

Locke Lord QuickStudy: OFAC Issues New and Amended FAQs for the Insurance Industry

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On November 13, 2024, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") amended several insurance-related Frequently Asked Questions ("FAQs") (61, 62, 63, 64, 65, 68, 69, 102, 103, and 104) as part of its ongoing process of publishing updated guidance to the industry, and published two new insurance-related FAQs (1199 and 1200).

Amended FAQs

FAQ 61 – In some cases, in order to comply with OFAC regulations, insurance industry participants (e.g., insurers and insurance producers) must commit an ostensible violation of state insurance regulation. In FAQ 61, OFAC clarifies that OFAC regulations preempt state insurance laws when OFAC sanctions conflict with state statutes. OFAC's regulations are derived from presidential declarations under the Trading with the Enemy Act (TWEA) and the International Emergency Economic Powers Act (IEEPA) which preempt state insurance regulations.

The Supremacy Clause of the U.S. Constitution ensures that federal law preempts state law when there is a conflict. While direct cases specifically about insurance companies lawfully withholding payment of insurance claims in order to comply with OFAC sanctions may be limited, broader preemption principles are well-established. Courts have generally found that state laws that conflict with federal law are without effect; see *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 108 (1992) and *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008). In particular, courts have held that federal law will preempt a state law if it is physically impossible to comply with both laws; see *3 Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Based on this, courts are likely to support the view that if state law requires payment or action on insurance claims that conflicts with OFAC sanctions, the federal regulations administered by OFAC would typically prevail. In 2014, the Second Circuit held that OFAC's blocking order preempted New York state law claims. The court ruled that the funds held in a blocked account by a financial institution regulated by the NYDFS could not be released to a claimant, even though New York state law might have required payment in the absence of OFAC sanctions.

FAQ 62 – Insurance industry participants are responsible for compliance with OFAC sanctions throughout the lifecycle of their involvement with an insurance policy or other product or service. If an insurance industry participant discovers that an applicant, policyholder or beneficiary is or becomes subject to OFAC sanctions (e.g., designated on OFAC's List of Specially Designated Nationals and Blocked Persons ("SDN List")), the insurer cannot issue or maintain a policy unless licensed by OFAC because doing so would provide a service (i.e., coverage) to the blocked person. If the blocked person sends a deposit or pays premiums for the insurance, the payment must be blocked and reported to OFAC within 10 business days. If an insurance industry participant

receives an application from a party identified on one of OFAC's other sanctions lists, they should review the relevant prohibitions carefully before taking any action.

FAQ 63 – If an insurer discovers that a policyholder or beneficiary becomes the subject of OFAC's SDN List or is located in a jurisdiction subject to U.S. sanctions, the insurer must block the policy or relevant policy portion, report the blocking to OFAC within 10 business days, and place any unearned premium or premium received after the blocking date into a blocked account. In order to continue the policy or pay any claims thereunder, the insurer must obtain a specific license from OFAC. Additionally, insurers must cease providing coverage to individuals or entities in sanctioned jurisdictions unless authorized or exempt by OFAC.

FAQ 64 – If an insurer has knowledge that a group policy held by an employer (e.g., workers compensation) covers a person blocked by OFAC sanctions, the insurer must block the policy with respect to the blocked person. In the event of a claim regarding the blocked person, the insurer must seek OFAC authorization to pay the claim. Any premium payments made by or on behalf of the blocked person should be blocked and placed in a blocked interest-bearing account at a U.S. financial institution.

In some cases, such as group travel policies, the insurer may not know the names of covered individuals until a claim is filed. In this case, once a claim is filed by a blocked person, the insurer would then be deemed to know the individual's sanctions status and the requirement to block that individuals' coverage and any other property of that person, such as unearned premium. Different restrictions may apply if the person is subject to other OFAC sanctions or located in a sanctioned jurisdiction.

FAQ 65 – OFAC reminds insurance industry participants that it may impose civil penalties based on strict liability. This means that a person subject to U.S. jurisdiction may be held civilly liable even if it did not have knowledge that it was engaging in a transaction that was prohibited under sanctions laws and regulations. Considering the foregoing, OFAC recommends that insurers adopt a risk-based approach to compliance, screening databases regularly to ensure they are not engaging in prohibited transactions. Since OFAC reporting is generally due within 10 business days following interaction with a specially designated national ("SDN"), including OFAC's addition of a name to the SDN List, OFAC recommends that insurance industry participants regularly screen all relevant parties, such as policyholders and beneficiaries, in order to make timely reporting to help mitigate the risk of violating sanctions and reduce exposure to penalties.

FAQ 68 – If a policyholder becomes a blocked person after a policy is issued, the insurer can notify the policyholder that the policy is now blocked without obtaining a specific license from OFAC.

FAQ 69 – When notifying a policyholder that their policy is "blocked" due to OFAC sanctions, the insurer may also notify the policyholder (i) that the insurer must place any future premium payments into a blocked account, and (ii) of the corresponding sanctions program pursuant to which the insurer took action.

FAQ 102 – OFAC advises insurance industry participants that participate in global insurance markets to avoid violating U.S. sanctions laws by including in policies "savings clauses" that explicitly exclude coverage for risks in sanctioned countries or for activities prohibited by U.S. sanctions laws. Exact wording of such clauses will vary depending on the type of policy. Insurance industry participants, including insurers and producers, should also ensure that such savings clauses cover all industry participants in the sales chain, and do not allow for any future

economic benefit for a sanctioned person or jurisdiction such as by providing for indemnification if or when relevant prohibitions no longer apply; there should be no coverage if, at the time of loss, coverage would violate U.S. sanctions law.

FAQ 103 – If a U.S. insurer cannot include a sanctions-specific exclusionary clause due to market conditions or local laws, they must apply to OFAC for a specific license before issuing the global insurance policy. In determining whether to issue a license, OFAC will evaluate the policy's facts and circumstances, including the insurer's market position and the risk involved, to ensure the policy does not conflict with U.S. foreign policy goals. A separate license from OFAC is generally required to pay claims under such a policy.

FAQ 104 – Insurers can offer global travel insurance and assistance as long as the coverage is related to authorized or exempt travel. Generally, U.S. sanctions cannot prohibit travel to or from any country, including transactions ordinarily incident such as the issuance and provision of travel-related insurance. The [Cuban Assets Control Regulations](#), however, specifically restrict insurance for travel to Cuba and require valid OFAC authorization. Additionally, insurers must ensure that they do not provide services to individuals or entities listed on OFAC's SDN List.

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FAQ 1199 – OFAC has not issued a general license to allow an insurer to pay a claim to an innocent third-party under a blocked policy. An insurer cannot pay a claim to an innocent third party (e.g., a party injured by a blocked person in an auto accident) without first contacting OFAC for additional guidance. OFAC will work with the insurer parties on the specifics of the case. Although authorizing payments to blocked persons is rarely aligned with the U.S. foreign policy and national security objectives of OFAC sanctions, circumstances may weigh in favor of authorizing payments to innocent third parties.

FAQ 1200 – When a non-sanctioned individual submits a claim to their insurance company for a loss caused by a blocked person, the non-sanctioned party's insurance company is generally permitted to pay the claim. The fact that a blocked person is responsible for the loss does not create a blocked interest in the insurance policy or the claim itself. Therefore, U.S. insurers can make payments to non-sanctioned claimants, unless other specific OFAC regulations prohibit it, such as if the recipient resides in a sanctioned country or jurisdiction.

We note that some insurance policies may include subrogation rights, which provide a legal right for the insurer to pursue reimbursement from the liable third-party. OFAC does not require U.S. persons to obtain a specific license to initiate legal proceedings against a blocked person. For example, a U.S. attorney, insurer, or other service provider is not required to obtain a specific license prior to initiating a proceeding against a SDN. In most OFAC programs, however, a license would generally be required to enter a settlement agreement with a blocked person, to accept payment from a blocked person, or to enforce an order or award transferring blocked property. Claims paid as described above and all other obligations of the insurer on behalf of the insured (or their non-sanctioned beneficiaries) under a policy must not be contingent on the successful pursuit of a subrogated claim by the insurer against a blocked person.

Conclusion

OFAC's recent FAQs highlight the ongoing scrutiny of insurers' compliance with U.S. sanctions, particularly when offering global insurance services. Insurance industry participants should ensure that their compliance policies, procedures, and internal controls reflect the guidance outlined in OFAC's recent FAQs. This includes reviewing insurance policies to incorporate appropriate sanctions clauses and conducting a thorough review of sanctions screening tools to ensure they effectively identify and block transactions involving sanctioned persons.

This paper is intended as a guide only and is not a substitute for specific legal or tax advice. Please reach out to the authors for any specific questions. We expect to continue to monitor the topics addressed in this paper and provide future client updates when useful.

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