

OFAC sheds regulatory light on longstanding tailored sanctions tools

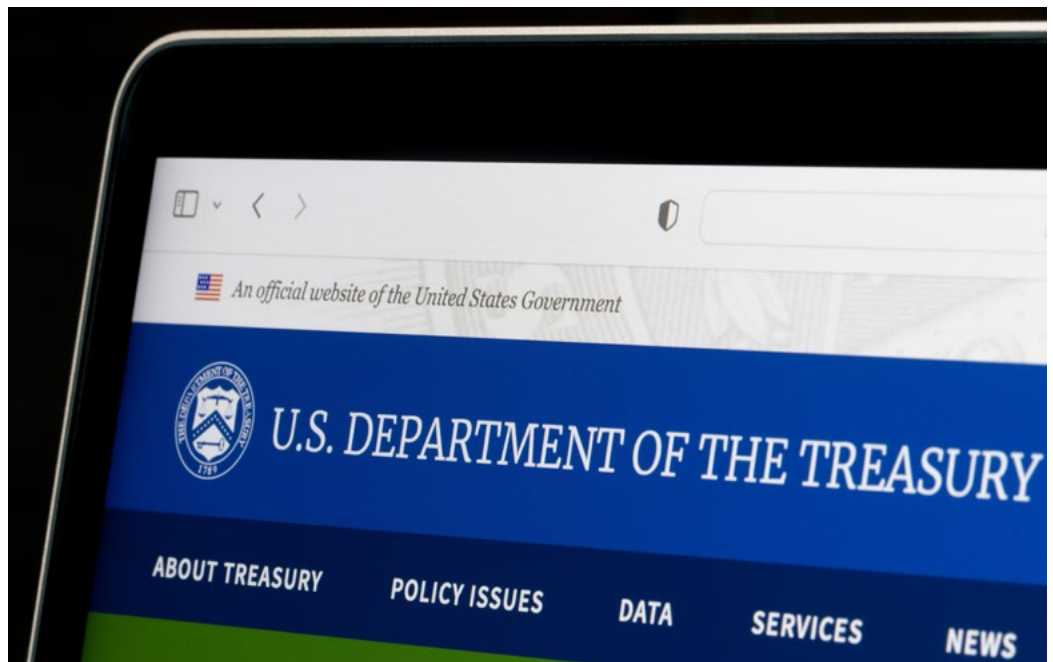


In recent months, the US Department of the Treasury's Office of Foreign Assets Control ('OFAC') has issued two rulemakings that inject regulatory transparency into certain tailored sanctions actions that OFAC has been taking for many years. While these types of actions are not new to the sanctions compliance community, their 'codification' merits attention, write Jason Prince and Andrew Schlossberg.

In recent months, the US Department of the Treasury's Office of Foreign Assets Control ('OFAC') has issued two rulemakings that inject regulatory transparency into certain tailored sanctions actions that OFAC has been taking for many years. Such OFAC actions, which emanate primarily from the President's authority under the International Emergency Economic Powers Act ('IEEPA') at 50 U.S.C. § 1702(a) (1)(B), include the issuance of 'monitoring instructions', 'blocking orders', and 'blocked pending investigation orders' or 'BPIs', as well as orders or directives that impose certain less-than-blocking sanctions on specific property or property interests. These types of actions are not new to the sanctions compliance community, especially financial institutions. That said, OFAC's express codification of these tools, as well as its related Federal Register comments about the types of notice associated with these tools, merits attention.

OFAC implemented this initiative through the publication of two regulatory 'Notes'. First, on 10 May 2024, OFAC published in the Federal Register an Interim Final Rule that, among other changes to OFAC's Reporting, Procedures and Penalties Regulations at 31 CFR part 501, added the following new 'Note 1' to 31 CFR § 501.602:

'Note 1 to § 501.602. If OFAC has reason to believe an account or transaction (or class of transactions) may involve the property or interests in property of a blocked person, OFAC may issue an instruction to one or more financial institutions



BPIs ensure the specific property or interests in property are not transferred outside OFAC's jurisdiction while OFAC seeks to develop the evidence necessary to designate the person. However, the Final Rule clarifies how OFAC will provide notice of such actions to affected persons.

that: (1) provides information or criteria to aid in the identification of blocked property; and (2) requires the financial institution to report transactions that meet the specified criteria and notify OFAC prior to processing such transactions. Upon review, OFAC may determine that a reported transaction involves the property or interests in property of a blocked person and take further action.'

This 'Note', which took effect on 8 August 2024, codifies OFAC's longstanding practice of issuing 'monitoring instructions' to financial institutions, which require them to identify and report to OFAC transactions meeting specified criteria before processing the transactions. Monitoring instructions enable OFAC to alert financial institutions to

potential transactions in which OFAC believes a blocked person may have a property interest. OFAC might learn about such transactions through a variety of sources, including US law enforcement or intelligence partners, non-US partner or ally governments, whistleblowers, voluntary self-disclosures, and OFAC-initiated investigations. When a financial institution then sees a transaction meeting OFAC's specified criteria, the financial institution must report that transaction to OFAC before processing it, so OFAC can analyse the transaction and, if appropriate, take action to ensure the relevant funds are moved into a blocked, interest-bearing account (e.g., by issuing a 'blocking order', as described below).

Second, on 17 September 2024, OFAC published in the Federal Register a Final Rule that, among other changes,

added the following 'Note' to 35 parts of 31 CFR chapter V:

Note [x] to § [5xx.xxx]. In certain cases, OFAC may issue an order to: identify as blocked specific property or interests in property of a person designated or otherwise blocked pursuant to this section; block specific property or interests in property of a person pending investigation; or block or impose other prohibitions with respect to specific property or interests in property less than full blocking sanctions. Notice of such orders will be provided: by publication in the Federal Register; in writing to persons OFAC may assess to have an interest in the property; or by issuing an order or directive in writing to financial institutions or other transaction intermediaries, and requiring the recipient of the order or directive to promptly disclose it to affected persons with whom the recipient maintains direct commercial relationships. Inquiries regarding any such order should be directed to OFAC's Compliance Division at 202-622-2490 or <https://ofac.treasury.gov/contact-ofac>.

In the 'Background' section of the Final Rule, OFAC explained that '[p]ersons affected by any type of OFAC prohibition should have an opportunity to understand the nature of OFAC's action and its impact on their property or interests in property', and that '[t]he form of notice may differ depending on the type of action OFAC takes or order it issues and the specific facts of an action.' When OFAC adds an individual or entity to the Specially Designated Nationals and Blocked Persons List ('SDN List'), it publishes notice of that action in the Federal Register 'because it ensures that anyone who may come into contact with a designated person or their property or interests in property is aware of the designation'. Although the Final Rule focuses solely on such Federal Register notice, OFAC also provides immediate public notice of designations by issuing a

The rulemakings codify tools that OFAC has been deploying for years. But the public explanation reflects another step in OFAC's recent efforts to raise public awareness and understanding of its sanctions authorities.

press release shortly before publication in the Federal Register.

In contrast, '[w]hen OFAC takes a more tailored action with respect to specific property or interests in property, the public may not always require notice of the action through publication in the Federal Register, and it may be more appropriate to provide actual notice specifically to a person affected by the prohibition.' Such 'tailored' notice may involve OFAC providing written notice *directly* to those who have an interest in the specific property or *indirectly* through financial institutions or other transaction intermediaries. According to OFAC, '[i]n many cases, requiring a transaction intermediary to disclose a blocking order may be the most efficient and effective means of providing notice because a transaction intermediary maintains direct commercial relationships through which affected persons may inquire about the status of their funds.'

The Final Rule's new 'Note', which took effect immediately, codifies in OFAC's regulations the following three longstanding categories of orders or directives that block or identify as blocked specific property or property interests, or that impose certain less-than-blocking prohibitions with respect to specific property or property interests:

(1) Identifying property or interests in property as blocked pursuant to OFAC's authority due to an interest of an already blocked person, including where such interest may not be apparent to the public.

OFAC takes this sort of 'blocking order' action in part by issuing a 'Notification of Blocked Property' or a 'Notification of Blocking of a Third Person' to persons to alert them to OFAC's determination that specific property or property interests in that person's possession or control are blocked due to the direct or indirect interest of a blocked person. For example, on 30 June 2022, OFAC announced in a press release that it had issued a Notification of Blocked Property to Heritage Trust, a

Delaware-based trust in which OFAC determined, through its own investigation, Suleiman Abusaidovich Kerimov, a Russian individual on the SDN List, holds a property interest. In that case, OFAC not only provided notice of its blocking action directly to Heritage Trust through the Notification of Blocked Property, but it also provided public notice by issuing a press release about this action.

(2) Blocking specific property or interests in property of a person who is not already blocked but whom OFAC is investigating for potential designation.

OFAC has for years taken this type of tailored blocking action by issuing BPIs to financial institutions or other persons in possession or control of specific property or interests in property of a person under OFAC investigation for potential designation on the SDN List. These BPIs ensure the specific property or interests in property are not transferred outside OFAC's jurisdiction while OFAC seeks to develop the evidence necessary to designate the person.

However, the Final Rule clarifies how OFAC will provide notice of such actions to affected persons. Specifically, the Final Rule says OFAC may implement such a BPI by 'issuing an order or directive in writing to financial institutions or other transaction intermediaries, and requiring the recipient of the order or directive to promptly disclose it to affected persons with whom the recipient maintains direct commercial relationships.' (Emphasis added.)

OFAC also has the authority to fully block a person's property and interests in property pending investigation by adding that person to the SDN List, such that the blocking action is public. In fact, OFAC's applicable regulations already contained a 'Note' addressing such full-blocking BPI actions. To clarify the distinction between these two forms of BPI action and the associated forms of notice, the Final Rule amended this existing 'Note' across the applicable regulations. For example,

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OFAC amended Note 2 to 31 CFR 587.201 (Russian Harmful Foreign Activities Sanctions Regulations) to include the following bolded language:

‘The International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), in Section 203 (50 U.S.C. 1702), authorizes the blocking of property and interests in property of a person during the pendency of an investigation. **Except as described in note 3 to this section**, the names of persons whose property and interests in property are blocked pending investigation pursuant to this section also are published in the Federal

Register and incorporated into the SDN List using the following identifier formulation: “[BPI-RUSSIA-EO (EO number pursuant to which the person’s property and interests in property are blocked pending investigation)]”.’ (Emphasis added.)

The ‘note 3’ referenced in the bolded text is the Final Rule’s new ‘Note’ regarding tailored BPI actions that block only specific property or property interests and, thus, do not involve publication in the Federal Register and incorporation into the SDN List.

(3) Blocking or imposing other prohibitions with respect to a person’s specific property or interests in property less than full blocking sanctions.

As explained in the Final Rule, ‘OFAC may consider designating a person but

determine US national security or foreign policy interests are better served by prohibitions that may be narrower than blocking the entirety of the person’s property and interests in property.’ In those cases, OFAC determines the person meets the criteria for designation but takes a less-than-blocking action. This type of action may take various forms, including OFAC’s issuance of an order directly to financial institutions or other persons in possession or control of specific property or interests in property, or OFAC’s publication of directives initially to its website (along with a press release) and then in the Federal Register. In the Final Rule, OFAC pointed to its 2014 directives issued pursuant to section 1(b) of executive order (‘EO’) 13662 that prohibited certain dealings in debt and equity of persons operating in those sectors of the Russian Federation economy

identified by the Secretary of the Treasury pursuant to section 1(a)(i) of EO 13662. OFAC has subsequently issued various similar less-than-blocking directives, including under the Ukraine/Russia-related, Russian Harmful Foreign Activities, Burma-related, and Belarus-related sanctions programmes.

In summary

The recent OFAC rulemakings discussed above did not mark a sea change in OFAC’s exercise of its delegated authority under IEEPA and other statutes. On the contrary, these rulemakings codified tried-and-true sanctions tools that OFAC has deployed for years. That said, OFAC’s public explanation of these tools – and the various ways it will provide notice to affected parties – reflects another step in OFAC’s recent efforts to raise public awareness and understanding of its sanctions authorities.

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