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Challenging OFAC Sanctions And Civil Penalties In US Courts

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The U.S. Department of the Treasury's Office of Foreign Assets Control[1] has near-plenary authority to impose the so-called economic death penalty, by adding foreign persons and entities to, among others, its List of Specially Designated Nationals and Blocked Persons, or SDN list.[2] This power continues to grow. In 2019, President Donald Trump created new grounds, whereby one can be listed by OFAC in connection with the agency's programs of sanctions related to regimes in Venezuela, Russia and Iran.

Concomitantly, legislators in Colombia are discussing bills on creating what amounts to an SDN list equivalent for that country. On the other side of the world, China has announced its own plans to publish a list of designated "unreliable entities," one that will encompass foreign companies, organizations and individuals that pose a national security risk to China, or have "severely damaged the legitimate interests" of Chinese firms by failing to obey market rules, or by blocking or cutting off supplies for "noncommercial" (i.e., political) reasons.

China's move comes amid recent U.S. actions targeting Huawei Technologies Co., the nation's largest telecommunications company, as well as a curiously-timed decision by U.S. federal prosecutors to criminally indict Meng Wanzhou, the company's chief financial officer and the daughter of Huawei's founder, for alleged violations of Iranian sanctions.

Although more or less a play for optics, as China's Central Government has always possessed de facto blacklisting power, U.S. and other foreign entities that operate but do not substantially invest or contribute to production in China, particularly logistics firms and those that focus on China-bound exports, will now have heightened sanctions exposure.

China's proposed retaliatory sanctions — under which the country's Ministry of Commerce has yet to outline any formal administrative or appellate procedures for affected parties to seek redress — is a prelude on what will likely become an active new front in the ongoing Sino-U.S. trade war.

On Oct. 8, a day after the U.S. Department of Commerce announced the blacklisting of 28 Chinese entities over alleged human rights abuses, a spokesman for China's Foreign Ministry confirmed in Beijing that the unreliable entities list, as well as associated legal and regulatory mechanisms, will soon be made public.

OFAC can add an individual or an entity to its SDN list based on different grounds, which vary depending on OFAC's programs of sanctions. For example, under the 2016 Global Magnitsky Human Rights Accountability Act, or GLOMAG, and the 2017 Executive Order 13818, foreign persons and entities can be added to the SDN list if connected to corruption or human rights



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violations in any foreign country.

However, once a name is added to OFAC's SDN list, the consequence is always the same: All of the individual's or entity's property or interest in property within or transiting any U.S. jurisdiction is blocked.

Additionally, unless authorized by a general or specific license issued by OFAC, U.S. persons are prohibited from engaging in transactions with any listed individual or entity, or with any entity having, directly or indirectly, 50% or greater ownership interest in a listed entity.



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Unquestionably, U.S. persons must comply with OFAC sanctions or face civil and/or criminal penalties. Foreign individuals and entities who cause a violation of OFAC sanctions or conspire to violate OFAC sanctions may also face penalties, including economic sanctions such as their own inclusion in OFAC's SDN List.

Against this backdrop, we present the following summary of U.S. administrative and/or judicial remedies for companies and individuals sanctioned by OFAC.

Anyone placed on the SDN list by OFAC has the right to seek removal under an administrative process known as de-listing. To be removed, listed individuals and/or entities can file a written request for reconsideration with OFAC.

If OFAC denies this request for de-listing, administrative remedies are deemed exhausted and listed individuals and entities can, through an attorney licensed to practice in the U.S., subsequently file an action with a U.S. district court seeking judicial review of OFAC's actions under the Administrative Procedure Act.[3]

While the U.S. district court's review of these actions is highly deferential to OFAC, OFAC's listing can be reversed if it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

As the United States Court of Appeals for the Ninth Circuit observed in *Al Haramain Islamic Foundation v. Treasury*, "the Constitution does require that the government take reasonable measures to ensure basic fairness to the private party and that the government follow procedures reasonably designed to protect against erroneous deprivation of the private party's interests." [4]

Accordingly, listed individuals or entities may challenge OFAC's listing if OFAC does not provide timely or sufficient notice of its rationale and evidence.[5] If OFAC's listing is based on classified information, OFAC should nonetheless explain the basis of its listing decision to the sanctioned individual or entity with unclassified summaries that provide the who, what, when and where of the allegations.[6]

On the request for de-listing, listed individuals or entities may also allege that OFAC did not provide a timely and meaningful opportunity to respond to OFAC's designation and determination.[7]

Individuals and entities penalized by OFAC for engaging in apparent violations of its sanctions, after exhausting administrative remedies, may also request a U.S. district court to set these civil penalties aside as arbitrary or capricious.[8]

Critically, a court can set these penalties aside when OFAC does not articulate a satisfactory explanation for its decision, including drawing a rational connection between the facts found and the conclusion made, and providing a statement of its reasons for discrediting the countervailing evidence presented by the sanctioned individual or entity.[9]

Additional grounds also exist to challenge an OFAC action, as appropriate to the specific factual circumstances which resulted in the OFAC action, such as: (i) First Amendment challenges based on relaxed standing analysis, overbreadth, vagueness or freedom of association; (ii) Fourth Amendment unreasonable seizure; (iii) Fifth Amendment due process; (iv) Fifth Amendment uncompensated taking; (v) Eighth Amendment excessive fines; (vi) separation of powers doctrine or (vii) equal protection.

Lastly, to challenge an OFAC action, individuals and entities need to establish, under U.S. law, the following standing requirements: an injury in fact; damages from such an injury; causation between the injury and damages suffered; and that the injury is redressable by the court.

With the 2019 expansion of OFAC sanctions, it is important to remember that U.S. federal courts can be a post-administrative point of redress for setting aside OFAC's determinations, including designations on the SDN list and OFAC's civil penalties.

Critically, recent proposals to implement possible parallel sanctions in Colombia, and retaliatory sanctions by China, indicate that the expansion of U.S. sanctions power does not exist a vacuum. The onset of retaliatory sanctions by China, the world's second largest economy, in the midst a heated trade war with the U.S., significantly broadens both the class of persons and entities who may face sanctions exposure, and the jurisdictions in which sanctions-related compliance and due diligence work must be targeted.

Due to the severity of the consequences of violating any of these OFAC or OFAC-retaliatory sanctions, coupled with the history of many U.S. federal courts to defer to the administrative decision-making authority of U.S. federal agencies, and the likely uncertainty of foreign governmental or judicial response, a critically important component of any international business activity requires a stringent and meaningful compliance program. The old axiom "an ounce of prevention is worth a pound of cure" has never been more appropriate in evaluating risks faced in these international areas.

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[1] OFAC administers and enforces its programs under the Foreign Assets Control Regulations, which can be found at 31 Code of Federal Regulations §§ 501.101 to 598.901, and which include the following programs: (i) the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) (22 U.S.C. §§ 7201 to 7211); (ii) the Countering America's Adversaries Through Sanctions Act of 2017 (CAATSA) (Pub. L. No. 115-44, 131 Stat. 886); (iii) the Trading with the Enemy Act (TWEA) (50 U.S.C. §§ 4301 to 4341); (iv) the International Security and Development Cooperation Act of 1985 (ISDCA) (22 U.S.C. § 2349aa-9); (v) the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. §§ 1701 to 1708); (vi) The National Emergencies Act (50 U.S.C. §§ 1601 to 1651); (vii) the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (18 U.S.C. § 2332d); (viii) the Cuban Democracy Act (22 U.S.C. §§ 6001 to 6010); (ix) the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (22 U.S.C. §§ 6021 to 6091); (x) the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA) (Pub. L. No. 111-195, 124 Stat. 1312); (xi) the Iran and Libya Sanctions Act of 1996, as amended (Pub. L. No. 104-172, 110 Stat. 1541); and (xii) the Iran Threat Reduction and Syria Human Rights Act of 2012 (Pub. L. No. 112-158, 126 Stat. 1214), to name a few.

[2] In addition to the SDN sanctions list, OFAC has created non-SDN sanctions lists appearing in a consolidated set of data files, named the Consolidated Sanctions list. Included in the Consolidated Sanctions list are the following: (i) the Foreign Sanctions Evaders (FSE) list; (ii) the Sectoral Sanctions Identifications (SSI) list; (iii) the Palestinian Legislative Council (NS-PLC) list; (iv) the List of Foreign Financial Institutions Subject to Part 561 (the Part 561 list); (v) the Non-SDN Iranian Sanctions Act (NS-ISA) list; and (vi) the List of Foreign Financial Institutions Subject to

Correspondent Account or Payable-Through Account Sanctions (CAPTA list).

[3] The propriety of any challenged OFAC action is governed by the judicial review provisions of the Administrative Procedure Act at 5 U.S.C. § 706, which provides in pertinent part,

Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

[4] [Al Haramain Islamic Found. Inc. v. Dep't of Treasury](#) , 686 F.3d 965, 980 (9th Cir. 2012). See also [KindHearts for Charitable Humanitarian Dev. Inc. v. Geithner](#) , 647 F. Supp. 2d 857, 916-18 (N.D. Ohio 2009).

[5] See [Al Haramain](#) and [KindHearts](#).

[6] See [Al Haramain](#).

[7] See [KindHearts](#).

[8] See [Epsilon Elecs. Inc. v. United States Dep't of Treasury Office of Foreign Assets Control](#) , 857 F.3d 913 (D.C. Cir. 2017).

[9] *Id.*