

## OFAC Expands Recordkeeping Requirements, Mandates Electronic Filings

Update

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Last week, the Office of Foreign Assets Control (OFAC) announced an interim final rule which amends the recordkeeping and reporting requirements relating to the various economic sanctions programs it enforces. Notably, the amendments confirm that the requirement to report and preserve records relating to blocked or rejected transactions applies not only to US financial institutions, but also to other non-financial institutions, both foreign and domestic, that are engaged in certain covered transactions subject to US jurisdiction. In addition to expanding the scope of the recordkeeping requirements, the amendments mandate electronic filing of reports through OFAC's online portal. The interim final rule will become effective in August 2024 following a brief comment period.

### The Existing Framework

Under current regulations, both blocked and rejected transactions are required to be reported to OFAC. Blocked transactions occur when a prohibited transaction involves the transfer of property or interests in property belonging to a Specially Designated National (SDN) or blocked person or government. In these cases, the transaction is blocked, and the property is held in an interest-bearing account unless and until the property is unblocked by OFAC.

In other cases, prohibited transactions exist without a blockable property interest. For example, a transfer between two non-sanctioned individuals resulting in the export of goods or services to Iran violates Iranian sanctions despite that the transaction itself does not involve any blocked property or interests. Because there is no blocked property at stake, the transaction is rejected, rather than blocked, and the property is returned to its originator.

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In either case, OFAC must be notified of the prohibited transaction. Section 501.603 of the Federal Regulations sets forth the reporting requirements for US persons and financial institutions in receipt of blocked property. Initial reports are due to OFAC within 10 business days from the date the property was blocked, and annual reports are due each year thereafter that the property remains blocked and held in an interest-bearing account.

Reports must include a variety of information, including a description of the transaction, the parties and banks involved, account information, the applicable sanctions regime and legal authority for blocking or rejecting the transaction, and other documentation associated with the transaction. If at any point, pursuant to an OFAC license or otherwise, the property becomes unblocked, an initial report on the release of the blocked property will also be required.

Section 501.604 governs the reporting of rejected transactions, which must similarly be filed within 10 days of the attempted transaction and contain the same information required of the blocking reports.

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## The Amendments

There is no doubt the most notable change made by the interim final rule is the confirmation that both blocked and rejected transactions must be reported not only by financial institutions, but by all US persons and non-US persons subject to US jurisdiction. The practical result of this change is that any prohibited transaction in US dollars, even if between wholly foreign parties, must be reported because any US-dollar denominated transaction must pass through the US banking system, rendering the transaction subject to US jurisdiction.

In response to concerns about the scope and types of transactions potentially covered by this expansive interpretation, and an undue burden it could impose on non-financial institutions, OFAC updated the term “transaction” for purposes of the rule governing rejected transactions to include “wire transfers, trade finance, transactions related to securities, checks, or foreign exchange, and sales or purchases of goods and services.” So, while securities, checks or foreign exchange that are provided as part of a prohibited transaction must be reported, securities, checks, or foreign exchange in and of themselves need not be.

In its announcement, OFAC recognized that non-financial institutions are likely to incur an up-front increase in burden and costs associated with implementing a system designed to detect and report prohibited transactions within the allotted time period but cites to other amendments to the regulations intended to minimize that burden. For example, OFAC is now requiring that reports be made on standardized forms and submitted to the OFAC Reporting System, an electronic reporting platform available on the OFAC website. In addition, because all information about the prohibited transaction may not be available

without added time and expense, OFAC will only require reporting of information to the extent it is available at the time the transaction takes place.

As OFAC continues to impose a broad range of sanctions against Russia in response to its invasion of Ukraine, both financial and non-financial institutions should consider the impact these amendments will have on their business operations, as OFAC has specifically invited comments on the accuracy of the estimated burden the amendments will pose as well as ways to minimize that burden. In any event, non-financial institutions previously unencumbered by these regulatory requirements, including foreign businesses engaged in US-dollar denominated transactions, would do well to put in place systems to detect and report transactions consistent with the amendments prior to the effective date of the final rule.