AMERICAN BANKERS ASSOCIATION

1120 Connecticut Avenue, NW
Washington, DC 20036

1-800-BANKERS
www.aba.com

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Virginia E. O'Neill
Senior Counsel
Center for Regulatory Compliance
Phone: 202-663-5073
Fax: 202-828-5052
voneill@aba.com

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By electronic delivery to:
www.regulations.gov

Office of Foreign Assets Control
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220
ATTN: Request for Comments
(Enforcement Guidelines)

Re: Economic Sanctions Enforcement Guidelines, FR Doc. E8-20704

Ladies and Gentlemen:

The American Bankers Association (ABA)[1] and the Bankers Association for Finance and Trade (BAFT)[2] appreciate the opportunity to submit comments to the Office of Foreign Assets Control's (OFAC) interim final rule, Economic Sanctions Enforcement Guidelines (the Guidelines).[3]

The substantially increased penalty authority granted to OFAC by the International Emergency Economic Powers Enhancement Act[4] prompted OFAC to review its enforcement policy and procedure and resulted in the development of the new Guidelines. These Guidelines supersede the January 29, 2003, Economic Sanctions Enforcement Guidelines (with the exception of the proposed Cuban Assets Control Regulations)[5] and the January 12, 2006, Economic Sanctions Enforcement Procedures for Banking Institutions.[6] Thus, the Guidelines establish one

[1] ABA brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and to strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.3 trillion in assets and employ over 2 million men and women.

[2] BAFT is a financial services association that represents financial institutions active in regional and global trade, payments, cross-border financing and other commercial banking areas by (1) supporting development of industry-wide strategic business solutions and advocacy initiatives, and (2) providing leadership to build consensus on preserving the safe and efficient conduct of the financial system worldwide. For over 85 years, BAFT has advanced the growth and evolution of international financial services by being a leader in addressing issues affecting its members.

[3] 73 Fed. Reg. 51933 (Sept. 8, 2008).
[4] *See* Pub.Law 110-96, 121 Stat. 1011 (October 16, 2007)
[5] 68 Fed.Reg. 4422 (January 29, 2003).
[6] 71 Fed. Reg.1971 (January 12, 2006).

enforcement policy and procedure applicable to all persons or entities subject to any of the United States' economic sanctions programs.

Summary of Comment

ABA and BAFT appreciate OFAC's efforts to redefine its enforcement policy and civil penalty process. We support OFAC's intent to engage in a "holistic consideration of the facts and circumstances of a particular case"[7] through the establishment of a set of eleven factors (the General Factors) to be considered when determining an appropriate enforcement response as well as the amount of a civil penalty. We also support the establishment of a range of enforcement actions and the creation of a well-defined process for determining the amount of a civil monetary penalty.

ABA and BAFT believe, however, that in the effort to create one enforcement policy and procedure applicable to all Subject Persons,[8] the Guidelines fail to recognize and to make accommodation for the unique role banks play in implementation of OFAC sanctions programs. Specifically, we are concerned about the absence of language acknowledging the importance of an institution's risk assessment and the absence of a process for periodically evaluating a financial institution's OFAC related violations in the context of the institution's overall OFAC compliance program and specific compliance record. ABA and BAFT also believe that OFAC's definition of a "voluntary" disclosure, as applied to financial institutions, discourages self-identification and information sharing with OFAC. We request that OFAC modify the definition of a voluntary self-disclosure as well as its discussion of certain elements of the General Factors "Harm to Sanctions Program Objectives" and "Cooperation with OFAC" to assure that these factors are accorded appropriate consideration in enforcement determinations. Finally, in response to OFAC's request for additional matters to address in enforcement determinations, we recommend that OFAC consider and give substantial weight to evidence of a Subject Person's good faith reliance on advice or direction provided by the OFAC Hotline. We also urge OFAC to add a right to appeal all final enforcement decisions.

The Guidance should expressly acknowledge the deference given to risk-based OFAC compliance programs in the enforcement context.

ABA and BAFT appreciate OFAC's desire to establish a uniform enforcement policy and procedure applicable to all enforcement actions. We believe, however, that this effort should not entail the loss to financial institutions of an important safeguard: explicit recognition of the importance of an institution's risk assessment and risk-based OFAC compliance program. As OFAC noted in the 2006 interim final rule, financial institutions are unique among entities subject to United States' economic sanctions programs:

> OFAC is publishing enforcement procedures for banking institutions because of their unique role in the

[7] *Id.* at 51935.

[8] The Guidelines define "Subject Person" to include individuals and entities subject to any of the sanctions programs administered or enforced by OFAC.

> implementation of OFAC sanctions programs and the nature of the transactions in which such institutions engage. The new enforcement procedures take into account that each banking institution's situation is different and that its compliance program should be tailored to its unique circumstances. This includes an analysis of its size, business volume, customer base, and product lines.[9]

As a necessary corollary to this acknowledgement of a financial institution's distinctive status, OFAC also explained, "Under the revised procedures, OFAC will periodically evaluate a banking institution's apparent OFAC-related violations in the context of the institution's overall OFAC compliance program and specific OFAC compliance record."[10] The new Guidelines, however, fail to include language expressly recognizing the importance of a risk-assessment and the consideration given to risk-based compliance programs.

Compounding this failure is language in the Guidelines that suggests that the nature of the harm caused to the relevant sanctions program is to be accorded significant weight in an enforcement decision regardless of the existence of a risk-based compliance program. For example, in the introduction to its discussion of the General Factors, the Guidelines state, "The type of enforcement action undertaken by OFAC will depend on the nature of the apparent violation and the harm caused to the relevant sanctions program and its objectives." [11] Similarly, in its discussion of how an "egregious violation" will be determined, OFAC explains:

> In making the egregiousness determination, OFAC generally will give *substantial weight and consideration to* General Factors A ("willful or reckless violation of law"), B ("awareness of conduct at issue"), C *("harm to sanctions program objectives"),* and D ("individual characteristics"), with particular emphasis on General Factors A and B. A case will be considered an "egregious case" where the analysis of the applicable General Factors, with a focus on those General Factors indicated above, indicates that the case represents a particularly serious violation of law calling for a strong enforcement response (emphasis added).[12]

ABA and BAFT member banks are concerned that these statements, combined with the absence of discussion about the consideration to be given to risk-based OFAC compliance programs, may signal a subtle, but nonetheless troubling, change in the emphasis of OFAC's enforcement policy—a decreased consideration of a Subject Person and the administration of its risk-based compliance program over time and a corresponding increase in emphasis on the nature of the violation. Although the nature of the violation and harm to sanctions program objectives have always been

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[9] 71 Fed. Reg. 1971, 1972 (Jan. 12, 2006).
[10] *Id.*
[11] 73 Fed. Reg., *supra* at 51937.
[12] *Id.* at 51939.

considered in enforcement determinations, we believe that these factors should not be accorded the "substantial weight" suggested by the Guidelines.[13]

Financial institutions have compliance programs in place so that they do not intentionally violate economic sanctions programs. A simple fact bears mention—it is the customer, not the bank, that initiates a prohibited transaction. The bank's "responsibility" flows from an unintentional act, which in the majority of circumstances is due to the failure of a bank's OFAC filter to recognize a blocked party or from an inadvertent clerical error. The harm to sanctions program objectives flowing from the error may be significant or relatively minor, but it should not be given substantial weight in an enforcement determination, which should more appropriately focus on degree of fault. Similarly, ABA and BAFT believe that the General Factor, "Future Compliance/Deterrence Effect," is irrelevant to an enforcement determination. Choosing to impose a particular penalty in order to send a message or to set an example for others is fundamentally unfair. We believe that the determination of an appropriate enforcement response should be based on a bank's culpability, not OFAC's perception of the harm caused or its desire to send a message.

On its face, the combination of the lack of discussion about the importance of, and deference given to, a risk-based compliance program and an apparent emphasis on the nature of harm suggests a step backward in OFAC enforcement, a return to strict liability. Indeed, we question whether OFAC's implicit intent could be to pressure banks to implement even more intrusive—and expensive— monitoring programs, regardless of their utility from a pure risk-benefit analysis. To assure financial institutions that the new Guidelines do not signal a change in policy, ABA and BAFT urge OFAC to add to the Guidelines language acknowledging the importance of an institution's risk assessment and the deference to be accorded to an appropriately tailored and managed risk-based compliance program. The Guidelines should be further revised to clarify that harm to sanctions program objectives and future compliance /deterrence effect are not factors to be given substantial weight unless there is clear evidence that a Subject Person knowingly or intentionally violated a sanction program administered by OFAC.

OFAC's narrow definition of "voluntary self-disclosure" discourages compliance.

ABA and BAFT request that OFAC reconsider its limited definition of a voluntary disclosure.[14] Since publication of OFAC's prior enforcement guidance, financial institutions have consistently argued against a definition that defines voluntariness on the basis of another institution's reporting obligations. If the goal is to encourage

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[13] Moreover, the 2006 interim final rule also directs OFAC to consider "the specifics of the apparent violation or violations and the institution's compliance effort" when analyzing current or potential harm to sanctions program objectives. *See* 71 Fed. Reg. *supra* at 1974. The Guidelines do not include a similar direction to factor the institution's compliance program into its harm calculation.

[14] *See* 73 Fed.Reg. *supra* at 51936 ("Notification to OFAC of an apparent violation is not a voluntary self-disclosure if: a third-party is required to notify OFAC of the apparent violation or a substantially similar apparent violation because a transaction was blocked or rejected by that third-party (regardless of whether or when OFAC actually receives such notice from the third-party and regardless of whether the Subject Person was aware of the third-party's disclosure).").

self-identification and reporting, a third-party's OFAC responsibilities are immaterial and inconsistent with sound compliance principles. Nevertheless, without explanation, OFAC re-affirms that definition and adds even more limitations on voluntariness by further excluding disclosures that: (1) include false or misleading information; (2) are materially incomplete; or (3) are made by an individual without the authorization of the entity's senior management. Assuming that a voluntary self-disclosure has been made in good faith, none of these limitations should be relevant, and we urge OFAC to redefine the concept of voluntariness so that it recognizes and rewards self-identification and reports made to OFAC in good faith. By doing so, OFAC will encourage the implementation of sound compliance programs.

Moreover, the impact of this narrow definition of a voluntary self-disclosure is compounded by OFAC's formula for calculating the base amount of a civil penalty for non-egregious cases. In these cases, the base amount is to be calculated as follows:

> i. In a non-egregious case, if the apparent violation is disclosed through a voluntary self-disclosure by the Subject Person, the base amount of the proposed civil penalty shall be one-half of the *transaction value*, capped at a maximum base amount of $125,000 per violation.
> ii. In a non-egregious case, if the apparent violation comes to OFAC's attention by means other than a voluntary self-disclosure, the base amount of the proposed civil penalty …shall be the "*applicable schedule amount*"…capped at a maximum base amount of $250,000 per violation (emphasis added).[15]

A simple example demonstrates how this formula substantially increases the penalty for OFAC violations that fail to fit within the narrow definition of a voluntary self-disclosure. Assume that a bank's filter inadvertently fails to identify a wire transaction in the amount of $15,000 as a prohibited transaction. The bank discovers the error and reports it to OFAC the next day. However, because a third-party (the receiving bank) has a duty to duty to notify OFAC of the apparent violation, by definition the apparent violation is not a voluntary self-disclosure. As a non-egregious violation that was not voluntarily disclosed, the civil penalty is the "applicable schedule amount"—in this instance, $25,000.[16] In contrast, had the disclosure been deemed voluntary, the penalty would have been $7500, or 50% of the transaction amount. Thus, the bank incurs a significantly increased civil penalty arising from the interaction of the narrow definition of a voluntary self-disclosure and the different base amount calculations for non-egregious violations.

ABA and BAFT believe that the disparity in civil monetary penalties is unwarranted. We urge OFAC to reconsider its base amount formula for non-egregious violations and to re-define the term voluntary self-disclosure so that it appropriately recognizes and rewards self-identification and reporting to OFAC.

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[15] *Id.* at 51939.

[16] *See Id*, at 51936 ("Applicable schedule amount means:…iii. $25,000 with respect to a transaction valued at $10,000 or more but less than $25,000.")

Finally, member banks report that the reputational damage resulting from a public OFAC penalty notice is significant. They believe that this damage could be mitigated by including a statement in the notice that the violation was voluntarily self-disclosed, regardless of whether the disclosure falls within OFAC's technical definition of voluntariness. Therefore, ABA and BAFT also request that OFAC agree to include this information in penalty notices whenever a voluntary self-disclosure has been made as well as when the institution is cooperative with OFAC during the investigation process.

Demonstrating "cooperation with OFAC" should not be predicated on a Subject Person's willingness to waive the statute of limitations.

Although the nature and extent of an institution's cooperation with OFAC is appropriately considered in the enforcement context, ABA and BAFT believe that a Subject Person's willingness to waive the statute of limitations or willingness to enter into a tolling agreement should not be factored into the determination. Statutes of limitation exist to promote certainty in legal relations and fairness; they limit the commencement of an action to a time period when memories are fresh and evidence is readily available. ABA and BAFT believe that it is against public policy for OFAC to consider a Subject Person's willingness to waive the statute of limitations as evidence of cooperation with OFAC. There is an inherent imbalance between a government agency wielding enforcement authority and an institution subject to that action—or to the prospect of future action—and the conditioning of a finding of cooperation on the waiver of an important procedural protection is contrary to public policy and cannot stand.[17] Thus, we believe that a Subject Person's willingness to waive the statute of limitations or to execute a tolling agreement should not be a consideration in an inquiry into whether a Subject Person has cooperated with OFAC, and we recommend that item 6 of the General Factor "Cooperation with OFAC" be removed.

Additional comments about the proposed enforcement Guidelines.

ABA and BAFT suggest an additional factor to be considered in enforcement decisions: reliance on advice or direction provided by OFAC's Hotline. Member banks consistently report incidents when advice or direction they receive from the Hotline is subsequently contradicted.[18] ABA and BAFT believe that if an institution acts in good faith on advice provided by the Hotline, the institution's good faith

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[17] Similarly, on August 28, 2008, the Department of Justice revised its policies applicable to white collar corporate criminal cases and retreated from its widely-criticized position that federal prosecutors could demand that corporations waive the attorney-client privilege and work product protection as a necessary precondition in earning credit for cooperating with DOJ. *See* DOJ press release, "Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud," August 28, 2008, available at http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html.

[18] For example, banks report receiving conflicting advice from the Hotline with respect to the disposition of letters of credit relating to vessels identified on OFAC's September 10, 2008, SDN designation. When contacted for further instructions (as directed by OFAC in the September 10 designation) the Hotline has issued the following contradictory directions: "reject and report," "pend," and "apply for a license."

reliance should be considered and given significant weight in enforcement decisions, even if the advice is subsequently found to be wrong or incomplete.

Finally, considering the increased size of civil penalties and the reputational damage that results from an OFAC Penalty Notice, we urge OFAC to include in the civil penalty process a right to appeal a final enforcement decision.

Conclusion

ABA and BAFT appreciate the opportunity to comment on the interim final rule. If you have any questions about these comments, please contact Virginia O'Neill at 202-663-5073 or voneill@aba.com.

Respectfully submitted,

Virginia O'Neill
Senior Counsel
ABA Center for Regulatory Compliance

Donna K. Alexander
President
Bankers' Association for Finance and Trade