EVERSHEDS SUTHERLAND

Horizon Scanner
Financial Crime – US

January 2023

Immediate impact

Short term impact

On the horizon

Immediate impact

Legal risk	When?	What's next?	Supporting information
OFAC and FinCEN brought significant enforcement actions against virtual currency exchanges. On October 11, 2022, the Office of Foreign Assets Control (OFAC) and Financial Crimes Enforcement Network (FinCEN) brought parallel virtual currency enforcement actions against Bittrex, Inc., a US-based virtual currency exchange. Bittrex entered into settlement agreements with OFAC and FinCEN for over $24 million and $29 million, respectively, for failing to implement appropriate controls to prevent persons located in sanctioned jurisdictions from using its platform, including preventing transactions where IP and physical address information indicated a nexus to sanctioned jurisdictions. FinCEN noted that Bittrex relied on as few as two employees with minimal anti-money laundering training and experience to manually review all of the transactions for suspicious activity, which at times were over 20,000 per day. Further, while Bittrex used a third party vendor for sanctions screening, the vendor only screened for hits against the Specially Designated Nationals (SDN) list. The vendor did not screen customers or transactions for a nexus to a sanctioned jurisdiction. The settlement is OFAC's largest for a virtual currency related action. In November 2022, OFAC announced another enforcement action against US virtual currency exchange Payward, Inc. d/b/a Kraken, for violations of the Iranian Transactions and Sanctions Regulations for similar failures relating to geolocation tools and IP address blocking. While Kraken's controls prevented users from opening an account while located in a sanctioned jurisdiction, it did not implement IP address blocking on transactional activity once the user was onboarded. Kraken was ordered to pay $362,158 in civil penalties and to invest $100,000 in its sanctions compliance program.	October 11, 2022	These enforcement actions highlight OFAC's and FinCEN's focus on sanctions and anti-money laundering violations by virtual currency exchanges. These exchanges should take this opportunity to review their compliance programs and ensure that they have implemented robust risk-based controls to prevent and identify illicit activity consistent with OFAC's Sanctions Compliance Guidance for the Virtual Currency Industry. In addition, all financial institutions should ensure that they have implemented geolocation tools and other IP blocking and location-verifying tools to identify and prevent users in sanctioned jurisdictions from opening accounts and transacting in sanctioned jurisdictions. They should also ensure that their transaction monitoring programs are staffed with sufficient resources and automated where appropriate, and they should maintain proper oversight over third party vendors.	Enforcement Actions by OFAC and FinCEN for Apparent Violations of Sanctions and Anti-Money Laundering Obligations (October 11, 2022). OFAC Settles with Bittrex, Inc. in Relation to Apparent Violations of Multiple Sanctions Programs (October 11, 2022) FinCEN Announces Enforcement Action Against Virtual Asset Provider for BSA Violations (October 11, 2022) OFAC Settles with Virtual Currency Exchange Kraken for $362,158.70 Related to Apparent Iran sanctions violations (November 28, 2022) OFAC Sanctions Compliance Guidance for the Virtual Currency Industry (October 2021)

Immediate impact

OFAC issued further guidance on the implementation of the Price Cap Policy for Russian oil. On November 22, 2022, OFAC issued further policy guidance relating to the Price Cap Policy banning certain "Covered Services" related to the maritime transport of Russian oil, except in transactions that adhere to the price cap exception. Covered Services include trading and commodities brokering, financing, and insurance (including reinsurance and protection and indemnity). Notably, US dollar clearing of Russian-origin seaborne oil transactions does not fall under the Covered Service of "financing." If a purchaser of Russian-origin oil does not hold a US account, it can remit a US dollar denominated payment from a third-country bank for Russian oil. Financial services related to foreign exchange transactions and the clearing of commodities futures contracts also are not considered "financing." The Price Cap Policy is triggered when Russian oil is sold by a Russian entity for maritime transport, and will apply to the Russian oil until its first landed sale (e.g., through customs clearance) in a jurisdiction outside of Russia. The policy will *not* apply to subsequent sales of the oil unless it is taken back out to sea, and becomes seaborne again without having been substantially transformed. The Price Cap Policy will apply to the price paid for the Russian-origin oil itself, independent of other charges, such as shipping, freight, customs, and insurance, which must be invoiced separately at commercially reasonable rates. A Covered Service provider may avail itself of the Price Cap Policy's "safe harbor" if it: – Demonstrates "good faith" compliance and reasonable reliance on required documentation (e.g., certificate of origin) and attestations; – Retains relevant records and documentation for five years; and	December 5, 2022 January 19, 2023	The Price Cap Policy applies to loadings of Russian oil on or after December 5, 2022 and/or unloaded at the port of discharge after January 19, 2023. Companies should consider whether the Price Cap Policy could impact their business and, if so, ensure that they are equipped to satisfy the recordkeeping and attestation requirements that would allow them to avail themselves of the Policy's safe harbor.	OFAC Guidance on Implementation of Price Cap Policy for Russian Crude Oil (November 22, 2022) Determination Pursuant to Executive Order 14071 (November 22, 2022)

Immediate impact

Legal risk	When?	What's next?	Supporting information
– Continues performance of customary compliance and due diligence practices, in addition to the new documentation and attestation requirements. OFAC will target its price cap enforcement at those who provide false pricing information or attestations rather than those who rely on false attestations.			
OFAC takes additional measures targeting the Russian financial sector. On December 15, 2022, OFAC designated Public Joint Stock Company Rosbank (Rosbank)—a "systemically important" Russian commercial bank—as an SDNpursuant to Executive Order 14024. OFAC issued General Licenses (GLs) 58 and 59 to authorize certain transactions with Rosbank. GL 58 generally authorizes a wind-down period until March 15, 2023, and GL 59 more specifically authorizes US persons to divest their Rosbank securities holdings to non-US persons. OFAC also amended GL 8E to allow Rosbank to process energy-related transactions. In addition, OFAC designated 17 subsidiaries of VTB Bank Public Joint Stock Company, Russia's second largest bank, as SDNs.	December 15, 2022 March 15, 2023	Pursuant to GL 58, the wind-down period ends on March 15, 2023. Subject to this and the other GLs, financial institutions should ensure that Rosbank's and the other newly-designated bank subsidiaries' property and interests in property are blocked and reported to OFAC.	Russia-related Designations and Designations Updates (December 15, 2022)

Immediate impact

Legal risk	When?	What's next?	Supporting information
The Public Company Accounting Oversight Board completed inspections of audit firms in mainland China and Hong Kong. On December 15, 2022, the Public Company Accounting Oversight Board (PCAOB) announced that it had been granted complete access to inspect and investigate PCAOB-registered public accounting firms in China and Hong Kong. The PCAOB's inspection marks the first time Chinese authorities have granted US officials this level of access to Chinese companies' information. In May 2020, Congress unanimously passed the Holding Foreign Companies Accountable Act of 2020 (HFCAA), which prohibits issuers from trading securities on US exchanges if they use public accounting firms in foreign jurisdictions that the PCAOB cannot inspect or investigate for three years (beginning in 2021). SEC Chair Gary Gensler lauded the recent PCAOB inspection, stating it was conducted according to the "four key pillars" of the August 2022 Statement of Protocol between the PCAOB and the China Securities Regulatory Commission and the Ministry of Finance of the People's Republic of China: (1) the discretion to inspect and investigate issuer audits without consulting Chinese authorities, (2) the ability to retain audit information, (3) the "unfettered ability to transfer information to the SEC," and (4) the ability to interview and take testimony from personnel associated with creating the audit materials.	December 15, 2022	The PCAOB's continued access to these audit firms based in mainland China and Hong Kong is critical to prevent delisting of China-based issuers that trade on US exchanges.	Statement of PCAOB's Determinations Regarding Public Accounting Firms in China FACT SHEET: PCAOB Secures Complete Access to Inspect, Investigate Chinese Firms for First Time in History PCAOB Chair Williams Statement Regarding Agreement with Chinese Authorities SEC Chair Gary Gensler Statement on Agreement Governing Inspections and Investigations of Audit Firms Based in China and Hong Kong

Immediate impact

The CFTC can bring an enforcement action against an unincorporated DAO. On September 22, 2022, the Commodity Futures Trading Commission (CFTC) settled charges against bZeroX, a decentralized finance (DeFi) company, and its founders for, among other issues, violating the Commodity Exchange Act (CEA) and CFTC regulations by illegally operating as an unregistered futures commission merchant, and failing to adopt a customer identification program as required by the Bank Secrecy Act. The CFTC simultaneously brought similar claims in a first-of-its-kind action against Ooki DAO, a decentralized autonomous organization (DAO) operating on the same DeFi protocol platform as bZeroX, to which bZeroX's founders transferred control of the company. DAOs are blockchain-based entities owned and operated collectively by their members that make decisions via member voting, which are automatically executed by smart contracts. DAOs often do not have centralized leadership, and members may be anonymous; as a result, it can be difficult to point to any one person or entity responsible for a DAO's actions. In this case, the CFTC argued that bZeroX's founders transferred control of bZeroX to Ooki DAO to avoid regulatory action for violating the CEA. The CFTC's action against Ooki DAO hinges on the legal theory that a DAO's founders can be liable for its illegal activities, even if the DAO is an unincorporated association. The CFTC argues that while bZeroX's founders transferred control to Ooki DAO, the company's operations continued as normal, by the same individuals, in practice under the same structure. Accordingly, Ooki DAO's members' actions were performed on behalf of Ooki DAO as an unincorporated association. On December 20, 2022, the Court ruled that Ooki DAO could be sued as an unincorporated association. Judge Orrick reasoned that, at least in this case, the "history of the development and control" of Ooki DAO showed that it was an unincorporated organization as	December 20, 2022	In this case, the Court found that the CFTC could bring the enforcement action against the DAO because the DAO was an unincorporated association under California state law. As states treat DAOs differently, companies and individuals expanding into the DeFi space should monitor these enforcement actions and similar cases that could affect whether, where, and how they choose to register a DAO. In some states, such as Wyoming, DAOs may be registered as LLCs. In addition, the outcome of this action (specifically the determination of whether the CEA applies to DAOs) could set the stage for future CFTC enforcement actions against DAOs.	CFTC Imposes $250,000 Penalty Against bZeroX, LLC and Its Founders and Charges Successor Ooki DAO for Offering Illegal, Off-Exchange Digital-Asset Trading, Registration Violations, and Failing to Comply with Bank Secrecy Act | CFTC Christian Sarcuni, et al., v. bZx DAO, et al., No. 22-cv-0618 (filed May 2, 2022). Commodity Futures Trading Commission v. Ooki DAO, No. 3:22-cv-05416 (filed September 22, 2022). Order Concluding That Service Has Been Achieved, Doc. No. 63, Commodity Futures Trading Commission v. Ooki DAO, No. 3:22-cv-05416-WHO (filed December 20, 2022).

Legal risk	When?	What's next?	Supporting information
defined under California state law, rather than simply a technology. Under California law, an unincorporated association is "an unincorporated group of two or more persons joined by mutual consent for common lawful purpose," and the criteria used to determine an unincorporated entity includes where "fairness requires the group to be recognized as a legal entity," including "where persons dealing with the association contend their legal rights have been violated." The Court reasoned Ooki DAO satisfied these criteria, and thus could be sued. Notably, Judge Orrick reserved judgment on whether the CEA applied to Ooki DAO. Judge Orrick also ruled that serving Ooki DAO via its online forum and help chat was a proper method of alternative service under California law because it was "reasonably calculated to apprise Ooki DAO" of the litigation.			
FINRA issued its 2023 Report on Examination and Risk Monitoring Program. The Financial Industry Regulatory Authority (FINRA) issued the 2023 Report on FINRA's Examination and Risk Monitoring Program (the Report), which highlights FINRA's focus on certain topics. Each topic includes information about the relevant rules, key considerations for compliance programs, a summary of recent noteworthy findings, examples of effective practices, and additional resources. The Report emphasizes, among other issues, FINRA's focus on compliance with Regulation Best Interest (Reg BI) and Form CRS; cybersecurity threats such as customer account intrusions, ransomware attacks, and cyber-enabled fraud; and mobile apps, which may adversely influence investor behavior. In addition, for the first time, the Report contains a standalone section on financial crimes, which encompasses anti-money laundering, fraud and	January 10, 2023	Companies should review the Report, and may want to focus their compliance efforts on the areas that FINRA identified as priorities.	2023 Report on FINRA's Examination and Risk Monitoring Program

Legal risk	When?	What's next?	Supporting information
sanctions; cybersecurity and technological governance; and manipulative trading.			
The US Department of Justice announced changes to its Corporate Enforcement Policy. On January 17, 2023, the DOJ announced changes to its Corporate Enforcement Policy (CEP), which explains how the DOJ considers a company's self-disclosure, cooperation, and remediation when determining whether a declination is appropriate or, if deemed not appropriate, calculating penalties. The CEP now provides an avenue for companies—including criminal recidivists—to obtain a declination, even if there are aggravating factors present. While not entitled to a presumption of a declination, prosecutors have the discretion to issue a declination if a company has satisfied three factors: 1. "The voluntary self-disclosure was made immediately upon the company becoming aware of the allegation of misconduct;" 2. "At the time of the misconduct and disclosure, the company had an effective compliance program and system of internal accounting controls, which enabled the identification of the misconduct and led to the company's voluntary self-disclosure;" and 3. "The company provided extraordinary cooperation with the Department's investigation and undertook extraordinary remediation that exceeds the respective factors listed herein." The revised CEP also provides for greater DOJ-recommended reductions in fines off the U.S. Sentencing Guidelines for companies that voluntarily self-disclose, cooperate, and/or remediate if they do not receive a declination.	January 17, 2023	While these changes provide companies with additional incentives to "come forward, cooperate, and remediate" when they uncover misconduct, companies seeking a declination if there are aggravating circumstances will need to go far beyond existing requirements. To ensure that they are well-positioned to take advantage of this option if they do discover misconduct, companies should proactively implement a robust, effective corporate compliance program now—*before* misconduct is identified. Under the revised CEP, waiting until after an issue arises could be too late.	9-47.120 – Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy | OPA | Department of Justice DOJ sweetens the deal for companies that "come forward, cooperate, and remediate" - Eversheds Sutherland (eversheds-sutherland.com) The DOJ's new guidance on corporate criminal enforcement—and what it means for your business (Wolters Kluwer)

Immediate impact

Legal risk	When?	What's next?	Supporting information
New York State Department of Financial Services released new guidance for virtual companies acting as custodians for customer assets. On January 23, 2023, the New York State Department of Financial Services (NYDFS) released Guidance on Custodial Structures for Customer Protection in the Event of Insolvency (Guidance), which applies to companies that NYDFS has licensed or chartered to custody or hold, store, or maintain virtual currency assets on behalf of customers. The Guidance aims to protect customers in the event a virtual currency entity (VCE) acting as a custodian for customer assets becomes insolvent. Under the Guidance: – All customer assets held in custody by VCEs must either be held in separate digital wallets for each customer, or one or more omnibus accounts containing only virtual currency the VCE holds as custodian. VCEs must be able to separately account for and segregate a customer's virtual currencies from the VCE's corporate assets—both on the blockchain and in the VCE's books and records. – VCEs must "structure their custodial arrangement in a manner that preserves the customer's equitable and beneficial interest in the customer's virtual currency." In other words, the customer owns the assets in custody, and VCEs may not use the assets, for example, to secure a loan or extend credit. – VCEs must request approval from NYDFS if they want to utilize a third party to provide custody services. – VCEs must clearly disclose to their customers the terms associated with their services, and obtain an acknowledgment of receipt from the customer before entering into an initial transaction. The	January 23, 2023	Companies operating in the virtual currency space, particularly companies offering custody services for customer assets, should first and foremost consider whether they are required to register with NYDFS. If so, they should carefully review the Guidance to ensure that they satisfy its requirements. Even if virtual currency companies are not subject to the Guidance, however, they should review their policies and procedures regarding customer assets. There have been several high-profile bankruptcies in recent months, including situations where ownership of customer assets held in company-owned accounts has become a key issue due, in part, to alleged widespread commingling and mismanagement of customer assets. Given the resulting government and public interest in these issues, companies operating in this space should prepare for additional and/or similar legislation or guidance.	Guidance on Custodial Structures for Customer Protection in the Event of Insolvency Superintendent Adrienne A. Harris Releases Consumer Protection Guidance in the Event of Virtual Currency Insolvency

Immediate impact

Legal risk	When?	What's next?	Supporting information
disclosure must clearly state that the parties intend to enter into a custodial relationship (and not a debtor-creditor relationship), and explain how the VCE segregates assets, how it may use the assets in its custody, and the property interest the customer retains in the assets.			
FinCEN flagged the risk of Russian elites investing in US commercial real estate. FinCEN issued an alert highlighting the evasion risks associated with the potential involvement of sanctioned Russian elites and their proxies in the commercial real estate (CRE) sector. The CRE sector is vulnerable to sanctions evasion because highly complex financing methods and opaque ownership structures, which are commonly used in legitimate transactions, may be used to conceal sanctioned persons' interests. The alert identifies several red flags and typologies that could indicate sanctioned Russian elites are utilizing CRE to evade sanctions, including: – use of pooled investment vehicles, including offshore funds, or otherwise involving parties in multiple jurisdictions in which sanctioned investors have reduced their holdings to avoid customer due diligence and beneficial ownership protocols; – use of shell companies and trusts, including for beneficial owners in multiple jurisdictions, used to conceal ownership in a CRE property; – use of relatives, friends, or business associates to establish legal entities to invest in CRE projects; – evasive answers to questions about beneficial owners;	January 25, 2023	Financial institutions should heed FinCEN's warning and apply a risk-based approach to address the threat of potential sanctions evasion by sanctioned Russian elites and their proxies via CRE investment.	FinCEN Alert on Potential U.S. Commercial Real Estate Investments by Sanctioned Russian Elites, Oligarchs, and Their Proxies (January 25, 2023) FinCEN Warns Of Sanctioned Russians In Commercial Realty (January 25, 2023)

Immediate impact

Legal risk	When?	What's next?	Supporting information
– involvement of multiple legal entities with slight name variations and ties to sanctioned Russian elites and their proxies; – ownership structures without a clear business purpose and/or investment outside normal business operations; – transfers of assets to proxies shortly after certain events, such as an arrest or an OFAC designation; and – revised ownership disclosures in which sanctioned individuals or politically-exposed persons have reduced their ownership below certain thresholds.			

Immediate impact

FinCEN issued the Notice of Proposed Rulemaking on access to and protection of beneficial ownership information. On December 15, 2022, FinCEN issued the anticipated Notice of Proposed Rulemaking (NPRM) regarding the second of three rules necessary to implement the Corporate Transparency Act (CTA) provisions requiring submission and use of beneficial ownership information (BOI). The NPRM follows the final BOI reporting rule issued by FinCEN on September 30, 2022, which requires companies created or incorporated in and/or registered to conduct business in the United States to provide information about their beneficial owners to FinCEN if they do not fall within one of 23 enumerated exemptions. The NPRM's proposed regulations, when enacted, will establish who can access BOI reported to FinCEN when the CTA takes effect, prescribe required safeguards to ensure BOI is secure and suitably protected, and establish guidelines for when and how BOI may be used, and when reporting companies may obtain and use FinCEN identifiers. Under the proposed regulations, financial institutions, among other entities, may request BOI, but only where necessary for the institution to comply with customer due diligence requirements, and the reporting company to which the information relates must consent to the disclosure. Federal, state, and tribal government agencies also may request BOI under certain circumstances. Agencies may also request information already received by an institution they regulate, to ensure compliance with customer due diligence requirements. For example, the US Department of the Treasury (Treasury) would be granted greater access to beneficial ownership information, making it available to any Department employee or officer whose duties require the information's inspection or disclosure, or more generally, for tax administration.	February 14, 2023 January 1, 2024	Financial institutions should considering submitting comments to FinCEN before the comment period for the NPRM closes on February 14, 2023. They also should be on the lookout for the anticipated proposed rule that will revise FinCEN's 2016 customer due diligence rule in light of the BOI reporting requirements. In addition, if they have not already done so, companies should determine whether they are subject to the CTA's beneficial ownership reporting requirements, which take effect on January 1, 2024.	FinCEN Issues Notice of Proposed Rulemaking Regarding Access to Beneficial Ownership Information and Related Safeguards Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities Pulling back the curtain: FinCEN finalizes ultimate beneficial owner reporting rule - Eversheds Sutherland (eversheds-sutherland.com) Federal Register :: Beneficial Ownership Information Reporting Requirements

Immediate impact

Legal risk	When?	What's next?	Supporting information
The NPRM outlines protocols for securely storing BOI received by an authorized entity under the proposed rules, including, among other things, storing BOI in a system only authorized personnel may access for authorized purposes. Receiving entities also be required to maintain key information about specific BOI searches or requests for FinCEN's review. The NPRM proposes both civil and criminal penalties for noncompliance, as outlined by the CTA, as well as suspension from access to FinCEN's BOI information system for unauthorized use.			
The SEC implemented final rule mandating a cooling-off period. On December 14, 2022, the Securities and Exchange Commission (SEC) unanimously adopted amendments to Rule 10b5-1, which prohibits the purchase or sale of securities on the basis of material nonpublic information (MNPI). The Rule provides an affirmative defense to an insider trading charge if a company insider can show that they entered into a binding contract or adopted a plan to purchase or sell the securities at issue (10b5-1 plans). Prior to the amendments, company insiders could rely on the affirmative defense even if there was no "cooling-off period" (i.e., an established amount of time between adoption of a 10b5-1 plan and when trading can begin). The amended rule mandates a cooling-off period of up to 120 days for trading under 10b5-1 plans. It also requires company insiders to make certain certifications about their knowledge of MNPI and good faith, changes how 10b5-1 plans can be used, and imposes new disclosure requirements for registrants and individuals.	February 27, 2023	The Rule will come into effect on February 27, 2023. In the meantime, companies should consider reviewing the language in their 10b5-1 plan template and related policies and procedures to ensure that they are in compliance with the amended rule. Companies also should review the additional disclosure requirements.	Final Rule: Insider Trading Arrangements and Related Disclosures SEC Adopts Amendments to Modernize Rule 10b5-1 Insider Trading Plans and Related Disclosures Fact Sheet: Rule 10b5-1: Insider Trading Arrangements and Related Disclosures SEC amends Rule 10b5-1 and revamps affirmative defense to insider trading charges - Eversheds Sutherland
SEC re-proposes rule on conflicts of interest in the asset-backed securities market. The SEC has issued (and re-proposed) a rule on the Prohibition Against Conflicts of Interest in Certain	March 27, 2023	Financial institutions can submit comments to weigh in on the re-proposed rule until at least March 27, 2023.	SEC.gov | SEC Proposes Rule to Prohibit Conflicts of Interest in Certain Securitizations

Immediate impact

Legal risk	When?	What's next?	Supporting information
Securitizations. The SEC initially proposed this rule in September 2011 pursuant to Section 621 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)—but the rule was never finalized. The proposed rule would prohibit securitization participants (e.g., underwriters, placement agents, initial purchasers, or sponsors of an asset-backed security) from engaging in transactions that involve or result in certain material conflicts of interest. For example, short sales of an asset-backed security or the purchase of a credit default swap that entitles the securitization participant to receive payments if there are specified credit events would be prohibited.			Fact Sheet: Prohibition Against Conflicts of Interest in Certain Securitizations Proposed rule: Prohibition Against Conflicts of Interest in Certain Securitizations Federal Register :: Prohibition Against Conflicts of Interest in Certain Securitization (September 2011)

Immediate impact

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Short term impact

Legal risk	When?	What's next?	Supporting information
The US Supreme Court heard oral argument in Foreign Bank and Financial Accounts penalty case. On November 2, 2022, the Supreme Court heard oral argument in *Bittner v. United States*, the outcome of which will affect calculation of penalties for non-willful failures to disclose foreign bank accounts on Reports of Foreign Bank and Financial Accounts (FBARs). Subject to certain conditions, US persons, including citizens, residents, and certain corporate entities, must file an FBAR to report financial interests in (or signature or other authority over) financial accounts located outside of the United States if the aggregate value of all foreign financial accounts exceeds $10,000 at any time during the reporting calendar year—irrespective of whether the account produced taxable income. The Bank Secrecy Act provides for a $10,000 penalty per violation for non-willful violations. In *Bittner*, the Internal Revenue Service (IRS) imposed a penalty of $2.72 million on a US citizen who failed to file FBARs for several years, arguing that the maximum penalty is applied per unreported foreign account, per year. The Fifth Circuit affirmed this position, leading to a circuit split. The Ninth Circuit previously held that the penalty applies only per year, which would result in significantly lower penalties. The Supreme Court is now considering the issue.	Ongoing	Foreign bank account holders should monitor the Supreme Court's decision in *Bittner*, as it will have significant implications for calculation of penalties for non-willful failures to file FBARs.	Report of Foreign Bank and Financial Accounts (FBAR) | Internal Revenue Service (irs.gov) Oral Argument Audio & Transcript Bittner v. U.S. Docket

Short term impact

Legal risk	When?	What's next?	Supporting information
Congress proposed bipartisan legislation that would expand the scope of the Bank Secrecy Act with respect to digital assets. On December 14, 2022, US Senators Elizabeth Warren (D-MA) and Roger Marshall (R-KS) introduced the Digital Asset Anti-Money Laundering Act of 2022, which is intended to "mitigate the risks that crypto currency and other digital assets pose to the United States' national security by closing loopholes in the existing anti-money laundering and countering of the financing of terrorism (AML/CFT) framework and bring the digital asset ecosystem into greater compliance with the rules that govern the rest of the financial system." The legislation would, among other things, explicitly designate cryptocurrency actors as money service businesses subject to the Bank Secrecy Act and prohibit financial institutions from using anonymity-enhancing technologies and/or handling digital assets anonymized using such technologies. The proposed legislation appears to respond to the White House's September 2022 Fact Sheet on the "First-Ever Comprehensive Framework for Responsible Development of Digital Assets," which urged Congress to amend the Bank Secrecy Act to broaden the applicability of current unlicensed money transmitting laws to digital asset service providers.	Ongoing	While it is unclear whether this legislation will gain traction, financial institutions should continue to monitor this and similar legislation that could significantly extend their Bank Secrecy Act and other anti-money laundering obligations with respect to digital assets.	Digital Asset Anti-Money Laundering Act of 2022 Press Release, Elizabeth Warren, Warren, Marshall Introduce Bipartisan Legislation to Crack Down on Cryptocurrency Money Laundering, Financing of Terrorists and Rogue Nations (Dec. 14, 2022) FACT SHEET: White House Releases First-Ever Comprehensive Framework for Responsible Development of Digital Assets | The White House

Short term impact

48410579.3

Legal risk	When?	What's next?	Supporting information
Senator Wyden urged increased IRS enforcement against offshore tax evasion and FATCA compliance. US Senate Finance Committee Chair Ron Wyden (D-OR) wrote a letter urging the US Department of Treasury and IRS to step up its enforcement of the Foreign Account Tax Compliance Act (FATCA). In August 2022, the Finance Committee released a report detailing significant abuse of the "shell bank loophole" in FATCA, which exempts offshore financial institutions from the requirement to report funds received from US citizens to the IRS. According to the report, the loophole allows shell companies to turn into shell banks, and self-certify that they are reporting income held in offshore accounts to the IRS. The foreign banks are then exempt from complying with basic FATCA requirements to identify and report US accounts. Senator Wyden's letter stated that he expects Treasury and the IRS to use the recent funding provided by the Inflation Reduction Act to "crack down" on the shell bank loophole, noting the need to enhance monitoring of offshore entities and increase enforcement action against foreign banks and intermediaries "who help conceal income." Finally, the letter urged the IRS to develop a more robust whistleblower program as part of its enhanced efforts in this regard.	Ongoing	The IRS may engage in rulemaking and increase enforcement involving the identified shell bank loophole.	Wyden Letter to Secretary Yellen and Fmr. Commissioner Rettig Senate Finance Committee Report
IRS-CI released FY 2022 Annual Report, revealing enforcement focus on tax fraud, money laundering, cryptocurrency, and international cooperation. On November 3, 2022, the IRS Criminal Investigation Division (IRS-CI) released its FY 2022 Annual report, providing insight into its enforcement priorities.	Ongoing	Companies should review these criminal enforcement priorities and devote resources to reviewing these areas.	IRS-CI FY 2022 Annual Report IRS Press Release on Annual Report IRS-CI 2022 Top 10 Case Countdown

Legal risk	When?	What's next?	Supporting information
– Between October 1, 2021 and September 30, 2022, IRS-CI identified over $31 billion from tax and financial crimes enforcement actions and secured a 90% conviction rate. – IRS-CI focused on financial crimes, dedicating 15% of its time investigating money laundering and other fraud crimes. IRS-CI will continue to leverage relationships with its international and domestic partners (e.g., FinCEN) to enforce the Bank Secrecy Act and other anti-money laundering laws. – IRS-CI also is focused on criminal cryptocurrency and digital asset cases, and it secured the largest single financial seizure in government history from a cryptocurrency laundering case. – IRS-CI is committed to international partnerships and notes the importance of its collaboration with foreign governments, international non-governmental organizations, and its twelve attaché posts abroad. – The agency will continue to concentrate on "high-income taxpayers who have a filing requirement" and on its "bread and butter"—tax fraud and evasion.			

On the horizon

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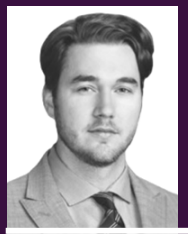

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