

BETTER SAFE THAN SORRY

THE CASE FOR BUILDING A ROBUST
SANCTIONS
COMPLIANCE
PROGRAM

Sanctions Compliance

UN Security Council Sanctions

OFAC

SDNs

Executive Orders

EU Sanctions

BANKING **FINANCIAL SERVICES**
MANUFACTURING **MEDICAL**
EXTRACTIVES **TELECOM**
TRANSPORTATION **UTILITIES**

Congo

Cuba

Iran

North Korea

Syria

Russia

“THE INCREASING NUMBER OF ENFORCEMENT AGENCIES—AND THEIR INCREASING VEHEMENCE IN ENFORCEMENT—MAKES THE RISK OF NOT KEEPING UP SUBSTANTIAL.”³

Adam M. Smith, Counsel
Gibson, Dunn & Crutcher LLP

More than half a century ago, the U.N. Security Council (UNSC) established the first sanctions regime on Southern Rhodesia, now known as Zimbabwe. Since 1966, the UNSC has enacted 26 sanctions regimes, 13 of which continue today.¹ Such small numbers belie the complexity organizations face maintaining sanctions compliance.

Sanctions regimes were devised as political apparatuses to prevent escalation or settle conflicts, curtail nuclear proliferation, and counter terrorism and human rights violations. While the current consolidated U.N. sanctions list only covers 13 sanctions regimes, the document is 158 pages long, reflecting the extensive collection of individuals, entities or States subject to sanctions.² U.N. sanctions regimes are subsequently adopted by supranational bodies like the European Union, as well as individual nations. In addition, countries may have their own sanctions lists related to specific regional threats or other national security considerations.

SANCTIONS COMPLIANCE

As a result, organizations must navigate a complicated web of sanctions—and it's not just banks and financial institutions that are subject to the sanctions. Increasingly, companies across various industries have been the target of enforcement actions, most notably by the U.S. Department of the Treasury's Office of Foreign Asset Control (OFAC), which aggressively pursues sanctions violations by U.S. companies, as well as by foreign companies if they are publicly-traded in the U.S., or if any U.S. person is involved.

In fact, OFAC showed a willingness to push the boundaries of the definition of a U.S. person when earlier this year, it issued a finding of violation against B Whale Corp. (BWC), a subsidiary of Taiwan-based shipping company TMT Group. At issue was a ship-to-ship transfer of crude oil from a vessel owned by the National Iranian Tanker Co., which at the time was on the OFAC list of specially designated nationals and blocked persons (SDNs). OFAC based its case against BWC because the sanctions violation took place at the same time that BWC was participating in a U.S. Bankruptcy Court proceeding, which OFAC deemed qualified the company as a U.S. person.

SANCTIONS COMPLIANCE RISK IN NON-BANKING INDUSTRIES

For years, banks and financial services companies were the primary focus of enforcement agencies. As a result, banks tend to have vigorous sanctions compliance programs in place. The same cannot be said of non-banking organizations, which is a cause of concern given a growing focus on companies in other industries.

Out of 17 OFAC penalties levied in 2015, for example, nine involved organizations outside banking and financial services industries. One critical detail shared by seven of those nine companies, noted by the *National Law Review*, was the lack of a compliance program at the time of the sanctions violations.⁴

Similarly, eight of nine organizations subject to OFAC civil settlements in 2016 came from non-banking industries, suggesting that they too had inadequate processes in place to mitigate sanctions compliance risk.⁵

Penalty	Organization	Industry
\$7,617,150	Alcon Laboratories, Inc.	Pharmaceuticals
\$5,976,028	National Oilwell Varco, Inc.	Oil and Gas
\$4,320,000	PanAmerican Seed Company	Agricultural
\$2,485,890	Barclays Bank Plc	Banking
\$614,250	CGG Services S.A.	Oil and Gas
\$304,706	Halliburton Atlantic Limited	Oil and Gas
\$140,400	WATG Holdings, Inc.	Architecture
\$107,691	HyperBranch Medical Technology	Medical
\$43,200	World Class Technology Corporation	Orthodontics Manufacturing

Compounding the enormous scope of sanctions regimes is the speed at which sanctions change. During a round table discussion on sanctions last year, Gibson, Dunn & Crucher counsel Adam M. Smith, who has in the past chaired the Treasury delegation to EU/G7 talks related to Russia sanctions, said, "To take the U.S. as an example—which has the most robust and well-tuned sanctions system in the world—the number of sanctions programs the U.S. has increased by nearly 300 percent since 2000. The number of blacklisted entities has more than doubled in that period, and the speed with which entities are put on and taken off the blacklist has meant that there are thousands of changes every year."⁶

THE HIGH COST OF SANCTIONS VIOLATIONS

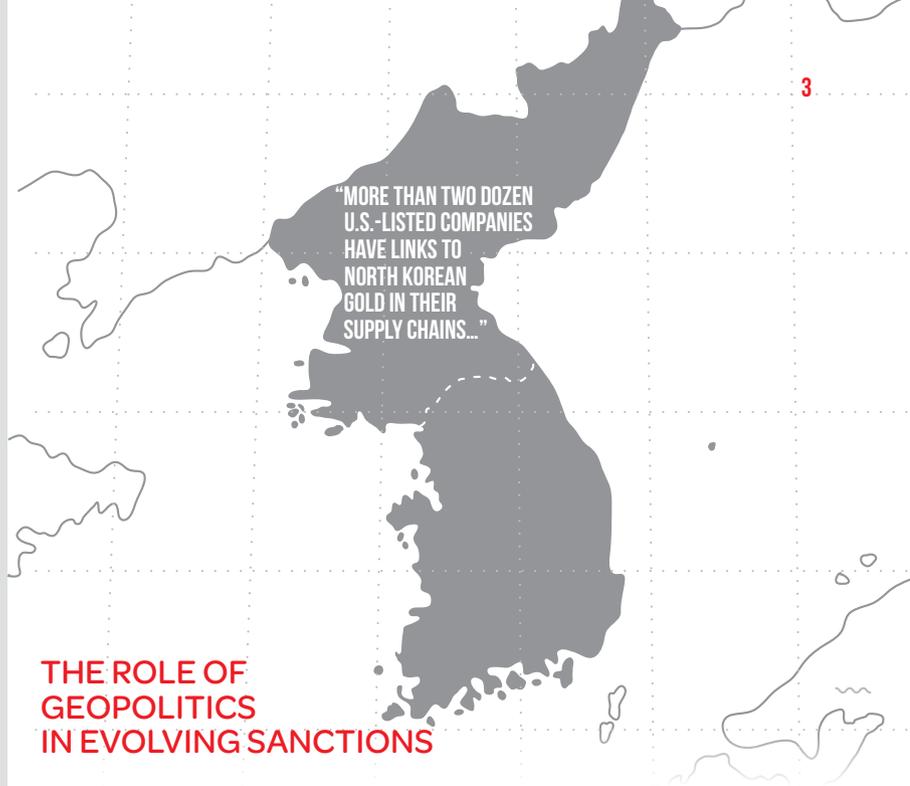
In March 2017, Chinese telecom company Zhongxing Telecommunications Equipment Corporation (ZTE) settled on an OFAC sanctions case over 251 violations of Iranian Transactions and Sanctions Regulations. The scope of the resolution is significant.⁹ ZTE must pay a \$900 million fine, with an additional \$300 million fine if the organization fails to meet the terms of the resolution. ZTE reported a \$342 million net loss, in addition to facing seven years suspended denial of export privileges, three years of probation, and required implementation of a compliance and ethics program with outside oversight.

Renato Antonini, a partner at Jones Day LLP focusing on EU trade and WTO laws, notes, “The penalties that a company may face will largely depend on the enforcing jurisdiction. In the U.S., this can amount to significant fines ranging from thousands to several billion dollars. Individuals, such as directors and managers, may even get prison sentences.”¹⁰ He anticipates more aggressive pursuit and penalties for violators by other countries as well, citing the UK’s establishment of the Office for Financial Sanctions Implementation (OFSI).

\$900 MILLION FINE

\$342 MILLION NET LOSS, IN ADDITION TO FACING SEVEN YEARS SUSPENDED DENIAL OF EXPORT PRIVILEGES, THREE YEARS OF PROBATION

ADDITIONAL \$300 MILLION FINE IF THE ORGANIZATION FAILS TO THE TERMS OF THE RESOLUTION



THE ROLE OF GEOPOLITICS IN EVOLVING SANCTIONS

Geopolitical issues—such as North Korea’s recent rhetoric about its nuclear capabilities and missile test and the on-going conflict related to Russia’s seizure of the Crimean Peninsula from Ukraine in 2014—often lead to changes to existing sanctions.

In March 2016, U.S. sanctions against North Korea were expanded to include a ban against “operating in North Korea’s mining sector or to have purchased metal from its government—even indirectly through a third-country supplier.”⁷ At the time, Reuters noted that “More than two dozen U.S.-listed companies have links to North Korean gold in their supply chains, according to regulatory disclosures reviewed by Reuters, potentially putting them at risk of penalties under tough new U.S. sanctions against Pyongyang’s mining sector.”⁸ In November 2016, the U.N. Security Council strengthened its sanctions against North Korea, and just this year, the EU and U.S. expanded sanctions to address the country’s continued test-firing of ballistic missiles.

Without comprehensive—and agile—sanctions compliance strategies and processes, organizations in industries ranging from finance, extractives and manufacturing to pharmaceuticals, telecommunications and transportation are vulnerable to substantial reputational, regulatory, financial and strategic risks.

HOW CAN COMPANIES MITIGATE SANCTIONS COMPLIANCE RISK?

Given the potential for criminal charges, substantial civil fines, debarment and other restrictions, the costs of sanctions compliance failures are significant. With a clear trend of enforcement actions against organizations beyond the traditional banking and financial services focus, any company conducting business across borders—whether through a subsidiary or via an extensive supply chain or third-party network—needs to have a rigorous sanctions risk mitigation strategy and process in place.



Ten Steps to Support Sanctions Compliance

1. Take a top-down approach to compliance.

Enforcement agencies around the world emphasize the importance of corporate leadership when it comes to creating a culture of compliance.

2. Maintain up-to-date policies and procedures, including disclosure requirements, based on guidance provided by:

- United Nations Security Council
- European Union Common Foreign and Security Policy
- UK HM Treasury
- UK Office of Financial Sanctions Implementation
- U.S. Office of Foreign Assets Control
- Individual Countries

3. Clearly communicate policies and procedures.

Internally—Management and staff

Externally—Third parties such as suppliers, sales agents, partners

4. Actively train employees and third-party agents

Tailor training to employee groups or third parties based on their level of involvement with sanctions issues. “Awareness of sanctions by personnel at all levels is a great first line of defence against potential violations. A company can have a great compliance program, but if the personnel who are engaging in the business transactions don’t understand how it applies to them and why it’s important, the company won’t have an effective program, says Megan Gajewski Barnhill, a seasoned corporate advisor on regulatory issues related to international trade.¹²

5. Implement a risk-based sanction screening process.

There is no one-size-fits-all approach to sanction screening. Screen, monitor and protect based on the level of risk faced.

- Organization size
- Industry type
- Customer profiles
- Products and services offered
- Delivery channels
- Countries of operation

Use our handy checklist to help determine how to tailor your screening process appropriately.



6. Align sanction screening to third-party due diligence procedures.

Including sanction, watch list and PEP checks in the due diligence procedures helps organizations mitigate risk more effectively—right from the start.

7. Ensure procedures include escalation contacts,

both for sanction enquiries and violation reporting.

8. Audit and regularly review sanction screening policies, procedures and training.

Sanctions regimes evolve over time—sometimes, more rapidly than you might expect—so organizations need to have source for sanctions lists that keeps pace with change.

9. Reinforce policies and procedures with independent audits and testing.

Every 12 to 18 months with results reported directly to the board.



10. Don't wait for enforcement as a trigger to implement above actions.

SANCTIONS RISK ASSESSMENT CHECKLIST

Know Your Customer requirements are so familiar within the banking industry that they are often referred to using the acronym, KYC. Outside that industry, however, the term is used less frequently. To better assess sanctions compliance risk, however, organizations spanning many industries need to be acquainted with KYC—as well as other key knowledge areas—to better assess the risks they face. Here's what should be on your risk assessment checklist:

Know Your Customers & Third Parties:

It's not just customers that put your organization at risk. Your supply chain and other third parties on which your company relies also pose a risk.

- Have individuals and entities been checked against published sanctions and SDNs lists?
- Do you have visibility into the controlling interests behind individual customers, suppliers or other third parties?

Know Your Product or Service

- Does the product or service you provide have a dual-use or military application?
- Does the product or service require an export license?
- Is the product or service subject to an embargo?

Know the Receiving Country

- Is the country a known facilitator for sanctioned countries or regimes?
- Is there a payment risk?
- Is the country's legal system reliable?
- Does the country have an elevated corruption risk?

Know the End-Use

- Have you confirmed the intended end-use of the product or services?
- Are there sanctions that might apply to that end-use?
- Do you have an end-use statement and sanctions clause built into your sales contracts?

Know the End-User

- Can you verify whether the end-user and its ultimate beneficiary are subject to sanctions?
- Do you have an end-user statement and sanctions clause built into your sales contracts? This is particularly important if the end-user is unknown.

Know the Transaction

- Is this an allowable transaction under applicable sanctions?
- Are there any sanctions applicable to the location of the delivery?
- Will third parties, such as agents acting on your company's behalf or transporters moving your products, be involved in the transaction?



STEP UP TO IMPROVED COMPLIANCE

With increased compliance focus on companies outside of the banking and financial services industries, it is crucial for companies to implement a robust framework to screen, monitor and protect against costly sanctions violations. Because sanctions laws change frequently, all internal procedures and controls need to be regularly assessed to identify potential gaps. In such a dynamic environment, companies need tools to automate screening processes for in-the moment insights that are unavailable with slower, manual processes. Can your own sanctions compliance process hold up to scrutiny?

1. <https://www.un.org/sc/suborg/en/sanctions/information>
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3. <https://www.financierworldwide.com/roundtable-sanctions-compliance-enforcement/#.WRYg5YWcGM8>
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5. <https://www.treasury.gov/resource-center/sanctions/CivPen/Pages/2016.aspx>
6. <https://www.financierworldwide.com/roundtable-sanctions-compliance-enforcement/#.WRYg5YWcGM8>
7. <http://www.reuters.com/article/us-usa-northkorea-sanctions-gold-idUSKCN0WU1B1>
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12. <https://www.financierworldwide.com/roundtable-sanctions-compliance-enforcement/#.WRmf64WcGM9>

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