

INTERNATIONAL TRADE ALERT

OFAC PUBLISHES FINAL RULE ON ECONOMIC SANCTIONS ENFORCEMENT GUIDELINES

On November 9, 2009, the U.S. Department of the Treasury, Office of Foreign Assets Control (OFAC) issued a final rule setting forth its Economic Sanctions Enforcement Guidelines (Guidelines), which are used to determine OFAC's enforcement response to apparent violations of the sanctions programs it administers.¹ The final rule adopts the interim final rule that OFAC issued on September 8, 2008, with several modifications described below. (Akin Gump previously published an alert on OFAC's interim final rule, available [here](#).)

OFAC continues to use the framework established in the interim final rule, which adopts a relatively uniform, standard approach to the enforcement/settlement process for resolving apparent sanctions violations, regardless of the sanctions program implicated, the underlying statutory authority or the industry of the Subject Person. In the *Federal Register* notice adopting the final rule, OFAC discusses the 11 sets of comments that it received and its decision to accept or reject the views expressed therein, as well as the changes that OFAC made based on its own review of the interim final rule. The following highlights some of the more notable issues.

VOLUNTARY SELF-DISCLOSURES

In response to several comments criticizing the interim rule's exclusion from eligibility for voluntary self-disclosure treatment of cases where a third party is required to notify OFAC of an apparent violation of the U.S. sanctions laws by a

¹ See 74 Fed. Reg. 57593 (November 9, 2009).

Subject Person (e.g., because it blocked or rejected a transaction in accordance with OFAC's regulations), OFAC determined to maintain the exclusion. However, OFAC revised the definition of "voluntary self-disclosure" to clarify that this policy only applies to cases in which the third party actually submits a report to OFAC, but does not apply to cases in which a third party is required to submit a report but fails to do so. Perhaps to cushion the impact of the third-party notification disqualifier, OFAC also emphasized that a Subject Party's cooperation with OFAC can have a "substantial impact on the nature of OFAC's enforcement response to an apparent violation," even in cases that do not qualify as voluntary self-disclosures.

OFAC also clarified that a Subject Party may submit a voluntary self-disclosure to OFAC prior to **or at the same time** that another government agency learns of the apparent violation or another substantially similar apparent violation. This clarification removes the risk that OFAC would not consider a notification to be a voluntary self-disclosure simply because the Subject Person also notified another government agency of the facts underlying the apparent violation in a parallel disclosure (e.g., a simultaneous disclosure to the Department of Commerce, Bureau of Industry and Security).

RISK-BASED COMPLIANCE

Several comments questioned whether OFAC had moved away from the "risk-based" compliance approach reflected in earlier enforcement guidelines. In response, OFAC confirmed that it considers a Subject Person's risk-based compliance program as a General Factor in assessing the appropriate enforcement response to an apparent violation. To clarify this point, OFAC added a specific reference to "risk-based" compliance in General Factor E and added a modified and consolidated version of the OFAC risk matrices as a new annex to the Guidelines. OFAC stated that it will apply these risk-based principles in assessing the overall adequacy of a Subject Person's compliance program.

STATUTE OF LIMITATION WAIVERS AND TOLLING AGREEMENTS

A number of comments objected to the interim rule's policy of allowing OFAC to consider a Subject Person's willingness to enter into a statute of limitations tolling agreement in assessing the Subject Person's cooperation with OFAC. While OFAC confirmed that it will treat a Subject Person's entry into a tolling agreement as a mitigating factor, a Subject Person's unwillingness to accept such an agreement will not be considered against it.

OTHER NOTABLE CHANGES AND RESPONSES TO COMMENTS

- **Egregious Case Base Penalty** – OFAC rejected a suggestion to reduce the base penalty amount for egregious cases by 50 percent and clarify the extent to which that amount may be increased by aggravating factors. OFAC stated that such a change would not “adequately reflect the seriousness” of egregious cases.
- **Compliance with Foreign Laws** – OFAC rejected a suggestion that it consider whether the conduct in question is permissible under the applicable law of another jurisdiction. However, OFAC stated that it would evaluate cases in which the applicable laws of another jurisdiction require conduct prohibited by OFAC sanctions (or vice versa) under General Factor K, which provides for the consideration of other relevant factors on a case-by-case basis.
- **Reliance on Advice from OFAC** – OFAC clarified that good-faith reliance on substantiated advice received from the OFAC hotline or from counsel is “subsumed within OFAC’s consideration of whether a Subject Person willfully or recklessly violated the law.”
- **Sanctions History** – OFAC revised the interim final rule to clarify that it will take into consideration a Subject Person’s entire sanctions history, including cautionary and warning letters, and not simply the Subject Person’s sanctions violations history, in determining the appropriate enforcement response to an apparent violation. It also amended the rule to clarify that it will consider a Subject Person’s compliance history for the five years preceding the transaction giving rise to the apparent violation, so that a “first violation” is generally considered that which occurred in the preceding five years and not any that may have occurred previously.
- **Transition Period for Foreign Acquisitions** – OFAC rejected a suggestion to afford a transition period for cases in which a Subject Person acquires an entity outside the United States not previously subject to OFAC requirements.
- **Trading with the Enemy Act Maximum Penalties** – OFAC clarified that the base penalty amounts for transactions subject to the Trading with the Enemy Act (e.g., those involving Cuba and Cuban nationals) is \$65,000 per violation.

- **Recordkeeping Violations** – OFAC amended the Guidelines to provide for a penalty of up to \$50,000 for a failure to maintain records in accordance with the requirements of OFAC regulations.
- **Specified Reductions of Penalty Amounts** – OFAC rejected suggestions that it establish a specific range of mitigation for reducing the base penalty amount for remediation and cooperation.

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