18 FEB 2021

What the Biden Administration Brings on Sanctions

What the Biden Administration Brings on Sanctions

Sanctions and economic and financial pressure campaigns have proven effective tools in national—and global—economic security. Over the last four years, the Trump administration ramped up several sanctions programs. It is likely the Biden administration will have a similar view of sanctions as a national security and economic tool, with some differences in approach and strategy on a program-by-program basis.

Despite a shift in the sanction landscape, it will take time for enforcement activity to catch up. As a result, organizations should regularly examine their exposure with business partners around the globe and consult with counsel and third-party compliance experts to assess weak points and risk.

Businesses engaged in global commerce should ensure that they have a robust sanctions compliance program in place, aligned with elements identified by OFAC as essential to an effective sanctions compliance program.

Examining Sanctions on a Program-by-Program Basis

Russia. A general uptick in this program can be expected. Further, the Biden administration will likely shift targets, moving away from secondary sanctions and those involving U.S. allies, such as Germany over Nordstream II, to a more direct pressure campaign on Russia, particularly in response to the SolarWinds hack and the December 2020 attack against U.S agencies. It is also likely that United States and other relevant authorities will take a more proactive approach to counter Russia's malicious cyber-attacks and authoritarianism.

Iran. During a recent press statement, President Biden indicated that he will not provide sanctions relief to the Iranian government unless the it stops enriching uranium and abides by the limits previously laid out in the Joint Comprehensive Plan of Action (JCPOA). The Biden administration may rejoin or restart denuclearization talks with Iran, therefore, relieving certain sanctions on Iran. However, effectively unwinding sanctions on Iran will be challenging because businesses are going to be very reluctant to engage with Iranian markets. With Congress already divided about this approach, it will likely become an even more partisan issue, with Republican members of Congress opposing any initiative.

Venezuela. While there is likely to be continued sanctions enforcement as it relates to persons supporting the Maduro regime and certain sectors of the Venezuelan economy, there will also likely be at least a slight pullback to provide humanitarian relief to the country. Additionally, it is likely there will be newly invigorated efforts to negotiate with the Maduro regime, potentially accompanied by limited sanctions relief.

Cuba. The Biden team has signaled that it is going to roll back several of the changes undertaken by the Trump administration to the Cuba sanctions program, including potentially reversing the recent state sponsor of terrorism designation. The Biden administration will likely aggressively use general licenses to permit otherwise prohibited activity as a means of empowering the Cuban civil sector, similar to the approach adopted by the Obama administration.

China. As the second largest economy in the world and a powerful competitor, China will remain a key focal point for the Biden team's foreign policy. It is likely that the team will keep in place a number of the actions taken by the Trump administration targeting China. For example, Biden's administration has made human rights a hallmark of its early public statements and conversations, and the business sector should anticipate that the Xinjiang and Hong Kong sanctions will remain in place. Likewise, while some elements of the recent Chinese Communist Military Companies Executive Order may be adjusted, the overall prohibitions will likely remain in place. One area where change may emerge relates to the likely forced divestment of China's holdings in certain social media companies and other state-owned enterprises.

North Korea. The Biden administration will likely apply an aggressive sanctions campaign against DPRK and will take a more aggressive designation and enforcement posture when dealing with the country than the one adopted by the Trump administration after the commencement of negotiations.

What This Means for Business

Businesses should ensure the following five elements identified by OFAC as essential to an effective sanctions compliance program are addressed:

1. Management Commitment. Organizations must ensure current senior management supports a significant investment in upgrading sanctions compliance programs. This includes confirming that compliance staff have the relevant background and training, resources, and authority to design and implement robust policies and procedures. Establishing a clear tone from the top ensures that every employee knows that they are responsible for preventing sanctions breaches, and that leadership, including the board of directors, will take reported issues seriously.

2. Risk Assessment. OFAC encourages organizations to conduct risk assessments to adequately account for sanctions-related risks across customers, products, services, supply chains, intermediaries, counterparties, transactions, and geographies. Organizations should update their risk assessments to account for changes in business activities or deficiencies that are identified through these audits. Regularly updating risk assessments also helps identify blind spots and emerging risks.

3. Internal Controls. Effective internal controls ensure that an organization has implemented a compliance program in a way that can prevent, detect, and respond to actual or suspected prohibited conduct. Policies must be translated into day-to-day activities that allow front-line employees as well as back-end finance team members to effectively manage risks, including sanctions risks. Establishing well-designed manual and automated controls around key business processes is key. This includes monitoring new business development, vendor or third-party onboarding, and sales and payments to ensure that business is not conducted with sanctioned persons or entities.

4. Testing and Auditing. Once in place, a company's compliance program needs to be independently tested and audited to confirm its continued effectiveness and to help it respond quickly to implementation gaps. This process should include an evaluation of the control functionality, frequency, sufficiency of resources to manage potential exceptions, and independence and authority of those with the responsibility to escalate issues to the board, audit committee, or executive leadership.

5. Training. A firm's compliance staff requires regular and structured training to reinforce an understanding of the risks they are facing and the actions they are required to follow. Training may also extend to other business relationships, including clients, suppliers, and business partners. Compliance staff also need opportunities to learn about changes in legal or regulatory frameworks governing sanctions, which can occur frequently. Training keeps staff at the cutting edge of a rapidly changing risk environment.

As OFAC has made it clear that these five elements are critical to ensuring that companies remain on the right side of the law, organizations looking to stay abreast of the latest changes should take advantage of available resources. The Treasury Department, through OFAC, regularly shares official alerts on changes to programs and designations that can be subscribed to via email. Additionally, organizations can subscribe to specialized law firms' and risk consultancies' client alerts and insights to stay informed.

With change on the horizon, entities should prepare their sanctions compliance programs to respond and mitigate risks that may arise.