OFAC Publishes Sanctions Compliance Guidance and Identifies Root Causes of Violations

Background
Last week, the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”) published “A Framework for OFAC Compliance Commitments” (the “Framework”) setting out not only the five essential components of an effective U.S. sanctions compliance program, but also identifying the most prominent “root causes” of recent sanctions violations.1 The root cause discussion is particularly noteworthy as it highlights potential landmines for both U.S. and non-U.S. companies to avoid as they seek to navigate the complexities of U.S. sanctions compliance.

The Framework comes on the heels of the U.S. Department of Justice’s own publication of guidance on how it evaluates corporate compliance programs,2 and follows months of focus by OFAC (communicated through its enforcement actions) on the importance of designing, implementing, and maintaining sound compliance practices, along with a marked increase in OFAC enforcement (OFAC has announced 14 civil penalties already this year, compared to seven in all of 2018).3

While OFAC acknowledges that no company is legally obligated to have a formal sanctions compliance program, it notes that it will consider the existence and effectiveness of a sanctions compliance program when evaluating the appropriate penalty after finding an apparent sanctions violation.

The Framework
The heart of the new Framework is five “essential components of compliance,” which will inform OFAC’s future evaluation of compliance programs. These

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components are not new, as we have highlighted in previous publications,\(^4\) and have been illuminated by past enforcement actions. What is new, however, is their solidification into formal guidance against which market participants can benchmark their own programs. OFAC's five essential components of compliance are:

> **Management Commitment** – OFAC describes management commitment to a compliance program as “one of the most important factors,” because it is necessary to ensure that the program has adequate resources, is fully integrated into the business, and is legitimate. In reviewing programs, OFAC will be looking for senior management’s review and approval of policies and procedures; delegation of sufficient authority; allocation of adequate resources; and promotion of a “culture of compliance” that recognizes the seriousness of sanctions violations. Companies should ensure that they appoint an OFAC sanctions compliance officer backed by compliance employees with adequate training and expertise to carry out their roles.

> **Risk Assessment** – OFAC suggests companies take a risk-based approach to designing compliance programs, meaning that companies should frequently conduct assessments to determine where risks of sanctions violations could arise in the course of transacting business. OFAC will be looking for companies to identify clients, customers, products, services, supply chains, intermediaries, counter-parties, transactions, or geographic areas that present sanctions risk and develop a methodology for identifying, analyzing, and addressing specific risks when they arise.

> **Internal Controls** – OFAC stresses that programs should include internal controls for identifying, escalating, reporting, and keeping records pertaining to sanctions risks. OFAC will be looking for companies to develop written policies and procedures outlining the compliance program that are relevant to the day-to-day operation of the company, easy to follow, and designed to prevent sanctions violations. Any such policies and procedures should be fully implemented, enforced, and adaptive within the company.

> **Testing and Auditing** – OFAC urges companies to test and audit their compliance practices to ensure they are up to date, relevant, and fully implemented. OFAC will be looking for a commitment to a comprehensive, independent, and objective testing regime and that, when risks are identified, companies adapt their practices to respond.

> **Training** – OFAC emphasizes that training is an “integral component” of a compliance program, necessary to ensure that all appropriate employees are, at least on an annual basis, provided with job-specific knowledge, made aware of their responsibilities, and held accountable through assessments.

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OFAC will be looking to ensure that trainings contain adequate information and instruction for all relevant employees, in a manner that is appropriate for the company’s products and services. The training program should also include easily accessible informational resources and materials that employees can refer to on a continual basis.

Root Causes
Perhaps more interesting than the Framework’s essential components of compliance, which largely formalize elements on which OFAC had focused in the past, the Framework is followed by an appendix of what are, in OFAC’s view, the “root causes” that most frequently lead to U.S. sanctions violations. While OFAC has made clear that this list of notable “deficiencies or weaknesses” in compliance programs is not exhaustive, OFAC has highlighted the factors to assist organizations in “designing, updating, and amending” their respective compliance programs. The root causes identified by OFAC in the Framework include:

> Where organizations lacked a formal sanctions compliance program;

> Where organizations generally failed to appreciate or consider the territorial reach of U.S. sanctions laws;\(^5\)

> Where an organization that was subject to U.S. jurisdiction facilitated (e.g., by making referrals or providing approval for) transactions or dealings between the organization’s non-U.S. locations and OFAC-sanctioned countries, regions, or persons;

> Where, often despite warning signs that such activity might be prohibited by U.S. sanctions law, non-U.S. persons repeatedly purchased U.S.-origin goods with the specific intent of re-exporting, transferring, or selling the items to a person, country, or region subject to OFAC sanctions;

> Where non-U.S. persons processed financial transactions to or through U.S. financial institutions connected to commercial activity involving an OFAC-sanctioned person, country, or region;\(^6\)

> Where organizations failed to update sanctions screening software to, for example, account for updates to the Specially Designated Nationals and Blocked Persons List (the “SDN List”) or the Sectoral Sanctions Identifications List (the “SSI List”), or account for the various ways that prohibited countries or parties could be spelled;

\(^5\) Significantly, OFAC notes that administrative actions involving this root cause typically were accompanied by additional aggravating factors, such as reckless conduct, the presence of numerous warning signs that the activity at issue was likely prohibited, and the size and sophistication of the subject person.

\(^6\) On this point, OFAC stresses that the mere inclusion of a U.S. financial institution in any payments associated with such a transaction often results in a prohibited activity.
Where organizations failed to conduct proper due diligence on customers, supply chain, intermediaries, or counter-parties relating to things like ownership or geographic location(s);

Where compliance programs were inconsistently applied across various offices or business units, owing largely to de-centralized compliance programs; and

Where business practices deviated from norms and practices;

Where individual employees—oftentimes in supervisory, managerial, or executive-level positions—of U.S.-owned or controlled entities operating outside of the U.S. conducted or facilitated dealings with OFAC-sanctioned persons, regions, or countries, even in situations where the U.S. entity had a compliance program in place.7

Conclusion

The new Framework provides companies with useful guidance on constructing effective sanctions compliance programs to (1) prevent and remediate sanctions risks; and (2) serve as mitigation in the unfortunate event that OFAC identifies an apparent violation. Further, the root causes serve as a helpful reminder of risk factors that are often overlooked and can lead to potential liability. As ever, if you have questions as to whether your program is OFAC-compliant, please contact one of the listed authors.

7 Notably, OFAC addresses the issue of potential liability of individuals, stating: “In some of these cases, the employees of the foreign entities also made efforts to obfuscate and conceal their activities from others within the corporate organization, including compliance personnel, as well as from regulators or law enforcement. In such circumstances, OFAC will consider using its enforcement authorities not only against the violating entities, but against the individuals as well.”

Authors: Adam Lurie, Doug Davison, Michael Lamson, Sterling Darling, Sean Solomon, and Aviva Kushner

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