

# A Summary of OFAC's New Enforcement Procedures & Penalties Guidelines

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Institutional Investor's  
3rd Annual Anti-Money Laundering & Counter-Terrorist Financing Forum  
October 29-31, 2008, New York City

## *Background*

- issued and effective 9/8/08
- interim final rule, comments until 11/7/08
- supersedes previous guidelines:
  - January 2003 (some exceptions for Cuba)
  - January 2006 (banking institutions)
- prompted by October 2007 law substantially increasing penalties for violations of IEEPA-based sanctions (IEEPA Enhancement Act)
- IEEPA -- principal statutory authority for most sanctions administered by OFAC

## *Background (continued)*

- Product of:
  - the combination of existing OFAC provisions and the relevant enforcement provisions and practices of several other federal agencies and SROs
  - the custom-tailoring of the most evolved relevant provisions to OFAC situations, the statute increasing penalties for IEEPA-based sanctions, and to the application to all OFAC sanctions programs
  - comments will make the guidelines better

## *Increased Penalties*

- New law increased maximum civil penalties for violations to the greater of \$250,000 or 2 x the amount of the transaction (from \$50K per violation)
- New law also increased criminal penalties to \$1 million per violation and up to 20 years imprisonment

*What OFAC will consider in formulating appropriate enforcement response*

The new guidance explains and elaborates upon the factors that OFAC will consider and the process that OFAC will follow in determining:

- an appropriate enforcement response to violations of sanctions administered by OFAC, and
- in cases warranting a civil monetary penalty, the amount of monetary penalty

## *Objectives*

### Objectives of the new guidelines:

- implement new law (Congressional intent) increasing monetary penalties
- consolidation of guidelines
- clarity (public and internally)
- universally applicable
- more and better due process of law
  - greater transparency; more useful notice
  - proportionate response, fairness
- more and better compliance; deterrence
- improve efficiency of internal decision-making/administration

## *Application*

### Guidelines apply to:

- all sanctions programs administered by OFAC (except for a few categories of cases involving Cuba)
- all pending and future civil enforcement matters (retroactively), unless as of October 16, 2007:
  - Pre-Penalty Notice Mailed
  - Written Settlement Offer Made
  - Statute Limitation Waiver Received
- “Subject Persons”
  - “U.S. persons” as well as “persons subject to the jurisdiction of the United States” (IEEPA & TWEA jurisdictional combination)

### *Some differences from previous guidance*

- OFAC will consider “general factors” in determining its enforcement response
- no longer “aggravating and “mitigating” factors
- as part of a holistic consideration of the facts and circumstances of a particular case
- “cautionary letters” or “findings of violation” versus (previously), “cautionary letters,” “warning letters,” and “evaluative letters”

## *OFAC's enforcement options*

1. take no action
2. request (require) additional information
3. issue cautionary letter
  - insufficient evidence, violation conclusion not warranted
4. finding of violation
  - determination and documentation of violation but no fine, or
  - monetary penalty
5. referral for criminal investigation/prosecution
6. further administrative action, e.g., license revocation

*What OFAC will consider in making its judgments – general factors*

Appropriate enforcement response  
(whatever it may be) will be informed by  
OFAC's careful and consideration and  
weighing of general factors

## *General factors*

### General factors:

#### 1. willfulness or recklessness

- knowledge, intent
- reckless disregard, failure to exercise minimal caution
- concealment
- pattern of misconduct
- prior notice
- management involvement

## *General factors*

5. compliance program
  - The effectiveness and quality of OFAC compliance program at time of violation
6. remedial Action
  - Corrective remedial action taken
  - Conduct of thorough review/investigation to detect and identify other possible violations
7. cooperation with OFAC
  - Disclose all information in a timely manner?
  - Research and disclose information about other apparent violations?
  - Voluntary or under administrative subpoena?
  - Waive or toll statute of limitations?

## *General factors*

8. timing of violation (close in time to imposition of or modification of sanctions)
9. other enforcement action
  - part of comprehensive settlement with regulators?
10. future compliance/deterrence effect
11. other relevant factors on a case-by-case, totality of the facts and circumstances basis (catch-all category, discretionary)

## *Types of Violations*

### Penalties or other enforcement action for violations of:

- substantive provisions
- reporting requirements
- recordkeeping requirements
- failure to respond to subpoena

## *OFAC's Two-Step Approach*

- What response is warranted?
- Two-step inquiry
  - Holistic consideration, general factors applied at:
    - 1) initial stage in determining whether cautionary letter, finding of violation w/o monetary penalty, and, if necessary, also at
    - 2) second stage of assessing the amount of base and final monetary penalty

### *Amount of Monetary Penalty - guiding considerations*

If civil monetary penalty is warranted:

determinations regarding the amount of civil penalty to be assessed are to be guided by whether the apparent violation is (1) egregious or non-egregious, and whether the transaction or activity in question was (2) voluntarily disclosed to OFAC

### *Process/analysis for determining monetary penalties*

## Proposed base penalty amount considerations:

- transaction value
- conduct: egregious or non-egregious?
- voluntary self-disclosure?
  - major factor, 50% mitigation

*Calculating the base amount of monetary penalty*

- Egregious?
  - Willful, reckless, awareness, harm to sanctions objectives (main weight)?
  - “represents a serious violation of the law calling for a strong enforcement response”

### *Calculating the base amount of monetary penalty*

Base penalty amounts (per violation) (i.e., the starting points):

- **Egregious** and not voluntarily disclosed: statutory maximum
- **Egregious** and **voluntarily disclosed**: ½ of statutory maximum
- **Non-egregious** and not voluntarily disclosed: applicable schedule amount capped at maximum base amount of \$250,000
- **Non-egregious** and **voluntarily disclosed**: ½ the transaction value capped at maximum base amount of \$125,000

*Penalty Matrix*

<b>Penalty Amount</b>	<b>Transaction Value</b>
\$1,000	less than \$1000
\$10,000	greater than or equal to \$1000 but less than \$10000
\$25,000	greater than or equal to \$10000 but less than \$25000
\$50,000	greater than or equal to \$25000 but less than \$50000
\$100,000	greater than or equal to \$50000 but less than \$100000
\$170,000	greater than or equal to \$100000 but less than \$170000
\$250,000	greater than or equal to \$170000

### *Statutory Maximums*

IEEPA, principal authority for most OFAC sanctions, e.g., Sudan, Iran, Iranian banks and other entities, designated terrorists, designated narco-traffickers

- the greater of 2 x the amount of transaction or \$250K

TWEA (Trading with the Enemy Act), Cuba and North Korea only

- the amount or value of the transaction up to \$65K

### *Determining monetary penalties*

- Base amounts may be adjusted upward or downwards based on general factors
  - e.g., cooperation, reduced by 25-40%
  - e.g., first violation, reduced by up to 25%

*Penalty Notices/Proceedings*

- Process and Resolution of Cases

- pre-penalty notice

- opportunity to respond/to be heard
- set forth actual proposed monetary penalty (v. merely reciting maximum penalty)

- penalty notice

- informal settlements (pre and post pre-penalty notice)

- in cases involving Cuba, option of ALJ procedure

## *Penalties other than OFAC civil penalties*

## Penalties for OFAC violations

- civil penalties involving the payment of substantial **monetary fines**
- referral for criminal investigation or prosecution and criminal penalties involving payment of substantial **fines, or imprisonment, or both**
- **action by regulator**
- **revocation** of an OFAC license or other privileges
- publication and **adverse publicity** and all the adverse consequences flowing from the same (opprobrium of dealing with sanctions targets)
- **disciplinary action** for employees, officers and directors up to and including termination

## *Concluding Summary*

## Comments

- OFAC is to be commended for their work on the new guidelines, implements Congressional intent
- represent a reasoned approach
- importance of self-disclosure, thorough review/audit of possible similar violations (some burden)
- generally more elaboration and specificity; predictability
- more powerful tools for OFAC in the form of higher penalties, but also protection for the public by requiring OFAC to follow a balanced case-by-case evaluation of each case based on defined and appropriate criteria; further abandonment of the "one-size fits all" approach
- challenge will be for Subject Persons as well as OFAC to adhere follows the letter and spirit of the new guidelines
- some (warranted) room for subjective interpretation/flexibility

### *Concluding Summary*

The guidelines give OFAC greater flexibility in the choice of enforcement response to apparent violations and provide for sensible and meaningful standards for the enforcement response in a given case, and for the amount of civil monetary penalties, if any