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Tri-Seal Compliance Note Highlights Broad Reach of US Trade Controls, Obligations of Non-US Persons

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On 6 March 2024, the US Department of Commerce, Department of the Treasury and Department of Justice issued a Tri-Seal Compliance Note (compliance note) advising foreign-based companies and individuals to assess their obligations with respect to US export control and sanctions laws and regulations (trade controls) and implement appropriate measures designed to achieve compliance. This compliance note follows a prior publication issued by the same three agencies in July 2023 that explained the benefits and urged self-disclosure of trade controls violations to US regulators.

Scope and application of US trade controls

Grounded in national security laws, trade controls aim to restrict certain countries, territories, entities and individuals from directly or indirectly receiving or otherwise benefiting from certain US products, technologies and services. Specifically:

- The Export Administration Regulations (EAR), administered and enforced by the US Department of Commerce's Bureau of Industry and Security (BIS), regulate exports, reexports, and transfers of commercial and dual-use tangible items, software and technology (each an 'item') subject to the jurisdiction of the EAR.

  Such items are:
  - Any item developed or produced in the US.
  - Items present in the US, regardless of their origin.
  - Certain items developed or produced outside the US that comprise relevant de minimis amounts of US-origin controlled content.
  - Items developed or produced outside the US that are the direct product of certain US-origin software or technology, or are produced using equipment that is the direct product of the same.
- Trade and economic sanctions, administered and enforced by the US Department of the Treasury's Office of Foreign Assets Control (OFAC), prohibit or restrict US persons' activities as they relate to certain countries, territories, entities, individuals and industry sectors.

  For OFAC purposes, US persons are:
  - US citizens and lawful permanent residents, wherever located.
  - Entities organized under the laws of the US and their foreign branches.
  - Any persons located in the US, regardless of nationality.

  Certain OFAC programs also apply to foreign entities that are owned or controlled by US persons.

Notably, trade controls can have extraterritorial reach. For example, non-US persons who reexport US-origin items or produce items subject to the EAR are obligated to comply with the EAR's licensing requirements and end-user and end-use controls. Similarly, the activities of foreign companies that employ US persons, leverage US-based resources such as servers, systems, and banking, or are owned or controlled by US entities are obligated to comply with applicable OFAC restrictions.

Heightened enforcement, including against non-US persons

Against the backdrop of rising national security and foreign policy threats to the US, both BIS and OFAC have aggressively enforced their respective regimes, including with respect to violations by non-US persons.

Recent BIS actions have involved foreign person reexports of US-origin items and sales to restricted parties of foreign-produced items subject to the EAR.

OFAC has focused certain enforcement efforts on non-US persons deemed to have **caused** or **induced** US persons to violate sanctions through any of the following:

- The obfuscation or omission of references to sanctioned countries in transaction documents.
- Routing of prohibited transactions through the US financial system.
- Intentional misleading of US persons in connection with business transactions involving sanctioned countries or persons.

Civil violations of trade controls regulations are subject to a strict scrutiny standard, meaning that a person can face hefty penalties even if the person did not know or have reason to know that they were engaging in a prohibited transaction. Willful violations are punishable as criminal violations, which the US Department of Justice is authorized to pursue – including against non-US persons whose actions have a US nexus. As noted, causing US persons to act can create a jurisdictional basis for enforcement actions involving non-US persons. Further, liability for past violations is inherited by successor parties (e.g., purchasers of companies).

Conclusion

The compliance note underscores that US trade controls can be broadly impactful, subjecting even non-US persons to US jurisdiction in sometimes nonobvious – but potentially significant – ways. In an era of heightened enforcement, global businesses are advised to closely assess the extent to which their operations and activities may be subject to US trade controls and develop appropriate internal controls reasonably designed to achieve compliance and mitigate (possibly substantial) penalties.

Please contact a member of our team with any questions regarding the potential application of trade controls, compliance best practices or other related matters.

Cooley trainee Amber Fisher also contributed to this alert.

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Key Contacts

Kevin King **Washington, DC**	**kking@cooley.com** **+1 202 842 7823**

Caroline Hobson London	chobson@cooley.com +44 20 7556 4522
Annie Froehlich Washington, DC	afroehlich@cooley.com +1 202 776 2019
Juan Nascimbene London	jnascimbene@cooley.com +44 (0) 20 7556 4558

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