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Memorandum

A Framework for Sanctions Compliance: OFAC Sets Expectations

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Introduction

On May 2, 2019, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") released a "Framework for OFAC Compliance."[1] This is the most extensive guidance OFAC has provided to date on its expectations regarding sanctions compliance. In particular, while OFAC continues to believe that companies should apply a risk-based approach to developing, implementing, and periodically updating a "**sanctions compliance program**" ("SCP"), OFAC has, for the first time, outlined its views on essential components of an SCP.

OFAC recommends that companies focus on these five compliance components: (1) **management commitment**; (2) **risk assessments**; (3) **internal controls**; (4) **testing and auditing**; and (5) **training**.

We anticipate that OFAC will use this framework when evaluating SCPs for purposes of determining whether a violation has been committed and/or when assessing an appropriate civil penalty for violations. Consequently entities should be prepared to demonstrate how their institution has addressed each of the essential compliance components. This detailed new framework presents an opportunity for entities to reevaluate their compliance efforts, get buy-in from senior leaders within their organization, and initiate new controls and training programs in accordance with these guidelines.

Five Essential Components of Sanctions Compliance

OFAC's guidance recognizes that there is no "one size fits all" approach to compliance and that an effective SCP will necessarily reflect the unique risk profile of the entity and the entity's size and resources. However, OFAC recommends that the following five essential components be incorporated in every SCP.

[1] This comes within days of the Justice Department's April 30, 2019 issuance of updated guidelines on corporate compliance.

Management Commitment: Senior management commitment to the compliance function is critical to the success of any SCP.[2] Such commitment includes ensuring that personnel responsible for compliance receive adequate staffing and funding resources and are empowered, legitimized, and integrated into the daily operations of the organization. OFAC will also assess the level of senior management commitment to the SCP by looking at multiple factors, including: (1) is there a dedicated sanctions compliance officer? (2) are compliance personnel sufficiently experienced? and (3) are the controls appropriate to address the organization's compliance risk profile including IT systems and software?

Risk Assessments: Routine, and sometimes ongoing, risk assessments are an integral component of an organization's SCP. These risk assessments should generally involve a "top-to-bottom" review of an organization's OFAC compliance risk factors. A top-to-bottom review might include an assessment of an organization's customers, suppliers, vendors, intermediaries and other counter-parties; its products and services; and the geographic scope of its operations and the operations of its customers, suppliers, vendors, intermediaries and counterparties. Risk assessments should also include sanctions-related due diligence for potential mergers and acquisitions.

Internal Controls: Policies and procedures that allow an organization to detect, prevent, report, and maintain records on any potential violations of the laws and regulations administered by OFAC are an essential component of an effective SCP. An effective SCP will have internal controls that are capable of rapidly adapting to changes published by OFAC including updates to the list of Specially Designated Nationals ("SDNs") and the Sectoral Sanctions Identifications list ("SSIs"), new sanctions programs, and new or amended general licenses. Effective internal controls will include written policies and procedures that capture the scope of an organization's sanctions compliance risk profile, be easy to follow, and designed to prevent employee misconduct.

Testing and Auditing: Testing and audits can help an organization identify weaknesses, remediate deficiencies, and enhance the overall SCP. Internal and/or external audits should be conducted to identify and remediate any weaknesses that may be identified. Audits should be comprehensive, independent, and objective. Moreover, audit personnel should be accountable directly to senior management, including the Board of Directors.

Training: Training should be provided for all appropriate employees on a periodic basis, but at a minimum, annually. Training should provide job specific knowledge, describe the compliance responsibilities of each employee, and include employee assessments. An organization's training program should be tailored to its sanctions compliance risk profile, and include easily accessible resources and materials.

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[2] Senior management may include senior leadership, executives, and/or the board of directors depending on the nature and size of the organization.

Root Causes of Compliance Breakdowns and Deficiencies

As part of its guidance on effective SCPs, OFAC identifies ten root causes of deficiencies it has identified during investigations conducted since the November 2009 publication of the Economic Sanctions Enforcement Guidelines, 31 C.F.R. part 501, Appendix A. This list, though not comprehensive, provides practical illustrations on the problems an SCP should be designed to eliminate.

The ten root causes OFAC highlights are: (1) a lack of a formal OFAC SCP; (2) misinterpreting, or failing to understand the applicability of, OFAC's regulations; (3) facilitating transactions by non-U.S. Persons (including through or by overseas subsidiaries or affiliates); (4) exporting or re-exporting U.S.-origin goods, technology, or services to OFAC-sanctioned persons or countries; (5) utilizing the U.S. financial system, or processing payments to or through U.S. financial institutions, for commercial transactions involving OFAC-sanctioned persons or countries; (6) sanctions screening software or filter faults; (7) improper due diligence on customers/clients (e.g., ownership, business dealings, etc.); (8) de-centralized compliance functions and inconsistent application of an SCP; (9) utilizing non-standard payment or commercial practices; and (10) individual liability (or rogue actors within the organization).

The root causes of compliance deficiencies that OFAC highlights are not surprising, and correspond directly to the elements of a strong SCP. Nevertheless, they also highlight that violations can occur even where an entity has already implemented some form of an SCP. In order to avoid potential violations of the rules and regulations administered and enforced by OFAC, and to obtain the benefit of having an SCP, organizations subject to U.S. jurisdiction should carefully review their current SCPs to determine if they conform to OFAC's recommendations and address each of the components identified in the guidance.

Conclusion

OFAC recognizes the reality that violations can still occur in the face of an effective SCP. Accordingly, OFAC will look favorably on the implementation of an effective SCP, providing a basis upon which to mitigate any potential civil monetary penalty under General Factor E (compliance program) of OFAC's enforcement guidelines. [3] An SCP that includes the five essential components of compliance may benefit from further mitigation pursuant to General Factor F (remedial response) if the SCP results in remedial measures in response to any apparent violation. OFAC may also consider the existence of an effective SCP as a factor in determining whether an apparent violation is deemed "egregious."

While this recent guidance presents valuable insights as to the specific elements of an effective SCP, the framework does not dictate a "one-size-fits-all" approach. Any assessment of the adequacy of a particular entity's compliance function and SCP will still depend on a number of fact-specific considerations, including the geographic scope of the entity's operations, the risks associated with the entity's industry and operations, and the size and sophistication of the entity, among others.

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[3] Economic Sanctions Enforcement Guidelines, 31 C.F.R. part 501, App. A (2018).

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