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REASSESSING YOUR RISK PROFILE FOR OFAC SANCTIONS

In recent years, OFAC has made the securities industry one of its compliance and enforcement priorities. It has endorsed a risk-based approach to compliance and listed types of transactions that warrant additional scrutiny or due diligence. The authors discuss the origins of this approach, common factors requiring reassessment of risk, and typical compliance measures to deal with it.

By Ronald I. Meltzer and David M. Horn *

The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") is responsible for administering and enforcing U.S. economic sanctions against certain designated countries, entities, and individuals. In recent years, OFAC has made the securities industry one of its compliance and enforcement priorities due to the importance of securities transactions as a means to create or distribute assets, and to engage in financing or transfer funds internationally – and in response to the growing risk that these transactions can be used for illicit purposes such as support for terrorism, WMD proliferation, or narcotics trafficking. Accordingly, U.S. securities firms are expected to maintain appropriate compliance programs that identify and address sanctions-related risks in their business operations. Indeed, OFAC guidance calls upon securities firms to develop a risk-based approach to sanctions compliance that takes into account – and regularly updates – their respective risk profiles based on assessments of their ongoing lines of business relative to applicable regulatory requirements.

In this article, we provide an overview of OFAC sanctions, and then discuss key elements of a risk-based approach to OFAC sanctions compliance. Our discussion will cover the origins of this approach; an explanation of OFAC's risk matrices for the securities industry; a discussion of the relationship between risk assessment and a firm's compliance program; and the identification of typical factors that should "trigger" a risk reassessment. Finally, we provide examples of the types of compliance measures that OFAC expects securities firms to incorporate into their compliance programs.

Overview of OFAC Sanctions

OFAC's enforcement of U.S. sanctions stems from the president's national security mandate, which grants OFAC significant discretionary authority to implement transaction prohibitions and asset-blocking requirements against designated countries, entities, and individuals.[1]

[1] *E.g.*, International Emergency Economic Powers Act (IEEPA),

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Many of the OFAC sanctions are based on United Nations and other international resolutions and agreements, and are therefore multilateral in scope, but in some cases (*e.g.*, Cuba or sanctions against Iran beyond the requirements of United Nations Security Council resolutions) the United States acts unilaterally.[2]

OFAC sanctions can be both country-based and list-based. Under the country-based sanctions, Cuba, Iran, and Sudan face comprehensive trade embargoes that prohibit most commercial and financial dealings with those countries. Currently, U.S. sanctions against Syria are also very restrictive, including a prohibition under Executive Order 13582 on transactions involving the provision of any services to Syria from the United States or by a U.S. person. Other countries, such as North Korea, are subject to more limited sanctions (*e.g.*, restrictions on imports from, or specific exports to, that country).[3] In addition, OFAC maintains a list of Specially Designated Nationals and Blocked Persons ("SDNs"), which are persons and entities with whom U.S. persons are prohibited from engaging in commercial or financial dealings based on U.S. national security and foreign policy considerations (*e.g.*, global terrorism, narcotics trafficking, regional destabilization). U.S. persons are also required to "block" any property or interest in property belonging to SDNs.

OFAC regulations apply to "U.S. persons," which include all U.S. citizens and permanent residents (*e.g.*, "green card" holders) located anywhere in the world, companies organized in the United States, foreign branches of U.S. companies, and all individuals, entities, and property located in the United States.[4] In addition, no U.S. person may facilitate, approve, or support any transaction by a foreign person that would otherwise be prohibited if performed by a U.S. person.[5]

While OFAC regulations apply to overseas branches of U.S. companies, foreign subsidiaries are, in most instances, beyond the scope of OFAC jurisdiction. However, under OFAC sanctions applicable to Cuba and – as a result of legislation enacted into law last year – Iran, foreign entities owned or controlled by U.S. persons are subject to OFAC regulatory requirements.[6] In the case of Cuba, such foreign entities are liable for OFAC violations themselves; in the case of Iran, they create liability for their U.S. parents when knowingly engaging in transactions that would be impermissible if undertaken by a U.S. person. Also, importantly, the primary statutory authority for most OFAC sanctions regulations prohibits any person, including non-U.S. persons, from *causing* the violation of a U.S. person.[7]

Origins of the Risk-Based Approach to Compliance

In 2006, OFAC issued interim guidance to banking institutions on compliance and enforcement, which included factors for use in evaluating an institution's risks for possible sanctions violations and for developing risk-based compliance programs.[8] It was ultimately followed, in 2009, by OFAC's Economic Sanctions Enforcement Guidelines.[9] The Guidelines repromulgated, with minor edits and in a consolidated form, the risk matrices originally issued as an annex to the 2006 guidance to the banking industry.[10] These risk

footnote continued from previous page…

50 U.S.C. §§ 1701-1706; Trading with the Enemy Act (TWEA), 50 U.S.C. App. §§ 5, 16.

[2] TWEA, *supra* note 1.

[3] *E.g.*, North Korea Sanctions Regulations, 31 C.F.R. § 510.201.

[4] *E.g.*, Iranian Transactions and Sanctions Regulations, 31 C.F.R. § 560.314.

[5] *E.g.*, *id.* at § 510.208.

[6] Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-58, Sec. 218; Cuban Assets Control Regulations, 31 C.F.R. § 515.329(d).

[7] International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1705(b).

[8] Economic Sanctions Enforcement Procedures for Banking Institutions (Interim Final Rule) (Dep't Treasury), 71 Fed. Reg. 1971 (Jan. 12, 2006) ("Banking Guidance").

[9] Economic Sanctions Enforcement Guidelines (Final Rule) (Dep't Treasury), 74 Fed. Reg. 57593 (Nov. 9, 2009) ("Guidelines").

[10] *Id.*

matrices, which are now incorporated into the Guidelines and are intended for use by all financial institutions (*i.e.*, not just banks), provide "a guide for evaluating an institution's risk of encountering accounts or transactions subject to OFAC regulations and for determining the quality of an institution's compliance program."[11] OFAC confirmed in the Guidelines that the repromulgation of the risk matrices evidenced OFAC's continued emphasis on a risk-based approach to compliance.[12]

In addition, in 2008, OFAC published guidance specifically for the securities industry: "Risk Factors for OFAC Compliance in the Securities Industry." As discussed below, this guidance echoes OFAC's endorsement of a risk-based approach to compliance. Specifically, OFAC has stated that it "encourages the securities industry to develop proactive, risk-based compliance programs to ensure that it does not conduct transactions for the benefit of designated terrorists or other sanctions targets."[13]

Risk Matrices and Risk Factors

Ultimately, it is up to a particular firm to engage in its own risk analysis and to determine how best to design and operate a compliance program to address its specific sanctions risks. While OFAC does not prescribe a specific standard for firms to apply, its Guidelines and – notably – its guidance to the securities industry both identify the key factors to consider.

Under the Guidelines, OFAC divides the risk matrix into two sections. Section A, which corresponds to a matrix provided in the FFIEC *Bank Secrecy Act, Anti-Money Laundering Examination* (2005), categorizes the following risk factors as low-, medium-, and high-risk:

- *Stability of customer base*: A stable, well-known customer base in a localized environment = low risk; a changing customer base due to branching, merger, or acquisition in the domestic market = medium risk; and a large, fluctuating client base in an international environment = high risk;

- *Number of high-risk customers*: (*e.g.*, non-resident aliens, foreign customers, including accounts with U.S. powers of attorney, and foreign commercial customers.) Few such customers = low; moderate number of such customers = medium; and a large number of such customers = high;

- *Overseas branches and correspondent accounts with foreign banks*: No overseas branches or correspondent accounts = low; overseas branches or correspondent accounts with foreign banks = medium; and overseas branches or multiple correspondent accounts with foreign banks = high;

- *Electronic banking services*: (*i.e.*, account transfers, e-bill payment, accounts opened via the Internet.) No provision of such products, or only for informational or non-transactional use = low; limited provision of such products = medium; and a wide array of such products = high;

- *Non-customer and third-party fund transfers*: A limited number of such transfers = low; a moderate number of such transfers, mostly for customers = medium; and a high number of such customers for customers and non-customers = high;

- *Other types of international transactions*: (*e.g.*, trade finance, cross-border ACH, and management of sovereign debt.) No such transactions = low; a limited number of such transactions = medium; and a high number of such transactions = high; and

- *OFAC history*: No history = low; a small number of recent actions = medium; and multiple recent actions= high.

Under Section B, OFAC lists factors of the compliance program to consider:

- *Management's assessment and understanding of OFAC risk*: Full risk assessment and satisfactory communication throughout the organization of management commitment to compliance = low; exhibition of a reasonable understanding of key aspects of OFAC compliance, and clear and satisfactory communication throughout organization, but lacking a program appropriately tailored to risk = medium; and no approval of an OFAC compliance program, or program is significantly deficient = high;

- *Board approval of an OFAC compliance program*: Approval of comprehensive program = low;

[11] Banking Guidance, *supra* note 8, at 1972.

[12] Guidelines, *supra* note 9, at 57597.

[13] "Risk Factors for OFAC Compliance in the Securities Industry," (Nov. 5, 2008) ("Securities Guidance"), p. 2, *available at* http://www.treasury.gov/resource-center/sanctions/Documents/securities_risk_11052008.pdf.

approval of an incomplete or partially deficient program = medium; and no approval of program, or significantly deficient program = high;

- *Staffing levels to execute an OFAC compliance program*: Adequate staffing = low; generally adequate but some deficiencies = medium; and failure to provide appropriate staffing = high;

- *Defined and enforced authority and accountability for OFAC compliance*: (*e.g.*, the designation of a qualified OFAC compliance officer.) Clearly defined and enforced authority and accountability = low; authority and accountability defined, but some refinements needed = medium; and no clear establishment of authority and accountability, including failure to appoint a qualified OFAC compliance officer = high;

- *Training*: Appropriate and effective training based on risk profile = low; training conducted with adequate resources but with some deficiencies = medium; and sporadic training and without coverage of important regulatory and risk areas = high;

- *Quality control methods*: Strong quality control = low; limited quality control = medium; and no quality control = high;

- *Consideration of compliance*: Incorporated into all products and areas = low; overlooked, but not in high-risk areas, and management promised corrective action when notified = medium; and not incorporated into numerous areas or do not adequately cover high-risk areas = high;

- *Screening policies*: Effective policies for screening transactions, and new accounts for SDNs and sanctioned countries that account for the level of risk = low; policies exist but not properly aligned with level of risk = medium; and no policies for screening transactions and new accounts = high;

- *Effectiveness of compliance systems' identification and reporting of potential violations*: Effectively identify and report potential OFAC violations and compliance systems commensurate with risk = low; generally identify potential OFAC violations, but lack comprehension based on risk or weaknesses that allow inaccurate reporting = medium; and ineffective and not commensurate with level of risk = high;

- *Review of accounts*: Periodic, based on level of risk, to ensure that problem accounts are properly blocked or restricted = low; periodic, to ensure that problem accounts are properly blocked or restricted, but not based on level of risk = medium; and no review = high;

- *Responsiveness of compliance systems to changes in OFAC requirements*: Quick adaption to changes in OFAC SDN list and country programs = low; generally adequate adaption to changes in OFAC SDN list and country programs = medium; and outdated compliance systems that are inadequate to comply with and adapt to changes to the OFAC SDN list and country programs = high;

- *Testing of the compliance program*: Independent audit function tests OFAC compliance with regard to systems, training, and use = low; overall, independent testing in place and effective, with some weaknesses = medium; and independent testing not in place or ineffective = high;

- *Identification and correction of problems and potential problems*: Quick identification of problems and prompt implementation of meaningful corrective action = low; problems generally corrected in normal course of business without significant investment of money or management attention, though management reasonably responsive when deficiencies are identified = medium; and errors and weaknesses not self-identified and management dependent on regulatory findings, or responds only when violations are cited or penalties assessed = high; and

- *Overall compliance controls*: Appropriate controls and systems have been implemented = low; no significant shortcoming are evident = medium; and significant problems are evident, with high likelihood of continued compliance violations or not compliant due to lack of corrective action program = high.

OFAC's guidance to the securities industry describes a risk-based approach to due diligence for financial institutions with respect to both new and existing customers. Such an approach would consider several factors, including the nature of the customer (*i.e.*, its location, market, products, and downstream customers); the type, purpose, and activity of the account; the nature and duration of the institution's relationship between the U.S. and foreign financial institution; the applicability of sanctions regulations and supervisory/enforcement regimes (including anti-money laundering and combating the financing of terrorism) to the foreign financial institution; and additional information regarding the institution's sanctions compliance record.[14]

OFAC has also provided the securities industry with particular risk factors that may warrant additional scrutiny or due diligence. These factors are organized by transaction type and include, *inter alia*:

- A high number of international or cross-border transactions, or investments in a foreign investment fund or on a foreign exchange;
- The presence of overseas branches or multiple correspondent accounts with foreign financial institutions (including correspondent accounts to enhance due diligence under Section 312 of the USA PATRIOT Act);
- A large, fluctuating client base across a number of foreign jurisdictions involving a large number of security transactions;
- Customers located in or having accounts in high-risk jurisdictions (*e.g.*, countries of "primary money laundering concern" pursuant to Section 311 of the USA PATRIOT Act);
- Customers located in or having accounts in countries that are havens for money laundering (*e.g.*, those identified by the Financial Action Task Force as maintaining inadequate AML/CFT oversight);
- Accounts for senior political or government officials of a foreign government, those of closely held corporations, and those of unregistered or unregulated investment vehicles;
- A lack of information about beneficial owners of securities, or beneficial ownership by a foreign person that maintains a private banking account with a U.S. financial institution;
- Foreign broker-dealers that act as introducing brokers;
- Investment in a foreign investment fund or foreign exchange, and/or cross-border settlements involving different settlement systems and jurisdictions;
- Very high net worth institutional accounts, hedge funds, and other alternative investment funds that lack transparency regarding their securities/investments and beneficial owners;
- U.S. hedge funds with offshore related funds where beneficial owners are offshore investors;
- The use of intermediaries (*e.g.*, accounts for intermediaries held in street name that trade on behalf of third parties); and
- Private accounts established or maintained for non-U.S. persons or services to wealthy clients using offshore accounts for tax avoidance purposes.[15]

Recent OFAC enforcement actions show its concern about the failure of securities firms to recognize and respond appropriately to these risk factors. In October of 2013, Alma Investment LLC, a UAE-based investment and advising company, agreed to pay a civil penalty of $1.5 million related to electronic funds transfers that passed through U.S. financial institutions for the benefit of persons in Iran.[16] In calculating the penalty, OFAC took account of several aggravating factors under its Guidelines, including that the firm had acted "at least recklessly, and apparently willfully, by concealing and/or omitting material information in funds transfers"; its management, likely including senior management, had actual knowledge or reason to know of the conduct; and the firm did not appear to have an OFAC compliance program. In September, OFAC levied a $750,000 penalty against a Turkey-based trading company related to at least three electronic funds transfers that passed through financial institutions located in the United States for the benefit of the government of Iran and/or Iranian persons.[17] OFAC considered under its Guidelines, among other factors, the firm's recklessness; its senior management's reason to know of the conduct; and its lack of any OFAC compliance program.

Similarly, last year, Genesis Asset Managers, LLP, ("GAM") the U.S. investment manager of a Guernsey-organized investment fund, entered into a settlement agreement with OFAC over its purchase (through its UK

[14] Risk Factors, *supra* note 13.

[15] *Id.* at 3-5.

[16] Enforcement Information for October 21, 2013, "Alma Investment LLC Assessed a Penalty for Violating the Iranian Transactions and Sanctions Regulations," *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20131021_alma.pdf.

[17] Enforcement Information for September 26, 2013, "Finans Kiymetli Madenler Turizm Otomotiv Gida Tekstil San. Ve Tic Assessed a Penalty for Violating the Iranian Transactions and Sanctions Regulations," *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/09262013.pdf.

subsidiary) of shares in a Cayman Islands company that invests exclusively in Iranian securities.[18] In calculating the penalty, OFAC identified several aggravating factors under its Guidelines, including that the firm had failed to exercise "a minimal degree of caution or care"; the firm was aware of the conduct; and it did not have an OFAC compliance program in place at the time of the violation. Earlier this year, during its Financial Symposium in Washington, OFAC specifically cautioned against securities firms' delegation of investment decisions or other functions to a foreign subsidiary or affiliate, which was precisely the cause of GAM's violation.[19]

Common Factors Requiring a Reassessment of Risk

OFAC expects that firms will make ongoing assessments of risk and will be responsive to any changes to their respective risk profiles. For example, if a firm launches a product line or service that introduces new complexities in its management of risk or transaction flows (*e.g.*, through the use of new foreign exchanges), or if a firm materially changes the nature or composition of its funds (*e.g.*, funds formed in, or involving beneficial owners in, higher-risk jurisdictions), then OFAC would expect the firm to assess whether such changes present new or different sanctions risks and to determine whether additional compliance policies or internal controls are needed to address such risks. Similarly, as Congress enacts new sanctions laws, OFAC promulgates new or updated regulations or guidance, or the President signs new Executive Orders, a firm's obligations will change. Indeed, the last several years have been an extraordinarily busy, dynamic period for U.S. sanctions requirements, especially with respect to Iran. A summary of such developments is included in the companion publication to this journal, *The Review of Securities & Commodities Regulation*, which identifies, *inter alia*, new SEC reporting requirements; new limitations on foreign financial institutions' use of the U.S. financial system; and the availability of sanctions against persons who knowingly transact business involving sovereign debt of the government of Iran.[20]

Typical Compliance Measures

OFAC acknowledges that there is "no cookie cutter approach" to sanctions compliance. Nevertheless, there are a number of measures that may be implemented in accordance with a firm's risk profile, all of which OFAC would view as applicable "best practices." Certainly, screening (through the use of interdiction software appropriate for the size and complexity of the firm) and enhanced due diligence of all counterparties and accounts are a minimum. Such screening and diligence should occur not only for new counterparties or accounts, but also for existing ones based on the firm's risk assessment. The frequency and method of screening need not be uniform for all counterparties and accounts. For example, higher-risk counterparties and accounts may be screened on a real-time basis, whereas lower-risk counterparties and accounts may be screened less frequently or on a sampling basis – as long as such methods are fully supported by relevant, contemporaneous risk assessments. For such screening, most firms use interdiction software provided commercially by numerous vendors, and they attempt to calibrate the level and frequency of such use based on their individual operations and risk assessments. These software products can be designed to perform screening in various ways, *e.g.*, one firm may require its interdiction software only to examine new accounts or to be deployed for other on-boarding events, whereas another firm with a greater risk profile may require enterprise-wide, real-time screening of all transactions and accounts.

In addition, firms may seek to address their sanctions risks by developing appropriate contractual provisions, including certifications or additional representations relating to compliance from intermediaries and counterparties. Of course, OFAC also stresses the importance of regular compliance training and delegated internal responsibility for compliance oversight as key elements of a sound compliance program.

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[18] Enforcement Information for May 21, 2012, "Genesis Asset Managers, LLP Settles Apparent Violation of the Iranian Transactions Regulations," *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/05212012_genesis_notice.pdf.

[19] We note that these cases are relatively modest compared to recent settlements entered into by several major, global financial institutions with OFAC and other U.S. enforcement agencies. *See, e.g.,* Settlement Agreement by and between the U.S. Department of the Treasury's Office of Foreign Assets Control and ING Bank, N.V., June 11, 2012, *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/06122012_ing_agreement.pdf; Settlement Agreement by and between the U.S. Department of the Treasury's Office of Foreign Assets Control and HSBC Holdings plc., December 11, 2012, *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121211_HSBC_Settlement.pdf.

[20] F. Amanda DeBusk, *Update on U.S. Sanctions Against Iran*, The Review of Securities and Commodities Regulation, Vol. 46, No. 1 (Jan. 9, 2013).

For the securities industry in particular, proper screening and diligence may be challenging due to the difficulty of ascertaining the true beneficial owners of certain types of firm counterparties, such as foreign-based trusts or funds. This can be problematic for OFAC compliance because, *inter alia,* SDN requirements apply to any entities (even those not specifically listed) in which a designated person holds 50 percent or greater ownership interest – and liability for transactions adheres under OFAC regulations even when a violation is due to undisclosed facts or factors. In some cases, resolution of the risk becomes problematic because certain foreign-based trusts, funds, or other investment vehicles may be unable or reluctant, due to fiduciary issues or other applicable laws, to provide full transparency into their beneficial owners. In these circumstances, some financial services firms have decided that the sanctions risks are too difficult to manage or can result in such significant consequences that they have deliberately adopted a "de-risking" policy as the basis for compliance, *i.e.*, effectively establishing bright-line rules against engaging in certain types of transactions, even if they may be permissible under particular circumstances (*e.g.*, trade covered by an OFAC general license) or involving parties that remain beyond the scope of OFAC jurisdiction (*e.g.*, financial dealings outside the United States between non-U.S. firms).[21] This "de-risking" approach has been seen most frequently in the recent period in instances involving possible dealings with Iran or Iranian entities.

Structurally and organizationally, there are additional compliance measures that are consistent with leading industry practices, such as corporate statements of commitment to OFAC compliance; policies and procedures to implement internal controls for maintaining OFAC compliance, and to establish lines of responsibility and accountability for such compliance (*e.g.*, through the appointment of a qualified OFAC compliance officer); measures intended to identify, correct, and report potential OFAC violations; and employee compliance training to ensure that policies and procedures are clearly defined and communicated. Indeed, a firm's OFAC compliance program can only be as strong as its employees' understanding of OFAC requirements and its attention to the risk factors identified above. At its recent Financial Symposium, OFAC specifically noted that a key source of sanctions violations for many firms in the financial services sector remains the failure to adequately train employees about applicable compliance requirements and risks.[22]

Further, a firm's OFAC compliance program should be subject to regular, independent testing and auditing that are commensurate with its risk profile. When gaps are identified in the compliance program, the firm should respond with appropriate remedial measures that are targeted to identified weaknesses or apparent risks of OFAC violations. Subsequent testing and auditing can confirm whether such corrective action has succeeded, thus creating a "virtuous cycle" of OFAC sanctions compliance.

CONCLUSION

OFAC expects securities firms to understand their core compliance responsibilities and to implement appropriate internal controls based on regular assessments of their specific exposure to sanctions risks. By following the risk-based compliance guidance described above and then implementing internal controls that reflect the application of such guidance to their particular operations and circumstances, securities firms can demonstrate their adherence to leading practices in OFAC compliance. In the current sanctions environment, such demonstration is not just aspirational – it has been shown in many cases to go a long way in preventing violations, mitigating possible penalties or reputational harm, and avoiding costly business disruptions. ■

[21] *See* Ronald Meltzer and David Ross, *Sanctions without borders*, International Financial Law Review, Extraterritorial Regulation Survey 2013 (available upon request to the authors).

[22] *See* "OFAC Compliance in the Securities & Investment Industry," presentation by Brandon Reddington at the OFAC Financial Symposium, Washington, D.C., March 19, 2013.