

Horizon Scanner
Financial Crime – US

May 2023



Immediate impact



Short term impact



On the horizon



Legal risk	When?	What's next?	Supporting information
<p>The Department of Justice issues a nationwide voluntary self-disclosure policy for US Attorney's Offices.</p> <p>In September 2022, Deputy Attorney General Lisa O. Monaco directed all Department of Justice (DOJ) components to develop formal written policies clearly outlining expectations for voluntary self-disclosure (VSD), including the benefits companies can expect to receive if they satisfy the standards. In response, on February 22, 2023, the DOJ announced a nationwide VSD policy applicable to all US Attorney's Offices (USAOs).</p> <p>Under the USAO VSD policy, a company qualifies for VSD credit if:</p> <ol style="list-style-type: none"> (1) the company "voluntarily" self-discloses the misconduct (e.g., there is no pre-existing obligation to disclose or a whistleblower report); (2) the misconduct is disclosed before imminent threat of public disclosure or government investigation, and "within a reasonably prompt time after the company becom[es] aware of the misconduct"; and (3) the disclosure includes "all relevant facts concerning the misconduct that are known to the company at the time of the disclosure." If a company voluntarily self-discloses and agrees to pay disgorgement, forfeiture, and restitution, the USAO will not impose a criminal penalty greater than 50% below the low end of the US Sentencing Guidelines (USSG) fine range, and may choose not to impose any criminal penalties. <p>In addition, the USAO will not seek a guilty plea if a company voluntarily self-discloses pursuant to the policy, fully cooperates, and timely and appropriately remediates, unless there are aggravating factors present. If a guilty plea is nonetheless required due to an aggravating factor, the company may still benefit</p>	<p>February 22, 2023</p>	<p>While the incentives outlined in the USAO VSD policy have always been available, this is the first time the USAO has detailed the specific percentage of available fine reductions and other benefits of VSD. Companies considering whether to self-disclose misconduct or seeking to maximize VSD credit from the USAO should carefully review the new policy. Companies also should consider whether other VSD policies could apply to the misconduct before self-reporting.</p>	<p>United States Attorneys' Offices Voluntary Self-Disclosure Policy</p> <p>New nationwide policy marks latest DOJ effort to incentivize voluntary self-disclosure - Eversheds Sutherland (eversheds-sutherland.com)</p> <p>Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement</p>



Legal risk	When?	What's next?	Supporting information
<p>under the USAO VSD policy, including at least 50% and up to a 75% reduction off the low end of the USSG fine range.</p>			
<p>Supreme Court resolves circuit split on calculation of penalties for Foreign Bank and Financial Accounts violations.</p> <p>Subject to certain conditions, the Bank Secrecy Act (BSA) requires US persons, including citizens, residents, and certain corporate entities, to file Reports of Foreign Bank and Financial Accounts (FBARs), and report their 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 BSA provides for a \$10,000 penalty for each non-wilful violation.</p> <p>In <i>Bittner v. United States</i>, the Internal Revenue Service (IRS) imposed a penalty of \$2.72 million on a US citizen who failed to file FBARs for several years. According to the IRS, the maximum penalty for non-wilful violations should be applied per-account. The Fifth Circuit affirmed the IRS's position, which created a circuit split, as the Ninth Circuit had previously found that the penalty applies on a per-filing basis, irrespective of the number of accounts.</p> <p>On February 28, 2023, the Supreme Court resolved the circuit split by reversing the Fifth Circuit's decision in <i>Bittner</i>. The Court held that penalties for non-wilful failures to disclose foreign bank accounts on FBARs should be imposed on a per-filing—and not on a per-account—basis. As discussed in the decision, the BSA treats failure to file a compliant FBAR as a single violation, not a “cascade” of penalties imposed on a per-account basis.</p>	<p>February 28, 2023</p>	<p>While taxpayers face significantly lower penalties for non-wilful FBAR violations after <i>Bittner</i>, they should still be diligent in ensuring compliance with FBAR filing requirements. Regulators' ability to seek larger penalties for certain wilful violations was unaffected by the Supreme Court decision, as the BSA expressly provides for per-account penalties for such violations.</p>	<p>Report of Foreign Bank and Financial Accounts (FBAR) Internal Revenue Service (irs.gov)</p> <p>Bittner v. U.S. decision</p>



Legal risk	When?	What's next?	Supporting information
<p>The DOJ announces updated guidance and a pilot program regarding compensation and clawback policies.</p> <p>In March 2023, the DOJ announced changes to how it will consider a company's compensation policies when evaluating a corporate compliance program and determining an appropriate criminal resolution.</p> <p>First, the DOJ announced revisions to the "Evaluation of Corporate Compliance Programs" (ECCP), which provides guidance to prosecutors on how to evaluate a company's corporate compliance program when determining whether an enforcement action is warranted. The updated ECCP instructs prosecutors to "consider more closely compensation structures and consequence management" when evaluating compliance programs. Companies whose policies include clawback provisions for corporate malfeasance will be looked upon favourably when investigated for misconduct.</p> <p>Relatedly, the Criminal Division is launching a three-year pilot program, beginning on March 15, 2023, to encourage companies to clawback compensation following misconduct. As part of the pilot program, all companies that enter into criminal resolutions will need to add compliance-related criteria to their compensation and bonus processes. In addition, DOJ prosecutors are directed to reduce fines if a company:</p> <ol style="list-style-type: none"> (1) fully cooperates and timely and appropriately remediates; (2) demonstrates it has implemented a program to clawback compensation from employees engaged in wrongdoing; and (3) has in good faith begun a process to recoup the compensation during the resolution process. If companies meet these criteria, prosecutors are directed to reduce the fine by 100% of the amount recouped from culpable employees. Even if 	<p>March 15, 2023</p>	<p>Companies should review and consider including compliance-related metrics in their compensation and bonus processes. In addition, companies should consider including clawback provisions in their policies that provide for recoupment of compensation if there is corporate misconduct. If a company identifies misconduct, it should consider taking action to recoup compensation from the individuals involved as appropriate.</p>	<p>Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime OPA Department of Justice</p> <p>Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks at the ABA's 38th Annual National Institute on White Collar Crime</p> <p>Department of Justice – Evaluation of Corporate Compliance Programs (Updated March 2023)</p> <p>The Criminal Divisions Pilot Program Regarding Compensation Incentives and Clawbacks</p>



Legal risk	When?	What's next?	Supporting information
<p>unsuccessful, prosecutors will have the discretion to reduce fines by up to 25% of the amount the company attempted to clawback in good faith.</p>			
<p>The DOJ announces new guidance for the use of personal devices and messaging applications.</p> <p>On March 3, 2023, Assistant Attorney General Kenneth A. Polite, Jr. (AAG Polite) announced that the ECCP now includes guidelines for the evaluation of a corporation's "use of personal devices, communications platforms, and messaging applications, including ephemeral messaging applications." The ECCP notes that a company's policies governing such devices and applications should be tailored to its risk profile and business needs, and should ensure that any business-related electronic data is preserved and accessible by the company.</p> <p>The ECCP directs prosecutors to consider the following three factors when evaluating a company's practices:</p> <ol style="list-style-type: none"> (1) Communication Channels - including (among other things) the particular communication channels employees are allowed to use, whether practices vary by jurisdiction, mechanisms the company utilizes to preserve communications, and whether employees have access to preservation and deletion settings; (2) The Policy Environment - including (among other things) what procedures are in place to ensure communications and data are preserved, the relevant laws and policies governing the company's ability to monitor and access business-related communications, and whether the company has a "bring your own device" policy; and (3) Risk Management - including (among other things) the consequences for employees who do not comply with the company's policies or refuse 	<p>March 2023</p>	<p>Companies should review their compliance programs to ensure that their policies and procedures include appropriate controls around personal and ephemeral messaging, and preserve all business-related communications.</p>	<p>Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks at the ABA's 38th Annual National Institute on White Collar Crime</p> <p>Department of Justice – Evaluation of Corporate Compliance Programs (Updated March 2023)</p>



Legal risk	When?	What's next?	Supporting information
<p>to provide the company with access to communications, and whether the use of ephemeral messaging platforms has impaired the company's compliance program, or its ability to conduct internal investigations or respond to requests from prosecutors, civil enforcement, or regulatory agencies.</p> <p>AAG Polite warned that a company's approach "may very well affect the offer it receives to resolve criminal liability."</p>			
<p>OFAC fines financial institution \$30 million for violations stemming from a predecessor entity's third party relationship.</p> <p>On March 30, 2023, the Office of Foreign Assets Control (OFAC) ordered a global financial institution to pay \$30 million in civil penalties for violating US sanctions against Iran, Sudan, and Syria. In 2008, the global financial institution acquired an entity that had created a trade insourcing software platform for a European bank, which then used the software to engage in trade-finance transactions with US-sanctioned jurisdictions and persons.</p> <p>According to the OFAC enforcement release, the financial institution knew or should have known that the software was being used to violate US sanctions, in part because after the acquisition, personnel raised sanctions concerns about the inherited trade insourcing relationships on several occasions. Despite red flags, however, the conduct continued until 2015. OFAC considered the financial institution's failure to address those internal reports as an aggravating factor when determining the appropriate civil penalty under OFAC's Economic Sanctions Enforcement Guidelines.</p>	<p>March 30, 2023</p>	<p>Among other compliance considerations, OFAC noted that this enforcement action showcases the risks that can arise if "employees pursue new opportunities or the preservation of existing business relationships without proper oversight" and the importance of oversight across all business units—even if they are small compared to the larger organization. In addition, it underscores the importance of (i) conducting due diligence regarding potential sanctions risks during mergers and acquisitions, and (ii) thoroughly and promptly investigating and addressing sanctions compliance concerns that are raised internally.</p>	<p>OFAC Settles with Wells Fargo Bank, N.A. for \$30,000,000 Related to Apparent Violations of Three Sanctions Programs (March 30, 2023)</p>



Legal risk	When?	What's next?	Supporting information
<p>OFAC fines money services business for inadequate customer due diligence.</p> <p>On March 31, 2023, OFAC ordered a California-based money services business to pay \$72,230.32 in civil penalties for failing to conduct adequate due diligence on its customers. The company operates a global multi-asset digital trading platform that enables customers to hold or transact in traditional and virtual currencies or commodities to conduct foreign exchange and cross-border remittances. According to the OFAC enforcement release, the company and its affiliates did not adequately screen customer information during onboarding, which resulted in the financial institution maintaining accounts and processing transactions for customers (i) located in Iran or Cuba or (ii) Government of Venezuela employees.</p> <p>For example, customers self-selected addresses in non-sanctioned countries in drop-down menus, but provided additional information in the free text or identification documentation suggesting that they were located in sanctioned jurisdictions. Despite these and other red flags that should have alerted the company that it may have been processing payments for sanctioned persons, the company did not conduct further due diligence or screening.</p>	<p>March 31, 2023</p>	<p>OFAC emphasized that this enforcement action highlights the need for financial institutions to maintain “robust controls to screen information provided by customers to identify sanctions risks” and “consider ways to address the potential for customers to circumvent such controls.”</p>	<p>OFAC Settles with Uphold HQ Inc. for \$72,230.32 Related to Apparent Violations of Multiple Sanctions Programs (March 31, 2023)</p>
<p>IRS announces enforcement priorities in its Strategic Operating Plan.</p> <p>On April 6, 2023, the IRS released its Strategic Operating Plan (SOP) outlining the agency’s plans to leverage the historic \$80 billion funding increase for the agency provided by last year’s Inflation Reduction Act. According to the SOP, one objective is “expanded enforcement” against taxpayers with “complex tax filings and high-dollar noncompliance” in order “to address the tax gap.” The SOP notes that enforcement efforts will focus on complex partnership structures,</p>	<p>April 6, 2023</p>	<p>With expanded enforcement on the horizon, companies and taxpayers, particularly those that fall within the categories identified by the IRS in the SOP, should take this opportunity to verify that they are complying with their tax obligations.</p>	<p>Remarks by IRS Commissioner Danny Werfel</p> <p>IRS Inflation Reduction Act Strategic Operating Plan</p>



Legal risk	When?	What's next?	Supporting information
large corporations, and high-income and high-wealth individuals. The IRS also will prioritize customer service, technological and data improvements, and employing a "highly-skilled, diverse workforce."			





Legal risk	When?	What's next?	Supporting information
<p>US Government interagency initiative issues Compliance Note to address Russian sanctions evasion.</p> <p>On March 2, 2023, OFAC, the Department of Commerce's Bureau of Industry and Security (BIS), and the Department of Justice (DOJ) issued a Tri-Seal Compliance Note about the three-department interagency initiative's imposition and enforcement of sanctions and export controls of an "unprecedented scope and scale."</p> <p>The Compliance Note identified the use of third-party intermediaries, among other mechanisms, to disguise the involvement of sanctioned parties and conceal the identities of Russian end users as one of the most common tactics in Russian sanctions evasion. It also listed a number of red flags that may indicate the illicit use of third-party intermediaries, including the use of corporate vehicles to obscure ownership, source of funds, or countries involved, and (ii) the use of shell companies to conduct international wire transfers, often involving financial institutions in jurisdictions distinct from company registration.</p>	Ongoing	The Tri-Seal Compliance Note stresses the importance of maintaining effective risk-based compliance programs and being vigilant against efforts to circumvent sanctions and export control laws.	Department of Commerce, Department of the Treasury, and Department of Justice Tri-Seal Compliance Notice (March 2, 2023)
<p>Multilateral REPO Task Force issues joint global advisory on Russian sanctions.</p> <p>On March 9, 2023, the Russian Elites, Proxies, and Oligarchs (REPO) Task Force, a multilateral effort comprised of Australia, Canada, France, Germany, Italy, Japan, the United Kingdom, the United States, and the European Commission, issued an advisory with an update on its information sharing and coordination campaign. According to the advisory, the REPO Task Force members have successfully tracked and targeted sanctioned Russian individuals and</p>	Ongoing	<p>The REPO Task Force advisory asked private sector partners to closely monitor for and review its advisories and publications, and sets forth six recommendations:</p> <ul style="list-style-type: none"> • Follow the Financial Action Task Force recommendations as implemented in applicable jurisdictions; • Comply with AML/CFT laws and regulations and reporting requirements — including those related to suspicious transaction reports; 	Global Advisory on Russian Sanctions Evasion Issued Jointly by the Multilateral REPO Task Force (March 9, 2023)



Legal risk	When?	What's next?	Supporting information
<p>their assets. However, some sanctioned targets and their financial networks have managed to evade sanctions and continue to access the international financial system.</p> <p>In furtherance of its objective to collaborate with the private sector, the advisory identified sanctions evasion typologies, including:</p> <ol style="list-style-type: none"> (1) transferring beneficial ownership of entities and property to family members and others who hold the assets on their behalf; (2) laundering illicit proceeds (e.g., those derived from sanctions evasion) through real estate purchases; (3) using complex ownership structures and shell companies to evade detection; and (4) using "enablers," such as lawyers and accountants, to interact with the international financial system on their behalf. 		<ul style="list-style-type: none"> • Participate in public-private partnerships and contribute data and insight indicative of Russian sanctions evasion; • Utilize available information sharing protocols to leverage others' insights; • Update internal risk assessments to mitigate evolving risks; and • Seek educational opportunities and engagements to better understand sanctions evasion risks. 	





Legal risk	When?	What's next?	Supporting information
<p>Deputy Attorney General Monaco announces expansion of DOJ National Security Division and focus on sanctions.</p> <p>On March 2, 2023, Deputy Attorney General Lisa O. Monaco ("DAG Monaco") gave a speech to the American Bar Association's National Institute on White Collar Crime on the DOJ's progress since it launched the Corporate Crime Advisory Group in October 2021. In addition to emphasizing the DOJ's renewed focus on voluntary disclosure, cooperation, and remediation, she noted that in today's "geopolitical environment, corporate crime and national security are overlapping to a degree never seen before, and the department is retooling to meet the challenge." According to DAG Monaco, "sanctions are the new FCPA."</p> <p>To confront the rising rate of "corporate investigations that involve sanctions evasion" and other issues of national security, DAG Monaco announced the DOJ will be adding 25 new prosecutors to its National Security Division, including the Division's first-ever Chief Counsel for Corporate Enforcement. In addition, the Division will issue joint advisory statements with the US Department of Commerce and Department of the Treasury to inform the private sector about enforcement trends, similar to the FCPA guidance jointly issued by the DOJ and the Securities and Exchange Commission. DAG Monaco also announced that the DOJ is making a "substantial investment" in the Bank Integrity Unit, which "has a significant track record of prosecuting global financial institutions for sanctions violations."</p>	<p>Ongoing</p>	<p>The announcement likely portends increased enforcement of those engaged in or facilitating sanctions evasion or other crimes implicating national security. Companies—especially global financial institutions—should proactively review their compliance programs to ensure that their policies and controls effectively deter and can identify and mitigate such violations.</p>	<p>Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime</p>
<p>FinCEN publishes its first set of guidance for reporting beneficial ownership information.</p> <p>On March 24, 2023, the Financial Crimes Enforcement Network (FinCEN) released its first set</p>	<p>January 1, 2024</p>	<p>Companies subject to the new BOI reporting requirements should review the guidance before the BOI reporting requirements take effect on January 1, 2024. In addition, reporting companies should regularly check the FinCEN BOI</p>	<p>FinCEN Issues Initial Beneficial Ownership Information Reporting Guidance</p>



Legal risk	When?	What's next?	Supporting information
<p>of guidance related to the Corporate Transparency Act's beneficial ownership information (BOI) reporting requirements. The BOI requirements, which take effect on January 1, 2024, will require certain companies incorporated and/or registered to do business in the United States to submit reports identifying their ultimate beneficial owners. The guidance includes frequently asked questions, one pagers on key filing dates and questions, and informational videos about the BOI requirements. According to Himamauli Das, Acting Director of FinCEN, the agency is "committed to making this transparency process as simple as possible, particularly for small businesses who may have never heard of or interacted with FinCEN before."</p>		<p>page (www.fincen.gov/boi) for additional guidance.</p>	<p>Beneficial Ownership Information Reporting Webpage</p>





For more information, please contact:



Sarah Paul
*Partner – Co-Global Head of
Corporate Crime & Investigations*

T: +1 (212) 301 6587
sarahpaul@
eversheds-sutherland.com



Andrea Gordon
Counsel

T: +1 (202) 383 0955
andragordon@
eversheds-sutherland.com



Dane N. Sowers
Associate

T: +1 (713) 425 3531
danesowers@
eversheds-sutherland.com



Jessica Rodgers
Associate

T: +1 (202) 383 0152
jessicarodgers@
eversheds-sutherland.com



Lamine Hardaway
Senior Attorney

T: +1 (202) 383 0272
laminehardaway@
eversheds-sutherland.com

Service Excellence

Driving service excellence
through well-designed,
tech-enabled legal
service delivery



© Eversheds Sutherland 2022. All rights reserved.
Eversheds Sutherland (International) LLP and Eversheds Sutherland (US) LLP are part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.

This document is intended as a general overview and discussion of the subjects dealt with. The information provided here was accurate as of the day it was created; however, the law may have changed since that date. This information is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. The authors are not responsible for any actions taken or not taken on the basis of this publication. Where references or links are made to external publications or websites, the views expressed are those of the authors of those publications or websites which are not necessarily those of the authors of this document, who accept no responsibility for the contents or accuracy of those publications or websites.