

## New U.S. Sanctions Penalties Spotlight Sanctions and Export Controls Scrutiny of False and Incomplete Statements

August 14, 2019

### Key Points

- On August 8, OFAC issued Findings of Violation to two U.S. companies in relation to administrative subpoenas with follow-up responses deemed by OFAC to be inaccurate or incomplete.
- These recent actions build upon a historical agency focus and recent upswing in trade-related enforcement activity involving false, misleading or incomplete statements in official government filings and voluntary self-disclosures. This type of enforcement activity has been undertaken by not only OFAC in the enforcement of U.S. sanctions regimes, but also by DDTC and BIS in the enforcement of U.S. export control laws.
- To mitigate the risk of enforcement action, companies should develop detailed and stringent internal investigation procedures; ensure material statements are accurate and complete, such that material information is not omitted in official filings; use standardized tools for recording information to substantiate key statements and assumptions in government submissions; and work with counsel to mitigate potential internal conflicts of interest.

### Introduction and Historical Context

On August 8, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) issued Findings of Violation to two U.S. companies, DNI Express Shipping Company and Southern Cross Aviation, LLC, in relation to administrative subpoenas with follow-up responses deemed by OFAC to be materially inaccurate or incomplete.

These OFAC actions build upon a historical agency focus and recent upswing in trade-related enforcement activity involving false, misleading or incomplete material statements in relation to internal investigations conducted in response to government requests for information or self-disclosures. OFAC has previously taken similar enforcement action, such as in its 2010 settlement with Pinnacle Aircraft Parts, Inc., where Pinnacle agreed to pay OFAC \$225,000 to settle alleged violations related to its failure to provide documents responsive to an administrative subpoena. In that case,

### Contact Information

If you have any questions regarding this alert, or if we can be of any assistance as you navigate the impact of these developments on current or pending engagements with OFAC, DDTC or BIS, please contact your Akin Gump lawyer or:

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Pinnacle had provided over 260 pages of responsive documents but failed to include one relevant email and other responsive documents in good faith reliance on the advice of outside counsel.

There are further examples of criminal and enforcement cases being brought based on the accuracy of statements made to export control and economic sanctions regulators, which is a cautionary development that may factor into not only whether companies should voluntarily disclose violations, but also the level of detail and accuracy included in formal submissions to these regulators.

Some of the largest enforcement actions by Directorate of Defense Trade Controls (DDTC) and the Bureau of Industry and Security (BIS) relate to false statements and omissions of material fact in voluntary or directed disclosures. For example, DDTC's 2007 proposed charging letter preceding the ITT Corporation Consent Agreement alleged willful omissions of material fact in an initial notification of voluntary disclosure and that the company failed to correct those omissions in subsequent, related correspondence with DDTC. Additionally, BIS's 2018 activation of a denial order against Zhongxing Telecommunications Equipment Corporation and ZTE Kangxun Telecommunications Ltd., both of China (collectively, ZTE) based the discovery that ZTE made false statements in letters to BIS regarding the discipline of numerous employees responsible for violations that led to initial proposed charges. ZTE subsequently entered into a superseding settlement agreement with BIS, and BIS lifted the denial order.

The legal basis for these actions has included, but has not been limited to, the following laws and regulations: Section 501.602 of OFAC's Reporting, Procedures and Penalties Regulations (RPPR); Section 127.12(a) and (e) of the International Traffic in Arms Regulations; Section 764.2(g) of the Export Administration Regulations; and 18 U.S.C. § 1001.

#### OFAC Findings of Violation Related to Administrative Subpoenas

The recent Findings of Violation for both DNI and Southern Cross involved violations of Section 501.602 of the RPPR, which relates to reports and documents to be furnished to OFAC on demand and under oath containing "complete information" related to a given act or transaction.

#### DNI

The Finding of Violation for DNI involved an administrative subpoena issued by OFAC to DNI in May 2015, investigating DNI's involvement in facilitating the shipment, supply and sale of farm equipment to Sudan in apparent violation of the now-defunct Sudanese Sanctions Regulations. According to OFAC's [web notice](#), upon reviewing DNI's responses submitted through outside counsel, OFAC determined that several responses were "contradictory, false, materially inaccurate, incomplete, and contained misleading statements." OFAC followed up with DNI's outside counsel by email in July 2016, in part requesting clarification regarding DNI's version of events, its supporting documents and whether DNI understood its obligations under Section 501.602 of the RPPR. Once again, OFAC found DNI's subsequent email response through outside counsel to be "contradictory, false, materially inaccurate, incomplete, and misleading." Additionally, OFAC found that the email response presented new information responsive to the subpoena but not included in the original response.

## Southern Cross

The Finding of Violation for Southern Cross involved two administrative subpoenas issued by OFAC to Southern Cross in 2016. According to its [web notice](#), OFAC issued the first subpoena in June 2016 to investigate Southern Cross's involvement in sales of helicopters destined for Iran through an Iranian businessman who was located in Ecuador. The subpoena directed Southern Cross to submit detailed information and documents related to those or any other dealings with Iran in the last five years. In an email response from the president of Southern Cross to OFAC, the company denied knowing of, or conducting, any business dealings with Iran. However, in a subsequent written response, Southern Cross stated that one of its sales representatives in Ecuador sent technical details to an Ecuadorian group related to a potential sale of helicopters to an Iranian group for operation in Ecuador. As documentation, Southern Cross only provided its internal Export Management Manual. OFAC issued a second administrative subpoena in October 2016, seeking similar information and documentation, particularly related to the potential sale. In its response, Southern Cross submitted email correspondence related to the potential sale between the Ecuadorian representative, the Ecuadorian group and the Iranian businessman who was the subject of the initial inquiry. Southern Cross had not produced these emails in response to the first administrative subpoena.

### Aggravating and Mitigating Factors

In both actions, OFAC considered aggravating factors to be that the companies: (1) demonstrated reckless disregard for sanctions requirements by failing to provide accurate, complete information in subpoena responses; (2) had actual knowledge, or reason to know, of the apparent violations at issue, rendering the responses false, materially inaccurate, materially incomplete and misleading; and (3) as a result of providing false and misleading statements, did not fully cooperate with OFAC's investigation. Additionally, DNI did not correct or amend the statements in response to OFAC's follow-up email. Mitigating factors for both companies included that they were not large businesses and had no prior OFAC sanctions history. An additional mitigating factor for DNI was that it filtered its responses through an outside attorney.

### Ways to Mitigate Risk

Agencies engaged in trade-related enforcement have a long history of focusing upon the completeness and accuracy of filings, both in response to government requests for information and in the course of voluntary self-disclosures. The above recent enforcement cases demonstrate continued government scrutiny of any such filings for false or misleading information and highlight the compliance obligations of companies submitting responsive or self-initiated reports or disclosures. Companies should not underestimate the importance of furnishing the required or requested information to agencies in a manner consistent with the obligation to submit complete, accurate information in the course of government or internal investigations, nor the potential consequences of failing to do so, which range from civil penalties to criminal charges.

To mitigate the risk of an enforcement action related to such responses and disclosures, companies should develop detailed and stringent internal investigation procedures to ensure that any official government submissions are thorough, complete and accurate to the best of the reporting personnel's knowledge and material information is not omitted. Additionally, companies should use standardized tools or

methods for recording information to substantiate key statements and assumptions in government submissions. Finally, working with experienced outside counsel mitigates potential internal conflicts of interest in the course of self-initiated or government investigations.

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