

COMPLIANCE CERTIFICATIONS JACK UP SANCTIONS VIOLATION COSTS

By [Jeremy Paner](#)

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The [U.S. Department of the Treasury's Office of Foreign Assets Control](#) may levy substantial civil monetary penalties for sanctions violations. OFAC is authorized to issue penalties equal to the greater of \$295,141 or twice the value of each prohibited transaction. But because of recent changes to OFAC's standard settlement terms, the total costs to companies that violate sanctions — including these penalties as well as other expenses — are growing.



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OFAC Settlements

Sanctions violations have led to several multibillion-dollar global settlements with international financial institutions. The high volume of international transactions creates sanctions compliance risk and enforcement exposure unique to that sector. With the notable exception of the \$100 million settlement with the China-based Zhongxing Telecommunications Equipment Corporation, OFAC penalties against nonfinancial institutions generally range from hundreds of thousands to a few million dollars.

But these OFAC settlement amounts do not account for the substantial costs of internal investigations and remedial compliance measures necessary for reaching an agreement to resolve apparent violations.[1] Historically, those costs ended when the apparent sanctions violator settled its potential civil liability. Without explanation or public guidance, OFAC recently ended this predictability, and significantly increased the real cost of settlements through a new term in its settlement agreements: the five-year annual certification of sanctions compliance commitments.

As outlined below, OFAC's new annual certification requirement can potentially increase the cost of sanctions violations by millions of dollars. As a result, that new settlement term may alter the cost-benefit analysis of implementing robust sanctions compliance programs at nonfinancial institutions.

Compliance Commitments

OFAC regulations do not mandate the existence or nature of sanctions compliance programs. The agency only evaluates programs after apparent violations to determine the types of administrative responses and the amount of any civil monetary penalties. In its economic sanctions guidelines, OFAC advises businesses to assess their risk-based compliance program through consideration of a risk matrix from the [Federal Financial Institutions Examination Council's Bank Secrecy Act Anti-Money Laundering Examination Manual](#).

OFAC also uses its publicly announced enforcement actions to express its specific compliance expectations beyond the five basic elements of a compliance program referenced in that document.[2]

U.S. Treasury Undersecretary Sigal Mandelker previewed OFAC's "compliance commitments" in early December of last year, in a speech to the [American Bar Association's](#) Financial Crimes Enforcement Conference. She noted that the following "compliance commitments will become an essential element in settlement agreements between OFAC and apparent violators":

- "Ensuring senior management commitment to compliance;
- Conducting frequent risk assessments to identify and mitigate sanctions-specific risks within an institution and its products, services and customers;
- Developing and deploying internal controls, including policies and procedures, in order to identify, interdict, escalate, report and maintain records pertaining to activity prohibited by OFAC's regulations;
- Engaging in testing and auditing, both on specific elements of a sanctions compliance program and across the organization, to identify and correct weaknesses and deficiencies; and
- Ensuring all relevant personnel, particularly those in high-risk areas or business units, are provided tailored training on OFAC obligation and authorities in general and the compliance program in particular."^[3]

Mandelker did not reference any sort of required annual certification of these commitments in her remarks. She simply recited the above long-established "hallmarks of an effective sanctions compliance program" that would soon become integral to OFAC's settlement agreements.

Annual Certification

The annual compliance certification settlement term made its first public appearance in OFAC's late December 2018 settlement agreement with [Zoltek Companies Inc.](#) According to OFAC, between January 2012 and October 2015, U.S.-based Zoltek appeared to have violated the Belarus-related sanctions by providing approval to its Hungary-based affiliate to make 26 purchases from a designated Belarusian company. In addition to paying a \$7.8 million civil monetary penalty, Zoltek agreed to make five annual certifications confirming its implementation and maintenance of certain compliance commitments set forth in the settlement agreement.

The second certification requirement was made public on March 27, 2019, when OFAC announced a \$1.9 million settlement with [Stanley Black & Decker Inc.](#) to resolve potential liability for apparent violations of the Iranian transactions and sanctions regulations. The settlement agreement requires the company to submit an interim progress report on the implementation of enhancements to its compliance program. Beginning one year after the execution of the settlement agreement, the company must also submit five annual certifications confirming that certain compliance program enhancements have been implemented and maintained.

Most recently, on April 9, 2019, OFAC announced its \$639 million global settlement with [Standard Chartered Bank](#) for apparent violations of various sanctions programs, and a separate \$18 million settlement of apparent violations of the Zimbabwe sanctions regulations. As part of its agreement to settle potential civil liability — and as in the settlements with Zoltek and Stanley Black & Decker — the bank must submit five annual compliance certifications. This requirement should be less burdensome for an international bank, because it already has dedicated staff for compliance functions including corporate governance, risk assessment, sanctions filtering and auditing/testing.

The annual certification of compliance commitments was likely influenced by similar standard demands from federal functional regulators.[4] For example, the Federal Reserve’s November 2018 cease and desist order issued against French international financial institution Société Générale requires that bank to submit quarterly written progress reports detailing its compliance program enhancements and ongoing functionality.[5] These reports must be submitted throughout the term of the order, which does not have a defined end date.

A bank’s compliance with a cease and desist order is not as costly as a monitorship, but the fees associated with the necessary outside consultants and legal experts generally runs into the millions of dollars per year. Large, international nonbank companies should expect similar costs to comply with OFAC’s revised settlement agreement terms.

With OFAC’s annual certifications, payment to OFAC no longer truly resolves apparent violations. This means that it is now more important than ever to avoid sanctions violations. Companies should carefully evaluate their compliance programs with that in mind, and consult experienced sanctions counsel.

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[1] Remedial efforts may include hiring additional qualified compliance personnel, enhancing internal controls and adjusting the risk assessment, training, auditing and testing components of compliance programs to address the root cause of apparent violations.

[2] The risk matrix references the following basic elements: (1) identification of unique risk factors; (2) implementation of internal controls to mitigate risk; (3) independent testing and auditing to evaluate the program; (4) designation of a qualified OFAC officer; and (5) effective and timely training.

[3] Undersecretary Sigal Mandelker Remarks ABA/ABA Financial Crimes Enforcement Conference, Dec. 3, 2018, available at <https://home.treasury.gov/news/press-releases/sm563>.

[4] These bank and nonbank financial institution regulators include the Board of Governors of the U.S. Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the U.S. Office of the Comptroller of the Currency, the U.S. Office of Thrift Supervision, the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission.

[5] The Federal Reserve Board Order to Cease and Desist and Order of Assessment of a Civil Money Penalty Issued Upon Consent Pursuant to the Federal Deposit Insurance Act, as Amended, available at <https://www.federalreserve.gov/newsevents/pressreleases/files/enf20181119a1.pdf>.