

OFAC Sanctions Compliance: Sample Contract Provisions

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A current trend by banks, insurers and acquisition-minded corporations is to insert rigorous Office of Foreign Assets Control sanctions compliance provisions into credit agreements, insurance policies and acquisition agreements. This trend is no doubt driven in part by the recent surge in huge settlements obtained by U.S. regulatory agencies arising out of enforcement actions for economic sanctions violations by major banks.

Many contracting parties would like to believe that the mere inclusion of OFAC compliance language in one or more contractual provisions enables a contracting party to insulate itself from OFAC liability and pass off responsibility for OFAC sanctions compliance to the contract counterparty. These efforts fall flat, however, and do not eliminate underlying OFAC risk for those seeking this goal. At most, OFAC sanctions compliance language provides contracting parties with a contractual remedy from contract counterparties for monetary damages associated with OFAC sanctions violations.



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To the extent that contracting parties and contract counterparties are each “U.S. persons,” as defined by OFAC, they will each have separate and individual responsibility for OFAC sanctions compliance. This means that to truly insulate themselves from OFAC liability, all U.S. persons must conduct their own OFAC sanctions screenings and ensure that they are not dealing with an OFAC-sanctioned party or an OFAC-sanctioned country.

OFAC sanctions compliance provisions vary in purpose and scope, as evidenced by sample clauses below, each of which is presented for illustrative purposes only.

Provisions Intended to Identify the OFAC Sanctions Status of the Contract Counterparty

None of the borrower, any of its subsidiaries or, to the knowledge of the borrower, any director, officer, or employee of the borrower or any of its subsidiaries is a person who

- is the target of any sanctions law, or

- is located, organized, or resident in a country or territory that is, or whose government currently is, the target of countrywide sanctions imposed by any U.S. government sanctions authority, which are currently Cuba, Iran, North Korea, Sudan and Syria.

Provisions Intended to Identify the OFAC Sanctions Status Compliance for the Ownership and/or Control of the Contract Counterparty

None of the borrower, any of its subsidiaries or, to the knowledge of the borrower, any director, officer, or employee of the borrower or any of its subsidiaries is a person who

- is directly or indirectly owned or controlled by any person currently included on the List of Specially Designated Nationals and Blocked Persons or the Foreign Sanctions Evaders List maintained by the U.S. Treasury Department's OFAC, or
- is directly or indirectly owned or controlled by any person who is located, organized, or resident in a country or territory that is, or whose government currently is, the target of countrywide sanctions imposed by any U.S. government sanctions authority, which are currently Cuba, Iran, North Korea, Sudan and Syria.

Provisions Intended to Identify the OFAC Sanctions Compliance Status of Both the Contracting Party and the Contract Counterparty

To the extent applicable, each party is in compliance with the Trading with the Enemy Act, as amended, and each of the foreign assets control regulations of the U.S. Department of Treasury (31 C.F.R., Subtitle B, Chapter V, as amended) and any other enabling legislation or executive order relating thereto, except to the extent that such noncompliance would not reasonably be expected to have a material adverse effect.

Provisions Intended to Obtain Assurance That No OFAC Investigations Are in Process

None of the borrower, any of its subsidiaries or, to the knowledge of the borrower, any director, officer, or employee of the borrower or any of its subsidiaries is a person who

- is currently the subject of any sanctions investigation, or
- is directly or indirectly owned or controlled by any person who is currently the subject of a sanctions investigation.

Provisions Intended to Obtain Assurance That an Investment Available for Purchase Was Not Funded by a Sanctioned Party or With Funding From a Sanctioned Country

The monies used to fund seller's acquisition and funding of the Interests were not derived from, invested for the benefit of, or related in any way to

- the governments of, or any persons within, any country under a U.S. embargo enforced by OFAC, or

- any persons who are named on the List of Specially Designated Nationals and Blocked Persons maintained by OFAC, or on any other similar list maintained by OFAC pursuant to any authorizing statute, executive order, or regulation.

Provisions Intended to Obtain Assurance That Loan Proceeds Will Not Be Used for the Benefit of a Sanctioned Party or a Sanctioned Country

The borrower will not, directly or indirectly, use the proceeds of the loan or lend, contribute, or otherwise make available such proceeds to any subsidiary, other affiliate of the borrower, joint venture partner, or other person

- to fund or facilitate any activities of or business or transaction with any embargoed person or any activities or business in any sanctioned country, or
- in any other manner that would result in a violation of any sanctions administered or enforced by OFAC, the U.S. Department of State, the United Nations Security Council, the European Union, Her Majesty's Treasury, any EU member state, or other relevant sanctions authority (collectively, "sanctions") by any person (including, without limitation, any person participating in the loans, whether as underwriter, adviser, investor or otherwise).

(Note that the language in the second bulleted item, taken holistically, may impose on a borrower economic sanctions compliance obligations and contractual liability far wider than applicable law and regulation may impose — depending on the nature of the borrower's corporate organization, place and type of business, and other factors. Accordingly, we recommend to many borrowers that these types of sections' respective expansive scopes be narrowed or otherwise be made congruent to — and not beyond — the jurisdictional limit and scope of U.S. sanctions requirements for U.S. borrowers.)

Additional Considerations

Although the above types of sample OFAC sanctions compliance provisions are currently quite commonplace, the contract parties that insert this type of language into their agreements should note that although such provisions may impose restraints on a contract counterparty, they do not absolutely immunize the contract parties from all OFAC liability in cases where the contract counterparty violates the relevant OFAC sanctions compliance language.

OFAC and other U.S. regulatory agencies are not bound by the terms of such agreements between private parties. Based on the specific facts and circumstances of a particular transaction, OFAC can seek to impose strict liability on a contracting party for certain violations committed by the contract counterparty, despite language in the agreement in which the contract counterparty covenanted that it would comply with all OFAC prohibitions.

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