

July 21, 2019

Request for Comments  
(Amendments to OFAC's Reporting, Procedures and Penalties Regulations)  
Office of Foreign Assets Control  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue NW  
Freedman's Bank Building  
Washington, DC 20220

**Re: Amendment's to OFAC's Reporting, Procedures and Penalties Regulations,  
Docket Number OFAC-2019-0003**

To Whom it May Concern:

Pursuant to the Interim Final Rule issued by the Department of the Treasury's Office of Foreign Assets Control ("OFAC") and published in the *Federal Register* at 84 Fed. Reg. 29055 (June 21, 2019), the Electronic Transactions Association ("ETA") submits the following comments regarding the amendments to OFAC's Reporting, Procedures and Penalties Regulations.

ETA strongly supports the U.S. Government's efforts to combat financial crimes and safeguard U.S. national security interests. Our members have invested and continue to re-invest resources, time, and attention to advance these objectives and to comply with OFAC's regulatory requirements. ETA also strongly supports OFAC's efforts to clarify and formalize its requirements concerning blocked and rejected property reports. We believe both OFAC and industry benefit from this effort. However, for the reasons set out below, ETA respectfully urges OFAC to include in its Final Rule further clarifying language that would minimize certain redundancies and unnecessary burdens that the Interim Final Rule places on ETA members without adversely impacting the purposes advanced by the Interim Final Rule. If OFAC decides not to update the Interim Final Rule, ETA respectfully requests that OFAC postpone the effective date of the Interim Final Rule until January 1, 2021, in order to minimize the burden on respondents to adjust to the changes. Additionally, postponing the effective date until January 1, 2021 would allow for OFAC to adjust internal processes to account for the significant uptick in volume created by this rule.

**I. Background on ETA and the Payment Industry**

ETA is the leading trade association for the payments industry, representing over 500 payments and technology companies involved in developing and providing electronic transaction processing products and services.<sup>1</sup> ETA's members include financial institutions, mobile payment

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<sup>1</sup> See full membership list here: <https://www.electran.org/membership/eta-member-companies/>.

service providers, mobile wallet providers, and non-bank online lenders that make commercial loans, primarily to small businesses. ETA member companies are creating innovative offerings in financial services, revolutionizing the way commerce is conducted with safe, convenient, and rewarding payment solutions and lending alternatives. Our members make commerce possible by processing trillions of dollars in purchases in the U.S. each year and deploying payments innovations to merchants and consumers.<sup>2</sup> In 2017, for example, payments generated nearly \$2 trillion in global revenue.<sup>3</sup>

## II. Introduction

OFAC requested comments on: (1) whether the new requirements for the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility, (2) ways to enhance the quality, utility, and clarity of the additional information required; and (3) ways to minimize the burden on respondents of the new requirements for the collection of information. For the reasons set forth below, we believe that certain refinements to the Interim Final Rule would increase the utility of blocked and rejected transactions reports.

## III. OFAC Should Further Clarify the Reporting Requirement for Rejected Transactions and Provide for an Exclusion for Certain Attempted, but Unfulfilled Payment Card Transactions

The Interim Final Rule significantly expands who must file a rejected transactions report and under what circumstances. In particular, the Interim Final Rule revises regulations on reporting rejected transactions such that they now apply broadly to *all* rejected transactions (rather than just to rejected funds transfers under the pre-existing rule) and to *all* U.S. persons (not just to previously covered financial institutions).<sup>4</sup> OFAC has also described “transactions” to include transactions involving “wire transfers, trade finance, securities, checks, foreign exchange, and goods or services,” significantly expanding the types of activities that are reportable.

This broad definition of “transactions,” coupled with the absence of guidance on the scope of activities encompassed by the term “rejected,” creates unwanted ambiguity that appears likely to lead to inconsistent or incomplete reporting. Without further clarity from OFAC, the plain

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<sup>2</sup> Electronic Transactions Association, *ETA Develops Guidance to Payment Facilitators with Voluntary Industry Best Practices* (Apr. 19, 2016), <https://www.electran.org/eta-develops-guidance-to-payment-facilitators-with-voluntary-industry-best-practices/>.

<sup>3</sup> Sukriti Bansal, et al., *Global Payments 2018: A Dynamic Industry Continues to Break New Ground*, McKinsey & Company (October 2018), <https://www.mckinsey.com/~media/McKinsey/Industries/Financial%20Services/Our%20Insights/Global%20payments%20Expansive%20growth%20targeted%20opportunities/Global-payments-map-2018.ashx>.

<sup>4</sup> See 31 C.F.R. § 501.604.

language of the Interim Final Rule would seem to include even informal communications or compliance decisions not to pursue transactions or other business opportunities in particular markets, as well as certain hard controls disabling certain individuals or entities from transacting with member companies. For example, the Interim Final Rule suggests that each of the following constitutes a rejected transaction that is reportable to OFAC: (i) a U.S. person's legal team determining that a general license does not authorize the U.S. person's pursuit of an opportunity presented by a commercial partner in the EU seeking to export medicines to Iran, (ii) a U.S. person's decision not to open a business account for a global travel services provider focused on vacation packages, because Cuba is one of the destinations that would be supported by the account, and (iii) a U.S. person's compliance department's negative response to a request from an internal business unit's query regarding supporting a commercial remittance to Iran, and (iv) a U.S. person forbidding a user from the Crimea Region of the Ukraine from accessing its website via use of IP blockers. In several of these scenarios, the U.S. person may not even have the opportunity to perform a legal analysis to determine whether supporting the particular transaction would be an actual violation of U.S. sanctions laws.

The Interim Final Rule revises the regulations on reporting rejected transactions such that OFAC will receive a significantly higher volume of rejected transactions reports, the vast majority of which are likely to have little to no practical utility on improving policies, but could open up OFAC to more burdensome FOIA requests against businesses proprietary information. In an effort to ensure compliance, companies will likely over-report their compliance decisions. As a result, OFAC will be inundated with information on unrealized activities that do little to enhance OFAC's data collection and analytical functions. For example, rejected transactions reports filed for the transactions described in the paragraph above would provide OFAC insight into mere consideration by parties forego a risk-based business decision to engage in transactions at risk of being prohibited by U.S. sanctions laws. Instead, these reports would simply detail the myriad, and very ordinary, day-to-day compliance determinations made by ETA members and other U.S. persons. Due to its vagueness, the rule also appears likely to result in inconsistent reporting practices across the industry, further lowering the utility of the reporting.

Moreover, if the rejected transaction reporting requirement under the Interim Final Rule remains applicable to all U.S. persons rather than just financial institutions, it will impose new, difficult, and unnecessary burdens on non-financial institutions. In many cases, the lack of a bright-line rule for U.S. persons to assess the point at which a "transaction" materializes, and, separately, the point at which it is rejected, will be unworkable for non-financial institutions that make complex judgements about whether and under what conditions to proceed with a particular business opportunity or specific "transaction" that may or may not have actually commenced. In contrast, financial institutions—as the gatekeepers to accounts that may be credited or debited to give effect to a transaction—are best positioned to approve or "reject" a transaction that has

necessarily been initiated and requires their approval to be completed or perfected. ETA respectfully requests that OFAC evaluate the nature and value of rejected transaction reports originating from non-financial institutions and whether such reports are, in fact, “necessary for the proper performance of the agency.” ETA expects that rejected property reports from financial institutions, but not other U.S. persons, are sufficient to provide meaningful, actionable data to OFAC in support of its important national security mandate.

Cumulatively, these changes result in substantial new compliance and regulatory obligations for hundreds of ETA members, and thousands of other U.S. businesses. Surprised by this new and drastic change, companies are working diligently to determine what new compliance policies and procedures they must implement to comply. However, ETA members, and all U.S. businesses, will struggle to right-size their compliance in response to the Interim Final Rule, including developing new technologies, without further clarification from OFAC.

Under Section 501.604(a)(1), ETA recommends adding an exclusion for attempted, but unfulfilled, payment card transactions initiated by a card issued by a bank in an embargoed country that has been terminated by the applicable payment card network. These attempted transactions are illusory because the card is not capable of working on the applicable payment card network. However, the reporting burden for a payment card network may be substantial. For example, when countrywide sanctions were promulgated against Syria and U.S. payment card networks terminated participation in their networks of all Syrian banks, there undoubtedly were thousands of cardholders of those banks who attempted thereafter to use their cards even though the cards were unusable.

#### **IV. OFAC Should Amend Requirements for Blocked Property Reports in Ways that Enhance the Quality, Utility, and Clarity of the information to be Collected, While Also Minimizing the Burden of Information Collection on Respondents**

OFAC should also clarify and narrow, as appropriate, the notification requirement for reporting blocked property. Expanding the scope of the reporting requirement to blocked property that persons “have had” such property under their possession or control, without establishing a temporal limit, will have the effect of imposing duplicative requirements, with little practical benefit to OFAC. Indeed, the Interim Final Rule, if maintained, may undermine OFAC’s efficiency and efficacy by overburdening it with duplicative information.

The Interim Final Rule requires that U.S. persons “who have or have had” blocked property in their possession or control file blocked property reports. In contrast, the pre-existing rule did not apply to persons who “have had” blocked property under their prior control.<sup>5</sup> A plain reading

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<sup>5</sup> 31 C.F.R. § 501.603(a).

of the Interim Final Rule suggests that persons who *had* in their possession or control blocked property at any point in the past must report such property even if it has been years since such occurrence or the property's subsequent release. Accordingly, if the Interim Final Rule imposes an affirmative obligation to make blocked property reports on parties that will often be poorly positioned—relative to banks and other financial institutions that actually have blocked property in their possession or control—to provide required information in those reports. Indeed, it is only those persons that “held as of June 30 of the current year” blocked property that are required to file annual reports on blocked property.<sup>6</sup> But requiring payment processors that may “have had” blocked property under their control, even for an instant, to file the same blocked property reports as banks and other financial institutions could have the undesirable effect of burdening compliance resources employed by the payment processor's transaction monitoring efforts, which detects and deters improper activity on their networks and positively contributes to the blocked property reporting requirements of the banks and other financial institutions.

## **V. OFAC Should Amend The 10 Business Day Rejected Transaction Reporting Obligation to 45 Business Days**

The 10-business day period in Section 501.604(c) within which a U.S. person must file a rejected transaction report should be extended for payment card network transactions. Payment card networks process hundreds of million transactions each day and employ various screens to reject attempted transactions, including screens based on country codes for embargoed countries. The interim final rule effectively imposes a new requirement on payment card networks to review multitudes of system-rejected transactions to figure out which of these transactions were rejected as potential sanctions violations as distinct from transactions that were false positives (e.g., a transaction rejected due to a miscoding error by bank participant in a payment card network) or were rejected for non-sanctions reasons. This process will be manual and time-consuming. We request that the reporting obligation for such rejected transactions be extended to 45 business days.

## **VI. Conclusion**

To remedy the issues identified, we recommend the following: (1) OFAC should include in the Final Rule a new definition of “reject” so that the term applies only to those activities—like a rejected funds transfer under the pre-existing rule—that have advanced beyond a contemplated transaction to some material and identifiable threshold of actuality;<sup>7</sup> and (2) that OFAC publish an

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<sup>6</sup> 31 C.F.R. § 501.603(b)(2)(i).

<sup>7</sup> Indeed, OFAC may be able to draw from the Interim's Final Rule as a potential starting point. Specifically, the Interim Final Rule requires the submission of “payment or transfer instructions, check, letter of credit, accompanying bill of lading, invoice, or any other relevant documentation received in connection with the transaction.” See 31 C.F.R. § 501.604(b)(7). Such documents are often created only once reaches an identifiable threshold of actuality.

exhaustive list of the specific “transactions” relating to goods or services that necessarily exclude the types of ordinary, day-to-day compliance decisions identified above. Indeed, OFAC may be able to draw from the Interim Final Rule to better define the activities that trigger the reporting requirement. Specifically, the Interim Final Rule requires the submission of “payment or transfer instructions, check, letter of credit, accompanying bill of lading, invoice, or any other relevant documentation received in connection with the transaction.”<sup>8</sup> Such documents are often created only at or beyond an identifiable threshold of transactional activity. Accordingly, the absence of such documents should indicate that a “transaction” does not yet exist or that there is no “transaction” to reject. In addition, we recommend that OFAC limit the requirement for rejected property reports to financial institutions rather than apply it to all U.S. persons. Indeed, if OFAC does not define the term “reject” nor clarify the definition of “transactions” then it becomes even more important that OFAC revert to the pre-existing applicability of this rule (i.e., to financial institutions only). Another option would be for OFAC to indicate that parties are required to file Rejected Transactions reports only where such parties have ‘actual knowledge’ that a processing or engaging in the transaction would violate U.S. sanctions laws.

ETA recommends adding an exclusion, under Section 501.604(a)(1), for attempted, but unfulfilled, payment card transactions initiated by a card issued by a bank in an embargoed country that has been terminated by the applicable payment card network. These attempted transactions are illusory because the card is not capable of working on the applicable payment card network. However, the reporting burden for a payment card network may be substantial.

We urge OFAC to maintain the pre-existing obligation to report blocked property only for persons who “have in their possession or control” blocked property. If OFAC does not reverse the inclusion of this *post hoc* reporting requirement then the Final Rule could decrease the regulatory burden without sacrificing OFAC’s access to information by requiring that the party filing the blocked property report notify all persons participating in the transaction. The Interim Final Rule already requires that the blocked property report identify “any persons, including financial institutions, participating in the transaction and their respective locations.” Because the party filing the blocked property report must identify these persons already, OFAC could require that they either (i) send a copy of the blocked property report to other participants, or (ii) identify in the blocked property report an email address of each other participant so that OFAC can provide notice of its receipt of the blocked property report to those other participants.

We request that the reporting obligation for such rejected transactions be extended to 45 business days. The interim final rule effectively imposes a new requirement on payment card networks to review multitudes of system-rejected transactions to figure out which of these transactions were rejected as potential sanctions violations as distinct from transactions that were

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<sup>8</sup> 31 C.F.R. § 501.604(b)(7).

false positives or were rejected for non-sanctions reasons. This process will be manual and time-consuming. As such, an extension to 45 business days is appropriate.

If OFAC decides to make no changes to the Interim Final Rule, ETA respectfully requests that OFAC postpone the effective date of the Interim Final Rule until January 1, 2021. This will minimize the burden on respondents of the new requirements and enable U.S. persons to make the necessary investments to fully comply with the Interim Final Rule.

Finally, we welcome the opportunity to discuss with OFAC and with our members how to further clarify the scope of the reporting requirement for rejected transactions, as well as ways to enhance the quality, utility, and clarity of the information collected through such reports.

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We appreciate you taking the time to consider these important issues. If you have any questions or wish to discuss any issues, please contact me or ETA Senior Vice President, Scott Talbott at [Stalbott@electran.org](mailto:Stalbott@electran.org).

Respectfully submitted,



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