

OFAC Compliance

In response to Russia's invasion of Ukraine, the United States, through the Department of the Treasury's Office of Foreign Assets Control ("OFAC"), has imposed economic sanctions on a number of Russian persons and entities. The summary below is intended to provide general information for NADA members regarding their obligations under the laws and regulations administered by OFAC in enforcing these and other sanctions imposed by the United States.

- OFAC is part of the Department of the Treasury, which administers and enforces economic sanctions programs primarily against countries and groups of individuals, such as terrorists and narcotics traffickers, for the purpose of accomplishing U.S. foreign policy and national security goals.
- The OFAC restrictions are *extremely broad*. They prohibit all U.S. persons from engaging in transactions with certain sanctioned countries, governments, or specially designated organizations or individuals (collectively referred to as "prohibited persons"). In the case of individuals and entities identified as terrorists or supporters of terrorism, the sanctions prohibit all U.S. persons from transacting or dealing in any property (or interest in property) of the designated party. *There is no minimum dollar threshold*. Therefore, the restrictions prohibit dealers from entering into a transaction with a prohibited person for an oil change just as they prohibit dealers from entering into a contract with a prohibited person for the purchase of a high-end vehicle.¹
- The prohibition on transacting or dealing in property or interests in property with a prohibited person is not dealer-specific. Although it is more likely to arise in the context of banks, importers/exporters, the securities industry, and others that frequently transact business with foreign entities, the prohibitions apply to all U.S. persons (including all U.S. retailers). Thus, the OFAC restrictions prohibit a fast-food restaurant from selling a hamburger to a prohibited person, a department store from selling an appliance to a prohibited person, and a gas station from selling a gallon of gas to a prohibited person.
- In order to determine whether someone is a "prohibited person," dealers must first check the List of Specially Designated Nationals and Blocked Persons ("SDN List") on the OFAC website (www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx). This is a list of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific. Collectively, such individuals and companies are called "Specially Designated Nationals" or "SDNs." Their assets are blocked and U.S. persons are generally prohibited from dealing with them.

¹ The potential penalties for violating the OFAC restrictions can be extremely severe. Depending on the program, criminal penalties for willful violations can include fines ranging up to \$20 million and imprisonment of up to 30 years. Civil penalties for violations of the Trading With The Enemy Act can be as much as \$97,529 for each violation. Civil penalties for violations of the International Emergency Economic Powers Act can be as much as \$330,947 or twice the amount of the underlying transaction for each violation. Civil penalties for violations of the Foreign Narcotics Kingpin Designation Act can be as much as \$1,644,396 for each violation. See 87 Fed. Reg. 7369.

- OFAC maintains a search engine for determining whether a person is on the SDN List (see <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1636>). In addition, many credit bureaus and agencies have adopted screening software to determine if a person is on the SDN List or any other OFAC sanctions lists. This software matches the person's name and other information to the names on the OFAC sanctions lists. If there is a potential match, the credit bureaus may place an OFAC "flag" or alert on the report. These systems work differently, but in most cases, they will simply alert the dealer that he or she should verify whether the individual is on one of the OFAC sanctions lists by comparing the dealer's information to the OFAC information.²
- But note: simply checking the SDN List may not suffice. The SDN List does not include names or descriptions of everyone with whom U.S. persons are prohibited from entering into a transaction. Some OFAC sanctions, such as those pertaining to Iran,³ Sudan, and Cuba, apply to persons acting on behalf of those targeted governments, even if those persons do not appear on the SDN List. For example, persons subject to U.S. jurisdiction continue to be prohibited from doing business or investing in Cuba unless authorized by OFAC.⁴ OFAC maintains information about these programs at www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx.
- Sanctions and trade restrictions were recently imposed in response to Russia's invasion of Ukraine and recognition of the so-called Donetsk People's Republic and Luhansk Republic as separate states. The broader sanctions are complicated and apply only to certain persons and entities that operate or have operated in specific sectors of the Russian economy—which do not generally appear to apply to dealership operations. Additional details about the sanctions and trade restrictions are available on OFAC's Russian Harmful Activities Sanctions page: <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/6626>. In addition, hundreds of Russian individuals and entities have been added to the SDN List. Although the existing OFAC compliance tools dealers use should catch these recent additions to the SDN List, dealers may wish to confirm this fact with any relevant OFAC compliance providers.

² For additional information on credit bureau screening, see <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1516>.

³ On November 5, 2018, OFAC posted an updated FAQ document regarding Iran sanctions based on changes in U.S. policy with respect to Iran, which is available at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/630>. In addition, OFAC amended the Iranian Transactions Sanctions Regulations (ITSR), effective November 5, 2018 to, among other things, reflect the re-imposition of sanctions pursuant to certain sections of Executive Order 13846 and other technical changes. The ITSR is available at https://home.treasury.gov/system/files/126/fr83_55269.pdf.

⁴ Although the U.S. government allows for certain activities to support the Cuban people's access to information on the internet and has loosened certain travel restrictions to Cuba, persons subject to U.S. jurisdiction continue to be prohibited from doing business or investing in Cuba unless authorized by OFAC as of the date of publication of this information. Details can be obtained via the OFAC documents at https://home.treasury.gov/system/files/126/cuba_fact_sheet_11082017.pdf and https://home.treasury.gov/system/files/126/cuba_fact_sheet_20210811.pdf.

- OFAC does not require U.S. retailers to develop and implement an OFAC compliance program, although a compliance program may be considered a mitigating factor by OFAC in a civil penalty proceeding. OFAC does not provide guidance to retailers on what constitutes an adequate compliance program. However, one component of compliance programs is the use of an appropriate mechanism to search the SDN List as noted above (recognizing that such mechanisms do not screen prohibited persons who are not identified on the SDN List).
- The OFAC website states that U.S. persons are expected to exercise “due diligence” in determining whether prohibited persons are involved in a proposed transaction. The appropriate degree of diligence will depend on the facts and circumstances, and it is recognized that retail operations in the United States are not where the primary focus of terrorist activity or financing exists. Nevertheless, the legal obligations apply to all U.S. persons and cannot be dismissed simply because the risk is low.
- The foregoing only highlights certain aspects of the OFAC restrictions. Additional information is available on the OFAC website, including frequently asked questions (<https://home.treasury.gov/policy-issues/financial-sanctions/faqs>).

*The foregoing is intended as general information on the broad contours of the OFAC requirements. It is not intended as legal advice. **Dealers should consult their counsel regarding their OFAC and other related obligations, and the most appropriate course of action for their business.***