



Part 1: As a matter OFAC

What every company should know about complying with the agency's complicated sanctions programs

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You are sitting at your desk when you are handed an envelope that just arrived in the mail. It bears the return address of the Department of Treasury's Office of Foreign Assets Control ("OFAC") and it contains an administrative subpoena seeking information and documents relating to a particular transaction in which your company participated. It asks you to make this discovery production to OFAC's Office of Enforcement within 30 days.

You may have seen news stories about extremely large civil penalties imposed on financial institutions and manufacturing companies for violations of OFAC's sanctions programs, but if you have not dealt with OFAC before, there are several important questions that you are probably asking yourself. What is OFAC? What should you do in response to the subpoena? What are the potential consequences for your company as a result of an investigation? What can you do to ensure compliance with OFAC's regulations or to avoid an investigation in the first place? This article answers these questions and offers a brief introduction to the subject of OFAC enforcement actions.

What is OFAC?

The Office of Foreign Assets Control – commonly known as OFAC – is a component of the Department of Treasury that administers and enforces economic sanctions imposed by the U.S. against various countries and individuals. OFAC supervises a host of sanctions programs, which fall into one of two basic categories. First, there are comprehensive sanctions programs that broadly prohibit transactions with all

individuals and companies in particular countries: Cuba, Iran, Myanmar, Sudan, and Syria. Second, there are non-comprehensive programs that prohibit transactions with specifically named individuals and entities who are in certain countries (such as North Korea or the Ivory Coast) or who are engaged in terrorism, proliferation of weapons of mass destruction, or international narcotics trafficking. These individuals and entities are included in a list maintained by OFAC that is formally known as the "Specially Designated Nationals and Blocked Persons" -- usually referred to simply as the "SDN List." The various sanctions programs are authorized by two principal federal statutes – typically either the Trading With The Enemy Act ("TWEA") or the International Emergency Economic Power Act ("IEEPA").

All U.S. persons – meaning U.S. citizens and permanent residents – are required to comply with OFAC regulations. This is true regardless of where the U.S. person currently resides. OFAC sanctions programs also apply to all persons and businesses within the United States, and the foreign branches of U.S. companies. The Cuba sanctions program also applies to foreign subsidiaries that are owned or controlled by U.S. companies (which can create a conflict of laws in some countries, including Canada, that prohibit adherence to the Cuba sanctions programs).

What types of transactions can give rise to a violation of an OFAC sanctions program?

OFAC sanctions programs have a broad reach. Most obviously (and with certain exceptions), a U.S. company cannot engage in financial transactions with, sell goods to,

or provide services to anyone on the SDN List or to nationals of the countries that are the subjects of the comprehensive sanctions programs. But not all violations of the OFAC programs are quite so obvious. The following facts, under certain circumstances and in the absence of a license or other permission, could give rise to a violation of OFAC sanctions programs:

- A U.S. company acquires a Europe bank that has customers who are Cuban nationals and now is faced with providing banking services in violation of the Cuba sanctions.
- A U.S. parent company provides back office services for its overseas subsidiaries, which may do business with entities or individuals on the SDN list.
- A financial institution makes a loan in support of an underlying sale of goods which are shipped on a vessel affiliated with an Iranian shipping company.
- Employees of a financial institution "strip" out accurate information in order to disguise transactions involving a Sudanese business.
- A food manufacturer sells its products to wholesalers knowing that the product will be sold to Iranian supermarkets.

Also, to the extent that a U.S. company re-structures its business or reporting lines in order use a foreign subsidiary or non-U.S. personnel to engage in a transaction that otherwise would be prohibited by sanctions, the company may be liable for facilitation of a prohibited transaction. The sanctions programs are complicated and can be easily

overlooked, even by well-intentioned businesses.

You also might want to ask for additional time to reply to the subpoena, as it is possible that the one apparent violation that is the subject of the subpoena may only be the tip of the iceberg of your company's OFAC problems. Given the incentives for voluntary reporting of violations and for cooperation with OFAC, you might want to take advantage of this opportunity to conduct an internal investigation so that your company can provide not only the information that OFAC is requesting, but also information about other potential violations.

What can be done to ensure compliance with OFAC's regulations in the future?

Finally, some types of international trade with countries that are subject to OFAC sanctions still can be conducted in a manner that is permitted by law. For example, there often are licenses available for selling U.S. agricultural products or providing humanitarian services in countries that are subject to comprehensive sanctions programs. Experienced OFAC and export controls practitioners can assist a company in obtaining such licenses or permissions so that such transactions can be carried out.

Additionally, companies that have any involvement in international trade or

finance would be wise to have an OFAC compliance program that has been reviewed and approved by experienced counsel. The program should require the routine screening of customers, suppliers and other business partners against the SDN list. These steps hopefully will allow you never to receive a subpoena from OFAC in the first place.

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