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Contributing Editors:
Roberto J. Gonzalez & Joshua R. Thompson
Paul, Weiss, Rifkind, Wharton & Garrison LLP

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Recent Developments in U.S. Sanctions: Russia Sanctions; OFAC Enforcement Trends; and Compliance Lessons Learned


Roberto J. Gonzalez


Joshua R. Thompson

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Introduction

Since Russia's invasion of Ukraine in February 2022, the United States ("U.S.") government, through the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC"), has imposed several rounds of sweeping sanctions targeting Russian financial institutions, state-owned entities, prominent Russian individuals and oligarchs, and government officials. OFAC has also imposed comprehensive sanctions targeting two regions of Ukraine – the so-called Donetsk and Luhansk People's Republics – that Russia has occupied and declared as independent of Ukraine. OFAC has also imposed a number of prohibitions on a U.S. persons' ability to engage in certain activities involving Russia, including a prohibition on U.S. persons engaging in "new investment" in Russia. These sanctions were imposed with unprecedented coordination among U.S. allies, including Australia, Canada, the European Union, Japan, and the United Kingdom. The cumulative effect of these sanctions has been to significantly cut off Russia from the U.S. economy and, as a result, a number of companies have exited the Russian market. The U.S. government has also announced a focus on criminally and civilly enforcing these sanctions.

In addition to surveying the new Russian sanctions, this chapter focuses on OFAC's compliance expectations and enforcement trends generally. Since January 2020, OFAC has taken 43 public enforcement actions and assessed over $56.8 million in civil monetary penalties. Increasingly, OFAC has drawn explicit links in its public enforcement actions to the compliance expectations laid out in its landmark 2019 guidance on the "hallmarks of an effective compliance program" (the "Framework"). U.S. and non-U.S. companies alike would be well served to learn from the mistakes of similarly situated entities and incorporate the compliance guidance found in recent OFAC enforcement actions into their own sanctions risk assessments and compliance programs.

U.S. sanctions targeting Russia

When Russia's invasion of Ukraine began, the U.S. government reacted by issuing broad-ranging blocking sanctions targeting major Russian financial institutions and state-owned entities (including Sberbank, Alfa Bank, VTB Bank, Alrosa, and the Russian Direct Investment Fund), as well as additional prominent Russian companies and individuals. OFAC designated these individuals and entities on its Specially Designated Nationals and Blocked Persons List (the "SDN List"), which broadly prohibits dealings that have a U.S. nexus with these blocked persons and which requires U.S. persons in possession of their property or interests in property to "block" or "freeze" their property and report the block to OFAC. In waves of designations in the months following the invasion, OFAC has added hundreds of Russian individuals and entities to the SDN List. Under OFAC's 50 percent rule, any entity owned 50 percent or more in the aggregate by one or more SDNs is treated as though it were an SDN, such that the prohibitions of the SDN List effectively apply to thousands of Russian entities. OFAC has also made similar designations of hundreds of Belarussian individuals and entities in response to Belarus' support for the invasion.

OFAC also issued four directives shortly after the invasion began that imposed prohibitions on certain types of dealings by U.S. persons with certain identified Russian entities, including prohibitions against dealing in the primary or secondary market for Russian sovereign debt and dealing in the new debt of greater than 14 days maturity or new equity of 13 major Russian companies, including Gazprom. Additionally, in an unprecedented move, OFAC, in coordination with the European Union, also arranged for seven Russian banks to be removed from the SWIFT messaging system. OFAC has also targeted the so-called Luhansk and Donetsk People's Republics in Ukraine with comprehensive sanctions that broadly cut off these regions from the U.S. economy and U.S. persons.

The U.S. government also imposed prohibitions on the importation into the U.S. of Russian-origin energy products (*e.g.*, crude oil, petroleum, liquified natural gas, coal) and Russian-origin fish, seafood, alcohol, and diamonds. On April 6, 2022, President Biden issued an executive order prohibiting U.S. persons from engaging in any "new investment" in Russia. Shortly thereafter OFAC also prohibited the export by U.S. persons of certain categories of services to Russia, including accounting services, trust and corporate formation services, and management consulting services. OFAC appears likely to continue to make periodic additional SDN List designations of Russian and Belarussian individuals and entities for the foreseeable future. The U.S. government could also add additional restrictions on the export of additional categories of U.S.-origin services to Russia in the future.

The cumulative effect of these sanctions has been to make Russia (and to a lesser extent Belarus) a quasi-comprehensively sanctioned country from a U.S. perspective. The U.S. government also threatens secondary sanctions on non-U.S. persons who engage in certain types of transactions with Russian companies or who directly or indirectly support Russia's war in Ukraine. Finally, a number of U.S. allies have issued sanctions that target many of the same individuals, entities, and/or activities that are targeted by U.S. sanctions, such that, depending on the facts and circumstances of any given transaction, there may be multiple countries' sanctions programs applicable to a given transaction.

The U.S. government has also made clear that it will rigorously enforce these sanctions. On March 2, 2022, the U.S. Department of Justice ("DOJ") announced the creation of the KelptoCapture task force, which coordinates actions across DOJ's divisions and partners with other federal agencies to target the evasion, violation, or undermining of U.S. sanctions targeting Russia and to seize assets belonging to sanctioned individuals. Later in March 2022, DOJ and OFAC announced the Russian Elites, Proxies, and Oligarchs ("REPO") task force, an international task force among the sanctions and law enforcement authorities of a number of U.S. allies to share information regarding sanctions targets, sanctions evasion attempts, and asset seizures. In April 2022, Deputy U.S. Attorney General Lisa Monaco emphasized the centrality of national security to DOJ's white collar enforcement efforts, noting in particular the enforcement of sanctions evasion and export control violations as a key part of deterring corporate crime, stating "one way to think about this is as sanctions being the new [Foreign Corrupt Practices Act]".

A major focus of the U.S. government has been on detecting and deterring attempts to evade or circumvent U.S. sanctions targeting Russia. The U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") issued guidance in March 2022 that included red flag indicators of potential sanctions evasion, including the Central Bank of Russia's attempts to use import or export companies to engage in foreign exchange transactions on its behalf. FinCEN issued additional guidance in March 2022 that included a list of red flag indicators for sanctions evasion and money laundering by sanctioned Russian oligarchs, including the use of high-value real estate, luxury goods, art, and precious metals and stones, to store value or undertake transactions. Although this March 2022 FinCEN guidance focused on anti-money laundering, it is nonetheless relevant to sanctions compliance efforts.

To emphasize the U.S. government's focus on enforcement in the Russia context, DOJ has announced new enforcement actions relating to earlier rounds of Russia sanctions. For example, in March 2022 DOJ announced a criminal indictment charging Jack Hanick, a U.S. citizen, for assisting sanctioned Russian oligarch Konstantin Malofeyev with various business deals. Additionally, DOJ has been focused not only on enforcing violations of sanctions, but also in seeking the seizure and forfeiture of sanctioned persons' assets (which requires showing that those assets are linked to criminal activity). For example, in April 2022 DOJ and Spanish law enforcement announced the seizure of sanctioned Russian oligarch Viktor Vekselberg's luxury yacht valued at $90 million in Spain. The seizure warrant alleged violations of sanctions and anti-money laundering laws related to the yacht, including that Vekselberg used a series of shell companies to make payments related to the yacht to obscure his ownership of the vessel and that Vekselberg caused entities and individuals to make U.S. dollar payments on his behalf relating to the yacht (including management fees, registration fees, and other services).

OFAC's Compliance Framework

The 2019 Framework, and the related "compliance commitments" that are now a standard part of OFAC settlements, represent OFAC's effort to more clearly and comprehensively communicate its expectations about appropriate sanctions compliance practices. OFAC made clear that the guidance is intended not only for U.S. companies, but also for non-U.S. companies that conduct business in or with the U.S., with U.S. persons, or using U.S.-origin goods or services. U.S. and non-U.S. companies would be well advised to study the Framework carefully because, among other things, OFAC will consider a compliance program that follows the Framework, a mitigating factor in the event of an enforcement action.[1]

The Framework describes five "essential components" of an effective sanctions compliance program ("SCP"):[2]

- ***Management Commitment.*** The Framework notes that Senior Management's[3] commitment to, and support of, a company's risk-based SCP is "one of the most important factors in determining its success". This commitment can be evidenced by management's: (1) review and approval of the SCP; (2) ensuring that the compliance function has sufficient authority and autonomy to deploy policies and procedures to effectively control OFAC risk (this includes the designation of a sanctions compliance officer); (3) ensuring the compliance function receives adequate resources; (4) promoting a "culture of compliance"; and (5) recognition of the seriousness of, and the implementation of necessary measures to reduce the occurrence of, sanctions violations.[4]
- ***Risk Assessment.*** As is consistent with OFAC's past practice, the Framework recommends that SCPs be designed and updated pursuant to a "risk-based approach". OFAC officials have emphasized that not every company is expected to satisfy every element of the Framework, but rather companies should tailor their programs to their unique risk profiles. One of the "central tenets" of a risk-based approach is for companies to "conduct a routine, and if appropriate, ongoing 'risk assessment' for the purposes of identifying potential OFAC issues they are likely to encounter".[5] OFAC identifies two core elements of a commitment to meet this compliance component: periodic risk assessments (including the conducting of due diligence during client and third-party onboarding and merger-and-acquisition activities); and the development of a methodology to analyze and address the particular risks identified by these risk assessments (which could include the root causes of any apparent violations or systemic deficiencies identified by the organisation during the routine course of business as well as through its testing and audit function).[6]
- ***Internal Controls.*** Effective OFAC compliance programs generally include internal controls to identify, interdict, escalate, report, and keep records pertaining to prohibited activity. Key elements include: (1) written policies and procedures tailored to the organisation's operations and risk profile and enforced through internal and/or external audits; (2) adequately addressing the results of a company's OFAC risk assessment; (3) implementation of immediate and effective remedial actions; (4) clear communication of policies and procedures to all relevant staff; and (5) identification of designated personnel responsible for integrating policies and procedures into daily operations.[7]
- ***Testing and Auditing.*** A comprehensive and objective SCP audit function ensures the identification of program weaknesses and deficiencies. OFAC notes that it is the company's responsibility to enhance its program, including all program-related software, systems, and other technology, to remediate any identified compliance gaps.
- ***Training.*** The Framework describes training as "integral" and outlines OFAC's expectation that training programs be "provided to all appropriate employees and personnel on a periodic basis (and at a minimum, annually) and generally should accomplish the following: (i) provide job-specific knowledge based on need; (ii) communicate the sanctions compliance responsibilities for each employee; and (iii) hold employees accountable for sanctions compliance training through assessments".[8]

As an appendix to the Framework, OFAC also describes some of the common "root causes" of the violations that were the subject of its prior enforcement actions. These themes and others are addressed in the enforcement trends section below. Additionally, in October 2021, OFAC issued guidance that discusses and applies the Framework in the context of crypto exchanges and other digital asset companies.

Enforcement trends

OFAC's enforcement actions in 2020, 2021, and the first half of 2022, together with the Framework's discussion of "root causes", highlight compliance deficiencies or breakdowns that are commonly responsible for sanctions violations. We describe the major areas of concern below.

Use of the U.S. financial system, including the use of U.S. dollar payments

OFAC has long viewed the use of the U.S. financial system for the benefit of sanctioned persons or jurisdictions as constituting a violation of U.S. sanctions.

OFAC's "big bank" enforcement actions have historically focused on global banks utilising "wire stripping" or other non-transparent payment methods to process transactions prohibited by U.S. sanctions through the U.S. financial system.[9] The 2019 multiagency resolutions with UniCredit Group ("UniCredit") ($1.3 billion in combined fines) and Standard Chartered Bank ("SCB") ($1.1 billion in combined fines assessed by the U.S. and United Kingdom) as well as the 2021 multiagency resolution with Mashreqbank Plc. ($100 million in combined fines), shows that the march of large, multi-agency enforcement actions against banks for such conduct continues to the present day.[10] The SCB action demonstrates that U.S. regulators have also taken enforcement action against financial institutions outside the context of "wire stripping" or other non-transparent payment methods. For example, DOJ cited the bank's transactions with an Iranian national who allegedly used supposed general trading companies in the UAE as fronts for a money exchange business located in Iran, and OFAC highlighted the bank's alleged delays in restricting sanctioned country access to its online banking platform and fax transmissions as a compliance failure that led to apparent sanctions violations.

Historically, OFAC and DOJ enforcement focused on banks – and not the banks' customers – that were conducting transactions with sanctioned jurisdictions or parties. However, in 2017, OFAC made clear through its enforcement action against Singaporean entity CSE Global Limited and its subsidiary CSE TransTel Pte. Ltd. that non-U.S. companies can violate U.S. sanctions by *causing* – through initiating U.S. dollar payments – U.S.-based banks or branches to violate sanctions by engaging in the prohibited exportation of financial services from the U.S. for the benefit of sanctioned parties or jurisdictions.

On July 16, 2020, DOJ and OFAC extended this line of enforcement further, announcing parallel resolutions with Essentra FZE Company Limited ("Essentra"), a UAE-based supplier, for selling cigarette products it knew to be ultimately destined for North Korea.[11] The transactions involved documentation falsely naming China as the destination. OFAC concluded that Essentra's conduct of this business and its *receipt* of three payments into its bank accounts at the non-U.S. branch of a U.S. bank "caused" the branch (a U.S. person) to export, directly or indirectly, financial services to North Korea. Similarly, in DOJ and OFAC's January 14, 2021, resolutions with PT Bukit Muria Jaya ("BMJ"), a paper products manufacturer located in Indonesia, BMJ "directed" payments for its North Korean exports to its USD bank account at a non-U.S. bank, which caused U.S. banks to clear wire transfers related to these exports.[12] Non-U.S. companies are now on notice of the risk of *criminal* enforcement in addition to OFAC enforcement, depending on the circumstances, for the *initiation* or *receipt* of U.S. dollar or other currency transactions that flow through the U.S. financial system, including non-U.S. branches of U.S. banks, in connection with sanctioned-country or sanctioned party business.

In late 2020, OFAC also issued its first and second public enforcement actions against cryptocurrency companies. First, on December 30, 2020, OFAC entered into a settlement with BitGo, Inc. ("BitGo"), a U.S. company that implements security and scalability platforms for digital assets and offers non-custodial secure digital wallet management services.[13] OFAC determined that deficiencies in BitGo's sanctions compliance procedures caused the company to fail to prevent persons it should have known (based on IP address data) were located in sanctioned jurisdictions from using its non-custodial secure digital wallet management service. Similarly, on February 18, 2021, OFAC entered into a settlement with BitPay, Inc. ("BitPay"), a U.S. company that offers a payment processing solution for merchants to accept digital currency as payment, for processing payments on behalf of individuals who, based on IP addresses and information available in invoices, were located in sanctioned jurisdictions. Additionally, OFAC has recently focused on money service businesses ("MSBs"), as evidenced by its 2021 actions against Payoneer Inc. ("Payoneer") and MoneyGram Payment Systems, Inc. ("MoneyGram"). OFAC stated that such digital currency businesses and MSBs, like other financial services providers, are responsible for ensuring compliance with OFAC sanctions, including understanding their sanctions-related risks and taking steps to mitigate against such risks (OFAC has also recently taken the more drastic step of designating crypto exchanges and other companies, including Blender.io and Tornado Cash, onto the SDN List for allegedly processing illicit transactions).[14]

In April 2022, OFAC entered into a $6,131,855 settlement with Toll Holding Limited ("Toll"), an Australian-headquartered freight forwarding and logistics company; based on OFAC's determination Toll originated in or caused the receipt of over 2,900 payments that flowed through the U.S. financial system in connection with sea, air, and rail shipments that involved Iran, North Korea, Syria, and/or SDNs. OFAC determined that Toll, due to inadequate sanctions compliance procedures, had processed U.S.-dollar denominated payments through the U.S. financial system. OFAC noted that this settlement highlights that non-U.S. companies that make use of the U.S. financial system to engage in commercial activity must take care to avoid routing transactions that relate to sanctioned countries or SDNs through the U.S. financial system.

Utilising non-standard payment or commercial practices

The Framework notes that companies are best positioned to determine whether a particular dealing, transaction, or activity is performed in a manner consistent with industry practice. Sometimes deviations from standard practice are driven by an effort to evade or circumvent sanctions. For example, on January 4, 2021, OFAC entered into a $8,572,500 settlement with *Union de Banques Arabes et Françaises* ("UBAF"), a French bank specialising in trade finance, for processing 127 payments on behalf of sanctioned Syrian financial institutions.[15] The

majority of the apparent violations involved UBAF's processing of internal book-to-book transfers on behalf of Syrian entities that were followed by corresponding funds transfers through the U.S. financial system. The remaining violations were either "back-to-back" letter of credit transactions – where a sanctioned Syrian entity was the beneficiary of export letters of credit or the applicant for import letters of credit that did not involve USD clearing, but the intermediary entered into or received one or more corresponding USD letters of credit to purchase or sell the same goods – or other trade finance transactions involving sanctioned parties, all of which were processed through a U.S. bank. OFAC stated that UBAF's actions during this time period demonstrated knowledge of OFAC sanctions, but the bank incorrectly believed that avoiding direct USD clearing on behalf of sanctioned parties was sufficient for compliance.

In other instances, a customer may ask for an accommodation that results in a sanctions violation. In OFAC's May 2019 Haverly Systems Inc. ("Haverly") settlement, it was determined that the company collected a debt from an entity on the Sectoral Sanctions Identification ("SSI") List outside of the permitted maturity window.[16] This enforcement action demonstrated that OFAC takes a broad view of what constitutes "debt" in the case of targeted sanctions, as OFAC took the position that the extending of payment terms beyond the relevant time period under the sanctions (here, 90 days) constituted a prohibited dealing in the "debt" of an SSI. In this case, Haverly's Russian customer requested that Haverly reissue an invoice with a different date, in an attempt to re-characterise the debt as within the permitted maturity window.

This was also the case in OFAC's April 2022 settlement with S&P Global, Inc. ("S&P Global"). In this case, OFAC determined that a U.S. subsidiary of S&P Global had reissued multiple invoices to Rosneft (an SSI that is the target of sanctions that prohibit dealings in its new debt of more than (during the relevant period of time) 90-day maturity) far beyond the 90-day restriction. According to OFAC, in one instance an invoice was reissued 749 days after the date that the initial invoice was issued. As a result, OFAC determined the U.S. subsidiary engaged in prohibited dealings in the debt of Rosneft.

Export or reexport of U.S.-origin goods

OFAC has regularly pursued enforcement actions against non-U.S. companies that sold U.S.-origin goods to sanctioned persons or jurisdictions. As noted in the Framework, some of OFAC's public enforcement actions in this area have focused on large or sophisticated entities that "engaged in a pattern or practice that lasted multiple years, ignored or failed to respond to numerous warning signs, utilised non-routine business practices, and – in several instances – concealed their activity in a wilful or reckless manner".[17]

For example, in April 2021, SAP SE ("SAP") entered into parallel resolutions with DOJ, OFAC, and BIS totalling around $8 million regarding U.S. sanctions and export violations involving the export of software and related services to Iran.[18] These resolutions involved, in part, SAP's release of U.S.-origin software to non-U.S. third parties who made the software available in Iran. OFAC determined that in some cases, SAP managers had direct knowledge and facilitated the purchase of this software. OFAC further determined that SAP had reason to know from IP address data that services were being downloaded in Iran. SAP was faulted for not adopting IP blocking technology to prevent such downloads. Additionally, several U.S.-based SAP subsidiaries allowed Iranian users to access U.S.-based cloud services. OFAC faulted SAP for allowing these subsidiaries to operate as standalone entities for years with respect to compliance, despite pre- and post-acquisition reports of significant compliance deficiencies.

Other OFAC actions in this area involve less egregious conduct. For example, in February 2020, OFAC reached a $2.4 million settlement with the Swiss entity *Société Internationale de Télécommunications Aéronautiques SCRL* ("SITA") involving, in part, SITA's provision of U.S.-origin software for the benefit of sanctioned airlines and its provision of messaging services that routed through servers in the U.S., where messaging went to or from sanctioned airlines or other parties that were providing services to those airlines.[19] The SITA action represents OFAC's first public enforcement action involving sets of violations where the only U.S. nexuses were the provision of U.S.-origin software by a non-U.S. person and the use of a U.S.-based server, respectively.

U.S. parent liability for non-U.S. subsidiary business; facilitating activities of non-U.S. affiliates

Multiple recent OFAC enforcement actions highlight OFAC's increased willingness to hold U.S. parent companies liable for the Iranian or Cuban business conducted by their non-U.S. subsidiaries.

For example, in its October 20, 2020 settlement with OFAC, Berkshire Hathaway, Inc.'s ("Berkshire") resolved its liability for its Turkish subsidiaries' sales to two Turkish intermediary companies with knowledge that these goods would be resold to Iran. OFAC found that these violations occurred despite the fact that Berkshire and other Berkshire subsidiaries repeatedly communicated with and sent policies to the Turkish subsidiary regarding Iran sanctions. The Turkish subsidiaries nonetheless took steps to conceal their dealings with Iran, such as using private email addresses that bypassed the controls of the corporate email system, utilising false names and false invoices, and providing false responses to compliance inquiries. OFAC found that certain other Berkshire subsidiaries received information that could have revealed that orders might have been destined for Iranian end users – but only one Berkshire subsidiary flagged that transactions with Iranian customers were prohibited. These actions highlight the importance of performing appropriate due diligence in connection with the acquisition of non-U.S. entities and ensuring that subsidiaries of U.S. companies, and other entities controlled by U.S. companies, understand their obligations to comply with U.S. sanctions on Iran and Cuba, including when they supply goods to other companies within their corporate organisation.

In April 2022, OFAC entered into a $141,442 settlement agreement with Newmont Corporation ("Newmont"), a U.S. headquartered company, to resolve apparent violations of U.S. sanctions targeting Cuba. According to OFAC, a non-U.S. subsidiary of Newmont in Suriname purchased Cuban-origin items through a non-U.S. vendor. Under the Cuba sanctions program, a non-U.S. subsidiary of a U.S. company cannot engage in any dealings relating to Cuba, including the purchase of Cuba-origin items. OFAC noted that the employee who engaged in these transactions had not received sanctions compliance training and therefore did not understand that the prohibitions of U.S. sanctions targeting Cuba applied to Newmont's Suriname subsidiary.

Relatedly, multiple OFAC enforcement actions have involved U.S. firms referring business to, approving, or otherwise facilitating dealings with sanctioned persons or jurisdictions by their non-U.S. affiliates. On October 1, 2020, OFAC announced a $5.8 million settlement with New York travel services company Generali Global Assistance, Inc. ("GGA") for apparent violations of Cuba sanctions. GGA intentionally

referred Cuba-related payments to its Canadian affiliate to avoid processing reimbursement payments directly to Cuban parties and to travelers while they were located in Cuba. GGA subsequently reimbursed its Canadian affiliate for those payments.

Additionally, non-U.S. companies with U.S. operations should take steps to ensure that U.S. offices and employees are walled off or recused from any sanctioned business engaged in by non-U.S. parts of the company. In July 2021, OFAC penalised a U.S. subsidiary of Alfa Laval AB for its referral of an Iranian business opportunity to its non-U.S. affiliate.[20] This case demonstrates the importance of adopting training to ensure U.S. persons know they are prohibited from referring or participating in business opportunities involving sanctioned jurisdictions.

Similarly, in September 2021, OFAC entered into a settlement agreement with Cameron International Corporation ("Cameron"), a U.S. headquartered company, to resolve apparent violations of U.S. sectoral sanctions targeting Russia. Under Directive 4 of U.S. sectoral sanctions, U.S. persons cannot engage in the provision of goods and services (other than financial services) that support the exploration of deepwater, Arctic offshore, or shale oil exploration or production to projects located anywhere in the world if a listed Directive 4 SSI entity owns 33% or more of the project or has a majority of the voting interests in the project. OFAC determined that Cameron's Romanian subsidiary had entered into contracts with Gazprom-Neft Shelf, a Directive 4 SSI, relating to supplying materials to a Gazprom-Neft Shelf Arctic oil project. While the initial negotiations between Cameron's Romanian subsidiary and Gazprom-Neft Shelf did not violate sanctions, Cameron's contract approval process required review and approval by certain U.S. persons for contracts above a certain monetary threshold and these contracts were ultimately reviewed and approved by U.S. persons in apparent violation of U.S. sanctions.

Deficient due diligence

A fundamental element of sanctions compliance is conducting appropriate due diligence on customers, supply chains, intermediaries, and counterparties. OFAC has recently brought several enforcement actions resulting from deficient due diligence.

As demonstrated by OFAC's September 20, 2020 settlement with Deutsche Bank Trust Company Americas ("DBTCA"), financial institutions are expected to conduct appropriate diligence on transactions that raise sanctions red flags prior to processing transactions.[21] Specifically, OFAC faulted DBTCA for not independently corroborating verbal representations it received from the U.S. counsel of a non-accountholder party to the transaction at issue in order to confirm that there was no SDN interest in the transaction. OFAC stated that although the payment transactions associated with the transaction did not contain an explicit reference to the SDN, the payment was "related to a series of purchases of fuel oil that involved" the SDN and that, at the time of the transaction, "DBTCA had reason to know of [the SDN's] potential interest in the transaction underlying the payment, which closely coincided [with the SDN's designation]". OFAC and other regulators expect companies to fully review all the documentation they receive for potential indicia of a nexus to a sanctioned jurisdiction or person prior to sending, approving, or facilitating a payment.

Similarly, OFAC expects that companies implement measures, beyond contractual provisions, to monitor and minimise sanctions risk over the life of a contractual relationship, such as a leasing agreement. In its settlement with U.S.-based Apollo Aviation Group LLC ("Apollo Aviation"), OFAC determined that Apollo Aviation leased three aircraft engines to a UAE company that subleased them to an airline in Ukraine that, in turn, installed the engines on an aircraft wet leased to an SDN.[22] When the engines were returned, Apollo Aviation discovered that the engines had been installed on aircraft owned by or leased to an SDN and used in Sudan (which, at the time, was subject to comprehensive U.S. sanctions). Although Apollo Aviation's lease agreements with the UAE company included sanctions commitments, OFAC faulted Apollo Aviation for failing to take steps to monitor whether the engines were being used in a sanctions-compliant manner.

Misinterpreting, or failing to understand the applicability of, OFAC's regulations

Often companies will misunderstand the applicability or scope of OFAC's sanctions prohibitions either because they are not aware of sanctions regulations or because they are unaware that such regulations apply to them by virtue of their status as U.S. persons, U.S.-owned subsidiaries (with respect to Cuba and Iran sanctions), or non-U.S. persons engaged in activities with a U.S.-nexus (involving U.S. persons, U.S.-origin goods, or U.S. territory, including payments transiting the U.S. financial system).

For example, on July 28, 2020, Whitford Worldwide Company, LLC's ("Whitford"), settled with OFAC for conduct with Iran conducted by Whitford and its subsidiaries in Italy and Turkey.[23] Whitford's Regulatory Affairs Manager had incorrectly advised that Whitford's non-U.S. subsidiaries could continue selling to Iran legally as long as there were no direct connections between a subsidiary and Iran. As a result of this advice, Whitford developed a plan to continue selling to Iran, which required that all sales be directed through third-party distributors and that documents related to those sales avoid referencing Iran.

Another area of recent enforcement focus is the failure of companies to identify an applicable general license or adhere to a general license's conditions, rendering the otherwise available authorisation inapplicable. For example, in OFAC's May 2020 settlement with BIOMIN America, Inc., BIOMIN incorrectly believed that it could structure transactions involving a Cuban counterparty that would be consistent with OFAC's Cuba sanctions.[24] BIOMIN coordinated and received commissions on sales to a Cuban counterparty as executed by BIOMIN's non-U.S. affiliates. In determining that BIOMIN's conduct resulted in violations, OFAC noted that the company could have availed itself of an existing general license – if the exports had been licensed by the Commerce Department – or applied for a specific license, and likely avoided the violations, but because the company appears not to have understood the scope of OFAC's Cuba sanctions, it was not in a position to take advantage of these potential licensing avenues. Likewise, in OFAC's July 2020 settlement with Amazon.com, Inc. ("Amazon"), OFAC determined that Amazon's failure to abide by the reporting requirements associated with a general license under its Ukraine-related sanctions effectively nullified that authorisation with respect to the affected transactions.

These actions demonstrate how companies can benefit from seeking appropriate advice and guidance when contemplating business involving U.S. sanctioned parties or jurisdictions. Management and sales teams would be wise to consult with internal and/or external legal or compliance experts to ensure that cross-border transaction structures do not run afoul of U.S. sanctions requirements. Such experts are also well positioned to identify potential eligibility for authorisations from OFAC, including general and specific licenses.

Screening software limitations; deficiencies in automated processes

Many companies screen their customers and other third parties, but such screening may be deficient due to a failure to adequately calibrate, update, or audit their screening software, lists, and procedures. A significant number of recent enforcement actions involved sanctions screening deficiencies, making it clear that the utilisation of defective screening software or insufficient screening lists will not provide a shield against regulatory enforcement.

For example, in its November 2018 settlement with Cobham Holdings, Inc. ("Cobham"), OFAC found that Cobham made three shipments of goods through distributors in Canada and Russia to an entity that did not appear on the SDN List, but which was blocked under OFAC's "50 percent rule" because it was 51 percent owned by a Russian SDN.[25] The apparent violations appear to have been caused by reliance on deficient third-party screening software. Although Cobham had selected "fuzzy" searching to detect partial matches, the software instead used an "all word" match criteria. The names of the blocked party and its subsidiary both contained several of the same uncommon words such that fuzzy searching apparently would have detected the match; however, under the "all word" criteria, the transactions were not flagged and were processed.

Additionally, in its settlement with Amazon, OFAC faulted, in part, the company's failure to screen for a city within a sanctioned jurisdiction and common alternative spellings of a sanctioned jurisdiction. OFAC also determined that Amazon's automated screening processes also failed to identify the correctly spelled names and addresses of persons on OFAC's SDN List. In a second September 2020 settlement with DBTCA, OFAC determined that DBTCA failed to stop payments destined for accounts at a designated financial institution because – contrary to its existing policies and procedures – DBTCA did not include in its sanctions screening tool the designated financial institution's SWIFT Business Identifier Code.[26]

OFAC's April 30, 2020 finding of violation issued to American Express Travel Related Services Company ("Amex"), criticised Amex for approving an SDN's customer application submitted by a non-U.S. bank due to system deficiencies.[27] When the non-U.S. bank entered the SDN's information into the screening system, Amex's "risk engine" identified the applicant as a potential SDN and generated multiple "declined" messages to the non-U.S. bank indicating that the application could not be processed. However, the non-U.S. bank made several additional approval attempts that caused the screening engine to time out, triggering the application to be automatically approved.

OFAC has stated that companies should carefully review and understand the functionality and limitations of their sanctions screening software, ensure sufficient staff training regarding the software, update the software accordingly, and periodically evaluate the software with test data to ensure that it sufficiently flags transactions even absent an exact match. Additionally, companies should ensure that automated sanctions compliance controls measures cannot be overridden without appropriate review. Companies should also ensure that the lists they screen against not only capture indicators for sanctioned jurisdictions – such as cities, regions, and ports within sanctioned jurisdictions – but also appropriate name variations for those locations. The Cobham settlement further suggests that, depending on their risk profile, companies should consider investing in systems for identifying entities that are treated as SDNs under OFAC's 50 percent rule. In that settlement, OFAC recognised Cobham's adoption of such a system as a risk-reducing measure.

Mergers and acquisitions

Multiple recent OFAC enforcement actions highlight the importance of performing adequate sanctions due diligence with regard to potential acquisition targets and to implementing strong sanctions compliance procedures following acquisition. Often, although these non-U.S. subsidiaries were required by their U.S. parents to cease their transactions with sanctioned jurisdictions, the non-U.S. subsidiaries failed to do so.

For example, in its September 24, 2020 settlement with OFAC Keysight Technologies, Inc. ("Keysight"), agreed to pay $473,157 to settle violations of Iran sanctions on behalf of its former Finnish subsidiary, Anite Finland Oy ("Anite").[28] Prior to Keysight's acquisition of Anite in 2015, Anite had committed to cease all existing and future business with certain sanctioned countries, including Iran. After the acquisition, Keysight reiterated to Anite that sales to these countries must cease. Nevertheless, Anite's Vice President for Europe, Middle East, and Africa and its Regional Director for the Middle East both expressed reluctance to comply. The Regional Director and two employees then took measures to obfuscate from Keysight their dealings with Iran, including omitting references to Iran in correspondence. Although Keysight conducted an internal investigation upon discovering the misconduct and voluntarily self-disclosed the violations, OFAC deemed Anite's violations an egregious case due to the willful violations, active participation by senior managers, and attempts at concealment.

Individual liability

Historically, OFAC has generally not pursued enforcement actions against individuals outside of the Cuba-travel context. However, the Framework notes that "individual employees – particularly in supervisory, managerial, or executive-level positions – have played integral roles in causing or facilitating" sanctions violations, even in instances where "the U.S. entity had a fulsome sanctions compliance program in place" and in some cases these employees "made efforts to obfuscate and conceal their activities from others within the corporate organisation, including compliance personnel, as well as from regulators or law enforcement".[29] The Framework states that, in such instances, OFAC will consider enforcement actions not only against the entities, but against the individuals as well.[30]

In 2019, OFAC took the unprecedented step of designating a former company manager as a foreign sanctions evader while concurrently announcing a settlement with the company's U.S. parent.[31] Specifically, OFAC designated the former managing director of the U.S. company's Turkish subsidiary whom OFAC determined to be primarily responsible for directing the apparent violations at issue and seeking to conceal them. This designation highlights increased personal risk for personnel who play a central role in causing violations of U.S. sanctions law.

In December 2021, OFAC entered into a $133,860 settlement with an unnamed U.S. person who OFAC determined to have arranged for and received four payments into his personal bank account in the U.S. on behalf of an Iranian cement company.[32] OFAC determined that this individual also worked with the Iranian cement company to make sales of certain equipment to a project in a third country and facilitated the shipment of the equipment. OFAC noted that this individual had previously applied for a specific license to authorize other transactions with Iran and that this license request had been denied such that this person understood the prohibitions of U.S. sanctions targeting Iran. OFAC noted that it took this unprecedented step because

this individual had harmed the objectives of the Iran sanctions program by "wilfully or recklessly" ignoring U.S. sanctions and enabling the evasion of U.S. sanctions by an Iranian company.

Conclusion

U.S. sanctions targeting Russia are broad and will continue to evolve as long as the conflict remains unresolved. As a result, U.S. and non-U.S. companies, particularly those with remaining exposure to Russia or Belarus, would be well advised to review their sanctions compliance program to ensure that it is taking account relevant risks, to continue to train and update relevant employees on the intricacies of these sanctions, and to monitor for any updates to the sanctions.

Although OFAC's regulations do not themselves require the implementation of a compliance program, OFAC's Framework and the compliance guidance embedded in recent enforcement actions represent a new effort by OFAC to more clearly and comprehensively communicate its expectations about appropriate sanctions compliance practices. U.S. and non-U.S. companies alike would be well advised to study this guidance and consider making appropriate enhancements to their compliance practices.

Endnotes

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Roberto J. Gonzalez is a litigation partner and the co-chair of the firm's Economic Sanctions and Anti-Money Laundering Practice Group. He represents global financial institutions, crypto companies, and other clients in civil and criminal investigations and enforcement matters relating to U.S. economic sanctions, export controls, and anti-money laundering. He also provides regulatory advice, compliance counselling, and transactional due diligence to U.S. and non-U.S. companies across a range of sectors. He writes and speaks frequently on these topics. Roberto joined Paul, Weiss after serving several years in senior legal positions at the U.S. Treasury Department, the Consumer Financial Protection Bureau, and the White House Counsel's Office. As Deputy General Counsel of the Treasury Department, Roberto supervised over a hundred lawyers – including the legal offices of OFAC and FinCEN – in the areas of sanctions, anti-money laundering, and financial regulation. He uses his multi-faceted experience in the federal government to help clients navigate the constantly evolving U.S. regulatory and enforcement landscape.

Paul, Weiss, Rifkind, Wharton & Garrison LLP
2001 K Street, NW
Washington, DC, 20006-1047
USA

Tel: +1 202 223 7316
Email: rgonzalez@paulweiss.com
URL: www.paulweiss.com

Joshua R. Thompson, an associate in the Corporate Department, focuses his practice on international trade, national security, and anti-corruption topics across a variety of matters, including regulatory and compliance counseling, internal investigations, investment reviews, and transactional due diligence. Josh advises clients on a range of international trade laws and regulations, including: sanctions administered by the Department of the Treasury's Office of Foreign Assets Control (OFAC); export controls administered by the Department of Commerce's Bureau of Industry and Security (BIS) and the Department of State's Directorate of Defense Trade Controls (DDTC); and investment reviews before the Committee on Foreign Investment in the United States (CFIUS). He represents a variety of U.S. and non-U.S. companies across a range of sectors.

Paul, Weiss, Rifkind, Wharton & Garrison LLP
2001 K Street, NW
Washington, DC, 20006-1047
USA

Tel: +1 202 223 7491
Email: jthompson@paulweiss.com
URL: www.paulweiss.com

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