

US sanctions agency (OFAC) issues notice regarding compliance concerns related to COVID-19

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Executive summary

On 20 April 2020, the United States (US) Department of the Treasury's Office of Foreign Assets Control (OFAC) released a notice addressing two issues:

- (1) Communicating with the agency about sanctions compliance related concerns during the COVID-19 global pandemic period.
- (2) A new "interim" factor the agency may use to evaluate any apparent violations of OFAC's sanctions programs that occur for businesses that temporarily rebalance sanctions compliance resources due to challenges caused by the pandemic.

The rebalancing of compliance resources does not absolve an organization from liability in the event that a violation occurs during the pandemic, and OFAC has not clarified how this "interim" factor will be assessed among existing factors it considers in enforcement actions. OFAC still expects businesses to maintain a risk-based approach to sanctions compliance. As businesses face COVID-19 related challenges, they should consider:

- ▶ How has the business's sanctions risk-profile changed?
- ▶ If necessary, how will they rebalance compliance resources to address any new and existing sanctions risks?

Detailed discussion

On 13 March 2020, President Trump issued Proclamation 9994, declaring a national emergency in response to the COVID-19 outbreak in the US. Since then, OFAC's economic and trade sanctions programs, applicable reporting requirements, and enforcement of their respective prohibitions have remained in full effect. OFAC has kept busy by designating and identifying numerous targets on its Specially Designated Nationals and Blocked Persons (SDN) List, making certain regulatory updates and license amendments to various sanctions programs it administers, and publishing guidance regarding existing humanitarian assistance programs targeting sanctioned jurisdictions persons seeking to combat COVID-19.¹ Even the maximum cap on civil monetary penalty for violations of those prohibitions was increased by OFAC on 9 April 2020—pursuant to various Federal statutes regarding civil penalties inflation adjustment—adjusting for inflation.²

In short, the agency has continued to implement and enforce its sanctions programs as it did before the outbreak. Notwithstanding challenges faced by organizations from the COVID-19 pandemic, OFAC's enforcement agenda perseveres and the agency expects compliance with sanctions programs to remain a critical program element for businesses whose operations and transactions have touchpoints, directly or indirectly, with sanctioned targets and jurisdictions.

Indeed, on 20 April 2020, OFAC issued a notice addressing certain sanctions compliance concerns arising from the pandemic. First, the notice encourages businesses affected by the pandemic, which anticipate experiencing potential delays in meeting regulatorily required OFAC deadlines,³ to contact the agency as soon as practicable. Some examples of these deadlines include: the 10-business day deadline related to the filing of blocking and reject reports (see 31 C.F.R. Sections 501.603 and 501.604), responses to administrative subpoenas issued by OFAC (pursuant to Section 501.602), and reporting deadlines required by general and specific licenses.

Second, OFAC's notice also advises that, should there be an apparent violation by an organization of the agency's sanctions programs during the pandemic period, the agency will consider any temporary reshuffling of sanctions compliance resources the organization was forced to take based on COVID-19 constraints, as a factor in determining the appropriate enforcement resolution. However, OFAC's notice indicates that it expects such reshuffling to be a part

of, and consistent with, a risk-based approach to sanctions compliance that the agency has previously articulated in its Economic Sanctions Enforcement Guidelines,⁴ and its 2 May 2019 Framework for Compliance Commitments. The notice does not specify how this new "interim" factor ties into the existing enforcement factors in OFAC's Enforcement Guidelines.

Implications and considerations for businesses

OFAC's Enforcement Guidelines and its Framework for Compliance Commitments indicate that the agency supports a risk-based approach to sanctions compliance programs (SCP), which vary from business to business, relying on factors such as a company's size and sophistication, products and services, customers and counterparties, and geographic locations. To address and account for a business' respective risk profile, OFAC suggests management ensure that its compliance function receive adequate resources in the form of capital, expertise, and information technology. Inevitably, the reallocation of such SCP resources by businesses that continue to operate during the COVID-19 pandemic will leave sanctions compliance gaps, increasing violation risks. Any such violations will need to be accounted for once a business returns its SCP to a level of normalcy, where proper internal controls and audits should identify them, prior to any independent investigations by the US Government.

The existence, nature, and adequacy of a business' risk-based SCP at the time of any apparent violation, will be an applicable individualized factor under OFAC's Enforcement Guidelines (*i.e.*, Factor E). The agency will consider this, among other listed factors, as either mitigating or aggravating, in calculation of a proposed penalty amount during the course of a civil enforcement action.⁵ Although OFAC's notice asserts that it will evaluate the temporary reallocation of compliance resources in response to COVID-19 as a factor in determining the appropriate penalty resolution, the manner and extent in which those resources are allocated should be carefully assessed. Indeed, businesses with a high sanctions risk profile, that even perhaps competently staff their sanctions compliance function, might still face OFAC's consideration of Factor E as aggravating where the business' SCP was inadequate under the circumstances. While the notice does not clarify how this new "interim" factor will be assessed among existing enforcement factors, it is apparent that it will not completely absolve a business of liability.

It is also unclear when and how the COVID-19 pandemic “period” would be deemed terminated for purposes of applying this new factor in an enforcement action. Will it be over when the President revokes the underlying national emergency declared in Proclamation 9994? Will it be at some other point in time determined by the agency?

Businesses rebalancing compliance resources during the pandemic should be mindful of their sanctions risk profile, while also maintaining the ability to quickly and effectively reinstitute such resources once this pandemic “period” is officially deemed terminated by OFAC.

Endnotes

1. U.S. Dept. of the Treasury’s Resource Center, 2020 OFAC Recent Actions (last accessed 20 April 2020), available at <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/OFAC-Recent-Actions.aspx>. See also U.S. Dept. of the Treasury’s Office of Foreign Assets Control, *Fact Sheet: Provision of Humanitarian Assistance and Trade to Combat COVID-19*, 16 April 2020, available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/covid19_factsheet_20200416.pdf.
2. 85 Fed. Reg. 19,884-19,888.
3. U.S. Dept. of the Treasury’s Resource Center, *The Office of Foreign Assets Control (OFAC) Encourages Persons to Communicate OFAC Concerns Related to the Coronavirus Disease 2019 (COVID-19)*, 20 April 2020, available at <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20200420.aspx>. This notice provides the appropriate contact information at OFAC. As apparent on the face of the notice, and understandably so during the on-going pandemic, the preferred method of communication with the agency is via email/telephone, and no longer the mailing addresses provided in the corresponding reporting regulations or relevant agency documents. Persons seeking to submit self-disclosures of any apparent violations of OFAC’s programs are similarly encouraged to do so through a specified email account, rather than through physical mail.
4. 31 C.F.R. Part 501 Appendix A.
5. 31 C.F.R. Part 501, Appendix A, III, E. In appropriate circumstances, OFAC may refer the matter to appropriate law enforcement agencies for criminal investigation and/or prosecution.

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