

June 26, 2019

## OFAC Modifies Sanctions Reporting Requirements

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### **OFAC Has Amended its Reporting, Procedures and Penalties Regulations (31 C.F.R. part 501) to Extend Rejected Transaction Reporting Requirements to Non-Financial Institutions and Incorporate New Reporting Requirements**

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#### **SUMMARY**

The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) published an interim final rule, effective as of June 21, 2019, amending its Reporting, Procedures and Penalties Regulations (the "Reporting Regulations").<sup>1</sup> Most significantly, the amendments extend to non-financial institutions that are U.S. persons a requirement to submit reports to OFAC after rejecting transactions that would be prohibited by OFAC-administered sanctions. Prior to the June 21 amendments, although financial institutions and non-financial institutions were both required to file blocked property reports, only financial institutions were required to submit reports on rejected funds transfers. These amendments also expand the scope of rejection reports beyond funds transfers to include, in addition to wire transfers, transactions related to trade finance, securities, checks, foreign exchange, and goods or services. As amended, the Reporting Regulations also require additional information to be provided to OFAC in blocking reports, and add reporting requirements when property is unblocked pursuant to certain OFAC licenses. While the amendments have the full force of law as of June 21, OFAC is soliciting public comment on various aspects of the interim final rule. Comments are due on July 22, 2019. Consistent with OFAC's recent compliance [guidance](#), U.S. persons and persons subject to U.S. jurisdiction, including but not limited to financial institutions, should review their sanctions compliance-related internal controls in light of the June 21 amendments to ensure that such controls are appropriately scoped to meet the new and amended requirements under the Reporting Regulations.

## DISCUSSION

The Reporting Regulations set forth standard reporting and recordkeeping requirements and license application and other procedures relevant to all of the economic sanctions programs administered by OFAC. With the amendments effected by the interim final rule, OFAC is updating six sections of the Reporting Regulations. The amendments to the Reporting Regulations implement a significant number of changes, the most significant of which are summarized below.

### A. INITIAL BLOCKING REPORTS

Prior to the amendments, the Reporting Regulations required all U.S. persons and persons subject to U.S. jurisdiction to file a report with OFAC with respect to property blocked pursuant to OFAC-administered sanctions. The primary requirement to report, and the scope of coverage, have not materially changed – a report of blocked property is due within 10 business days of the date that property becomes blocked, and must be filed by any U.S. person, or person subject to U.S. jurisdiction. The amendments, however, added to the type of information that must be submitted to OFAC as part of an initial blocking report. Such reports must now include:

- The name and address of the person holding the blocked property and identification of a contact person from whom additional information may be obtained, and that person's telephone number and email address;
- A description of any transaction associated with the blocking, including the type of transaction, identification of any persons participating in the transaction and their respective locations (such as customers, beneficiaries, originators, letter of credit applicants, and various financial institutions, including banks, intermediary banks, correspondent banks, issuing banks, and advising or confirming banks), a description of the property that is the subject of the transaction, and any reference numbers, account numbers, dates, or other information necessary to identify the transaction;
- The associated sanctions target(s) whose property is blocked, the location of the sanctions target (if known) and, if not evident, a description of the sanctions target's interest in the property, or if there is no sanctions target or an unknown sanctions target, a reference to the written communication from OFAC pursuant to which the blocking action was taken;
- A description of the property that is the subject of the blocking and its location, including any relevant account numbers and account types, check numbers, reference numbers, dates, or other information necessary to identify the property;
- The date the property was blocked;
- The actual or, if unknown, estimated value of the property in U.S. Dollars (transactions in foreign currencies must be reported in USD, with the foreign currency amount and notional exchange rate used for reporting noted in the narrative contained in the report);<sup>2</sup>
- The legal authority or authorities under which the property is blocked; and
- A copy of any payment or transfer instruction, check, letter of credit, accompanying bill of lading, invoice or other relevant documentation.

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### B. ANNUAL REPORTS ON BLOCKED PROPERTY

For annual reports on blocked property held as of June 30, which are due each September 30, the amendments clarify that reporting in respect of omnibus blocked accounts must contain individual listings of the blocked assets contained in such an account. OFAC authorizes financial institutions holding blocked funds to aggregate these funds into omnibus accounts.<sup>3</sup> Before these amendments, financial institutions holding blocked omnibus accounts could annually report the total amount contained in the account, but starting with the annual report due on September 30, 2020, reporters must include a disaggregated list identifying each blocked asset in the omnibus account. After the June 21 amendments, annual reports must include:

- The name and address of the person holding the blocked property and identification of a contact person from whom additional information may be obtained, and that person's telephone number and email address;
- The total number of accounts or items reported in the annual report;
- The associated sanctions target(s) whose property is blocked, the location of the target (if known), if not evident, a narrative description of the sanctions target's interest in the property (and if there is no sanctions target or an unknown sanctions target, a reference to the relevant written communication from OFAC pursuant to which the blocking action was taken);
- A description of the property that is the subject of the blocking and its location;
- The date the property was blocked;
- The actual or, if unknown, estimated value of the property in U.S. Dollars ; and
- The legal authority or authorities under which the property is blocked

The annual report must be submitted either using the most recent version of Form TDF 90-22.50, Annual Report of Blocked Property (which OFAC has revised to reflect the amendments), or by another official reporting option, including electronic, as specified by OFAC on its website. OFAC's release indicates that the changes to Form TDF 90-22.50 are also being made in an effort to reduce the need for follow up requests from OFAC in order to lessen the overall reporting burden for submitters. However, OFAC will consider requests to submit the required information in an alternate format on a case-by-case basis.

### C. REPORTS ON UNBLOCKED PROPERTY

OFAC has expanded the reporting requirement with respect to blocked property to cover persons unblocking previously blocked property if OFAC makes such reports an explicit condition of the applicable general or specific license. The Reporting Regulations require that unblocking reports include the following:

- The name and address of the person holding the property immediately prior to the property's release from blocked status and contact information—including name, telephone number, and email address—of a person from whom additional information may be obtained;
- The associated sanctions target(s) whose property had been previously blocked, the location of the target, if known, or if not evident a narrative description of the interest(s) of the target(s) in the previously

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blocked property or transactions. If there is no target or the target is unknown, a reference to the relevant written communication from OFAC pursuant to which the blocking action was taken should be included;

- A description of the property and its location immediately prior to its release from blocked status, including relevant account numbers, account types, check numbers, reference numbers, dates, or other necessary identifying information;
- The date the property was unblocked;
- The actual or, if unknown, estimated value of the property in U.S. Dollars (transactions in foreign currencies must be reported in USD, with the foreign currency amount and notional exchange rate used for reporting noted in the narrative contained in the report)<sup>4</sup>;
- The legal authority or authorities under which the property was unblocked; and
- When available, a copy of the original blocking report filed with OFAC pursuant to § 501.603(b)(1).

### D. REJECTED TRANSACTION REPORTS

The June 21 amendments also significantly expand the rejected transactions reporting requirements. Prior to the amendments, only financial institutions were required to report rejected transactions, and the only type of transaction covered were funds transfers that were not subject to blocking requirements but would violate a sanctions provision if processed.

OFAC has expanded the types of transactions subject to rejected transaction reporting requirements to include not only wire transfers, but also transactions related to trade finance, securities, checks, foreign exchange, and goods or services. In addition, the universe of persons required to make such reports was expanded beyond financial institutions. After the amendments, all U.S. persons and persons subject to U.S. jurisdiction must report within 10 business days when they reject a transaction for sanctions-related reasons. The result of these modifications is that firms who previously had no responsibility to report rejected transactions—for instance, a U.S. firm that rejected a request to fulfil a purchase order for U.S.-origin goods from a counterparty located in Iran—now must submit a rejected transaction report to OFAC. Such reports should include:

- The name and address of the person that rejected the transaction and a contact—including the name and telephone number—from whom additional information may be obtained;
- A description of the rejected transaction, including the type of transaction, identification of any persons participating in the transaction and their respective locations (such as customers, beneficiaries, originators, letter of credit applicants, and various financial institutions, including banks, intermediary banks, correspondent banks, issuing banks, and advising or confirming banks), a description of the property that is the subject of the transaction, and any reference numbers, account numbers, dates, or other information necessary to identify the transaction;
- The associated sanctions target(s) whose involvement in the transaction has resulted in the transaction being rejected and its location. If the location is not known, a narrative description of the interest(s) of the target(s) in the transaction should be included;
- The date the transaction was rejected;

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- The actual or, if unknown, estimated value of the property in U.S. Dollars (transactions in foreign currencies must be reported in USD, with the foreign currency amount and notional exchange rate used for reporting noted in the narrative contained in the report)<sup>5</sup>;
- The legal authority or authorities under which the transaction was rejected; and
- A copy of any related payment or transfer instructions, as well as other relevant documentation received in connection with the transaction such as a checks, letters of credit, bills of lading, or invoices.

### E. REPORTING RELATING TO LICENSING

The amendments appear to soften OFAC's position regarding the consequences of a failure to file reports mandated by the terms of a general license. Previously, § 501.801(a) of the Reporting Regulations stated that the failure to file reports required by a general license "will nullify" the authority of that license with respect to the transaction in question. OFAC has amended § 501.801(a) to provide that the failure to timely file all required information in such reports or statements "may nullify the authorization otherwise provided by the general license and result in apparent violations of the applicable prohibitions that may be subject to OFAC enforcement action" (emphasis added). This change suggests that OFAC intends to exercise discretion in determining whether, in the enforcement context, to give potential violators the benefit of general license authorizations when required statements or reports have not been filed.

Additionally, OFAC has added language to § 501.801 aimed at clarifying OFAC's position that, while additional information relevant to specific license requests may be submitted at any time, requests for oral presentations must be submitted in writing to the attention of OFAC's director, and "are rarely granted." In the same vein, OFAC has removed from the Reporting Regulations the option of requesting an explanation of the reasons behind a license denial, either in person or by personal interview. OFAC will no longer provide such an explanation, though a party may request, in writing, reconsideration of a denial on the basis of new facts or changed circumstances. The revised Reporting Regulations also clarify that, while specific licenses are normally granted by OFAC, the Secretary of the Treasury may also issue such licenses directly or through a designated person, agency or instrumentality.

### F. DISCLOSURE OF INFORMATION UNDER THE FREEDOM OF INFORMATION ACT

Prior to the June 21 amendments, the Reporting Regulations stated that blocked property reports were considered "privileged and confidential." OFAC has now clarified that information submitted in required reports is subject to the Freedom of Information Act (FOIA) and will "generally" be released when requested unless OFAC determines that a FOIA exemption applies. Under Treasury's FOIA regulations governing confidential commercial information<sup>6</sup> exempt from disclosure under Exemption 4,<sup>7</sup> OFAC will provide notice to submitters upon receipt of an applicable FOIA request if the submitter either designates the information contained in the report, either at the time of submission or within a reasonable time thereafter, as protected from disclosure or if OFAC has reason to believe it would fall within the exemption.<sup>8</sup> In order to satisfy the confidentiality standard established by the U.S. Supreme Court in its recent decision in [FMI v. Argus Leader Media](#), firms submitting initial or annual blocking reports or

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unblocking reports should explicitly note whether the information they are submitting is private and confidential and therefore falls within one of the FOIA exemptions, in particular Exemption 4.<sup>9</sup>

### G. NEW DEFINITION OF “DOCUMENTS” FOR PURPOSES OF OFAC ADMINISTRATIVE SUBPOENAS

The International Emergency Economic Powers Act grants the President the authority to require any person to furnish reports relative to transactions in foreign property subject to a declaration of national emergency.<sup>10</sup> § 501.602(a) implements this provision by authorizing OFAC to “require by subpoena . . . other hard copy or electronic documents relating to any matter under investigation.” While OFAC has long maintained an unstated position that the term “documents” should be read broadly, the June 21 amendments provide a new, expansive definition of the term. § 501.602(b) makes clear that documents required to be produced under an administrative subpoena include “any written, recorded or graphic matter or other means of preserving thought or expression”; examples include correspondence, memoranda, notes, messages, contemporaneous communications such as text and instant messages, letters, emails, spreadsheets, metadata, contracts, bulletins, diaries, chronological data, minutes, books, reports, examinations, charts, ledgers, books of account, invoices, air waybills, bills of lading, worksheets, receipts, printouts, papers, schedules, affidavits, presentations, transcripts, surveys, graphic representations of any kind, drawings, photographs, graphs, video or sound recordings, and motion pictures or other film.

### H. REQUEST FOR COMMENTS

OFAC is requesting comments by July 22, 2019 on:

- Whether this collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- The accuracy of the agency’s estimate of the burden of the collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected;
- Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques and other forms of information technology; and

The estimated capital or start-up costs of the operation, maintenance, and/or purchase of services to provide information.

### I. PRACTICAL IMPLICATION: THE NEED TO ADJUST INTERNAL CONTROLS

Consistent with OFAC’s May 2, 2019 [Framework for Sanctions Compliance Commitments](#), which emphasizes the importance of the ability of an organization’s internal controls to adjust rapidly to changes – including new, amended, or updated sanctions programs and prohibitions, U.S. persons and persons subject to U.S. jurisdiction should review their sanctions compliance-related internal controls in light of the June 21 amendments to ensure that such controls are appropriately scoped to meet the new and amended requirements under the Reporting Regulations. While the changes in the Reporting Regulations

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primarily impact financial institutions, non-financial institutions should also review their controls to ensure the requirements are captured, in particular the new requirement to report on rejected transactions.

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ENDNOTES

- 1 Reporting Procedures and Penalties Regulations, 84 Fed. Reg. 29055 (June 21, 2019), *available at* <https://www.govinfo.gov/content/pkg/FR-2019-06-21/pdf/2019-13163.pdf>.
- 2 The regulation provides that: “If the blocked property represents an outstanding loan, a credit card receivable, or other property with a negative balance, the amount blocked should be reported as \$0.00 (zero) with the amount owed reflected in a narrative description. Blocked trade finance documents should also be reported as \$0.00 (zero) with the value of the shipment reflected in a narrative description.”
- 3 U.S. Dep’t of Treasury, Office of Foreign Assets Control, “FAQ #32: How do I block an account or a funds transfer,” *available at* [https://www.treasury.gov/resource-center/faqs/sanctions/pages/faq\\_compliance.aspx](https://www.treasury.gov/resource-center/faqs/sanctions/pages/faq_compliance.aspx).
- 4 The regulation provides that: “If the property represents an outstanding loan, a credit card receivable, or other property with a negative balance, the amount unblocked should be reported as \$0.00 (zero) with the amount owed reflected in a narrative description. Trade finance documents should also be reported as \$0.00 (zero) with the value of the shipment reflected in a narrative description.”
- 5 Rejected trade documents should be reported as \$0.00 (zero) with the value of the shipment reflected in a narrative description
- 6 Treasury’s FOIA regulations define confidential commercial information as “trade secrets and commercial or financial information obtained by the Department from a submitter that may be protected from disclosure under Exemption 4 of the FOIA.” 31 C.F.R. § 1.5(a)(1).
- 7 See United States Department of Justice, Guide to the Freedom of Information Act, Exemption 4, *available at* [https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption4\\_0.pdf](https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption4_0.pdf).
- 8 31 C.F.R. § 1.5(b).
- 9 In *Food Marketing Inst. V. Argus Leader Media*, the U.S. Supreme Court held “[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is “confidential” within the meaning of Exemption 4.” No. 18-481, slip op. at 12 (U.S. June. 24, 2019).
- 10 50 U.S.C. § 1702(a)(2).



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