OFAC Enforcement Guidelines: Responses to Apparent Violations and Civil Monetary Penalties in 2024

The Office of Foreign Assets Control (OFAC) is continuing its efforts to investigate and penalize economic sanctions programs violations and other statutory and regulatory offenses in 2024. OFAC has substantial enforcement authority, and it acts on this authority by conducting investigations and imposing appropriate enforcement response in the form of penalties in accordance with its Economic Sanctions Enforcement Guidelines (the “Enforcement Guidelines”).

Financial institutions, businesses, and individuals targeted in OFAC enforcement cases can face a variety of potential consequences. They can also play a significant role in determining the outcome of their case by executing a proactive and strategic defense. This starts with conducting a comprehensive OFAC compliance assessment to determine their risk, and then formulating a defense strategy focused on achieving a favorable result in light of the circumstances at hand.

One of the keys to formulating an effective defense strategy in an OFAC enforcement case is understanding the potential outcomes—and, more importantly, why OFAC pursues specific outcomes in specific circumstances. With this in mind, here is an overview of the actions that OFAC can take in response to apparent violations under the Economic Sanctions Enforcement Guidelines:

Responses to Apparent Violations Under OFAC’s Enforcement Guidelines

1. No Action

Section II of OFAC’s Enforcement Guidelines expressly recognizes the possibility that an investigation may result in findings that enforcement action is unnecessary. This can be the case in two scenarios: (i) “there is insufficient evidence to conclude that a violation has occurred;” or, (ii) “an analysis of the General Factors outlined in Section III of [the Enforcement Guidelines] concludes that the conduct does not rise to a level warranting an administrative response.”

The General Factors in Section III outline 11 specific considerations that OFAC may assess when determining whether (and to what extent) formal enforcement action is warranted. Section III states
that OFAC will consider “some or all” of the General Factors in determining an “appropriate
administrative action . . . and, where a civil monetary penalty is imposed, in determining the
appropriate amount of any such penalty.” The General Factors also allow for consideration of “such
other factors that OFAC deems relevant on a case-by-case basis,” with the ultimate goal of
“consider[ing] the totality of the circumstances to ensure that [OFAC’s] enforcement response is
proportionate to the nature of the violation.”

2. Settlement

While not listed among the “types of responses to apparent violations” in Section II of the
Enforcement Guidelines, the possibility of settlement is addressed separately in Section V.
Specifically, Section V.C.1. provides that settlement discussions may be initiated by OFAC or a
target, and “[s]ettlements generally will be negotiated in accordance with the principles set forth in
these Guidelines with respect to appropriate penalty amounts.”

Section V of the Enforcement Guidelines goes on to discuss considerations pertinent to OFAC’s
decision to negotiate a settlement in three distinct scenarios: (i) settlement prior to the issuance of a
pre-penalty notice, (ii) settlement following the issuance of a pre-penalty notice, and (iii) settlements
involving multiple apparent violations.” Each of these scenarios presents different risks; and, as a
result, when pursuing a settlement with OFAC, targets must give due consideration for the specific
substantive and procedural posture of their case.

3. Request for Additional Information

The Enforcement Guidelines provide that OFAC can issue a request for additional information “if
needed.” While OFAC can request additional information from a target informally, it can also do so
through the issuance of an administrative subpoena in accordance with 31 C.F.R. Section 501.602.

The Enforcement Guidelines also discuss OFAC’s ability to obtain information in support of its
investigative efforts from other regulators. OFAC has entered into Memorandums of Understanding
(MOUs) with some other regulators, and these MOUs can specify the terms of any information-
sharing arrangements. However, as the Enforcement Guidelines also note, “[e]ven in the absence of
an MOU, OFAC may seek relevant information about a regulated institution and/or the conduct
constituting the apparent violation from the institution's federal, state, or foreign regulator.” Once
OFAC obtains sufficient additional information—whether from the target, another regulator, or another
third party—it will “decide, based on an analysis of the General Factors . . . whether to pursue further
enforcement action or whether some other response to the apparent violation is appropriate.”

4. Cautionary Letter

Issuing a cautionary letter is the lowest level of enforcement action that OFAC can take under the
Enforcement Guidelines. The Guidelines provide that a cautionary letter is warranted when OFAC
determines that, “there is insufficient evidence to conclude that a violation has occurred or that a
Finding of Violation or a civil monetary penalty is not warranted under the circumstances, but . . . that
the underlying conduct could lead to a violation in other circumstances and/or that [the target] does
not appear to be exercising due diligence in assuring compliance with the statutes, Executive orders,
and regulations that OFAC enforces.”

The Enforcement Guidelines clarify that while the issuance of a cautionary letter represents OFAC’s
“final enforcement response . . . unless OFAC later learns of additional related violations or other relevant facts,” it does not constitute a final agency determination for appellate purposes. Even so, targets that disagree with OFAC’s decision to issue a cautionary letter can—and should—work with their counsel to seek a revised determination from OFAC.

5. Finding of Violation

If OFAC determines that a violation has occurred and that “it [is] important to document the occurrence of [the] violation . . . but that a civil monetary penalty is not the most appropriate response,” it can issue a Finding of Violation. Unlike a cautionary letter, a Finding of Violation represents both OFAC’s final enforcement response (unless it later learns of additional relevant facts or violations) and a final agency determination that a violation has occurred. With that said, targets that receive a Finding of Violation have an opportunity to respond; and, if a target submits a response, OFAC will consider the response before making a final determination.

6. Civil Monetary Penalty

OFAC can impose civil monetary penalties for apparent violations in its discretion. Section II.E. of the Enforcement Guidelines includes civil penalty provisions that state: “If OFAC determines that a violation has occurred and, based on an analysis of the General Factors . . . , concludes that the [target’s] conduct warrants the imposition of a monetary penalty, OFAC may impose a civil monetary penalty. . . .” We discuss OFAC’s methods for calculating civil penalties in greater detail below.

7. Criminal Referral

Section II.F. of the Enforcement Guidelines provides that, “[i]n appropriate circumstances, OFAC may refer the matter to appropriate law enforcement agencies for criminal investigation and/or prosecution.” This typically involves referring the matter to the U.S. Department of Justice (DOJ). If the DOJ elects to prosecute, it can potentially pursue a wide range of charges—including charges specific to the sanctions violations (or other OFAC-specific violations) at issue as well as charges for conspiracy, wire fraud, money laundering, and other federal crimes.

8. Other Administrative Action

Finally, the Enforcement Guidelines provide that OFAC can take administrative action “[i]n addition to or in lieu of” pursuing other means of enforcement. Specifically, Section II.G. of the Guidelines authorizes OFAC to issue a cease-and-desist letter and/or initiate proceedings to deny, suspend, modify, or revoke a specific license or license application.

Calculating Civil Monetary Penalties Under OFAC’s Enforcement Guidelines in 2024

Many OFAC enforcement actions result in the imposition of civil penalties. Under Section V.B. of the Enforcement Guidelines, the “base penalty calculation” is determined based on two key factors: (i) whether the apparent violation at issue is “egregious” or “non-egregious,” and (ii) whether the target self-disclosed the apparent violation to OFAC.

In determining whether an apparent violation is “egregious,” OFAC focuses on a specific subset of the General Factors listed in Section III of the Enforcement Guidelines, which includes things like
willful or reckless conduct, the subject person's sanctions history, and whether the apparent violation has done harm to sanctions program objectives. Based on this determination, the “base penalty calculation” is then determined as follows:

- **Non-Egregious Apparent Violations** – For a self-reported non-egregious apparent violation, the base penalty calculation is half of the transaction value, capped at a maximum of $178,290 for 2024. For non-self-reported apparent violations, the base penalty calculation is the transaction value, capped at a maximum of $356,579 for 2024. These caps are reduced if the applicable statutory penalty is less than the cap amount.

- **Egregious Apparent Violations** – For an egregious self-reported apparent violation, the base penalty calculation is half of the applicable maximum statutory penalty for the calculation. For a non-self-reported egregious apparent violation, the base penalty calculation is the full maximum statutory penalty.

After calculating the base penalty amount, OFAC can then adjust the penalty based on relevant General Factors. As Section V.B.b. of the Enforcement Guidelines explains, “[e]ach factor may be considered mitigating or aggravating, resulting in a lower or higher proposed penalty amount,” depending on the circumstances at hand.

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