

OFAC 101



U.S. Sanctions Demystified

2011 Firearms Industry

Importer, Exporter, and Manufacturer Conference

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Proud NRA Life Member

Agenda

1. Overview
2. OFAC Sanctions Today
3. OFAC Compliance and Enforcement

1. Overview

Sanctions: What?

- **Sanctions** are legal measures that restrict or prohibit trade and financial transactions with specified targets
- Compare with **embargo**, which historically meant restrictions on outbound trade alone, and derives from the use of naval blockades and other physical measures of force to prevent outbound trade
- And **boycott**, which historically meant restrictions on inbound trade alone
- Terms often used interchangeably today

Sanctions: Why?

- To **compel** the target to **change** its practices
- To **penalize** the target for its practices
- To make a symbolic **political statement** of opposition against such practices
 - To the world community
 - Or perhaps to more narrow constituencies
- To thwart activities that are **illegal or threaten national security**, such as terrorism, drug trafficking, and WMD proliferation
- To **protect assets** from wrongful expropriation

A Very American Form of Diplomacy

- Used since the earliest days of American history, often as a prelude to and in conjunction with armed conflict
- Increasingly used in peacetime to achieve foreign policy and national security goals
- Ideally, sanctions deprive targets of vital resources and isolate them from the international community
- Much debate over their effectiveness and collateral costs

A Terrible Remedy!

“A nation boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. ***It is a terrible remedy.*** It does not cost a life outside the nation boycotted, but it brings pressure upon the nation that, in my judgment, no modern nation could resist.”

President Woodrow Wilson, 1919

A Terrible Remedy?



U.S. sanctions have inspired controversy since their earliest use
(political cartoon ridiculing 1807 Embargo Act)

Going It Alone

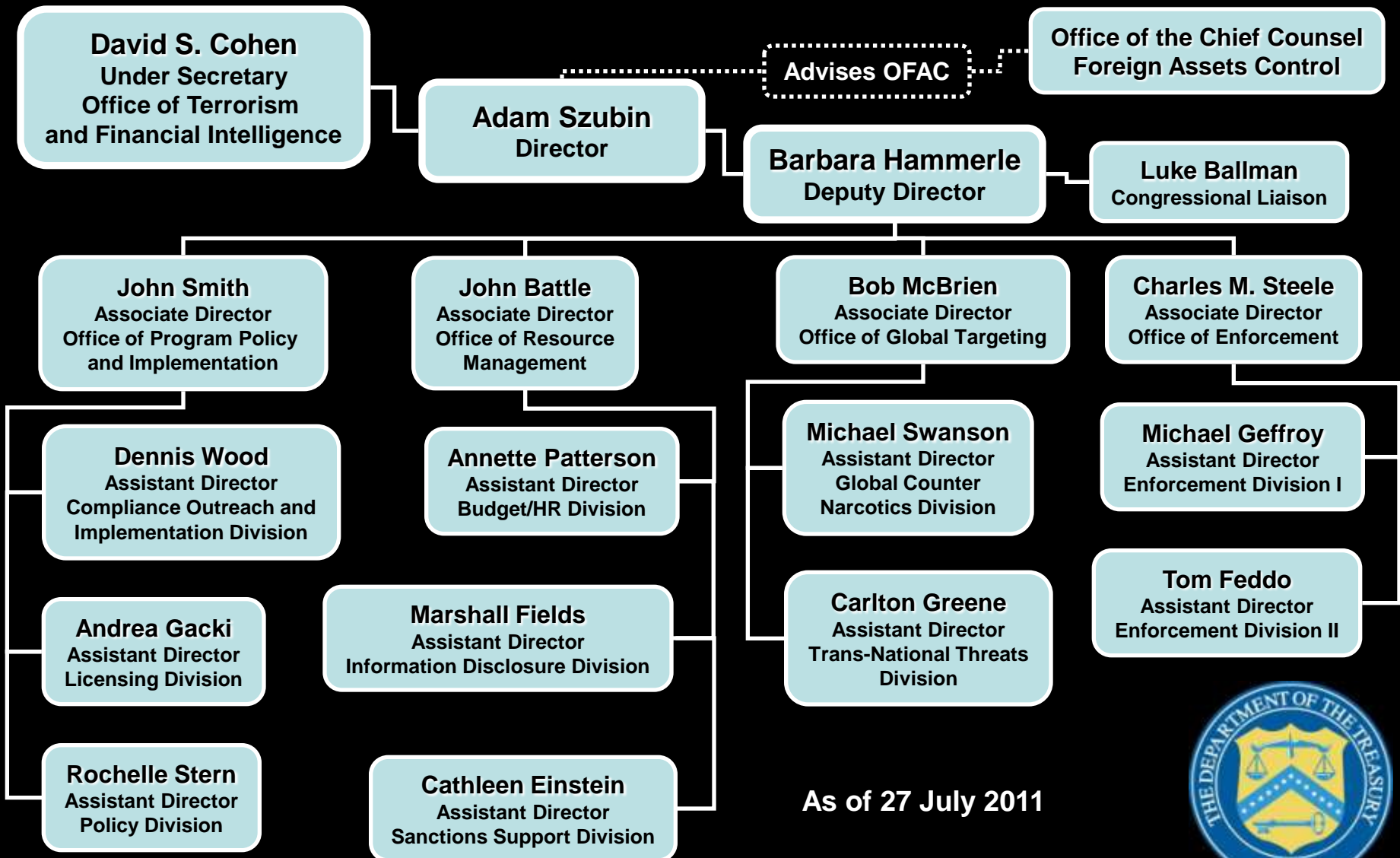
- Most U.S. sanctions are **unilateral**
 - Creates tensions and unintended consequences for allies, and arguably diminishes impact
 - U.S. prominence makes unilateral sanctions difficult to avoid or ignore
 - Detractors argue that anticompetitive impact on friendly business often outweighs the objectives
- U.S. often implements **multilateral** sanctions more strictly (or effectively) than allies
 - U.S. arms embargo against China more comprehensive than EU embargo, though both stem from 1989 Tiananmen Square incident
- **Extraterritorial** reach raises many concerns
 - And has prompted legal countermeasures in some foreign jurisdictions

A Job for the Treasury Department

- Non-Importation Act of 1806 and the Embargo Act of 1807, which preceded the War of 1812
- Civil War-era sanctions against the Confederacy
- **Office of Foreign Funds Control (“FFC”)** established to administer World War II sanctions against Axis
- **FFC became the Office of Foreign Assets Control (“OFAC”)** in 1950 following Chinese entry into North Korea
- **OFAC** came into full bloom in the 1990s, which at least one foreign policy observer called the “sanctions decade”

2. OFAC Sanctions Today

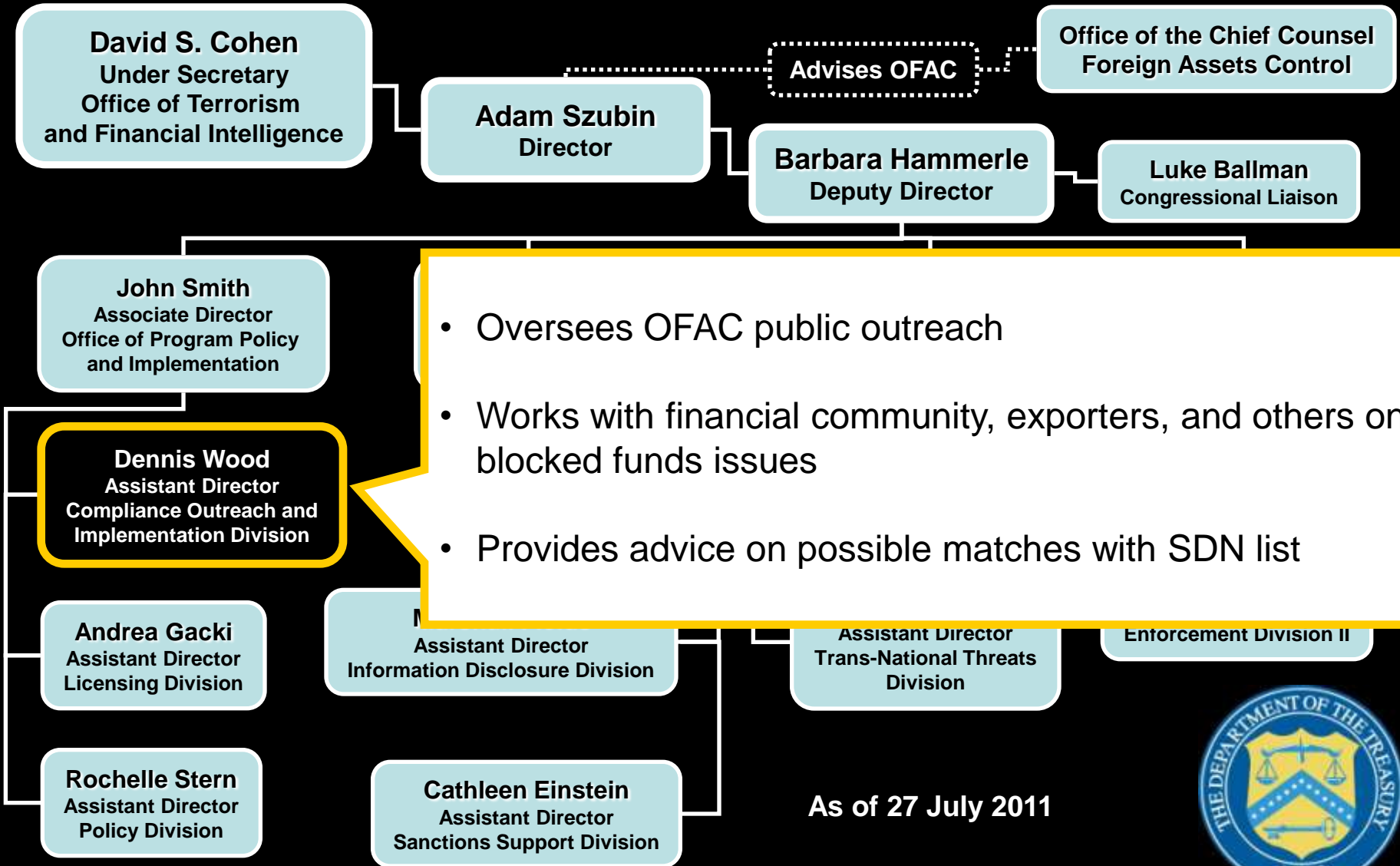
OFAC Organization



As of 27 July 2011



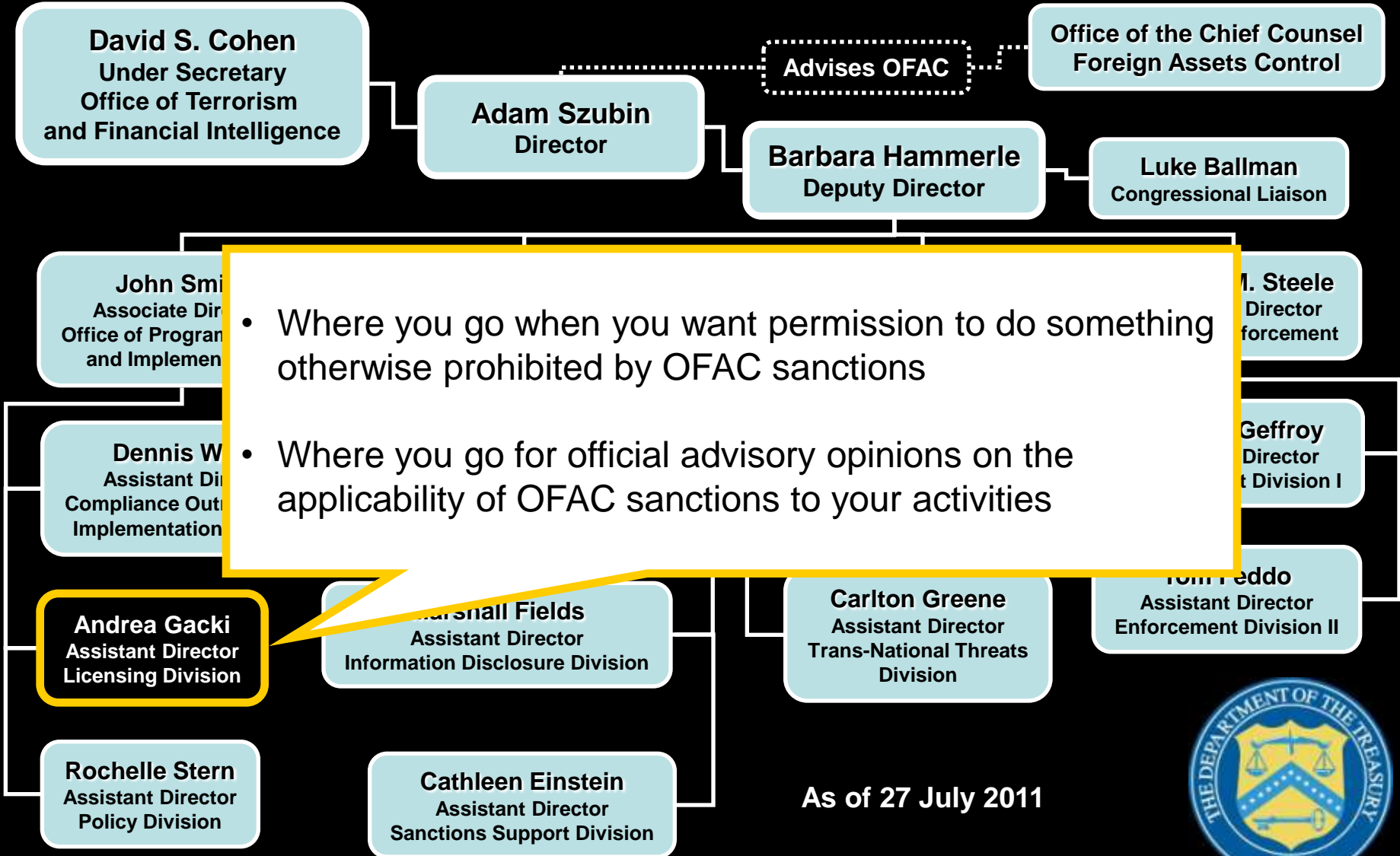
OFAC Compliance



As of 27 July 2011



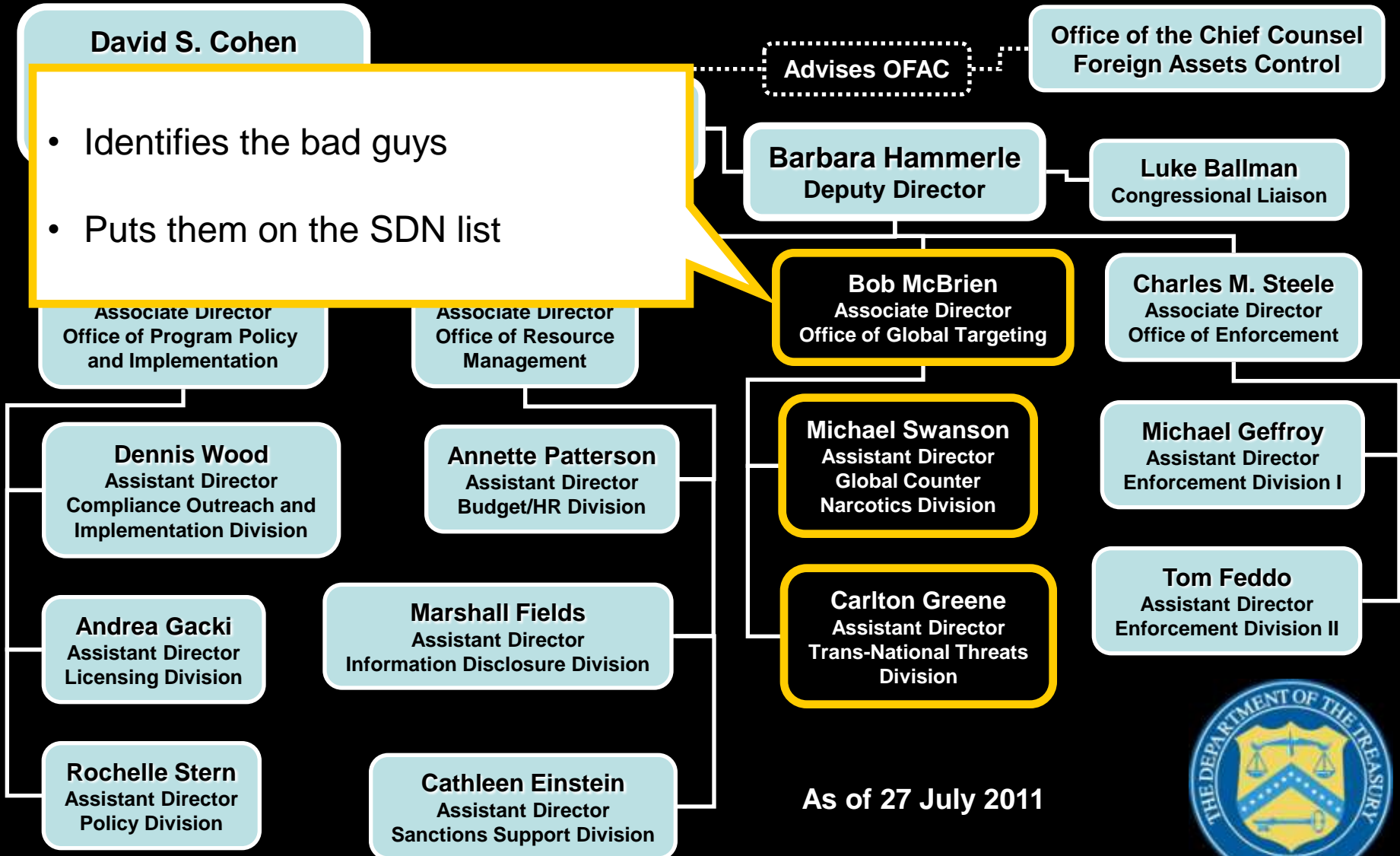
OFAC Licensing



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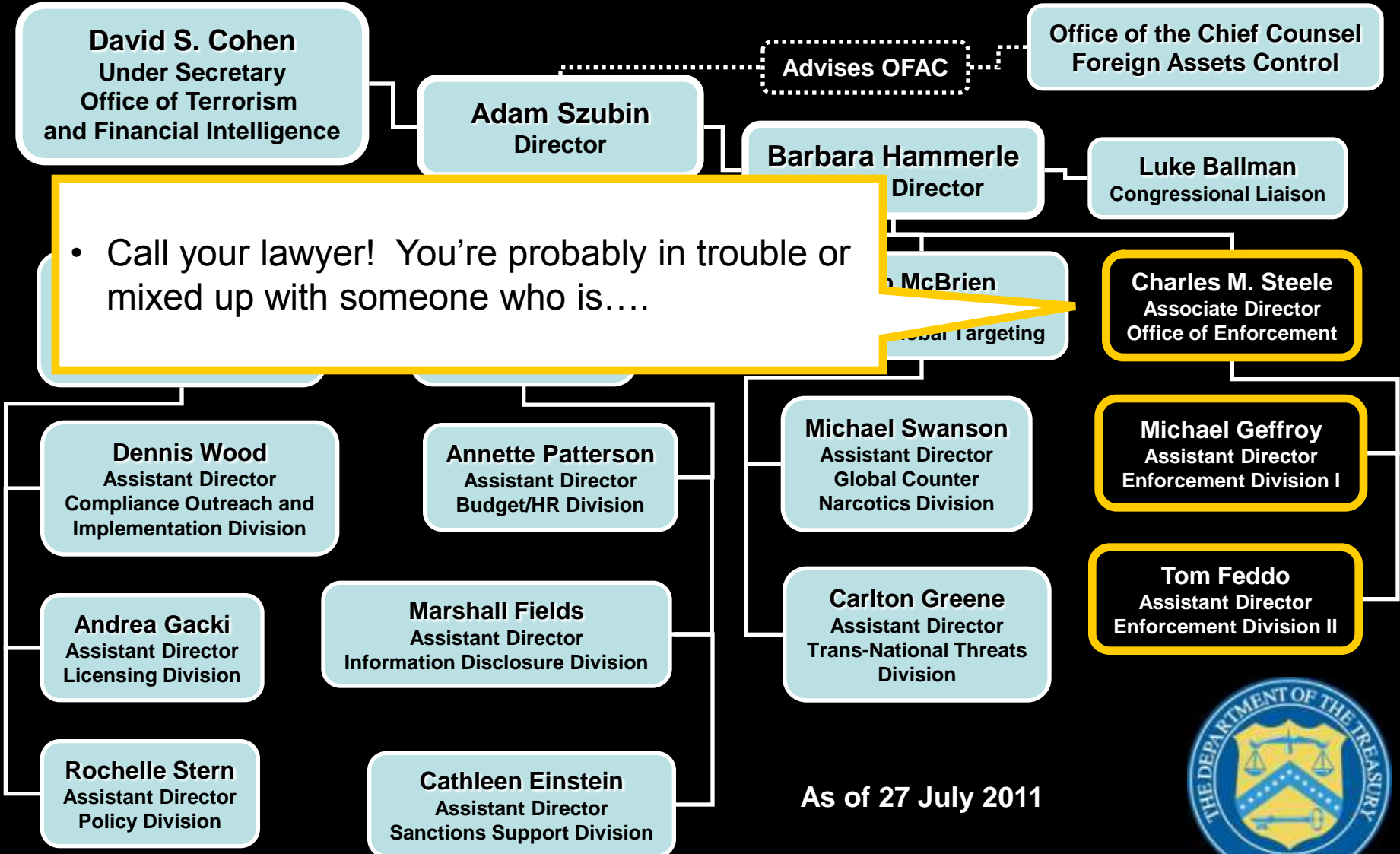
OFAC Global Targeting



As of 27 July 2011



OFAC Enforcement



As of 27 July 2011



OFAC Legal Authorities

- OFAC empowered by several laws, including
 - For most sanctions, the ***International Emergency Economic Powers Act***, 50 U.S.C. §§ 1701-06 (“IEEPA”)
 - For the longstanding Cuban embargo, the ***Trading with the Enemy Act***, 50 U.S.C. App. §§ 1-44 (“TWEA”)
 - For certain terrorism-related sanctions, the ***Antiterrorism and Effective Death Penalty Act***, enacting various statutory provisions of the U.S. Code
 - For certain narcotics-related transactions, the ***Foreign Narcotics Kingpin Designation Act***, 21 U.S.C. §§ 1901-08
 - Several other statutes that often overlap and buttress each other
- These laws implemented principally through
 - Presidential ***executive orders***
 - ***Regulations*** codified at 31 C.F.R. Ch. V

IEEPA -- OFAC's Sanctions Toolbox

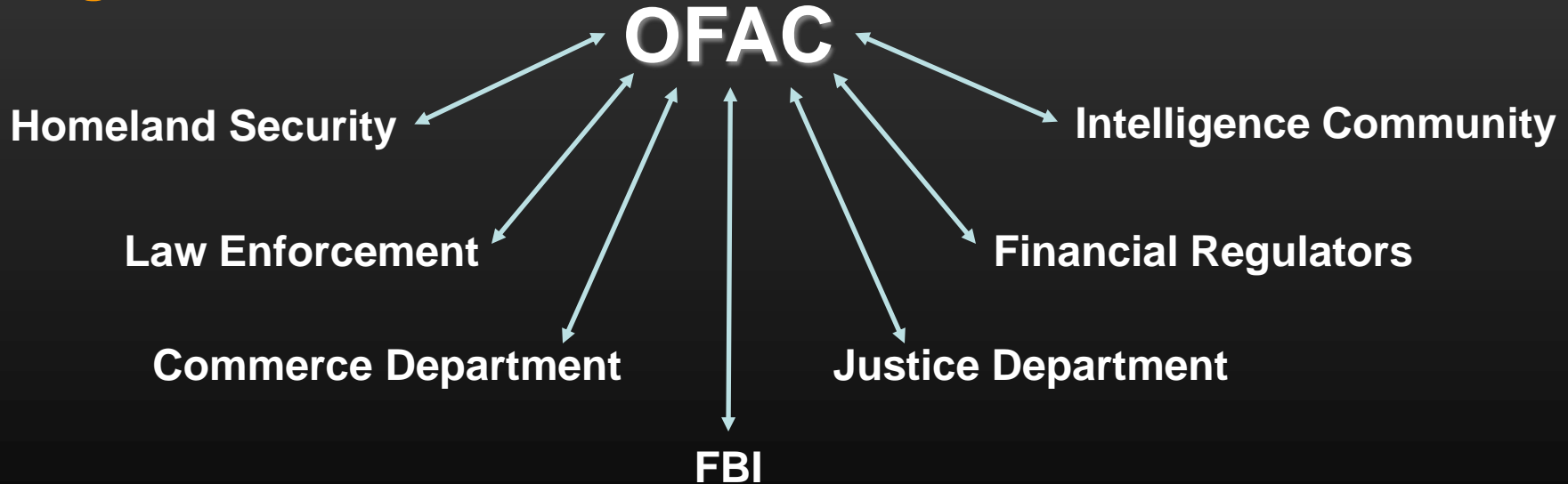
- Basis for most OFAC sanctions
- President may issue executive order under IEEPA declaring a ***“national emergency”*** to address any ***“unusual and extraordinary threat”*** to the ***“national security, foreign policy, or economy of the United States”***
- Judicial deference makes actions difficult (but not impossible) to challenge
- Range of possible measures broad, including the ability to restrict or altogether prohibit trade and services, block property, investigate and impose penalties for violations, compel production of information, and impose administrative recordkeeping and reporting obligations
- President has wide discretion to tailor available measures to achieve specific policy objectives
- Penalties substantially enhanced by Congress in 2007

Sanctions Policymaking/Coordination



Policy

Program Coordination



Other USG Players

Congress

- Enacts sanctions laws

State Department

- Formulates sanctions policies
- Designates WMD proliferators
- Enforces U.S. and U.N. arms embargoes
- Maintains defense trade debarment list

Commerce Department

- Administers several export control lists restricting trade with export violators, WMD proliferators, and “unverified” entities whose bona fides could not be established during end use checks

Pentagon and Other USG Agencies

- Administer contract debarment programs

Judiciary

- Interprets sanctions laws

Tailoring Sanctions

- **Comprehensive** sanctions prohibit most unlicensed dealings with target, and may include
 - Exports, reexports, or imports of goods, technology, and services
 - Trade brokering, financing, investment, and facilitation
 - Limited exceptions may exist for purely “informational materials”, humanitarian donations, and telecommunications services
 - Some humanitarian, flight safety, agricultural, and medical export activities may be licensable by OFAC and/or U.S. Commerce
 - Other activities may be permissible or licensable on case-by-case basis, such as travel and personal funds transfers
- **Limited** sanctions may target a specific activity or activities, such as African trade in “blood diamonds”
- Both comprehensive and limited sanctions may require property to be **blocked**

Frozen Assets



Frozen Assets

- IEEPA and other statutes authorize OFAC to direct persons subject to U.S. jurisdiction to **block** or **freeze** property in which a sanctions target has an interest, however remote (whether past, present, future, or contingent)
 - Requires banks subject to U.S. jurisdiction to put blocked funds in special accounts
 - Title remains with owner, but access/control denied unless OFAC authorizes unblocking
 - Blocked property must be reported to OFAC within 10 days
- **Property** defined in sweeping terms to include **anything** of value and any **interest** in anything of value, including
 - Funds
 - Stocks, bonds, and other securities
 - Contracts, commercial paper, and negotiable instruments
 - Real and personal property (land and goods)
 - Intellectual property and intangible interests

Trends

- Emphasis previously on “rogue” or “pariah” countries
 - Attitude toward some countries has shifted from isolation to engagement
 - Changes in former Yugoslavia and post-Hussein Iraq have necessitated changes in older programs
 - But perennial targets remain: Cuba, Iran, Libya (again), Sudan
- Increasingly, emphasis has shifted toward discrete activities such as terrorism, narcotics trafficking, WMD proliferation, human rights abuses, regional destabilization, and “blood diamond” trading
- With emphasis on such activities has come shift to greater reliance on **list-based** sanctions
 - Also, instead of targeting an entire country, sanctions may focus on specific factions or despots (past or present)

On Target

- OFAC maintains comprehensive blacklist of ***Specially Designated Nationals and Blocked Persons*** (“***SDNs***”)
- SDN list contains thousands of names of individuals and organizations targeted by specific sanctions programs
 - Names added frequently and removed occasionally ad hoc
- SDNs include individuals, companies, banks, vessels, and other entities considered to be principals and agents of targeted countries and regimes, terrorist organizations, narcotics cartels, and WMD proliferators
 - Including “front companies” that seek to procure U.S. technology for illicit purposes
 - SDNs often have innocuous names and are located in friendly places

Guess the SDN

- Colony Trading S.A.
Panama
SDN (Cuba)
- Bank Sepah International
London
SDN (WMD Proliferation)
- Hassan Ahmed
Morocco
Not an SDN (U.S. Diplomat)
- Benevolence International Foundation
Canada
SDN (Terrorism)

- Al Haramain Foundation
United States
SDN (Terrorism)
- Arab Turkish Bank
Turkey
SDN (Libyan-Owned Bank)
- Color Stereo S.A.
Colombia
SDN (Narcotics Trafficking)
- Dr. Saad Al-Faqih
London
SDN (Terrorism)

Current Comprehensive Sanctions

- Most dealings **prohibited** with
 - **Cuba**
 - **Iran**
 - **Libya**
 - **Sudan**
 - Designated **terrorists**
 - Designated **narcotics traffickers**
 - Designated **WMD proliferators**
 - Designated **transnational criminal organizations (NEW)**
 - Designated members and associates of **former Iraqi regime**
 - Designated members of **former Liberian regime of Charles Taylor**
 - Designated persons who threaten peace efforts in the **Balkans**
 - Designated persons undermining democracy in **Zimbabwe**
 - Designated persons contributing to conflict in **Côte D'Ivoire**
 - Designated persons undermining democracy in **Belarus**
 - Designated persons contributing to conflict in the **Congo**
 - Designated persons undermining democracy in **Lebanon**
 - Designated persons contributing to conflict in **Somalia**

Current Limited Sanctions

- **North Korea**
 - No dealings with North Korean SDNs
 - No imports of North Korean-origin products into the United States
 - Exports subject to Commerce Department controls
- **Burma**
 - Designated Burmese political groups blocked
 - No imports of Burmese-origin products into United States
 - No new investments or exports of financial services
- **Syria**
 - No receipt of unlicensed Syrian government donations
 - No financial transactions supporting terrorism
 - BUT...Commerce Department export controls effectively curtail most trade
- **“Blood Diamonds”**
 - African diamond trade must comply with international process

OFAC's Sweeping Jurisdiction

- ***U.S. persons*** and ***persons subject to U.S. jurisdiction***
 - U.S. citizens and permanent resident aliens (“green card” holders), *whether in the United States or abroad*
 - Companies organized under U.S. law
 - Any individual or organization *physically located* in the United States at the time of the activity, regardless of nationality
 - For the **Cuban embargo**, any entity *owned or controlled* by a U.S. individual or company, which could extend to foreign subsidiaries
- Except for the Cuban embargo, most foreign subsidiaries of U.S. companies are not subject to OFAC jurisdiction when they act ***independently*** from the U.S. corporate parent
- And most foreign companies that are not owned or controlled by U.S. persons likewise are not subject to OFAC jurisdiction

Facilitation – Closing Loopholes

- In addition to direct controls over U.S. activities, OFAC sanctions prohibit the facilitation of foreign trade with U.S. sanctions targets
- The facilitation prohibitions prevent U.S. persons from undermining sanctions through indirect support
- Facilitation prohibitions apply to
 - Approving, financing, guaranteeing, or otherwise assisting foreign trade with a sanctions target
 - Changing policies and procedures to permit a foreign affiliate to engage in activities with a sanctions target that previously required U.S. approval
 - Referring declined business opportunities to foreign party
 - U.S. expats working for foreign companies and vice versa

3. OFAC Compliance & Enforcement

Key Issues for the Firearms Industry

- Due diligence
 - Ensure you are not dealing with prohibited destinations or parties, *directly or indirectly* (including SDN banks, vessels, and other third parties)
 - Principally addressed through screening and identifying “red flags”
- Facilitation
 - Ensure you are not unwittingly supporting foreign affiliates and other third parties with transactions involving OFAC sanctions targets

Penalties

	Civil	Criminal
IEEPA (most OFAC programs)	Up to \$250,000 or 2X transaction value (whichever is greater)	<ul style="list-style-type: none">• Up to \$1M• Up to 20 years imprisonment
TWEA (Cuba)	Up to \$65,000	<ul style="list-style-type: none">• Up to \$1M or 2X transaction value (whichever is greater)• Up to 10 years imprisonment
Kingpin Act (narcotics traffickers)	Up to \$1.075M	<ul style="list-style-type: none">• Organizations<ul style="list-style-type: none">• Up to \$10M• Individuals<ul style="list-style-type: none">• Up to \$5M• Up to 30 years imprisonment

Other Consequences

- Blocked funds
- Seized/forfeited property
- Debarment from U.S. exports
- Debarment from U.S. government contracting
- Collateral liability for violations of U.S. export controls and other laws (especially **ITAR §126.1**)
- Reputational damage

Jeff Cooper (1920 – 2006)

OFAC Compliance Legend...?

- One of the foremost experts on use and history of small arms
- Father of the “modern technique” of handgun shooting
- His rules for gun safety and “combat color code” are widely accepted as firearms gospel
- These principles can be applied to OFAC compliance

Jeff Cooper's Rules for Firearms Safety

- All guns are always loaded. Even if they are not, treat them as if they are.
- Never let the muzzle cover anything you are not willing to destroy.
- Keep your finger off the trigger till your sights are on the target.
- Identify your target, and what is behind it. Never shoot at anything that you have not positively identified.

Jeff Cooper's Rules for Firearms

OFAC Safety

- All guns are always loaded. Even if they are not, treat them as if they are.
 - All business transactions—*domestic and international*—carry the risk of OFAC violations
 - Thousands of SDNs around the world—including in the United States—fronting for organizations that would seek to procure firearms
 - Vigilance required for even seemingly garden-variety transactions

Jeff Cooper's Rules for Firearms

OFAC Safety

- Never let the muzzle cover anything you are not willing to destroy.
 - Do not pursue a business opportunity unless you are ready, willing, and able to follow the rules
 - If you don't know the rules, learn them, and seek expert help when appropriate

Jeff Cooper's Rules for Firearms

OFAC Safety

- Keep your finger off the trigger till your sights are on the target.
 - Don't act until you have identified and mitigated potential risks
 - Potential strict liability for violations = no room for guesswork

Jeff Cooper's Rules for Firearms

OFAC Safety

- Identify your target, and what is behind it. Never shoot at anything that you have not positively identified.
 - Know your customer and all parties to a transaction
 - Screen for SDNs and denied parties
 - Look for and respond appropriately to “red flags”
 - These are suspicious circumstances that suggest something is not right
 - Regulators have identified examples of red flags (included with handouts)
 - Existence of red flags can trigger a duty to investigate and failure to do so can create presumption of liability

OFAC Online

<http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>

- Points of contact for major functions, including compliance hotline and licensing helpdesk
- Increasing availability of electronic communication for questions and comments
- Downloadable copies of OFAC regulations, executive orders and legal authorities
- Advisory opinions, frequently asked questions, brochures and other general guidance (**CAVEAT: some general guidance outdated**)
- Email notification service
- Reasonably well-organized and user-friendly

Talking to OFAC

- Phone guidance caveat...your mileage may vary
- “Garbage in = garbage out”
 - Junior staffers may not always grasp every subtlety
 - To be fair, try finding anyone with an encyclopedic knowledge of all OFAC programs...who doesn't charge \$700 an hour....
- OFAC will disavow inaccurate advice and avoids giving oral guidance based on hypotheticals
- Instead, best to use phone advice for general awareness
- But, for potential matches to SDN list and transactions in progress, decisive guidance can be obtained
- Regarding face-to-face meetings...conserve your ammo

Parting Thoughts....

- Identify how OFAC sanctions impact your international (and even domestic) business activities, and integrate OFAC into your broader trade and corporate compliance program
- Take advantage of training opportunities (like this one)
 - And official conferences sponsored by OFAC, the Commerce Department, etc.
- Use outside counsel and other expert advisers to supplement internal resources
- Always operate in a default state of **Condition Yellow**
 - Jeff Cooper's combat code for maintaining a constant state of **heightened situational awareness**