

LOOKING AHEAD TO 2019 AND OFAC'S FOCUS ON REMEDIATION AND COMPLIANCE

OFAC's Economic Sanctions Enforcement Guidelines (31 CFR Part 501) have always included a section on "Remedial Response," reflecting OFAC's consideration of the entity/Subject Person having or improving its "OFAC compliance program," particularly as a potential mitigating factor for penalties. However, OFAC has not provided specific guidance on what exactly an "OFAC compliance program" must entail. Recent settlements suggest that this will change in 2019. While egregious behavior will probably still be called out, expect that settlements in the near future will also highlight compliance and remediation lessons.

Lessons From 2018 Enforcement Actions

In recent statements, OFAC officials have pointed to language in the 2018 publicly announced Enforcement Actions to forecast their compliance expectations. In these announcements, OFAC has highlighted some of the themes that likely will shape their position on OFAC compliance programs in 2019:

Compliance Program Should be Risk-Based. This theme was mentioned in two decisions.

- "Risk-based compliance measures" (*Cobham Holdings, Inc.*, November 27, 2018) and "Develop risk-based compliance programs that include control mechanisms." (*Yantai Jereh Oilfield Services Group Co., Ltd.*, December 12, 2018).

Compliance Function Must be Robust and Sufficient Staffed/Supported. OFAC focused on compliance personnel, their numbers and their proficiency.

- "Ensure their sanctions compliance teams are adequately staffed, receive sufficient technology and other resources, and are delegated appropriate authority to ensure compliance efforts meet an entity's risk profile." (*Ericsson, Inc. and Ericsson AB*, June 6, 2018).

- "Increased the number of personnel within compliance staffing." (*Société Générale S.A.*, November 19, 2018).
- "Ensure compliance units receive adequate resources, including in the form of human capital, information technology, and other resources" (*Cobham Holdings, Inc.*, November 27, 2018).

Employee Training is Critical. Just investing in personnel and equipment was not sufficient, as resources also had to be devoted to ensuring that the personnel were appropriately trained.

- "Persons employing sanctions screening software should take steps to ensure it is sufficiently robust and that appropriate personnel are trained on its functionality" (*Cobham Holdings, Inc.*, November 27, 2018).
- "More comprehensive training regime for employees." (*Société Générale S.A.*, November 19, 2018).

Create and Foster a Culture of Compliance. OFAC is going to focus on whether employees were supported in their efforts to comply.

- "Maintain a culture of compliance where front line staff are encouraged to follow-up on sanctions issues, including by promptly reporting to compliance personnel transactions suspected to involve sanctioned parties" (*Cobham Holdings, Inc.*, November 27, 2018).

Test and Audit Compliance Measures. OFAC is looking at whether the compliance programs were stress-tested, monitored and maintained for maximum effectiveness.

- "Implementation of audits, reviews, and control measures." (*Yantai Jereh Oilfield Services Group Co., Ltd.*, December 12, 2018).
- "Remediating known compliance program deficiencies in an expedient manner, and when that is not possible, the importance of implementing compensating controls to mitigate risks until a comprehensive solution can be deployed." (*JPMorgan Chase Bank, N.A.*, October 5, 2018).

In addition to this year's Enforcement Actions, the statements of senior OFAC officials suggest that 2019 will be the year of guidance on "OFAC compliance programs" as OFAC tries to "raise the bar" on compliance with sanctions. However, waiting for guidance should not be the plan but instead, proactively examining your compliance programs and identifying areas for improvement will make for a happier New Year.

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