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OFAC UNDER THE BIDEN ADMINISTRATION: WHAT TO EXPECT

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For years, U.S. Presidents have used the powers of the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) with increasing effect to carry out their foreign policy goals.

OFAC administers and enforces economic and trade sanctions against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy, or economy of the United States.

During President Trump's final year, there were 105 updates to the OFAC sanctions list, or an average of 8.75 per month. In the first month under the new administration, the rate of OFAC actions has slowed, likely a result of a government in transition. However, three recent decisions provide a glimpse into what OFAC may look like under President Biden.

Before approving sanctions against military officials from Burma who supported a government coup, President Biden sought consultation with Republican Senator Mitch McConnell, as well as foreign allies. The sanctions restrict access to roughly \$1 billion in funds held by the Burmese government in the United States.

With respect to Venezuela, a target of many recent OFAC actions, President Biden reversed course slightly by allowing certain transactions and activities related to the ordinary operations of Venezuela's airports and ports to proceed without restrictions. Such activities had been blocked since August 2019.

Lastly, President Biden delayed a previous ban on U.S. businesses from investing in companies with ties to the Chinese military including entities with similar names to a group of blacklisted Chinese firms. The decision was reportedly made in response to some confusion relayed by the private sector and to allow the new administration to review and assess how to proceed.

Under President Trump's Administration, OFAC sanctions against foreign entities and foreign persons were used extensively and unilaterally as a weapon of choice. Are President Biden's initial decisions an indication of things to come? What will be the major differences between his and the previous administration with respect to OFAC sanctions?

Integro Advisers reached out to a number of financial industry experts for their thoughts.

Ross Delston, an attorney and former banking regulator based in Washington D.C., believes the biggest difference between the two administrations will be Russia.

"Even though Russia was targeted by the previous administration, I think it's going to be an even bigger target for this administration because of all the [cyber] attacks on the U.S. election process dating back to 2015," he says. "There is great interest shown by both political parties to punish Russia and that is one of those rare issues that has bipartisan support. I would not be surprised if this administration took advantage of that support and went big."

In August 2017, following a 419-3 vote in the U.S. House of Representatives and a 98-2 vote in the Senate, President Trump signed the Countering America's Adversaries Through Sanctions Act (CAATSA) into law (Public Law 115-44), which among other things, imposed new sanctions on Iran, North Korea, and Russia.

Timothy White, Director of Sanctions at AML RightSource, believes Russia is a low hanging fruit for the Biden Administration.

"You take a look at Congress' vote for approving CAATSA. The result was to hold President Trump's feet to the fire for not playing hard ball with Russia [on the cyber-attacks]."

White believes OFAC sanctions may be one of the vehicles to reach common ground with Congressional Republicans following a very polarizing election season.

"The easiest way to do this is to find agreement outside of the United States, and OFAC lends itself to that, certainly with Russia".

As of this article's publication, OFAC was preparing sanctions and other measures to punish Russia for its cyber-espionage campaigns.

White sees President Biden utilizing sanctions as much as President Trump. "It is the foreign policy tool of choice," he says.

But Sarah Beth Felix, an anti-money laundering consultant, believes a roll back is coming.

"I think the majority of the changes are going to be less sanctions going forward," says Felix. "I wouldn't be surprised if some of our existing Executive Orders that were pushed through under Trump that were specific to regimes, and people related to regimes, get changed. Not necessarily canceled altogether across the board because I think Biden knows what's good for national security." But she says she doesn't expect sanctions to remain as active under Biden as they were during the Trump Administration.

Felix does expect one significant policy shift. "The OFAC sanction lists were so nuanced under Trump. It was, don't do business with any of these people and, of course we will list these specific people you can't do business with, and then anyone else who may or may not be related to them, and good luck finding them," she says. "I think that the more nuanced sanctions that we experienced under Trump will shift back to being more linear under Biden."

Carl Fornaris, an attorney and shareholder at Greenberg Traurig's Miami office, sees sanctions remaining a priority for any administration, regardless of who is in the Oval Office.

"You don't have to press a button and blow someone up anymore, you can blow them up in the wallet. So, I think politically it'll continue to be a very strong tool."

Fornaris thinks a return to Obama-level fines against financial institutions is inevitable under President Biden. "Politically it looks good for the current administration and [Democrats] to show that sophisticated financial institutions are being fined and called to task. That's not going to stop."

Fornaris also thinks that foreign banks will be subject to greater scrutiny by OFAC.

"I think we are going to see a return to that," he says. "It's not going to bother anyone that a foreign bank got blown up because of some U. S. action. It shows that the U.S. is being tough against crooked bankers."

"If you notice what happened in the last year or two with Trump and OFAC, they were going after Venezuelan oligarchs. The policy was very clear: go hard against Venezuela and Venezuelan interests," he says. "They [significantly added] tons of people on the OFAC [Specially Designated Nationals] list. But outside of Venezuelans, and a few Russians here or there, they didn't blow up too many companies." Fornaris foresees that we may be heading for a "dark period of overzealous naming" of non-U.S. companies and individuals to the OFAC list.

Besides Venezuela and Russia, Iran is certainly getting a good deal of attention from the Biden Administration. This week, President Biden announced that the U.S. would be re-engaging with the sanctioned country in coordination with allies. "Without a doubt, the biggest issue," says White, who wonders how President Biden will play the Iranian sanction issue by trying to bring the U.S. back in line with the European Union and other foreign allies, and still remain strong on Iran's nuclear threats. "I see some sort of compromise there," he says.

Clearly, changes are underway at OFAC. In addition to recent OFAC actions, Andrea Gacki stepped down as OFAC Director and was replaced by Acting Director, Bradley Smith, a seven-year OFAC veteran and former Deputy Legal Adviser to President Obama's National Security Staff.

Nevertheless, financial institutions need to remain vigilant and proactive. Fornaris thinks that under the current administration, overall enforcement will increase on banks that fail to apply an OFAC sanction order properly. "I think it's going to be strong," he says.

"The only thing that people need to remember is that a change in presidency does not absolve [bankers] from the risk of doing business with bad actors, regardless of what Biden puts forward or rolls back," says Felix. "That doesn't change the need for a sanctions' compliance program."



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