

Three Key Takeaways From OFAC Enforcement Actions Thus Far in 2022

The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) has been busy thus far in 2022 implementing regulations and issuing guidance related to sanctions against Russia. Despite that activity, we should not ignore the enforcement actions OFAC has publicly disclosed related to apparent violations of its sanctions programs.

The following are notable takeaways from the enforcement actions:

1

OFAC can bring enforcement actions against foreign companies for “causing” sanctions violations by a U.S. person: Toll Holdings Limited (Toll Holdings), a freight forwarding and logistics company, headquartered in Australia, agreed to pay more than \$6 million to settle its potential liability for apparent violations of multiple OFAC sanctions programs. OFAC found that by originating or receiving payments through the U.S. financial system (including foreign branches of U.S. financial institutions) for transactions involving sanctioned persons and jurisdictions, Toll Holdings caused the U.S. financial institutions to engage in prohibited activities with sanctioned persons and jurisdictions. The payments were in connection with sea, air, and rail shipments conducted by Toll Holdings, its affiliates, or suppliers to, from, or through sanctioned jurisdictions or involving the property of sanctioned persons. OFAC noted the importance for non-U.S. persons, that seek to conduct business that involves processing transactions through the U.S. financial system, to ensure that their compliance policies contain measures to prevent dealings with sanctioned persons or jurisdictions. Although foreign companies are generally not required to comply with U.S. sanctions, a transaction that has a U.S. nexus (such as payments through the U.S. financial system) subjects the foreign company to OFAC's jurisdiction if it involves sanctioned countries or persons.

2

Companies experiencing rapid expansion should adequately resource compliance functions, including personnel, to address any gaps or risks: In the enforcement action involving Toll Holdings, OFAC found that the company's rapid expansion and its rather complex payment and invoicing arrangement presented a risk when connections to sanctioned jurisdictions or persons were obscured. For example, Toll often initiated payments that involved a single shipment spread across several invoices, where the payment amount associated with a sanctioned country or person was a portion of a larger amount consisting of non-sanctioned country or person payments. In processing the payments through the U.S. financial system, OFAC found that Toll Holdings failed to adopt or implement policies and controls that prevented it from conducting transactions that involved sanctioned parties or persons in sanctioned jurisdictions. OFAC found that the absence of such policies and controls resulted in part from Toll Holdings' rapid expansion without a requisite increase in compliance resources. Toll Holdings had a compliance policy in place, but its compliance program, personnel, and controls failed to keep up with the expansion pace and complexity of its growing operations. OFAC found that Toll Holdings' bank had warned it of sanctions concerns related to potentially problematic payments, but it took Toll Holdings close to two years before it introduced hard controls that prevented shipments to or from sanctioned countries. OFAC noted the importance for entities to respond promptly and fully to address compliance weaknesses when issues first arise, identify their full extent and causes, and implement necessary changes to their compliance programs, practices, and procedures.

3

Companies who do business with entities on OFAC's Sectoral Sanctions Identifications List (SSI List) need to comply with all aspects of the relevant OFAC Directive and seek guidance from OFAC if compliance becomes untenable: A U.S.-based company that provides business information and financial analytics agreed to pay over \$78,750 to settle its potential liability for apparent violations of the Ukraine-Related Sanctions Regulations. In 2016, the U.S. company (Parent Company) acquired a U.S. company (Acquired Company) that provided certain products and services to energy and commodity customers throughout the world including JSC Rosneft, one of Russia's largest oil companies. In 2014, OFAC had placed JSC Rosneft on its SSI List pursuant to Directive 2 of Executive Order 13662. Under Directive 2 (originally issued July 16, 2014, amended September 12, 2014, and September 29, 2017), all transactions or other dealings in new debt (e.g., extension of credit) of JSC Rosneft of longer than 90 days maturity were prohibited. Prior to its acquisition, the Acquired Company issued an invoice (the August 2015 invoice) for \$82,500 to JSC Rosneft for services provided. JSC Rosneft did not pay the invoice prior to its due date (less than 90 days from the invoice date). JSC Rosneft attempted to pay the invoice in May 2016 but the Acquired Company's bank rejected the payment in accordance with its sanctions program. JSC Rosneft attempted to make the payment again in June 2016. The Acquired Company's bank requested additional information from JSC Rosneft to process the payment, but JSC Rosneft failed to respond. In August 2016, the Parent Company reissued and redated the original August 2015 invoice with an August 2106 date—374 days after the invoice for the debt was originally issued. In October 2016, the Parent Company received partial payment of the August 2016 invoice. The Parent Company reissued the original August 2015 invoice for the remaining balance, creating two new invoices for the remaining debt. In late December 2016, JSC Rosneft paid only one of the “new” invoices. The Parent Company reissued and redated a fourth invoice for JSC Rosneft—749 days after the original invoice. JSC Rosneft paid the last invoice in October 2017. Despite finally being paid, the Parent Company paid a penalty that almost equaled the original invoiced amount.

Referencing its prior guidance (FAQ 419, issued in December 2014, revised in November 2017), OFAC noted that companies facing similar circumstances should contact OFAC if compliance becomes untenable due to actions or delays by their clients on the SSI List. FAQ 419 states that U.S. persons should contact OFAC to determine whether a license or other authorization is required.