

PUBLICATION

OFAC Enforcement Trends in the Health Care, Agriculture and Tech Industries

Authors: D. Taylor Tipton

June 20, 2017

The United States Department of the Treasury's Office of Foreign Assets Control (OFAC), the U.S. governmental agency tasked with administering and enforcing economic sanctions against hostile targets in furtherance of U.S. foreign policy, has gained broad attention in the last decade for a series of high-profile enforcement actions against and settlements with major financial institutions. These settlements include those with Credit Agricole Corporate and Investment Bank (2015 – \$329.6 million); Commerzbank (2015 – \$258.7 million); and BNP Paribas (2014 – \$963.6 million).

In recent years, however, as U.S. and foreign entities have implemented improvements in OFAC compliance policies and procedures, OFAC has expanded its enforcement priorities towards non-bank financial service providers and non-financial services firms, including those in the technology, agriculture and health care sectors. This update examines those trends and provides helpful guidance for companies with heightened OFAC-related risk in implementing enhanced compliance procedures.

The Office of Foreign Assets Control

OFAC was established in 1950 to administer U.S. economic sanctions against hostile targets in furtherance of U.S. foreign policy and national security objectives. For most of its history, OFAC has been a low-profile agency with little public recognition. However, after the terrorist attacks of September 11, 2001, OFAC has taken a prominent role in the "War on Terror," increasing its public profile through more robust enforcement activity.

OFAC has jurisdiction over all "U.S. persons" located anywhere in the world, including citizens, permanent resident aliens and corporations organized under U.S. law, as well as all individuals and entities located in the United States. Under certain sanctions programs, foreign subsidiaries of U.S. companies can be subject to U.S. sanctions.

OFAC maintains both "list-based" and "country-based" sanctions. List-based sanctions are primarily administered through the Specially Designated Nationals List, or "SDN List." SDNs are governments, entities and individuals who are "designated" by OFAC under one or more programs for being sponsors of terrorism, trafficking in narcotics or other activities targeted by U.S. foreign policy. U.S. persons are prohibited from transacting with SDNs without a license from OFAC.

Country-based sanctions programs target transactions with a nexus to a specific country or region. Such sanctions programs vary significantly in the economic activity they prohibit, with certain programs only prohibiting transactions with government or ruling party officials (e.g., the Zimbabwe Sanctions Program). On the other end of the spectrum, "comprehensive sanctions programs" amount to near-total economic embargoes on transactions with sanctioned countries (e.g., the Cuba, Iran and North Korea Sanctions Programs).

As noted above, OFAC issues two types of licenses: General Licenses and Specific Licenses. These licenses allow U.S. persons to engage in activities that would normally be prohibited by the relevant regulations. While General Licenses are contained within the regulations and grant general permission to U.S. persons to engage

in certain types of transactions, Specific Licenses are issued to specific parties granting those parties permission to engage in a particular transaction or set of transactions. As all Specific License applications are considered on a case-by-case basis, there is no guarantee that OFAC will grant a Specific License once it has completed its review of an application.

Recent Trends in OFAC Enforcement Actions

For much of the post-9/11 era, OFAC has focused its enforcement efforts on banks, especially foreign banks that processed U.S. dollar clearing transactions for SDNs or that had a nexus to sanctioned countries. For example, from 2011 – 2015, OFAC's five largest settlements and nine of its ten largest settlements, were with banks and other financial institutions.

However, since the beginning of 2016, only two of the 14 civil penalties issued by OFAC have been against financial institutions and those penalties were the fifth and sixth largest penalties, respectively, issued by OFAC. Several non-financial companies in the health care, agricultural and technology industries have been penalized by OFAC for violations of U.S. sanctions. Notably, several small- and medium-sized health care companies have faced OFAC investigations and penalties since the beginning of 2016, including United Medical Instruments Inc. (\$515,400), World Class Technology Corporation (\$43,200) and HyperBranch Medical Technology, Inc. (\$107,691).

In addition to issuing enforcement actions against the small businesses noted above, OFAC has also issued enforcement actions against major technology and health care companies. Earlier this year, OFAC penalized Zhongxing Telecommunications Equipment Corporation (ZTE) for egregious violations of U.S. sanctions. For six years, ZTE had exported telecommunications equipment from the U.S. to China with the intent to re-export such equipment to Iran. OFAC penalized ZTE \$100.9 million because ZTE facilitated the violation of the Iranian Transactions and Sanctions Regulations by U.S. persons.

Last year, OFAC penalized Alcon Laboratories, Inc. (Alcon) and affiliated entities \$7.6 million, the largest penalty issued by OFAC in 2016 for violating the Iranian and Sudanese Sanctions Programs by exporting medical and pharmaceutical products to an exporter who intended to deliver such products to Iran and Sudan. OFAC determined that Alcon either knew or should have known that its products were destined for Iran and Sudan, but (i) did not have proper screening policies and procedures in place to comply with OFAC regulations and (ii) as a result did not voluntarily self-disclose such violations. For these reasons, OFAC issued a penalty against Alcon, even though its transactions were eligible for export under OFAC's licensing procedures for medical and pharmaceutical products.

Takeaways

OFAC's recent enforcement trends reinforce the need for all U.S. persons to ensure they understand the risks and requirements of OFAC.

First, the recent enforcement trend towards enforcement actions against non-financial services companies may be a deliberate shift in priorities for OFAC. As more financial institutions have implemented robust sanctions compliance programs designed to monitor and prevent sanctions violations, OFAC resources have been freed to pursue a broader range of targets. As OFAC must no longer allocate the majority of its resources to pursuing large financial institutions that in the past have processed hundreds or thousands of impermissible transactions, it may use its resources to pursue even limited violations by small companies in industries such as health care and agriculture.

Second, given this increased enforcement activity, it is essential that any U.S. company that exports products overseas implement an OFAC compliance program. Such a program should include: (i) written policies and procedures tailored to the degree of sanctions risk posed by the company; (ii) qualified compliance personnel

trained in OFAC issues;

(iii) screening procedures to identify end-users of goods and all intermediaries in the export process, including transporters, import/export agents, financiers, distributors and where applicable the beneficial owners of such parties; and (iv) regular training in OFAC issues for directors, officers and employees of the company. In recent enforcement actions, OFAC has tended to grant companies credit for improvements made to compliance policies and reduced the amount of penalties accordingly.

Finally, companies with export activities should consult counsel where there is a question as to the permissibility of a particular transaction, especially in determining whether or not to apply for a license for a particular transaction. Such companies should also consult with counsel in determining whether to voluntarily self-disclose an apparent violation.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC represents clients nationally and globally on regulatory, compliance and enforcement matters. Should you desire to discuss any of the material contained in this update, please contact any of the following persons or a member of Baker Donelson's [Government Enforcement and Investigations Group](#).