

COUNTERTERRORISM AND HUMANITARIAN ENGAGEMENT PROJECT

OFAC Licensing

Background Briefing

March 2013

I. INTRODUCTION¹

The U.S. Department of Treasury's Office of Foreign Assets Control (OFAC) administers and enforces economic sanctions against countries and individuals, including those persons and entities designated as "terrorists." In certain cases, OFAC may authorize certain activities that would otherwise be prohibited under current U.S. sanctions. This authorization comes in the form of a license, which permits an individual or entity to engage in certain types of transactions specified by the license.

Many organizations may have questions about the licensing process, as well as the legal framework underlying OFAC and the licenses it issues. Accordingly, this paper discusses the licensing process, the types of licenses that an individual or organization may request, and examples of licenses for certain activities. There are aspects of the licensing process that remain unknown, however, including the review process for license applications and whether agencies other than the Treasury Department may be involved in the approval process.

In sum, organizations considering whether to apply for OFAC licenses should:

- **Research whether they are subject to OFAC's jurisdiction:** Organizations should make this initial determination because OFAC has jurisdiction over only those persons and entities with a legally significant nexus to the United States.
- **Be cognizant of the potential consequences of submitting an application to OFAC:** If OFAC denies a license application, an organization will likely face significant legal hurdles to successfully challenging OFAC's decision. If an organization's application is approved, the specific terms of the license may require organizations to conduct due diligence or meet reporting requirements.
- **Ensure, if a license application is warranted, that their application conforms to guidance OFAC has issued regarding that type of application and the sanctions program it falls under:** For some sanctions programs, OFAC has issued guidance for organizations to consider when submitting their licensing applications. Accordingly, it is important for

organizations to determine whether any guidance has been issued and what recommendations it offers for organizations.

- **Make certain that their application is complete and accurate before submitting it to OFAC:** Ensuring that a license is complete and accurate will facilitate OFAC's review of the license and provide organizations with the best chance that their license will be approved.

II. OFAC'S ROLE, AUTHORITY, AND ENFORCEMENT SCOPE

What is OFAC?

OFAC administers and enforces economic sanctions against countries and individuals, including those persons and entities designated as terrorists. These sanctions programs are designed to enable the United States to accomplish its national security and foreign policy goals.²

OFAC oversees many sanctions programs, which are organized primarily by subject matter or geographic location. Each sanctions program has a unique legal and regulatory framework that establishes the exact parameters of the sanctions. For instance, counterterrorism sanctions are authorized by diverse legal authorities, including Executive Order 13224, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and various sections of the Code of Federal Regulations (CFR).³

Sanctions programs may be either comprehensive or selective. Examples of comprehensive sanctions programs include Burma (Myanmar), Cuba, Iran, Sudan, and Syria.⁴ Examples of non-comprehensive, or selective, programs include Cote d'Ivoire, Iraq, Libya, North Korea, and Somalia, as well as programs targeting named individuals or entities (such as foreign terrorists found on OFAC's list of Specially Designated Nationals and Blocked Persons, or the SDN List).⁵

The United States has a long history with using sanctions against other countries and entities. For example, the U.S. used sanctions as a foreign policy tool during the War of 1812, when the Treasury Department instituted sanctions

1. This publication is part of a research and policy project and reflects academic research and consultations carried out by the commissioned author. This publication does not constitute legal or professional advice or legal services, and should not be used for decision-making purposes. Organizations and individuals should consult their own counsel prior to making decisions regarding compliance with the law and responses to regulatory requirements.

2. *Frequently Asked Questions and Answers*, OFFICE OF FOREIGN ASSETS CONTROL (hereinafter OFAC), available at <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#1>.

3. See *Counter Terrorism Sanctions*, OFAC, available at <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/terror.aspx>.

4. *Frequently Asked Questions and Answers*, OFAC available at <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#9>.

5. *Id.*

against Great Britain for its harassment of U.S. soldiers. The United States continued to employ sanctions against other countries and entities during the Civil War and throughout World War II, when the Office of Foreign Funds Control, the immediate predecessor to OFAC, was created. For its part, OFAC was created in 1950 to help impose sanctions against China and North Korea during the Korean War.

Who must comply with OFAC regulations?

All U.S. persons (including all U.S. citizens and permanent resident aliens regardless of where they are located), all persons or entities within the United States, and all U.S. incorporated entities and their foreign branches must comply with OFAC regulations. With certain sanctions programs, such as those programs targeting Cuba and North Korea, all foreign subsidiaries owned or controlled by U.S. companies must also comply with OFAC regulations. Individuals or entities that violate OFAC regulations may incur civil or criminal penalties, including fines of \$50,000 to \$10 million, as well as ten to thirty years' imprisonment for any "willful violations."⁶

What is a license?

In certain cases, OFAC may authorize certain activities that would otherwise be prohibited under current U.S. sanctions. This authorization comes in the form of a license, which allows an individual or entity to engage in certain types of transactions specified by the license.⁷ According to OFAC, "[a] license is an authorization from OFAC to engage in a transaction that otherwise would be prohibited."⁸ OFAC issues two different types of licenses: general licenses and specific licenses. A general license authorizes "a particular type of transaction for a class of persons without the need to apply for a license."⁹

6. *Id.* at <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#11>.

7. In the case of the Burmese and Sudanese sanctions programs, NGOs seeking to engage in "humanitarian or religious activities" in certain areas of these countries need not apply for specific licenses. Instead, OFAC directs these NGOs to apply for a registration number. Registered NGOs may conduct "transactions authorized pursuant to their registrations to support their humanitarian or religious activities" in those specified areas. Specific licenses may still be needed, however, before engaging in certain activities (such as donating food to Sudan). See *Guidelines for the Licensing and Registration of Non-Governmental Organizations (NGOs)*, OFAC, available at www.treasury.gov/resource-center/sanctions/Documents/ngo_guide.pdf. See also Code of Federal Regulations § 538.521 (Sudan) and § 537.523 (Burma); *Frequently Asked Questions and Answers*, OFAC, available at <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#52>.

8. *Frequently Asked Questions and Answers*, OFAC, available at <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#60>.

9. *Id.*

A specific license "is a written document issued by OFAC to a particular person or entity, authorizing a particular transaction in response to a written license application."¹⁰

The Code of Federal Regulations (CFR) is the collection of regulations setting out how the executive branch will interpret the parts of the U.S. Code that Congress charged it with enforcing. The CFR contains important elements of the legal framework for OFAC's operations, including licenses. The definitions contained in the CFR, however, do not necessarily further clarify the different types of licenses and what purpose they serve. For instance, 31 CFR § 595.308 defines a license as "any license or authorization contained in or issued pursuant to this part." Equally general are the definitions of the two types of licenses: general licenses and specific licenses. For example, 31 CFR § 595.305 defines a general license as "any license or authorization the terms of which are set forth in this part." Specific licenses, defined in 31 CFR § 595.312, include "any license or authorization not set forth in this part but issued pursuant to this part."

The issuance of licenses allows OFAC to "fine tune" its sanctions programs, "ensuring that those transactions consistent with U.S. policy are permitted."¹¹ Executive Orders establishing sanctions programs will often include language authorizing these exceptions. For instance, characteristic language might state: "Except to the extent . . . provided in . . . licenses that may be issued pursuant to this order . . . all property and interests in property of the following persons . . . are blocked . . ."¹²

How does a person or entity apply for a license?

Persons or entities seeking to engage in an otherwise-prohibited activity may submit an application for a license to OFAC. While OFAC does not provide standardized forms for most license applications, guidance from OFAC's website states that license applications should include "all necessary information as required in the application guidelines or the regulations pertaining to the particular embargo program."¹³ According to 31 CFR § 501.801, applications for licenses must include "all information

10. *Id.*

11. Testimony of R. Richard Newcomb, OFAC Director, before the House Financial Services Subcommittee on Oversight and Investigations (June 16, 2004), available at <http://www.treasury.gov/press-center/press-releases/Pages/js1729.aspx>.

12. Executive Order 13224, 66 FED. REG. 49079 (Sept. 23, 2001), available at www.treasury.gov/resource-center/sanctions/Documents/13224.pdf.

13. *Id.* at <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#61>.

specified by relevant instructions and/or forms, and must fully disclose the names of all parties who are concerned with or interested in the proposed transaction.” Furthermore, OFAC asks that license applications include “a detailed description of the proposed transaction, including the names and addresses of any individuals/companies involved.”¹⁴

OFAC has issued guidance for NGOs on licensing requirements for sanctions programs concerning Sudan, Burma, Cuba, and Iran. That guidance provides additional information on the respective license application requirements for those sanctions programs.¹⁵ Applications for licenses in these countries tend to require similar types of information, such as the name and address of the NGO applying for the license; the full name, nationality, citizenship, and current country of residence of “key” staff members; financial information and reports; and a “detailed description” of the NGO’s proposed activities.¹⁶

According to 31 CFR § 501.801, license applications must be submitted by mail or courier. Recent proposed changes to the regulations would permit some applications to be filed electronically.¹⁷

How does OFAC decide whether to grant a license?

OFAC provides scant public information about the approval process for licenses. OFAC broadly states that its licensing determinations are “guided by U.S. foreign policy and national security concerns” and may involve coordination with other federal agencies, including the U.S. Department of State and the U.S. Department of Commerce.¹⁸ One reason that other agencies may be brought in to deliberate a license application involves the content of the application: for instance, if the proposed license involves exports, the Commerce Department may participate in the approval process.¹⁹ If the proposed license implicates State Department regulations, such as arms trafficking, then the State Department may also

review the license application.²⁰

In its guidance on the Traveler, Carrier, and Remittance Forwarding Service Provider Program (TCRFSP Program), OFAC provides some additional information on the factors it may consider when granting service provider licenses in the context of its Cuban sanctions program. While not necessarily indicative of the considerations OFAC may weigh with respect to other types of applicants or sanctions programs, the TCRFSP Program guidance provides some insight into the types of considerations that OFAC and other federal agencies may weigh during the review process. For instance, OFAC states that it may conduct background investigations of “each owner, significant shareholder, director, manager, and other key employee [sic] that will be directly involved in the applicant’s Cuba-related business.”²¹ If an individual fails a background investigation, OFAC states that it will inform the applicant, who may then “elect to remove that person from his or her position of authority.”²² Additionally, OFAC states that it may consider “OFAC-related conduct, including, for example, past compliance with rules and regulations.”²³ The guidance also contains recordkeeping and reporting requirements for entities that receive OFAC licenses.²⁴

According to OFAC’s most recent licensing report on the Sudanese and Iranian sanctions programs, the average processing time for issuing license determinations is 77 business days.²⁵ While not indicative of the processing time for other types of licenses, this information offers one example of the amount of time it takes OFAC to reach a decision on a license application. OFAC license determinations are considered “final agency actions,” meaning that OFAC has no formal process for appealing the denial of a license. Rather, OFAC states that it will reconsider its licensing decisions only “for good cause,” defined as situations “where the applicant can demonstrate changed circumstances or submit additional relevant information not previously made available to OFAC.”²⁶ The only challenge a person or entity could make to OFAC’s denial of a license would be through the judicial

14. *Id.*

15. *Guidelines for the Licensing and Registration of Non-Governmental Organizations (NGOs)*, OFAC, available at www.treasury.gov/resource-center/sanctions/Documents/ngo_guide.pdf.

16. *Id.*

17. *See Comment Request for Electronic License Application Form*, (June 26, 2012), available at <https://www.federalregister.gov/articles/2012/06/26/2012-15494/proposed-collection-comment-request-for-electronic-license-application-form>.

18. *Frequently Asked Questions and Answers*, OFAC, available at <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#64>.

19. *Id.*

20. *Id.*

21. *Circular 2012: Traveler, Carrier, and Remittance Forwarding Service Provider Program*, OFAC, at Appendix II (July 26, 2012), available at www.treasury.gov/resource-center/sanctions/Programs/Documents/circ2012.pdf.

22. *Id.*

23. *Id.*

24. *Id.* at Appendix IV.

25. *Report of Licensing Activities Pursuant to the Trade Sanctions Reform and Export Enhancement Act of 2000, April-June 2012*, OFAC, at 2, available at www.treasury.gov/resource-center/sanctions/Documents/3quarter2012.pdf.

26. *Frequently Asked Questions and Answers*, OFAC, available at <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#62>.

process: here, the party challenging the decision would have to prove that OFAC acted arbitrarily and capriciously in denying the license application. The “arbitrary and capricious” standard, established by the Administrative Procedure Act, represents a high evidentiary bar in U.S. courts that may prove difficult for an applicant to overcome.

Should my organization apply for an OFAC license?

If a humanitarian organization operates in a country or with an individual that is subject to OFAC sanctions, it may consider applying for a license to engage in otherwise-prohibited activities. The first issue an organization may wish to consider is whether that organization is subject to OFAC’s jurisdiction. All U.S. persons, including U.S. citizens and permanent resident aliens, along with all persons and entities located in the United States, must comply with OFAC regulations. Additionally, those entities incorporated in the United States and their foreign branches must also comply with OFAC regulations. If an organization is located in the United States, it has to comply with OFAC regulations and may face civil or criminal penalties for its failure to do so. It may not be necessary for non-U.S.-based organizations to apply for OFAC licenses unless the organization has some legally significant nexus to the United States.

Once an organization determines that it is legally obligated to follow OFAC regulations, it must determine whether an existing sanctions program prohibits the organization’s proposed activities. The organization should also examine any general licenses that OFAC has issued for that sanctions program; for instance, OFAC has issued general licenses relating to the provision of humanitarian aid for several sanctions programs.²⁷ These general licenses may permit an organization’s proposed activities; if so, an application for a specific license may not be needed. OFAC provides this information publicly through its website, and each sanctions program lists its legal authorities, along with any general licenses and any guidance issued by OFAC.

If my organization applies for an OFAC license, what considerations should we weigh?

If an organization decides to apply for a specific license, it should investigate whether OFAC has provided any

guidance on the information required for that license. For instance, OFAC has issued guidance for NGOs on applying for licenses for some country-specific sanctions programs.²⁸ Organizations applying for specific licenses should ensure that their application includes all information requested by OFAC, and that the information provided is accurate and complete. Because the review process can take several months or longer, inaccurate information may delay OFAC’s processing or lead to a denial of the proposed license. In their applications, organizations may also wish to discuss how their proposed license would be consistent with current U.S. policy. For example, an organization applying for a license to deliver humanitarian aid to a particular country could cite statements by U.S. government agencies or officials showing their support for that type of assistance reaching that specific population.

Ensuring that applications contain thorough and complete information is especially important because OFAC licensing decisions are considered “final” agency actions. To appeal OFAC’s denial of a license, the organization would have to demonstrate some “good cause” (meaning changed circumstances since the application was previously submitted, or additional relevant information that could change the outcome of OFAC’s decision) for OFAC to reconsider the application. The only other option available to organizations that receive a denial of their license application is filing a lawsuit against OFAC. This option is not only costly; a successful challenge to “final agency action” would require an organization to show that OFAC’s decision was arbitrary and capricious, a demanding standard in the U.S. legal system. Furthermore, given the deference that U.S. courts afford to government agencies charged with making decisions that affect national security, it seems relatively unlikely that a legal challenge to OFAC’s licensing decision would succeed. For these reasons, if an organization decides to apply for a license from OFAC, it should make every effort to ensure that the application is accurate and exhaustive prior to submitting it for OFAC’s consideration.

If an organization receives a license from OFAC, it must also ensure that it complies with the terms of that license. OFAC may require the licensee to conduct due diligence, or it may require additional reporting on actions taken pursuant to the license. Organizations should review carefully the terms of any license it receives to ensure that all its provisions are being observed.

27. See, e.g., General License 11, *Authorizing Certain Services in Support of Nongovernmental Organizations’ Activities in Syria*, OFAC (Sept. 26, 2011), available at www.treasury.gov/resource-center/sanctions/Programs/Documents/syria_gl11.pdf.

28. See, e.g., *Guidelines for the Licensing and Registration of Non-Governmental Organizations (NGOs)*, OFAC, available at www.treasury.gov/resource-center/sanctions/Documents/ngo_guide.pdf.

What if my organization doesn't need a license from OFAC?

After considering these issues, an organization may decide that its current and future activities do not contravene OFAC regulations. The organization's due diligence does not stop after this determination, however. OFAC makes frequent changes to existing sanctions programs,²⁹ and it issues new licenses, guidance, and other information as situations change. Organizations can subscribe to updates from OFAC's website as one means of staying informed about changes in existing sanctions programs, or new sanctions that might affect an organization's activities.

29. The recent changes to Iranian sanctions garnered a significant amount of attention in U.S. and global news outlets. *See, e.g.,* Rick Gladstone, *U.S. Acts with Europe to Strengthen Iran Penalties*, N.Y. TIMES (Dec. 21, 2012), available at <http://www.nytimes.com/2012/12/22/world/middleeast/penalties-on-iran-strengthened-by-us-and-europe.html>. *See also* Recent Action Notice for Publication of ITSR Amendment, OFAC (Dec. 27, 2012), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20121227.aspx>.

ABOUT

The Project on Counterterrorism and Humanitarian Engagement (CHE Project) is an initiative of the Harvard Law School. The CHE Project undertakes legal research, policy analysis, and engagement initiatives in order to identify and develop — as well as to facilitate networks to support — sustainable, principled, and practical solutions to the challenges of large-scale humanitarian operations conducted in areas where listed armed groups are active and counterterrorism laws affect humanitarian action.

This publication is part of the CHE Project's Research and Policy Paper series, which is intended to inform the humanitarian community regarding critical issues of law, policy, and practice related to counterterrorism and humanitarian action.

The CHE Project seeks to inform and shape debate regarding the intersecting trajectories of counterterrorism norms and humanitarian action. The Project does so principally by:

- Producing independent analyses of emerging and foundational challenges and opportunities concerning humanitarian engagement in situations involving listed non-state armed actors; and
- Engaging actors across international humanitarian NGOs, intergovernmental agencies, academic centers, and governments to capture, examine, and inform their (sometimes overlapping and sometimes countervailing) perspectives and approaches.

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