WILLKIE FARR & GALLAGHER LLP

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Compliance Cross-Border on International Sanctions

The US prospective on the basis of the US laws and regulations: Enforcement trends.

David Mortlock September 22, 2020

Overview of U.S. Sanctions

- Primarily administered by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"), with some sanctions imposed by the State Department.
- Three general categories of U.S. sanctions:
  - General embargoes (Cuba, Iran, Syria, DPRK, Crimea);
  - Targeted sanctions on Specially Designated Nationals ("SDNs") (e.g., the Government of Venezuela);
  - More limited restrictions, such as on extension of credit, to certain Russian entities (e.g., Sberbank, Rozneft)
- U.S. primary sanctions generally prohibit activities by U.S. persons:
  - U.S. nationals and permanent residents ("green card" holders), wherever located;
  - Any entity constituted under the laws of the United States; or
  - Any person or entity physically located in the United States.
- For Iran and Cuba, the restrictions also apply to foreign entities that are "owned or controlled" by a U.S. person, such as foreign subsidiaries of a U.S. company.

Implementation and Enforcement of Sanctions

- OFAC administers and enforces most economic and trade sanctions
- OFAC administers civil enforcement
  - Civil enforcement is subject to strict liability, i.e., without proof of fault or intent. U.S. statute authorizes civil penalties of $307,922 per transaction or twice the value of the transaction.
  - OFAC also looks favorably on voluntary self-disclosure and subsequent cooperation if a sanctions violation has occurred. In the event a company voluntarily discloses an apparent violation to OFAC, the base amount of the proposed civil penalty is one-half of the transaction value capped at a maximum base amount of $153,961 per violation.
- The U.S. Department of Justice ("DOJ") and the U.S. Attorney may pursue criminal investigations independently of and in addition to OFAC enforcement for "willful" violations.
- The New York Department of Financial Services ("DFS") and other regulators may impose penalties for failure to maintain specific controls to help ensure compliance with OFAC-administered regulations.

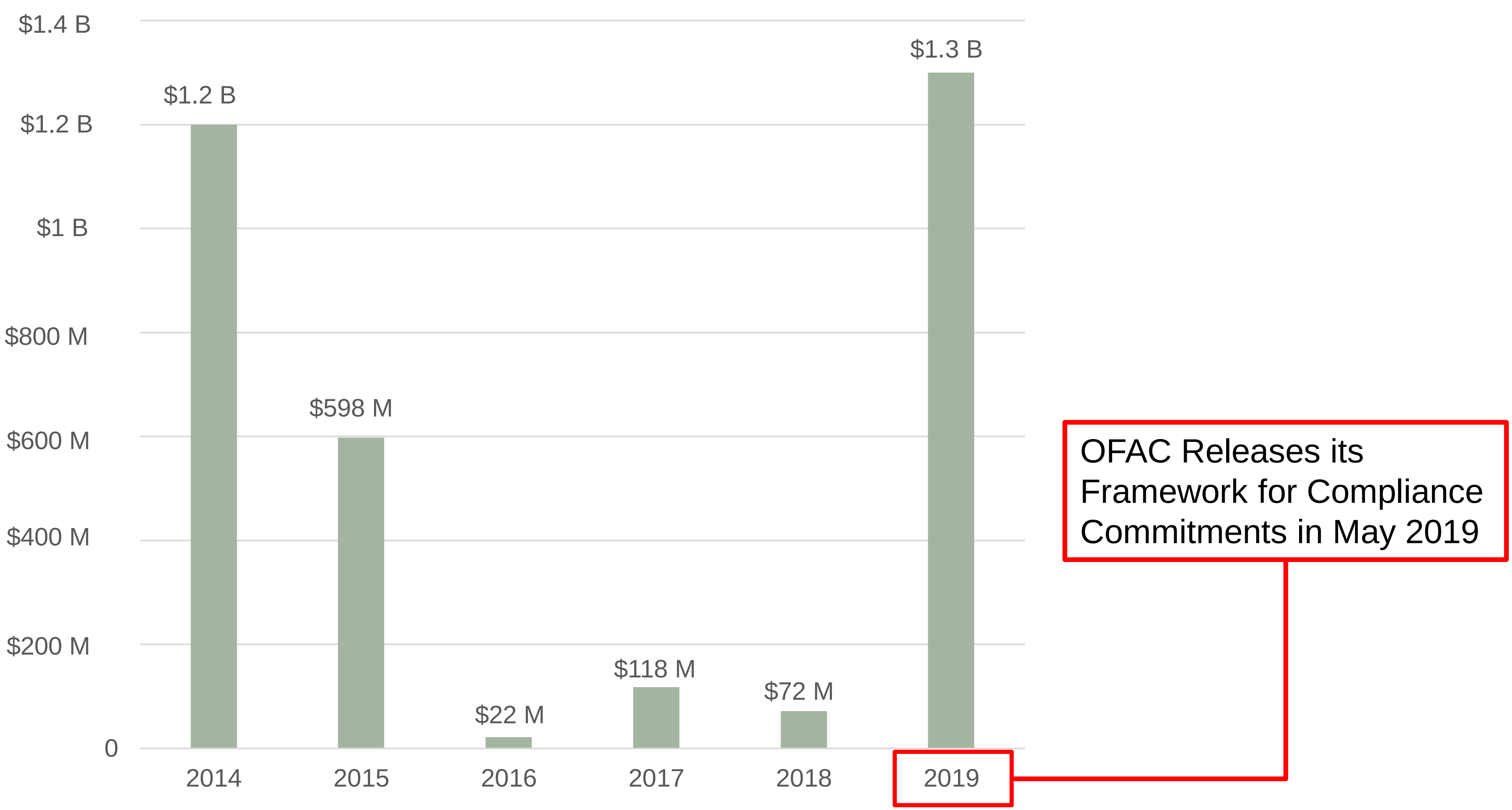
Who Do U.S. Sanctions Apply To?

- U.S. Persons
  - Generally, primary sanctions prohibit transactions only by U.S. persons, including:
    - U.S. citizens and permanent residents (‘green card’ holders), <u>wherever located;</u>
    - Any entity organized under U.S. law; and
    - Any person physically located in the United States.
- Non-U.S. Subsidiaries
  - For Iran and Cuba, the restrictions also apply to foreign entities that are “owned or controlled” by a U.S. Person (i.e. foreign subsidiaries of U.S. companies).
- Non-U.S. Persons
  - Non-U.S. persons are subject to U.S. sanctions if the transaction involves a U.S. nexus.
  - Certain transactions with no U.S. nexus could result in the imposition of “secondary sanctions.”

Risks For Non-U.S. Companies

- Exporting services from the United States –Non-U.S. entities could face potential liability for exporting services from the United States to a sanctioned jurisdiction or person, including for routing U.S. dollar payments through the United States that involve a sanctioned person or jurisdiction.
- "Causing a violation" – Non-U.S. entities could also face potential liability for causing a sanctions violation by involving a U.S. person in a transaction that would be prohibited for a U.S. person.
- Therefore, non-U.S. companies can face potential liability for activity such as:
  - U.S. employees being involved in business activity that involves a sanctioned jurisdiction, individual, or entity.
  - Companies involving a U.S. financial institution in any transaction with a sanctioned jurisdiction, individual, or entity.
  - U.S. dollar-denominated transactions requiring clearance from a U.S. correspondent bank.

Total OFAC Civil Enforcement Penalties by Year



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OFAC's Compliance Framework

- In May 2019, OFAC released a Framework for Compliance Commitments, the first significant guidance from OFAC on the key elements of a compliance program. In the Framework, OFAC lays out what it calls "five essential components of compliance."

1. **Management commitment**, calling for senior leadership to demonstrate their involvement with the company's compliance in specific ways;
2. **Risk assessment**, including holistic reviews of the company's activities for sanctions risks, including reviews of risks associated with customers and business partners;
3. **Internal controls**, referring to the adoption and dissemination of clear internal policies and procedures that are actively enforced and allow for the company to "identify, interdict, escalate, report (as appropriate), and keep records pertaining to activity that may be prohibited by the regulations and laws administered by OFAC;"
4. **Testing and auditing,** referring to functions within the compliance program that allow the company to "assess the effectiveness of current processes and check for inconsistencies between these and day-to-day operations;" and
5. **Training,** involving tailored trainings to employees "with a frequency that is appropriate based on its OFAC risk assessment and risk profile."

OFAC’s Compliance Framework

- Since May 2019, OFAC has used the benchmarks in the Compliance Framework to assess compliance programs as mitigating and aggravating factors in enforcement actions.
- **<u>General Electric</u>**
  - Agreed to pay $2,718,581 on to settle liability for $8,018,615 of invoices paid by directly to a Cuban SDN.
  - OFAC the fact that GE identified the alleged violations by testing and auditing its compliance program as a mitigating factor.
- **<u>Apple, Inc.</u>**
  - Agreed to pay $466,912 to settle liability for violations of the Foreign Narcotics Kingpin Act.
  - OFAC regarded the multiple points of failure within the company’s sanctions compliance program, policies, and procedures as an aggravating factor.
  - In the enforcement action, OFAC highlighted the importance of implementing effective, thorough, and on-going risk-based compliance measures as stated in its Framework for Compliance Commitments.
- **<u>Société Internationale de Télécommunications Aéronautiques SCRL (“SITA”)</u>**
  - OFAC highlighted that SITA did not maintain or implement an effective compliance policy.
  - OFAC again highlighted the importance of implementing effective, thorough, and on-going risk-based compliance measures as stated in its Framework for Compliance Commitments.

Effects of COVID-19 on OFAC Enforcement

- OFAC has recently stated that it will evaluate any technical and resource challenges faced by organizations and businesses due to the COVID-19 pandemic as a factor in determining an appropriate administrative response to an apparent violation that occurs within this period on a case-by-case basis.

- OFAC has reaffirmed its support for a risk-based approach to sanctions compliance and stated that it understands that businesses and organizations affected by the pandemic may choose to reallocate sanctions and compliance resources as part of that approach.

- OFAC will be evaluating such effects on a case-by-case basis, meaning that resource shortages caused by the pandemic may not counter a weak compliance program or a disregard for sanctions compliance during the pandemic.

- Companies should still ensure that their compliance programs are up to date with OFAC's Framework for Compliance.

Questions?

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