

Export Control Advisory

OFAC Issues Weapons of Mass Destruction Proliferators Sanctions Regulations

On April 13, 2009, the Treasury Department's Office of Foreign Assets Control ("OFAC") published a [final rule](#) adding a new part to its regulations to elucidate its sanctions on weapons of mass destruction ("WMD") proliferators. New Part 544 to Title 19 of the Code of Federal Regulations implements [Executive Order 13382](#) of June 28, 2005, "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters."

The final rule is primarily a "blocking" regime. In accordance with the Executive Order, the rule blocks all property and interests in property that are in the United States or within the possession or control of U.S. persons, of the following persons:

- (1) Any person listed in the Annex to Executive Order 13382;
- (2) Any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies, to have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer or use such items, by any person or foreign country of proliferation concern;
- (3) Any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to have provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, any activity or transaction described in paragraph (2), or any person whose property and interests in property are blocked pursuant to this section; and
- (4) Any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this section.

This rule also prohibits any dealing in a security within the possession or control of a U.S. person that is registered or inscribed in the name of (or known to be held for the benefit of, or issued by) any blocked entity. While this rule formally implements the blocking provision of Executive Order 13382, OFAC has been carrying out the requirements of the Executive Order since it was issued in 2005. The parties originally listed in the Executive Order, in addition to parties subsequently designated by OFAC, have already been added to the Specially Designated Nationals ("SDN") list.

Please note that the sanctions included in this rule are separate and distinct from those issued under the Weapons of Mass Destruction Trade Control Regulations in Part 539, despite the fact that both regimes were established pursuant to the same declaration of national emergency in [Executive Order 12938](#) of November 14, 1994. This final rule makes clear that a "designated foreign person" subject to importation restrictions under Part 539 is not necessarily a blocked person under these sanctions, unless the "designated foreign person" has separately been blocked by this or other sanctions regimes.

The blocking and other provisions in this final rule are similar to those found in other sanctions programs administered by OFAC. However, this new regime contains certain provisions that are worthy of note.

First, this rule contains two notes to the blocking provision (§ 544.201(a)) that are not commonly found in

other programs. One states that Section 203 of the International Emergency Economic Powers Act (“IEEPA”) authorizes OFAC to block property and interests of property of a person during the pendency of an investigation. The names of persons blocked during the pendency of an investigation will be published on the SDN list with the identifier “[BPI-NPWMD].” The second specifically refers to OFAC’s rules (at §§ 501.806 and 501.807) to seek the unblocking of funds due to mistaken identity or administrative reconsideration of blocked status.

Second, the final rule includes a section (§ 544.411) explicitly stating that a blocked person has an interest in all property and interests in property of an entity in which it owns, directly or indirectly, a 50 percent or greater interest. The property and interests in property of that subsidiary entity are blocked regardless of whether it is specifically designated by OFAC or included on the SDN list. This appears to be the first instance of OFAC specifically promulgating a rule in the context of its sanctions programs to implement its current [50 percent rule](#).

Third, these WMD proliferator sanctions explicitly prohibit the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any blocked party. They also prohibit the receipt of such funds, goods, or services from blocked parties. In addition, the rule goes on to prohibit charitable contributions by, to, or for the benefit of blocked parties, including contributions to relieve human suffering. In Executive Order 13382, the President determined that such charitable donations would seriously impair his ability to deal with the national emergency.

Fourth, the penalties provision (§ 544.701) includes two notes that are not commonly included in OFAC rules. After referencing the applicable IEEPA penalty provision, the rule notes that IEEPA currently provides for a maximum civil penalty of up to \$250,000 or twice the amount of the transaction. The rule also refers to the Federal Civil Penalties Inflation Adjustment Act, stating that IEEPA civil penalties are subject to adjustment.

This final rule gives additional regulatory structure to a blocking program that OFAC has already been implementing pursuant to Executive Order. For example, OFAC appears to be instituting its 50 percent rule (previously only established in guidance) by promulgating it as a rule. OFAC also appears to be re-stating its authority in important procedural areas, such as its powers to block parties pending investigation and impose enhanced IEEPA civil penalties.

If you have any questions about this final rule and its implications, please contact [Ed Krauland](#) at 202-429-8083) or [Michael Gershberg](#) at 202-429-6208).

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