
OFAC Issues Final Rule on Economic Sanctions Enforcement Guidelines

2009-11-11

The U.S. Treasury Department's Office of Foreign Assets Control (OFAC)¹ has released its Economic Sanctions Enforcement Guidelines (Guidelines) as a final rule, effective November 9, 2009 (Final Rule), replacing the interim final rule published on September 2, 2008 (Interim Rule). The Guidelines set forth OFAC's policy for determining the appropriate enforcement response, including proposed civil monetary penalty (CMP) amounts, to an apparent violation of U.S. economic sanctions enforced by OFAC. This Email Alert updates our earlier Email Alert on the Guidelines, available [here](#), and describes the key changes to the Interim Rule.

Risk-Based Compliance Programs

As discussed previously, the Guidelines set forth general factors, some or all of which OFAC will consider in determining the appropriate enforcement response and, if a CMP is appropriate, the amount of the proposed penalty. Most importantly, the Final Rule explicitly confirms that OFAC expects U.S. entities to maintain risk-based compliance programs, which OFAC will consider when assessing the appropriate enforcement response to an apparent violation. In addition, the Final Rule re-

promulgates, with minor edits and in a consolidated form, the risk matrices originally issued as an annex to OFAC's interim enforcement procedures for banking institutions dated January 12, 2006. The Final Rule indicates that the consolidated risk matrix is to be used by all financial institutions—not just banks—in assessing OFAC compliance risks. This matrix should also be used, where appropriate, by other entities as a guide in performing an OFAC risk assessment.

Cooperation with OFAC

The Final Rule made several changes in its discussion of general factors that emphasize the importance OFAC places on cooperation as a factor in determining the appropriate enforcement response to an apparent violation. A key element of such cooperation is a Subject Person's² voluntary self-disclosure. The Final Rule clarifies that if a third party is required, but fails, to report an apparent violation to OFAC, and the Subject Person notifies OFAC of such violation in accordance with the definition of voluntary self-disclosure, the notification will be considered a voluntary self-disclosure. Similarly, a self-initiated notification to OFAC at the same time as notification to another government agency qualifies as a voluntary self-disclosure if the other elements of the definition are met. When circumstances so warrant, OFAC may even treat a voluntary self-disclosure to another government agency (i.e., not to OFAC) as a voluntary self-disclosure under the Guidelines. These clarifications are important because they respond to prior concerns that the Interim Rule defined a voluntary self-disclosure too narrowly, effectively eliminating its intended mitigation benefits under the Guidelines in many instances that commonly arise for financial services and securities firms.

The Final Rule clarifies that a Subject Person's willingness to enter into a

tolling agreement regarding the statute of limitations for an apparent violation may be considered a factor in determining its cooperation with OFAC, but a Subject Person's unwillingness to enter into such an agreement will not be considered an aggravating factor in assessing such entity's cooperation with OFAC. Finally, OFAC will publicly note substantial cooperation by a Subject Person.

Sanctions History

The third general factor modified in the Final Rule is the evaluation of a Subject Person's sanctions history. The Final Rule states that OFAC will consider a Subject Person's overall sanctions history, not its sanctions violations history as stated in the Interim Rule. OFAC's review will thus take into account both formal actions and informal actions (i.e., cautionary letters, warning letters, and evaluative letters). Such review will be limited to the five years preceding the transaction giving rise to the apparent violation.

Civil Monetary Penalty Amounts and Process

The Final Rule addresses a number of issues relating to the assessment of the appropriate enforcement response and CMP amounts. Under the Final Rule, a group of substantially similar violations addressed in a single pre-penalty notice shall be considered a single violation for purposes of the up to 25% reduction in CMP amount for a first apparent violation. In addition, OFAC clarified the meaning of the term "first violation", noting that an apparent violation will generally be considered a "first violation" if the Subject Person has not received a penalty notice or finding of violation from OFAC in the five years preceding the date of the apparent violation. In cases where a penalty notice or finding of violation within the prior five

years involved conduct of a substantially different nature from the apparent violation, OFAC may still consider the apparent violation at issue a "first violation." The Final Rule makes clear that OFAC will not seek penalties in cases where responsive information is withheld on the basis of an apparently applicable and properly invoked privilege. Finally, OFAC made a number of edits clarifying base CMP calculation amounts.

¹ OFAC administers and enforces country-based and list-based economic sanctions against targeted foreign countries and regimes, terrorists and terrorist organizations, and others in furtherance of U.S. foreign policy and national security considerations.

² OFAC sanctions regulations apply to all U.S. citizens and permanent residents located anywhere in the world, entities organized under U.S. law (including foreign branches), all persons (individuals and entities, including U.S. subsidiaries of foreign companies) located in the United States, and, in limited circumstances (Cuba and North Korea), foreign subsidiaries of U.S. entities (collectively, Subject Persons).

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