DEPARTMENT OF THE TREASURY

# OFAC

Office of Foreign Assets Control

# FAQs
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U.S. DEPARTMENT OF THE TREASURY

# Resource Center

## OFAC FAQs: General Questions

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### Basic Information on OFAC and Sanctions

Print this topic

**1. What is OFAC and what does it do?**

The Office of Foreign Assets Control administers and enforces economic sanctions programs primarily against countries and groups of individuals, such as terrorists and narcotics traffickers. The sanctions can be either comprehensive or selective, using the blocking of assets and trade restrictions to accomplish foreign policy and national security goals. [09-10-02]

**2. How long has OFAC been around?**

The Treasury Department has a long history of dealing with sanctions. Dating back prior to the War of 1812, Secretary of the Treasury Gallatin administered sanctions imposed against Great Britain for the harassment of American sailors. During the Civil War, Congress approved a law which prohibited transactions with the Confederacy, called for the forfeiture of goods involved in such transactions, and provided a licensing regime under rules and regulations administered by Treasury.

OFAC is the successor to the Office of Foreign Funds Control (the "FFC''), which was established at the advent of World War II following the German invasion of Norway in 1940. The FFC program was administered by the Secretary of the Treasury throughout the war. The FFC's initial purpose was to prevent Nazi use of the occupied countries' holdings of foreign exchange and securities and to prevent forced repatriation of funds belonging to nationals of those countries. These controls were later extended to protect assets of other invaded countries. After the United States formally entered World War II, the FFC played a leading role in economic warfare against the Axis powers by blocking enemy assets and prohibiting foreign trade and financial transactions.

OFAC itself was formally created in December 1950, following the entry of China into the Korean War, when President Truman declared a national emergency and blocked all Chinese and North Korean assets subject to U.S. jurisdiction. [05-02-06]

**3. What does one mean by the term "prohibited transactions"?**

Prohibited transactions are trade or financial transactions and other dealings in which U.S. persons may not engage unless authorized by OFAC or expressly exempted by statute. Because each program is based on different foreign policy and national security goals, prohibitions may vary between programs. [06-16-06]

**4. Are there exceptions to the prohibitions?**

Yes. OFAC regulations often provide general licenses authorizing the performance of certain categories of transactions. OFAC also issues specific licenses on a case-by-case basis under certain limited situations and conditions. Guidance on how to request a specific license is found below and at 31 C.F.R. 501.801.

To apply for a specific license, please go to our License Application Page. [06-16-06]

**6. Where can I find the specific details about the embargoes?**

A summary description of each particular embargo or sanctions program may be found in the Sanctions Program and Country Summaries area and in the Regulations by Industry area on OFAC's website. The text of Legal documents may be found in the Legal Documents area of OFAC's website which contains the text of 31 C.F.R. Chapter V and appropriate amendments to that Chapter which have appeared in the Federal Register. [09-10-02]

**7. Can I get permission from OFAC to transact or trade with an embargoed country?**

OFAC usually has the authority by means of a specific license to permit a person or entity to engage in a transaction which otherwise would be prohibited. In some cases, however, legislation may restrict that authority.

To apply for a specific license, please go to our License Application Page. [09-10-02]

**8. What must I do to get permission to trade with an embargoed country?**

In some situations, authority to engage in certain transactions is provided by means of a general license. In instances where a general license does not exist, a written request for a specific license must be filed with OFAC. The request must conform to the procedures set out in the regulations

pertaining to the particular sanctions program. Generally, application guidelines and requirements must be strictly followed, and all necessary information must be included in the application in order for OFAC to consider an application. For an explanation about the difference between a general and a specific license as well as answers to other licensing questions, see the licensing questions section.

To apply for a specific license, please go to our License Application Page. [09-10-02]

**9. What do you mean by "blocking?"**

Another word for it is "freezing." It is simply a way of controlling targeted property. Title to the blocked property remains with the target, but the exercise of powers and privileges normally associated with ownership is prohibited without authorization from OFAC. Blocking immediately imposes an across-the-board prohibition against transfers or dealings of any kind with regard to the property. [09-10-02]

**10. What countries do I need to worry about in terms of U.S. sanctions?**

OFAC administers a number of U.S. economic sanctions and embargoes that target geographic regions and governments. Some programs are comprehensive in nature and block the government and include broad-based trade restrictions, while others target specific individuals and entities. (Please see the "Sanctions Programs and Country Information" page for information on specific programs.) It is important to note that in non-comprehensive programs, there may be broad prohibitions on dealings with countries, and also against specific named individuals and entities. The names are incorporated into OFAC's list of Specially Designated Nationals and Blocked Persons ("SDN list") which includes approximately 5,500 names of companies and individuals who are connected with the sanctions targets. In addition, OFAC maintains other sanctions lists that may have different prohibitions associated with them. A number of the named individuals and entities are known to move from country to country and may end up in locations where they would be least expected. U.S. persons are prohibited from dealing with SDNs wherever they are located and all SDN assets are blocked. Entities that a person on the SDN List owns (defined as a direct or indirect ownership interest of 50% or more) are also blocked, regardless of whether that entity is separately named on the SDN List. Because OFAC's programs are dynamic, it is very important to check OFAC's website on a regular basis to ensure that your sanctions lists are current and you have complete information regarding the latest restrictions affecting countries and parties with which you plan to do business. [03-14-17]

**11. Who must comply with OFAC regulations?**

U.S. persons must comply with OFAC regulations, including all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, all U.S. incorporated entities and their foreign branches. In the cases of certain programs, foreign subsidiaries owned or controlled by U.S. companies also must comply. Certain programs also require foreign persons in possession of U.S.-origin goods to comply. [01-15-15]

**12. How much are the fines for violating these regulations?**

The fines for violations can be substantial. In many cases, civil and criminal penalties can exceed several million dollars. Civil penalties vary by sanctions program, and the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalty Inflation Adjustment Act Improvements Act of 2015, requires OFAC to adjust civil monetary penalty amounts annually. For current penalty amounts, see section V.B.2.a of Appendix A to OFAC's Economic Sanctions Enforcement Guidelines at 31 C.F.R Part 501. [03-08-17]

**13. Is there a mechanism for a company to report its past undetected violations of OFAC regulations for completed transactions? Is any type of "amnesty" available for inadvertent failure to comply prior to the company becoming aware of the OFAC regulations?**

Yes, a company can and is encouraged to voluntarily disclose a past violation. Self-disclosure is considered a mitigating factor by OFAC in Civil Penalty proceedings. A self-disclosure should be in the form of a detailed letter, with any supporting documentation, to Compliance and Enforcement Division, Director, Office of Foreign Assets Control, U.S. Department of the Treasury, 1500 Pennsylvania Ave., N.W., Washington, DC 20220. OFAC does not have an "amnesty" program. The ramifications of non-compliance, inadvertent or otherwise, can jeopardize critical foreign policy and national security goals. OFAC does, however, review the totality of the circumstances surrounding any violation, including the quality of a company's OFAC compliance program. [11-16-07]

**14. Can I regard previously issued and published opinion letters, regulatory interpretations, or other statements as guidance for my transactions?**

Great care should be taken when placing reliance on such materials to ensure that the transactions in question fully conform to the letter and spirit of the published materials and that the materials have not been superseded. [09-10-02]

**15. Can OFAC change its previously stated, non-published interpretation or opinion without first giving public notice?**

Yes. OFAC, therefore, strongly encourages parties to exercise due diligence when their business activities may touch on an OFAC-administered program and to contact OFAC if they have any questions about their transactions. [09-10-02]

**468. How do I verify an OFAC document? For example, how do I know that an OFAC license or a Specially Designated Nationals (SDN) List removal letter is authentic?**

If you have questions about the authenticity of an OFAC document that is not publically posted on the OFAC website, you can contact OFAC and reference the specific case ID or FAC number that is included on the document.

- To verify a specific license, please contact the OFAC Licensing Division at 1-202-622-2480.
- To verify an SDN removal letter, please email ofac.reconsideration@treasury.gov.
- To verify another OFAC document, please contact the OFAC Compliance Division at 1-202-622-2490.

[04-21-2016]

**469. Does OFAC issue certificates of non-inclusion to help prove that a name is not on one of OFAC's sanctions lists?**

No, OFAC does not issue non-inclusion certificates. [04-21-2016]

**91. I am looking for the terrorist list on your web site so I can bring my company in compliance with U.S. law. Where can I find this list?**

OFAC's regulations are broader than the specific laws that deal with the terrorists and persons who support them. All individuals and entities that fall under U.S. jurisdiction should use OFAC's list of Specially Designated Nationals and Blocked Persons ("SDN List"). This list includes designated terrorists and is available on OFAC's website. It is important to note that some OFAC sanctions, such as those pertaining to Iran, Sudan, and Cuba, apply to persons acting on behalf of those targeted governments even if those persons do not appear on the SDN list. It is also important to note that OFAC's Cuba sanctions prohibit most transactions with Cuban nationals, wherever located. U.S. persons are expected to exercise due diligence in determining whether any such persons are involved in a proposed transaction. [01-15-15]

**126. I tried to ship a package and it was returned to me "due to OFAC sanctions." Why?**

There may have been one or more reasons the package was rejected. For example, was it destined for Iran, Sudan or Cuba and lacking a description of the contents? Was it an unlicensed commercial shipment destined for Iran, Sudan or Cuba? Was it a personal gift destined for an individual in Iran or Sudan, with a stated value exceeding $100? These are legitimate reasons for shipping companies to refuse to process such packages. Not only could you be liable for attempting to send such packages, but the shipping companies also could be liable for their role in processing them. See OFAC's country brochures and program webpages for more information on the restrictions on shipping goods to Iran, Sudan and Cuba:

- Overview of Iran sanctions
- Overview of Sudan sanctions
- Overview of Cuba sanctions

[02-07-2011]

**127. I tried to ship a package and it was "blocked" by the shipping company "due to OFAC sanctions." Why? And how can I get the package unblocked?**

Shipping companies are required to "block" packages in which a Specially Designated National ("SDN") or other blocked person has an interest. When a package is required to be "blocked," the shipper must retain the package rather than reject and return it to the sender. Blocking is not required if a general or specific license from OFAC authorizes the shipper to reject or process the package, or if the transaction is otherwise exempted from the prohibitions based on the type or content of the package. To request a license for the package's release, apply online or send a letter with a detailed description of the package's contents and an explanation of the parties involved in the transaction, along with a copy of the package's air waybill or Customs Declaration and Dispatch form, to:

U.S. Department of the Treasury
Office of Foreign Assets Control
Licensing Division
1500 Pennsylvania Avenue, NW
Washington, DC 20220

[02-07-2011]

## OFAC Licenses

Print this topic

### General Questions Regarding OFAC Licenses and Licensing Procedures (Print)

**74. What is a license?**

A license is an authorization from OFAC to engage in a transaction that otherwise would be prohibited. There are two types of licenses: general licenses and specific licenses.

A general license authorizes a particular type of transaction for a class of persons without the need to apply for a license.

A specific license is a written document issued by OFAC to a particular person or entity, authorizing a particular transaction in response to a written license application.

Persons engaging in transactions pursuant to general or specific licenses must make sure that all conditions of the licenses are strictly observed.

OFAC's regulations may contain statements of OFAC's specific licensing policy with respect to particular types of transactions. [06-16-06]

**75. Do I have to fill out a particular form to get a license to engage in a transaction?**

Most license applications do not have to be submitted on a particular form. However, it is essential to include in the request all necessary information as required in the application guidelines or the regulations pertaining to the particular embargo program. When applying for a license, provide a detailed description of the proposed transaction, including the names and addresses of any individuals/companies involved. The mailing address for license applications is:

Office of Foreign Assets Control
U.S. Department of the Treasury
Treasury Annex
1500 Pennsylvania Avenue, NW
Washington, DC 20220
Attn: Licensing Division

In order to apply for a specific license to release blocked funds, you are encouraged to file an electronic application to have blocked funds released by visiting the following link: http://www.treasury.gov/resource-center/sanctions/Pages/licensing.aspx

You may also submit an application for the release of blocked funds which is available on OFAC's website under "Forms." You should print this form, complete the required information, attach payment instructions, and mail it to the address listed above.

Depending upon the transaction, there may be specific guidance available on OFAC's website under relevant "Guidance on Licensing policy" on OFAC's various sanctions program web pages. [10-08-13]

**76. Can I appeal a denial of my license application?**

A denial by OFAC of a license application constitutes final agency action. The regulations do not provide for a formal process of appeal. However, OFAC will reconsider its determinations for good cause, for example, where the applicant can demonstrate changed circumstances or submit additional relevant information not previously made available to OFAC. [09-10-02]

**77. How can I find out the status of my pending license application?**

OFAC will notify applicants in writing as soon as a determination has been made on their application. The length of time for determinations to be reached will vary depending on the complexity of the transactions under consideration, the scope and detail of interagency coordination, and the volume of similar applications awaiting consideration. Applicants are encouraged to wait at least two weeks before telephonically contacting the Licensing Division at (202) 622-2480 to inquire about the status of their application. Callers can use OFAC's automated license application status hotline (accessible through the 202-622-2480 number) to check on the status of their application. [10-08-13]

**78. What agencies other than Treasury review OFAC license applications and what are the roles of these other agencies?**

Many of OFAC's licensing determinations are guided by U.S. foreign policy and national security concerns. Numerous issues often must be coordinated with the U.S. Department of State and other government agencies, such as the U.S. Department of Commerce. Please note that the need to comply with other provisions of 31 C.F.R. chapter V, and with other applicable provisions of law, including any aviation, financial, or trade requirements of agencies other than the Department of Treasury's Office of Foreign Assets Control. Such requirements include the Export Administration Regulations, 15 C.F.R. Parts 730 et seq., administered by the Department of Commerce, and the International Traffic in Arms Regulations, 22 C.F.R. Parts 120-130, administered by the Department of State. [06-16-06]

**51. How do I apply for a license to get my money unblocked?**

With respect to blocked funds transfers, you are encouraged to file an electronic application to have blocked funds released by visiting the following link: http://www.treasury.gov/resource-center/sanctions/Pages/licensing.aspx

You may also submit an application for the release of blocked funds which is available on OFAC's website under "Forms." You should print this form, complete the required information, attach payment instructions, and mail it to:

Office of Foreign Assets Control
U.S. Department of the Treasury
Treasury Annex
1500 Pennsylvania Avenue, NW
Washington, DC 20220
Attn: Licensing Division

It is extremely important that the underlying transaction be described in detail and copies of supporting documentation be included in the package. [10-08-13]

**58. What are the chances that my application will be approved?**

Each application is reviewed on a case-by-case basis and often requires interagency consultation. Although we cannot predict how long this review might take, following existing application guidelines will help to expedite your determination. [09-10-02]

**59. Do I need a registration number or license to donate goods?**

Most OFAC sanctions programs provide exemptions to their prohibitions for certain donated goods, such as articles to relieve human suffering. This is not the case for all programs, however. You should refer to the legal section of OFAC's website for the regulations applicable to the specific target or target country of your donation. [09-10-02]

## Questions Regarding Licenses Authorizing Exports of Agricultural Commodities, Medicine, and Medical Devices to Iran and Sudan Pursuant to the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) (Print)

**97. What format options are permitted for submitting license applications pursuant to the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA)?**

OFAC permits two format options for submitting TSRA license applications: online or hard-copy. Applications submitted via mail must be accompanied by a cover letter that includes some essential information: the purpose of the application and the applicant's full contact information. If either the cover letter or the pertinent information is missing, the application is considered incomplete and risks delay or rejection. Effective January 17, 2017, a specific license is not required to export or reexport agricultural commodities, medicines, or medical devices to Sudan, as such transactions are generally licensed pursuant to 31 C.F.R. § 538.540. [01-13-2017]

**98. How should I present my TSRA license application?**

Applicants should clearly enumerate in a table format all pertinent information related to their proposed transactions, including: a) Full names and addresses of all parties involved in the transactions and their roles, including financial institutions and any Iranian broker (identify company principals), purchasing agent (identify company principals), end-user(s) (full contact name), or other participants involved in the purchase of the proposed export items; and b) If applicable, the commodity classification numbers that are associated with the proposed export items. Effective January 17, 2017, a specific license is not required to export or reexport agricultural commodities, medicines, or medical devices to Sudan, as such transactions are generally licensed pursuant to 31 C.F.R. § 538.540. [01-13-2017]

**100. If I am submitting multiple TSRA license applications at the same time, should I send them under a single cover letter?**

OFAC requires applicants to submit each individual application separately; regardless of if you are completing the online application or sending in a hard copy application through the mail. If an applicant is submitting a hard copy, each application should be in a separate envelope, accompanied by a separate cover letter. Applicants should not submit multiple applications in a single envelope with a single cover letter. If you submit applications in that manner, you may encounter some delay in the processing of your applications. Therefore, in order to prevent such delay, submit one application with one cover letter per envelope. [03-16-2015]

**101. Should I send a sample of the proposed export product as an attachment to my TSRA license application?**

No. OFAC does not require samples of proposed export products to be sent as attachments to any application. OFAC does not need to examine samples of the actual product in making its final determination. Therefore, please do not include any samples with your application. [06-14-2007]

**Specific to Iran**

**117. I hold a specific license to sell agricultural goods, medicine, or medical devices to Iran. The general license at section 560.532(a)(4) of the Iranian Transactions and Sanctions Regulations (ITSR) authorizes me to accept a letter of credit issued by an Iranian financial institution whose property and interests in property are blocked solely pursuant to the ITSR (i.e., an Iranian financial institution that is not listed on OFAC's List of Specially Designated Nationals and Blocked Persons (SDN List)). The general license, however, also states that a U.S. financial institution may not advise, confirm, or otherwise deal in that credit. How am I supposed to know if/when a letter of credit has been issued for my sale and how do I get paid? My bank accounts are all at U.S. financial institutions.**

This language is in the general license at section 560.532(a)(4) of the ITSR because it is contrary to U.S. foreign policy to allow U.S. financial institutions to maintain active correspondent relationships with Iranian banks. The language, however, does not preclude a U.S. financial institution or an entity owned or controlled by a United States Person and established or maintained outside the United States ("U.S.-owned or -controlled foreign entity") from being a second advising bank (i.e. receiving and passing forward advice from a third-country bank that the credit has been issued), nor does it preclude the U.S. financial institution or a U.S.-owned or -controlled foreign entity from receiving funds in payment for the licensed export from a third-country bank. You should also note that the Iranian Transactions and Sanctions Regulations authorize U.S. financial institutions and U.S.-owned or -controlled foreign entities to directly advise or confirm letters of credit issued by third-country banks for authorized shipments. The third-country bank may not be an overseas branch of a U.S. financial institution, a U.S.-owned or -controlled foreign entity, an Iranian financial institution, or the Government of Iran, unless otherwise authorized by OFAC.. In none of these circumstances, however, may there be any direct or indirect involvement of entities the property and interests in property of which have been blocked under any of the programs administered by OFAC, except

for persons whose property and interests in property are blocked solely pursuant to Executive Order 13599 and the Iranian Transactions and Sanctions Regulations. [01-13-2017]

**Specific to Sudan**

**500. I am an exporter of agricultural commodities, medicine, or medical devices to Sudan and have previously obtained specific licenses from OFAC for such exports. Do I still need to apply for a specific license from OFAC for exports or reexports of such items to Sudan or renew my existing specific licenses?**

No. The general license authorizing transactions involving Sudan, 31 C.F.R. § 538.540 (the "2017 Sudan Rule"), authorizes all transactions prohibited by the Sudanese Sanctions Regulations, 31 C.F.R. part 538, and, therefore, effective January 17, 2017, U.S. persons are not required to renew or obtain a new specific license from OFAC to export or reexport agricultural commodities, medicine, or medical devices to Sudan. Further, pursuant to 31 C.F.R. § 501.801, it is the policy of OFAC not to grant applications for specific licenses authorizing transactions to which the provisions of an outstanding general license are applicable.

However, pursuant to the 2017 Sudan Rule, which implements certain requirements of the Trade Sanctions Reform and Export Enhancement Act of 2000 (22 U.S.C. §§ 7201 – 7211), as amended, any exports or reexports of agricultural commodities, medicine, or medical devices to the Government of Sudan, to any individual or entity in Sudan, or to any person in a third country purchasing specifically for resale to any of the foregoing, must be shipped within 12 months of the date of the signing of the contract for the relevant export or reexport of such items to Sudan. [01-13-2017]

## How to Receive Notifications About OFAC Updates

Print this topic

**86. Does OFAC have an email service that will notify me when there are updates to any of its sanctions lists?**

Yes. OFAC has multiple e-mail subscription services available. Please visit the following link to sign up for these services:

https://service.govdelivery.com/service/multi_subscribe.html?code=USTREAS

OFAC also maintains a Really Simple Syndication (RSS) feed . This feed is updated whenever the OFAC site is updated. [11-18-10]

**92. I'm a subscriber to OFAC's e-mail notification services. For some reason I have stopped receiving the broadcast messages when OFAC updates its website. Why is this?**

Check to see if the messages are in your SPAM folder. Mostly likely, it is your SPAM filter or your network configuration that is preventing you from receiving the OFAC broadcast messages. If you believe that may be the case, please discuss the matter with your IT department or network administrator. You may need to have your IT personnel allow e-mails from the following domain to come through the SPAM filter, "subscriptions.treas.gov;" in some cases allowing the domain, "treas.gov" through the filter will also work. If you believe that you have been removed from the subscription list in error you may contact OFAC at O_F_A_C@do.treas.gov or re subscribe here. [04-21-15]

**93. I recently attempted to subscribe to one of OFAC's e-mail list services and I have not yet received my confirmation e-mail. Why is this?**

Failure to receive a confirmation e-mail is typically (though not always) the result of a configuration problem on the user's end. The user should follow these steps to ensure that he or she is using the system properly.

1. Be patient. For a variety of reasons e-mail sometimes take a little longer than expected to reach a user. If you do not receive a confirmation e-mail within a day of subscribing, proceed to step 2.
2. Confirm that you have entered the correct e-mail address and address punctuation. A surprising number of errors have been the result of users accidentally using commas instead of periods.
3. Check to see if you have a SPAM filter in place. SPAM filters have a variety of configurations. Some of these filters have been known to erroneously block e-mails originating from OFAC's list servers. OFAC cannot provide technical support for local configuration issues. If you believe a SPAM filter is preventing you from receiving OFAC e-mails, please discuss the matter with your IT department or network administrator. You will need to have your IT personnel allow e-mails from the following domain to come through the SPAM filter "subscriptions.treas.gov". Once this is done you may proceed to step 4. If you can confirm that you do not have a SPAM filter in place or any other local configuration problem, please skip step 4 and proceed to step 5.
4. If your network or e-mail client's configuration is preventing you from receiving your subscription confirmation e-mail, it is likely that you will not be able to receive e-mail from OFAC's list servers even if OFAC manually adds you to our listserv. These configuration issues must be resolved with your IT department or network administrator before you can proceed.
5. If, after you have exhausted all of the above options, you still fail to receive OFAC's broadcast notifications, please call our support hotline at 1-800-540-6322. [12-19-07]

## OFAC Information on a Credit Report

Print this topic

**70. What Is This OFAC Information On My Credit Report?**

Credit bureaus and agencies in particular have adopted new measures to ensure compliance with OFAC regulations. Before issuing a credit report, they use screening software to determine if a credit applicant is on OFAC's Specially Designated Nationals (SDN) list or one of OFAC's other sanctions lists. This software matches the credit applicant's name and other information to the names on OFAC's sanctions lists. If there is a potential match, the credit bureaus may place a "red flag" or alert on the report. This does not necessarily mean that someone is illegally using your social security number or that you have bad credit. It is merely a reminder to the person checking your credit that he or she should verify whether you are the individual on one of OFAC's sanctions lists by comparing your information to the OFAC information. If you are not the individual on the sanctions list, the person checking your credit should disregard the OFAC alert, and there is no need to contact OFAC. However, if the person checking your credit believes you are the person on one of OFAC's sanctions lists, then he or she should call the OFAC Hotline to verify and report it. [01-30-15]

**71. How Can I Get The OFAC Alert Off My Credit Report?**

A consumer has the right under the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 et seq., to request the removal of incorrect information on his/her credit report. To accomplish this, consumers should contact the credit reporting agency or bureau that issued the credit report. For more information on consumers' rights under the FCRA, visit the Federal Trade Commission's website at http://www.ftc.gov/os/statutes/fcrajump.shtm or the Consumer Financial Protection Bureau at 855-411-2372. [01-30-2015]

## Entities Owned by Persons Whose Property and Interest in Property are Blocked (50% Rule)

Print this topic

These Frequently Asked Questions (FAQs) respond to inquiries received by the Department of the Treasury's Office of Foreign Assets Control (OFAC) relating to the status of entities owned by individuals or entities whose property and interests in property are blocked under Executive orders and regulations administered by OFAC (blocked persons). These FAQs provide additional clarity regarding revised guidance that OFAC issued today, which can be found on OFAC's website here, amending earlier guidance that had been issued on February 14, 2008 (OFAC's 50 Percent Rule). The revised guidance states that the property and interests in property of entities directly or indirectly owned 50 percent or more in the aggregate by one or more blocked persons are considered blocked regardless of whether such entities appear on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) or the annex to an Executive order. The revised guidance expands upon the earlier guidance by setting forth a new interpretation addressing entities owned 50 percent or more in the aggregate by more than one blocked person.*

For the purposes of clarification, please see specific FAQs below that OFAC is adding to its website. If you require additional guidance with respect to the application of OFAC's 50 Percent Rule, please contact OFAC and submit information pertaining to the specific facts and circumstances. [08-13-2014]

**OFAC also applies a 50 percent rule to entities on the Sectoral Sanctions Identifications List (SSI List) created in July 2014 in the Ukraine-related sanctions context. The property and interests in property of persons on the SSI List (and entities owned 50% or more in the aggregate by one or more persons subject to the SSI List restrictions) are not required to be blocked; instead a more limited set of transaction restrictions applies to them. In the context of the SSI List restrictions, therefore, these FAQs can be used to identify which subordinate entities are subject to the SSI List restrictions only and are not meant to suggest that any additional actions (such as blocking) apply to those entities.*

**398. Does OFAC consider entities over which one or more blocked persons exercise control, but do not own 50 percent or more of, to be blocked pursuant to OFAC's 50 Percent Rule?**

No. OFAC's 50 Percent Rule speaks only to ownership and not to control. An entity that is controlled (but not owned 50 percent or more) by one or more blocked persons is not considered automatically blocked pursuant to OFAC's 50 Percent Rule. OFAC may, however, designate the entity and add it to the SDN List pursuant to a statute or Executive order that provides the authority for OFAC to designate entities over which a blocked person exercises control. OFAC urges caution when considering a transaction with an entity that is not a blocked person (a non-blocked entity) in which one or more blocked persons have a significant ownership interest that is less than 50 percent or which one or more blocked persons may control by means other than a majority ownership interest. Such non-blocked entities may become the subject of future designations or enforcement actions by OFAC. In addition, persons should be cautious in dealings with such a non-blocked entity to ensure that they are not, for example, dealing with a blocked person representing the non-blocked entity, such as entering into a contract that is signed by a blocked person. Please also note that some sanctions programs (such as Cuba and Sudan) block persons without an OFAC designation; these blockings are based on criteria separate from OFAC's 50 Percent Rule. [08-13-2014]

**399. Does OFAC aggregate ownership stakes of all blocked persons when determining whether an entity is blocked pursuant to OFAC's 50 Percent Rule?**

Yes. On August 13, 2014, OFAC indicated in its revised 50 Percent Rule guidance that OFAC's 50 Percent Rule applies to entities owned 50 percent or more in the aggregate by one or more blocked persons. Accordingly, if Blocked Person X owns 25 percent of Entity A, and Blocked Person Y owns another 25 percent of Entity A, Entity A is considered to be blocked. This is so because Entity A is owned 50 percent or more in the aggregate by one or more blocked persons. For the purpose of calculating aggregate ownership, the ownership interests of persons blocked under different OFAC sanctions programs are aggregated. [08-13-2014]

**400. As explained in FAQ 398, OFAC's 50 Percent Rule does not apply if one or more individuals who are blocked persons (blocked individuals) control, but do not own 50 percent or more of, an entity. Can persons engage in negotiations, enter into contracts, or process transactions involving a blocked individual when that blocked individual is acting on behalf of the non-blocked entity that he or she controls (e.g., a blocked individual is an executive of a non-blocked entity and is signing a contract on behalf of the non-blocked entity)?**

No. OFAC sanctions generally prohibit transactions involving, directly or indirectly, a blocked person, absent authorization from OFAC, even if the blocked person is acting on behalf of a non-blocked entity. Therefore, U.S. persons should be careful when conducting business with non-blocked entities in which blocked individuals are involved; U.S. persons may not, for example, enter into contracts that are signed by a blocked individual. [08-13-2014]

**401. OFAC's 50 Percent Rule states that the property and interests in property of entities directly or indirectly owned 50 percent or more in the aggregate by one or more blocked persons are considered blocked. How does OFAC interpret indirect ownership as it relates to certain complex ownership structures?**

"Indirectly," as used in OFAC's 50 Percent Rule, refers to one or more blocked persons' ownership of shares of an entity through another entity or entities that are 50 percent or more owned in the aggregate by the blocked person(s). OFAC urges persons considering a potential transaction to conduct appropriate due diligence on entities that are party to or involved with the transaction or with which account relationships are maintained in order to determine relevant ownership stakes. Please see FAQ 116 for additional guidance on due diligence standards for intermediary parties to wire transfers. Please refer to the examples below for further guidance on determining whether an entity is blocked pursuant to OFAC's 50 Percent Rule.

Example 1: Blocked Person X owns 50 percent of Entity A, and Entity A owns 50 percent of Entity B. Entity B is considered to be blocked. This is so because Blocked Person X owns, indirectly, 50% of Entity B. In addition, Blocked Person X's 50 percent ownership of Entity A makes Entity A a blocked person. Entity A's 50 percent ownership of Entity B in turn makes Entity B a blocked person.

Example 2: Blocked Person X owns 50 percent of Entity A and 50 percent of Entity B. Entities A and B each own 25 percent of Entity C. Entity C is considered to be blocked. This is so because, through its 50 percent ownership of Entity A, Blocked Person X is considered to indirectly own 25 percent of Entity C; and through its 50 percent ownership of Entity B, Blocked Person X is considered to indirectly own another 25 percent of Entity C. When Blocked Person X's indirect ownership of Entity C through Entity A and Entity B is totaled, it equals 50 percent. Entity C is also considered to be blocked due to the 50 percent aggregate ownership by Entities A and B, which are themselves blocked entities due to Blocked Person X's 50 percent ownership of each.

Example 3: Blocked Person X owns 50 percent of Entity A and 10 percent of Entity B. Entity A also owns 40 percent of Entity B. Entity B is considered to be blocked. This is so because, through its 50 percent ownership of Entity A, Blocked Person X is considered to indirectly own 40 percent of Entity B. When added to Blocked Person X's direct 10 percent ownership of Entity B, Blocked Person X's total ownership (direct and indirect) of Entity B is 50 percent. Entity B is also blocked due to the 50 percent aggregate ownership by Blocked Person X and Entity A, which are themselves both blocked persons.

Example 4: Blocked Person X owns 50 percent of Entity A and 25 percent of Entity B. Entities A and B each own 25 percent of Entity C. Entity C is not considered to be blocked. This is so because, even though Blocked Person X is considered to indirectly own 25 percent of Entity C through its 50 percent ownership of Entity A, Entity B is not 50 percent or more owned by Blocked Person X, and therefore Blocked Person X is not considered to indirectly own any of Entity C through its part ownership of Entity B. Blocked Person X's total ownership (direct and indirect) of Entity C therefore does not equal or exceed 50 percent. Entity A is itself a blocked person, but its ownership of Entity C also does not equal or exceed 50 percent.

Example 5: Blocked Person X owns 25 percent of Entity A and 25 percent of Entity B. Entities A and B each own 50 percent of Entity C. Entity C is not considered to be blocked. This is so because Blocked Person X's 25 percent ownership of each of Entity A and Entity B falls short of 50 percent. Accordingly, neither Entity A nor Entity B is blocked and Blocked Person X is not considered to indirectly own any of Entity C through its part ownership of Entities A or B. [08-13-2014]

**402. How does OFAC's 50 Percent Rule apply to situations in which one or more blocked persons owned 50 percent or more of an entity, but subsequent to their designations one or more blocked persons divest their ownership stakes in the entity in a transaction that occurs entirely outside of U.S. jurisdiction such that the resulting combined ownership of the entity by blocked persons is less than 50 percent? How should a person treat property or interests in property of such an entity (1) in future transactions (post-divestment) and (2) that was properly blocked while the entity was owned 50 percent or more by one or more blocked persons?**

According to OFAC's 50 Percent Rule, entities are considered blocked if they are owned 50 percent or more (directly or indirectly) in the aggregate by one or more blocked persons. If one or more blocked persons divest their ownership stake such that the resulting combined ownership by blocked persons is less than 50 percent, the entity is no longer considered automatically to be a blocked entity. Any such divestment transactions must occur entirely outside of U.S. jurisdiction and must not involve U.S. persons, as any blocked property or interests in property that come into the possession or control of a U.S. person must be blocked and reported to OFAC, and OFAC does not recognize any subsequent unlicensed transfers, through changes in ownership or otherwise, of such property.

Entities in which the aggregate of one or more blocked persons' ownership stakes has fallen below 50 percent are not considered blocked pursuant to OFAC's 50 Percent Rule, and therefore property of such entities that comes into the United States or the possession or control of a U.S. person while the aggregate of one or more blocked persons' ownership stakes is below 50 percent is not considered blocked by OFAC's 50 Percent Rule. OFAC urges caution when dealing with or processing transactions involving such entities, as those entities may become the subject of future designations or enforcement actions by OFAC. Sufficient due diligence should be conducted to determine that any purported divestment in fact occurred and that the transfer of ownership interests was not merely a sham transaction.

When the property of an entity owned 50 percent or more by a single blocked person comes within the United States or within the possession or control of a U.S. person and is blocked, the property remains blocked unless and until (1) OFAC authorizes the unblocking of or other dealings in the property or (2) OFAC removes the blocked person from the SDN List. The property remains blocked even if the blocked person's ownership of the entity subsequently falls below 50 percent. This is so because the blocked person is considered to have an interest in the blocked property, and OFAC does not recognize the unlicensed transfer of the blocked person's interest after the property becomes blocked in the United States or in the possession or control of a U.S. person. Persons holding such property may request authorization from OFAC's Licensing Division to transfer or otherwise deal in that property (the electronic application can be found on OFAC's website here), and OFAC will evaluate such requests on a case-by-case basis.

Similarly, when the property of an entity owned 50 percent or more in the aggregate by more than one blocked person comes within the United States or in the possession or control of a U.S. person and is blocked, the property remains blocked unless and until (1) OFAC authorizes the unblocking of or other dealings in the property or (2) OFAC removes from the SDN List one or more of the blocked persons such that the aggregate ownership by blocked persons falls below 50 percent. If the aggregate ownership of the entity by blocked persons falls below 50 percent not due to SDN List removal actions by OFAC but instead due to actions by one or more of the blocked persons, including the entity itself, the property remains blocked. This is so because the group of blocked persons is considered to have an interest in the blocked property, and OFAC does not recognize the unlicensed transfer of any of the blocked persons' interests after the property becomes blocked in the United States or in the possession or control of a U.S. person. Persons holding such property may request authorization from OFAC's Licensing Division to transfer or otherwise deal in that property (the electronic application can be found on OFAC's website here), and OFAC will evaluate such requests on a case-by-case basis. [08-13-2014]

## Cross-Programmatic Compliance Services Guidance

Print this topic

**495. Why did OFAC issue the Guidance on the Provision of Certain Services Relating to the Requirements of U.S. Sanctions Laws (the "Compliance Services Guidance")?**

OFAC has received numerous inquiries, many from foreign companies at outreach events, regarding whether U.S. persons may provide, and whether U.S. persons have been able to provide in the past, certain types of legal and compliance services to covered persons. The Compliance Services Guidance provides clarity in response to those inquiries. For purposes of the Compliance Services Guidance, "covered persons" means U.S. persons and foreign persons other than any person (i) whose property and interests in property are blocked pursuant to any part of 31 C.F.R. chapter V, including persons listed on OFAC's List of Specially Designated Nationals and Blocked Persons (SDN List), or (ii) to whom a U.S. person is prohibited from exporting services or from whom a U.S. person is prohibited from importing services pursuant to any part of 31 C.F.R. chapter V. The Compliance Services Guidance does not describe every allowable service relating to the requirements of U.S. sanctions laws. [01-12-2017]

**496. Does the Compliance Services Guidance represent a change in OFAC's policy with respect to the provision of legal and compliance services?**

No. The Compliance Services Guidance does not reflect a change in OFAC's policy with respect to the provision of these types of legal and compliance services. OFAC is issuing the Compliance Services Guidance in response to numerous inquiries to ensure that both U.S. and foreign individuals and entities understand that U.S. persons may provide services consistent with the Compliance Services Guidance. [01-12-2017]

**497. In providing services consistent with the Compliance Services Guidance to a foreign covered person, can a U.S. person opine on the legality of a transaction under U.S. sanctions laws, including by providing a legal opinion, certification, or other clearance as to the legality of such transaction, where it would be prohibited for a U.S. person to engage in such transaction?**

Yes. In providing services to a foreign covered person, a U.S. person may opine on the legality of a transaction under U.S. sanctions laws, including by providing a legal opinion, certification, or other clearance as to the legality of such transaction, where it would be prohibited for a U.S. person to engage in the transaction. U.S. persons may not provide such services to persons who are subject to certain restrictions under OFAC's regulations, such as persons listed on OFAC's SDN List.

U.S. persons, wherever located, may not otherwise approve, finance, facilitate, or guarantee any transaction by a foreign person, including one that meets the definition of a covered person, as defined in FAQ #495, where the transaction by that foreign person would be prohibited by 31 C.F.R. chapter V if performed by a U.S. person or within the United States. For example, U.S. persons could not vote on a transaction (e.g., as a board member), or execute transaction documents (other than as to the legality of the transaction, as specified above), where the transaction would be prohibited if performed by a U.S. person or within the United States. [01-12-2017]

**498. The Compliance Services Guidance states that a U.S. person may solicit information from covered persons and conduct research to make a determination as to the legality of transactions under U.S. sanctions laws. What are examples of research that would be allowable under the Compliance Services Guidance?**

U.S. persons may conduct research using the internet, including searches of commercial databases, as well as published reference materials for the purpose of determining the legality of transactions under U.S. sanctions laws. In addition, U.S. persons may solicit information regarding a

transaction from covered persons, such as, for example, the currency involved; any involvement of U.S. persons, directly or indirectly; and the identity of the covered person's counterparty. [01-12-2017]

**499. What type of research exceeds the scope of the Compliance Services Guidance?**

A U.S. person may not conduct research that otherwise involves the importation or exportation of services where such transactions are prohibited by any part of 31 C.F.R. chapter V, unless such transactions are authorized by OFAC. [01-12-2017]

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**DEPARTMENT OF THE TREASURY**

**Office of Foreign Assets Control**

**31 CFR Part 501**

## Economic Sanctions Enforcement Guidelines

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury is issuing this final rule, ''Economic Sanctions Enforcement Guidelines,'' as enforcement guidance for persons subject to the requirements of U.S. sanctions statutes, Executive orders, and regulations. This rule was published as an interim final rule with request for comments on September 8, 2008. This final rule sets forth the Enforcement Guidelines that OFAC will follow in determining an appropriate enforcement response to apparent violations of U.S. economic sanctions programs that OFAC enforces. These Enforcement Guidelines are published as an Appendix to the Reporting, Procedures and Penalties Regulations.

**DATES:** This final rule is effective November 9, 2009.

**FOR FURTHER INFORMATION CONTACT:** Elton Ellison, Assistant Director, Civil Penalties, (202) 622–6140 (not a toll-free call).

**SUPPLEMENTARY INFORMATION:**

### Electronic Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, tel.: (202) 622–0077.

### Procedural Requirements

Because this final rule imposes no obligations on any person, but only explains OFAC's enforcement policy and procedures based on existing substantive rules, prior notice and public comment are not required pursuant to 5 U.S.C. 553(b)(A). Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply. This final rule is not a significant regulatory action for purposes of Executive Order 12866.

Although a prior notice of proposed rulemaking was not required, OFAC solicited comments on this final rule in order to consider how it might make improvements to these Guidelines. OFAC received a total of 11 comments.

The collections of information related to the Reporting, Procedures and Penalties Regulations have been previously approved by the Office of Management and Budget (OMB) under control number 1505–0164. A small adjustment to that collection was submitted to OMB in order to take into account the voluntary self-disclosure process set forth in the Guidelines. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. This collection of information is referenced in subpart I of Part I, subpart G of part III and subpart B of part V of these Guidelines, which will constitute the new Appendix to part 501. The referenced subparts explain that the voluntary self-disclosure of an apparent violation to OFAC will be considered in determining the appropriate agency response to the apparent violation and, in cases where a civil monetary penalty is deemed appropriate, the penalty amount. As set forth in subpart B of part V of the Guidelines, an apparent violation involving a voluntary self-disclosure will result in a base penalty amount at least 50 percent less than the base penalty amount in similar cases that do not involve a voluntary self-disclosure. This provides an incentive for persons who have or may have violated economic sanctions laws to voluntarily provide OFAC information that it can use to better implement its economic sanctions programs. The submitters who will likely seek to avail themselves of the benefits of voluntary self-disclosure are businesses, other entities, and individuals who find that they have or may have violated a sanctions prohibition and wish to disclose their actual or potential violation.

*The estimated total annual reporting and/or recordkeeping burden:* 1,250 hours. *The estimated annual burden per respondent/record keeper:* 10 hours. *Estimated number of respondents and/or record keepers:* 125. *Estimated annual frequency of responses:* Once or less, given that OFAC expects that persons who voluntarily self disclose their violations will take better care to avoid future violations.

## Background

The primary mission of OFAC is to administer and enforce economic sanctions against targeted foreign countries and regimes, terrorists and terrorist organizations, weapons of mass destruction proliferators, narcotic traffickers, and others, in furtherance of U.S. national security, foreign policy, and economic objectives. OFAC acts under Presidential national emergency powers, as well as specific legislation, to prohibit transactions and block (or ''freeze'') assets subject to U.S. jurisdiction. Economic sanctions are designed to deprive the target of the use of its assets and to deny it access to the U.S. financial system and the benefits of trade, transactions, and services involving U.S. markets, businesses, and individuals. These same authorities have also been used to protect certain assets subject to U.S. jurisdiction and to further important U.S. nonproliferation goals.

OFAC administers and enforces economic sanctions programs pursuant to Presidential and statutory authorities. OFAC is responsible for civil investigation and enforcement of economic sanctions violations committed by Subject Persons, as defined in the Guidelines. Where appropriate, OFAC may coordinate its investigative and enforcement activities with federal, state, local and/or foreign regulators and/or law enforcement agencies. Active enforcement of these programs is a crucial element in preserving and advancing the national security, foreign policy, and economic objectives that underlie these initiatives. Among other things, penalties, both civil and criminal, are intended to serve as a deterrent to conduct that undermines the goals of sanctions programs.

On January 29, 2003, OFAC published, as a proposed rule, generally applicable Economic Sanctions Enforcement Guidelines, as well as a proposed Appendix to the Cuban Assets Control Regulations (CACR) providing a schedule of proposed civil monetary penalties for certain violations of the CACR (Cuba Penalty Schedule). Though this proposed rule was not finalized, OFAC used the generally applicable guidelines set forth therein as a general framework for its enforcement actions and the Cuban Penalty Schedule as a framework for the imposition of civil monetary penalties for the violations of the CACR described therein. On January 12, 2006, OFAC published, as an interim final rule, Economic Sanctions Enforcement Procedures for Banking Institutions, which withdrew the January 29, 2003, proposed rule to the extent that it applied to banking institutions, as defined in the interim final rule.

On October 16, 2007, the President signed into law the International Emergency Economic Powers Enhancement Act (Enhancement Act),[1] substantially increasing the maximum penalties for violations of the International Emergency Economic Powers Act (IEEPA),[2] a principal statutory authority for most OFAC sanctions programs. The increased maximum penalty amounts set forth in the Enhancement Act, as well as its application to pending cases involving apparent violations of IEEPA, prompted the development of new Guidelines for determining an appropriate enforcement response to apparent violations of sanctions programs enforced by OFAC, and, in cases involving civil monetary penalties, for determining the amount of any civil monetary penalty.

On September 8, 2008, OFAC published an interim final rule (73 FR 51933) setting forth Economic Sanctions Enforcement Guidelines as enforcement guidance for persons subject to the requirements of U.S. sanctions statutes, Executive orders, and regulations. The Guidelines set forth in the interim final rule superseded the enforcement procedures for banking institutions set forth in the interim final rule of January 12, 2006, which was withdrawn, as well as the proposed guidelines set forth in the proposed rule of January 29, 2003, which was also withdrawn, with the exception of the Cuba Penalty Schedule. (Those withdrawn enforcement procedures and guidelines continue to apply to the categories of cases identified in, and as provided in, OFAC's November 27, 2007 Civil Penalties—Interim Policy and OFAC's October 28, 2008 Civil Penalties—Revised Interim Policy, both of which are available on OFAC's Web site, *http://www.treas.gov/ofac.* Those Interim Policies provide that the withdrawn enforcement procedures generally apply to cases (a) in which a Pre-Penalty Notice was mailed before October 16, 2007, when the Enhancement Act became law; (b) where a tentative settlement amount had been communicated and memorialized; (c) where a party agreed to a tolling or waiver of the statute of limitations, which otherwise would have expired before October 16, 2007; and (d) in which a Pre-Penalty Notice was mailed, or a settlement tentatively reached, prior to the September 8, 2008, publication of the interim final rule.) In all cases in which a Pre-Penalty Notice has been issued prior to the publication of this final rule, the case will continue to be processed in accordance with the enforcement guidelines pursuant to which such Pre-Penalty Notice was issued. The interim final rule also solicited comments on the Guidelines set forth therein.

OFAC hereby publishes an amended version of the Enforcement Guidelines as a final rule. These Enforcement Guidelines are published as an Appendix to the Reporting, Procedures and Penalties Regulations, 31 CFR part 501. Except as noted above, the Guidelines set forth herein are applicable to all persons subject to any of the sanctions programs administered by OFAC. The Guidelines set forth in this final rule are not applicable to penalty or enforcement actions by other agencies based on the same underlying course of conduct, the disposition of goods seized by Customs and Border Protection, or the release of blocked property by OFAC.

The Guidelines set forth in this final rule are applicable to all enforcement matters currently pending before OFAC or that will come before OFAC in the future, whether such matters fall under IEEPA or any of the other statutes pursuant to which OFAC is authorized to enforce sanctions (including, but not limited to, the Trading With the Enemy Act), with the exception of those categories of cases set forth in OFAC's November 27, 2007 Civil Penalties—Interim Policy and OFAC's October 28, 2008 Civil Penalties—Revised Interim Policy. The Guidelines reflect the factors that OFAC will consider in determining the appropriate enforcement response to an apparent violation of an OFAC sanctions program, and those factors are consistent across programs. The civil penalty provisions of the Guidelines take into account the maximum penalties available under the various statutes pursuant to which OFAC is authorized to enforce its sanctions programs.

## Summary of Comments

OFAC received eleven sets of comments on the interim final rule, from the following organizations: The American Bar Association, the Association of Corporate Credit Unions, the American Insurance Association, the British Bankers' Association, the Clearing House Association, the Credit Union National Association, the Industry Coalition on Technology Transfer, the Institute of International

[1] Public Law 110–96, 121 Stat. 1011 (October 16, 2007) (amending 50 U.S.C. 1705).

[2] 50 U.S.C. 1701–06.

Bankers, the National Foreign Trade Council, the Securities Industry and Financial Markets Association, and a joint submission from the American Bankers Association and the Bankers Association for Finance and Trade.[3]

Eight comments addressed the definition of voluntary self-disclosure. Although the final rule slightly amends this definition, it does not do so in the ways suggested by the comments. Six comments questioned a perceived move away from risk-based compliance, based on OFAC's withdrawal of the 2006 interim final rule setting forth Economic Sanctions Enforcement Procedures for Banking Institutions, and the risk matrices that were issued as an annex to that interim final rule. In response, OFAC is reissuing a slightly edited and consolidated risk matrix as an annex to the Enforcement Guidelines and clarifying that the adequacy of a Subject Person's risk-based compliance program will be considered among the General Factors considered by OFAC. Five comments noted that OFAC should not consider a Subject Person's entering into or refusing to enter into an agreement tolling the statute of limitations in an assessment of the Subject Person's cooperation with OFAC. In response, OFAC is amending the Guidelines to make clear that while entering into a tolling agreement may be a basis for mitigating the enforcement response or lowering the penalty amount, a Subject Person's refusal to enter into such an agreement will not be considered against the Subject Person. Two comments simply commended OFAC on the Guidelines. Other comments addressed other aspects of the Guidelines.

**Specific Responses to Comments**

The comments received, OFAC's response to those comments, and OFAC's revisions to the Guidelines in response to the comments are summarized below.

*1. Voluntary Self-disclosure*

a. *Third-Party Notifications.* Many of the comments that addressed the definition of voluntary self-disclosure expressed concern about the interim final rule definition's exclusion of apparent violations where ''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).'' The comments argued that the definition should not exclude such self-initiated notifications to OFAC, and that OFAC should focus instead on the good faith of the party making the disclosure, regardless of whether another party was obligated to report the apparent violation. The comments argued that broadening the definition of voluntary self-disclosure will benefit OFAC by encouraging such disclosures and providing OFAC with additional information regarding apparent violations.

OFAC has considered these comments but believes that the recommended alternative approach would be difficult to administer in a meaningful manner. Accordingly, OFAC has determined to maintain the exclusion for apparent violations that a third party is required to and does report to OFAC as a result of the third party having blocked or rejected a transaction in accordance with OFAC's regulations. The purpose of mitigating the enforcement response in voluntary self-disclosure cases is to encourage the notification to OFAC of apparent violations of which OFAC would not otherwise have learned. In those cases where a third party is required to, and does, report an apparent violation to OFAC, OFAC is aware of the violation and there is no need to provide incentives for such notification. In addition, OFAC's administrative subpoena authority, 31 CFR 501.602, generally provides the basis for OFAC to require the production of whatever additional information it may require to assess its enforcement response to the apparent violation. In those cases, therefore, there is no need to further incentivize disclosure to OFAC. Moreover, OFAC believes that the ''good faith'' standard suggested in the comments would be administratively unworkable, as OFAC would be unable to ascertain the good or bad faith of Subject Persons making disclosures of apparent violations. A bright line rule generally defining a voluntary self-disclosure based on whether OFAC would otherwise have learned of the apparent violation is more readily administrable.

Consistent with the premise that in those cases where OFAC would otherwise not have learned of the apparent violation a notification to OFAC should be deemed a voluntary self-disclosure, and in response to the suggestion made in one comment, OFAC is amending this aspect of the definition of ''voluntary self-disclosure'' by deleting the words ''whether or'' from that part of the definition in the interim final rule that provided that notification to OFAC of an apparent violation would not be considered a voluntary self-disclosure ''regardless of whether or when OFAC actually receives such notice from the third party * * *.'' Thus, the final rule provides that such notifications shall not be considered voluntary self-disclosures ''regardless of when OFAC receives such notice from the third party * * *.'' The change is intended to make clear that in the event that a third party that is required to report an apparent violation to OFAC fails to do so, and the Subject Person notifies OFAC of the apparent violation in a manner otherwise consistent with a voluntary self-disclosure, the notification will be considered a voluntary self-disclosure. In those cases where the third party does notify OFAC before a final enforcement response to the apparent violation, the Subject Person's notification will not be considered a voluntary self-disclosure even if the Subject Person's notification precedes the third party's notification. This is consistent with the notion that voluntary self-disclosure does not apply where OFAC would have learned of the apparent violation in any event—in this case, from the subsequent required disclosure by the third party.

Interestingly, different industry sectors all commented that this provision of the definition would unfairly target their industry. Thus, the banking industry commented that financial institutions are disproportionately affected by this exclusion, a trade group commented that this exclusion ''define[s] the entire import-export sector out of'' the definition, and the securities industry commented that as a result of this exclusion most filings by securities firms would not be considered voluntary self-disclosures. The fact that these different industries believe that the definition unfairly targets them weakens the force of the argument as to each. In any event, the argument does not address the underlying basis for the rule: The purpose of treating certain notifications as voluntary self-disclosures is to bring to OFAC's attention apparent violations of which it otherwise would not have learned.

OFAC stresses that the final rule provides (as did the interim final rule), that ''[i]n cases involving substantial cooperation with OFAC but no voluntary self-disclosure as defined herein, including cases in which an apparent violation is reported to OFAC by a third party but the Subject Person provides substantial additional

[3] Several of the comments were received after the November 7, 2008, deadline for submission of comments. Those comments are nevertheless addressed herein.

information regarding the apparent violation and/or other related violations, the base penalty amount generally will be reduced between 25 and 40 percent.'' In addition, a Subject Person's cooperation with OFAC—including whether the Subject Person provided OFAC with all relevant information regarding an apparent violation (whether or not voluntarily self-disclosed), and whether the Subject Person researched and disclosed to OFAC relevant information regarding any other apparent violations caused by the same course of conduct—is a General Factor to be considered in assessing OFAC's enforcement response to the apparent violation. These provisions are intended to reward voluntary disclosures of all relevant information and address the concerns raised by the comments. The provisions make clear that a Subject Person'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 meet the definition of ''voluntary self-disclosure'' set forth in the final rule.

Several comments noted that failure to treat self-initiated notifications to OFAC in the circumstances discussed above as voluntary self-disclosures causes unwarranted reputational harm to the institutions involved. OFAC does not believe that this concern provides a sufficient basis to alter the definition of voluntary self-disclosure discussed above. In response to this comment, OFAC has amended the final rule to expressly provide that, where appropriate, substantial cooperation by a Subject Person in OFAC's investigation will be publicly noted.

b. *Material Completeness.* Several comments also suggested that the definition's exclusion of disclosures that are materially incomplete is unfair because a party may not have had time to complete its investigation or access supplementary material before OFAC learns of an apparent violation from another source. The definition of voluntary self-disclosure set forth in the interim final rule, and retained in this final rule, excludes only those notifications where ''the disclosure (*when considered along with supplemental information provided by the Subject Person*) is materially incomplete'' (emphasis added). Similarly, the definition provides that ''[i]n addition to notification, a voluntary self-disclosure must include, *or be followed within a reasonable period of time by,* a report of sufficient detail to afford a complete understanding of an apparent violation's circumstances, and should also be followed by responsiveness to any follow-up inquiries by OFAC.'' (emphasis added). The definition thus expressly contemplates that a Subject Person may notify OFAC of an apparent violation before it has completed its investigation or accessed all of the supplementary material necessary for a complete disclosure. So long as that information is provided to OFAC within a reasonable period of time after the initial notification of the apparent violation, and assuming the other aspects of the definition are met, the disclosure would still constitute a voluntary self-disclosure. OFAC therefore concludes that this aspect of the definition already accommodates these comments and does not need to be changed.

c. *Good Faith.* OFAC likewise has considered and rejected the suggestion that the definition of voluntary self-disclosure not exclude disclosures that include false or misleading information or that are made without management authorization, when the disclosure is made in good faith. As noted above, the good faith standard is not readily administrable. OFAC believes that disclosures that contain false or misleading information should not receive the substantial benefit accorded to voluntary self-disclosures. In such cases, OFAC will consider the totality of the circumstances in determining whether the false or misleading information warrants negation of a finding of voluntary self-disclosure. When the Subject Person is an entity, disclosures made without the authorization of the entity's senior management do not reflect disclosure by the entity but rather by a third party. A finding of voluntary self-disclosure by the Subject Person is not warranted in whistleblower cases. Nor does OFAC believe that a whistleblower should be required to first notify the entity's senior management, as one comment suggested.

d. *Regulatory Suggestion.* One comment suggested that OFAC delete the word ''suggestion'' from that part of the definition of voluntary self-disclosure that excludes a disclosure that ''is not self-initiated (including when the disclosure results from a suggestion or order of a federal or state agency or official),'' on the ground that the term ''suggestion'' produces a subjective standard. While OFAC recognizes the concern expressed in the comment, in many instances federal or state regulators do not formally order institutions to report an apparent violation to OFAC. The use of the phrase ''suggestion'' in this context is intended to capture those instances in which a Subject Person's regulator, or another government agency or official, directs, instructs, tells, or otherwise suggests to the Subject Person that it notify OFAC of the apparent violation. In such cases, the notification to OFAC by the Subject Person is not properly considered self-initiated and OFAC likely would have learned of the apparent violation from the other government agency or official in the event that the Subject Person did not itself notify OFAC.

e. *Timing of Notification.* OFAC has also considered the comment that offered an alternative definition of voluntary self-disclosure that would have treated as a voluntary self-disclosure any notification to OFAC of an apparent violation prior to the time that OFAC issued a Pre-Penalty Notice, and suggested other changes to the definition. OFAC does not believe that the suggested changes are warranted. A Pre-Penalty Notice is typically issued once OFAC has completed an investigation into an apparent violation, and such investigation often involves the issuance of administrative subpoenas to the Subject Person. Affording voluntary self-disclosure credit to disclosures made after the issuance of such a subpoena would reward Subject Persons who did not disclose the apparent violation to OFAC until after OFAC had learned of it from other sources, and it would not accord with the purpose of mitigating the enforcement response in voluntary self-disclosure cases, which is to encourage the notification to OFAC of apparent violations of which OFAC would not otherwise have learned.

f. *Suspicious Activity Report Filing.* One comment asked that OFAC clarify that the filing of a Suspicious Activity Report (SAR) by a Subject Person pursuant to the Bank Secrecy Act has no impact on whether a subsequent notification to OFAC of an apparent violation, presumably based on the same transaction that is the subject of the SAR, constitutes a voluntary self-disclosure. The filing of a SAR does not itself preclude a determination of voluntary self-disclosure for a subsequent self-disclosure to OFAC of the same transaction, except to the extent that OFAC has learned of the apparent violation prior to the filing of the self-disclosure.

g. *What to Report.* One comment requested clarification regarding the circumstances in which the mere possibility that a violation exists should cause an institution to make a voluntary self-disclosure. The comment noted that the alleged uncertainty surrounding this

issue creates a strong incentive for an institution to err on the side of reporting transactions that likely do not constitute a violation. OFAC does not believe that additional guidance is necessary or warranted. The Guidelines define an ''apparent violation'' as an actual or possible violation of U.S. economic sanctions laws, and they define a voluntary self-disclosure as a self-initiated notification to OFAC of an apparent violation (subject to the other provisions of the definition). The Subject Person determines whether to report an apparent violation to OFAC. Such a notification to OFAC need not constitute an admission that the conduct at issue actually constitutes a violation in order to be considered a voluntary self-disclosure. To the extent that the Guidelines as written provide an incentive for ''over-reporting'' to OFAC of possible violations, OFAC does not view that as a problem that needs to be addressed. To the contrary, OFAC would prefer that Subject Persons report a transaction or conduct that is ultimately determined to not be a violation, rather than that they elect not to report conduct that does constitute a violation.

h. *Other OFAC Modifications.* Finally, OFAC has made two additional changes to the definition of voluntary self-disclosure. The first change is to make clear that a self-initiated notification to OFAC that is made at the same time as another government agency learns of the apparent violation (through the Subject Person's disclosure to that other agency or otherwise) does qualify as a voluntary self-disclosure if the other aspects of the definition are met. This change is intended to cover voluntary self-disclosures made simultaneously to OFAC and another government agency. OFAC has thus substituted the phrase ''prior to or at the same time'' for the phrase ''prior to'' in the operative sentence of the definition, which now reads:

''*Voluntary self-disclosure* means self-initiated notification to OFAC of an apparent violation by a Subject Person that has committed, or otherwise participated in, an apparent violation of a statute, Executive order, or regulation administered or enforced by OFAC, prior to or at the same time that OFAC, or any other federal, state, or local government agency or official, discovers the apparent violation or another substantially similar apparent violation.''

OFAC has also added the following sentence to the definition of voluntary self-disclosure:

''Notification of an apparent violation to another government agency (but not to OFAC) by a Subject Person, which is considered a voluntary self-disclosure by that agency, may be considered a voluntary self-disclosure by OFAC, based on a case-by-case assessment of the facts and circumstances.''

This is intended to clarify that OFAC may treat a voluntary self-disclosure to another government agency as a voluntary self-disclosure to OFAC when the circumstances so warrant.

*2. Risk-Based Compliance*

Six comments questioned whether OFAC intended to move away from the risk-based compliance approach reflected in the 2006 Economic Sanctions Enforcement Procedures for Banking Institutions, which, along with their appended risk matrices, were withdrawn by the interim final rule. In no way has OFAC moved away from considering an institution's risk-based compliance program in assessing the appropriate enforcement response to an apparent violation. The final rule clarifies this by making explicit reference to risk-based compliance in its discussion of General Factor E, which focuses on a Subject Person's compliance program, and by re-promulgating with minor edits and in consolidated form, as an annex to the final rule, the risk matrices that had originally been promulgated as an annex to the 2006 Enforcement Procedures. By these changes, OFAC intends to reflect that it will continue to apply the same risk-based principles it has been applying in assessing the overall adequacy of a Subject Person's compliance program.

Two comments argued that in the case of banks, OFAC's focus should be more narrowly focused on the bank's fault or the nature of its compliance program. OFAC has considered these comments, but believes that all of the General Factors are as applicable to banks as they are to other Subject Persons. Those Factors account for both fault and the nature and existence of a compliance program, but they also account for other criteria that are relevant to a determination of an appropriate enforcement response to an apparent violation. For example, the degree of harm caused by an apparent violation is as relevant and important a factor to consider in cases involving banks as it is in other cases. OFAC thus disagrees with the comment that asserted that less weight should be afforded to the harm to sanctions programs objectives and a greater emphasis placed on risk-based compliance. The harm to sanctions program objectives is as valid and relevant a consideration as an institution's risk-based compliance program, and the Final Guidelines appropriately account for consideration of both factors.

One comment expressed concern about the absence of a process to periodically evaluate an institution's violations in the context of its overall OFAC compliance program and OFAC compliance record. The Guidelines, however, expressly provide for consideration of both an institution's OFAC compliance program and its overall compliance record over time in a number of places. For example, the Guidelines provide for consideration of a Subject Person's compliance program in General Factor E, which, as noted above, has been clarified to make explicit reference to risk-based compliance. The Guidelines also provide that in considering the individual characteristics of a Subject Person (General Factor D), OFAC will consider ''[t]he total volume of transactions undertaken by the Subject Person on an annual basis, with attention given to the apparent violations as compared with the total volume.'' This provision of the Guidelines is intended to allow for the consideration of any apparent violation in the context of a Subject Person's overall compliance record.

Another comment addressing risk-based compliance asserted that the Guidelines reflect ''OFAC's stated intention to apply penalties on every erroneous transaction.'' The Guidelines do not so state; to the contrary, they expressly note that ''OFAC will give careful consideration to the appropriateness of issuing a cautionary letter or Finding of Violation in lieu of the imposition of a civil monetary penalty.'' Another comment suggested that OFAC should state that it will not assess penalties based on minor or isolated compliance deficiencies. OFAC believes that the process set forth in the Guidelines for determining its enforcement response to an apparent violation is appropriate and that it would not be appropriate to make broader, categorical statements of its enforcement policy based on the minor or isolated nature of an apparent violation. The General Factors already account for the consideration of the minor or isolated nature of an apparent violation in determining whether a civil monetary penalty is warranted.

*3. Cooperation and Tolling Agreements*

Five comments argued that OFAC should not consider whether a Subject Person agreed to waive the statute of limitations or enter into a tolling agreement in assessing the Subject Person's cooperation with OFAC. The comments argued that it was unfair and contrary to public policy to consider this as a factor. One comment suggested

that the provision should either be dropped or its consideration limited to cases where late discovery by or notification to OFAC threatens resolution within the five year statute of limitations period and that tolling agreements should be limited to extending the period for no more than five years from discovery of the apparent violation by OFAC.

OFAC has carefully considered these comments. The interim final rule addressed both waivers of the statute of limitations and tolling agreements. It is not OFAC's general practice to seek outright waivers of the statute of limitations, and the final rule eliminates any reference to statute of limitations waivers.

OFAC agrees that a Subject Person's refusal to enter into a tolling agreement should not be considered an aggravating factor in assessing a Subject Person's cooperation or otherwise. At the same time, a tolling agreement can be of significant value to OFAC, especially in cases where OFAC does not learn of an apparent violation at or near the time it occurs, in particularly complex cases, or in cases in which a Subject Person has requested and received additional time to respond to a request for information from OFAC. Accordingly, OFAC believes it appropriate to consider a Subject Person's entering into a tolling agreement in a positive light and as a basis for mitigating the enforcement response or lowering the penalty amount. The final rule thus clarifies that while a Subject Person's willingness to enter into a tolling agreement may be considered a mitigating factor, a Subject Person's unwillingness to enter into such an agreement will not be considered against the Subject Person.

*4. Penalty Calculation*

Two comments addressed the calculation of the base penalty amount under the Guidelines.

a. *Disparity in Base Penalty Amounts.* One comment suggested that the applicable schedule amounts, which are applicable to cases involving non-egregious apparent violations that are not voluntarily self-disclosed to OFAC, be changed to lessen the disparity in the base penalty amount between such cases and non-egregious cases that are voluntarily self-disclosed.[4] OFAC has considered this suggestion but believes that the applicable schedule amounts, which provide for a gradated series of penalties based on the underlying transaction value, reflect an appropriate starting point for the penalty calculation in non-egregious cases not involving a voluntary self-disclosure. As currently structured, the base penalty calculation ensures that the base penalty for a voluntarily self-disclosed case will always be one-half or less than one-half of the base penalty for a similar case that is not voluntarily self-disclosed. This is intended to serve as an additional incentive for voluntary self-disclosure.

b. *Other Penalty Issues.* A second comment made a number of suggestions regarding the penalty calculation. OFAC has considered each of these suggestions, which are discussed below.

i. *Egregious Cases.* First, this comment suggested that OFAC 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. Reducing the base penalty amount for egregious cases would not adequately reflect the seriousness with which OFAC views such cases. As set forth in the preamble to the interim final rule, OFAC anticipates that the majority of enforcement cases will fall in the non-egregious category.

ii. *Specified Reduction for Remediation.* Second, this comment suggested that OFAC provide for remedial measures as a mitigating factor and state the extent to which such actions generally will reduce the base penalty amount (*e.g.,* 10–25%). The Guidelines expressly recognize a Subject Person's remedial response as one of the General Factors OFAC will consider in determining its enforcement response to an apparent violation. OFAC does not believe it appropriate to identify a specific range of mitigation for remedial measures, which can vary widely in their nature and scope. The Guidelines envision a holistic examination of the facts and circumstances surrounding an apparent violation in determining a proposed penalty amount. With the exception of first offenses and substantial cooperation, OFAC does not believe it appropriate to provide a specified mitigation percentage for the existence of potentially mitigating factors.

iii. *Specified Reduction for Cooperation.* Third, the comment suggested that OFAC specify that substantial cooperation in voluntary self-disclosure cases would reduce the base penalty amount by 25% to 40% (as would occur in cases that do not involve a voluntary self-disclosure). This suggestion appears to misapprehend the purpose of the provision of the Guidelines that provides for such a reduction in non-voluntarily self-disclosed cases. The reduction in the base penalty amount for cases involving substantial cooperation but no voluntary self-disclosure is intended to approximate the significant mitigation provided for voluntary self-disclosure cases in the base penalty amount itself. This reduction is intended to afford parties whose conduct was reported to OFAC by others (for example, through a blocking or reject report) the opportunity to obtain, by providing substantial cooperation, much (but not all) of the benefit they would have obtained had they voluntarily self-disclosed the apparent violation. Subject Persons who have voluntarily self-disclosed their apparent violations to OFAC are already benefiting from a significantly reduced base penalty amount. Moreover, a voluntary self-disclosure must include, or be followed within a reasonable period of time by, a report of sufficient detail to afford a complete understanding of an apparent violation's circumstances, and should also be followed by responsiveness to any follow-up inquiries by OFAC. OFAC recognizes that in some instances an additional reduction in the base penalty amount based on substantial cooperation may be warranted in cases involving voluntary self-disclosure, but that additional reduction may be less than 25 to 40 percent.

iv. *Specified Additional Adjustments.* Fourth, the comment suggested that OFAC specify that further adjustments to the base penalty amount may be made depending on the relevance of the other General Factors, including in particular the existence and nature of a compliance program and permissibility of the conduct under applicable foreign law. The Guidelines already expressly provide that the base penalty amount may be adjusted to reflect applicable General Factors, including the existence and nature of a compliance program. The suggestion that the penalty be adjusted in light of the permissibility of the conduct under applicable foreign law is addressed below under the heading ''Compliance With Foreign Law.''

v. *Emphasize Number vs. Value of Transactions.* Fifth, the comment suggested that OFAC clarify that when considering ''apparent violations as compared with the total volume'' of transactions undertaken by a Subject Person, the focus will be on the number rather than the value of transactions. OFAC does not believe that such a clarification is warranted. While in many cases the overall number of transactions, as compared to the number of apparent violations, will be the

[4] The base penalty amount for a non-egregious case involving a voluntary self-disclosure equals one-half of the transaction value, capped at $125,000 for an apparent violation of IEEPA and $32,500 for an apparent violation of TWEA.

appropriate measure of a Subject Person's overall compliance program, there may be cases where the relative value of the transactions is the more appropriate metric. OFAC will address this issue on a case-by-case basis, as appropriate.

vi. *First Violations.* Finally, the comment suggested that OFAC clarify that, for purposes of the reduction of the penalty amount by up to 25% for cases involving a Subject Person's first violation, OFAC will consider the entire set of ''substantially similar violations'' at issue in a case as a single ''first violation,'' and thus provide the penalty reduction for all transactions at issue, and not just for the first of the substantially similar violations. OFAC intends that in enforcement cases addressing a set of ''substantially similar violations,'' the penalty reduction for a Subject Person's first violation will generally apply to the entire set of ''substantially similar violations'' and not solely to the first of those violations. OFAC has added the following sentence to the final rule to clarify this: ''A group of substantially similar apparent violations addressed in a single Pre-Penalty Notice shall be considered as a single violation for purposes of this subsection.'' In addition, OFAC has clarified that an apparent violation generally will be considered a ''first violation'' if the Subject Person has not received a penalty notice or Finding of Violation from OFAC in the five years preceding the date of the transaction giving rise to the apparent violation, and that in those cases where a prior penalty notice or Finding of Violation within the preceding five years involved conduct of a substantially different nature from the apparent violation at issue, OFAC may still consider the apparent violation at issue a ''first violation.''

*5. General Factors*

A number of comments either identified additional proposed General Factors that OFAC should consider or suggested the deletion of General Factors as inappropriate for OFAC's consideration.

a. *Compliance With Foreign Law.* Two comments suggested that, in cases concerning conduct occurring outside the United States, OFAC should consider whether the conduct in question is permissible under the applicable law of another jurisdiction. OFAC does not agree that the permissibility of conduct under the applicable laws of another jurisdiction should be a factor in assessing an apparent violation of U.S. laws. In cases where the applicable laws of another jurisdiction require conduct prohibited by OFAC sanctions (or vice versa), OFAC will consider the conflict under General Factor K, which provides for the consideration of relevant factors on a case-by-case basis. OFAC notes that Subject Persons can seek a license from OFAC to engage in otherwise prohibited transactions and that the absence of such a license request will be considered in assessing an apparent violation where conflict of laws is raised by the Subject Person.

b. *Reliance on Advice from OFAC.* Three comments suggested that OFAC should explicitly state that good faith reliance on advice from the OFAC hotline (two comments) or on a reasoned analysis of OFAC regulations with the assistance of private counsel (one comment) should be considered in assessing an appropriate enforcement response. Subject Persons are encouraged to seek written guidance from OFAC on complex matters for the sake of clarity. 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.

c. *Relevance of Future Compliance/ Deterrence.* One comment suggested that OFAC should eliminate General Factor J, which focuses on the impact that administrative action may have on promoting future compliance with U.S. economic sanctions by the Subject Person and similar Subject Persons, arguing that OFAC's enforcement response should focus solely on the Subject Person's culpability. OFAC rejects this argument, as the purpose of enforcement action includes raising awareness, increasing compliance, and deterring future violations, and not merely punishment of prior conduct.

d. *Reason to Know.* One comment suggested that OFAC should eliminate the ''reason to know'' provision of General Factor B, which focuses on the Subject Person's awareness of the conduct giving rise to the apparent violation. OFAC rejects this suggestion as it would invite Subject Persons to act with willful blindness. OFAC believes the ''reason to know'' formulation is consistent with general legal principles and appropriate for consideration.

e. *Responsibility for Employees.* One comment suggested that OFAC should make clear that actions of ''rogue employees,'' including supervisors or managers, will not be attributed to organizations so long as a reasonable compliance program was in place. OFAC rejects this suggestion. The actions of employees may be properly attributable to their organizations, depending on the facts and circumstances of the particular case. Among the factors OFAC will consider in determining whether such actions are attributable to an organization are the position of the employee in question, the nature of the conduct (including how long it lasted), who else was or should have been aware of the conduct, and the existence and nature of a compliance program intended to identify and stop such conduct.

f. *Sanctions History.* One comment suggested that cautionary letters, warning letters, and evaluative letters should not be considered when assessing a Subject Person's sanctions violations history. OFAC believes that such prior letters are appropriate to consider in determining an appropriate enforcement response. In addition, such letters evidence the Subject Person's awareness of OFAC sanctions generally. OFAC has amended the final rule to refer to ''sanctions history'' instead of ''sanctions violations history'' to make clear that consideration is not limited to prior formal determinations of sanctions violations.

OFAC has also amended the final rule to note that, as a general matter, consideration of a Subject Person's sanctions history will be limited to the five years preceding the transaction giving rise to the apparent violation. As explained above, a five-year limitation has also been incorporated into the provision providing that in cases involving a Subject Person's first violation, the base penalty amount generally will be reduced up to 25 percent, so that ''first violation'' is understood as the first violation in the five years preceding the transaction giving rise to the apparent violation. In certain cases, however, such as those involving enforcement responses to substantially similar apparent violations, it may be appropriate to consider sanctions history outside the five-year period.

g. *Transition Period for Foreign Acquisitions.* One comment suggested that the Guidelines should provide a transition period for cases in which a Subject Person acquires an entity outside the United States not previously subject to OFAC requirements. OFAC does not believe that such a provision is warranted. U.S. persons acquiring entities outside the United States should consider OFAC compliance as part of their due diligence review of the acquisition.

*6. Provision of Information to OFAC*

Four comments focused on possible impediments to fully complying with an OFAC request for information. Three of

these comments raised concerns about foreign laws that may prohibit the provision of requested information to OFAC. OFAC does not believe that these comments warrant a change to the text of the interim final rule. As discussed above with respect to conflict-of-laws situations, OFAC will give due consideration to applicable restrictions of foreign law regarding the provision of information to OFAC on a case-by-case basis. OFAC expects that Subject Persons will provide to OFAC a detailed explanation of any allegedly applicable foreign law and the steps undertaken by the Subject Person to avail themselves of all legal means to provide the requested information.

One comment raised concerns about information protected by the attorney-client privilege or the attorney work product doctrine. OFAC generally does not expect Subject Persons to provide privileged or protected information in response to a request for information or otherwise. OFAC does, however, expect Subject Persons who withhold responsive information on the grounds of the attorney-client or other privilege or the work product doctrine to properly invoke such privilege or protection and to identify such withheld information on a privilege log, in accordance with any instructions accompanying requests for information and ordinary legal practice. OFAC has clarified the provision of the Guidelines providing for penalties for failure to respond to a request for information by eliminating the reference to ''failure to furnish the requested information'' and instead referring to a ''failure to comply'' with a request for information. The revised language is intended to make clear that OFAC will not seek penalties in those cases where responsive information is withheld on the basis of an apparently applicable and properly invoked privilege.

*7. Penalty/Finding of Violation Process*

Several comments made suggestions regarding OFAC's penalty process. One comment suggested that OFAC should offer Subject Persons a meeting before issuing a Pre-Penalty Notice, and another comment suggested that OFAC provide a process by which to appeal a final enforcement decision. OFAC does not believe that the adoption of either suggestion is warranted. In most cases, OFAC will have communicated with the Subject Person (by means of issuing a request for information or receiving a disclosure) prior to issuance of the Pre-Penalty Notice. Moreover, the Pre-Penalty Notice does not constitute final agency action and specifically affords a Subject Person the opportunity to respond to the allegations and proposed penalty set forth therein with additional information or argument.

OFAC also does not believe that an administrative appeal process is warranted. In cases involving civil monetary penalties, the Pre-Penalty Process just described affords a Subject Person sufficient opportunity to present its case to OFAC before a Penalty Notice is issued. In cases involving a Finding of Violation, the Guidelines provide that a Finding of Violation will afford the Subject Person an opportunity to respond to OFAC's determination that a violation has occurred before the finding is made final. No other actions by OFAC constitute formal determinations of violation, and no administrative appeal process is therefore necessary in such cases.[5]

*8. Other Comments*

One comment suggested that OFAC should be sensitive to the views of non-U.S. regulators. The Guidelines explain that OFAC may seek information from a regulated institution's foreign regulator, and may take into account the views of a foreign regulator with respect to a Subject Person's compliance program where relevant. Nor do the Guidelines preclude other consideration of foreign regulators' views. Accordingly, OFAC believes that no additional changes are necessary in this regard.

One comment suggested that the definition of ''transaction value'' needs clarification because it does not allocate responsibility in multiparty transactions, and this comment suggested certain edits to the definition with the goal of clarifying that transaction value will be determined based on a Subject Person's role in the transaction. OFAC has considered this comment but determined that no change is needed to the definition of transaction value. The current definition provides sufficient flexibility to allow for the determination of an appropriate transaction value in a wide variety of circumstances, including multiparty transactions where the differing roles of the parties may result in differing transaction values.

One comment suggested that there should be two sets of guidelines, one for financial institutions and one for entities focused on trade in goods, arguing that these types of entities maintain different business models. OFAC considered such an approach when developing the Guidelines, but determined that a single set of Guidelines, providing general factors and sufficient flexibility, was a better approach. The Guidelines as crafted do not dictate a particular outcome in any particular case, but rather are intended to identify those factors most relevant to OFAC's enforcement decision and to guide the agency's exercise of its discretion. Because the General Factors are equally applicable to all sectors, and because the Guidelines provide sufficient flexibility to allow for the consideration of the factors most relevant to a particular Subject Person, OFAC does not believe that particularized sets of Guidelines for particular business models are warranted or necessary.

**OFAC Edits**

In addition to the changes made in response to public comments and the additional changes to the definition of voluntary self-disclosure described above, OFAC has made several other changes to the Guidelines. First, OFAC has clarified the base penalty amounts for transactions subject to the Trading With the Enemy Act (TWEA), which presently has a $65,000 statutory maximum penalty. In non-egregious cases involving apparent violations of TWEA, where the apparent violation is disclosed through a voluntary self-disclosure by the Subject Person (*i.e.,* Box ''1'' on the penalty matrix), the base amount of the proposed civil penalty shall be capped at a maximum of $32,500 per violation. This correction is necessary to ensure that in such cases the base amount of the proposed civil penalty is no more than one-half the base penalty amount for a similar transaction that is not voluntarily self-disclosed.

OFAC is also clarifying that for non-egregious transactions under TWEA that are not voluntarily self-disclosed, the base amount of the civil penalty shall be capped at $65,000. The Guidelines already provide for this by capping base penalty amounts at the applicable statutory maximum; this change is intended simply to clarify this point. Similarly, OFAC is clarifying that, in egregious cases, the base penalty calculation will be based on the ''applicable'' statutory maximum, in an effort to signal that the base penalty in such cases will differ for transactions under IEEPA (where the statutory maximum equals the greater of $250,000 or an amount that is twice the value of the transaction), TWEA (where the statutory maximum equals $65,000), or other applicable statutes.

[5] The Trading With the Enemy Act and its implementing regulations, 31 CFR part 501, subpart D, provide for Administrative Law Judge hearings on penalty determinations. Nothing in the Guidelines affects the applicability of those provisions.

OFAC has also amended the Guidelines to provide for a penalty of up to $50,000 for a failure to maintain records in conformance with the requirements of OFAC regulations. This change is intended to ensure that penalties for a failure to maintain records are commensurate with penalties for a failure to comply with a requirement to furnish information.

The Guidelines are also amended to make clear that for apparent violations identified in the Cuba Penalty Schedule, 68 FR 4422, 4429 (Jan. 29, 2003), for which a civil monetary penalty has been deemed appropriate, the base penalty amount shall equal the amount set forth in the Schedule for such a violation, except that the base penalty amount shall be reduced by 50% in cases of voluntary self-disclosure. This is intended to clarify the interplay between the penalty amounts set forth in the Cuba Penalty Schedule and the base penalty calculation process set forth in the Guidelines.

OFAC has eliminated the reference to the Cuba Travel Service Provider Circular in Part IV of the Guidelines, as that Circular has been amended to include a reference to the Guidelines, which now govern apparent violations by licensed Travel Service Providers.

OFAC has also changed references to ''conduct, activity, or transaction'' to ''conduct'' throughout the Guidelines. This change is not intended to have substantive effect, but rather to provide greater consistency in terminology within the Guidelines. OFAC understands the term ''conduct'' to encompass ''activities'' and ''transactions,'' and notes the definition of an ''apparent violation'' is based on the term ''conduct.''

Finally, in General Factor H, concerning the timing of the apparent violation in relation to the imposition of sanctions, OFAC has changed the word ''soon'' to ''immediately'' so that the relevant provision reads: ''the timing of the apparent violation in relation to the adoption of the applicable prohibitions, particularly if the apparent violation took place immediately after relevant changes to the sanctions program regulations or the addition of a new name to OFAC's List of Specially Designated Nationals and Blocked Persons (SDN List).'' This change is intended to more accurately reflect the purpose of General Factor H and to convey that mitigation as a result of changes to sanctions program regulations or additions to the SDN List is unlikely to be applicable other than in the time period immediately following such changes or additions.

**List of Subjects in 31 CFR Part 501**

Administrative practice and procedure, Banks, Banking, Insurance, Money service business, Penalties, Reporting and recordkeeping requirements, Securities.

■ For the reasons set forth in the preamble, 31 CFR part 501 is amended as follows:

## PART 501—REPORTING, PROCEDURES AND PENALTIES REGULATIONS

■ 1. The authority citation for part 501 continues to read as follows:

**Authority:** 8 U.S.C. 1189; 18 U.S.C. 2332d, 2339B; 19 U.S.C. 3901–3913; 21 U.S.C. 1901–1908; 22 U.S.C. 287c; 22 U.S.C. 2370(a), 6009, 6032, 7205; 28 U.S.C. 2461 note; 31 U.S.C. 321(b); 50 U.S.C. 1701–1706; 50 U.S.C. App. 1–44.

■ 2. Part 501 is amended by revising Appendix A to Part 501 to read as follows:

### Appendix A to Part 501—Economic Sanctions Enforcement Guidelines.

**Note:** This appendix provides a general framework for the enforcement of all economic sanctions programs administered by the Office of Foreign Assets Control (OFAC).

#### I. Definitions

A. *Apparent violation* means conduct that constitutes an actual or possible violation of U.S. economic sanctions laws, including the International Emergency Economic Powers Act (IEEPA), the Trading With the Enemy Act (TWEA), the Foreign Narcotics Kingpin Designation Act, and other statutes administered or enforced by OFAC, as well as Executive orders, regulations, orders, directives, or licenses issued pursuant thereto.

B. *Applicable schedule amount* means:

1. $1,000 with respect to a transaction valued at less than $1,000;
2. $10,000 with respect to a transaction valued at $1,000 or more but less than $10,000;
3. $25,000 with respect to a transaction valued at $10,000 or more but less than $25,000;
4. $50,000 with respect to a transaction valued at $25,000 or more but less than $50,000;
5. $100,000 with respect to a transaction valued at $50,000 or more but less than $100,000;
6. $170,000 with respect to a transaction valued at $100,000 or more but less than $170,000;
7. $250,000 with respect to a transaction valued at $170,000 or more, except that where the applicable schedule amount as defined above exceeds the statutory maximum civil penalty amount applicable to an apparent violation, the applicable schedule amount shall equal such applicable statutory maximum civil penalty amount.

C. *OFAC* means the Department of the Treasury's Office of Foreign Assets Control.

D. *Penalty* is the final civil penalty amount imposed in a Penalty Notice.

E. *Proposed penalty* is the civil penalty amount set forth in a Pre-Penalty Notice.

F. *Regulator* means any Federal, State, local or foreign official or agency that has authority to license or examine an entity for compliance with federal, state, or foreign law.

G. *Subject Person* means an individual or entity subject to any of the sanctions programs administered or enforced by OFAC.

H. *Transaction value* means the dollar value of a subject transaction. In export and import cases, the transaction value generally will be the domestic value in the United States of the goods, technology, or services sought to be exported from or imported into the United States, as demonstrated by commercial invoices, bills of lading, signed Customs declarations, or similar documents. In cases involving seizures by U.S. Customs and Border Protection (CBP), the transaction value generally will be the domestic value as determined by CBP. If the apparent violation at issue is a prohibited dealing in blocked property by a Subject Person, the transaction value generally will be the dollar value of the underlying transaction involved, such as the value of the property dealt in or the amount of the funds transfer that a financial institution failed to block or reject. Where the transaction value is not otherwise ascertainable, OFAC may consider the market value of the goods or services that were the subject of the transaction, the economic benefit conferred on the sanctioned party, and/or the economic benefit derived by the Subject Person from the transaction, in determining transaction value. For purposes of these Guidelines, ''transaction value'' will not necessarily have the same meaning, nor be applied in the same manner, as that term is used for import valuation purposes at 19 CFR 152.103.

I. *Voluntary self-disclosure* means self-initiated notification to OFAC of an apparent violation by a Subject Person that has committed, or otherwise participated in, an apparent violation of a statute, Executive order, or regulation administered or enforced by OFAC, prior to or at the same time that OFAC, or any other federal, state, or local government agency or official, discovers the apparent violation or another substantially similar apparent violation. For these purposes, ''substantially similar apparent violation'' means an apparent violation that is part of a series of similar apparent violations or is related to the same pattern or practice of conduct. Notification of an apparent violation to another government agency (but not to OFAC) by a Subject Person, which is considered a voluntary self-disclosure by that agency, may be considered a voluntary self-disclosure by OFAC, based on a case-by-case assessment. Notification to OFAC of an apparent violation is not a voluntary self-disclosure if: a third party is required to and does 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 when OFAC receives such

notice from the third party and regardless of whether the Subject Person was aware of the third party's disclosure); the disclosure includes false or misleading information; the disclosure (when considered along with supplemental information provided by the Subject Person) is materially incomplete; the disclosure is not self-initiated (including when the disclosure results from a suggestion or order of a federal or state agency or official); or, when the Subject Person is an entity, the disclosure is made by an individual in a Subject Person entity without the authorization of the entity's senior management. Responding to an administrative subpoena or other inquiry from, or filing a license application with, OFAC is not a voluntary self-disclosure. In addition to notification, a voluntary self-disclosure must include, or be followed within a reasonable period of time by, a report of sufficient detail to afford a complete understanding of an apparent violation's circumstances, and should also be followed by responsiveness to any follow-up inquiries by OFAC. (As discussed further below, a Subject Person's level of cooperation with OFAC is an important factor in determining the appropriate enforcement response to an apparent violation even in the absence of a voluntary self-disclosure as defined herein; disclosure by a Subject Person generally will result in mitigation insofar as it represents cooperation with OFAC's investigation.)

## II. Types of Responses to Apparent Violations

Depending on the facts and circumstances of a particular case, an OFAC investigation may lead to one or more of the following actions:

A. *No Action.* If OFAC determines that there is insufficient evidence to conclude that a violation has occurred and/or, based on an analysis of the General Factors outlined in Section III of these Guidelines, concludes that the conduct does not rise to a level warranting an administrative response, then no action will be taken. In those cases in which OFAC is aware that the Subject Person has knowledge of OFAC's investigation, OFAC generally will issue a letter to the Subject Person indicating that the investigation is being closed with no administrative action being taken. A no-action determination represents a final determination as to the apparent violation, unless OFAC later learns of additional related violations or other relevant facts.

B. *Request Additional Information.* If OFAC determines that additional information regarding the apparent violation is needed, it may request further information from the Subject Person or third parties, including through an administrative subpoena issued pursuant to 31 CFR 501.602. In the case of an institution subject to regulation where OFAC has entered into a Memorandum of Understanding (MOU) with the Subject Person's regulator, OFAC will follow the procedures set forth in such MOU regarding consultation with the regulator. Even 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. Upon receipt of information determined to be sufficient to assess the apparent violation, OFAC will decide, based on an analysis of the General Factors outlined in Section III of these Guidelines, whether to pursue further enforcement action or whether some other response to the apparent violation is appropriate.

C. *Cautionary Letter:* If 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 believes that the underlying conduct could lead to a violation in other circumstances and/or that a Subject Person does not appear to be exercising due diligence in assuring compliance with the statutes, Executive orders, and regulations that OFAC enforces, OFAC may issue a cautionary letter, which may convey OFAC's concerns about the underlying conduct and/or the Subject Person's OFAC compliance policies, practices and/or procedures. A cautionary letter represents a final enforcement response to the apparent violation, unless OFAC later learns of additional related violations or other relevant facts, but does not constitute a final agency determination as to whether a violation has occurred.

D. *Finding of Violation:* If OFAC determines that a violation has occurred and considers it important to document the occurrence of a violation and, based on an analysis of the General Factors outlined in Section III of these Guidelines, concludes that the Subject Person's conduct warrants an administrative response but that a civil monetary penalty is not the most appropriate response, OFAC may issue a Finding of Violation that identifies the violation. A Finding of Violation may also convey OFAC's concerns about the violation and/or the Subject Person's OFAC compliance policies, practices and/or procedures, and/or identify the need for further compliance steps to be taken. A Finding of Violation represents a final enforcement response to the violation, unless OFAC later learns of additional related violations or other relevant facts, and constitutes a final agency determination that a violation has occurred. A Finding of Violation will afford the Subject Person an opportunity to respond to OFAC's determination that a violation has occurred before that determination becomes final. In the event a Subject Person so responds, the initial Finding of Violation will not constitute a final agency determination that a violation has occurred. In such cases, after considering the response received, OFAC will inform the Subject Person of its final enforcement response to the apparent violation.

E. *Civil Monetary Penalty.* If OFAC determines that a violation has occurred and, based on an analysis of the General Factors outlined in Section III of these Guidelines, concludes that the Subject Person's conduct warrants the imposition of a monetary penalty, OFAC may impose a civil monetary penalty. Civil monetary penalty amounts will be determined as discussed in Section V of these Guidelines. The imposition of a civil monetary penalty constitutes a final agency determination that a violation has occurred and represents a final civil enforcement response to the violation. OFAC will afford the Subject Person an opportunity to respond to OFAC's determination that a violation has occurred before a final penalty is imposed.

F. *Criminal Referral.* In appropriate circumstances, OFAC may refer the matter to appropriate law enforcement agencies for criminal investigation and/or prosecution. Apparent sanctions violations that OFAC has referred for criminal investigation and/or prosecution also may be subject to OFAC civil penalty or other administrative action.

G. *Other Administrative Actions.* In addition to or in lieu of other administrative actions, OFAC may also take the following administrative actions in response to an apparent violation:

1. *License Denial, Suspension, Modification, or Revocation.* OFAC authorizations to engage in a transaction (including the release of blocked funds) pursuant to a general or specific license may be withheld, denied, suspended, modified, or revoked in response to an apparent violation.

2. *Cease and Desist Order.* OFAC may order the Subject Person to cease and desist from conduct that is prohibited by any of the sanctions programs enforced by OFAC when OFAC has reason to believe that a Subject Person has engaged in such conduct and/or that such conduct is ongoing or may recur.

## III. General Factors Affecting Administrative Action

As a general matter, OFAC will consider some or all of the following General Factors in determining the appropriate administrative action in response to an apparent violation of U.S. sanctions by a Subject Person, and, where a civil monetary penalty is imposed, in determining the appropriate amount of any such penalty:

A. *Willful or Reckless Violation of Law:* a Subject Person's willfulness or recklessness in violating, attempting to violate, conspiring to violate, or causing a violation of the law. Generally, to the extent the conduct at issue is the result of willful conduct or a deliberate intent to violate, attempt to violate, conspire to violate, or cause a violation of the law, the OFAC enforcement response will be stronger. Among the factors OFAC may consider in evaluating willfulness or recklessness are:

1. *Willfulness.* Was the conduct at issue the result of a decision to take action with the knowledge that such action would constitute a violation of U.S. law? Did the Subject Person know that the underlying conduct constituted, or likely constituted, a violation of U.S. law at the time of the conduct?

2. *Recklessness.* Did the Subject Person demonstrate reckless disregard for U.S. sanctions requirements or otherwise fail to exercise a minimal degree of caution or care in avoiding conduct that led to the apparent violation? Were there warning signs that should have alerted the Subject Person that an action or failure to act would lead to an apparent violation?

3. *Concealment.* Was there an effort by the Subject Person to hide or purposely obfuscate its conduct in order to mislead OFAC, Federal, State, or foreign regulators, or other

parties involved in the conduct about an apparent violation?

4. *Pattern of Conduct.* Did the apparent violation constitute or result from a pattern or practice of conduct or was it relatively isolated and atypical in nature?

5. *Prior Notice.* Was the Subject Person on notice, or should it reasonably have been on notice, that the conduct at issue, or similar conduct, constituted a violation of U.S. law?

6. *Management Involvement.* In cases of entities, at what level within the organization did the willful or reckless conduct occur? Were supervisory or managerial level staff aware, or should they reasonably have been aware, of the willful or reckless conduct?

B. *Awareness of Conduct at Issue:* the Subject Person's awareness of the conduct giving rise to the apparent violation. Generally, the greater a Subject Person's actual knowledge of, or reason to know about, the conduct constituting an apparent violation, the stronger the OFAC enforcement response will be. In the case of a corporation, awareness will focus on supervisory or managerial level staff in the business unit at issue, as well as other senior officers and managers. Among the factors OFAC may consider in evaluating the Subject Person's awareness of the conduct at issue are:

1. *Actual Knowledge.* Did the Subject Person have actual knowledge that the conduct giving rise to an apparent violation took place? Was the conduct part of a business process, structure or arrangement that was designed or implemented with the intent to prevent or shield the Subject Person from having such actual knowledge, or was the conduct part of a business process, structure or arrangement implemented for other legitimate reasons that made it difficult or impossible for the Subject Person to have actual knowledge?

2. *Reason to Know.* If the Subject Person did not have actual knowledge that the conduct took place, did the Subject Person have reason to know, or should the Subject Person reasonably have known, based on all readily available information and with the exercise of reasonable due diligence, that the conduct would or might take place?

3. *Management Involvement.* In the case of an entity, was the conduct undertaken with the explicit or implicit knowledge of senior management, or was the conduct undertaken by personnel outside the knowledge of senior management? If the apparent violation was undertaken without the knowledge of senior management, was there oversight intended to detect and prevent violations, or did the lack of knowledge by senior management result from disregard for its responsibility to comply with applicable sanctions laws?

C. *Harm to Sanctions Program Objectives:* the actual or potential harm to sanctions program objectives caused by the conduct giving rise to the apparent violation. Among the factors OFAC may consider in evaluating the harm to sanctions program objectives are:

1. *Economic or Other Benefit to the Sanctioned Individual, Entity, or Country:* the economic or other benefit conferred or attempted to be conferred to sanctioned individuals, entities, or countries as a result of an apparent violation, including the number, size, and impact of the transactions constituting an apparent violation(s), the length of time over which they occurred, and the nature of the economic or other benefit conferred. OFAC may also consider the causal link between the Subject Person's conduct and the economic benefit conferred or attempted to be conferred.

2. *Implications for U.S. Policy:* the effect that the circumstances of the apparent violation had on the integrity of the U.S. sanctions program and the related policy objectives involved.

3. *License Eligibility:* whether the conduct constituting the apparent violation likely would have been licensed by OFAC under existing licensing policy.

4. *Humanitarian activity:* whether the conduct at issue was in support of a humanitarian activity.

D. *Individual Characteristics:* the particular circumstances and characteristics of a Subject Person. Among the factors OFAC may consider in evaluating individual characteristics are:

1. *Commercial Sophistication:* the commercial sophistication and experience of the Subject Person. Is the Subject Person an individual or an entity? If an individual, was the conduct constituting the apparent violation for personal or business reasons?

2. *Size of Operations and Financial Condition:* the size of a Subject Person's business operations and overall financial condition, where such information is available and relevant. Qualification of the Subject Person as a small business or organization for the purposes of the Small Business Regulatory Enforcement Fairness Act, as determined by reference to the applicable regulations of the Small Business Administration, may also be considered.

3. *Volume of Transactions:* the total volume of transactions undertaken by the Subject Person on an annual basis, with attention given to the apparent violations as compared with the total volume.

4. *Sanctions History:* the Subject Person's sanctions history, including OFAC's issuance of prior penalties, findings of violations or cautionary, warning or evaluative letters, or other administrative actions (including settlements). As a general matter, OFAC will only consider a Subject Person's sanctions history for the five years preceding the date of the transaction giving rise to the apparent violation.

E. *Compliance Program:* the existence, nature and adequacy of a Subject Person's risk-based OFAC compliance program at the time of the apparent violation, where relevant. In the case of an institution subject to regulation where OFAC has entered into a Memorandum of Understanding (MOU) with the Subject Person's regulator, OFAC will follow the procedures set forth in such MOU regarding consultation with the regulator with regard to the quality and effectiveness of the Subject Person's compliance program. Even in the absence of an MOU, OFAC may take into consideration the views of federal, state, or foreign regulators, where relevant. Further information about risk-based compliance programs for financial institutions is set forth in the annex hereto.

F. *Remedial Response:* the Subject Person's corrective action taken in response to the apparent violation. Among the factors OFAC may consider in evaluating the remedial response are:

1. The steps taken by the Subject Person upon learning of the apparent violation. Did the Subject Person immediately stop the conduct at issue?

2. In the case of an entity, the processes followed to resolve issues related to the apparent violation. Did the Subject Person discover necessary information to ascertain the causes and extent of the apparent violation, fully and expeditiously? Was senior management fully informed? If so, when?

3. In the case of an entity, whether the Subject Person adopted new and more effective internal controls and procedures to prevent a recurrence of the apparent violation. If the Subject Person did not have an OFAC compliance program in place at the time of the apparent violation, did it implement one upon discovery of the apparent violations? If it did have an OFAC compliance program, did it take appropriate steps to enhance the program to prevent the recurrence of similar violations? Did the entity provide the individual(s) responsible for the apparent violation with additional training, and/or take other appropriate action, to ensure that similar violations do not occur in the future?

4. Where applicable, whether the Subject Person undertook a thorough review to identify other possible violations.

G. *Cooperation with OFAC:* the nature and extent of the Subject Person's cooperation with OFAC. Among the factors OFAC may consider in evaluating cooperation with OFAC are:

1. Did the Subject Person voluntarily self-disclose the apparent violation to OFAC?

2. Did the Subject Person provide OFAC with all relevant information regarding an apparent violation (whether or not voluntarily self-disclosed)?

3. Did the Subject Person research and disclose to OFAC relevant information regarding any other apparent violations caused by the same course of conduct?

4. Was information provided voluntarily or in response to an administrative subpoena?

5. Did the Subject Person cooperate with, and promptly respond to, all requests for information?

6. Did the Subject Person enter into a statute of limitations tolling agreement, if requested by OFAC (particularly in situations where the apparent violations were not immediately notified to or discovered by OFAC, in particularly complex cases, and in cases in which the Subject Person has requested and received additional time to respond to a request for information from OFAC)? If so, the Subject Person's entering into a tolling agreement will be deemed a mitigating factor. **Note:** a Subject Person's refusal to enter into a tolling agreement will not be considered by OFAC as an aggravating factor in assessing a Subject Person's cooperation or otherwise under the Guidelines.

Where appropriate, OFAC will publicly note substantial cooperation provided by a Subject Person.

H. *Timing of apparent violation in relation to imposition of sanctions:* the timing of the

apparent violation in relation to the adoption of the applicable prohibitions, particularly if the apparent violation took place immediately after relevant changes in the sanctions program regulations or the addition of a new name to OFAC's List of Specially Designated Nationals and Blocked Persons (SDN List).

I. *Other enforcement action:* other enforcement actions taken by federal, state, or local agencies against the Subject Person for the apparent violation or similar apparent violations, including whether the settlement of alleged violations of OFAC regulations is part of a comprehensive settlement with other federal, state, or local agencies.

J. *Future Compliance/Deterrence Effect:* the impact administrative action may have on promoting future compliance with U.S. economic sanctions by the Subject Person and similar Subject Persons, particularly those in the same industry sector.

K. *Other relevant factors on a case-by-case basis:* such other factors that OFAC deems relevant on a case-by-case basis in determining the appropriate enforcement response and/or the amount of any civil monetary penalty. OFAC will consider the totality of the circumstances to ensure that its enforcement response is proportionate to the nature of the violation.

**IV. Civil Penalties for Failure To Comply With a Requirement To Furnish Information or Keep Records**

As a general matter, the following civil penalty amounts shall apply to a Subject Person's failure to comply with a requirement to furnish information or maintain records:

A. The failure to comply with a requirement to furnish information pursuant to 31 CFR 501.602 may result in a penalty in an amount up to $20,000, irrespective of whether any other violation is alleged. Where OFAC has reason to believe that the apparent violation(s) that is the subject of the requirement to furnish information involves a transaction(s) valued at greater than $500,000, a failure to comply with a requirement to furnish information may result in a penalty in an amount up to $50,000, irrespective of whether any other violation is alleged. A failure to comply with a requirement to furnish information may be considered a continuing violation, and the penalties described above may be imposed each month that a party has continued to fail to comply with the requirement to furnish information. OFAC may also seek to have a requirement to furnish information judicially enforced. Imposition of a civil monetary penalty for failure to comply with a requirement to furnish information does not preclude OFAC from seeking such judicial enforcement of the requirement to furnish information.

B. The late filing of a required report, whether set forth in regulations or in a specific license, may result in a civil monetary penalty in an amount up to $2,500, if filed within the first 30 days after the report is due, and a penalty in an amount up to $5,000 if filed more than 30 days after the report is due. If the report relates to blocked assets, the penalty may include an additional $1,000 for every 30 days that the report is overdue, up to five years.

C. The failure to maintain records in conformance with the requirements of OFAC's regulations or of a specific license may result in a penalty in an amount up to $50,000.

**V. Civil Penalties**

OFAC will review the facts and circumstances surrounding an apparent violation and apply the General Factors for Taking Administrative Action in Section III above in determining whether to initiate a civil penalty proceeding and in determining the amount of any civil monetary penalty. OFAC will give careful consideration to the appropriateness of issuing a cautionary letter or Finding of Violation in lieu of the imposition of a civil monetary penalty.

*A. Civil Penalty Process*

1. *Pre-Penalty Notice.* If OFAC has reason to believe that a sanctions violation has occurred and believes that a civil monetary penalty is appropriate, it will issue a Pre-Penalty Notice in accordance with the procedures set forth in the particular regulations governing the conduct giving rise to the apparent violation. The amount of the proposed penalty set forth in the Pre-Penalty Notice will reflect OFAC's preliminary assessment of the appropriate penalty amount, based on information then in OFAC's possession. The amount of the final penalty may change as OFAC learns additional relevant information. If, after issuance of a Pre-Penalty Notice, OFAC determines that a penalty in an amount that represents an increase of more than 10 percent from the proposed penalty set forth in the Pre-Penalty Notice is appropriate, or if OFAC intends to allege additional violations, it will issue a revised Pre-Penalty Notice setting forth the new proposed penalty amount and/or alleged violations.

a. In general, the Pre-Penalty Notice will set forth the following with respect to the specific violations alleged and the proposed penalties:

i. Description of the alleged violations, including the number of violations and their value, for which a penalty is being proposed;

ii. Identification of the regulatory or other provisions alleged to have been violated;

iii. Identification of the base category (defined below) according to which the proposed penalty amount was calculated and the General Factors that were most relevant to the determination of the proposed penalty amount;

iv. The maximum amount of the penalty to which the Subject Person could be subject under applicable law; and

v. The proposed penalty amount, determined in accordance with the provisions set forth in these Guidelines.

b. The Pre-Penalty Notice will also include information regarding how to respond to the Pre-Penalty Notice including:

i. A statement that the Subject Person may submit a written response to the Pre-Penalty Notice by a date certain addressing the alleged violation(s), the General Factors Affecting Administrative Action set forth in Section III of these Guidelines, and any other information or evidence that the Subject Person deems relevant to OFAC's consideration.

ii. A statement that a failure to respond to the Pre-Penalty Notice may result in the imposition of a civil monetary penalty.

2. *Response to Pre-Penalty Notice.* A Subject Person may submit a written response to the Pre-Penalty Notice in accordance with the procedures set forth in the particular regulations governing the conduct giving rise to the apparent violation. Generally, the response should either agree to the proposed penalty set forth in the Pre-Penalty Notice or set forth reasons why a penalty should not be imposed or, if imposed, why it should be a lesser amount than proposed, with particular attention paid to the General Factors Affecting Administrative Action set forth in Section III of these Guidelines. The response should include all documentary or other evidence available to the Subject Person that supports the arguments set forth in the response. OFAC will consider all relevant materials submitted.

3. *Penalty Notice.* If OFAC receives no response to a Pre-Penalty Notice within the time prescribed in the Pre-Penalty Notice, or if following the receipt of a response to a Pre-Penalty Notice and a review of the information and evidence contained therein OFAC concludes that a civil monetary penalty is warranted, a Penalty Notice generally will be issued in accordance with the procedures set forth in the particular regulations governing the conduct giving rise to the violation. A Penalty Notice constitutes a final agency determination that a violation has occurred. The penalty amount set forth in the Penalty Notice will take into account relevant additional information provided in response to a Pre-Penalty Notice. In the absence of a response to a Pre-Penalty Notice, the penalty amount set forth in the Penalty Notice will generally be the same as the proposed penalty set forth in the Pre-Penalty Notice.

4. *Referral to Financial Management Division.* The imposition of a civil monetary penalty pursuant to a Penalty Notice creates a debt due the U.S. Government. OFAC will advise Treasury's Financial Management Division upon the imposition of a penalty. The Financial Management Division may take follow-up action to collect the penalty assessed if it is not paid within the prescribed time period set forth in the Penalty Notice. In addition or instead, the matter may be referred to the U.S. Department of Justice for appropriate action to recover the penalty.

5. *Final Agency Action.* The issuance of a Penalty Notice constitutes final agency action with respect to the violation(s) for which the penalty is assessed.

*B. Amount of Civil Penalty*

1. *Egregious case.* In those cases in which a civil monetary penalty is deemed appropriate, OFAC will make a determination as to whether a case is deemed ''egregious'' for purposes of the base penalty calculation. This determination will be based on an analysis of the applicable General Factors. In making the egregiousness

determination, OFAC generally will give substantial weight 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 identified above, indicates that the case represents a particularly serious violation of the law calling for a strong enforcement response. A determination that a case is ''egregious'' will be made by the Director or Deputy Director.

2. *Pre-Penalty Notice.* The penalty amount proposed in a Pre-Penalty Notice shall generally be calculated as follows, except that neither the base amount nor the proposed penalty will exceed the applicable statutory maximum amount: [6]

a. Base Category Calculation

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 in the Pre-Penalty Notice shall be one-half of the transaction value, capped at a maximum base amount of $125,000 per violation (except in the case of transactions subject to the Trading With the Enemy Act, in which case the base amount of the proposed civil penalty will be capped at the lesser of $125,000 or one-half of the maximum statutory penalty under TWEA, which at the time of publication of these Guidelines equaled $32,500 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 in the Pre-Penalty Notice shall be the ''applicable schedule amount,'' as defined above (capped at a maximum base amount of $250,000 per violation, or, in the case of transactions subject to the Trading With the Enemy Act, capped at the lesser of $250,000 or the maximum statutory penalty under TWEA, which at the time of publication of these Guidelines equaled a maximum of $65,000 per violation).

iii. In an egregious case, if the apparent violation is disclosed through a voluntary self-disclosure by a Subject Person, the base amount of the proposed civil penalty in the Pre-Penalty Notice shall be one-half of the applicable statutory maximum penalty applicable to the violation.

iv. In an 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 in the Pre-Penalty Notice shall be the applicable statutory maximum penalty amount applicable to the violation.

The following matrix represents the base amount of the proposed civil penalty for each category of violation:

[6] For apparent violations identified in the Cuba Penalty Schedule, 68 Fed. Reg. 4429 (Jan. 29, 2003), for which a civil monetary penalty has been deemed appropriate, the base penalty amount shall equal the amount set forth in the Schedule for such violation, except that the base penalty amount shall be reduced by 50% in cases of voluntary self-disclosure.

**BASE PENALTY MATRIX**

| Voluntary Self-Disclosure | Egregious Case: NO | Egregious Case: YES |
|---|---|---|
| YES | (1) One-Half of Transaction Value (capped at $125,000 per violation/ $32,500 per TWEA violation) | (3) One-Half of Applicable Statutory Maximum |
| NO | (2) Applicable Schedule Amount (capped at $250,000 per violation/ $65,000 per TWEA violation) | (4) Applicable Statutory Maximum |

*Where the base penalty amount would otherwise exceed the statutory maximum civil penalty amount applicable to an apparent violation, the base penalty amount shall equal such applicable statutory maximum amount.*

b. Adjustment for Applicable Relevant General Factors

The base amount of the proposed civil penalty may be adjusted to reflect applicable General Factors for Administrative Action set forth in Section III of these Guidelines. Each factor may be considered mitigating or aggravating, resulting in a lower or higher proposed penalty amount. As a general matter, in those cases where the following General Factors are present, OFAC will adjust the base proposed penalty amount in the following manner:

i. In cases involving substantial cooperation with OFAC but no voluntary self-disclosure as defined herein, including cases in which an apparent violation is reported to OFAC by a third party but the Subject Person provides substantial additional information regarding the apparent violation and/or other related violations, the base penalty amount generally will be reduced between 25 and 40 percent. Substantial cooperation in cases involving voluntary self-disclosure may also be considered as a further mitigating factor.

ii. In cases involving a Subject Person's first violation, the base penalty amount generally will be reduced up to 25 percent. An apparent violation generally will be considered a ''first violation'' if the Subject Person has not received a penalty notice or Finding of Violation from OFAC in the five years preceding the date of the transaction giving rise to the apparent violation. A group of substantially similar apparent violations addressed in a single Pre-Penalty Notice shall be considered as a single violation for purposes of this subsection. In those cases where a prior penalty notice or Finding of Violation within the preceding five years involved conduct of a substantially different nature from the apparent violation at issue, OFAC may consider the apparent violation at issue a ''first violation.'' In determining the extent of any mitigation for a first violation, OFAC may consider any prior OFAC enforcement action taken with respect to the Subject Person, including any cautionary, warning or evaluative letters issued, or any civil monetary settlements entered into with OFAC.

In all cases, the proposed penalty amount will not exceed the applicable statutory maximum.

In cases involving a large number of apparent violations, where the transaction value of all apparent violations is either unknown or would require a disproportionate allocation of resources to determine, OFAC may estimate or extrapolate the transaction value of the total universe of apparent violations in determining the amount of any proposed civil monetary penalty.

3. *Penalty Notice.* The amount of the proposed civil penalty in the Pre-Penalty Notice will be the presumptive starting point for calculation of the civil penalty amount in the Penalty Notice. OFAC may adjust the penalty amount in the Penalty Notice based on:

a. Evidence presented by the Subject Person in response to the Pre-Penalty Notice,

or otherwise received by OFAC with respect to the underlying violation(s); and/or

b. Any modification resulting from further review and reconsideration by OFAC of the proposed civil monetary penalty in light of the General Factors for Administrative Action set forth in Section III above.

In no event will the amount of the civil monetary penalty in the Penalty Notice exceed the proposed penalty set forth in the Pre-Penalty Notice by more than 10 percent, or include additional alleged violations, unless a revised Pre-Penalty Notice has first been sent to the Subject Person as set forth above. In the event that OFAC determines upon further review that no penalty is appropriate, it will so inform the Subject Person in a no-action letter, a cautionary letter, or a Finding of Violation.

*C. Settlements*

A settlement does not constitute a final agency determination that a violation has occurred.

1. *Settlement Process.* Settlement discussions may be initiated by OFAC, the Subject Person or the Subject Person's authorized representative. Settlements generally will be negotiated in accordance with the principles set forth in these Guidelines with respect to appropriate penalty amounts. OFAC may condition the entry into or continuation of settlement negotiations on the execution of a tolling agreement with respect to the statute of limitations.

2. *Settlement Prior to Issuance of Pre-Penalty Notice.* Where settlement discussions occur prior to the issuance of a Pre-Penalty Notice, the Subject Person may request in writing that OFAC withhold issuance of a Pre-Penalty Notice pending the conclusion of settlement discussions. OFAC will generally agree to such a request as long as settlement discussions are continuing in good faith and the statute of limitations is not at risk of expiring.

3. *Settlement Following Issuance of Pre-Penalty Notice.* If a matter is settled after a Pre-Penalty Notice has been issued, but before a final Penalty Notice is issued, OFAC will not make a final determination as to whether a sanctions violation has occurred. In the event no settlement is reached, the period specified for written response to the Pre-Penalty Notice remains in effect unless additional time is granted by OFAC.

4. *Settlements of Multiple Apparent Violations.* A settlement initiated for one apparent violation may also involve a comprehensive or global settlement of multiple apparent violations covered by other Pre-Penalty Notices, apparent violations for which a Pre-Penalty Notice has not yet been issued by OFAC, or previously unknown apparent violations reported to OFAC during the pendency of an investigation of an apparent violation.

**Annex**

The following matrix can be used by financial institutions to evaluate their compliance programs:

OFAC RISK MATRIX

| Low | Moderate | High |
|---|---|---|
| Stable, well-known customer base in a localized environment. | Customer base changing due to branching, merger, or acquisition in the domestic market. | A large, fluctuating client base in an international environment. |
| Few high-risk customers; these may include nonresident aliens, foreign customers (including accounts with U.S. powers of attorney), and foreign commercial customers. | A moderate number of high-risk customers .... | A large number of high-risk customers. |
| No overseas branches and no correspondent accounts with foreign banks. | Overseas branches or correspondent accounts with foreign banks. | Overseas branches or multiple correspondent accounts with foreign banks. |
| No electronic services (*e.g.,* e-banking) offered, or products available are purely informational or non-transactional. | The institution offers limited electronic (*e.g.,* e-banking) products and services. | The institution offers a wide array of electronic (*e.g.,* e-banking) products and services (*i.e.,* account transfers, e-bill payment, or accounts opened via the Internet). |
| Limited number of funds transfers for customers and non-customers, limited third-party transactions, and no international funds transfers. | A moderate number of funds transfers, mostly for customers. Possibly, a few international funds transfers from personal or business accounts. | A high number of customer and non-customer funds transfers, including international funds transfers. |
| No other types of international transactions, such as trade finance, cross-border ACH, and management of sovereign debt. | Limited other types of international transactions. | A high number of other types of international transactions. |
| No history of OFAC actions. No evidence of apparent violation or circumstances that might lead to a violation. | A small number of recent actions (*i.e.,* actions within the last five years) by OFAC, including notice letters, or civil money penalties, with evidence that the institution addressed the issues and is not at risk of similar violations in the future. | Multiple recent actions by OFAC, where the institution has not addressed the issues, thus leading to an increased risk of the institution undertaking similar violations in the future. |
| Management has fully assessed the institution's level of risk based on its customer base and product lines. This understanding of risk and strong commitment to OFAC compliance is satisfactorily communicated throughout the organization. | Management exhibits a reasonable understanding of the key aspects of OFAC compliance and its commitment is generally clear and satisfactorily communicated throughout the organization, but it may lack a program appropriately tailored to risk. | Management does not understand, or has chosen to ignore, key aspects of OFAC compliance risk. The importance of compliance is not emphasized or communicated throughout the organization. |
| The board of directors, or board committee, has approved an OFAC compliance program that includes policies, procedures, controls, and information systems that are adequate, and consistent with the institution's OFAC risk profile. | The board has approved an OFAC compliance program that includes most of the appropriate policies, procedures, controls, and information systems necessary to ensure compliance, but some weaknesses are noted. | The board has not approved an OFAC compliance program, or policies, procedures, controls, and information systems are significantly deficient. |
| Staffing levels appear adequate to properly execute the OFAC compliance program. | Staffing levels appear generally adequate, but some deficiencies are noted. | Management has failed to provide appropriate staffing levels to handle workload. |
| Authority and accountability for OFAC compliance are clearly defined and enforced, including the designation of a qualified OFAC officer. | Authority and accountability are defined, but some refinements are needed. A qualified OFAC officer has been designated. | Authority and accountability for compliance have not been clearly established. No OFAC compliance officer, or an unqualified one, has been appointed. The role of the OFAC officer is unclear. |

OFAC RISK MATRIX—Continued

| Low | Moderate | High |
| --- | --- | --- |
| Training is appropriate and effective based on the institution's risk profile, covers applicable personnel, and provides necessary up-to-date information and resources to ensure compliance. | Training is conducted and management provides adequate resources given the risk profile of the organization; however, some areas are not covered within the training program. | Training is sporadic and does not cover important regulatory and risk areas or is nonexistent. |
| The institution employs strong quality control methods. | The institution employs limited quality control methods. | The institution does not employ quality control methods. |

Dated: November 2, 2009.

**Adam J. Szubin,**

*Director, Office of Foreign Assets Control.*

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