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The Long Arm of U.S. Sanctions Jurisdiction: The Extraterritorial Application of U.S. Sanctions Regimes to Both U.S. and Non-U.S. Actors and the Importance of Compliance Programs to Combat Potential Violations

EMILY FLANIGAN*

I. INTRODUCTION

On April 25, 2023, British American Tobacco p.l.c. (“BAT”) agreed to pay to the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”)¹ a civil penalty of \$508,612,492 for multiple violations of the U.S. Weapons of Mass Destruction

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1. The Office of Foreign Assets Control is a sub-department of the U.S. Department of the Treasury that “administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States.” See Office of Foreign Assets Control, <https://ofac.treasury.gov/> (last visited Jan. 28, 2024).

Proliferations Sanctions Regulations and the North Korean Sanctions Regulations in what is one of the largest civil penalties issued in OFAC's history.² Over the course of a decade, BAT, a British entity organized under the laws of the United Kingdom, vis-à-vis its Singapore-based subsidiary, British-American Tobacco Marketing (Singapore) PTE Ltd. ("BATM"), orchestrated an elaborate scheme to disguise BAT's sale of its products in the North Korean market.³ Beginning in 2001, BATM and a North Korean entity established a joint venture located in North Korea for the purpose of manufacturing and selling BAT tobacco products in the North Korean market.⁴ In 2007, BAT executives approved the sale of BATM's stake in the joint venture to a Singaporean trading company, which would function as an intermediary between BATM and the joint venture.⁵ Under the terms of the sales agreement, BAT would continue to retain ownership and control of the joint venture, while the Singaporean trading company would function "as a vehicle for BAT to bring out [the Joint Venture's] money and distribute [dividends] back to BAT."⁶

From roughly 2009 to 2016, the joint venture in North Korea remitted payments in U.S. dollars ("USD") to BATM via the Singaporean trading company utilizing a complex network of North Korean, Chinese, and Singaporean banks (many of them subject to OFAC sanctions), until the payments reached their final destination: the foreign branch of a U.S. bank with which BATM had an account.⁷ Despite having knowledge as early as 2005 that U.S. sanctions could prohibit banks from processing payments originating from North Korea, and despite knowing that several of the banks utilized by the joint venture and the Singaporean trading company were subject to U.S. sanctions, BAT and BATM continued to engage in business with

2. Press Release, U.S. Dep't of the Treasury, Treasury Announces \$508 Million Settlement with British American Tobacco Largest Ever Against Nonfinancial Situation (Apr. 25, 2023), <https://home.treasury.gov/news/press-releases/jy1441>.

3. Press Release, U.S. Dep't of the Treasury, OFAC Settles with British American Tobacco p.l.c. for \$508,612,492 Related to Apparent Violations of the North Korea and Weapons of Mass Destruction Proliferators Sanctions Regulations (Apr. 25, 2023), <https://ofac.treasury.gov/media/931666/download?inline>.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*; see also Press Release, U.S. Dep't of the Treasury, Treasury Announces \$508 Million Settlement with British American Tobacco Largest Ever Against Non-Financial Institution (Apr. 25, 2023), <https://home.treasury.gov/news/press-releases/jy1441> [Rule 17.5(b)] (providing a schematic that details each step of the transactions from their origins with the North Korean entity, through various Chinese and Singaporean financial institutions, and ultimately to the foreign branch of a U.S. bank.).

and reap profits from North Korea.⁸ Further, BAT actively concealed its conduct from banks to avoid detection.⁹ For example, BATM removed references to North Korean customers in transactional documents, and BAT allowed wire transfers to expire in order to avoid answering banks' questions that would have revealed the North Korean origin of the transfers.¹⁰ This entire process ultimately resulted in twelve U.S. financial institutions processing 228 USD payments (totaling \$251,631,903) from the joint venture in North Korea to the Singaporean trading company, inclusive of payments that were remitted to BATM.¹¹ An additional fifteen USD payments totaling \$29,685.72 were processed as a result of BATM's sale of cigarettes to the North Korean embassy in Singapore.¹²

OFAC determined that this conduct resulted in sixteen total violations of the U.S. Weapons of Mass Destruction Proliferations Sanctions Regulations and the North Korean Sanctions Regulations.¹³ Specifically, OFAC found that "BAT and its subsidiaries willfully conspired to transfer hundreds of millions of dollars through U.S. banks ... in which sanctioned North Korean banks had an interest or that otherwise pertained to the exportation of goods to North Korea..."; BAT and its subsidiaries actively concealed their North Korea-related business so as to avoid detection by U.S. financial institutions; BAT management had actual knowledge of the conspiracy; and BAT's conduct ultimately enabled North Korea to establish a cigarette manufacturing industry, the revenue of which would likely be used to fund its nuclear and missile programs.¹⁴ OFAC concluded its summary of BAT's violations with the following warning:

Foreign firms that form and participate in conspiracies that cause U.S. persons to engage in prohibited transactions, including dealing in property in which blocked persons have an interest, expose themselves to strict penalties. . . . Even though [BAT and its subsidiary BATM] did not deal directly with the . . . sanctioned banks, they exposed themselves to civil liability for sanctions violations when they

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Press Release, U.S. Dep't of the Treasury, OFAC Settles with British American Tobacco p.l.c. for \$508,612,492 Related to Apparent Violations of the North Korea and Weapons of Mass Destruction Proliferators Sanctions Regulations (Apr. 25, 2023), <https://ofac.treasury.gov/media/931666/download?inline>.

formed and executed the broader scheme to use the U.S. financial system in furtherance of North Korea-related business.¹⁵

The case of BAT is noteworthy for two reasons: (1) the sheer volume of the financial penalty being imposed against it,¹⁶ and (2) the fact that the only connection that BAT, a British entity, had to the United States during the entire period of its business dealings with North Korea, was indirect contact with the foreign branch of a U.S. bank.¹⁷ Yet, the U.S. government evidently concluded that this tenuous connection to the United States was sufficient to charge BAT with violations of U.S. sanctions. This case demonstrates that the U.S. government can and will go after any actor for violations of U.S. sanctions, whether U.S. or non-U.S., whether the violation was intentional or unintentional, and regardless of how far removed they might be from the United States, for violations of U.S. sanctions.

The U.S. government has long applied U.S. economic sanctions prohibitions (also known as primary sanctions) extraterritorially to non-U.S. actors, relying on the International Emergency Economic Powers Act's ("IEEPA") prohibitions on "conspir[ing] to violate" and "caus[ing] a violation"¹⁸ of economic sanctions prohibitions in imposing penalties on non-U.S. actors.¹⁹ So long as there is a sufficient U.S. nexus between the non-U.S. person and the alleged prohibited activity (such as a U.S. financial institution or transacting in U.S. dollars), a foreign entity can be penalized for violating U.S. sanctions.²⁰ Consequently, it is imperative that U.S. companies with overseas affiliates and non-U.S. companies with potential nexuses to the United States have in place sophisticated internal controls designed to address the extraterritorial application of U.S. sanctions. This comment will (1) briefly summarize the current

15. *Id.*

16. H. Christopher Boehning et. al., *DOJ and OFAC Reach Historic Resolutions with British American Tobacco for North Korea Sanctions Violations*, PAUL WEISS (May 22, 2023), <https://www.paulweiss.com/practices/litigation/economic-sanctions-aml/publications/doj-and-ofac-reach-historic-resolutions-with-british-american-tobacco-for-north-korea-sanctions-violations?id=46871>.

17. Press Release, U.S. Dep't of the Treasury, OFAC Settles with British American Tobacco p.l.c. for \$508,612,492 Related to Apparent Violations of the North Korea and Weapons of Mass Destruction Proliferators Sanctions Regulations (Apr. 25, 2023), <https://ofac.treasury.gov/media/931666/download?inline>.

18. 50 U.S.C. §1705(a).

19. Alex Lakatos & Jan Blöchiger, *The Extraterritorial Reach of U.S. Anti-Terrorist Finance Laws*, 14 No. 10 Elec. Banking L. & Com. Rep. 1, 5 (2010).

20. Roberto J. Gonzales and Joshua R. Thompson, *Sanctions USA 2024*, ICLG.com (Jul. 29, 2023), <https://iclg.com/practice-areas/sanctions/usa#:~:text=Non%2DU.S.%20persons%20may%20expose,primary%20sanctions%20do%20not%20apply>.

state of U.S. sanctions law on this issue, (2) explain the theories the U.S. Government has used to penalize non-U.S. persons for violations of U.S. sanctions laws, and (3) recommend internal compliance measures that U.S. companies with overseas affiliates and non-U.S. companies with touchpoints to the United States can implement to reduce the risk of unintentionally violating U.S. sanctions.²¹

Although U.S. sanctions are administered by several departments, for the purposes of this comment, only the sanctions programs administered by the U.S. Department of the Treasury's OFAC will be discussed, as they are the predominant U.S. sanctions regime. As a final cautionary note, it is worth highlighting that the realm of sanctions law is far from predictable.²² As one sanctions practitioner puts it,

The U.S. government's interpretations of the sanctions generally do not establish binding precedents and can shift rapidly with the political winds. Also, well-crafted arguments that a particular transaction is not prohibited by the sanctions can be negated overnight by publication of an amendment to the Treasury Department's regulations without further notice or comment.²³

Consequently, the interpretations of the law and theories of violations discussed herein are not exhaustive and remain subject to change.

II. THE CURRENT LEGAL FRAMEWORK FOR THE EXTRATERRITORIAL APPLICATION OF U.S. SANCTIONS LAW.

The extraterritorial nature of U.S. sanctions regimes is rooted in the language of the IEEPA, which authorizes the President of the United States to declare a national emergency in response to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."²⁴ Specifically, 50 U.S.C. § 1705 of the IEEPA states that "it shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a

21. See *infra* Sections II, III, and IV.

22. Arthur B. Culvahouse, Jr., *A Practical Guide to International Sanctions Law and Lore: Mamas, Don't Let Your Children Grow Up to Be Sanctions Lawyers*, 32 Hous. J. Int'l L. 587, 588 (2010).

23. *Id.*

24. International Emergency Economic Powers Act, 50 U.S.C. §1701(a).

violation of any license, order, regulation, or prohibition issued under this title.”²⁵

U.S. courts²⁶ have routinely held that § 1705 “establishes criminal penalties for ‘[a] person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of, an unlawful act’ described in the statute” and “is not limited to individuals (such as U.S. citizens) who are subject to the jurisdiction of the United States, indicating that Congress intended the statute to be applied extraterritorially,”²⁷ and that “the plain language of several provisions of the IEEPA unambiguously indicate that the IEEPA applies extraterritorially.”²⁸ Courts have additionally cited to § 1701²⁹ (authorizing the President to use any authority granted under the IEEPA to deal with a national emergency occurring in whole or in part outside of the United States) and § 1702³⁰ (affording the President broad interventional powers with respect to virtually any interaction between foreign and U.S. parties) of the IEEPA to emphasize that the President is authorized to extend the scope of the IEEPA to include foreign individuals and entities where failure to do so “will result in adverse effects within the United States.”³¹

In particular, the extraterritorial application of the IEEPA hinges on the phrase “cause a violation.”³² This language enables the

25. International Emergency Economic Powers Act §1705(a)

26. See *United States v. Zarrab*, 15 Cr 867 (RMB), 2016 WL 6820737 (S.D.N.Y. Oct. 17, 2016) (holding that a Turkish-Iranian businessman violated the IEEPA and the Iranian Transactions and Sanctions Regulations by willfully concealing the identity of his Iranian clients when using U.S. financial institutions to process U.S.-dollar transactions) and *United States v. Tajideen*, 319 F.Supp.3d 445, 457-458 (D.D.C. 2018) (holding that defendant, a non-U.S. person subject to OFAC sanctions, had violated the IEEPA by causing U.S. persons to conduct unlawful transactions with an OFAC-sanctioned individual.)

27. *U.S. v. Zarrab*, 2016 WL 6820737 at *9.

28. *U.S. v. Tajideen*, 319 F.Supp.3d at 457.

29. 50 U.S.C. §1701(a) (stating that “[a]ny authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.”).

30. 50 U.S.C. §1702(a)(1)(B) (authorizing the President to “investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.”).

31. *Torrico v. Int’l Bus. Machines Corp.*, 213 F. Supp. 2d 390, 397 (S.D.N.Y. 2002) (citing *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993).

32. International Emergency Economic Powers Act, 50 U.S.C. §1705(a).

IEEPA to apply to parties that would otherwise not be subject to U.S. sanctions jurisdiction, so long as those parties have caused “a party that is covered by OFAC regulations. . . unwittingly to violate those regulations. . . .”³³ For example, a violation of U.S. sanctions would occur if “a foreign financial institution not directly covered by OFAC regulations engages in conduct that causes its U.S. correspondent bank to violate OFAC prohibitions without knowing that it is doing so.”³⁴ This “causation language has since been used by OFAC as the basis for enforcement against conduct taken outside the United States and by non-U.S. parties,”³⁵ hinging on the presence of a U.S. nexus (i.e., at least one element that can tie a non-U.S. actor’s conduct to the United States, such as a U.S. financial institution or U.S. dollars,³⁶ or the foreign subsidiary of a U.S. company).³⁷ The different forms U.S. nexuses have taken over the years will be discussed in more detail in the following section.

III. THEORIES OF VIOLATIONS THE U.S. GOVERNMENT HAS USED TO PENALIZE NON-U.S. ACTORS FOR VIOLATIONS OF U.S. SANCTIONS LAWS.

As the extraterritorial application of U.S. sanctions hinges on the presence of a U.S. nexus, understanding what, in the U.S. government’s view, constitutes a U.S. nexus is vital. As such, this section will analyze recent OFAC enforcements to obtain a better understanding of the different theories of violations the U.S. government has employed to charge non-U.S. actors with violations of the U.S. sanctions regimes. Specifically, this section will focus on the following nexuses which have featured prominently in OFAC enforcements: (1) the involvement of a U.S. financial institution; (2) the involvement of U.S. dollars; (3) the presence of U.S.-origin products; and (4) the involvement of the foreign subsidiary of a U.S. company.

33. Alex Lakatos & Jan Blöchiger, *The Extraterritorial Reach of U.S. Anti-Terrorist Finance Laws*, 14 No. 10 Elec. Banking L. & Com. Rep. 1, 5 (2010).

34. *Id.*

35. Christine Abely, *Causing a Sanctions Violation with U.S. Dollars: Differences in Regulatory Language Across OFAC Sanctions Programs*, 48 Ga. J. Int’l & Comp. L. 29, 44 (2019).

36. *Id.*

37. Press Release, U.S. Dep’t of the Treasury, Stanley Black & Decker, Inc. Settles Potential Civil Liability for Apparent Violations of the Iranian Transactions and Sanctions Regulations Committed by its Chinese-Based Subsidiary Jiangsu Guoqiang Tools Co. Ltd. (Mar. 27, 2019), <https://ofac.treasury.gov/media/9321/download?inline>.

Theories of Sanctions Violations Involving U.S. Financial Institutions

In the case of BAT (as discussed above), the use, whether intentional or not, of U.S. financial institutions to process payments to and from sanctioned entities effectively caused a violation of U.S. sanctions, even though neither BAT nor its subsidiaries were themselves U.S. persons.³⁸ By actively concealing the details of their U.S.-sanctioned customers, BAT and its subsidiaries caused U.S.³⁹ banks to violate U.S. sanctions by processing payments to and from these customers, when the banks otherwise could have refused to do so had they known that the payments were destined for sanctioned entities.⁴⁰ Specifically, OFAC found that BAT actively concealed its business relationships with sanctioned North Korean entities by removing references to North Korea from transactional documents and ignoring information requests from U.S. financial institutions so as to ensure that they were unaware that they were processing payments to and from U.S. sanctioned entities.⁴¹

U.S. v. Zarrab presents a similar scenario. Zarrab concerned a Turkish-Iranian businessman who was charged with conspiring to violate the IEEPA and the Iranian Transactions and Sanctions Regulations (“ITSR”)⁴² by actively concealing the identity of his Iranian clients from U.S. banks when using those banks to process payments to and from his clients.⁴³ Specifically, Zarrab was found to have known “that U.S. banks would not knowingly and voluntarily process his U.S.-dollar financial transfers if they learned that the transactions were for the benefit of blocked Iranian entities.”⁴⁴ The

38. Press Release, U.S. Dep’t of the Treasury, OFAC Settles with British American Tobacco p.l.c. for \$508,612,492 Related to Apparent Violations of the North Korea and Weapons of Mass Destruction Proliferators Sanctions Regulations (Apr. 25, 2023), <https://ofac.treasury.gov/media/931666/download?inline>.

39. See Office of Foreign Assets Control, *FAQ 125: Weak Aliases* (Jan. 18, 2011) <https://ofac.treasury.gov/faqs/125> (stating that if “the [U.S. bank] involved in the processing [of the transaction] had no other reason to know that the transaction involved an entry on one of OFAC’s sanctions lists or was otherwise in violation of U.S. law, and . . . the [U.S. bank] maintains a rigorous risk-based compliance program, OFAC will not issue a civil penalty against an individual or entity for processing such a transaction.” In other words, OFAC generally will not penalize a U.S. bank – or any other actor, for that matter – that has been tricked by a foreign actor into violating U.S. sanctions regulations.).

40. *Id.*

41. See Press Release, U.S. Dep’t of Treasury OFAC *supra* note 38.

42. See Exec. Order No. 12170, 31 C.F.R. § 560, et seq. (1979) (OFAC has maintained a comprehensive embargo against Iran since approximately 1979).

43. *United States v. Zarrab*, No. 15 CR 867 (RMB) 2016 WL 6820737, at *2 (S.D.N.Y. Oct. 17, 2016).

44. *U.S. v. Zarrab*, WL 6820737, at *2.

conscious decision to conceal the identities of his clients was necessary to ensure that U.S. banks processed the payments.⁴⁵

A. Theories of Sanctions Violations Involving U.S. Dollars

A violation may also be caused where a non-U.S. actor uses U.S. dollars to transact with a sanctioned entity. In the case of PT Bukit Muria Jaya (“BMJ”), an Indonesian paper products manufacturer charged with violating the North Korea Sanctions in 2021, OFAC found that BMJ “directed payments for its [North Korea]-related exports to its U.S. dollar bank account at a non-U.S. bank,” thereby causing twenty-eight wire transfers related to these exports to be cleared through U.S. banks.⁴⁶ In so doing, BMJ “caused U.S. banks to: (i) deal in the property or interests in property of a [sanctioned person]; (ii) export financial services to [North Korea]; or (iii) otherwise facilitate export transactions that would have been prohibited if engaged in by U.S. persons.”⁴⁷ This third item essentially conveys the message that any conduct that a U.S. person would be prohibited from engaging in is equally off-limits for a foreign person provided that there is a U.S. nexus – in this case, U.S. dollars – involved in the conduct at issue. As OFAC noted with regard to BMJ’s conduct, “[a]ll persons, including non-U.S. persons, engaged in international trade and commerce should be aware of sanctions prohibitions applicable to non-U.S. persons who involve U.S. persons in such transactions.”⁴⁸

B. Theories of Sanctions Violations Involving U.S.-Origin Products

A violation may also be caused where a U.S.-origin product is sold by a non-U.S. actor to a U.S.-sanctioned entity. In 2017, Chinese telecommunications company ZTE was charged with 251 apparent violations of the Iranian Transactions and Sanctions Regulations (“ITSR”) for supplying U.S.-origin goods, “including goods controlled for anti-terrorism, national security, regional stability, and encryption item purposes,” to Iran.⁴⁹ In so doing, ZTE was found to have improved the surveillance capabilities of Iran’s telecommunications

45. *Id.*

46. Press Release, U.S. Dep’t of the Treasury, OFAC Settles with PT Bukit Muria Jaya for Its Potential Civil Liability for Apparent Violations of the North Korea Sanctions Regulations (Jan. 14, 2021), <https://ofac.treasury.gov/media/50611/download?inline>.

47. *Id.*

48. *Id.*

49. Press Release, U.S. Dep’t of the Treasury, Zhongxing Telecommunications Equipment Corporation Settles Potential Civil Liability for Apparent Violations of the Iranian Transactions and Sanctions Regulations (Mar. 7, 2017), <https://ofac.treasury.gov/media/11131/download?inline>.

facilities and telecommunications infrastructure, thereby compromising the integrity of the ITSR.⁵⁰ A similar example is presented in the OFAC enforcement against Construction Specialties Inc., a U.S.-incorporated company, wherein the company's Emirati subsidiary "removed labels denoting the U.S. origin of goods, and commingled U.S.-origin goods with goods produced by [Emirati subsidiary] in the UAE when they were sold to Iran, all in an effort to obfuscate the true country of origin."⁵¹ This particular example also highlights the involvement of a foreign subsidiary of a U.S. parent company as a potential theory of violation.

C. Theories of Sanctions Violations Involving the Foreign Subsidiaries of a U.S. Parent Company

A violation may also be caused by the foreign subsidiary of a U.S. parent company. Note that this theory of violation is not strictly extraterritorial in nature, as the U.S. parent is ultimately being penalized for the actions of the foreign subsidiary. However, the following examples underscore the importance of U.S. parent companies providing adequate compliance training and compliance monitoring to their foreign subsidiaries so as to avoid potential violations of U.S. sanctions laws.⁵² Moreover, OFAC enforcements concerning the conduct of the foreign subsidiaries of U.S. parent companies are becoming increasingly common, and U.S. parent companies face exposure to significant civil monetary penalties as a result.⁵³ For example, in the case of Stanley Black & Decker, OFAC

50. *Id.*

51. Press Release, U.S. Dep't of the Treasury, OFAC Settles with Construction Specialties Inc. for \$660,594 Related to Apparent Violations of the Iranian Transactions and Sanctions Regulations (Aug. 16, 2023), <https://ofac.treasury.gov/media/932086/download?inline>.

52. Press Release, U.S. Dep't of the Treasury, Stanley Black & Decker, Inc. Settles Potential Civil Liability for Apparent Violations of the Iranian Transactions and Sanctions Regulations Committed by its Chinese-Based Subsidiary Jiangsu Guoqiang Tools Co. Ltd. (Mar. 27, 2019), <https://ofac.treasury.gov/media/9321/download?inline>.

53. *See, e.g.*, Press Release, U.S. Dep't of the Treasury, OFAC Settles with Construction Specialties Inc. for \$660,594 Related to Apparent Violations of the Iranian Transactions and Sanctions Regulations (Aug. 16, 2023), <https://ofac.treasury.gov/media/932086/download?inline>; Press Release, U.S. Dep't of the Treasury, OFAC Settles with 3M Company for \$9,618,477 Related to Apparent Violations of the Iranian Transactions and Sanctions Regulations (Sept. 21, 2023), <https://ofac.treasury.gov/media/932161/download?inline>; Press Release, U.S. Dep't of the Treasury, OFAC Settles with Microsoft Corporation for \$2,980,265.86 Related to Apparent Violations of Multiple OFAC Sanctions Programs (Apr. 6, 2023), <https://ofac.treasury.gov/media/931591/download?inline>; Press Release, U.S. Dep't of the Treasury, Stanley Black & Decker, Inc. Settles Potential Civil Liability for Apparent

penalized the U.S. parent company (Stanley Black & Decker) for the violative conduct of its Chinese subsidiary (GQ).⁵⁴ Stanley Black & Decker acquired GQ in 2013.⁵⁵ Prior to this point, GQ had engaged in business dealings with Iran.⁵⁶ Despite providing U.S. sanctions compliance training to GQ upon acquisition, Stanley Black & Decker did not otherwise monitor GQ's conduct for compliance, consequently resulting in GQ continuing to engage in transactions with Iranian clients in violation of the Iranian Transactions and Sanctions Regulations (ITSR).⁵⁷

In the case of Construction Specialties Inc., the Emirati subsidiary expressly ignored instructions from the U.S. parent company prohibiting it from engaging in transactions with Iranian customers.⁵⁸ Specifically, the Emirati subsidiary imported U.S.-origin building materials to the United Arab Emirates, removed all references to Iran from transaction documentation, removed references to the U.S. as the point of origin for the materials, and reexported them to Iran despite having knowledge that this was prohibited by the ITSR.⁵⁹

D. Bottom Line: Awareness of U.S. Nexuses Necessary to Reduce Risk of Sanctions Violations

The theories of violations discussed in this section are not an exhaustive list and are subject to change as new sanctions programs are established and new OFAC guidance is released.⁶⁰ As demonstrated by the case of BAT, the monetary penalties imposed against violators of U.S. sanctions regimes have been and will likely continue to be

Violations of the Iranian Transactions and Sanctions Regulations Committed by its Chinese-Based Subsidiary Jiangsu Guoqiang Tools Co. Ltd. (Mar. 27, 2019), <https://ofac.treasury.gov/media/9321/download?inline>.

54. Press Release, U.S. Dep't of the Treasury, Stanley Black & Decker, Inc. Settles Potential Civil Liability for Apparent Violations of the Iranian Transactions and Sanctions Regulations Committed by its Chinese-Based Subsidiary Jiangsu Guoqiang Tools Co. Ltd. (Mar. 27, 2019), <https://ofac.treasury.gov/media/9321/download?inline>.

55. *Id.*

56. *Id.*

57. *Id.*

58. Press Release, U.S. Dep't of the Treasury, OFAC Settles with Construction Specialties Inc. for \$660,594 Related to Apparent Violations of the Iranian Transactions and Sanctions Regulations (Aug. 16, 2023), <https://ofac.treasury.gov/media/932086/download?inline>.

59. *Id.*

60. See Office of Foreign Assets Control, *Frequently Asked Questions*, <https://ofac.treasury.gov/faqs> (containing a compilation of frequently asked questions pertaining to all of the OFAC-administered sanctions programs).

steep.⁶¹ Consequently, it is advisable for both foreign actors with potential nexuses to the United States and U.S. actors with overseas affiliates to establish and maintain comprehensive U.S. sanctions compliance programs so as to reduce the risk of liability.⁶²

IV. RECOMMENDATIONS FOR INTERNAL COMPLIANCE MEASURES THAT COMPANIES SHOULD IMPLEMENT TO REDUCE THE RISK OF UNINTENTIONALLY VIOLATING U.S. SANCTIONS PROGRAMS.

It is important for all companies, both U.S. and non-U.S., to have at minimum a basic understanding of U.S. sanctions regulations so as to avoid inadvertent violations and be able to design and implement effective sanctions compliance programs, particularly programs designed to identify and address the nexuses a foreign company may have to the United States.⁶³ Accordingly, this section will (1) summarize the OFAC sanctions regimes; (2) summarize the OFAC Compliance Framework, inclusive of its recommendations for a baseline sanctions compliance program; (3) explain the importance of sanctions screening and sanctions screening best practices as part of an effective sanctions compliance program, inclusive of the OFAC “50 Percent Rule”;⁶⁴ and (4) explain the importance of educating both non-U.S. actors and the foreign subsidiaries of U.S. parent companies about the U.S. sanctions regimes and the compliance obligations that both face.⁶⁵ This section is by no means exhaustive, but rather, is designed to offer a baseline summary of the OFAC sanctions, what an effective OFAC compliance program might look like, and areas that companies may wish to focus on to shore up their sanctions compliance practices.

A. *Summary of the OFAC Sanctions Regimes.*

The OFAC sanctions programs are comprised of comprehensive embargoes, which block foreign governments and broadly prohibit all trade with those countries, sanctions programs that

61. *DOJ and OFAC Reach Historic Resolutions with British American Tobacco for North Korea Sanctions Violations*, Paul Weiss (May 22, 2023), <https://www.paulweiss.com/practices/litigation/economic-sanctions-aml/publications/doj-and-ofac-reach-historic-resolutions-with-british-american-tobacco-for-north-korea-sanctions-violations?id=46871>.

62. *See infra* Section IV.

63. *See infra* Section IV Part A and Section IV Part C.

64. Press Release, U.S. Dep’t of the Treasury, Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked (Aug. 13, 2014), <https://ofac.treasury.gov/media/6186/download?inline>.

65. *See infra* Section IV Part B.

target specific individuals and entities, such as the Specially Designated Nationals List, and country-specific sanctions programs that fall short of comprehensive embargoes but still block certain trade activities.⁶⁶ OFAC currently maintains comprehensive embargoes against the following countries: Syria, Iran, Cuba, North Korea, and the Crimea region of Ukraine.⁶⁷ Generally, all transactions involving U.S. persons and these countries are prohibited unless OFAC has issued a license approving the specific transaction.⁶⁸ The Specially Designated Nationals List (the “SDN List”), in contrast, does not concern specific countries but rather, specifically targets individuals, entities, groups (i.e., terrorist organizations), and even vessels.⁶⁹ The SDN List includes approximately 12,000 SDNs.⁷⁰ The assets of SDNs are blocked, and U.S. persons are generally prohibited from transacting with SDNs, unless OFAC has issued a license approving the transaction.⁷¹

B. Summary of the OFAC Sanctions Compliance Framework.

In May 2019, OFAC published a compliance framework recommending internal compliance controls for both organizations subject to U.S. jurisdiction and foreign organizations with significant nexuses to the United States (e.g., “foreign entities that conduct

66. *FAQ 10. What Countries Do I Need to Worry about in Terms of U.S. Sanctions, Basic Information on OFAC and Sanctions* [italicized -Rule 18.2.2(b)(ii)], Office of Foreign Assets Control (May 21, 2018), <https://ofac.treasury.gov/faqs/10>; see also *Sanctions Programs and Country Information*, Office of Foreign Assets Control, <https://ofac.treasury.gov/sanctions-programs-and-country-information> (containing a complete list of all active OFAC sanctions programs, guidance, relevant FAQs, etc.).

67. *Sanctions Programs and Country Information*, Office of Foreign Assets Control, <https://ofac.treasury.gov/sanctions-programs-and-country-information>; see also Exec. Order No. 13,685, 79 Fed. Reg. 77,357 (Dec. 19, 2014) (imposing blocking sanctions on the Crimea Region of Ukraine in response to the 2014 Russian annexation of Crimea).

68. *FAQ 74. What is a License?, OFAC Licenses*, Office of Foreign Assets Control (Jun. 16, 2016), <https://ofac.treasury.gov/faqs/74>.

69. *Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists*, Office of Foreign Assets Control (Oct. 12, 2023), <https://ofac.treasury.gov/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists>.

70. *Where is OFAC's Country List? What countries do I need to worry about in terms of U.S. sanctions?*, Office of Foreign Assets Control, Office of Foreign Assets Control <https://ofac.treasury.gov/sanctions-programs-and-country-information/where-is-ofacs-country-list-what-countries-do-i-need-to-worry-about-in-terms-of-us-sanctions#:~:text=OFAC's%20Specially%20Designated%20Nationals%20and, names%20connected%20with%20sanctions%20targets>.

71. Office of Foreign Assets Control, *Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists*, Office of Foreign Assets Control (Oct. 12, 2023), <https://ofac.treasury.gov/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists>.

business in or with the United States, U.S. persons, or using U.S.-origin goods or services”) that would consequently bring them under U.S. jurisdiction if a violation of U.S. sanctions were to occur.⁷² Specifically, the OFAC Compliance Framework emphasizes five essential compliance components: (1) management commitment;⁷³ (2) risk assessment;⁷⁴ (3) internal controls;⁷⁵ (4) testing and auditing;⁷⁶ and (5) training.⁷⁷

The OFAC Compliance Framework is an especially useful resource in that, not only does it provide companies with a basic framework for a sanctions compliance program, but it also identifies common root causes of violations that companies may utilize to identify potential weak points in their corporate structures that may lead to violations.⁷⁸ It is important to clarify that OFAC does not mandate that companies establish and maintain compliance programs.⁷⁹ A company does not risk legal ramifications for choosing not to have a compliance program so long as they do not violate the

72. Office of Foreign Assets Control, *A Framework for OFAC Compliance Commitments*, Office of Foreign Assets Control (May 2, 2019), <https://ofac.treasury.gov/media/16331/download?inline>.

73. *I.e.*, senior management commitment to establishing and maintaining a sanctions compliance program and “culture of compliance”; see Office of Foreign Assets Control, *A Framework for OFAC Compliance Commitments*, Office of Foreign Assets Control (May 2, 2019), <https://ofac.treasury.gov/media/16331/download?inline>. (defining a “culture of compliance” as promoting a workplace environment characterized by the following features: “[t]he ability of personnel to report sanctions related misconduct by the organization or its personnel to senior management without fear of reprisal. . . . Senior management messages and takes actions that discourage misconduct and prohibited activities, and highlight the potential repercussions of non-compliance with OFAC sanctions; and. . . . The ability of the SCP to have oversight over the actions of the entire organization, including but not limited to senior management, for the purposes of compliance with OFAC sanctions.”).

74. *I.e.*, routine conduction of due diligence for potential sanctions risks during employee onboarding and mergers & acquisitions; see Office of Foreign Assets Control, *A Framework for OFAC Compliance Commitments*, Office of Foreign Assets Control (May 2, 2019), <https://ofac.treasury.gov/media/16331/download?inline>.

75. *I.e.*, creation and maintenance of “policies and procedures, in order to identify, interdict, escalate, report (as appropriate), and keep records pertaining to activity that is prohibited by the sanctions programs administered by OFAC,” see Office of Foreign Assets Control, *A Framework for OFAC Compliance Commitments*, Office of Foreign Assets Control (May 2, 2019), <https://ofac.treasury.gov/media/16331/download?inline>.

76. *I.e.*, routine testing and auditing of the sanctions compliance program to identify deficiencies; see Office of Foreign Assets Control, *A Framework for OFAC Compliance Commitments*, Office of Foreign Assets Control (May 2, 2019), <https://ofac.treasury.gov/media/16331/download?inline>.

77. *I.e.*, routine trainings for all employees to communicate sanctions compliance responsibilities; see Office of Foreign Assets Control, *A Framework for OFAC Compliance Commitments*, Office of Foreign Assets Control (May 2, 2019), <https://ofac.treasury.gov/media/16331/download?inline>.

78. *Id.*

79. *Id.*

sanctions.⁸⁰ For example, a small foreign outfit that does not have any nexuses to the United States may feel that its sanctions compliance risk is low, and that the cost of maintaining a sanctions compliance program is unduly burdensome. OFAC ultimately leaves this up to the company's discretion.⁸¹ However, OFAC stresses that many sanctions violations are caused by the complete absence of a comprehensive sanctions compliance program, resulting in both low-level employees and senior management lacking a sufficient understanding of the U.S. sanctions regulations to be able to identify potentially violative conduct before it happens.⁸² Further, OFAC tends to view the absence of a compliance program in cases of apparent violations in a negative light, potentially increasing the financial penalty for a company found to be in violation of the sanctions.⁸³

*C. The Importance of Sanctions Screening and Sanctions Screening Best Practices, including the OFAC "50 Percent Rule."*⁸⁴

Sanctions screening is an especially vital risk assessment mechanism for both U.S. and non-U.S. actors to identify potentially sanctioned parties before engaging in business dealings with clients.⁸⁵ Third-party sanctions screening software are readily available through numerous vendors, such as Bureau Van Dijk, Moody's Analytics, Lexis Nexis Risk Solutions, the OFAC Sanctions List Search Tool, and the Consolidated Screening List.⁸⁶ Sanctions screening software enables a company to input a potential client's information (such as the client's name) and screen it against the software's database to determine if the client is subject to any sanctions or trade restrictions.⁸⁷ If the software hits upon a potential match, it will flag it for the

80. *Id.*

81. *Id.*

82. *Id.*

83. 31 C.F.R. Appendix A (III)(E) to Part 501 (2023).

84. Press Release, U.S. Dep't of the Treasury, Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked (Aug. 13, 2014), <https://ofac.treasury.gov/media/6186/download?inline>.

85. *Id.*

86. See Bureau Van Dijk, <https://www.bvdinfo.com/en-gb/about-us?ref=rdc> (last visited Nov. 18, 2023); Moody's Analytics, <https://www.moody.com/web/en/us/kyc/solutions/screen-monitor.html> (last visited Nov. 18, 2023); Lexis Nexis Risk Solutions, <https://risk.lexisnexis.com/financial-services/financial-crime-compliance/know-your-customer-and-due-diligence/> (last visited Nov. 18, 2023); OFAC Sanctions List Search Tool, <https://sanctionssearch.ofac.treas.gov/> (last visited Nov. 18, 2023); International Trade Administration Consolidated Screening List, <https://www.trade.gov/consolidated-screening-list> (last visited Nov. 18, 2023).

87. Bureau Van Dijk, *Review*, <https://www.bvdinfo.com/en-gb/our-products/data/international/review?ref=rdc#secondaryMenuAnchor2>.

screeener’s review.⁸⁸ However, sanctions screening is not infallible, and careless screening practices can still result in potentially violative conduct.⁸⁹ For example, sanctions screening software may produce a false negative if the name of a party’s name is misspelled, erroneously capitalized, or formatted incorrectly (especially in cases where the party originates from a country that employs a different alphabet, such as Russian; the phonetic spellings of these names can vary greatly, leading to inconsistent screening results).

Take the example of Apple, Inc. (“Apple”), which violated the OFAC-administered Foreign Narcotics Kingpin Sanctions Regulations as a result of a sanctions screening failure.⁹⁰ When attempting to screen an App Store developer against its sanctions screening software, Apple incorrectly entered the developer’s name (specifically entering the name in all caps) into the software.⁹¹ Apple’s sanctions screening software produced a false negative result, notifying Apple that the developer was not subject to sanctions and thereby safe for Apple to engage in business with.⁹² In reality, that developer was an SDN.⁹³ Apple’s sanctions screening software failed to flag the developer because Apple had entered the developer’s name in all caps, when the developer’s name appeared in lower case characters on the SDN List.⁹⁴ This case highlights the importance of utilizing a screening software that employs fuzzy logic, i.e., configuration of the screening software “to identify non-exact matches and account for spelling mistakes or variations in spellings.”⁹⁵ Not all sanctions screening software incorporates fuzzy logic in its search parameters, and thus it is of the utmost importance that a company vet potential screening software options for this feature prior to committing to a software.

88. *Id.*

89. Office of Foreign Assets Control, *A Framework for OFAC Compliance Commitments*, Office of Foreign Assets Control (May 2, 2019), <https://ofac.treasury.gov/media/16331/download?inline>.

90. Press Release, U.S. Dep’t of the Treasury, Apple, Inc. Settles Potential Civil Liability for Apparent Violations of the Foreign Narcotics Kingpin Sanctions Regulations, 31 C.F.R. part 598 (Nov. 25, 2019), <https://ofac.treasury.gov/media/25931/download?inline>.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. John P. Barker & Soo-Mi Rhee, *Recent OFAC Enforcement Action Highlights Importance of Real-Time Sanctions Screening*, Arnold & Porter (Sept. 21, 2022), <https://www.arnoldporter.com/en/perspectives/advisories/2022/09/recent-ofac-enforcement-action>.

Additionally, effective sanctions screening practices must account for OFAC's "50 Percent Rule."⁹⁶ Pursuant to the 50 Percent Rule:

Persons whose property and interests in property are blocked pursuant to an Executive order or regulations administered by OFAC. . . are considered to have an interest in all property and interests in property of an entity in which such blocked persons own, whether individually or in the aggregate, directly or indirectly, a 50 percent or greater interest. Consequently, any entity owned in the aggregate, directly or indirectly, 50 percent or more by one or more blocked persons is itself considered to be a blocked person.⁹⁷

Essentially, this means that although a company itself may not be subject to OFAC sanctions, if at least one of its owners is subject to OFAC sanctions and owns a fifty percent or greater share in the company, the company itself is treated by OFAC as a sanctioned entity.⁹⁸ This is important from a sanctions screening perspective because not all sanctions screening software screens against ownership information.⁹⁹ For example, the OFAC Sanctions List Search Tool does not screen against ownership information, meaning that an entity that would otherwise be treated by OFAC as sanctioned may go unflagged.¹⁰⁰ Even if a sanctions screening vendor represents to a company that its software screens against ownership information, it is advisable that a company conduct its own independent research of potential clients to (1) obtain their ownership information (either by directly requesting it from the potential client or researching it via a third-party vendor, such as Pitchbook¹⁰¹ or Dun & Bradstreet¹⁰²), and (2) screen that ownership information to determine whether any parties are subject to sanctions. If a potential client turns out to be fifty percent or more owned by a sanctioned party, that client would be treated by

96. Press Release, U.S. Dep't of the Treasury, Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked (Aug. 13, 2014), <https://ofac.treasury.gov/media/6186/download?inline>.

97. *Id.*

98. *Id.*

99. Certa, *Your Guide to Completing a Vendor OFAC check* (Dec. 1, 2022), <https://www.getcerta.com/resources/ofac-check>.

100. *Id.*

101. Pitchbook, <https://pitchbook.com/> (last visited Nov. 20, 2023).

102. Dun & Bradstreet, <https://www.dnb.com/> (last visited Nov. 20, 2023).

OFAC as a sanctioned entity, and ergo, a company should not conduct business with this entity to avoid a violation U.S. sanctions.¹⁰³

D. The Importance of Educating both Non-U.S. Actors and the Foreign Subsidiaries of U.S. Parent Companies about the U.S. Sanctions Regimes and the Compliance Obligations that Both Face.

Perhaps the simplest preventative measure a company, whether U.S. or non-U.S., can take in preventing sanctions violations is to educate its workforce about U.S. sanctions regimes.¹⁰⁴ OFAC cites misinterpretations of the U.S. sanctions regimes or misunderstanding the applicability of the sanctions to a foreign actor as the root cause of many violations.¹⁰⁵ For example, in the case of a foreign subsidiary to a U.S. parent company, if the foreign subsidiary is uninformed about the U.S. sanctions programs and does not realize that they in fact apply to the foreign subsidiary, that foreign subsidiary is liable to unknowingly violate U.S. sanctions.¹⁰⁶ It is important to first understand the theories of violations by which OFAC has penalized both U.S. and non-U.S. actors in order to identify potential violation areas that a company may have (such as U.S. nexuses for a completely foreign firm, or instances of violative conduct by foreign subsidiaries of U.S. parent companies) and take steps to ensure that they are complying with the U.S. sanctions regimes.¹⁰⁷ This step can be achieved simply by analyzing recent OFAC enforcement actions, which are readily available via the OFAC website and contain both summaries of recent violations and compliance recommendations for companies that may be prone to similar conduct.¹⁰⁸

Further, a company should take steps to ensure that its workforce is well-versed in the OFAC regulations – namely, what countries OFAC maintains comprehensive embargoes against – and ensure that its workforce understands the consequences of selling its products, whether intentionally or unintentionally, to those

103. *Id.*

104. *See infra* Section IV Part A.

105. Office of Foreign Assets Control, *A Framework for OFAC Compliance Commitments*, Office of Foreign Assets Control (May 2, 2019), <https://ofac.treasury.gov/media/16331/download?inline>.

106. Thorsten J. Gorny, *Root Causes for OFAC Sanctions Violations*, Sanctions.io (Feb. 20, 2022), <https://www.sanctions.io/blog/root-causes-of-ofac-sanctions-violations>.

107. *See infra* Section III.

108. Office of Foreign Assets Control, *Civil Penalties and Enforcement Information*, <https://ofac.treasury.gov/civil-penalties-and-enforcement-information>.

countries.¹⁰⁹ This can be achieved by implementing OFAC compliance training programs.¹¹⁰ Additionally, a company should reinforce these training sessions by holding routine refresher training courses and regularly performing audits to ensure compliance with the sanctions regimes.¹¹¹ Both of these processes can be utilized to identify weak points in the company's understanding of and compliance with the sanctions and identify potentially violative conduct before it occurs.¹¹²

V. CONCLUSION

This comment serves to highlight the importance of understanding how U.S. sanctions apply extraterritorially to non-U.S. actors and the theories of violations that the U.S. government frequently relies on for the purposes of penalizing non-U.S. actors and the foreign subsidiaries of U.S. parent companies.¹¹³ As the case of British American Tobacco (“BAT”) effectively demonstrates, if there is any nexus between a non-U.S. actor and the United States, regardless of how tenuous that connection might appear, the U.S. government can and will penalize that non-U.S. actor.¹¹⁴ A financial penalty in the hundreds of millions may be a drop in the bucket for a transnational corporation such as BAT, but it could have staggering effects on a smaller firm. Consequently, both non-U.S. and U.S. actors can benefit from educating themselves about the U.S. sanctions,¹¹⁵ identifying their potential nexuses to the United States,¹¹⁶ and implementing sanctions compliance measures accordingly.¹¹⁷

109. Office of Foreign Assets Control, *A Framework for OFAC Compliance Commitments*, Office of Foreign Assets Control (May 2, 2019), <https://ofac.treasury.gov/media/16331/download?inline>.

110. *Id.*

111. *Id.*

112. *Id.*

113. *See infra*, Sections II and III.

114. *See infra* Section I.

115. *See infra* Section IV Part A.

116. *See infra* Section III.

117. *See infra* Section IV Parts B-D.