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US Treasury's OFAC and its effect on non-US individuals and corporate entities

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The terrorist attacks on September 11, 2001 brought the US Treasury's Office of Foreign Assets Control to centre stage in the US government's war on terror. OFAC is a small, low-profile branch of the Treasury with 60 years' experience in operating sanctions programmes, which date back to the Korean War when sanctions were imposed against North Korea and China. Its mission is defined, as follows: "The Office of Foreign Assets Control of the US Department of the Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States.

OFAC acts under presidential national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze assets under US jurisdiction. Many of the sanctions are based on United Nations and other international mandates, are multilateral in scope, and involve close cooperation with allied governments."

Few would necessarily take issue with the aims expressed above; however, fewer still would appreciate that OFAC's mission can impact the seemingly most innocuous of international business dealings, where a US dimension exists. For a growing number of non-US nationals and corporate entities, inclusion in one or more of OFAC's sanctions programmes confers unwanted membership of the most toxic of clubs.

OFAC sanctions programmes

The trade and economic sanctions programmes fall into three, mutually dependent categories. Certain sovereign states, which are considered to pose a threat to the security of the US, are specified. The most obvious is probably Cuba, although the degree of sanctions is currently under review and relaxation by the Obama administration, with action taken to permit US nationals with family connections to make more frequent visits to Cuba. Others states specified include Iran, Iraq, Liberia, Myanmar, the Democratic Republic of Congo, Sudan, Syria and Zimbabwe. The extent and detail of each programme varies from country to country. Some of these countries are also subject to United Nations and European Union sanctions, and are generally considered pariah states. The US, however, is often alone in applying sanctions to other countries, such as Syria, and that gives rise to considerable difficulties for foreign subsidiaries of US companies and for non-US companies that are owned or controlled by US nationals.

OFAC also operates a "list-based sanctions programme", which is targeted at specific activities, commodities and industrial sectors. After 9/11, a presidential executive order was made, "blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism". Other list-based sanctions address the non-proliferation of weapons of mass destruction, counter-narcotics trafficking and diamond trading, (which is essentially directed at Sub-Saharan Africa's "blood diamond" trade).

These programmes clearly affect the nationals of sovereign states, who are held to be either enemies of the US or threats to its security, and those engaged in demonstrably nefarious criminal activity. It is true

to say, however, that Iran, despite 30 years of sanctions, continues to conduct international trade with many countries without the need to trade directly with US companies. The Islamic Republic of Iran Shipping Lines (IRISL Group), for example, operates a fleet of more than 100 ocean-going vessels worldwide.

OFAC's "specially designated nationals" programme affects non-US individuals, corporate entities, charities and other organisations. SDNs are defined as "individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific". Any assets held in the US, or with US banks or institutions wherever they are located, are blocked and US persons are generally prohibited from dealing with SDNs.

There are sub-categories of SDNs, which account for persons and organisations that are allegedly engaged in international or global terrorism, narcotics trafficking and proliferating weapons of mass destruction. OFAC's SDN list is forever growing; it is updated on a regular basis and it is open to anyone to receive updates. For the US banking, financial services and manufacturing industries, subscription to OFAC's updates is essential in due diligence procedures. For non-US nationals, who find themselves on the list, the first notification they might have of inclusion will be by someone who has access to the subscription service.

OFAC offers guidance to its programmes; however, sanctions will vary from country to country and, frequently, terminology that is used defies uniform definition. As a rule of thumb, OFAC prohibits transactions with a corporate entity or other organisation of which an SDN owns, directly or indirectly, 50 per cent or more.

The SDN list currently runs to 420 pages and contains in excess of 5,000 names. Some entries are actually alternate spellings of names and this has caused confusion. In its Select Committee on Economic Affairs 2006-2007, the UK's House of Lords cited a number of examples where individuals names had been inaccurately recorded on the SDN list; most notoriously perhaps, the 1998 inclusion of "Usama bin Laden", with the true name "Osama bin Laden" not appearing until after 9/11. The House of Lords also expressed reservations about the instances in which similar names appear on the list and gave the example of the permutations of the spellings of "Muhammed", "Hussein" and other common Arabic names.

De-listing of SDNs: challenges and solutions

There is no automatic right for an SDN to know why their name appears on the list. On occasion, sovereign states have interceded on behalf of their nationals and individuals have been de-listed. This is rare, however, and cannot be relied upon by the SDN. OFAC does, in fact, de-list individuals and entities, either where the requirement has passed or in consideration of submissions that are lodged with it. OFAC maintains that the list is under constant review and active contrition on the part of an SDN is a factor.

Where an SDN relies on submissions, by way of rebuttal of inclusion, the procedure is broadly as follows. An SDN enlists the assistance of specialist US attorneys to prepare written submissions, preferably with documentary evidence that the listing is in error. The immediate difficulty, however, is that any US attorney must, in common with "all US persons and entities (companies, non-profit groups, government agencies, etc.,) wherever located", apply for a licence to engage with an SDN. The rules that govern instruction of US attorneys allow for payment from blocked funds, to a specified limit, and are predicated by an assurance that fees cannot be found from resources outside the US. An SDN, without blocked funds and/or with access to funds outside the US, therefore, is obliged to fund the instruction of US attorneys.

The practical difficulty with instructing US attorneys is two-fold. First, each application for a licence to accept instructions will inevitably take time, with some estimates running to four months or longer. Secondly, an SDN cannot travel to the US to give instructions, therefore, potentially leading to the need to fund the attorney to travel to a mutually convenient location. Time and money are likely to pose major issues for an SDN who is already potentially seriously prejudiced by inclusion.

A solution that has been successfully deployed is that the SDN instructs non-US lawyers to engage a specialist US attorney. The US attorney cannot act beyond applying for the licence, although non-US lawyers can take instructions from the SDN, prepare an initial statement of fact and collate all relevant documentary evidence. In all likelihood, and assuming that the SDN is not subject, for example, to EU sanctions, the SDN can travel, say, to London.

Once the US attorney is licensed to act, and is in funds, it is then a matter of liaison between both lawyers to assess how best to present the submissions and for the former to draft the submission, in

"American" legal format. The non-US lawyer remains a valuable point of contact between the SDN and the US attorney, and this approach should mitigate the costs of the exercise.

There is another benefit to this strategy — EU sanctions are often imposed on those that OFAC targets. The remedy lies with the European Court of First Instance, which is subject to an even tighter timeframe than OFAC's limit of 70 days in which to lodge a submission of rebuttal. By employing non-US lawyers, (EU lawyers in this example), the statement and documentary evidence that is collated for the OFAC application can be deployed before the ECFI, therefore, avoiding costly duplication of effort.

There is no prospect of OFAC, and its equivalents at the state and commerce departments (which maintain different, although similar lists) and US Immigration and Customs Enforcement, reducing its activities in the foreseeable future. At a recent OFAC symposium, which was held in Washington DC for the banking and finance industry and lawyers, it was a constant theme that sanctions-busting exports of computer components could be directly linked to the use of improvised explosive devices on coalition troops in Iraq and Afghanistan. The challenge for those who are designated SDNs is to move swiftly to rebut designation, with the assistance of both US attorneys and non-US lawyers, to protect both global reputation and worldwide business interests.

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