

OFAC ISSUES ECONOMIC SANCTIONS GUIDANCE ON DIGITAL CURRENCIES

To Our Clients and Friends:

Over the last several months, the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) has expressed a clear interest in protecting the U.S. financial system from illicit activities in the digital currency space and has posited that transactions involving digital currencies be treated similarly to transactions involving traditional fiat currency.^[1] OFAC released Frequently Asked Questions (FAQs) on March 19 and June 6, 2018 that addressed the treatment of digital currencies. In particular, the FAQs suggest that compliance obligations apply to digital currencies in the same manner as they would apply to traditional fiat currencies.^[2] Moreover, the FAQs note that OFAC may add digital currency addresses associated with blocked persons to its List of Specially Designated Nationals (SDN List) and put the onus on individuals^[3] engaging in such transactions to screen and ensure that they are not dealing with banned persons.^[4] Finally, an Executive Order from President Trump and related guidance from OFAC prohibited transactions involving "petro," a digital currency issued by the Venezuelan government to evade U.S. sanctions.^[5]

Through this series of FAQs, OFAC has begun to stake out its position on certain compliance obligations for digital currency transactions as well as OFAC sanctions for those who use digital currency for illicit transactions. However, key questions still remain around the scope and application of such obligations. We discuss OFAC's guidance on digital currencies in more detail below.

FAQ 559: Definitions of "virtual currency," "digital currency," "digital currency wallet," and "digital currency address" for purposes of OFAC sanctions programs

OFAC's FAQ 559 defined "virtual currency" as "a digital representation of value that functions as (i) a medium of exchange; (ii) a unit of account; and/or (iii) a store of value; is neither issued nor guaranteed by any jurisdiction; and does not have legal tender status in any jurisdiction."^[6] Similarly, OFAC defined the broader term, "digital currency," which involves "sovereign cryptocurrency, virtual currency (non-fiat), and a digital representation of fiat currency."^[7] Next, it was explained that a "digital currency wallet" is typically a software application that holds, stores, and transfers digital currency.^[8] And finally, the FAQ explained that a "digital currency address" consists of "an alphanumeric identifier that represents a potential destination for a digital currency transfer."^[9] These definitions are used throughout OFAC's other FAQs.

FAQ 560: Compliance obligations for digital currency and traditional fiat currency

In FAQ 560, OFAC indicated its view that individuals are subject to identical compliance obligations regardless of whether a transaction involves digital currency or traditional fiat currency,

prohibitions on the following: trade or other transactions with persons on OFAC’s SDN List; “unauthorized transactions prohibited by OFAC sanctions, such as dealings with blocked persons or property, or engaging in prohibited trade or investment-related transactions”; and transactions involving entities in which a blocked person has an ownership interest of 50 percent or more.[11] These restrictions include “transactions that evade or avoid, have the purpose of evading or avoiding, cause a violation of, or attempt to violate prohibitions imposed by OFAC under various sanctions authorities.”[12] Accordingly, OFAC warns that “persons that provide financial, material, or technological support for or to a designated person may be designated by OFAC under the relevant sanctions authority.”[13]

OFAC recommends that individuals should develop a compliance solution that is tailored to each circumstance. In particular, the FAQ states that “technology companies; administrators, exchangers, and users of digital currencies; and other payment processors should develop a tailored, risk-based compliance program, which generally should include sanctions list screening and other appropriate measures.”[14]

FAQ 561: Using the SDN List to sanction the illicit use of digital currencies

OFAC recognizes in FAQ 561 that there is a “growing and evolving threat posed by malicious actors using new payment mechanisms” and is determined to sanction those who use digital currency and other emerging payment systems to conduct prohibited financial transactions and evade United States sanctions.[15] Accordingly, the FAQ explains that in order “[t]o strengthen our efforts to combat the illicit use of digital currency transactions under our existing authorities, OFAC *may* include as identifiers on the SDN List specific digital currency addresses associated with blocked persons” (emphasis added).[16] This practice of using the SDN list would mirror OFAC’s current practice of adding people and governments to such list and would enable OFAC and other users to screen for digital currency addresses.

FAQ 562: Identifying digital currency-related information on the SDN List

In FAQ 562, OFAC recognizes that although it may add digital currency addresses to the SDN List, those address listings are not likely to be exhaustive.[17] Consequently, OFAC states that individuals should take the necessary steps to block questionable digital currencies and file reports with OFAC if and when they identify digital currency identifiers or wallets that they believe are owned by or are “*associated with* an SDN” (emphasis added).[18]

FAQ 563: Format of digital currency addresses on the SDN List

OFAC explains that the structure of a digital currency address on the SDN List will include a currency’s unique alphanumeric identifier and will identify the specific digital currency to which the address corresponds (e.g., Bitcoin (BTC), Litecoin (LTC), petro (PTR), etc.).

FAQ 594: Querying a digital currency address using OFAC’s Sanctions List Search tool

OFAC confirmed that it is not possible to query for digital currency addresses using OFAC’s Sanctions List Search Tool.[20] Instead, FAQ 594 recommends that OFAC will use its SDN List to screen for listed digital currency addresses.[21]

OFAC’s Guidance and President Trump’s Executive Order Concerning Venezuela

On March 19, 2018, OFAC released a set of FAQs to deal with the situation in Venezuela at the same time President Trump issued Executive Order 13827 on “Taking Additional Steps to Address the Situation in Venezuela” (“Executive Order”).[22] The Executive Order aimed to combat Venezuela’s attempts to use digital currencies to bypass sanctions that were implemented against it by the United States.[23] Specifically, the Executive Order bans individuals from engaging in transactions involving “any digital currency, digital coin, or digital token that was issued by, for, or on behalf of the Government of Venezuela on or after January 9, 2018.”[24] In February 2018, the Venezuelan government launched a digital currency known as the “petro” to try to enable the national oil company of Venezuela, *Petróleos de Venezuela, S.A.*, to engage in transactions that were not denominated in U.S. Dollars. OFAC’s FAQ 564 confirmed that the phrases “digital currency, digital coin, or digital token” referenced in the Executive Order include the petro and petro-gold.[25]

Concluding Thoughts

Through issuing a series of FAQs, OFAC has begun to stake out its position on certain compliance obligations for digital currency transactions as well as OFAC sanctions for those who use digital currency for illicit transactions. However, key questions still remain around the scope and application of such obligations. For example, it is unclear how broadly OFAC will apply its definitions of “virtual currency” and “digital currency” to various cryptoassets that are fundamentally unlike major cryptocurrencies such as bitcoin. Also, under FAQ 562, it is unclear to what extent an entity is “associated” with an SDN and when parties are obligated to block questionable digital currencies and file reports with OFAC. Further, it is unclear under FAQ 560 as to what specifically should be included within a “tailored, risk-based compliance program, which include[s] . . . sanctions list screening and other appropriate measures.”

The FAQs also fail to address significant practical concerns. For example: To what extent do parties have the technical abilities to block incoming transactions? Are there exceptions for companies that are hacked and subsequently forced to pay ransom to an address on the SDN List? How will OFAC address the use of private blockchain addresses? These uncertainties highlight the complexity and evolving nature of digital currency transactions and blockchain technology and, perhaps more importantly, they suggest the need for additional guidance from OFAC.

[1] *See* Statements & Remarks, U.S. Department of the Treasury, U.S. Department of the Treasury Under Secretary Sigal Mandelker Speech before the Securities Industry and Financial Markets Association Anti-Money Laundering & Financial Crimes Conference (Feb. 13, 2018), <https://home.treasury.gov/news/press-release/sm0286>.

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[2] Office of Foreign Assets Control, Frequently Asked Questions, Questions 559-63, 594, *available at* https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_compliance.aspx [hereinafter “OFAC FAQ”].

[3] The term “individual,” as used by OFAC in its FAQs, generally encompasses persons, parties, corporations, and other entities subject to OFAC jurisdiction. *See* OFAC FAQ, Question 560.

[4] *Id.*

[5] Exec. Order No. 13827, 83 Fed. Reg. 12469 (Mar. 21, 2018).

[6] OFAC FAQ, Question 559.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] OFAC FAQ, Question 560.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] OFAC FAQ, Question 561.

[16] *Id.* (emphasis added).

[17] OFAC FAQ, Question 562.

[18] *Id.* (emphasis added).

[19] OFAC FAQ, Question 563.

[20] OFAC FAQ, Question 594.

[21] *Id.*

[22] Exec. Order No. 13827, 83 Fed. Reg. 12469 (Mar. 21, 2018).

[23] *Id.*

[24] *Id.*

[25] Office of Foreign Assets Control, Frequently Asked Questions, Question 564, available at https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#venezuela..



The following Gibson Dunn lawyers assisted in preparing this client update: Judith Lee and Jeffrey Steiner.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the above developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders and members of the firm's International Trade or Financial Institutions practice groups:

International Trade Group - United States:

Judith Alison Lee - Co-Chair, International Trade Practice, Washington, D.C. (+1 202-887-3591, jalee@gibsondunn.com)

Ronald Kirk - Co-Chair, International Trade Practice, Dallas (+1 214-698-3295, rkirk@gibsondunn.com)

Jose W. Fernandez - New York (+1 212-351-2376, jfernandez@gibsondunn.com)

Marcellus A. McRae - Los Angeles (+1 213-229-7675, mmcrae@gibsondunn.com)

Adam M. Smith - Washington, D.C. (+1 202-887-3547, asmith@gibsondunn.com)

Christopher T. Timura - Washington, D.C. (+1 202-887-3690, ctimura@gibsondunn.com)

Ben K. Belair - Washington, D.C. (+1 202-887-3743, bbelair@gibsondunn.com)

Courtney M. Brown - Washington, D.C. (+1 202-955-8685, cmbrown@gibsondunn.com)

Laura R. Cole - Washington, D.C. (+1 202-887-3787, lcole@gibsondunn.com)

Stephanie L. Connor - Washington, D.C. (+1 202-955-8586, sconnor@gibsondunn.com)

Helen L. Galloway - Los Angeles (+1 213-229-7342, hgalloway@gibsondunn.com)

William Hart - Washington, D.C. (+1 202-887-3706, whart@gibsondunn.com)

Henry C. Phillips - Washington, D.C. (+1 202-955-8535, hphillips@gibsondunn.com)

R.L. Pratt - Washington, D.C. (+1 202-887-3785, rpratt@gibsondunn.com)

Scott R. Toussaint - Palo Alto (+1 650-849-5320, stoussaint@gibsondunn.com)

International Trade Group - Europe:

Peter Alexiadis - Brussels (+32 2 554 72 00, palexiadis@gibsondunn.com)

Attila Borsos - Brussels (+32 2 554 72 10, aborsos@gibsondunn.com)

Patrick Doris - London (+44 (0)207 071 4276, pdoris@gibsondunn.com)

Penny Madden - London (+44 (0)20 7071 4226, pmadden@gibsondunn.com)

Benno Schwarz - Munich (+49 89 189 33 110, bschwarz@gibsondunn.com)

Michael Walther - Munich (+49 89 189 33-180, mwalther@gibsondunn.com)

Richard W. Roeder - Munich (+49 89 189 33-160, rroeder@gibsondunn.com)

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Financial Institutions Group:

Arthur S. Long - New York (+1 212-351-2426, along@gibsondunn.com)

Jeffrey L. Steiner - Washington, D.C. (+1 202-887-3632, jsteiner@gibsondunn.com)

Carl E. Kennedy - New York (+1 212-351-3951, ckennedy@gibsondunn.com)

James O. Springer - Washington, D.C. (+1 202-887-3516, jspringer@gibsondunn.com)

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