ABA Staff Analysis: Final OFAC Economic Sanctions Enforcement Guidelines
Effective November 9, 2009

On November 9, 2009 OFAC published a final rule as enforcement guidance for persons subject to the requirements of the U. S. sanctions statutes, Executive orders and regulations. This finalizes an interim rule published in September 2008 with adjustments based on comments from the ABA and others.

FINAL RULE
OFAC will review an apparent violation and, after considering the facts and circumstances will:

- **Take No Action**
- **Request Additional Information**
- **Issue a Cautionary Letter** (due to insufficient evidence or where a penalty is not warranted)
- **Find a Violation** (an administrative response without a civil money penalty)
- **Impose a Civil Money Penalty**
- **Refer the Matter for Criminal Investigation**
- **Take Other Administrative Action** as appropriate (e.g., deny, suspend, modify or revoke a license or issue a cease-and-desist order)

**General Factors considered by OFAC** in determining an enforcement action (note that these factors can increase or decrease the steps OFAC takes):

- **Willful or Reckless Violation of Law (Egregiousness)** will result in a stronger response. In making this determination, OFAC will consider whether the subject attempted to conceal the violation, whether the violation was part of a pattern of conduct, whether there was prior notice and whether senior management was involved in the conduct in question
- **Awareness of Conduct at Issue**: the greater a subject’s knowledge, the stronger the enforcement action (factors considered are actual knowledge, reason to know and management involvement)
- **Harm to Sanctions Program Objectives** evaluates the economic or other benefit to the sanctioned individual, entity or country, including possibly the causal link between the subject’s conduct and the benefit conferred
- **Implications for U. S. Policy**
- **License Eligibility** (could the conduct have been authorized by an OFAC license)
- **Humanitarian Activity**
- **Individual Characteristics** of the subject, including commercial sophistication, size of operations and financial condition, volume of transactions, sanctions history over the preceding five years, and its compliance program.
- **Remedial Response**: steps taken by the subject once the possible violation was discovered.
- **Cooperation with OFAC**: voluntary disclosure, providing all relevant information, whether additional research was conducted to provide that information, whether information was provided voluntarily or in response to a subpoena, whether information provided promptly and whether there was an agreement to waive any applicable statute of limitations. Where appropriate, OFAC will publicly note voluntary cooperation.
- **Timing of Apparent Violation in Relation to Imposition of Sanctions** (the time elapsed between the conduct in question and the time sanctions are applied).
- **Other enforcement action taken** involving the same conduct.
- **Future Compliance/Deterrence Effect** (whether the sanction “sets an example”).
- **Other Relevant Factors**, determined on a case-by-case basis.
Civil Penalty Process
  - Pre-Penalty Notice: OFAC’s initial assessment describing the alleged violation, the provision(s) violated, the base category for the penalty, the maximum possible penalty and the proposed penalty
  - Response to a Pre-Penalty Notice: either agrees to the penalty or sets forth reasons why a penalty should not be imposed or should be reduced
  - Penalty Notice: issued after OFAC concludes a civil money penalty is appropriate

Civil Money Penalties are imposed on a sliding scale, as follows:

- $1,000 for transactions under $1,000
- $10,000 for transactions of $1,000 or more but under $10,000
- $25,000 for transactions of $10,000 or more but under $25,000
- $50,000 for transactions of $25,000 or more but under $50,000
- $100,000 for transactions of $50,000 or more but under $100,000
- $170,000 for transactions of $100,000 or more but under $170,000
- $250,000 for transactions of $170,000 or more

**NOTE:** the statute that imposes a specific penalty may have a lesser cap
  - The transaction value is the dollar value of the transaction (where the transaction value is not readily determined, OFAC may consider the market value of the goods)

The **Amount of Civil Penalty** will be based on whether the violation was **egregious** and whether the subject **voluntarily self-disclosed** the violation.

- **Egregious**: OFAC will determine if the case is egregious, giving substantial weight to certain General Factors (whether the conduct was willful or reckless, the awareness of the conduct at issue, possible harm to sanction program objectives and individual characteristics of the subject of the penalty, giving special focus to the first two)
- **Voluntary Self-Disclosure** is self-initiated notification to OFAC. HOWEVER, voluntary self-disclosure is not possible if a third party is required to notify OFAC and does notify OFAC. In addition, a disclosure must be materially complete, self-initiated, and made by a person within the subject organization authorized to notify OFAC to be voluntary.
- **Cooperation** with OFAC is an important factor in determining an appropriate enforcement action, whether the disclosure is voluntary or not.

**Pre-Penalty Notice – Base Calculation**

- **Non-egregious/voluntary self-disclosure**: one-half of the transaction value, capped at $125,000 (if the transaction is covered by the *Trading with the Enemy Act* (TWEA), the cap is the lesser of $125,000 or ½ the maximum TWEA penalty, currently $32,500 per violation)
- **Non-egregious/not voluntary self-disclosure**: the “applicable schedule amount” capped at $250,000 maximum (if TWEA applies, the lesser of $250,000 or the maximum TWEA penalty, currently $62,500 per violation)
- **Egregious/voluntary self-disclosure**: one-half of the applicable statutory maximum
- **Egregious/not voluntary self-disclosure**: applicable statutory maximum
## BASE PENALTY MATRIX

### Egregious Case

<table>
<thead>
<tr>
<th>Voluntary Self-Disclosure</th>
<th>NO</th>
<th>YES</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>YES</strong></td>
<td></td>
<td>(1) One-Half of Transaction Value (capped at $125,000 per violation/$32,500 per TWEA violation)</td>
</tr>
<tr>
<td><strong>NO</strong></td>
<td>(2) Applicable Schedule Amount (capped at $250,000 per violation/ $65,000 per TWEA violation)</td>
<td>(4) Applicable Statutory Maximum</td>
</tr>
</tbody>
</table>

### Additional Adjustments

- Substantial cooperation/no voluntary self-disclosure: based penalty will generally be reduced 25 to 40%
- First violation: base penalty generally reduced by 25%
- In all cases, the penalty will not exceed the applicable statutory maximum

### Additional Civil Penalties for Failure to Comply with a Request to Furnish Information or Keep Records

Up to $20,000, regardless of any other violation (up to $50,000 for transactions over $500,000)

- Failure to comply with a request may be considered a continuing violation and penalties can be imposed each month
- Penalties do not preclude judicial enforcement of the request for information
- Late Filing of a Report: Up to $2,500 if filed within 30 days of the due date and up to $5,000 if filed over 30 days after the date (if the penalty involves blocked assets, an additional $1,000 may be added for every 30 days the report is overdue, up to five years)
- Up to $50,000 for failure to maintain records

For questions, contact Ginny O’Neill.