

# **American Chamber of Commerce in Ukraine**

## **Compliance Club Meeting**

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## **IMPORTANT NOTE:**

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This presentation provides general information, and should not be construed as, and does not constitute, legal advice on any specific matter of set of facts.

Sanctions laws and regulations are complex. Many laws and regulations overlap and are otherwise subject to varying interpretations and application. Thus, legal advice should be sought for each specific situation.

This presentation has made reasonable efforts to assure that it is current, but notes that sanctions laws and regulations are subject to expiration or change.

# Agenda

- 1 Sanctions Overview
- 2 U.S. Sanctions
  - a. Development of U.S. Sanctions Policy
  - b. How U.S. Primary and Secondary Sanctions Work
  - c. U.S. Sanctions Enforcement
- 3 EU and UK Sanctions
- 4 Sanctions Focus: U.S. and EU/UK  
“Russia/Ukraine Sanctions”
- 5 U.S. Export Controls
- 6 Sanctions & Export Controls Best Practices for Compliance
- 7 The Future of Sanctions

# 1 Sanctions Overview

A

**Governments and international organizations** (e.g., the United Nations) **impose economic and trade sanctions** to further national and international security or other policy goals.

B

Sanctions have been **imposed against countries**, including governments and their instrumentalities (e.g., government-owned entities) and in some cases, **their citizens and/or residents, and even vessels**.

C

Sanctions have been imposed **against individuals and entities**, including known or suspected terrorists and other criminals (e.g., narcotics traffickers), **regardless of whether the country with which they are associated is itself a sanctioned country**.

D

Sanctions **ban or limit engaging in any business transaction with or providing services** to those individuals or entities on sanctions lists. Such **individuals or entities may also be subject to freezing and reporting obligations**.

# 1 Recent Violations of Sanctions Regulations

- > BNP Paribas sentenced in \$8.9 billion accord over sanctions violations



- > U.S. (OFAC) breaks new ground by penalizing non-U.S., non-financial company for causing U.S. bank to violate sanctions



- > ExxonMobil fined by U.S. (OFAC) for countersigning legal documents by a sanctioned individual



- > U.S. (OFAC) OFAC Imposes First Penalty for Russia Sectoral Sanctions Violations



## 2 Development of U.S. Sanctions Policy

Through Executive Orders, the U.S. President can build on existing sanctions programs or create brand new ones. New sanctions are instituted quickly, individuals and entities are added to targeted lists at an unprecedented pace, and the number and severity of enforcement actions has increased remarkably.

### IEEPA and TWEEA<sup>1</sup> Give U.S. President Executive Power

#### List

“U.S. Hits Iran with Sanctions, Drawing from Tehran”  
*Wall Street Journal, Feb. 3, 2017*

#### De-List

“The Frustrating Struggle to Come Off U.S. Sanctions Lists”  
*Wall Street Journal, June 21, 2016*

#### Interpret

“U.S. Looses Iran Sanctions to Smooth Dollar Transactions”  
*Bloomberg, Oct. 8, 2016*

#### License

“Licenses Granted to U.S. Companies Run the Gamut”  
*New York Times, Dec. 24, 2010*

#### Enforce

“OFAC Has Broadened the Scope of its Potential Targets”  
*Law 360, Jan. 8, 2018*

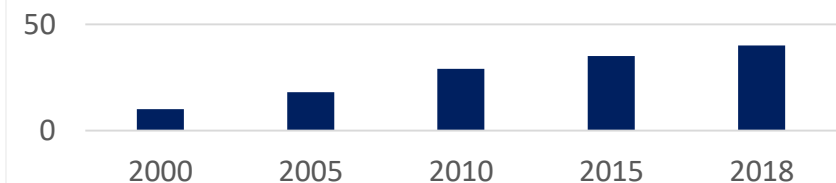
### Key Figures

Since 2009, there has been a **40% increase in the number of individuals and entities listed as SDNs**

On an annual basis, there are **1000s of changes to the SDN list** (listings and de-listings)

**Individuals and companies** sanctioned by the U.S. are domiciled **across 156 countries and territories**

### Active OFAC Sanctions Programs



<sup>1</sup> International Emergency Economic Powers Act of 1977 and Trading with the Enemy Act of 1917.

## 2 Types of U.S. Sanctions

### Summary of U.S. Sanctions

- > **OFAC publishes a list of individuals and companies owned or controlled by, or active for or on behalf of, targeted countries. It also lists individuals, groups and entities, such as terrorists and narcotics traffickers designed under programs that are not country-specific.**
  - > Collectively, such individuals and companies are called “**specially designated nationals**” or “**SDNs**”. Their assets are blocked and U.S. persons are generally prohibited from dealing with them.
- > In many cases, it **may also be a legal violation for U.S. persons to refer transactions** that would otherwise be prohibited to foreign persons or entities for the purpose of evading legal restrictions.

### Primary Sanctions

- > **Comprehensive (country/territory) Sanctions**  
Prohibits U.S. persons from undertaking almost all transactions associated with a listed country or territory. The current list includes: **Crimea, Cuba, Iran, North Korea and Syria**
- > **List-based Sanctions**  
Prohibits U.S. persons from undertaking almost all transactions related to entities listed for specific behaviors (SDNs).
- > **Sectoral Sanctions**  
Prohibits U.S. persons from undertaking only limited, specific transactions with listed entities (SSIs).

### Secondary Sanctions

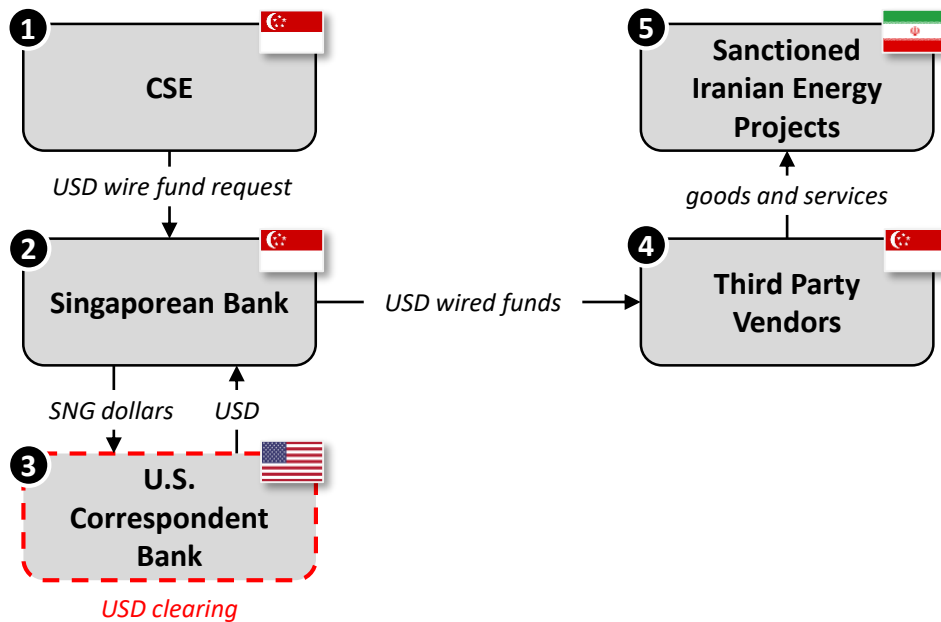
- > **Secondary Sanctions**  
Threatens U.S. sanctions against non-U.S. persons for engaging in transactions with targeted individuals and entities (i.e., “**significant**” transactions with Russian SDNs and SSIs), or providing “**material support**” to targeted individuals or entities.

Violations of primary or secondary sanctions can result in civil and criminal penalties

## 2 U.S. Dollar Transactions as Jurisdictional Hook for U.S. Primary Sanctions

OFAC targets transactions conducted in U.S. dollars even if the underlying transaction involves only non-U.S. entities. The “U.S. dollar clearing” process allows OFAC to claim U.S. jurisdiction.

### Example: CSE (a Singaporean Telecom Company)



- > CSE paid \$12 million penalty for “causing” U.S. financial institutions to violate U.S. sanctions against Iran.
- > CSE Agreed to provide goods and services to sanctioned Iranian energy project.
- > CSE initiated 104 wire transfers in U.S. dollars from its Singaporean bank to third-party vendors providing goods and services on CSE’s behalf for the sanctioned Iranian energy projects.
- > These wire transfers were “cleared” (i.e., converted) into U.S. dollars by the U.S. based correspondent bank of the Singaporean bank.

Because the wire transfers were in support of sanctioned entities in Iran, providing the U.S. dollar clearing service violated U.S. sanctions. CSE “caused” the U.S. correspondent bank to violate U.S. sanctions, and therefore violated U.S. sanctions itself.



## 2 Key U.S. Russia/Ukraine Sanctions Developments: CAATSA

### Countering America's Adversaries Through Sanctions Act ("CAATSA") of 2017

CAATSA limits  
U.S. President's  
discretion over  
Sanctions

#### > List-Based Sanctions

Blocking sanctions against individuals and entities related to **cyber attacks** and corrupt acts.

#### > Sectoral Sanctions

**Added sectors** for potential future sectoral sanctions including the metals and mining, engineering and "defense and related material" sectors.

#### > Secondary Sanctions

On a discretionary basis, sanctions can be imposed on non-U.S. persons engaging in transactions with Russia's energy, defense, and/or intelligence sectors.

Requires sanctions against non-U.S. persons who **knowingly facilitate "significant" transactions on behalf of persons listed as SDNs or SSIs** and entities subject to sanctions pursuant to 50% rule.

## 2 Secondary Sanctions on “Significant” Transactions

### Factors for Determining a “Significant” Transaction

- > The **size, number and frequency** of the transactions(s);
  - > The **nature** of the transaction(s);
  - > The level of **awareness of management** and whether the transaction(s) are part of a pattern of conduct;
  - > The **nexus between the transaction(s) and a blocked person**;
  - > The **impact** of the transaction(s) **on statutory objectives**;
  - > Whether the transaction(s) **involve deceptive practices**; and
  - > Such **other factors** that the Secretary of the Treasury deems relevant **on a case-by-case basis**.
- 
- > A transaction is not “significant” if U.S. persons would not require specific licenses from the U.S. (OFAC) to participate in it.
  - > To potentially be **considered “significant”**, a transaction with an SSI must also involve **deceptive practices** (ie., attempts to obscure or conceal the actual parties or true nature of the transactions, or to evade sanctions).

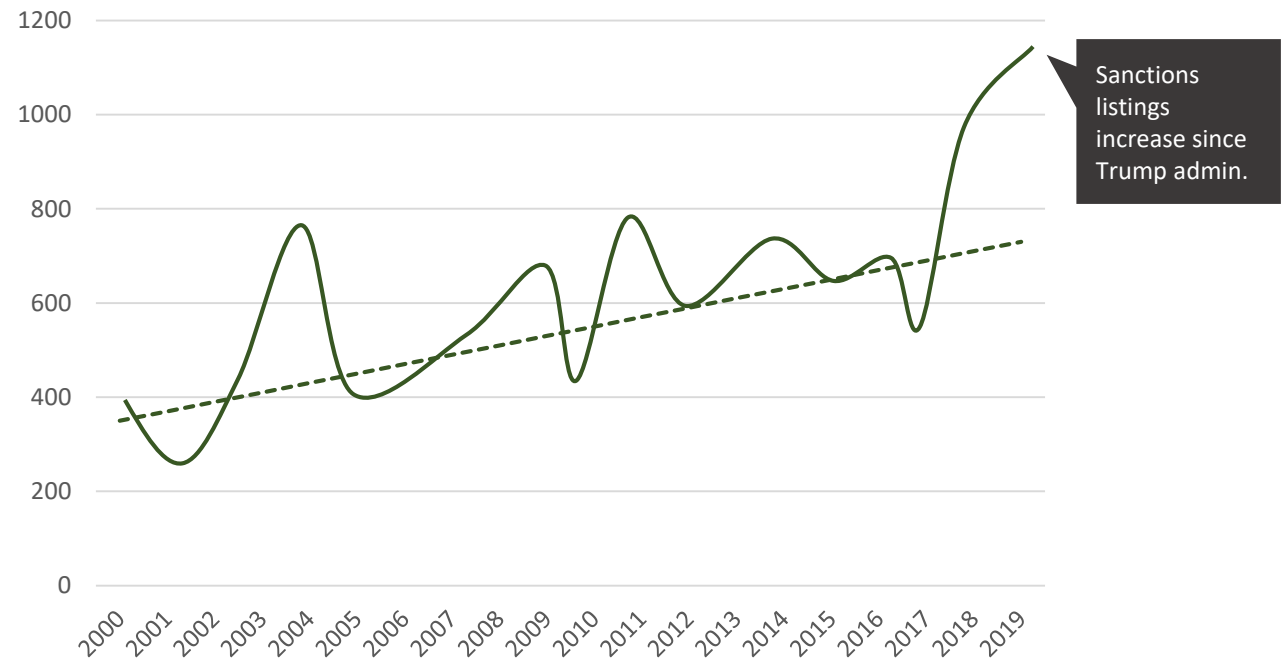
## 2 U.S. Sanctions Under the Current Administration

The Trump Administration has continued a nearly two-decade trend of increasing reliance on sanctions by the U.S. government.

### Sanctions at Highest Ever Rate

- > Nearly **1000 new targeted listings in 2017** (~5700 persons on SDN list).
- > **More than 1 sanctions action per week in 2017 - 2019.**
- > Billions of dollars of fines by OFAC, Dept. of Commerce, and local state authorities.
- > Several new sanctions programs including targeting human rights and corruption, Venezuela and **enhanced penalties against Russia**, North Korea and Iran.

### Sanctions Listings by Year



### 3 EU and UK Sanctions

Overview	Types of EU Sanctions	EU Sanctions Application <sup>1</sup>
<ul style="list-style-type: none"> <li>&gt; <b>Imposition of Sanctions</b> The EU imposes sanctions imposed by the UN Security Council but may, and does, also act on its own to impose additional sanctions.</li> <li>&gt; <b>EU Member States Lists</b> It is possible to have discrepancies amongst the multiple EU member states (e.g., UK's sanctions lists are often broader than the EU's).</li> <li>&gt; <b>Coordination/Divergence with the U.S.</b> Coordination on Russia/Ukraine Divergence on Cuba, Iran and Venezuela.</li> </ul>	<ul style="list-style-type: none"> <li>&gt; <b>Financial Sanctions</b> Prohibition on availability of assets and funds, directly and indirectly, to certain persons (i.e., “<b>asset freeze targets</b>”). <i>Similar to U.S. SDN Sanctions</i></li> <li>&gt; <b>Trade Sanctions</b> Restrictions such as import and export bans regarding sector, product, or activity. <i>Similar to U.S. Sectoral Sanctions</i></li> <li>&gt; <b>Embargoes/Travel</b> Arms embargoes and visa/travel bans.</li> </ul>	<p>Within the <b>territory of the EU</b>, including its airspace;</p> <p>On <b>aircraft and ships</b> registered in a EU member state;</p> <p>To <b>all EU nationals whether inside or outside the EU</b>;</p> <p>To <b>all entities incorporated or constituted in the EU</b>;</p> <p>To all entities “in respect of <b>any business done in whole or in part within the EU</b>”.</p>

<sup>1</sup> EU sanctions also apply to the U.K.'s offshore jurisdictions of Jersey, Guernsey, Isle of Man, BVI, Gibraltar, Cayman and Bermuda

### 3 New UK OFSI Begins Sanctions Enforcement

The Office of Financial Sanctions Implementation (“**OFSI**”) was created in 2016 to oversee the enforcement of domestic and international financial sanctions in the UK, through monetary penalties. OFSI also maintains a list of financial sanctions targets.

New Enforcement Cases	On Brexit
<ul style="list-style-type: none"><li>&gt; <b>Raphael &amp; Sons plc</b> (21 January 2019) Dealing with funds belonging to a designated person, without a license. £5000</li><li>&gt; <b>Travelex UK Ltd</b> (08 March 2019) Dealing with funds belonging to a designated person, without a license. £10,000</li><li>&gt; <b>Telia Carrier UK Limited</b> (09 September 2019) Making economic resources available to a designated person, without a license. £146,341</li></ul>	<ul style="list-style-type: none"><li>&gt; The creation of OFSI and the historically low level of financial sanctions enforcement in the UK is likely to change.</li><li>&gt; A significant number of new pieces of legislation related to the UK’s financial sanctions regimes post-Brexit have already been laid before the UK’s Parliament.</li><li>&gt; Draft legislation envisions that the UK and EU should adopt sanctions that are “mutually reinforcing”.</li></ul>

## 4 Russia/Ukraine Sanctions and Restrictions

### International Sanctions

- > U.S. and EU sanctions have developed since June/July 2014, **restrictions on mid- and long-term funding of sector-specific sanctioned parties (finance, defense and energy)**, as well as trade finance restrictions.

#### Type 1: Asset Freezes/SDNs

- > Applies to **SDNs and Asset Freeze Targets**, and individuals and entities owned (or controlled) 50% or more by one or (in aggregate) more than one SDN or Asset Freeze Target.
- > **No transactions or business activities by U.S. or EU individuals or entities with SDNs or Asset Freeze Targets.**

#### Type 3: Trade Finance Restrictions

- > Applies to **targeted names sectoral sanctions identification (“SSI”) list** parties and **all entities owned 33% or more** by one or (in aggregate) more than one SSI.
- > Prohibits the **export of certain military equipment, dual-use goods and technology, and certain technologies and services** for specific areas of the **oil industry in Russia or for the use in Russia** (e.g., deep sea, arctic and shale oil).

#### Type 2: Funding Restrictions

- > Applies to **targeted names sectoral sanctions identification (“SSI”) list** parties and all entities owned 50% or more by one or (in aggregate) more than one SSI.
- > Only **certain business activities are prohibited**, including providing **financing for other otherwise dealing in new debt/equity greater than 14/30 days.**
- > No prohibited transactions or business activities by U.S. or EU individuals or entities with SSIs.

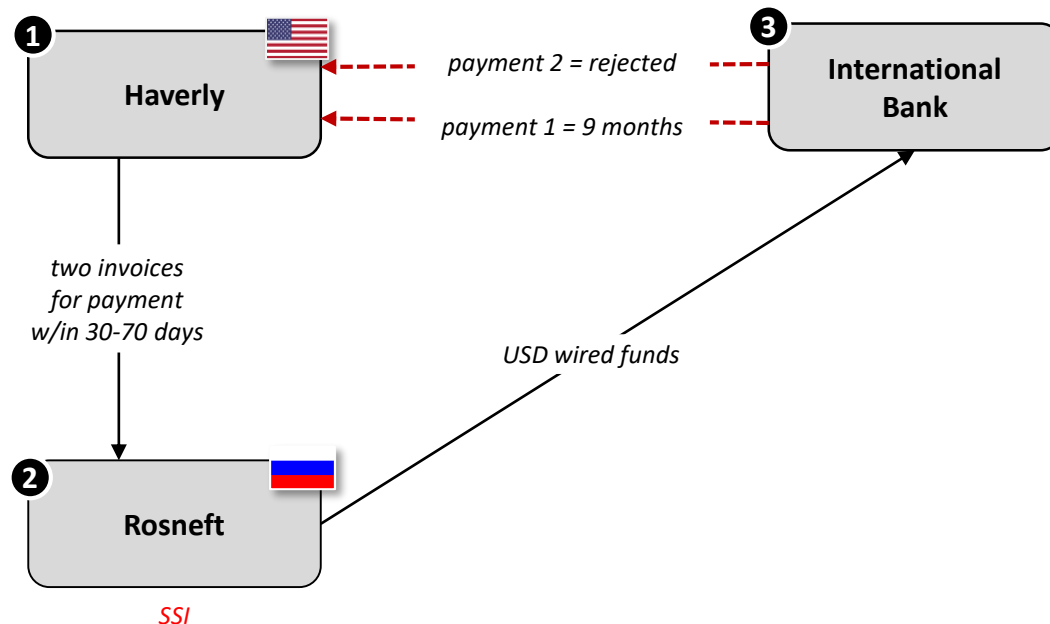
#### Type 4: Crimea Restrictions

- > **Prohibits any investment in Crimea** which includes acquiring shares of companies incorporated in Crimea, creating any joint venture in Crimea and real estate in Crimea.
- > **Prohibits any loans, credits or financing to an entity or individual in Crimea**, exporting of goods technology or services to Crimea, and the importing of goods from Crimea.

## 4 Receiving Payments Beyond Debt Threshold as Sectoral Sanctions Violation

U.S. and EU persons are prohibited from dealing in certain new equity and new debt of specific maturity (either 14, 30 or 90 days). Extending payment terms of longer than the applicable maturity constitutes a prohibited extension of debt to SSI entities.

### Example: Haverly Systems, Inc.



- > On April 25, 2019, Haverly paid \$75,375 for two violations of SSI restrictions.
- > First ever OFAC penalty on SSI restrictions.
- > Haverly issued two invoices to Rosneft, an SSI, for software support services (with payment due dates within SSI restrictions). However, due to Haverly's delays to provide certain documentation to Rosneft, and the intermediary banks' rejection of Rosneft's transactions, the payments were not made to Haverly for 9 months.

OFAC expressed states this enforcement action is intended to demonstrate the general risk associated with engaging in transactions with Russian entities and Russian economic sectors targeted under U.S. sanctions, which should undergo enhanced due diligence.

## 5 What Are Export Controls?

### U.S. Export Administration Regulations (“EAR”)

- > Administered and enforced by the US Department of Commerce’s Bureau of Industry & Security (“BIS”)
- > Primarily regulate exports/reexports of commercial and “dual use” commodities, hardware, software, technology, and services (as well as certain defense items)
- > EAR applies to the **item** (good, software, hardware)
- > Accordingly, **EAR can apply even to non-US persons** who engage in exports/reexports of items “subject to the EAR”
- > Items “**subject to the EAR**”:
  - Items **originating in the United States**
  - Items developed or manufactured outside the United States that comprise **US-origin content** in amounts meeting the **relevant *de minimis* thresholds**
  - Certain items produced outside the United States **derived from U.S.-origin technology**

International Traffic in  
Arms Regulations (ITAR)

### EU Export Controls

- > EU Export Controls
  - Military items
  - Items with a dual military and civilian use: “Dual-Use” items
- > Dual-use items
  - Export of dual-use items from **the EU customs territory to third countries**
  - **Administration and enforcement of dual-use export controls (including penalties for violations) belongs to individual Member States**
  - Export controls in some Member States go beyond the Dual-Use Regulation
  - Important to consider both the EU and individual Member State regimes
    - UK includes additional items not listed in the EU Dual-Use Regulation
    - UK imposes arms embargoes beyond those imposed by the UN or EU



## 5 Export Control Definitions

Term	Definition	Further Details
Export	The transfer from the U.S. or EU of any commodity, hardware, software, or technology “subject to the EAR” or requiring an export license pursuant to the EU “Dual-Use” Regulation.	<ul style="list-style-type: none"> <li>➤ <b>Hardware:</b> end-items, parts, components, assemblies, modules, and systems</li> <li>➤ <b>Software:</b> computer instructions or data</li> <li>➤ <b>Technology:</b> technical data, or “know how,” whether paper or electronic</li> </ul>
Re-Export	Exporting <b>from one foreign country to another</b> of EAR- or EU-Dual-Use-regulated items	
Deemed Export	Release or disclosure of controlled technology within the US to a foreign national is “deemed” to be an export to that country.	Under the EAR’s “deemed export” and “deemed reexport” rules, <b>“releasing” EAR-controlled technology or source code to a foreign person is deemed to be an export or reexport</b> to that foreign person’s most recent country of citizenship or permanent residency. <b>Such a “release” can occur through an actual transfer, a visual or other inspection by the employee, or through oral or written exchanges of the technology.</b>
Technology Transfer	<p><b>Any transfer of technology or software across US borders is an “export”</b> – even if the recipient is a US person.</p> <p>Any transfer of technology or software, by any means, inside or outside the United States, to a “foreign person” is an “export”</p>	<b>Technology transfers can occur electronically or through meetings, presentations, employment, tours, or other interchanges</b>

## 5 U.S. Export Control Restricted Parties

1

### Denied Persons

- Persons that have been denied export privileges
- Dealings with Denied Parties that violate the terms of the relevant Denial Order prohibited

2

### Entity List

- Non-US parties that are prohibited from receiving some or all items subject to the EAR absent a specific license
- May be accompanied by a licensing policy of presumption of denial
- Typically license exceptions are not available

3

### Unverified List

- Parties whose bona fides BIS has been unable to verify
- License exceptions for transfers to these parties not available

## 2 U.S. Export Controls Under the Current Administration

### Sanctions at Highest Ever Rate

- > Over 2,000 investigations since 2017
- > \$1.1 billion+ in fines in 2019 (50% increase from 2017)
- > New export compliance measures enacted

### Sanctions Listings by Year



**U.S. Department of Commerce**  
**Bureau of Industry and Security (BIS)**

## 5 Key Export Control Developments

### ZTE

- > On April 15, 2018, the **U.S. imposed a Denial Order against ZTE** for failure to fulfill commitments under a settlement with the U.S. (for which ZTE was subjected to a USD 1.4 billion penalty).
- > The Denial Order restricted ZTE from participating in U.S.-regulated hardware, software or technology, and prohibited any persons (whether U.S. or non-U.S.) from, directly or indirectly, engaging with ZTE in activities involving certain regulated items or services.
- > The U.S. has since lifted the Denial Order.
- > Must retain Special Compliance Coordinator (Monitor)

### Huawei

- > On May 16, 2019, **Huawei Technologies Company Ltd. (“Huawei”) and 68 of its affiliates were designated on the “Entity List”**. Companies globally are prohibited from directly or indirectly sending to Huawei any U.S.-origin or U.S.-regulated goods, software, or technology (“Items”). Companies are not prohibited, however, from procuring Items from Huawei, unless they know that Huawei received the Items in violation of law.
- > On May 20, 2019, the U.S. issued a 90-day **temporary general license (“TGL”)**. The TGL only authorizes a narrow set of activities, including transactions necessary to maintain and support (but not enhance) existing networks and equipment.
- > On August 19, 2019, the U.S. issued a second 90-day TGL requiring additional (and burdensome) certifications and recordkeeping requirements. The **U.S. also added 46 additional Huawei affiliates to the Entity List**, under the same restrictions as the previously listed Huawei Entities.
- > On November 18, 2019, the U.S. issued a third 90-day TGL.

### Supply Chain EO

- > On May 15, 2019, President Trump issued an Executive Order that allows the U.S. government to restrict transactions involving certain technology and services from countries **or persons determined to be “foreign adversaries”** of the United States. Although not specifically named in the Executive Order, **this is likely to include Huawei and ZTE. Importantly, this Executive Order does not go into effect immediately.** Instead, the U.S. Department of Commerce and other trade and national security agencies have five months to define the specific rules and regulations of this new regime and how they will apply.

## 6 Top Sanctions & Export Controls Risks to Companies

Government authorities have pushed companies to implement risk-based compliance programs taking into account: (i) products and services, (ii) frequency and volume of international transactions and shipments, (iii) client base, (iv) and size and geographic footprint.

Risks	Issue	Consequence
Listing as an SDN or Asset Freeze Target	<b>Growth of sanctions programs</b> adds to the number and type of conduct which may be sanctioned, and <b>increases the potential of being listed</b> .	<b>Assets are frozen and access to markets</b> (retail, investment, insurance, bonds, and correspondent banking) <b>are restricted or prohibited</b> .
Violations and Penalties	<b>Large number of enforcement agencies</b> involved and the <b>growing number of listed entities increases the likelihood of engaging with sanctioned individuals or entities</b> .	A company that <b>unknowingly engages with a sanctioned party can still face reputational, civil and criminal liability for itself, its officers and directors</b> .
De-Risking	The rising risks of being listed and being penalized, combined with reputational harm, means that <b>no companies are “to big to be de-risked”</b> .	<b>A company can face sanctions-related consequences if its business partners</b> (customers, licensees, suppliers, bankers, investors) <b>are concerned that its sanctions compliance is unsatisfactory</b> .

## 6 Sanctions & Export Controls Compliance Best Practices

1

### **Policies, Procedures, Training and Controls**

- **Awareness of latest sanctions** events and enforcement guidance
- **Screening** for customers, vendors and other counterparties (collectively “third parties”).

2

### Escalation and **due diligence on third parties** to:

- identify any U.S. or EU Nexus, and
- if applicable, consider any Secondary Sanctions risks.

3

### **Contractual Clauses, Representations and Warranties** for transactions and business activities.

- Loan / credit agreements to ensure no default if lender becomes sanctions target
- Protections against **business partner and supply chain risk**

4

### **Independent Audit** and Testing of Program.

- Identify gaps in your program

## 7 Future of Sanctions & Export Controls

### Continued Focus on Russia/Ukraine Sanctions

- > **New enforcement actions** from U.S. and UK/EU on CAATSA (Cyber) and SSI designated entities
- > Expansion of entities added to **sanctions lists particular to election meddling**
- > **Possible launch of Russia “CryptoRuble”** to subvert U.S. dollar-based sanctions

### Changing Entity Ownership and Control Structures

- > Several **moves by entities to dilute their ownership and Board control** in order to not be listed as an SDN or Asset Freeze Target
- > Important to note that **once an entity is explicitly targeted and listed, any reduction in ownership or control will not result in an automatic de-listing.**

### Reignited Focus on Iran

- > **“Snap-back” of Primary and Secondary Sanctions**
- > **New designations** in finance, energy and defense industries

### Increased Focus on China

- > **Additional Export Controls on Chinese** technology firms
- > Imposition of rules under the new **U.S. Supply Chain EO**
- > **Revision of the EAR** and *de minimis* threshold to 10%

Q&A

Questions or Feedback

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