

MEMO# 23972

November 23, 2009

OFAC Economic Sanctions Enforcement Guidelines

[23972]

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TO: TRANSFER AGENT ADVISORY COMMITTEE No. 87-09 RE: OFAC ECONOMIC
SANCTIONS ENFORCEMENT GUIDELINES

The Office of Foreign Assets Control (“OFAC”) of the Department of the Treasury recently issued a final rule setting 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 (“Final Guidelines”). [\[1\]](#) This rule was published as an interim final rule with request for comments on September 8, 2008. The Final Guidelines, which are applicable to all persons subject to any of the sanctions programs administered by OFAC, are effective as of November 9, 2009.

The Final Guidelines contain certain changes from the interim final rule, some of which are based on comments received by OFAC. Below is a brief description of the significant changes.

Risk-Based Compliance

Some comments to the interim final rule questioned whether OFAC intended to move away from the risk-based compliance approach. The Final Guidelines clarify that OFAC has not moved away from this approach 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 Guidelines, the risk matrices that had originally been promulgated as an annex to the 2006 Economic Sanctions Enforcement Procedures for Banking Institutions. The Final Guidelines indicate that the consolidated risk matrix is to be used by all financial institutions, not just banks, is assessing OFAC compliance risks.

Voluntary Self-Disclosure

OFAC explains that the guiding principle for determining voluntary self-disclosure is whether OFAC would otherwise have learned of the apparent violation. OFAC has, therefore, amended the definition of “voluntary self-disclosure” to make clear that, if 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. However, 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.

OFAC also revised the Final Guidelines to clarify 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. Further, OFAC notes that it may even treat a voluntary self-disclosure to another government agency as a voluntary self-disclosure to OFAC when the circumstances so warrant.

Cooperation and Tolling Agreements

The Final Guidelines specify 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.

Sanctions History

OFAC has revised the Final Guidelines 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, but may also include cautionary letters, warning letters and evaluative letters. OFAC also revised the Final Guidelines 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.

Penalty Calculation

The Final Guidelines clarify that 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 additionally 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.” OFAC also made certain changes to the Final Guidelines clarifying base civil monetary penalty calculation amounts.

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endnotes

[1] Final Rule, Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57593 (Nov. 9, 2009), available at http://www.treas.gov/offices/enforcement/ofac/legal/regs/fr74_57593.pdf. The Enforcement Guidelines are published as an Appendix to the Reporting, Procedures and Penalties Regulations.

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