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OFAC Update

On August 2, 2017, President Trump signed the *Countering America's Adversaries Through Sanctions Act* (the "Sanctions Bill"), H.R. 3364. While Iran, the Russian Federation, North Korea, and Syria had all already been subject to trade sanctions, the Sanctions Bill codifies many of the sanctions programs that had previously been established through executive order, adds additional restrictions on interactions with individuals who are subject to sanctions or reside in a sanctioned location, and restricts the ability of the President to modify sanctions or to grant licensing exceptions. Over the next few months, we expect the U.S. Treasury's Office of Foreign Assets Control ("OFAC") to issue guidance implementing the changes set out in the Sanctions Bill.

Many ERISA and governmental benefit plans may view trade sanctions as something that applies to banks but that doesn't impact our retirement system. This view is wrong. While benefit plan compliance has not traditionally been a focus for many pension plans historically, we have seen an increase in the number of pension plans that have faced possible OFAC violations arising out of distributions and investments. Given this recent increase as well as the new Sanctions Bill's enactment, we thought this would be a good time to remind retirement plan administrators and fiduciaries of steps to avoid violations of U.S. trade sanctions. Below we provide an overview of the U.S. trade sanctions generally, steps plans can take to comply, and a more detailed look at the recent Russian sanctions in particular.

Background

OFAC currently oversees 26 different sanction programs. These include sanctions programs that apply to Belarus, Burundi, Central African Republic, Cuba, Iran, Libya, North Korea, Syria, Sudan, and North Zimbabwe, as well as sanctions focused on specific industries, such as organizations and individuals identified with trans-national criminal organizations, the spread of weapons of mass destruction, and that are engaged in terrorism or drug trafficking or focused on deterring certain actors in various regions such as Iraq or Ukraine. OFAC maintains a list of individuals and entities that are sanctioned on three lists, the Specially Designated Nationals List ("SDN List"), the Foreign Sanctions Evaders List ("FSE List"), and the Sectoral Sanctions List ("SS List"). (To assist with compliance, OFAC offers an online search tool that allows users to compare names against the SDN and FSE Lists. The official tool can be found at: <https://sdnsearch.ofac.treas.gov/>. Other websites and software providers offer tools that search all three lists and allow batch searching.)

Under OFAC guidance, both governmental and private employee benefit plans are required to comply with OFAC compliance programs. Failure to comply can lead to reputational damage and/or civil and criminal penalties. An OFAC investigation generally ends with one of five concluding letters: (1) No Action Letter; (2) Cautionary Letter; (3) Finding of Violation; (4) Civil Penalty; or a (5) Criminal Referral. Findings of Violation, Civil Penalties, and Criminal Referrals are generally issued publicly and can impact not just an organization's reputation, but also its ability to obtain government contracts. In terms of civil penalties, as of July 27, 2017, OFAC has imposed nine civil penalties totaling almost \$117 million. Criminal penalties, while less frequently imposed, are severe and can include fines of up to \$20 million and/or imprisonment of up to 30 years.

The Sanctions Bill largely codifies sanctions that were imposed by the Obama Administration and directs the Administration to issue new sanctions against Iran and North Korea. Where it goes beyond prior sanctions law is with respect to Russia. There, the Sanctions Bill imposes restrictions on President Trump's ability to lift those sanctions and to grant waivers and licenses. Before the executive branch can take such actions, the Administration will be required to send a report to Congress and Congress will be given an opportunity to disapprove of the proposed executive action. This could be an area of concern for pension plan fiduciaries who are considering investments in sectors of the Russian economy that are subject to sanctions as it reduces the likelihood that a license will be granted and heightens the risk of adverse publicity.

OFAC has not provided specific guidance on what the components should be for a compliance program. Rather, it has indicated that OFAC compliance is not "one size fits all" and that entities should apply a "risk-based approach when considering the likelihood that they may encounter OFAC issues." Below, we provide a high level overview of things that a plan would want to consider in evaluating/developing an OFAC compliance program.

Compliance Program Overview

We have developed the following recommendations to assist with compliance program design. Traditionally, OFAC compliance could be broken into four steps:

First, plans should develop a compliance program and enter into contracts with service providers to assist with compliance. This involves:

- Drafting a compliance policy.
- Including language in service provider contracts that service providers and asset managers will comply with OFAC sanction rules.
- Acquiring tools to permit the plan to comply with OFAC's sanction rules. Depending on a plan's risk factors, this could mean selecting an online SDN, FSE, and SS List search tool to use or it could mean contracting with a search tool provider or outsourced OFAC compliance provider.

Second, plans should examine (and continue to monitor) existing contracts and participant and beneficiary lists to ensure that the payments the plan is making (and investments and transactions the plan is making) are permitted. This involves:

- Checking if plan assets and investments are connected with entities on the SDN, FSE, or SS lists.
- Checking if participant or beneficiary payments are going to individuals on the SDN, FSE, or SS lists.
- Identifying payments to sanctioned countries such as Cuba, Iran, Sudan, and North Korea.

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Third, if this monitoring reveals that the plan is or would be engaged in a transaction with an OFAC sanctioned entity, the plan should determine if OFAC has granted a license to permit the transaction.

Fourth, if OFAC has not granted a license, the plan should take corrective action. This includes:

- Notifying OFAC.
- Blocking the transaction.
- Continuing to hold the blocked assets.
- Potentially applying for an OFAC license.

* * *

We note that this is an area of law that is rapidly evolving, and that we are continuing to monitor U.S. sanctions programs as they develop. If you have additional questions about the existing sanctions programs, we can provide further analysis. Additionally, it is possible to seek guidance from OFAC.

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