

Export Controls & Economic Sanctions: Key Concepts, Compliance Challenges, and Enforcement Trends

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Agenda

- I. Understanding Legal and Regulatory Authorities for Export Controls & Economic Sanctions (ECES) and the Agencies Implementing and Enforcing Them
- II. Focus on China and Russia ECES
- III. OFAC and BIS Penalty Regimes: Sanctions is the new FCPA
- IV. Due Diligence and Compliance Expectations

Government Agencies

- ❑ US Bureau of Industry and Security (BIS)
- ❑ Office of Foreign Assets Control (OFAC)
- ❑ Director of Defense Trade Controls (DDTC)
- ❑ US Customs and Border Protection (CBP)
- ❑ US Department of Justice (DOJ)
- ❑ Federal Bureau of Investigations (FBI)
- ❑ Foreign regulatory and law enforcement agencies

Legal and Regulatory Authorities

□ Export Controls

- Export Control Reform Act of 2018 (eff. 13 Aug 18) – 50 U.S.C. §§ 4801 *et seq.*
 - Part of John S. McCain National Defense Authorization Act (NDAA) FY19
 - Permanent statutory authority for Export Administration Regulations (EAR)
 - ✓ Export Administration Act of 1979 expired – remained in effect under Executive Orders (EO) and International Emergency Economic Powers Act (IEEPA)
 - Codified practices of Bureau of Industry and Security (BIS)
 - Section 1758 – emerging and foundational technologies

Legal and Regulatory Authorities

□ Export Controls

- Export Administration Regulations (EAR) - 15 CFR §§ 730-774
 - Administered and enforced by BIS
 - ✓ Office of Export Enforcement (OEE)
 - Regulates exports, reexports, and transfers (in-country) of commodities, technologies, and software
 - Mission: Protect national security, economic security, cyber security, and homeland security
 - Governs “items subject to the EAR” - civilian, dual-use, and military applications

Legal and Regulatory Authorities

□ Antiboycott

- Anti-Boycott Act of 2018 (Part 760 of EAR)
 - Part II of the Export Controls Reform Act of 2018
 - Statutory basis for Office of Antiboycott Compliance (OAC) administration and enforcement of regulations
 - Prohibit US persons from advancing other nations' foreign policies
 - Activities of US persons undertaken with boycott intent in the interstate or foreign commerce of the US
- Related antiboycott laws : Section 999 of the IRC
 - Key: Treasury's list of countries; OAC "irrespective of country or origin"

Legal and Regulatory Authorities

❑ Prohibited antiboycott Activities or Information

- Furnishing or agreeing to furnish information about business relationships with or in a boycotted country or with blacklisted companies
- Implementing letters of credit containing prohibited boycott terms or conditions

❑ Duty to report requests *and* not further boycott activities

❑ Voluntary disclosure of violations

❑ Penalties: Supp. No. 2 to Part 766 (amended 7 Oct 22)

- Three categories of violations (A, B, C) reflecting seriousness of violations – Category A the most serious violations

Legal and Regulatory Authorities

- Antiboycott language in purchase orders, contracts, or surveys:
 - Buyer shall in no way contravene the regulations issued by Bahrain Government and or Israel Boycott Office. Buyer shall not nominate a vessel blacklisted by the said office
 - No produced commodity shall be eligible for ... financing if such commodity contains any component or components which were imported into the producing country from Israel and countries not eligible to trade with ... the People's Republic of Bangladesh. The equipment and materials must not be of Israeli origin. The supplier/bidder who are not blacklisted by Arab boycott of Israel will be allowed to participate in this bid
 - What companies in whose capital are your shareholders? Please state the name and nationality of each company and the percentage of share of their total capital

Legal and Regulatory Authorities

□ Economic Sanctions

- Trading with the Enemy Act – 50 U.S.C. §§ 4301 *et seq.*
 - Authorizes President to restrict trade during wartime
- IEEPA (1977) amended TWEA – times of peace
 - ✓ Unusual and extraordinary threats from outside US to national security, foreign policy, or economy - President declares a national emergency regarding the threat
 - ✓ Applicable to “US persons” – US nexus
- Other statutes: Countering America’s Adversaries Through Sanctions Act (CAATSA) – Iran, Russia, N. Korea; Sergei Magnitsky Rule of Law Accountability Act of 2012

Legal and Regulatory Authorities

- Economic Sanctions - 31 CFR §§ 501 *et seq.*
 - Administered and enforced by OFAC
 - 37 sanctions programs in effect
 - Comprehensive – Cuba, Ukraine Regions, Iran, N. Korea, Syria
 - ✓ Extend to imports
 - Targeted – Libya, South Sudan, Venezuela, Zimbabwe
 - List-based – Terrorism, narco-trafficking, weapons proliferation
 - ✓ Specially Designated Nationals and Blocked Persons (SDN) List
 - Secondary sanctions – non-US persons; generally, financial institutions and foreign sanctions evaders
 - New: Russian Harmful Foreign Activities Sanctions (RuHSR)
 - Facilitation, indirect, evasion, conspiracy

Legal and Regulatory Authorities

□ OFAC Licenses

- General (GL) – broad authorization
 - Conditions and reporting requirements
- Specific – transaction-based, case-by-case basis

□ OFAC 50% Rule

- Entities *owned* in the aggregate, directly or *indirectly*, 50% or more by one or more by blocked persons are considered to be a blocked person
 - Without regard to SDN listing

Focus: China and Russia ECES

□ OFAC 50% Rule – Revised Guidance (13 Aug 14)

- US persons should use caution engaging in business with non-blocked entities in which blocked persons are involved
- Indirect ownership – ownership of shares in an entity through one or more other entities
- 50% Rule only addresses ownership, not control (11 Aug 20)

□ SDN List - Individuals, groups, entities, aircraft, and vessels

- Assets and interests in property blocked
- US persons prohibited from transacting business – directly, indirectly, facilitating → conspiracy, evasion
- OFAC SDN search tool, <https://sanctionssearch.ofac.treas.gov/>

Focus: China and Russia ECES

□ SDN List

- BEIJING ALITE TECHNOLOGIES CO., LTD. (a.k.a. ALCO; a.k.a. BEIJING HAILI LIANHE KEJI YOUXIAN GONGSI), 12A Beisanhuan Zhong Road, P.O. Box 3042, Beijing, China; Additional Sanctions Information - Subject to Secondary Sanctions; and all other locations worldwide [NPWMD] [IFSR]
- JOINT STOCK COMPANY KAZAN HELICOPTERS (a.k.a. AO KAZANSKII VERTOLETNYI ZAVOD; a.k.a. KAZAN HELICOPTERS; a.k.a. KAZANSKI VERTOLETNY ZAVOD AO), Ul. Tetsevskaya D. 14, Kazan 420085, Russia; Organization Established Date 1993; Tax ID No. 1656002652 (Russia); Registration Number 1021603881683 (Russia) [RUSSIA-EO14024] (Linked To: VERTOLETY ROSSII AO)

Focus: China and Russia ECES

□ Military End User (MEU) List – Supp. No. 7 to Part 744

- Announced in 85 FR 23459 (28 Apr 20) - Military End Use/Military End Users in PRC, RU, and VZ – issued 23 Dec 20 (58 PRC, 43 RU parties)
- Expanded licensing requirements - “military end users” includes party “whose actions or functions are intended to support ‘military end uses’”
- Expanded “military end use” definition - “item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, “development,” or “production” of military item
- *“This expansion will require increased diligence with respect to the evaluation of end users in China . . .”* (85 FR 23459, 23460)
- “Knowledge”-based control: positive knowledge that a circumstance exists or is substantially certain to occur or awareness of high probability of its existence or future occurrence.
 - Awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of facts.

Focus: China and Russia ECES

- ❑ Russian *and Belarusian* Industry Sector Sanctions (§ 746.5(a)(1)(ii))
 - Supp. No. 4 – new export controls on Russia and Belarus and luxury goods (24 Feb 2023)
 - License review policy – denial ((§ 746.5(b)(2))
 - ✓ Exceptions: health/safety reasons or humanitarian needs – case-by-case basis
 - Remove Schedule B Columns and use HTS – 6-digit level codes (24 Feb 2023)
- ❑ Crimea, DNR and LNR regions – license for all items subject to the EAR, other than food and medicine or software for personal communications over the Internet

Focus: China and Russia ECES

❑ Entity List – Supp. No. 4 to Part 744

- Export, reexport, transfer (in-country) license requirement – “all items subject to the EAR” or limited
- License review policy – case-by-case, presumption of denial, denial
- Expansion – Huawei, PRC (incl. HK), RU, Belarus

❑ Unverified List – Supp. No. 6 to Part 744

- Parties whose bona fides cannot be verified
 - No end-use check completed – pre-license check or post-shipment verification
 - UVL Statement – § 744.15(b)
 - “sustained lack of cooperation by a host government authority . . .” (§ 744.11(b), eff. 7 Oct 22) → Entity List

Focus: China and Russia ECES

- ❑ Non-SDN Chinese Military-Industrial Complex Companies (NS-CMIC) List
 - EOs 13959 & 14032 – Addressing the Threat From Securities Investments That Finance Communist Chinese Military Companies (12 Nov 20; 3 Jun 21)
 - China National Offshore Oil Corp. (CNOOC), Huawei, Semiconductor Manufacturing International Corp. (SMIC), China Telecom Corp. Ltd.
- ❑ Ukraine-/Russia-Related Sanctions Regulations – 2 May 22
 - Sectoral Sanctions Identifications (SSI) List
 - Directives 1 - 4 - Sectoral sanctions
 - New debt or equity (Directives 1 -3)
 - Exports, reexports, transfers, or services – exploration or production for deepwater, Arctic offshore, or shale projects
 - New Sectoral Sanctions : Metals and Mining Determination (24 Feb 2023)
- ❑ OFAC Penalty settlement (1 Apr 22) – accepted past due payments from Rosneft (Directive 2 – 90 days)

Focus: China and Russia ECES

□ Russian Harmful Foreign Activities Sanctions (RuHSR)

■ Prohibitions

- New debt and equity with certain entities
- “New investment” in Russia
- Accounting, corporate formation, and management consulting services
- Approving, financing, facilitating, or guarantying of foreign person transactions if it were prohibited under EO 14066

OFAC & BIS Penalty Regimes: Sanctions is the New FCPA

- ❑ OFAC – Economic Sanctions Enforcement Guidelines: Appx. A to Part 501
 - Applicable penalty schedule – based on transaction value, e.g., \$100k for transaction valued at \$50k but less than \$100k
 - Statutory max. per IEEPA violation - \$356,579 or 2x the transaction value
- ❑ Civil Penalty Process – Guidelines V.A.
 - Pre-Penalty Notice (PPN) - opportunity to settle
 - Response to PPN
 - Penalty Notice
 - Final Agency Action
- ❑ Penalty amount – egregious v. non-egregious
 - Non-egregious: Applicable schedule amount
 - Egregious: General Factors - willful or reckless, awareness of conduct, harm to sanctions program – base amount is max. penalty

OFAC and BIS Penalty Regimes: Sanctions is the New FCPA

- ❑ Voluntary disclosure – 50% credit

BASE PENALTY MATRIX

Egregious Case

NO

YES

Voluntary Self-Disclosure

YES

(1)
One-Half of Transaction Value
(capped at lesser of \$165,474 or
one-half of the applicable statutory
maximum per violation)

(3)
One-Half of
Applicable Statutory Maximum

NO

(2)
Applicable Schedule Amount
(capped at lesser of \$330,947 or
the applicable statutory maximum
per violation)

(4)
Applicable Statutory Maximum

OFAC and BIS Penalty Regimes: Sanctions is the New FCPA

□ OFAC – General Factors

- Awareness of Conduct at Issue (General Factor B)
 - Actual knowledge; reason to know; management involvement
- Individual Characteristics (General Factor D)
 - Commercial sophistication; size of operations and financial condition; volume of transactions; sanctions history
- Compliance Program (General Factor E) – existence, nature, and adequacy at the time of apparent violation(s)
- Remedial Response (General Factor F)

OFAC and BIS Penalty Regimes: Sanctions is the New FCPA

□ OFAC – Responses to Apparent Violations

- No action – insufficient evidence
- Request additional information
- Cautionary letter – insufficient evidence or Finding of Violation or civil penalty not warranted
- Finding of Violation – violation occurred but civil penalty not appropriate response
- Civil monetary penalty - settlement
- Criminal referral
- Other administrative actions – license denial, suspension, modification, or revocation; cease and desist order

OFAC and BIS Penalty Regimes: Sanctions is the New FCPA

- ❑ BIS – Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases: Supp. No. 1 to Part 766
 - Applicable penalty schedule – based on transaction value; same as OFAC
 - Statutory max. per IEEPA violation - \$356,579 or 2x the transaction value
- ❑ Civil Penalty Process – Guidelines V.A.
 - Proposed Charging Letter (PCL) - opportunity to settle
 - Response to PCL
 - Charging Letter – opportunity to settle
- ❑ Penalty amount – egregious v. non-egregious
 - Non-egregious: Applicable schedule amount
 - Egregious: General Factors - willful or reckless, awareness of conduct, harm to regulatory program objectives – base amount is max. penalty

OFAC and BIS Penalty Regimes: Sanctions is the New FCPA

□ BIS Violations (§ 764.2)

(a) Engaging in prohibited conduct

(b) Causing, aiding, or abetting a violation

(c) Solicitation and attempt

(d) Conspiracy

(e) Acting with knowledge of a violation

(f) [reserved]

(g) Misrepresentation and concealment of facts

(h) Evasion

OFAC and BIS Penalty Regimes: Sanctions is the New FCPA

- ❑ Voluntary disclosure – 50% credit
- ❑ *Aggravating* Factors
 - Willful or reckless violation of law (III.B.)
 - Willfulness, recklessness/gross negligence, concealment, pattern of conduct, prior notice, management involvement
- ❑ General Factors: Individual Characteristics (D.)
 - Commercial sophistication; size of operations and financial condition; volume of transactions; regulatory history; **compliance program** – existence, nature, and adequacy at the time of apparent violation(s)
- ❑ Mitigating Factors
 - F. Remedial Response
 - G. Exceptional Cooperation with OEE
 - H. License was likely to be approved

OFAC and BIS Penalty Regimes: Sanctions is the New FCPA

□ BIS – Responses to Apparent Violations

- No action – insufficient evidence
- Warning letter – violation might have occurred, but civil penalty is not warranted
- Administrative enforcement case – a violation has occurred, and conduct warrants a civil penalty: Proposed Charging Letter issued; settlement
- Civil monetary penalty
- Criminal referral
- Other administrative actions – license revision, suspension, or revocation; denial of export privileges; training and audit
- Suspension or deferral - probation

OFAC and BIS Penalty Regimes: Sanctions is the New FCPA

□ Successor liability for violations

- BIS – In the Matter of Sigma-Aldrich Business Holdings, Inc. (2002)
- C.A. Litzler Co., Inc. (2014) – “substantial continuity”
 - Successor-in-interest - \$45,000 penalty settlement
- OFAC – Keysight Techs., Inc. (2020) – subsidiary merged into parent - \$473,157 penalty settlement

ECES Compliance Resources

- ❑ DOJ Evaluation of Corporate Compliance Programs (3 Mar 23)
<https://www.justice.gov/criminal-fraud/page/file/937501/download>
 - Monaco Memo (15 Sept 22) – Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group https://www.ethics.org/wp-content/uploads/2022.09.15_ccag_memo_0.pdf – updated 28 Oct 21 Memo
- ❑ BIS – seminars, Export Compliance Program video (YouTube), *Don't Let this Happen to You*, Red Flag Indicators, Know Your Customer Guidance
 - *Export Compliance Guidelines*, <https://bis.doc.gov/index.php/documents/pdfs/1641-ecp/file>
 - Consolidated Screening List (CSL), <https://www.export.gov/consolidated-screening-list>
- ❑ OFAC – A Framework for OFAC Compliance Commitments (2 May 19), https://home.treasury.gov/system/files/126/framework_ofac_cc.pdf

Due Diligence and Compliance Expectations

❑ Enforcement Environment

- *FinCen-BIS Joint Alert: Export Control Evasion Attempts (28 Jun 22)* <https://www.fincen.gov/sites/default/files/2022-06/FinCEN%20and%20Bis%20Joint%20Alert%20FINAL.pdf>
- *USAO Voluntary Self-Disclosure Policy (23 Feb 23)* https://www.justice.gov/d9/pages/attachments/2023/02/23/usao_voluntary_self-disclosure_policy.pdf
- *Department of Commerce, Department of the Treasury, and Department of Justice Tri-Seal Compliance Note: Cracking Down on Third-Party Intermediaries Used to Evade Russia-Related Sanctions and Export Controls (2 Mar 23)* https://home.treasury.gov/system/files/126/20230302_compliance_note.pdf

Thank you

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