

## A FRAMEWORK FOR OFAC COMPLIANCE COMMITMENTS

### OFAC Provides a Blueprint (of sorts) for Building a Risk-Based Sanctions Compliance Program

Last year, OFAC signaled that it would be issuing much-anticipated guidance for companies on building sanctions compliance programs and, on May 2, 2019, OFAC delivered. "A Framework for OFAC Compliance Commitments" (the "Framework") sets forth OFAC's view of the elements of an effective compliance program.<sup>1</sup> In the buildup to publishing the Framework, OFAC increasingly had included compliance-related guidance in its public settlement documents and enforcement notices, much of which is reproduced and highlighted in the Framework as "root causes" of sanctions violations.

OFAC makes clear that its Framework is not "one sizes fits all." Rather, the Framework recognizes that each company's program should be based on a comprehensive assessment of risks in the company's business, and adequately tailored to address those specific risks. While a company does not violate any law or regulation if it fails to follow the Framework guidance, in the event a company is involved in a OFAC violation, its failure to follow the guidance will have a detrimental impact on the both the form of resolution with OFAC and the severity of the penalty. Further, a company adhering to the guidance also may stand a lower risk of becoming involved in an OFAC violation. In any event, a company that appears before OFAC in settlement discussions will need to convincingly explain whether, how and why its program deviates from the Framework as the Framework most likely will become a "checklist" that may be mechanically applied by OFAC to test compliance programs.

#### Essential Components

The Framework is built around five "essential components": (1) management commitment; (2) risk assessment; (3) internal controls; (4) testing and auditing; and (5) training.

#### Component 1: Management Commitment

OFAC states that management's commitment to sanctions compliance is one of the "most important factors" in determining the success of an OFAC compliance program. The responsibility of management in developing and communicating a

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<sup>1</sup> [https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20190502\\_33.aspx](https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20190502_33.aspx)

"culture of compliance" includes direct words and actions that stress the importance of compliance and responding to compliance failings with appropriate corrective actions. OFAC places the burden on management for forming and adequately staffing the compliance function, focusing both on human capital and technological resources.

### **Component 2: Risk Assessment**

OFAC notes that "one of the central tenets of [the Framework] is for organizations to conduct a routine, and if appropriate, ongoing 'risk assessment' for the purposes of identifying potential OFAC issues they are likely to encounter." OFAC's expectation is that the risk assessment will inform the development of policies, procedures, internal controls, and training. Importantly, this cannot be a one-time event, but risk assessments should be ongoing and intended to constantly inform the company where enhancements are needed and to address new or changing risks to the company on an ongoing basis.

Regulated financial institutions have become very experienced in conducting thorough risk assessments in order to satisfy applicable regulations and regulator expectations. Companies in less regulated industries typically have less developed risk management programs, but going forward are likely to be held to higher standards by OFAC and other enforcement authorities.

The Framework acknowledges that a risk assessment will be unique to each company but OFAC suggests where to start: (i) customers, supply chain, intermediaries, and counter-parties; (ii) the company's products and services, including how and where such items fit into other financial or commercial products, services, networks, or systems; and (iii) the geographic locations of the company, and its customers, supply chain, intermediaries, and counter-parties.

OFAC also focuses on due diligence activities. This has been a particular focus in its 2019 settlements. OFAC uses the Framework to remind companies of its expectation that risk-assessments will inform due diligence, including during onboarding of customers and as part of mergers and acquisitions.

### **Component 3: Internal Controls**

The Framework calls for written policies and procedures to be disseminated and enforced throughout a company. OFAC notes, however, that a successful and effective sanctions compliance program, "should be capable of adjusting rapidly to changes published by OFAC." The Framework indicates that the internal controls should be in writing and address the sanctions escalation chain, reporting, and OFAC-related record-keeping. OFAC is not otherwise specific as to the content of the policies and procedures.

### **Component 4: Testing and Auditing**

OFAC states that "testing or audit, whether conducted on a specific element of a compliance program or at the enterprise-wide level, are important tools to ensure the program is working as designed and identify weaknesses and deficiencies within a compliance program." The Framework notes that this auditing or testing function can be accomplished internally or externally by the company. Such testing or audit must be independent, have sufficient authority and the results must be used to inform (and improve) the OFAC compliance program.

## **Component 5: Training**

Training for "employees and personnel" should, at a minimum, occur annually, with training materials made accessible to employees. OFAC also notes that additional training should be offered where testing and auditing findings identify potential issues and remedial steps should be reinforced through additional training. The training must be tied to the company's risk assessment and address the company's particular risk profile. The Framework is otherwise silent as to the manner in which training should be provided or the specific content.

OFAC indicates that it will apply the Framework in enforcement cases in three situations. First, after determining that a civil monetary penalty is appropriate, OFAC will use the Framework to determine which elements of the Framework the company will need to incorporate in its compliance program in conjunction with the settlement. Second, OFAC will use the Framework to evaluate mitigating factors warranting a reduction in penalty under OFAC's Enforcement Guidelines, including whether the company had an effective compliance program at the time of the violations or whether the company's remediation efforts warrant mitigation. Finally, OFAC will use the Framework when evaluating whether the case involves "egregious" sanctions violations.

The Framework also contains an appendix in which OFAC lists some of the "root causes" of sanctions violations identified in prior OFAC investigations of sanctions violations, including:

- not having a formal sanctions compliance program;
- misinterpreting OFAC's regulations or failing to properly understand their applicability;
- US companies facilitating transactions by non-US persons, including by referring business to or approving transactions conducted by non-US subsidiaries or affiliates;
- non-US companies transferring or re-exporting US-origin goods to OFAC sanctions targets that they have specifically purchased from US suppliers for that purpose;
- non-US persons processing US dollar payments through the US financial system for transactions involving OFAC sanctions targets;
- not having effective sanctions screening or filtering software, including not having updates to sanctions lists incorporated and not filtering using alternative name spellings for commonly used variations such as "Habana" instead of "Havana";
- improper or incomplete due diligence on customers, suppliers and other counterparties;
- having a de-centralized compliance function that can result in improper interpretation and application of OFAC's regulations; and
- using non-standard payment or commercial practices.

The Framework is useful in determining what OFAC considers necessary for an effective sanctions compliance program. However, its key value may be when there is a compliance failure. In that situation, the Framework provides a script for settlement discussions with OFAC and a measurement tool for assessing potential penalties, including aggravating and mitigating factors that OFAC will weigh in the balance.

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