

## OFAC Publishes New Economic Sanctions Enforcement Guidelines

Washington, DC  
September 10, 2008

On Monday, September 8, the Office of Foreign Assets Control (“OFAC”) of the U.S. Treasury Department published new guidance outlining its procedures for responding to apparent violations of the economic sanctions it administers (the “Guidelines”).<sup>1</sup> With limited exceptions, the Guidelines supersede previous OFAC enforcement guidance and apply to all pending and future enforcement matters.<sup>2</sup> While the Guidelines are effective immediately, OFAC is soliciting comments for their improvement, which are due by November 7, 2008.

### **I. Summary of Key Changes**

The Guidelines reflect several key changes from the approach adopted in prior OFAC enforcement guidelines, including:

- *A new list of general factors* that OFAC will consider in determining what type of enforcement action to take (e.g., cautionary letter, civil penalty, criminal referral) and establishing the amount of any civil monetary penalty (“CMP”).
- A distinction between “egregious” and “non-egregious” cases that will result in *significantly higher penalties in “egregious” cases*, while recognizing that the statutory maximum penalties “should be reserved for the most serious cases.”
- *A new process for determining the amount of a CMP* by which: (1) a base penalty will be calculated based on whether a violation is deemed egregious, any

<sup>1</sup> 73 Fed. Reg. 51933 (Sept. 8, 2008). Issuance of the Guidelines was prompted by legislation adopted last year that significantly increased the maximum penalty for most OFAC sanctions violations. *See* International Emergency Economic Powers Enhancement Act, Pub. Law 110-96 (Oct. 16, 2007).

<sup>2</sup> With very narrow exceptions, OFAC has withdrawn its previous guidance. *See* 68 Fed. Reg. 4422 (Jan. 29, 2003) (proposed guidelines); 71 Fed. Reg. 1971 (Jan. 12, 2006) (interim final guidelines for banking institutions). Accordingly, the Guidelines apply to both banking institutions and other entities.

self-disclosure by the violator, and the value of the transaction ; and (2) that base penalty will then be increased or decreased based on the applicability of certain “general factors” enumerated by OFAC.

- *Automatic reduction of base penalty amounts by 50 percent for violations that are voluntarily self-disclosed.*
- *Pre-penalty notices that will include the actual CMP proposed by OFAC based on the Guidelines, rather than the maximum possible penalty.*
- The general use of “*cautionary letters*” where there is insufficient evidence to conclude that a violation has occurred and “*findings of violation*” where a violation has occurred but a CMP is not considered appropriate.

## II. Summary of the Guidelines

The Guidelines generally set forth the actions OFAC may take in response to an apparent sanctions violation, the factors it considers in choosing a response, and the procedures by which it assesses a CMP.

### A. Possible OFAC Actions

OFAC may take *no action* regarding an apparent sanctions violation if it determines that there is insufficient evidence to conclude that a violation has occurred or it determines that a response is not otherwise warranted. However, if it believes the underlying conduct could lead to a violation in other circumstances or the subject of the inquiry has paid insufficient attention to compliance, it may issue a *cautionary letter*. While such a letter represents OFAC’s final enforcement response, it does not constitute a determination that any violation occurred.

Where OFAC determines a violation has occurred, it may issue (1) a *finding of a violation* that conveys its concerns about the violation and any compliance issues, or (2) impose a *CMP*. In both cases, the alleged violator is afforded an opportunity to respond. In addition to these measures, OFAC may make a *criminal referral* to appropriate law enforcement agencies or take *other administrative actions* (e.g., license suspension or revocation, or cease and desist orders).<sup>3</sup>

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<sup>3</sup> In addition to these actions, OFAC may request additional information regarding an apparent violation at any time from the subject of the investigation, and may impose monetary penalties for the failure to respond adequately to such requests. OFAC may also request information from a subject’s federal, state, and foreign regulators (e.g., through inter-agency memoranda of understanding or legal assistance treaties).

B. Factors in Determining the Enforcement Action and Penalty

The Guidelines enumerate ten “general factors” that OFAC will consider in determining the appropriate enforcement response to an apparent sanctions violation and, where a CMP is imposed, the penalty amount. Among the most salient factors are:

- *Willful or reckless violation of sanctions*, including, among other things, any concealment of misconduct (such as misleading regulators or other transaction parties), patterns of misconduct, prior notice of misconduct, and the knowledge of senior management.
- *Awareness of the conduct at issue*, including any actual knowledge of, or reason to know of, the misconduct, and at what level of management.
- *Harm to sanctions program objectives*, including any economic or other benefit conferred on a target of sanctions and whether the apparent violation likely would have been licensed by OFAC or was in support of humanitarian activity.
- *Individual circumstances and characteristics of the apparent violator*, including its commercial sophistication, size of operations and financial condition, total volume of transactions as compared to the size of violations, and sanctions violation history.
- *Existence and nature of the apparent violator’s OFAC compliance program* at the time of the apparent violation.
- *Remedial response upon learning of the apparent violation*, including reporting to the Board of Directors and Audit Committee, adoption of new and more effective internal controls and procedures, and any reviews to identify other potential violations.
- *Cooperation with OFAC*, including any voluntary self-disclosure, prompt provision of information, any research and disclosure of other apparent violations, and waiver of a statute of limitations where requested.

Other general factors that OFAC will consider include (1) the timing of the apparent violation in relation to the imposition of sanctions, (2) other enforcement actions underway for the same or similar violations, and (3) the future compliance or deterrent effect OFAC action may have. OFAC also may take into account other relevant factors on a case-by-case basis.

### C. Civil Penalty Process

Under the Guidelines, if OFAC concludes that a CMP may be warranted, it will issue a pre-penalty notice to the subject of its investigation, setting forth a preliminary assessment of the appropriate penalty. The subject may submit a written response to this notice. If OFAC decides to proceed with a CMP, it will issue a penalty notice that takes into account the information provided in any response.<sup>4</sup>

In calculating the proposed penalty amount, OFAC will first determine whether a violation is considered “*egregious*.” In making that assessment, OFAC will focus particularly on the general factors related to willful or reckless violations and the awareness of misconduct, with substantial weight also given to the harm to sanctions program objectives and individual characteristics of the subject.

Next, OFAC will take into account whether the violation was *voluntarily self-disclosed*.<sup>5</sup> As indicated in the attached chart, voluntary self-disclosure by a subject will cut the base penalty amount in half.

Finally, this base amount may be adjusted up or down depending on the applicability of all the general factors. The Guidelines expressly provide that, in cases where there was “*substantial cooperation*” but not voluntary self-disclosure, the base penalty amount will generally be reduced between 25 and 40 percent, and in cases involving an institution’s *first violation*, the base penalty will generally be reduced up to 25 percent.

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The new Guidelines are a welcome addition to OFAC guidance and provide useful insights into OFAC’s enforcement priorities. They also point to specific steps that an institution may take to mitigate its risk both before and after discovering a potential violation. In particular, the Guidelines have confirmed a concrete and quantifiable benefit to voluntary self-disclosure. At the same time, because OFAC retains significant discretion to

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<sup>4</sup> In no case will the final penalty amount exceed the amount in the pre-penalty notice by more than 10 percent. If OFAC determines that a greater amount is appropriate, it will issue a new pre-penalty notice and provide an opportunity for response.

<sup>5</sup> Voluntary self-disclosure generally means self-initiated notification to OFAC prior to the time that OFAC, or another government agency or official, discovers an apparent violation. Voluntary self-disclosure does not include, among other things, (1) disclosures where a third party is required to notify OFAC because a transaction was blocked or rejected, (2) incomplete or misleading disclosures, (3) disclosures made without the authorization of senior management, or (4) disclosures resulting from the suggestion or order of a government agency or official (it is unclear what may constitute a “suggestion” in this context).

adjust its penalties depending on the circumstances of an apparent violation, it will be important to see how OFAC applies the Guidelines in practice.

If you should have any questions, please contact Kenneth Bachman, Paul Marquardt, Shawn Chen, Katherine Carroll, or Nathaniel Stankard in the Firm's Washington Office at +1 202 974 1500, or Robert Tortoriello or Paul Glotzer in our New York Office at +1 212 225 2000.

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**Summary of Base Civil Monetary Penalties**

		“Egregious” violation?	
		NO	YES
Voluntary self-disclosure of violation?	YES	$\frac{1}{2}$ Transaction Value (capped at \$125,000 per violation)	$\frac{1}{2}$ Statutory Maximum <sup>6</sup>
	NO	Applicable Schedule Amount <sup>7</sup> (based on transaction value, capped at \$250,000 per violation)	Statutory Maximum <sup>6</sup>

<sup>6</sup> In most cases, the statutory maximum for an OFAC violation will be the greater of \$250,000 or twice the amount of the transaction that is the basis of the violation.

<sup>7</sup> The schedule is contained in the Guidelines and provides for penalties from \$1,000 to \$250,000, depending on the transaction value.

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