

# Locke Lord QuickStudy: OFAC, BIS and DOJ Issue TriSeal Guidance on Obligations of Non-U.S. Persons to Comply With U.S. Sanctions and Export Control Laws

Locke Lord LLP

## WRITTEN BY

Ryan Last

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On March 5, 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") issued a Tri-Seal Compliance Note ("Compliance Note") to address the three parties respective mandates for non-U.S. persons' obligations to comply with U.S. sanctions and export control laws, particularly when dealing with Russia, China, North Korea, and Iran.

It has been widely publicized that U.S.' adversaries have gone to great efforts to circumvent U.S. sanctions and export control laws to access U.S. commercial and financial markets and unlawfully acquire U.S. controlled goods, technology and services; circumvention of these U.S. sanctions and export control laws pose threats to U.S. national security and global stability. In response, the U.S. has empowered these agencies with tools to ferret out non-compliance and armed them with powerful weapons to deter and punish would-be violators.

The Compliance Note highlights the applicability of these laws and regulations to non-U.S. persons, and outlines the enforcement mechanisms, including the possibility of criminal prosecution, available to the U.S. government.

## U.S. Sanctions

OFAC administers and enforces U.S. economic and trade sanctions. OFAC can enforce sanctions in a number of ways including blocking the property of listed individuals and entities (generally referred to as "specially designated nationals" or "SDNs"), restricting U.S. persons from dealing with specified actors, and prohibiting transactions involving an entire jurisdiction or country, such as through a trade embargo or sanctions related to particular jurisdiction or economic sector.

U.S. persons must comply with OFAC regulations. U.S. persons include U.S. citizens and permanent resident aliens regardless of where they are located, all persons within the United States, and all U.S.- incorporated entities and their foreign branches.

Certain sanctions programs require foreign persons in possession of U.S.-origin goods to comply with U.S. sanctions and export control laws. For example, non-U.S. persons cannot direct or conspire with U.S. persons to violate or evade U.S. sanctions. Since OFAC violations carry strict liability, even unwitting violations may result in

civil or criminal penalties to all participants.

## **U.S. Export Controls**

The BIS is charged with administering and enforcing export controls on dual-use and certain munitions items through the Export Administration Regulations (“EAR”) under the authority of the Export Control Reform Act of 2018. U.S. export control laws apply to items subject to the EAR anywhere in the world and to foreign persons who deal with them. In addition to the initial export, the EAR continues to apply to U.S. goods, services and technologies when (i) reexported from one foreign country to another foreign country and in-country transfers (the transfer of an item subject to the EAR within a foreign country); (ii) incorporated (above *de minimis* thresholds) into foreign made goods; and (iii) foreign made goods are made with U.S. technology or machinery. Anyone wherever located must adhere to U.S. export control laws when transacting in goods, service or technologies subject to the EAR.

The BIS and OFAC also employ their enforcement authorities against non-U.S. financial institutions and other non-U.S. persons who have or have facilitated improper payments or exports from the United States, or otherwise violated U.S. sanctions or export controls. Examples include: (i) disguising the identity of a sanctioned party involved in a transaction; (ii) redirecting exported goods to a sanctioned jurisdiction; and (iii) using the U.S. financial system to process payments to sanctioned persons.

## **Criminal Proceedings**

OFAC and the BIS may direct matters involving violations of sanctions and export control laws to the DOJ for criminal prosecution. Criminal penalties can include fines, monetary disgorgement, seizure of assets, imprisonment, cancellation of U.S. visas and deportation. Recent DOJ charges highlight some of the DOJ’s enforcement mechanisms:

- In October 2022, the DOJ unsealed an indictment charging three Latvian nationals, one Ukrainian national living in Estonia, one Latvian company, and one Estonian company with violating U.S. export laws and regulations by trying to smuggle from the United States to Russia a dual-use, high-precision computer-controlled grinding machine known as a “jig grinder.” The DOJ alleged that the defendants conspired to have the Latvian company act as the purported purchaser of the device and then reexport the machinery from Latvia to a Russian company without first acquiring a BIS license. The machine was controlled under the U.S. nuclear non-proliferation and defense programs. The jig grinder was intercepted by U.S. authorities in Latvia. Two defendants pled guilty, and approximately \$826,000 was forfeited to the United States. In February 2024, approximately \$500,000 of those funds were transferred to the Estonian government to provide aid to Ukraine.
- In December 2023, the DOJ charged an Iran-based person and an individual based in China and Hong Kong for conspiring to illegally purchase and export from the United States to Iran dual-use microelectronics commonly used in unmanned aerial vehicle (drone) production. To obtain the products, the defendants allegedly caused Canadian and French companies to place orders with U.S. manufacturers, causing the items to be shipped first to either Canada and France and then to Hong Kong and China, where they were reexported to Iranian end users. The defendants allegedly provided false and misleading information about the ultimate end use and true identities of the end users to the U.S. manufacturers.

## **Compliance Measures**

To avoid inadvertent violation of sanctions and export control laws, and the potentially severe fines and criminal charges that accompany those violations, non-U.S. companies that deal in U.S. goods or services, have U.S. presence, or other U.S. nexus, should build and maintain comprehensive U.S. sanctions and export control compliance programs, including know-your-customer (KYC) protocols and geolocation data screening processes. The basic elements of an effective compliance program include (i) strong management messaging regarding compliance including programmatic funding, (ii) effective risk assessments to exposures to applicable U.S. laws, (iii) internal controls to comply with such laws, and designation of staff and facilities (e.g., roles and responsibilities) to implement internal controls, (iv) regular periodic audit and testing of the effectiveness of the compliance program, and (v) employee training programs. Similarly, sanctions and export control due diligence should be conducted before engaging in strategic transactions such as mergers or acquisitions with entities that have exposure to U.S. sanctions and export control laws. By conducting thorough due diligence assessments and implementing tailored compliance programs, businesses can navigate the complexities of U.S. sanctions and export controls, thereby safeguarding their operations and mitigating potential legal and reputational risks.

## **Conclusion**

Foreign-based companies and individuals must recognize the far-reaching impacts of U.S. sanctions and export control laws on their global operations. Proactive engagement, comprehensive understanding of applicable laws and regulations, and robust compliance measures are indispensable for navigating the evolving regulatory landscape successfully. By prioritizing compliance and accountability, businesses can continue to engage in international trade responsibly, contributing to global economic prosperity while upholding the principles of security and stability.

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