



# U.S. economic sanctions compliance for non-U.S. firms

The Office of Foreign Assets Control (OFAC), within the U.S. Treasury Department, is the primary agency responsible for the administration of U.S. economic sanctions against designated non-U.S. countries, governments and persons. This briefing describes how these sanctions affect non-U.S. firms.

## Who must comply?

All “U.S. persons” must comply with U.S. economic sanctions. A U.S. person is:

- any individual or entity located within or operating from the U.S. (“territorial jurisdiction”);
- any U.S. citizen or permanent resident alien (i.e., a “green card” holder), wherever located; and
- the worldwide operations of any entity organized under U.S. law, excluding affiliates that are not formed under U.S. law.

The Cuba sanctions have even broader application.<sup>1</sup> The Cuba Sanctions state that, unlike the sanctions against other countries, any entity, wherever organized, that is “owned or controlled” by a U.S. person must comply. The extra-territorial nature of these sanctions often gives rise to a conflict with other law, including EU law, as discussed below.

## What is prohibited and required?

U.S. economic sanctions take different forms with respect to each targeted country. In general, the sanctions (a) prohibit transactions or dealings with the targeted individuals, entities and governments described below, (b) require U.S. persons to block (freeze), upon receipt, any property of the persons described in

paragraphs (ii), (iii) and (iv) below, and (c) restrict trade with or investment in certain targeted countries.

No U.S. person may approve, assist, finance, guarantee or otherwise “facilitate” any transaction that would, if engaged in by a U.S. person, violate U.S. economic sanctions regulations. This prohibition has a broad practical effect, particularly for companies and financial institutions based in the U.S. or operating from their U.S. branches.

## Who are the targets?

The targets of U.S. economic sanctions include:

- i persons located within or doing business from Burma (import, financial, and investment embargo only), Cuba, Iran or Sudan;
- ii several thousand individuals and entities (wherever located) included in OFAC’s list of Specially Designated Nationals (SDNs) available on the OFAC website, including persons involved with a targeted government, international terrorism or WMD proliferation activities;
- iii the governments of Cuba, Iran or Sudan, any entity owned or controlled thereby, and their agents; and
- iv Cuban nationals and companies, controlled entities, Cuban branches of non-Cuban companies, and their agents.

<sup>1</sup> The OFAC sanctions regulations relevant to Cuba are found in 31 C.F.R. Part 515.

## Summary chart of OFAC sanctions targeted at key countries

Target country	Extra-territorial application?	Government property blocked?	All other property blocked?	Trade in goods and services?	Export embargo?	Investments prohibited?	Financial embargo?	Personal travel?
<b>Burma (Myanmar)</b>	No, unless a U.S. person is involved.	Only SDNs.		Embargo on imports to U.S.	Most dual use items are restricted; arms embargo.	No new investment in the development of economic resources.	✓	
<b>Cuba</b>	Yes, if owned or controlled by a U.S. entity.	✓	✓	✓	✓	✓	✓	Very tightly restricted.
<b>Iran</b>	No, unless a U.S. person is involved or the “re-export” restrictions apply.	✓		✓ (Certain foods/textiles may be imported.)	All dual use items are restricted; arms embargo.	✓ Also, Iran Sanctions Act (not currently enforced).	Financial services and trade financing are generally prohibited.	Some restrictions apply.
<b>North Korea (DPRK)</b>	No, unless a U.S. person is involved.	Blocking lifted June 2000, but property already blocked remains so.		Imports to U.S. require OFAC approval.	✓			
<b>Sudan</b>	No, unless a U.S. person is involved.	✓		✓	Most dual use items are restricted; arms embargo.	✓	✓	Some restrictions apply.

## Enforcement and penalties

OFAC may impose a civil penalty for each violation up to the greater of \$250,000 and twice the “amount of the transaction that is the basis of the violation”. Civil penalties are imposed on a strict liability basis. There is no requirement that the penalized person had any knowledge of the violation. Available criminal penalties are up to 20 years in prison and a fine up to the greater of \$1 million and twice the “pecuniary gain or loss”. In addition, OFAC can seek the forfeiture of any property “traceable to” any OFAC violation.

As in other areas of trade regulatory law, companies have limited ability to fight an OFAC enforcement action, as the courts give a great deal of deference to the U.S. government’s exercise of its foreign affairs and national security authorities.

## Non-U.S. firms with U.S. operations

A non-U.S. firm that engages in business with targeted countries or persons (restricted business) may face certain compliance issues if it has a subsidiary, branch

or other operations in the U.S. (the U.S. operations). The most significant such issues are as follows.

- While unlikely, it is possible that OFAC could take the view that the non-U.S. firm is a person “in the United States” by virtue of its significant U.S. operations and therefore must comply with U.S. sanctions. There clearly is OFAC enforcement risk if the firm takes or procures any action within the U.S. in connection with, or in furtherance of, any restricted business.
- The firm will need to maintain procedures to ensure that no U.S. individual within the firm, or any U.S. operations, is involved with the restricted business. No products or services (including IT systems based in the U.S.) should be provided in support of the restricted business. Officers and directors who are U.S. persons should be recused from relevant discussions and decisions.
- There may be a compliance issue if revenues arising from the restricted business are distributed or transferred to any U.S. individual or to the U.S. operations. However, this is unlikely to be of concern unless a revenue stream from restricted

business is directly channeled to a U.S. person, or a majority of the firm's overall earnings come from restricted business.

- If the restricted business might involve property that was allegedly confiscated by the Cuban government from U.S. persons, there is the risk to the non-U.S. firm of consequences under the Helms-Burton Act. This risk is limited, provided there continues to be no active enforcement of the act.
- Any transfer of U.S. dollars by the non-U.S. firm in connection with the restricted business is at risk of being blocked (frozen) when such funds pass through the U.S. or any U.S. financial institution.
- There may be risks arising under non-U.S. law as well. The EU has imposed its own (somewhat more limited) sanctions against several countries. In particular, most transactions with the major Iranian banks, Bank Sepah, Bank Mellī and Bank Saderat, are restricted under sanctions imposed by the United Nations and European Union (EU) in March 2007, June 2008 and November 2008, respectively. The banks had extensive commercial dealings with Europe and other countries.

## EU, Canada and Mexico blocking laws

The EU, Canada and Mexico have each enacted "blocking" laws intended to prevent compliance with the extraterritorial aspects of U.S. economic sanctions against Cuba. In broad terms, the aim of these measures is to prohibit compliance with the U.S. Cuba sanctions by nationals and any other person located within these territories and require that such persons report any communications or instructions they receive in relation to the Cuba sanctions.

As noted above, the U.S. sanctions against Cuba are binding upon any entity owned or controlled by a U.S. person. Such an entity (and its U.S. owner or parent) will face OFAC enforcement risk if it engages in any transaction or dealing with Cuba or Cuban persons. At the same time, if the entity operates in the EU, Canada or Mexico, it will need to comply with the relevant blocking law and may be exposed to criminal sanctions if it does not (although, in practice, enforcement action in respect of the EU blocking law is rare). In April 2007, Austria initiated an enforcement action against BAWAG P.S.K., one of the country's largest banks, for violating the EU

blocking law by closing the bank accounts of Cuban nationals. A BAWAG press statement reported that the account closures were required as part of the deal terms of its pending acquisition by U.S. private equity firm Cerberus Capital.

OFAC has generally been willing to consider requests for a limited authorization under the Cuba sanctions to resolve a direct conflict of the sanctions with a non-U.S. blocking law. OFAC issued such an authorization, leading to a resolution of the BAWAG case. While licenses are not always granted, and often do not take the form sought, it is often possible to obtain some relief. As a note of caution, however, there are anecdotal indications that it has become more difficult to obtain such authorizations over the past year or so.

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