

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

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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

Penalty Amount	Transaction Value
\$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