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INTERNATIONAL TRADE ALERT

OFAC ISSUES NEW ECONOMIC SANCTIONS ENFORCEMENT GUIDELINES

On September 8, 2008, the U.S. Treasury's Office of Foreign Assets Control (OFAC) issued new Economic Sanctions Enforcement Guidelines ("Guidelines") as an interim final rule establishing the new framework by which the agency will assess penalties under last year's statutory increase in the penalty maximum for most trade embargo and economic sanctions programs. (73 Fed. Reg. 51933) (http://edocket.access.gpo.gov/2008/pdf/E8-20704.pdf). As expected, the Guidelines provide for the application of the enhanced $250,000 statutory penalty enacted last year, but indicate that OFAC intends generally to limit its use of the maximum statutory amount as a basis for penalties to what it determines are "egregious" cases.

The Guidelines took effect on September 8, but OFAC is soliciting comments on the interim final rule until November 7, 2008. The new statutory penalties have already substantially altered the legal landscape for sanctions and export control compliance, and OFAC's new Guidelines warrant careful consideration and scrutiny because they will impact how the agency will treat companies who discover potential violations of the sanctions laws. There are several noteworthy aspects of the new Guidelines, including the following—

- **Assessment of Penalty Basis.** Under the Guidelines, the two most significant factors affecting the penalty assessment are whether the case is "egregious" or "non-egregious" and whether the person submitted a voluntary self-disclosure.

  – Egregious v. Non-Egregious Cases. OFAC establishes a two-track approach to penalty assessment: one for "egregious" cases and one for "non-egregious" cases. The penalty amount in egregious cases will be based on the enhanced statutory maximum ($250,000, or more if the transaction value is greater), while the penalty in non-egregious cases will be based on the transaction value. OFAC will determine whether a case is "egregious" based on an analysis of several "General Factors" it sets out in the Guidelines. Four of these factors will be given substantial weight in determining whether a case is "egregious": (1) willful or reckless violation of law; (2) awareness of the conduct at issue (including reason to know); (3) harm to sanctions program objectives; and (4) individual characteristics of the entity(ies) involved. Particular emphasis will be placed on the first two factors identified.

– Submission of Voluntary Self-Disclosure. The second significant distinction concerns whether the company has submitted a voluntary self-disclosure (VSD). In non-egregious cases, submitting a VSD will reduce the penalty to one-half of the actual transaction value (capped at $125,000 per violation). In egregious cases, submitting a VSD will reduce the penalty to one-half of the statutory maximum of $250,000 per violation. In contrast, failure to file a VSD in a case that OFAC determines is egregious will result in a penalty based on the full statutory maximum, and a penalty based on a new penalty "schedule" that is tied to, but in most cases exceeds, transaction value in a non-egregious case.

- **Adjustment of Penalty Basis.** As mentioned above, the Guidelines set out several "General Factors" that OFAC will consider when evaluating the facts of a case, including the questions of whether or not enforcement action is required, and whether or not a penalty is appropriate. In doing so, OFAC has moved away from the nomenclature of "mitigating" and "aggravating" factors, but its consideration of the "General Factors" will still result in upward or downward adjustments in its base penalty determination based on the two considerations of egregiousness and voluntary disclosure. However, depending on OFAC's analysis, the General Factors may serve to influence its determination in a positive or negative manner and result in a decrease or increase in proposed penalties. In addition to the four factors considered in the egregiousness determination, OFAC lists several other factors including, but not limited to, prior sanctions penalties or warnings, the "existence and nature" of a compliance program, the steps taken to remedy the apparent violation and cooperation with the agency. Notably, a significant reduction of 25 percent from the base penalty is available for first-time offenders.

- **Findings of Violation and Cautionary Letters.** The Guidelines also indicate that, in some cases (presumably not "egregious"), OFAC may issue "Findings of Violation" in lieu of civil penalties. A "Findings" letter represents OFAC's final determination that a violation has occurred and that it is important to document its occurrence but that a civil monetary penalty is not the most appropriate response. The Guidelines also confirm that OFAC may, as in the past, issue cautionary letters when it determines that there is insufficient evidence to conclude that a violation has occurred but is concerned that the underlying conduct might lead to a violation in other circumstances. In more serious cases, OFAC will continue to impose civil monetary penalties, take other administrative actions, and make criminal referrals.

- **Pre-Penalty Notice of Intended Assessment.** When OFAC determines that a civil monetary penalty is appropriate, it will issue a Pre-Penalty Notice which, under the Guidelines, will set forth the actual monetary penalty that OFAC proposes, rather than the maximum penalty possible under the agency's prior practice. Persons receiving such a notice may respond with arguments and evidence concerning the proposed penalty. As in the past, the Guidelines provide for the settlement of cases prior to the issuance of the Pre-Penalty Notice.

The new Enforcement Guidelines reflect OFAC's continued desire to provide a strong incentive to self-disclose potential violations of the sanctions laws, notwithstanding the more than five-fold increase in penalties last fall. A company that discovers a potential violation and discloses can generally still obtain at least 50 percent deduction from the penalty it would otherwise receive were the agency to independently discover the matter. But such a company still faces a great degree of uncertainty in terms of its potential exposure because of the multifactored and relatively subjective threshold determination of whether OFAC will view the case as "egregious" or not. As this suggests, the current formulation of the interim final rule could fall short of OFAC's stated goal of promoting self-disclosure. Companies with an interest in this area should review the new Guidelines carefully and potentially consider submitting comments on the current formulation before the comment period expires.

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