

OFAC..... What do I do now??

How a little-known branch of the U.S. Treasury can “block” your assets

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Imagine the following conversation:

Buyer: “I’m terribly sorry, sir. We cannot close this transaction.”

Seller: “Why the hell not? Everything is prepared; our lawyers have reviewed everything; we have a deal!”

Buyer: “Well it seems that the United States Government says you are a drug dealer, and I’m not allowed to do business with you.”

Seller: “Drug dealer?? I’ve never sold drugs in my life! Who told you this? I’ll sue!”

Buyer: “OFAC.”

Seller: “OFAC?”

Buyer: “OFAC.”

Seller: “Who the F&\$K is OFAC?”

It may sound like something out of Catch 22, but for some Americans and foreign nationals this scenario is anything but fiction. It turns out that there is an almost unknown branch of the U.S. Treasury Department whose sole job it is to point its icy, asset-freezing finger at people and bring their entire financial lives to a screeching, often irreversible halt by labelling them a drug dealer, a smuggler, or worse yet, a terrorist. This is OFAC, and it may be the biggest landmine in international commerce today.

The Office of Foreign Asset Control (OFAC) has been operating in one form or another since 1950, with its distant ancestors operating as far back as the War of 1812. Throughout that time, its mission has remained basically the same – to financially sanction people and business entities connected to or supporting countries or enterprises whose interests run contrary to those of the United States and its allies. In its infancy, the agency imposed sanctions on Great Britain for harassing U.S. sailors. It went on to freeze assets of the Confederacy during the Civil War, and it later shut down the movement of Chinese and North Korean finances in the U.S. during the Korean War. Today OFAC is an agency of over 200 employees, largely lawyers and investigators, with an annual budget of over \$30 million. It exercises disturbingly broad discretion and power over any asset that touches U.S. institutions. And, what is more troubling, OFAC operates with almost no oversight, and without any notice or opportunity for defense on the part of its targets.

OFAC’s power stems from a hazy web of federal statutes, executive orders, and federal treasury regulations, many of which date back almost to its inception. Its stated goal is fairly simple, but frustratingly self-referential – to prevent “prohibited transactions.” What, you may ask, is a prohibited transaction? Well, in OFAC’s words it is “trade or financial transactions and other dealings in which U.S. persons may not engage unless authorized by OFAC or expressly exempted by statute.” In other words, a prohibited transaction is whatever OFAC says it is. And, for the well over 6,000 people and entities on one of OFAC’s several “Specially Designated Nationals” (SDN) lists, the fact that OFAC has seen fit to even put them on the list is pretty much the end of the road for their financial operations in the United States. OFAC claims to have a meaningful appeals process for those who feel they have been put on an SDN list without justification, but the anecdotal evidence suggests that attempting to convince OFAC to change its mind is a confusing, frustrating, and sometimes impossible undertaking.

Once a target is placed on an SDN list, all of its assets are “blocked,” which is just another way of saying they are frozen, and it becomes a federal offense to engage in any transaction with that Specially Designated National. The

penalty for disregarding this prohibition can range from a few thousand dollars in fines, to up to 30 years in jail and \$20 million in fines. Famously, in 2014, OFAC reached a record-breaking \$1 billion settlement with French financial institution BNP Paribas for violating OFAC's orders regarding prohibited transactions with SDNs.

So, at this point, even with this limited information, you are probably wondering – what can I do to stay the hell away from OFAC?? Well, today a great deal of OFAC's work stems from upholding various ongoing trade embargoes against countries like Iran, Sudan, and at least for the moment, Cuba. So it would be wise to tread cautiously when doing business with entities that have any relation, even a slight one, with those countries. In fact, an entire industry of auditing legal compliance services has arisen to help businesses stay on the OFAC's good side. Aside from being very careful of those with whom you do business, it goes without saying that it would be wise to avoid actually becoming a terrorist or a drug dealer, as they are always popular targets.

If you aren't actually a drug dealer, smuggler, or terrorist, but you still end up in OFAC's crosshairs, there may still be some cause for hope. In recent years, civil liberty groups, including the ACLU have had some success in arguing that OFAC's method for determining whom should be added to their SDN lists doesn't pass constitutional muster. Most notably, the Ninth Circuit Court of Appeals held that OFAC's process violated both the Fourth and Fifth Amendments to the United States Constitution in *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965 (9th Cir. 2012). The U.S. District Court for Northern District of Ohio reached a similar conclusion in *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio 2009).

The few test cases that have made it through to judicial review in the federal courts have involved charitable organizations accused of acting as fronts for terrorist groups, and foreign nationals who own businesses here in the U.S. with a habit of sending money back home to their families in often war-torn countries. Particularly for smaller targets with no knowledge of OFAC's watchful eye upon them and limited resources to fight the Goliath of the United States Government to unblock their meager assets, putting up a fight without help isn't much of an option. With a big net and a lot of unchecked discretion, OFAC has caught its fair share of big fish. But, as often happens, a lot of guppies have ended up on the deck in the process.

The best defense here, as in many relatively unexplored areas of regulation, is to be aware of as much of the legal landscape as possible and invest in good counsel to help you avoid becoming a target in the first place. For it seems that with no due process on the front end to defend yourself once you are a target, and no money to fund a legal campaign to undo the injustice once your assets are blocked, maybe this is a lot like Catch 22 after all.

For any of your litigation needs, please contact an attorney in our litigation group:

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