

Human Resources

REPORT

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Lead Report

Screening

Screening Against OFAC List of Terrorists, Drug Traffickers Is Potentially Problematic


In one of the many reverberations of 9/11, some employers are checking job candidates and employees against the Specially Designated Nationals List. The SDN List is a periodically updated compilation of some 6,000 people and entities--including terrorists and drug **traffickers**--that U.S. companies are not allowed to do business with, at the risk of potentially steep fines. Supporters say the list helps companies maintain workplace security, while helping the nation keep terrorists and drug cartels from plugging into the U.S. financial network. But critics call the list mostly irrelevant and say that false hits have led to discrimination against individuals with Latino-, Middle Eastern-, or Muslim-sounding names.

As more companies screen job applicants against the list--often known as the OFAC list for the federal agency that administers it, Treasury's Office of Foreign Assets Control--some civil rights advocates fear that people will be denied jobs because of cases of mistaken identity. For example, the fact that most individuals and groups on the list are foreign, with a large number of drug **traffickers** from South America and Mexico, has complicated life for more than a few U.S. citizens with Latino names, the list's critics contend.

Another piece of confusion surrounding the SDN List is that it is not technically mandatory for *anyone* to check it. Instead, businesses--or individuals, for that matter--are liable should they do business with a "person" (meaning individual or entity) on the list.

Increased Use as a Screening Tool

Required or not, until fairly recently, it was primarily the financial industry consulting the list, including home loan companies, car dealerships, and the like. They were often screening their customers.

"But from our point of view, a troubling development is that other industries are being encouraged to check it," Shirin Sinnar, a staff attorney at the Asian Law Caucus, told BNA. Sinnar authored a March report for the Lawyers Committee for Civil Rights of the San Francisco Bay Area, *The OFAC List: How a Treasury Department Terrorist Watchlist Ensnarers Everyday Consumers* (25 HRR 347, 4/2/07 ).

LCCR filed a Freedom of Information Act lawsuit against the Treasury Department May 16 to find out who has called OFAC, broken down by industry, and to get documents regarding companies' calls to the office's compliance hotline.

BNA asked OFAC for examples of questions human resources and payroll professionals have asked about parties on the list but was told such information is unavailable.

Sinnar told BNA she had not received calls from any HR specialists as a result of her report, or heard from people who have been denied jobs as a result of being mistaken for someone

on the list. "But as more and more companies are being encouraged to screen" candidates against the list, she said, the odds increase.

After repeated requests, BNA was unable to get a comment from the Equal Employment Opportunity Commission's Office of the Special Counsel on whether there is potential discrimination liability for employers that screen job candidates and employees against the OFAC list.

Incompleteness Is a Problem

A common complaint about the OFAC list is that key identifiers for cross-checking, such as dates and places of birth, often are missing. The office is "working hard" to fix that, said OFAC spokeswoman Molly Millerwise. The list is updated frequently, with more information being added as it is acquired, she said, including dates and places of birth, passport ID numbers, and addresses. She noted that while the chances of a "qualified hit"--actually identifying an applicant as someone on the list--are small, there have been legitimate hits and the payoffs are large.

Explaining the importance of keeping people on the list out of U.S. workplaces, Millerwise said that even a single transaction on the U.S. financial system gets a terrorist organization or drug cartel into the loop, where such a group can "dollarize" transactions--a much more convenient and safe way for bad actors to do business.

Millerwise added that, as she sees it, businesses consider the SDN list a "resource." She noted that it is used by many foreign companies. "What we're finding is banks and companies around the world are beginning to check against the OFAC list, even though they're under no legal obligation," Millerwise said.

Jason Morris, president and chief operating officer of employeescreenIQ, a background screening firm in Cleveland, said he always includes the homeland security aspect in screening his own job candidates and employees. It is just part of "securing the workforce," he said. Morris noted that the homeland security piece adds only about \$2 to a typical screening, which often includes a number of other lists, such as the FBI's Most Wanted and lists from the United Nations and Interpol. His company's trademarked Homeland Security Search, for example, includes 45 databases.

Some groups have said that purveyors of background screening software should be held liable in cases of errors on their end. Morris noted that if a consumer reporting agency made a mistake that led to discrimination against a candidate or employee, the onus would be on the CRA. "But anyone can be sued," he added.

Given the numerous screening organizations that sprang up after the Sept. 11 attacks, Morris advises companies looking for a background screener to choose a member of the National Association of Professional Background Screeners, a standard-setting group created in 2003 to address "inconsistencies" in the field. It would also be essential that the screening company be Fair Credit Reporting Act-compliant, and it is recommended that the screening company also have consumer educational materials on its Web site, said Morris, former co-chair of NAPBS.

He emphasized that a screening is only as good as the database the consumer reporting agency compiles. "There are criminal databases out there that actually hold only 5 percent of the criminal records in the country," he said. Doing background checks and doing background checks properly are two different things, he asserted, adding that the danger of missing the positives are worse than that of generating false negatives, which are disqualified in the case of the SDN list by comparing data points. If that does not eliminate the suspicion, Morris said he calls Treasury's OFAC, which generally has an extensive file on the true listee. It can take two minutes to two days to clarify who's who, Morris said.

How to Qualify a Hit

Is there really any danger of companies preemptively eliminating a potential employee because of what appears to be a match during an informal search of the OFAC list, with an employer perhaps thinking that following up with OFAC would be too costly or time-consuming?

"Absolutely," Morris said. "It's a terrible, terrible hiring practice," he said, comparing a sloppy OFAC list search to making rash decisions on candidates based on searches of social networking sites MySpace and FaceBook (25 HRR 173, 2/19/07 [link](#)).

OFAC considers it an employer's duty to follow up on any apparent hit to the SDN list, not only to avoid discriminating against an innocent person, but also to protect the country from a possible terrorist or drug trafficker getting into the system, Millerwise said.

Former Privacy Rights Clearinghouse (PRC) Research Director Tena Friery concurs that the discrimination potential would be similar to that of doing a Google search or checking out MySpace or FaceBook in screening candidates or employees, because the OFAC list is in the public domain.

There is nothing inherently illegal with consulting the list, she said, noting that the discrimination would come in not bothering to check further to make sure the person standing before you is not the person with the same name on the list. And an enormous part of the time, he or she would not be, nearly everyone agrees.

It is often more difficult for a small company to employ a background screening organization because of the expense of setting up the system, Morris said. What if a small employer that does not use a background screener finds a match for a name on the OFAC list? "Call Treasury and start asking questions," Morris said.

One thing the experts had no disagreement about: Companies screening employees against the OFAC list must make sure they do it right.

PRC Director Beth Givens would like to see a task force examine the FCRA vis-a-vis fair credit employment background checks and all the data sources that are now available to employers. Such a task force should include representatives from large employers, background screening companies, employee rights organizations, consumer rights organizations, the data vendors themselves, and the Federal Trade Commission, she said.

"What needs to be done is a thoughtful examination of the background check process and perhaps a white paper on what legislation is needed to level the playing field for job applicants," Givens said.

EmployeescreenIQ's Morris asserts that problems usually are not caused by the available data, but instead tend to be the result of a poorly done background screening. "If someone loses a job wrongly, it's because the screening wasn't done properly," he said.

The direct connection to information on qualifying a hit to the OFAC list is available at <http://www.treas.gov/offices/enforcement/ofac/faq/answer.shtml#hotline>. The SDNL and updates can be located at <http://www.treas.gov/offices/enforcement/ofac/sdn/index.shtml>. The Web site of the Lawyers Committee for Civil Rights of the San Francisco Bay Area is <http://www.lccr.com>, which has a link to its report on the OFAC list. Information on the National Association of Professional Background Screeners is available at <http://www.napbs.com>. The Privacy Rights Clearinghouse can be found at <http://www.privacyrights.org>.

Navigating the OFAC Site

The OFAC Web site can be a challenge to maneuver, but the agency gave BNA the following tips:

One path to following up on a possible match with a name on the SDN list is to start at <http://www.treasury.gov/ofac>. At that site, do not choose the "SDN" link--unless you are simply looking for the list itself or updates. Instead, under "Answers to Your Questions," at the top right of the page, choose "Contact Us." At this page, searchers should click on "When Should I Call the OFAC Hotline?" and they are almost home. At first glance, this will appear to pull up the wrong page, beginning with a somewhat interesting history of OFAC and U.S. economic sanctions, but the fifth question down the page is "When should I call OFAC's compliance 'hotline?'" The hotline takes messages 24-7, offers Spanish and English options, with a phone tree branching out to specific concerns. It rings a long time during off hours before picking up, but does eventually answer. The hotline number, which is somewhat buried, is 1-800-540-6322. The line gets 300 calls a day, according to the Treasury Department, which notes that many callers simply hang up if they do not get a live operator. But in fact, the best way to expedite answers is to leave a very specific message--including the caller's name, position, company, phone number, name of the person of concern, and specific identifiers, according to OFAC.

"We try to make this as quick and painless as possible," said Millerwise, noting that OFAC will also accept e-mail queries. ☐

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