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OFAC Violation Response Checklist

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Even the most sophisticated company, with a well-developed compliance program, can find itself subject to an OFAC violation. A company's response to an OFAC violation can have significant reputational and financial consequences.

Upon discovering a potential sanctions violation, a company faces a host of decisions. Is the conduct ongoing and if so, how can it be immediately halted or reversed? How broad of an investigation should be performed? How can similar violations be prevented in the future? Should the violation be disclosed to the government?

Although each decision involves unique considerations, each step may affect another. It is therefore useful to think carefully, at the outset, about the proper approach to any potential or actual violation. This checklist is intended to help make companies and their counsel aware of the issues to consider when responding to an OFAC violation.

For more information on U.S. sanctions laws in general, see [Understanding and Complying with OFAC Regulations](#). For an in-depth discussion of the elements of how to respond to an OFAC violation, see [Responding to an OFAC Violation](#).

Issues to Consider When Responding to an OFAC Violation

The results of each enforcement action are different and OFAC does not follow a predictable formula; therefore, a company should consider their response to an OFAC violation an opportunity to attempt to mitigate and shape the outcome. A company's response to one OFAC violation can have an impact on any future violations.

Although a company may approach each OFAC violation differently based on the facts, the steps below provide an overarching guide which should be tailored to the circumstances:

- **Implement Immediate Remedial Actions.** The most important step is to halt the conduct that caused the violation – an action that will vary depending on the root cause(s). Halting the misconduct can be particularly challenging and companies should consider the commercial and legal considerations of halting a trading relationship mid-transaction or unwinding a transaction. The actions taken to halt the misconduct may themselves require a license from OFAC. See [Understanding and Complying with OFAC Regulations — How Do Parties Apply for Sanctions Licenses?](#) The actions noted below are not exclusive to the root cause and any remedial action should be tailored to the specific circumstances:
 - **Employee's lack of knowledge that their conduct violated U.S. sanctions.** The proper remedial action could consist of educating the employee and taking appropriate action to halt any ongoing misconduct.
 - **Company systems and processes failed to anticipate the particular situation.** The immediate response should include modifying the applicable procedures and approach systems to prevent similar violations in the future.
 - **Intentional action by an individual who is aware their conduct violates U.S. sanctions and company policy.** Proper remedial action may consist of disciplinary action up to and including termination of the employees involved. However, the company should consider whether the employee's cooperation will be valuable to the internal review prior to termination. Taking the appropriate disciplinary action against employees is particularly important if the company is considering self-disclosure.

Regardless of the underlying reason for the violation, or the company's decisions about subsequent steps, a company must not simply ignore the issue and hope it will go away.

- **Decide Whether to Self-Disclose.** While not required by law, self-disclosure that is self-initiated, authorized by senior management, and made prior to or at the same time the government discovers the apparent violation or another substantially similar apparent violation may result in the company receiving mitigation credit (and a corresponding reduction in penalties). A company must consider myriad factors in determining whether to self-disclose:

- o **Likelihood that OFAC will discover the violation through other means.** OFAC is a small agency that does not have the resources to single-handedly seek out and enforce all suspected violations. Actions may be brought to OFAC's attention through routine reporting by financial institutions. OFAC may also learn of a sanctions violation through investigations of other companies or those conducted by international counterparts. The likelihood that OFAC will independently learn of a suspected violation depends on a number of factors including the breadth of the wrongdoing and the industry in which the company operates.
- o **The degree to which the misconduct could expose the company to government scrutiny.** Certain activities are closely regulated by other government authorities that could result in notification to OFAC. For example, if a company exports U.S. origin goods to a prohibited destination, the U.S. export control authorities could become aware and notify OFAC of the potential sanctions violations.
- o **Analysis of the potential penalty that could be imposed.** A single circumscribed violation may generally be subject to a significantly smaller potential penalty than a case of misconduct that occurs over a significant period of time. The company may be less inclined to self-disclose serious, widespread violations; however, the likelihood of independent discovery by OFAC increases with the pervasiveness of the conduct.
- o **Practical impact of the self-disclosure on the company.** A self-disclosure, done properly, can be time-consuming and expensive, diverting resources and time away from other business functions. On the other hand, a self-disclosure allows the company to maintain some control over the scope of the investigation, whereas a response to an independent OFAC inquiry may be unpredictable in scope and duration. Self-disclosure can also have an impact on the company's reputation. While the publication of a sanctions violation that may not have been discovered otherwise may have a negative impact on reputation, a company's willingness to disclose and cooperate with a discovered violation could solidify its reputation as a responsible corporate citizen.
- **Scope the Internal Investigation.** Regardless of a company's decision to self-disclose, the company should take steps to fully investigate the underlying conduct. The investigation should be tailored to the particular violation at issue, taking into consideration the size of the company. A properly scoped investigation will review transactions related in time and subject matter to the discovered violation. The depth of the investigation will also depend on the applicability of the statute of limitations.

At minimum, an appropriate investigation will involve:

- o Interviews with personnel involved or suspected to possess relevant information
- o A review of relevant documents (e.g. e-mails, contracts, shipping documents, related invoices, and the like)
- o It may be appropriate to secure outside counsel to perform the investigation to ensure the independence of the review and to benefit from the protection of the attorney-client privilege.
- o A thorough report should be drafted at the conclusion of the investigation to document the investigative steps and outcome. Among other elements, the report should identify the root cause of any discovered violations, propose targeted corrective actions to prevent similar violations in the future, and commit to a timeline addressing each corrective action, identifying the personnel responsible and a mechanism to audit its completion.
- **Take Corrective Action.** It is essential to implement efficient and effective corrective actions that respond directly to the root cause of the identified violations. At a minimum, any company that has discovered a sanctions violation should ensure that its policies and procedures address U.S. sanctions requirements and prohibitions and that all personnel involved in international business transactions are provided periodic training on applicable U.S. laws and company policies. If, on the other hand, an investigation revealed broad gaps in the company's compliance program, more systemic changes may be needed.
- **Negotiate with OFAC.** A company's decisions regarding whether to self-disclose, the scope of its internal investigation, and the remedial actions it implements all will be relevant to the ultimate action (or lack thereof) that OFAC takes in response to a sanctions violation. After considering these and other factors, OFAC will determine how to respond to the violation or apparent violation. The agency's response may result in no action, request for additional information, cautionary letter, finding of violation, civil penalty, criminal referral, or other administrative actions. For more information see 31 CFR PART 501 APPENDIX A —Economic Sanctions Enforcement Guidelines.

In those cases in which OFAC determines that a civil penalty is appropriate, it will issue a pre-penalty notice proposing the amount of the proposed penalty, taking into consideration whether the violation was voluntarily self-disclosed.

During the course of an investigation or imposition of a penalty, OFAC or the company may initiate settlement discussions. In some cases, OFAC may condition the entry into or continuation of settlement negotiations on the execution of a tolling agreement with respect to the statute of limitations. Finally, OFAC may enter into a global settlement with a company regarding multiple apparent violations.

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