



OFAC

Office of Foreign Assets Control

Opening Securities and Futures Accounts from an OFAC Perspective

Introduction

The Treasury Department's Office of Foreign Assets Control (OFAC) is responsible for administering and enforcing economic and trade sanctions based on U.S. foreign policy, national security, and economic goals against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction. All U.S. persons, including securities and futures firms, such as investment advisers, broker-dealers, futures commission merchants, introducing brokers in commodities, commodity pool operators, and commodity trading advisors, are subject to the requirements of OFAC. The guidance below is intended to assist such firms when evaluating new clients and investments or transactions by such clients.

Account Opening Review

OFAC recommends that every securities and futures firm establish and maintain an effective OFAC compliance program. In the event of an OFAC violation, both the adequacy of a company's transaction processing system, as well as its overall OFAC compliance program, are taken into consideration when determining the severity of potential enforcement actions. Generally, at the time of account opening, there are two specific stages that warrant caution: (i) the client acceptance process, and (ii) the selection of new investments or transactions. Prior to entering into an advisory or brokerage relationship with a client, securities and futures firms should screen the new client's identification information, as well as the customer's proposed transaction(s), against OFAC's Specially Designated Nationals and Blocked Persons list ("SDN list") [which is available at www.treas.gov/offices/enforcement/ofac/sdn/index.shtml], and applicable OFAC sanctions programs. Securities and futures firms should maintain adequate documentation about the results of their screening in order to illustrate their efforts to comply with OFAC regulations. Periodic checks of "non-accountholders" (e.g., beneficiaries, guarantors, or principals) may also be necessary, depending upon each firm's specific risk profile.

OFAC Compliance and CIP requirements

A strong OFAC compliance program consists of procedures that are similar to those found in a brokerage firm's Customer Identification Program ("CIP"). Firms should use risk-based measures for verifying the identity of each new customer who opens an account. In establishing procedures, firms should identify and consider their size (e.g., total assets under management), their location, their customer base, the types of accounts they maintain, the methods by which accounts can be opened (e.g., in person or non face-to-face), and the types of identifying information available for each customer. Firms should also assess risks posed by each customer and transaction, asking questions such as:

- *Is the customer regulated by a Federal functional regulator, widely known, or listed on an exchange?*
- *Has the firm had any previous experience with the customer or does it have prior knowledge about the customer?*
- *Is the firm facilitating a U.S. person's investment in a foreign issuer or other company that conducts business in a sanctioned country?*
- *Is the customer located in a high-risk foreign jurisdiction that is considered to be poorly regulated or in a known offshore banking or secrecy haven?*
- *Is the customer located or does it maintain accounts in countries where local privacy laws, regulations, or provisions prevent or limit the collection of client identification or beneficial ownership information?*

Despite similarities between compliance with OFAC and compliance with CIP requirements, there are differences between the two. In this regard, FinCEN, in guidance issued separately with the SEC and CFTC, has stated that, with respect to an omnibus account established by an intermediary, a securities broker-dealer or a futures commission merchant is not required to look through the intermediary to the underlying beneficial owners of the omnibus account for purposes of complying with CIP requirements.¹ A "customer" is defined in the relevant CIP rules as "[a] person that opens a new account." OFAC regulations, however, apply to all property and interests in property of a sanctions target within the possession or control of a U.S. person. That would include shares held in omnibus accounts on behalf of a sanctioned party. In some cases, it may be prudent for a firm to obtain beneficial ownership information for certain types of accounts. Some accounts, such as those opened by non-U.S. persons or entities located in high risk jurisdictions, may present a higher risk of sanctions violations. If a foreign financial institution is a new client trying to establish an omnibus account, then the risks associated with the new account may warrant additional OFAC due diligence. That may include conducting a risk-based assessment of the nature of the foreign financial institution's business, the market that it serves, and the nature of the foreign firm's customer base.

Timing of Verification

A new customer's identity should be verified before the account is opened, or within a reasonable time period after account opening. Review and verification of non-U.S. individuals and certain entities may require more time. In accordance with the firm's risk assessment regarding the particular customer, the firm may need to restrict transactions in accounts until such verification has been completed. Recognizing that some transactions may be executed and settled within a day (T+1), firms should, at a minimum, screen the names of their account holders and counter-parties against OFAC's SDN List and other sanctions programs as part of their account opening procedures.

Reliance in the Introducing/Clearing Relationship

In the world of anti-money laundering responsibilities, clearing firms and introducing firms often rely upon each other for certain functions. Recently, for example, FinCEN indicated that it would not take any action against a securities clearing firm for non-compliance with the CIP rule when accounts are introduced on a fully disclosed basis to a clearing firm under the following circumstances: when the functions of opening and approving customer accounts and directly receiving and accepting orders from the introduced customer are allocated exclusively to the introducing firm and the clearing firm is allocated exclusively the functions of extending credit, safeguarding funds and securities, and issuing confirmations and statements.² CFTC and FinCEN also have clarified that a futures commission merchant, acting as an executing broker in a give-up arrangement, does not establish a formal relationship with the commodity or option customer, and therefore is not subject to the CIP rule.³

OFAC, however, does not generally permit businesses, including securities and futures firms, to reallocate their legal liability to a third party with regard to the statutes that it administers. Should a business delegate its OFAC compliance responsibilities to others, it, as well as the third parties, could be held liable for any OFAC violations that occur due to the third parties' negligence.

Notwithstanding the strict liability nature of OFAC's regulations, OFAC examines the functions that securities and futures firms perform and their relative use of customer information in order to determine their overall liability in the context of enforcement cases. Every firm is encouraged to develop risk-based policies and procedures that properly monitor and mitigate sanctions risk; in fact, the presence of a robust, OFAC compliance program is a factor that OFAC considers in determining the appropriate response to an apparent OFAC violation.

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¹ http://www.fincen.gov/statutes_regs/guidance/pdf/futures_omnibus_account_qa_final.pdf
<http://www.sec.gov/divisions/marketreg/qa-bdidprogram.htm>

² http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2008-g002.pdf

³ http://www.fincen.gov/statutes_regs/guidance/pdf/cftc_fincen_guidance.pdf