

OFAC Compliance

New Enforcement Guidelines for All U.S. Individuals and Entities

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Courtesy of **ATTUS Technologies, Inc.**

Business After 9/11

Throughout its history the U.S., under the auspices of the Treasury Department, has utilized economic sanctions and trade embargoes to meet and further its national security objectives during times of war and peace. OFAC's (Office of Foreign Assets Control) predecessor was established in 1940 in response to World War II and OFAC itself was created in 1950 in response to the Korean War. However for over fifty years, references to "OFAC Compliance" were rarely heard and regulatory oversight was minimal, at best, until September 11, 2001. On that day, the world as we knew it changed and national security was abruptly brought to the forefront.

The term "OFAC Compliance" quickly became more widely known and to some degree it also became synonymous with "National Security". Even so, there are many people in the U.S. still unaware that OFAC compliance is applicable to them. Although knowledge of OFAC has admittedly been unfolding at a seemingly slow pace, significant effort has been made to increase public awareness and to gain greater assurance that all U.S. persons are complying with the sanctions program requirements.

Who Does OFAC Apply To?

With respect to OFAC compliance, the laws under which the sanctions programs are authorized, as well as the penalties for non-compliance, are applicable to all U.S. persons, including both individuals and entities, which are defined by OFAC as follows:

- All U.S. citizens and permanent residents,
- All persons located in the United States,
- Any business organized under U.S. law, including U.S. branches and representative offices of foreign companies and overseas branches of U.S. companies, and
- In the case of the Cuba and North Korea programs, non-U.S. subsidiaries of U.S. companies.

Improving OFAC Effectiveness

OFAC, the agency responsible for administration of the sanctions programs, obviously recognizes certain elements as crucial for the effectiveness and success of the underlying initiatives:

- increased education and public awareness of the laws,
- a dedicated commitment and willing cooperation from all U.S. persons and businesses with respect to adherence to the laws,
- diligent oversight by all regulatory agencies responsible for ensuring compliance with the sanctions programs for the industries under their jurisdiction, and
- active enforcement of the sanctions programs by OFAC.

Therefore, in an effort to emphasize the importance of compliance with the sanctions programs, the International Emergency Economic Powers Enhancement Act (Enhancement Act) was passed and substantially increased the maximum penalties for violations of the International Emergency Economic Powers Act (IEEPA). The IEEPA is one of the principal statutes under which most of the sanctions programs are authorized.

Enhanced Enforcement

Under the Enhancement Act, the maximum civil money penalties (CMP) for violations of the IEEPA increased from \$50,000 to the greater of \$250,000 or twice the amount of the transaction in question. **Note: Whichever is greater.** In addition, the Enhancement Act sets forth the penalties for unlawful acts that are found to be criminal in nature as well. Any person who willfully commits, attempts to commit, conspires to commit, or aids or abets in the commission of an act that violates the IEEPA, may be fined up to \$1,000,000. If convicted, in addition to the criminal monetary fine, a natural person could also face possible imprisonment up to 20 years.

New Uniform Enforcement Guidelines

In response to the increased penalty amounts, and its application to pending or commenced cases involving apparent violations of IEEPA, OFAC issued the [Economic Sanctions Enforcement Guidelines \(Guidelines\)](#) on September 8, 2008. These new Guidelines provide uniform guidance for determining the appropriate enforcement response to apparent violations and, when it comes to such, for determining the amount of the CMP to be imposed.

As a result of these new Guidelines, OFAC has withdrawn the enforcement procedures previously set forth in the interim final rule of January 12, 2006 for banking institutions, who to this point have been held most accountable to OFAC compliance. While the new enforcement procedures apply to banking institutions, they are also an effort by OFAC to emphasize the importance of OFAC compliance by all U.S. persons subject to the sanctions programs.

OFAC – Beyond Financial Institutions

Although a majority of the guidance previously issued by OFAC has generally been directed towards financial institutions, the new Guidelines as well as other recently published guidance are a strong indication that OFAC is aggressively working to educate, communicate expectations, and encourage willful cooperation within other key industries as well. The Guidelines are also a clear indication that with or without willful cooperation or whether the person was aware that the conduct was illegal or not, OFAC will be actively enforcing the sanctions programs, through administrative action, the imposition of penalties, or both, regardless of the type of entity.

Effective immediately, the new enforcement procedures and the penalties described within are applicable to **all** persons subject to the sanctions programs. In addition, they will be applied to all enforcement matters currently pending before OFAC or that will come before OFAC in the future, whether the matter falls under the IEEPA or any of the other statutes under which OFAC is authorized to enforce sanctions, with the exception of the categories of cases set forth in OFAC's November 27, 2007 Civil Penalties Interim Policy, and those addressed in the Cuba Penalty Schedule.

OFAC's Administrative Response

In determining the appropriate administrative response, OFAC will now consider "General Factors", which are detailed within the new Guidelines, as opposed to their previous approach of identifying "aggravating" and "mitigating" factors. Among the General Factors OFAC will consider are whether the apparent violation is the result of "Willful" or "Reckless" conduct by the subject person.

The following demonstrates what OFAC will consider in this evaluation:

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?

Recklessness:

- Did the subject person demonstrate a reckless disregard for U.S. sanctions requirements or otherwise fail to exercise a minimal degree of caution or care to avoid conduct, activities or transactions that led to the apparent violation?
- Were there warning signs that should have alerted them that an action or failure to act would lead to an apparent violation?

Although “willfulness” will obviously be concluded in cases where the subject person had specific knowledge that their conduct would constitute or likely constitute a violation, the standard for “recklessness” may be much lower.

For example, in this evaluation OFAC will consider whether the subject person failed to exercise a minimal degree of caution or care to avoid the apparent violation. The level of caution the subject person is reasonably expected to take will likely depend on whether they are an individual or a business and if a business entity, the type of business and the volume of transactions.

For many types of businesses, a minimal degree of caution or care may simply consider whether the subject person proactively took steps to reasonably ensure they were not engaging in business activities with a party that is the target of a sanctions program. In addition, a minimal degree of caution or care may include whether the business maintains this assurance on an ongoing basis by comparing its customer records to the OFAC list after each update.

The Guidelines also emphasize the importance of having an OFAC compliance program. The nature and existence of such is a General Factor that will be considered in determining the appropriate enforcement action. In this evaluation, OFAC may consider any guidance or views issued by state, federal, and foreign regulatory agencies having jurisdiction over the type of business entity.

The Consequences of a Violation

Cautionary Letter

If OFAC has insufficient evidence to conclude that a violation has occurred but feels the conduct in question could eventually lead to a violation, or, if they believe the subject person is not exercising the appropriate level of due diligence to prevent future violations, they may issue a “Cautionary Letter”. This letter is intended to convey OFAC’s concerns about the policies, practices, and procedures employed by the subject person with respect to OFAC compliance. If issued, this will serve as the final enforcement response, unless additional related violations or relevant information becomes known.

Finding of Violation

If OFAC determines a violation has occurred but a CMP (Civil Monetary Policy) is not warranted, the concerns will be conveyed and documented through a “Finding of Violation”. As with the cautionary letter, a finding of violation will serve as the final enforcement response unless additional related violations or relevant information becomes known. In addition, the subject person will have the opportunity to respond to OFAC’S determination.

Civil Monetary Policy (CMP)

In some cases however, OFAC may find that the nature of the violation warrants the imposition of a CMP and if necessary, they may refer the matter to the appropriate law enforcement agency for criminal investigation and/or prosecution.

Paying the High Price of Civil Monetary Penalties

If a Civil Monetary Penalty is warranted, OFAC will first calculate the base amount by determining whether the conduct was “egregious” or “non-egregious”. In making this determination, OFAC will consider its analysis of the applicable General Factors with significant emphasis placed on “willful” and/or “reckless” conduct. If OFAC finds the case to be “egregious”, you can count on their enforcement response being strong.

Example 1

If the subject person voluntarily disclosed the apparent violation, the base amount of the civil penalty OFAC will initially propose shall be one-half the statutory maximum penalty applicable to the violation. If the violation is found to be “non-egregious”, and it was voluntarily disclosed, the base penalty amount will be capped at \$125,000.

Example 2

For “non-egregious” violations not voluntarily disclosed, the penalty will be capped at a maximum of \$250,000 per violation.

Example 3

If the apparent violation comes to OFAC’S attention by means other than a voluntary self-disclosure, and it is found to be “egregious”, the proposed base amount of the civil monetary penalty shall be the statutory maximum applicable to the violation.

The new Guidelines contain a matrix illustrating the proposed base penalty amount for each category of violations, which will be used by OFAC.

Conclusion

Based on the new Guidelines, it is clear OFAC has paved the way to actively enforce the sanctions programs in a uniform manner regardless of whether you are an individual or an entity and regardless of the type of entity. However, it is also clear they will recognize and give substantial weight to any proactive efforts made by an entity to reasonably ensure compliance. Willful blindness is definitely not a valid defense - and if you have lived by the old saying "What I don't know won't hurt me" - you should probably rethink your strategy pertaining to OFAC compliance.

At a minimum, the increased penalty amounts and the benefit to be gained from a proactive compliance program should be good cause to review your current process to ensure your risk-based approach considers all of the new factors. You will likely find that the cost of a proactive compliance program is much less than the potential consequences faced if even a single violation were to occur.

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