

RECOMMENDATIONS REGARDING OFAC AND RELATED SANCTIONS ISSUES

BACKGROUND

The Subgroup has considered several related issues under the common topic of the effect of government sanctions on ICANN’s operations and accountability. In particular, these issue have been raised in relation to U.S. government sanctions administered by the Office of Foreign Asset Control (OFAC).

OFAC is an office of the U.S. Treasury that administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted individuals and entities.¹ Where a nation is subject to sanctions, the sanctions may extend to its citizens, regardless of their personal character or activities. OFAC has been delegated responsibility by the Secretary of the Treasury for developing, promulgating, and administering U.S. sanctions programs. Many of these sanctions are based on United Nations and other international mandates; therefore, they are multilateral in scope, and involve close cooperation with allied governments. Other sanctions are specific to the national security interests of the United States.

OFAC acts under executive and legislative authority to impose controls on transactions and to freeze assets under U.S. jurisdiction.

OFAC also enforces apparent violations of its regulations, based on its Economic Sanctions Enforcement Guidelines.² Enforcement may result in civil penalties up to \$250,000 per violation or twice the amount of a transaction, whichever is greater.

Persons Subject to Compliance Obligations

According to the OFAC website, “U.S. persons must comply with OFAC regulations, including all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, all U.S. incorporated entities and their foreign branches. In the cases of certain programs, foreign subsidiaries owned or controlled by U.S. companies also must comply. Certain programs also require foreign persons in possession of U.S.-origin goods to comply.”³

All U.S. persons, including legal entities, must comply with OFAC’s regulations. The laws and OFAC-issued regulations apply not only to U.S. entities and their domestic affiliates, but also to their foreign branches, and often overseas offices and subsidiaries.

Covered Persons

OFAC maintains a list of specially designated nationals (SDNs) that U.S. persons cannot transact with. These are individuals who are singled out for sanctions. However, where a sanction applies to a country,

¹ Target individuals and entities may include foreign countries, regimes, terrorists, international narcotics traffickers and those engaged in certain activities such as the proliferation of weapons of mass destruction or transnational organized crime.

² See OFAC Final Rule, "Economic Sanctions Enforcement Guidelines," November 9, 2009. The Guidelines outline various factors used by OFAC in taking enforcement decisions, which may include how compliance programs within an institution are working to comply with OFAC regulations. https://www.treasury.gov/resource-center/sanctions/Documents/fr74_57593.pdf

³ https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic

Comment [1]: I believe this is incomplete. As I read the implementing regulations OFAC restrictions apply to all "persons or entities within the United States." My understanding is that foreign entities with US based branches are also potentially covered.

Comment [2]: As noted on last week's call, it is probably cleaner to use a quote from the OFAC website instead of preparing our own summary on this point. This change has been made.

citizens of that country who are not SDNs often cannot freely transact with U.S. persons, without regard to their personal character or activities.

Prohibited Transactions

Under OFAC, certain transactions may be prohibited. Such transactions cannot be consummated unless there is either a specific license or a general license permitting the transaction.

OFAC Licenses

OFAC has the authority, through a licensing process, to permit certain transactions that would otherwise be prohibited under its regulations. OFAC can issue a license to engage in an otherwise prohibited transaction when it determines that the transaction does not undermine the U.S. policy objectives of the particular sanctions program, or is otherwise justified by U.S. national security or foreign policy objectives. OFAC can also promulgate general licenses, which authorize categories of transactions, without the need for case-by-case authorization from OFAC. General licenses are actually regulations, which must be adopted and then can be found in the regulations for each sanctions program⁴ and may be accessed from OFAC's Web site. The regulation covering a general license will set forth the relevant criteria of the general license, including the classes of person and category or categories of transactions covered by the general license.

Specific licenses are applied for by one of the parties to the transaction and issued on a case-by-case basis. A specific license is a written document issued by OFAC authorizing a particular transaction or set of transactions generally limited to a specified time period. To receive a specific license, the person or entity who would like to undertake the transaction must submit an application to OFAC. If the transaction conforms to OFAC's internal licensing policies and U.S. foreign policy objectives, the license generally is issued.

ISSUES PRESENTED

- Generally
- ICANN contractual language in RAA relating to OFAC licenses
- Applicability of OFAC to Non-US Registrars
- Approval of gTLD registries
- Application of OFAC restrictions by Non-US Registrars
- General LicensesApproval of gTLD registries
- Cancellation by some registrars of domain name registrations owned by registrants in countries subject to OFAC

Generally

There is a tension between the goal of administering the Internet as a neutral global resource and the imposition of sanctions by the U.S. on other countries.⁵ Sanctions laws and policies, when applied to

⁴ 31 CFR, Chapter V (Regulations). http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=db8ee7ba44af7af5a01907d23d67dae4&c=ecfr&tpl=/ecfrbrowse/Title31/31cfrv3_02.tpl#500

⁵ The Subgroup recognizes that many countries impose sanctions regimes and cooperate in the creation and enforcement of sanctions. As a practical matter, the effect of sanctions other than US sanctions has not been a

domain name registrars and registries, can hamper access to the domain name system by innocent users and businesses, simply based on their nationality. For these persons to transact with ICANN, they or ICANN will need to apply for an OFAC license.

ICANN contractual language in RAA relating to OFAC licenses

Currently, the Registrar Accreditation Agreement states that “ICANN is under no obligation to seek [a license for a transaction with a non-SDN resident of a sanctioned country] and, in any given case, OFAC could decide not to issue a requested license.”

This is not an encouraging policy for potential registrars from sanctioned countries, even though ICANN mentions that it has sought such licenses in the past. If ICANN chose to exercise its discretion and not seek a license in any given case, this would have the effect of hampering ICANN’s ability to provide services, inconsistent with the spirit if not the letter of ICANN’s Mission. ICANN likely could not be held accountable for this decision under the current set-up, because the contractual language gives ICANN unfettered discretion to decline to seek a license, without any indication of the criteria ICANN would use to make that determination.

Recommendation

Currently, the RAA reads as follows:

” 4. Application Process.

Applicant acknowledges that ICANN must comply with all U.S. laws, rules, and regulations. One such set of regulations is the economic and trade sanctions program administered by the Office of Foreign Assets Control (“OFAC”) of the U.S. Department of the Treasury. These sanctions have been imposed on certain countries, as well as individuals and entities that appear on OFAC’s List of Specially Designated Nationals and Blocked Persons (the “SDN List”). ICANN is prohibited from providing most goods or services to residents of sanctioned countries or their governmental entities or to SDNs without an applicable U.S. government authorization or exemption. ICANN generally will not seek a license to provide goods or services to an individual or entity on the SDN List. In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs, but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. **However, Applicant acknowledges that ICANN is under no obligations to seek such licenses and, in any given case, OFAC could decide not to issue a requested license.**” [Emphasis Added]

The last sentence should be amended to require ICANN to apply for and use best efforts to secure an OFAC license if the other party is otherwise qualified to be a registrar, unless ICANN makes a determination based on well-understood criteria that it is ~~not~~ inappropriate for ICANN to seek such a license. ICANN and the community would need to develop these criteria and determine how they are applied, how the decision whether or not to apply is communicated, and the options for the potential registrar if ICANN decides not to apply. In line with that, the Subgroup recommends that such criteria be developed, and that a potential registrar in such a situation has the opportunity to escalate this decision to the Board in order to seek a reversal of the determination. ICANN should also be instructed

concern for ICANN operations. Therefore, this report focuses on concerns raised by US sanctions. However, the concerns and recommendations in this report could be considered and applied in the context of other jurisdictions’ sanctions regimes if there are effects from those regimes.

to be helpful and transparent with regard to the process of deciding to seek a license and the licensing process itself, including ongoing communication with the potential registrar.

Applicability of OFAC to Non-US Registrars

- ~~Application of OFAC restrictions by Non-US Registrars~~
- ~~Cancellation by some registrars of domain name registrations owned by registrants in countries subject to OFAC~~

Approval of gTLD registries

In the 2012 round of the New gTLD Program, it proved to be difficult for residents from countries subject to the US sanctions to file and make their way through the application process. The AGB (Applicant Guidebook) states, in language highly reminiscent of the RAA: “In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs (specially designated nationals) but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. In any given case, however, OFAC could decide not to issue a requested license.”⁶

It is the Subgroup’s understanding that new gTLD applicants from sanctioned countries who are not on the SDNs list found that the process for requesting that ICANN apply for an OFAC license is not transparent, and that response times for ICANN replies felt quite lengthy. In particular, ICANN apparently did not provide any indication that it had applied for an OFAC license. Furthermore the process is quite lengthy, even if ICANN is proceeding with speed. As a result, applicants may have felt they were in limbo.

Recommendation

ICANN should commit to applying for and using best efforts to secure an OFAC license for all such applicants, if the applicant is otherwise qualified, unless ICANN makes a determination based on well-understood criteria that it is inappropriate for ICANN to seek such a license, unless it determines not to do so based on well-publicized criteria. ICANN should commit to apply as promptly as possible, and to be informative and transparent throughout the process. As with registrars, the Subgroup recommends that such criteria be developed, and that an applicant in such a situation has the opportunity to escalate this decision to the Board in order to seek a reversal of the determination. ICANN should also be instructed to be helpful and transparent with regard to the process of deciding to seek a license and the licensing process itself, including ongoing communication with the applicant.

Comment [3]: Changes made to harmonize the language of this recommendation with the language of the first recommendation.

Application of OFAC limitations by non-US registrars

It appears that some registrars might be following the rules of OFAC sanctions even when they are not based in the U.S and it would appear they are not required to do so. The Subgroup was provided examples of two non-US registrars with registrant agreements that cited OFAC regulations. One was Gesloten.cw,⁷ a registrar based in Curacao (Netherlands Antilles), which stated ds in its registrant

⁶ New gTLD Applicant Guidebook, 1-25

⁷ http://www.gesloten.cw/support/legal.php?requestfor=registraragreement&from=agree_page.

agreement that it follows OFAC regulations in its legal agreement with the registrants.⁸ Similarly, Olipso,⁹ an ~~ICANN accredited~~ registrar based in Turkey (Atak Domain Hosting), ~~also states~~ in its registrant agreement that it prohibits persons located in sanctioned countries from using its services due to OFAC.

It should be noted that both of these registrars seem to have been using a registrant agreement (i.e., the same agreement) that was “cut and pasted” from one or more third party sources, and was not created for either of these registrars.¹⁰ Thus, it appeared is possible that these registrars were not aware that these terms were in the registrant agreement and do not in fact follow OFAC regulations, even though they say registrant agreements indicated that they do.

Notably, one of the two registrars (Gesloten) has since revised its registrant agreement significantly, and removed any mention of OFAC restrictions. This could indicate that the OFAC restrictions were included in these registrant agreements by mistake, or that the registrar reviewed its policies and determined that OFAC restrictions did not apply it. It is also possible that the other registrar (Ollipso) is, in fact, subject to OFAC compliance for reasons not known to the Subgroup.

More generally, it is also possible that some non-US based registrars may apply OFAC restrictions even when they are not obliged to do so, merely based on an assumption that because of their contract with ICANN they have to apply OFAC sanctions. The Subgroup is aware of claims that this has happened; however, we have not yet seen any supporting data.

~~While e~~Each registrar must make their own legal determination of how OFAC restrictions apply. ICANN could provide a clarification to registrars that registrars do not have to follow OFAC sanctions solely on the basis of the existence of their contract with ICANN. ~~Of course, Since ICANN cannot is not in the business of providing~~ legal advice to registrars, so this would need to be accompanied by a statement that this is not legal advice, and recommendation that each registrar should seek legal counsel regarding whether OFAC (or non-U.S.) sanctions apply to their business, on the matter to avoid liability.

~~{DO WE HAVE MORE CONCRETE OR PROVEN EXAMPLES OF THIS ISSUE?}~~

Nonetheless, if registrars that are not based in the U.S. and do not have OFAC compliance obligations are nonetheless prohibiting registrants in sanctioned countries from using their services based on a mistaken belief that OFAC sanctions apply, that raises significant concerns with the availability of Internet resources on a global and neutral basis. Although it is plausible that this has occurred or could occur in the future, the Subgroup has no clear evidence that this has occurred. In any event, the solution lies with the relevant registrars, who should clarify whether they need to comply with OFAC sanctions.

⁸ (17) “Prohibited Persons (Countries, Entities, and Individuals)” refers to certain sanctioned countries (each a “Sanctioned Country”) and certain individuals, organizations or entities, including without limitation, certain “Specially Designated Nationals” (“SDN”) as listed by the government of the United States of America through the Office of Foreign Assets Control (“OFAC”), with whom all or certain commercial activities are prohibited. If you are located in a Sanctioned Country or your details match with an SDN entry, you are prohibited from registering or signing up with, subscribing to, or *using any service of Parent.*”

⁹ <https://www.olipso.com/en/domain-registration-agreement>.

¹⁰ For example, bBoth agreements use d “Mumbai time” as a standard for certain matters even though neither is in India, located in that time zone, or has any particular contacts with India. This has now been removed from the Gesloten.cw registrant agreement.

Comment [4]: While the language is inapt, vel non, shouldn't we have an indication from someone somewhere that this is an actual problem before making an issue out of it?

Comment [5]: It would help if someone would check if these two registrars enforce this provision (or even know it's there). It would also help if there are other examples, particularly where actions have been taken (vs. what T&Cs say)

Recommendation

ICANN is not a party to ~~the~~ registrant agreements, so there is nothing ICANN can do directly. Furthermore, ICANN cannot provide legal advice to registrars. However, ICANN could bring awareness to this issue with registrars, and could ~~consider~~seek various tools to ~~remind~~encourage registrars to accurately reflect the applicable law under which they operate.

General Licenses

In contrast to specific licenses, a general license covers classes of persons and types of transactions. ICANN could consider seeking one or more general licenses to cover particular classes of persons and types of transactions that are an integral part of ICANN's role in managing the DNS and in contracting with third parties to provide Internet resources. Broadly speaking, these licenses could apply to registries and registrars entering into RAs and RAAs, respectively, and to other transactions that may be core functions for ICANN (e.g., Privacy/Proxy Accreditation, support for ICANN funded travelers, etc.).

Creation of a general license involves a regulatory process, which is in the purview of the executive branch (more specifically, the U.S. Treasury, of which OFAC is a part). Indeed, 31 CFR § 595.305 defines a general license as "any license or authorization the terms of which are set forth in this part." In other words, the general license is a part of the OFAC regulations.

As such, one does not merely "apply" for a general license. One must determine the desired parameters of the the general license(s) and work with the U.S. Department of the Treasury and provide appropriate reasoning, support, etc. so that the Treasury undertakes the regulatory effort to bring the general license into being.

The Subgroup believes that one or more general licenses could make future transactions with "covered persons" easier to consummate. Since ~~that~~However, this is a significant undertaking in terms of time and expense. ~~As such,~~ it would be premature to simply recommend that ICANN must pursue a general license. Rather, it would be prudent to first advise ICANN to ~~Rather, the Subgroup recommends that ICANN make it a priority~~ to study the costs, benefits, timeline and specifics of seeking and securing one or more general licenses for DNS-related transactions. ICANN would also need to determine the specific classes of persons and types of transactions that would be covered by the license. Depending on the outcome, ICANN could then begin the process of seeking these general licenses.

Recommendation

ICANN should take steps to pursue one or more OFAC "general licenses" with the U.S. Department of Treasury in connection with DNS-related transactions. Initially, ICANN should make it a priority to study the costs, benefits, timeline and specifics (including likelihood of success) of seeking and securing one or more general licenses for DNS-related transactions. ICANN should then pursue one or more OFAC general licenses, unless the results of the study demonstrate that it would be inappropriate for ICANN to pursue these licenses.

Domain name registrants in countries subject to U.S. sanctions have been struggling with the arbitrary cancellation of their domain names by some registrars." Some registrars (both American and non-American) might stop providing services to countries sanctioned under the Office of Foreign Affairs Control (OFAC) regime. Sometimes they do this without prior notice"

For some, if not all, countries which are under OFAC sanction “the general license that authorizes export of certain services and software incident to Internet-Based communications excludes domain name registration services”

At first glance, this might not appear to be a major problem. Domain name registrants usually have the ability to move to another registrar, and the problem only exists for American registrars. The interesting question, however, is whether registrars that are based in another country are also subject to OFAC because of their contractual relationship with ICANN.

Comment [6]: The sentence may need further clarification of "subsidiaries in page 1 of background section". Are registrars classified as part of ICANN subsidiaries, bearing in mind the inter-relationship of DNS systems?

Comment [7]: Registrars are definitely not ICANN subsidiaries.

Comment [8]: Thank you, Greg. The ICANN customers and partners are the Registry Operators and Registrars. The majority of these customers are based outside US. The maintainer of domain names is ICANN, for these customers (Registry Operator and Registrars), and the services are iterative and recursive by design. Question of whether the customers are subject to OFAC could be partial or total?

Comment [9]: This text was actually meant to be deleted, as I believe these points were dealt with elsewhere in the text. I moved them to the page after the end of the document and then forgot to delete them.