

Guidance on OFAC Sanctions Compliance Programs

I. INTRODUCTION

On May 2, 2019, the United States Department of Treasury's Office of Foreign Assets Control ("OFAC") issued its "Framework for OFAC Compliance Commitments" presenting OFAC's new recommendations for the design, implementation and update of Sanctions Compliance Programs ("SCPs") by "organizations subject to U.S. jurisdiction and foreign entities that conduct business in or with the United States, U.S. persons, or using U.S.-origin goods or services." ("OFAC's Guidelines"). Specifically, OFAC's Guidelines set forth the most important factors for assessing an SCP's success in preventing violations to the regulations and sanctions that are administered by OFAC ("OFAC Sanctions"). OFAC's Guidelines also describe the circumstances that frequently cause SCPs to fail.

Although OFAC does not absolutely require the design and implementation of an SCP, such a program is "strongly recommended" for companies and financial institutions because it is a significant mitigating factor that OFAC will consider when deciding whether to sanction an apparent violation of its regulations, or for calculating the appropriate penalty. Additionally, avoiding potential criminal or civil penalties actions against executives of companies and financial institutions by the U.S. Government is another important reason to design and implement an SCP pursuant to OFAC's Guidelines.

For example, on February 7, 2019 in the case of Kollmorgen Corporation, OFAC sanctioned the executive that caused certain violations of OFAC Sanctions related to Iran. Furthermore, the Department of Justice has recently presented criminal conspiracy charges against the employees of a number of companies that have violated OFAC Sanctions. These cases involve employees of Sovfracht (2018), Huawei (2019), and Standard Chartered Bank (2019). Similarly, certain employees of companies in the air charter industry are under criminal investigation for violations of OFAC Sanctions.

For these reasons, we present the following summary of OFAC's Guidelines for companies and financial institutions, their shareholders, directors, officials, employees, and other personnel.

II. FACTORS FOR ASSESSING AN SCP'S SUCCESS

OFAC's Guidelines recommend that companies and financial institutions use a "risk-based approach" to design, implement, and periodically update their SCPs. Accordingly, the SCP of each organization should be different. Nevertheless, OFAC expects that companies and financial institutions develop the following "essential components of compliance" in their SCPs: (i) Management Commitment; (ii) Risk Assessment; (iii) Internal Controls; (iv) Testing and Auditing; and (V) Training.

A. Management Commitment

The management of companies and financial institutions must undertake the following actions: (i) review and approve the organization's SCP; (ii) assure that the compliance unit or delegate has enough independence to guarantee that the SCP is effective to control OFAC Sanctions risks; (iii) conduct efforts for the compliance unit or delegate to receive enough resources; (iv) foster a "culture of compliance" throughout the organization; and (v) recognize the seriousness of violations of OFAC Sanctions and implement the pertinent measures to prevent them from happening.

B. Risk Assessment

The organization must evaluate OFAC Sanctions risks in a manner, and with a frequency, that responds to factors such as the size and complexity of the organization's operations, its products, services, clients, counter-parties, and geographical location. In any event, the organization must develop a method to identify, analyze, and administer specific risks.

¹See *U.S. v. Tareck Zaidan El Aissami Maddah et al.*

This assessment of OFAC Sanctions-related risks must be conducted by the organization in different moments of its business cycle. For instance, the organization should conduct such risk assessment when it onboards new clients or groups of clients; or engages in mergers and acquisitions. Additionally, the organization must update its risk evaluation if it identifies potential violations of OFAC Sanctions.

C. Internal controls

An effective SCP must have internal controls, including policies and procedures to identify, interdict, escalate, report (if necessary), and keep records of, any activity that might be prohibited pursuant to OFAC Sanctions. These policies and procedures must capture the organization's risks and day-to-day operations. The organization must also be capable of adjusting rapidly to changes published by OFAC.

For internal controls to be successful, the organization must (i) design and implement written policies and procedures; (ii) conduct internal and external audits; (iii) assure that its policies and procedures for recordkeeping follow OFAC Sanctions; (iv) take immediate and effective actions to determine and remedy the causes of potential failures on its SCP; (v) communicate the policies and procedures to the relevant personnel of the organization such as its compliance unit, supervisors, business units located in high-risk areas, and the external personnel that has SCP-related responsibilities; and (vi) designate personnel in charge of administering the SCP's policies and procedures in the organization's day-to-day operations.

D. Testing and Auditing

The organization must have internal and external audits that can identify any weaknesses in the SCP. For this purpose, the organization must assure that the testing or audit function answers only to management, is independent of the audited activity, and has the necessary authority, experience, and resources. The audit or testing procedures must be proportional to the SCP's level of complexity. Additionally, after learning that the audit has produced negative results, the organization must undertake immediate and effective efforts to identify and remedy the causes of any weaknesses in the SCP.

E. Training

The organization must train its personnel about the responsibilities that each employee has in securing compliance with OFAC Sanctions. Additionally, this training must be extended to other stakeholders

such as clients, suppliers, business partners, and counter-parties, if needed.

Training must be adjusted to the products and services offered by the organization, its clients, business partners, and geographic location. Accordingly, the knowledge conveyed by this training should be consistent with the personnel's needs and risks. Further, the number of times per year that the organization must conduct training is largely based on each organization's risk assessment. However, the organization must conduct training at least once a year, and if the audit has produced negative results, it should conduct additional training.

Lastly, as part of its training, the organization must have reading materials about OFAC Sanctions that can be easily accessed by its personnel.

III. THE CIRCUMSTANCES THAT FREQUENTLY CAUSE SCPs TO FAIL

OFAC's Guidelines also include a summary of the circumstances that frequently cause SCPs to fail based on the results of recent administrative enforcement actions. Such an internal failure led to OFAC's recent enforcement actions against Stanley Black & Decker, Inc. and Standard Chartered Bank. Specifically, OFAC mentions the following circumstances:

- i. Not having an SCP;
- ii. Misinterpreting, or failing to understand the scope of, OFAC Sanctions;
- iii. Facilitating transactions between foreigners and sanctioned countries, regions, or persons;
- iv. Exporting or re-exporting U.S. goods, technology, or services to sanctioned countries, regions, or persons;
- v. 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;
- vi. Not updating the software or filters used by the organization to comply with OFAC Sanctions, or insert erroneous or insufficient information in them;
- vii. Not conducting due diligence on the organization's customers, supply chain, intermediaries, and counter-parties.
- viii. De-centralizing the SCP's implementation

in personnel that is located in different offices or business units; and

- ix. Utilizing non-standard payment or commercial practices, or that are not consistent with the industry norms and practices.

Lastly, OFAC's Guidelines highlight that the employees of companies and financial institutions, especially executives and those in supervisory or managerial positions, are known to conduct or facilitate dealings or transactions that violate OFAC Sanctions on persons, regions, or countries. These employees may also conduct efforts to obfuscate or conceal OFAC Sanctions violations. Accordingly, OFAC will consider directing its enforcement actions against the involved companies and financial institutions, as well as against the individuals that are responsible.

IV. IV. CONCLUSION

OFAC's Guidelines set forth the most important factors for designing and implementing an SCP that prevents, detects, and reacts appropriately to violations of OFAC Sanctions. Because of this, and to reduce the risks of enforcement actions by the U.S. Government, it is important that companies and financial institutions, their shareholders, directors, officials, and employees understand OFAC's Guidelines, and immediately implement and/or update their compliance programs accordingly.

CONTACTS

Michael Diaz, Jr.
Global Managing Partner,
Miami
T: +1 305 375 9220
mdiaz@diazreus.com

Robert I. Targ
Founding Partner, Miami
T: +1 305 375 9220
rtarg@diazreus.com

Marta Colomar-Garcia
Administrative Managing
Partner, Miami
T: +1 305 375 9220
mcolomar@diazreus.com

Javier Coronado
Associate Attorney,
Bogotá / Miami
T: +1 305 375 9220
jcoronado@diazreus.com

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DIAZREUS

100 SE 2nd Street
3400 Miami Tower
Miami, Florida 33131

Tel: +1 305-375-9220
Fax: +1 305-375-8050
info@diazreus.com

www.diazreus.com