \$3,740,442 for Apparent violations of Multiple Sanctions Programs” (March 14, 2023), available at <https://ofac.treasury.gov/media/932766/download?inline>.

[11] *Id.* at 1–2.

[12] Compliance Note, at 7–8 (citing 50 USC. § 1705(a)–(c)).

[13] Compliance Note, at 9 (citing Press Release, Department of Justice, “Binance and CEO Plead Guilty to Federal Charges in \$4B Resolution” (Nov. 21, 2023), available at <https://www.justice.gov/opa/pr/binance-and-ceo-plead-guilty-federal-charges-4b-resolution>). In addition to sanctions violations, the charges against Binance also included anti-money laundering compliance failures and unlicensed money transmitting, and DOJ coordinated with US Treasury’s Financial Crimes Enforcement Network, the US Commodity Futures Trading Commission, as well as OFAC in reaching a \$4 billion settlement with Binance. DOJ Press Release, Binance, *supra*.

[14] DOJ Press Release, Binance, *supra*; US Dep’t of the Treasury, “OFAC Settles with Binance Holdings, Ltd. for \$968,618,825 Related to Apparent Violations of Multiple Sanctions Programs” (Nov. 21, 2023), available at <https://ofac.treasury.gov/media/932351/download?inline>.

[15] Indictment, *United States v. Carter*, 22 Cr. 503 (S.D.N.Y. 2022); Press Release, DOJ, “U.K. Businessman Graham Bonham-Carter Indicted for Sanctions Evasion Benefitting Russian Oligarch Oleg Vladimirovich Deripaska” (Oct. 11, 2022), available at <https://www.justice.gov/opa/pr/uk-businessman-graham-bonham-carter-indicted-sanctions-evasion-benefitting-russian-oligarch>.

[16] DOJ Press Release, Bonham-Carter, *supra*.

[17] Carter Indictment, ¶¶ 13, 26, *supra*. The DOJ alleges that the assistance Bonham-Carter knowingly provided to Deripaska violated Executive Orders 13660, 13661, and 13662, and 31 C.F.R. § 589.201 of the Ukraine-/Russia-Related Sanctions Regulations. *Id.* at ¶ 26.

[18] E.O. 14114, *supra*; Press Release, US Dep’t of the Treasury, Statement from Secretary Yellen on President Biden’s Executive Order Taking Additional Steps With Respect to Russia’s Harmful Activities (Dec. 22, 2023), available at <https://home.treasury.gov/news/press-releases/jy2011>.

[19] OFAC FAQ 1149 (Dec. 22, 2023), available at <https://ofac.treasury.gov/faqs/1149>.

[20] *Id.*

[21] Compliance Note, at 10. OFAC also issued guidance for foreign financial institutions on compliance considerations with respect to E.O. 14114 in December 2023, which recommends, among other things, that

FFIs review their customer bases, communicate compliance expectations to counterparties, take mitigating steps with respect to high-risk counterparties, ask counterparties to attest that they do not engage in activities covered by E.O. 14114, update sanctions risk assessments to include involvement in Russia's military-industrial base, and use open-source information as part of due diligence and proactive investigation efforts to identify possible sanctions and export control evasion. OFAC, Sanctions Advisory: Guidance for Foreign Financial Institutions on OFAC Sanctions Authorities Targeting Support to Russia's Military-Industrial Base (Dec. 22, 2023), available at <https://ofac.treasury.gov/media/932436/download?inline>.

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