

What Insurers Need To Know About OFAC's Expanded FAQs

By **Kenneth Nunnenkamp** and **Eli Rymland-Kelly** (December 5, 2024, 5:02 PM EST)

On Nov. 13, the U.S. Department of the Treasury's Office of Foreign Assets Control amended and expanded its insurance-related FAQs. The FAQs provide more concrete guidance on insurers' compliance obligations and dealings with sanctioned persons but unfortunately do not address many of the issues that have arisen under the Russia sanctions program.

FAQs are the most common method by which OFAC provides explanatory advice to U.S. industry. Following recent enforcement actions involving insurers and dealings related to sanctioned parties, OFAC amended FAQs 61, 62, 63, 64, 65, 68, 69, 102, 103 and 104, and added FAQs 1199 and 1200, in an apparent effort to further assist the insurance industry with its compliance efforts.

The new FAQs and amendments to existing FAQs clarify the scope and jurisdiction of certain OFAC regulations and, in general, elaborate upon OFAC's existing guidance pertaining to insurers in particular sanctions-related scenarios. The amended FAQs also add detail to OFAC's guidance for insurers on how to conduct sanctions screenings for compliance with OFAC regulations, a topic with broad applicability.

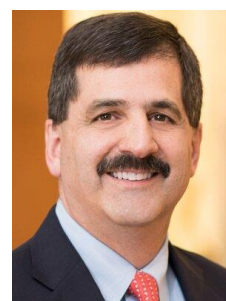
Amended FAQs

Below, we provide a summary of the relevant updates to OFAC's insurance-related FAQs, starting with FAQ 63, which provides the most broadly applicable guidance on what an insurer must do if it discovers that a policyholder or named beneficiary is sanctioned pursuant to OFAC regulations.

FAQ 63

In amending FAQ 63, OFAC does not take a shift in policy, rather it elaborates on the obligations that arise if an insurer discovers that an existing policyholder becomes sanctioned by OFAC, and the provision of insurance services is not authorized or exempt. Specifically, FAQ 63 makes clear that if a policyholder or named beneficiary becomes subject to OFAC sanctions, the policy itself must be blocked and reported to OFAC.

While most insurers were already taking blocking action, this clarification continues OFAC's recent trend toward seeking the reporting of blocked property on a broader level.



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The amended version of FAQ 63 also adds that if a prohibition on the provision of services to a specific jurisdiction comes into place, insurers should cease providing coverage to the relevant policyholder or beneficiary within the jurisdiction unless they receive authorization from OFAC or are otherwise exempt.

While the FAQ does not specify how to address various types of insurance — i.e., life versus health versus property — OFAC is signaling that proactive measures are required to terminate coverage, keeping in mind that if the insured were due any monies in return, those would be blocked funds.

OFAC seems to appreciate the practical impacts of blocking a policy in referring to the possibility of an OFAC-specific license where it is necessary to make payments under the blocked policy. While this does not indicate that OFAC will routinely grant such licenses, at the least, it appears to suggest OFAC is setting the groundwork for reviewing such applications.

FAQ 62

OFAC's amendments to FAQ 62 add detail to its guidance for insurers when fielding applications from individuals or entities that are subject to OFAC sanctions, or when the underlying insured activity is subject to OFAC sanctions. OFAC's previous guidance stated that insurers must block all payments from and not issue any policies to an applicant if they are a specially designated national, or SDN, or a blocked person.

The amended version clarifies that if an application is received from a blocked person, the insurer may only issue the policy if it receives express authorization from OFAC. If the blocked person sends a deposit to the insurer along with the application, OFAC requires that the insurer block the deposit and report it to OFAC within the standard 10 business days.

The amendments to this FAQ add that compliance with OFAC sanctions regulations is not just the insurers' responsibility, but the responsibility of all insurance industry participants throughout the life cycle of the policy or service, including underwriters, brokers and agents.

Insurers should also anticipate, but should not rely solely on, banks likely blocking or rejecting funds wired from the SDN in conjunction with an application. However, OFAC clarifies the insurer's independent obligation to reject the policy and take steps to block the funds even if the bank does not.

FAQ 64

FAQ 64 has been expanded to make clear that if an insurer knows that a person covered under a group policy, such as a workers' compensation policy, is an SDN and subject to blocking, their coverage must also be blocked, and any claims cannot be paid without OFAC authorization. The amendments to FAQ 64 clarify this guidance by adding that any premium payments made by or on behalf of a blocked person must be blocked.

In cases where insurers may not know the identities of all the covered individuals until a claim is filed, once a claim is filed, the insurer would then have reason to know of the presence of a blocked person and would be responsible for conducting due diligence to comply with OFAC regulations.

While many insurers likely already took these measures, since OFAC generally issues FAQs in response to widely expressed concerns or questions, this amended FAQ will provide important guidance for insurers that request this information from the groups managing such policies.

FAQ 65

OFAC's amendments to FAQ 65 add detail to its response to how frequently an insurer is expected to screen its databases, highlighting OFAC's practice of imposing civil penalties based on strict liability and heightened expectations for screening across all industry sectors.

OFAC updated its guidance in FAQ 65 by recommending that insurers use a risk-based approach to implement screenings of all their issued policies, policyholders, beneficiaries and other relevant counterparties at a high frequency, an implicit reference to OFAC's framework for compliance commitments.

Because OFAC frequently updates its sanctions programs and lists, OFAC recommends that insurers screen against OFAC sanctions at policy renewal, policy amendment, claim submission, claim payment and at any other time when they might be exposed to sanctions risks, rather than just screening the aforementioned individuals and entities upon policy issuance.

Given the increase in enforcement actions that result from inadequate screening or rescreening, OFAC appears to have identified some concerns about the frequency with which this occurs in some areas of the insurance industry. Insurers should recognize this as a friendly reminder that inadequate frequency of screening may result in an enforcement action should violations occur.

FAQ 104

FAQ 104 offers guidance for providers of travel-related insurance coverage. Specifically, it explains that worldwide travel assistance payments made under a global policy for incidents or damages occurring in a sanctioned country could be prohibited without authorization from OFAC, and that the legal analysis will differ depending on the sanctions authority. With a likely renewed focus on tighter sanctions for Cuba, this FAQ is particularly timely.

Newly Added FAQs

FAQ 1199

The first of the two new FAQs is FAQ 1199, which clarifies that even payments to innocent third parties — i.e., beneficiaries of policies — require OFAC authorization in cases where the policy has been blocked.

While authorizing payments to blocked persons rarely aligns with the U.S. foreign policy and national security objectives of OFAC sanctions, OFAC highlights the possibility that circumstances may weigh in favor of authorizing payments to innocent third parties, such as if the innocent third party is an injured party in an automobile accident.

This FAQ provides important clarification as to how OFAC views insurance policies in a number of circumstances.

While the policy is blocked property of the insured, so too are payments made based on the policy dealings that require OFAC authorizations. As a result, insurers are on notice that OFAC is taking the broadest possible view with respect to insurance policies where SDNs are involved, and requiring that

insurers consider both the policies and payments made based on those policies as presumptively blocked property.

FAQ 1200

FAQ 1200 relates to situations where a nonsanctioned person files a claim under the nonsanctioned person's policy for harm caused by a sanctioned person. Thus, the SDN's only connection is that the SDN caused the harm. This scenario is likely to arise as claims are made against SDNs responsible for actions in Israel on Oct. 7, 2023.

The FAQ makes clear that the fact that a blocked person has caused the loss does not necessarily create a blocked interest in the policy, or any claim or payment under the policy. It also does not necessarily constitute a dealing involving the blocked person.

OFAC advises that U.S. insurers may pay such claims to nonsanctioned recipients but warns insurers that receive these claims to conduct due diligence to identify if there are sanctions risks associated with making or facilitating related claim payments.

Importantly, OFAC emphasizes that if a claim is contingent on the insurer obtaining subrogation from the SDN, then collection of the subrogation from an SDN remains subject to OFAC regulations governing collections from sanctioned parties.

Takeaways

These FAQs come on the back of two insurance-related enforcement actions over the last year.

Most recently, on Nov. 14, OFAC settled with American Life Insurance Co. after it provided insurance policies to entities in the United Arab Emirates that were ultimately owned or controlled by the government of Iran. OFAC determined that the insurance policies constituted a violation of the Iranian Transactions and Sanctions Regulations, which prohibit the export of services to Iran.

Prior to that, on Dec. 31, 2023, OFAC announced an enforcement action against Privilege Underwriters Reciprocal Exchange for violations of OFAC's Ukraine/Russia-related sanctions. The insurer was found to have engaged in 39 transactions related to insurance policies issued to a Panama-based company owned by a sanctioned individual.

Interestingly, and unfortunately, OFAC did not amend existing FAQs or issue new FAQs regarding certain issues peculiar to the insurance industry that have arisen under the Russia sanctions programs.

For example, the FAQs do not speak to the issues that arise from the insurer or reinsurer becoming sanctioned, or where insurance is provided in countries not subject to comprehensive sanctions but where significant government actors may be sanctioned. Since governmental approvals to provide insurance are routinely required, OFAC's guidance does not address the parameters for dealing with those parties.

Considering the substantive amendments to OFAC's insurance-related FAQs, insurers seeking guidance on how to navigate their compliance obligations should consider the following:

- Insurers are required to block policies and submit reports to OFAC where a policyholder or named beneficiary becomes subject to sanctions.
- Compliance with OFAC sanctions is not just the insurers' responsibility, but the responsibility of all participants in the insurance ecosystem, including underwriters, brokers and agents.
- OFAC will hold all parties to high standards for screening and rescreening when evaluating whether to pursue an enforcement action.
- Insurers are obligated to stop providing coverage to policyholders in sanctioned locations when sanctions change such that they prohibit the provision of insurance to a specific jurisdiction.
- Insurers are obligated to evaluate insurance policies for compliance with OFAC's sanctions obligations even when such insurance policies are governed by state law.
- Insurers should consider using exclusionary clauses for global policies and where it is necessary to obtain an OFAC license prior to issuing the policy itself.

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