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Managing Compliance with U.S. Treasury Department OFAC Obligations: Even If Your Business Is Exclusively Outside the U.S.

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The U.S. has long used trade and economic sanctions as elements of its national security and foreign policy. These sanctions target individuals and countries that represent national security threats to the U.S. and affect a wide range of transactions, both within the U.S. and beyond borders. Understanding these regulations and the transactions they cover is critical to anyone participating in international business transactions.

Indeed, if you engage in international business from outside the U.S., there is a good chance that your work will involve U.S. companies, subsidiaries of U.S. companies, U.S. banks, or U.S. citizens and permanent residents. Or you may yourself be a U.S. citizen, U.S. permanent resident or an employee of a U.S. subsidiary located outside the U.S. In these cases, some of your activities may be regulated by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC). These regulations have a surprisingly broad reach, even covering certain activities that take place entirely outside the U.S. For the international business and legal representative, it is essential to understand the scope and coverage of the OFAC regulations and recognize how they can apply to transactions outside the U.S. Failure to comply with the regulations can result in personal liability as well as U.S. sanctions on your company or organization, limiting your ability to transact business in the U.S. and with U.S. companies.

In general, the OFAC regulations serve to restrict certain types of trade with countries or entities of concern. OFAC has a variety of country-specific regulations. Two of the most well known are the Cuban Assets Control Regulations (31 C.F.R. Part 515) and the Iranian Transaction Regulations (31 C.F.R. Part 560). These regulations restrict trade with Cuba and Iran in many significant ways. Another well-known set of restrictions are those imposed on individuals or organizations of concern to the U.S., the so-called "Specially Designated Nationals" (SDNs). The names of these individuals and entities appear on OFAC's SDNs list. The list includes organizations such as al-Qaeda, Hezbollah, and Hamas, as well as particular individuals, including known terrorists, supporters of weapons of mass destruction programs, and drug kingpins.

This article highlights ten key aspects of the OFAC regulations for the international business representative operating predominantly outside the U.S. Our list focuses on the particular risks to non-U.S. persons, and U.S. persons operating outside the U.S.

Issue #1: OFAC Asserts Jurisdiction Broadly

The first question one must consider is the application of the sanctions. U.S. regulators design these provisions to have a broad global reach. This "extraterritorial" regulatory coverage can apply to many types of transactions.

Financial Transactions. Office of Foreign Assets Control (OFAC) jurisdiction can apply to any transaction that uses the U.S. financial system for payments and claims. Even if the underlying transaction has nothing to do with the U.S., if a financial transaction goes through the U.S. or is handled by a person subject to U.S. OFAC jurisdiction, the laws and regulations implemented by OFAC likely will apply.

Actions of U.S. Subsidiaries. Under some of the applicable provisions, OFAC jurisdiction can apply to the activities of subsidiaries of U.S. companies organized outside the U.S. Many transactions subject to OFAC jurisdiction take place entirely outside the U.S.

One significant example of OFAC regulations with extraterritorial effect are the Cuban Assets Control Regulations.[1] The Cuba sanctions prohibit transfers of property by those persons "subject to the jurisdiction of the U.S." or property "subject to the jurisdiction of the U.S." without a license.[2] The regulations define the

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1 31 C.F.R. Part 515.

2 See 31 C.F.R. § 515.201(a)(1).

term "subject to U.S. jurisdiction" to include U.S. citizens, U.S. residents, corporations and other organizations organized under the laws of the U.S., and corporations or other organizations owned or controlled by U.S. citizens or corporations and other organizations organized under the laws of the U.S.[3]

Under this definition, subsidiaries of U.S. companies organized outside the U.S. are considered "subject to the jurisdiction of the U.S." and therefore subject to the OFAC Cuba sanctions. Even companies partially owned by U.S. companies or joint ventures between U.S. and non-U.S. companies may be subject to the OFAC sanctions as they may be "controlled by" U.S. persons. Although the regulations do not define specifically what it means to be "controlled by" a U.S. company, a 50% or more ownership would be deemed by OFAC to be a person subject to U.S. jurisdiction. A smaller ownership interest could also trigger OFAC jurisdiction, particularly if the ownership interest includes significant minority rights, the ability to influence day-to-day operations of a company, or significant involvement of U.S. persons in the non-U.S. subsidiary. The regulations thus apply to the non-U.S. subsidiaries in the same way they apply to the U.S. parent corporation.

Another important example of the extraterritorial effect of OFAC sanctions involves the Iranian Transactions Regulations (ITR).[4] The ITR prohibit exports of goods, technology, or services to Iran by U.S. persons. The ITR defines "U.S. persons" to include foreign branches of entities organized under the laws of the U.S.[5] The language here is tricky; in the vernacular one would think this means that a representative office of a U.S. company would be subject to U.S. jurisdiction in all cases. The actual interpretation of the law is more limited. In this context, a "branch" refers to a U.S. company that is "doing business" in the non-U.S. jurisdiction and has purposely availed itself to the laws and regulations of that non-U.S. jurisdiction. Subsidiaries of U.S. companies organized outside the U.S. are not "branches" of U.S. companies under this provision. Theoretically at least, this permits subsidiaries of U.S. companies organized outside the U.S. to engage in trade with Iran whereas they could not engage in the same trade with Cuba. U.S. companies have used this theory to defend sales by their subsidiaries to Iran.

The problem with the "corporate separateness" of subsidiaries of U.S. companies is that companies within the same corporate group are increasingly not so separate. Accounting and disclosure rules in the U.S. encourage U.S. senior management to be on top of the actions of their subsidiaries. This frequently results in compliance policies requiring approvals by U.S. persons. There may be integrated accounting, Information Technology (IT), credit and other services that cut across the parent/subsidiary lines. In practical terms, it is increasingly difficult for U.S. companies to take the position that their non-U.S. subsidiaries can act truly independently when it comes to activities involving Iran. The application of OFAC sanctions is very fact specific.

It is also important to recognize that a U.S. company cannot avoid the application of OFAC sanctions by referring opportunities to its non-U.S. affiliates, or an unaffiliated entity. U.S. companies cannot, for example, ship items ultimately bound for Cuba to a foreign affiliate or partner and have that foreign entity send the items to Cuba. The regulations specifically forbid such deliberate evasion of the OFAC regulations.[6]

Application to U.S. Persons Wherever Located. The OFAC regulations apply to U.S. persons living anywhere. U.S. citizens and permanent residents wherever located must ensure that when working for entities not otherwise subject to U.S. jurisdiction, they do not participate in transactions with countries and entities subject to U.S. sanctions, even if their employer is not otherwise subject to U.S. jurisdiction.

Re-exports of U.S.-Origin Goods and Technology. The ITR also prohibit the re-exportation of U.S.-origin goods, technology, and services by non-U.S. persons that would have been prohibited if undertaken by U.S. persons.[7] With the exception of some low-level technology items under specific circumstances, or the incorporation of small amounts of U.S. content into a larger or substantially transformed product made outside the U.S., a non-U.S. company cannot acquire U.S.-origin items from a U.S. company and re-export the items to Iran without an OFAC license.

These extraterritorial applications of the OFAC regulations, to many outside the U.S., represent overreaching by the U.S. government in that they have an effect outside the continental U.S. Nevertheless, OFAC can and will impose sanctions on non-U.S. companies, including, if the violations are sufficiently severe, adding a company to the Specially Designated Nationals (SDNs) list and thereby severely limiting trade with the U.S. Before engaging in transactions with Cuba, Iran, or other countries subject to OFAC regulations or with prohibited parties as identified by OFAC, subsidiaries of U.S. companies must consider the applicability of the OFAC regulations to the

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3 See 31 C.F.R. § 515.329.
4 See 31 C.F.R. Part 560.
5 See 31 C.F.R. § 560.314.
6 See 31 C.F.R. § 515.201(c).
7 See 31 C.F.R. § 560.205(a)(1).

particular transactions. U.S. persons wherever located may not support activity indirectly or from outside the U.S. if they could not provide such support from the U.S. directly.

Issue #2: Know the Scope of the Applicable Sanctions Regime

The scope and coverage of OFAC sanctions varies from country to country. Some countries are subject to near-total embargoes, while sanctions on other countries are much more narrowly tailored. Before entering into any international transaction, one must identify all parties to the transaction—including brokers, intermediate banks, and other middlemen for any transaction with a U.S. nexus—and identify the applicable sanctions and their relationship to the transaction.

Some countries, such as Iran and Cuba, are subject to an almost complete U.S. embargo. The vast majority of re-exports of U.S.-origin commodities are prohibited to Iran without a license from OFAC. With limited exceptions, U.S. persons must not engage in any transactions with Iran, including as middlemen, brokers, or intermediary banks, or in transactions involving Iranian goods or assets without an OFAC license. The U.S. sanctions on Cuba apply even more strictly. Not only are most transactions with Cuban entities prohibited, but transactions with Cuban nationals—wherever they may be located—are prohibited without an OFAC license.[8]

The regulations do permit transactions with Cuban nationals who have taken up legal residence in the U.S., but the regulations prohibit transactions with Cuban nationals in most other locations.[9] By contrast, U.S. persons are permitted to transact business with most Iranian nationals who are not ordinarily resident in Iran. So while U.S. persons generally are permitted to transact business with an Iranian national living in Europe, one cannot transact business with a Cuban national living in Europe without obtaining an OFAC license.

Other countries and individuals are subject to less restrictive sanctions. For example, imports into the U.S. from North Korea require a license, while exports from the U.S. to North Korea or exports to North Korea of U.S.-origin items do not require an OFAC license, but do require a license under the Export Administration Regulations (EAR).[10] The sanctions on Sudan are also more narrowly tailored to reflect U.S. foreign policy. The U.S. imposes a nearly complete embargo on the northern portion of Sudan (which is ruled by the government responsible for the atrocities in Darfur), but places much fewer restrictions on Southern Sudan (ruled by a different government). Nearly all transactions with the northern portion of Sudan that involve U.S. persons require an OFAC license, while many transactions with southern Sudan do not require an OFAC license.

For most other partially embargoed countries, the sanctions are limited to preventing transactions with particular individuals in that country who are listed in OFAC's SDN list.

Issue #3: Always Check the Regulations—They Change Frequently

OFAC sanctions are based on U.S. national security and foreign policy interests. Global events that drive U.S. policy change frequently, and the U.S. government amends the OFAC regulations to respond to these changes. The U.S. government may implement sanctions as initial measures in response to national security or foreign policy threats. As such, the OFAC regulations change frequently.

For example, in February 2010, the U.S. Senate considered a bill to sanction individuals in Iran identified as having committed human rights violations in the wake of the June 2009 Iranian presidential election and thereafter. The proposed sanctions include freezing of these individuals' assets and prohibiting U.S. financial institutions from participating in transactions involving these individuals in any way. Should these sanctions become law, the SDN list and, potentially, the OFAC regulations likely will be revised to implement the new sanctions.

Other examples of recent changes include the U.S.'s removal in June 2008 of North Korea from the OFAC sanctions imposed by the Trading with the Enemy Act, although separate export and import licensing requirements remain in place. In September 2009, the U.S. implemented changes to the Cuban Asset Control Regulations to make it easier for the provision of telecommunications services, family travel and family remittances between the U.S. and Cuba. Finally, the U.S. updates the SDN list constantly to add new names of SDNs, based on new intelligence and policy changes. It is essential to keep abreast of changes to the OFAC SDN List and country lists.

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8 See 31 C.F.R. § 515.201.

9 See 31 C.F.R. § 515.505.

10 Military shipments under the U.S. International Traffic in Arms Regulations (ITAR) continue to require a license to North Korea, and current U.S. policy would be to deny such license.

Issue #4: Know the Exceptions to OFAC Sanctions—It Could Be Important to Your Business

There are a number of exceptions available under the regulations which permit exports to sanctioned countries without an OFAC license, or which provide that OFAC has a policy of granting particular types of license requests. For Iran, persons subject to U.S. jurisdiction may obtain licenses for export of food and medicine to Iran. OFAC generally will also issue licenses for humanitarian support for Iran, conduct of research by U.S. persons, etc. but most any other trade with Iran will not be licensed. Some limited trade in U.S.-origin products can proceed with Iran by non-U.S. persons if the U.S. content is very small or has been substantially transformed outside the U.S. Goods or technology substantially transformed into a foreign-made product outside the U.S., or foreign-made items where U.S.-origin parts comprise less than 10% of the total value of the item may be exported to Iran by non-U.S. persons without a license if the parts were not ordered originally from the U.S. with the intent to ship them to Iran. This is particularly important for non-U.S. companies that rely on U.S. parts and technology to develop their products.

Other exceptions, such as exceptions for the provision of telecommunications services, as well as research activities and professional meetings, can also apply. Each of these exceptions must be analyzed individually for applicability to specific fact patterns.

Issue #5: Remember Other Relevant Export Regulations Including U.S. Export Regulations

The U.S. maintains export control regimes separate from the OFAC regulations. These separate regimes include the EAR (15 C.F.R. Part 730 et seq.) and the International Traffic in Arms Regulations (ITAR) (22 C.F.R. Part 120 et seq.). The EAR regulate dual-use items, which have civilian but also potentially military uses, while the ITAR regulate items specifically designed, developed, configured, modified or adapted for military purposes (including most space-related purposes, even if civil in nature).

The EAR and ITAR can apply to transfers that take place wholly outside the U.S. as well as exports from the U.S. It is especially important to consider the EAR when exporting or re-exporting U.S. origin products, or items that are the direct foreign-made product of U.S. goods or technology. While the OFAC regulations may not require a license for the export or re-export of such items, the EAR might. For example, exports of goods to Cuba may require an export license from the U.S. Commerce Department, depending on the nature of the item and the item's eligibility for certain export license exceptions.[11] There are certain license exceptions for exports to Cuba or Iran of items made outside the U.S. and comprising 10% or less U.S.-origin content (the "*de minimis*" exemption).[12] You should also be aware that products made outside the U.S. that are the direct product of U.S.-origin technology or software cannot be exported to Cuba and several other countries if certain conditions are true.[13]

In the case of Iran, both the OFAC regulations and the EAR control exports and re-exports of certain items to Iran. You should consult both the ITAR and the relevant EAR section (15 C.F.R. § 746.7) before exporting items to Iran. Note, however, that if both the OFAC regulations and EAR require an export license to Iran, you need only obtain the license from OFAC to cover the export.[14]

One final important country to note is Syria. The U.S. has imposed a comprehensive export embargo on Syria through the Commerce Department, rather than through OFAC.[15] Almost all U.S.-origin products except for food and medicine require a license for export or re-export to Syria, and current policy would be to deny such licenses. A separate set of Syrian Transaction Regulations under OFAC also apply, but they focus primarily on SDNs. The OFAC sanctions are limited to transactions involving the finances and property of specifically identified individuals, including Syrians who assist or provide safe haven for other individuals on the SDN list for terrorism-related reasons; Syrians who have been directing Syria's activities and security presence in Lebanon; Syrians involved with Syrian government decisions that are intended to destabilize Iraq; and other specified individuals.[16] The names of these individuals appear on the SDN list. Therefore, if you plan to export or re-export U.S.-origin goods to Syria, you must consult both the EAR and the OFAC sanctions/SDN list before exporting or re-exporting the item.

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11 See 15 C.F.R. § 746.2.
12 See 15 C.F.R. § 734.4(c).
13 See 15 C.F.R. § 736.2(b)(3).
14 See 15 C.F.R. § 746.7(a)(2).
15 See Supplement No. 1 to 15 C.F.R. Part 736, General Order No. 2.
16 See 31 C.F.R.§ 542.201.

Issue #6: Acquiring a Company? Be Aware of Successor Liability!

Violations of the U.S. export control and trade sanctions laws are strict liability violations. Moreover, liability for these violations does not end upon the acquisition of the violating company. Rather, the U.S. government applies the doctrine of successor liability and holds the successor company liable for past violations of its predecessor. This is true even in the common circumstance of a company acquiring another company that committed export violations before the acquisition. Even though the acquiring company likely had nothing to do with the violations, the acquiring company may still be liable for the violation.

The full panoply of penalties are available to the U.S. government even in cases of successor liability. That means that an acquiring company can be threatened with large fines and even export denial orders prohibiting exports by or to that company. Companies such as Boeing, General Dynamics and Sigma-Aldrich have been held liable—and been fined millions of dollars apiece—under the doctrine of successor liability.

Companies planning to purchase another company should carefully review the company's export policies and practices, especially if the company being purchased does significant export (or re-export) business. You should consider facts such as where the company does business and its customer base. A thorough due diligence process should include a review of the acquisition target's export compliance plan, product classification matrices (which identify the U.S. export controls associated with a particular product), export documentation, customer lists, and any communications with U.S. government agencies regarding export controls. We also believe it is important as part of the diligence process to interview export compliance personnel at the target to understand its compliance activities and processes, and to get a sense of the target's implementation of export compliance activities. This is especially important for the acquisition of a U.S. company.

For U.S. companies, due diligence is also critical when acquiring non-U.S. companies; there is no transitional or "grace" period following acquisitions of non-U.S. companies. A U.S. company that acquires a non-U.S. company must be fully compliant on Day One.[17] It is thus important, for example, for a U.S. buyer or a non-U.S. buyer with significant ties to the U.S. to understand if a potential target is doing business in countries such as Iran or Cuba. If a person subject to U.S. jurisdiction purchased a non-U.S. company that continued sales to Cuba after the closing, the purchased entity would automatically be violating OFAC's restrictions after the closing.

If you do find violations, and still want to pursue the transaction, you should consider filing a voluntary self-disclosure with OFAC or the relevant U.S. government agency prior to closing the transaction and also seek appropriate licensing relief. This way, you will mitigate the potential risk and penalties and get a sense of the level of exposure prior to completing the deal. In cases of serious potential liability, it may be prudent to delay the closing until the U.S. enforcement authorities have completed their investigation and assessed liability.

Issue #7: Conflicts of Laws: When OFAC Says You Cannot, and Local Laws Say You Must

Cases arise in which compliance with both OFAC sanctions and local law is not possible. This can arise in many contexts, including for non-U.S. subsidiaries of U.S. companies.

A good example is transactions with Cuba. Subsidiaries of U.S. companies, such as subsidiaries of a U.S. bank operating inside or outside the U.S., must freeze, or "block," any funds they receive funds which Cuba or a Cuban national has an interest.[18] The bank cannot even release the funds back to the person who provided them without an OFAC license. This, however, runs contrary to the laws of other countries, which in this circumstance might require the bank to return the funds to the person who provided them. Both Mexico and Canada have passed so-called "blocking" statutes, which prohibit local companies from complying with certain provisions of OFAC's Cuba transactions regulations. The European Union has passed a similar directive, one which has been adopted as law by several EU Member States, including the United Kingdom, Germany, and Italy.

This dilemma is not easily resolved. Even though OFAC is aware of these conflicts, it continues to enforce its regulations. One way to resolve such conflicts would be to seek a license, possibly on an emergency basis, to permit the overseas entity to reject the funds rather than require them to be blocked. However, the best way to avoid such issues is to screen transactions in advance that could become subject to U.S. jurisdiction, and refuse to participate in any transactions involving sanctioned entities unless you obtain an OFAC license.

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17 See *Economic Sanctions Enforcement Guidelines*, 74 Fed. Reg., 57,593 and 57,599 (Nov. 9, 2009).

18 See 31 C.F.R. § 515.201(e).

Issue #8: Maintain an Effective Compliance Plan

Many of the potential issues discussed previously can be avoided by a robust, well-implemented compliance plan. Most companies have compliance plans for a variety of legal issues, from corporate and securities activities to environmental compliance plans. To this list, companies should add compliance plans for OFAC sanctions. Often, OFAC compliance plans are subsumed in larger export compliance or trade compliance programmers. However, companies doing business with U.S. companies or individuals as principals or middlemen would benefit from an OFAC compliance plan to help them identify and fulfill any responsibilities imposed under U.S. law.

The essence of a good OFAC compliance plan is the review and screening of customers and participants in transactions to determine if U.S. jurisdiction applies. This cuts to the heart of OFAC sanctions compliance, for OFAC sanctions are focused on the entities participating in a transaction. A complete OFAC compliance program for activities subject to U.S. OFAC jurisdiction should include customer screening against the SDN list, as well as screening against any of the relevant lists for U.S.-origin products and technology such as the Commerce Department's Denied Persons List, Entity List and Unverified List. It is important to recognize that there are specific U.S. prohibitions applicable to all persons, whether or not U.S. persons, to prohibit retransfers of U.S.-origin products to those identified on the SDN list.

A good compliance program should include a requirement that the details of all transactions and the parties involved be documented and maintained in a file or database. Other elements of the compliance plan can be tailored to meet the specific needs of and risks associated with an individual company, based on its activities, the types of customers with which it works, and the locations of its operations and activities. Relevant employees should be trained in OFAC compliance.

An effective, thoroughly implemented compliance plan is an important mitigating factor in the event a company is charged with regulatory violations by OFAC. General Factor E of OFAC's new enforcement guidelines provides that "the existence, nature and adequacy" of a company's compliance program at the time of the violation is relevant to determining the appropriate penalty.[19] OFAC's new enforcement guidelines also provide a risk matrix to help you determine the level of risk in your company, which forms the basis for developing the compliance plan.[20] To avoid OFAC violations, and to mitigate penalties if they occur, companies should have in place an OFAC compliance plan.

Issue #9: If You Violate—Cooperate

OFAC has a number of enforcement mechanisms at its disposal, ranging from issuing a Finding of Violation with no monetary penalty, issuing a civil monetary fine to referring the violation to U.S. law enforcement agencies for criminal enforcement. OFAC can also issue license denials or suspend or revoke existing licenses. In serious cases, a violator could risk its ability to gain U.S. government contracts, licenses or even the ability to continue to do business with U.S. persons.

The action OFAC takes in response to a violation certainly depends on the nature of the violation itself. It also depends at least in part on a company's response and level of cooperation with the U.S. government in the wake of discovering the violation. It is important for U.S. and non-U.S. companies to consider the ways they can cooperate with OFAC following discovery of a violation to mitigate any resulting penalties.

In November 2009, OFAC issued its Economic Sanctions Enforcement Guidelines, a set of guidelines designed to explain the factors OFAC considers in determining penalties for violations of its regulations.[21] The guidelines set forth a number of factors, General Factors A-K, that OFAC will consider in determining the penalty for violation of the OFAC regulations. One of the key factors to consider is General Factor G, "Cooperation with OFAC." General Factor G lists a number of different criteria to judge the level of a company's cooperation following a violation.

Perhaps the most important way to cooperate with OFAC is voluntarily to disclose violations that your company discovers. This is the very first criterion listed in General Factor G.[22] A voluntary disclosure of a violation can result in up to a 50% reduction in the base penalty associated with the violation (up to a certain limit).[23] Cooperation is also important for companies that anticipate seeking OFAC licenses in the future. OFAC has discretion in issuing specific licenses for transactions for which a license is required, and it is certainly possible that OFAC would be more consider a history of violations and a failure to cooperate in making its licensing determinations.

When making a voluntary disclosure of a potential violation, it is important that you provide all relevant

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19 See *Economic Sanctions Enforcement Guidelines*, 74 Fed. Reg., 57,603.
20 *Ibid.*, 57,607.
21 See *Economic Sanctions Enforcement Guidelines*, 74 Fed. Reg., 57,593–57,608.
22 *Ibid.*, 57,603.
23 *Ibid.*, 57,606.

information regarding the violation. OFAC may not give incomplete disclosures any credit. It is also important to thoroughly investigate the facts and circumstances surrounding the violation, to determine if any other related violations may have occurred. The more thorough the disclosure, the more likely the disclosure will mitigate any resulting penalties.

One wrinkle in mitigating penalties with a voluntary disclosure is that you will not receive credit for a "voluntary" disclosure if a third party is required to report the violation, and actually does report the violation before OFAC issues a final penalty. Third party participants in transactions such as banks may be required to report to OFAC transactions that violate OFAC sanctions. In such cases, if the bank reports the violation to OFAC before OFAC issues a final penalty ruling, the violator will not receive the full mitigation credit for a "voluntary" disclosure. This is true even if the violator voluntarily reports the violation to OFAC before the third party makes its required disclosure.[24] However, in these cases OFAC will still reduce the base penalty anywhere from 25% to 40% for substantial cooperation by the violator, which can include a detailed disclosure of all of the relevant facts surrounding the violation.[25] Moreover, if the third party fails to disclose altogether, and the violator voluntarily discloses the violation, it will be considered a voluntary self-disclosure for mitigation purposes. Based on this, disclosing a potential violation to OFAC and substantially cooperating in any investigation often will result in significant mitigation of the final penalty, regardless of whether the disclosure you make is formally considered a "voluntary self-disclosure."

Another critical factor in making a voluntary self-disclosure is ensuring that the information provided to OFAC is accurate and complete. False or misleading information can negate a voluntary self-disclosure, and can even make the situation worse.[26] If you have just determined a potential violation has occurred but do not have all of the facts regarding the potential violation, you can submit a notification of the potential violation to OFAC and then provide the detailed information after a "reasonable" amount of time and still get credit for a "voluntary self-disclosure."[27]

Companies often take this approach, providing notification to OFAC of potential violations, performing an internal investigation, and then providing a detailed report of the investigation's findings in a detailed disclosure. We often submit these disclosures within 60 days of the initial notification. In performing these investigations, you should investigate whether there are related issues or violations, and include all violations found related to the same course of conduct in the detailed disclosure.

The decision to make a voluntary disclosure should not be taken lightly. Any voluntary disclosure could result in fines and publicity. Companies must balance that risk against the penalties that could apply if the violation is discovered first by the government and the risk of similar violations remaining ongoing if they are not addressed and brought to the government's attention.

Issue #10: What to Do When You Discover a Transaction that Potentially Violates the Regulations

Banks or other parties frequently discover transactions prohibited by the OFAC regulations without a license. Parties to the transaction subject to the jurisdiction of the applicable regulation cannot continue participating in the transaction without a license. In some cases, however, the transaction is already underway, and the party subject to U.S. jurisdiction already has in its hands assets or money belonging to the party to the transaction that is the prohibited party. For example, an overseas subsidiary of a U.S. company might be handling the transfer of funds as part of a sale of goods, and the payor or the payee may be a Cuban national. The subsidiary is subject to U.S. OFAC jurisdiction, and cannot proceed with the transaction because a Cuban national has an interest in it.[28] Depending on the applicable regulations, it may need to take additional steps.

OFAC has two mechanisms to treat money or property in this situation. The first and stricter response is called "blocking." Blocking is essentially freezing the transaction. If OFAC requires the money be blocked, the money cannot be released to the intended recipient or returned to the payor. It must remain with the bank until the transaction is licensed or OFAC otherwise grants its approval for the release of the funds to approved parties. In the case of money or property in which Cuba or a Cuban national has an interest, that property if it comes into the possession of an entity subject to U.S. jurisdiction must be blocked.[29] Similarly, property or funds in which the Government of

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24 *Ibid.*, 57,595.
25 *Ibid.*, 57,595–57,596.
26 *Ibid.*, 57,596.
27 *Ibid.*
28 See 31 C.F.R. § 505.201(a).
29 See 31 C.F.R. § 515.201(e).

Sudan has an interest must be blocked.[30] In addition, the property of SDNs must be blocked by entities subject to U.S. jurisdiction if the transaction is not licensed.[31] In each case, the determination of whether these requirements apply to companies organized outside the U.S. will depend on the statute involved, and the specific facts of the case.

The less strict alternative is rejecting a transaction. If OFAC permits the intermediary bank or entity to refuse the transaction, as it would for example for persons subject to U.S. jurisdiction under the ITR, then the intermediary bank or entity may return the property or funds to the recipient. Transactions involving Iran that require a license may be rejected, and the funds or property returned to the providing party. The ITR do not include a provision for blocking funds.

If you discover that a transaction in which you are participating requires an OFAC license and is subject to OFAC jurisdiction, you should stop the transaction immediately unless you have obtained a license. Before doing anything with any money or property in your possession, you must identify the parties involved, and whether OFAC has jurisdiction to require you to block the property or funds, or if you may simply refuse the transaction and return any property or monies in your possession. This would also be a logical time to assess whether any actual violations occurred, and if a voluntary disclosure would be prudent.

11. Conclusion

OFAC sanctions have a surprisingly broad—and somewhat controversial—reach. Participants in international business need to be aware of these regulations and the risks involved. Moreover, the U.S. government is now seeking to expand the efficacy of OFAC sanctions even further by encouraging non-U.S. parties, particularly financial institutions, to refrain from doing business with specific Iranian entities on a worldwide basis and with Iran itself. This marks a significant shift in U.S. tactics, and one which makes it even more important to understand the obligations under U.S. law for transactions that take place entirely outside the U.S. but have a nexus with the U.S. Being aware of these issues is a critical first step to complying with the regulations. As you conduct your business, you should think about the ways U.S. jurisdiction might extend to particular transactions. By doing so, you minimize the chances of violating OFAC regulations and protect your company and its employees from the risk of OFAC violations.

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30 See 31 C.F.R. § 538.201.

31 See, for example, 31 C.F.R. § 537.201 (blocking of property or funds of specially designated Burmese nationals); 31 C.F.R. § 541.201 (blocking of property or funds of SDNs of Zimbabwe); and 31 CFR § 545.201 (blocking of property or funds of SDNs that are members of the Taliban).

GUIDE TO AUTHORS

The following is a brief guide concerning the provision of articles which may be of assistance to authors.

1. Articles must be submitted in Microsoft Word-format, in their final form, in correct English. Please send the electronic file to the Editor by e-mail, at jsnyder@crowell.com.
2. Special attention should be given to quotations, footnotes and references which should be accurate and complete. In the case of book references please provide the name of author, publisher, place and year of publication.
3. Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Keep column headings as brief as possible and avoid descriptive matter in narrow columns.
4. A brief biographical note, including both the current affiliation as well as the e-mail address of the author(s), should be provided in the first footnote of the manuscript.
5. Due to strict production schedules it is often not possible to amend texts after acceptance or send proofs to authors for correction.
6. Articles which are submitted for publication to the editor must not have been, nor be, submitted for publication elsewhere.
7. This article should contain an abstract, a short summary of about 100 words, placed at the beginning of the article. This abstract will also be added to the free search zone of the Kluwer Online database.