

WHITE PAPER

OFAC provides long-awaited guidance on compliance requirements

For the first time, the U.S. Office of Foreign Assets Control (OFAC) has outlined its expectations for sanctions compliance programs. On May 2, 2019, the office published “A Framework for OFAC Compliance Commitments.”¹ The information it contains should serve as a checklist for sanction compliance programs for all companies subject to U.S. jurisdiction.

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Strengthening sanctions programs

OFAC created its compliance framework to help safeguard the U.S. financial system. According to Sigal P. Mandelker, Under Secretary for Terrorism and Financial Intelligence, “As the United States continues to enhance our sanctions programs, ensuring that the private sector implements strong and effective compliance programs that protect the U.S. financial system from abuse is a key part of our strategy.”

Andrea M. Gacki, Director of the Office of Foreign Assets Control, described the framework as part of the Treasury’s continuing effort to bolster sanctions compliance practices across the board. “It underlines our commitment to engage with the private sector to further promote understanding of, and compliance with, sanctions requirements.”



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The core elements of compliance

OFAC’s framework identifies five essential components of compliance:

- 1. Management commitment** - OFAC expects organizations to create a “culture of compliance” that starts at the top. Senior management—including leadership, executives and the board of directors—must be in step with the program. They must allocate sufficient resources to the organization’s compliance department, appoint a dedicated OFAC sanctions compliance officer, ensure that personnel are dedicated to implementing the program, and develop sufficient control functions.
- 2. Risk assessment** - OFAC recommends that companies use a risk-based approach in designing and updating their sanctions control program. They should conduct a risk assessment to identify any potential compliance issues and then tailor their program to address those issues. Risk assessments should be conducted in the due diligence of all customers, client relationships and transactions, including on-boarding new clients or customers, and in mergers and acquisitions, which often present challenges to OFAC sanctions.
- 3. Internal controls** - An effective compliance program needs policies and procedures to identify, interdict, escalate, report and keep records related to OFAC sanctions.
- 4. Testing and auditing** - To evaluate the effectiveness of a company’s compliance program and identify any deficiencies, OFAC recommends independent testing and auditing. The company should continually update and enhance its program including all compliance-related software, systems and technology.
- 5. Training** - OFAC wants organizations to provide sanctions-specific training to appropriate employees at least once a year. They should communicate the sanctions compliance responsibilities of each employee and hold employees accountable for sanctions compliance training through assessments.

OFAC demonstrates it means business

Although the Treasury was slow to outline its requirements, it has been steadily stepping up enforcement actions. Already in 2019, numerous U.S. businesses and subsidiaries of foreign companies operating in or with the U.S. have come under fire from OFAC for multiple violations. In just the first five months of 2019, OFAC issued over \$1.2 billion in settlements and fines. And the majority of those penalties were imposed against non-financial institutions.²

In providing guidelines, OFAC has established a measurement tool by which it can now calculate the extent of penalties assessed for violations. The absence of a sanctions compliance program or the ineffectiveness of a program can result in higher penalties. Conversely, an effective program can reduce any penalty when violations occur in spite of earnest efforts to maintain a risk-free environment. This publication swiftly came on the heel of the U.S. Department of Justice (DOJ) Criminal Divisions publication titled “The Evaluation of Corporate Compliance Programs” which highlights a lot of the same topics as OFAC does in its guidance.



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Avoid making these mistakes

In an appendix to its framework of compliance commitments, OFAC offers a list of 10 common violations that have led to enforcement actions over the years:

1. Lack of a formal OFAC sanctions compliance program
2. Misinterpretation or failure to understand the applicability of OFAC’s regulations
3. Facilitating transactions by non-U.S. persons, especially by overseas subsidiaries or affiliates
4. Exporting or re-exporting U.S.-origin goods, technology or services to OFAC-sanctioned people or countries
5. Processing payments through U.S. financial institutions for commercial transactions involving OFAC-sanctioned people or countries
6. Failure to update sanctions screening software and filters
7. Improper due diligence on customers/clients (e.g., ownership, business dealings, etc.)
8. Decentralized compliance functions and inconsistent application of a sanctions compliance program throughout an organization
9. Using non-standard payment or commercial practices
10. Individual liability of managers, supervisors and senior management. OFAC states that both entities in violation *and* the people responsible for the violation can be held liable



The case of AppliChem GmbH

The largest fine for a non-bank in 2019 thus far—just over \$5.5 million—was levied against AppliChem GmbH for violations of the Cuban Assets Control Regulations (CACR). The AppliChem case involved a concerted effort by a foreign subsidiary to conceal ongoing transactions with Cuba. It created fraudulent “Caribbean procedures” to avoid oversight by the U.S. Company Illinois ToolWorks (ITW).³

The penalties imposed in that case illustrate the importance of:

- 1. Implementing risk-based controls such as audits**
- 2. Performing due diligence on acquisitions**
- 3. Responding appropriately to negative information received on foreign persons**

AppliChem did receive some relief within the penalty due to ITW self-disclosing, cooperating with OFAC and assisting with the investigation.

Another example that highlights the importance of the core elements of the sanction compliance program can be seen in the May 2019 Mid-Ship Group LLC OFAC fine for violations of the Weapons of Mass Destruction Proliferation Sanctions Regulations. OFAC identified amongst the aggravating factors that managers were aware of the behavior and not only allowed it to continue, but took part in the activity as well.⁴ This activity took place in 2011, which indicates OFAC will retroactively apply the SCP guidelines.

Create, maintain and improve your sanctions compliance program

By publishing its “Framework for Compliance Commitments,” OFAC has established standards for compliance programs. Now it’s up to individual organizations to use those guidelines to create, maintain and continually improve their sanctions compliance program or risk enforcement actions.

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¹ https://www.treasury.gov/resource-center/sanctions/Documents/framework_ofac_cc.pdf

² <https://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx>

³ https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190214_applichem.pdf

⁴ https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190502_midship.pdf