

How OFAC Calculates Penalties for Violations of Economic Sanctions

12/1/2014

Treasury's Office of Foreign Assets Control (OFAC) is charged with enforcing a range of economic sanctions programs in connection with which it has taken [recent enforcement actions](#) involving staggering amounts of civil money penalties. This has raised questions as to how OFAC confronts apparent violations and deals with the myriad types of companies and financial institutions that must comply with economic sanctions. OFAC's sanctions regulations prohibit or regulate transactions with, and order the blocking of property of certain foreign nations, persons, or entities identified as threatening the national security of the United States. Sanctions are imposed pursuant to [specific statute](#) or by Presidential Executive Order issued under the [International Emergency Economic Powers Act of 1977 \(IEEPA\)](#).

Recent OFAC penalties, e.g., [almost \\$1 billion](#) against BNP Paribas for violating Sudanese, Iranian, and Cuban sanctions; and almost [\\$17 million](#) against Bank of America for violations of the [Foreign Narcotics Kingpin Sanctions Regulations](#), were calculated on the basis of OFAC's [Economic Sanctions Enforcement Guidelines](#) (Guidelines). These Guidelines provide an insight into what OFAC expects of compliance programs. Familiarization with them can provide a roadmap for companies and financial institutions on how to interact with OFAC and to blunt the possibility of massive penalties when confronting an apparent violation of one of the economic sanction programs.

Some sanctions are directed at specific countries, e.g., [Cuba](#) and [Iran](#). Others aim to further limited U.S. foreign policy objectives, e.g., eliminating trade in [conflict diamonds](#). Still others target various kinds of corruption and terrorism. Many of the sanctions are based on Executive Orders issued under authority of IEEPA. Some, such as [the Foreign Narcotics Kingpin Designation Act](#) (Kingpin Act), are derived from a specific statute; others, such as [Counter Terrorism Sanctions](#) and [Counter Narcotics Sanctions](#) rely on a combination of Executive Orders and specific statute

Under IEEPA, once the President has declared a national emergency with respect to a threat "to the national security, foreign policy, or economy of the United States" from a source "in whole or in substantial part outside the United States," broad authority is available to impose an economic embargo over transactions and property in which a foreign nation or foreign person has an interest. Pursuant to this authority, after the President has issued an Executive Order regulating or prohibiting transactions involving property or interests in property of specific foreign countries, entities, or individuals, OFAC will issue implementing regulations. Generally, these regulations will identify with specificity the sanctioned parties and the types of transactions and property interests covered. The regulations will often include procedures for obtaining licenses to engage in certain transactions, to challenge the applicability of the regulations, or to seek to be delisted from OFAC's Specially Designated Nationals List ([SDN List](#)), naming hundreds of specially designated individuals and companies whose assets are blocked.

According to the Guidelines, a company's compliance program and the specific factual circumstances giving rise to a sanctions violation are among the principal factors that OFAC considers in determining the course of an enforcement action. If the business, itself, uncovered the violation, how it reacted will be important as will whether it reported the violation. In any case, cooperation with OFAC will be considered a mitigating factor. The Guidelines provide a Risk Matrix that businesses and financial institutions may use to assess the general degree of risk posed by their activities and establish a compliance program tailored to whether their risks are low, moderate, or high. In making this determination, businesses are to consider: whether their customer base is stable or fluctuating; whether their business deals locally or internationally; and, whether there are frequent international funds transfers, multiple foreign correspondent accounts; foreign branches,

or other international transactions. Other factors that may be important are whether there is a large array of electronic products and services and how much the firm's management is involved in assessing the risks, keeping abreast of OFAC developments, assigning responsibilities, and assuring adequate staffing and training.

When OFAC becomes aware of an apparent violation, it determines what type of enforcement action is appropriate after considering a number of factors provided in the Guidelines. There is no indication of the weight OFAC gives to each factor or the extent to which any one of the factors or combination of factors would moot an enforcement action or require a specific action. What the Guidelines pinpoint, however, is that OFAC looks kindly on self-reporting, cooperation, and good faith efforts at compliance.

The list of potential enforcement actions includes license denial, revocation, or suspension; cease and desist order; civil money penalty; and criminal referral. After investigating an apparent violation, OFAC has several options: (1) taking no action and, if the subject is aware of the OFAC investigation, notifying the subject; (2) seeking more information either by issuing an administrative subpoena or working through the entity's federal regulator; (3) issuing a cautionary letter urging improved compliance--indicating that OFAC has failed to sufficiently establish a violation; (4) issuing a Finding of Violation—indicating a problem that does not rise to a level that calls for a civil penalty but requires steps to improve compliance; (5) imposing a civil money penalty; and (6) making a criminal referral (either with or without imposing a civil money penalty).

In determining which of these actions to take, OFAC considers a number of factors in mitigation of the offense. The enforcement decision may be influenced by the extent to which the conduct was willful or reckless; the degree of management culpability; the level of harm to the policy objectives of the sanctions program; or the potential effect of deterring further violations. Moreover, OFAC may make allowances for individual characteristics of the violator, such as relative unsophistication. It is also likely that OFAC will consider the volume of violations; the quality of the compliance program; and, whether there was cooperation by self-disclosing or agreeing to toll any statute of limitations. If civil penalties are in order, the Guidance includes a schedule that ranges from \$1,000 to \$250,000. This schedule, of course, could be supplanted by any applicable statutory penalty. IEEPA, for example, provides for a maximum penalty of the greater of \$250,000 or twice the amount of the transactions. Under the Kingpin Act, the maximum penalty is \$1,000,000. Other statutes, such as the [United Nations Participation Act](#) (\$10,000), set lower maximum penalties.

When OFAC has determined that a civil money penalty is appropriate, it will issue a Pre-Penalty Notice specifying details of the purported violation and proposed amount of the penalty and offer the subject an opportunity to respond. In calculating the base penalty, OFAC makes a distinction between egregious and non-egregious cases with emphasis on factors such as the extent to which the conduct is a willful or reckless violation of law committed with a high level of awareness of the conduct violating the law or regulation. Only OFAC's Director or Deputy Director may determine an offense to be egregious. Voluntary self-disclosure of either type of conduct—egregious or non-egregious—will result in cutting the applicable penalty by one half.

Posted at 12/01/2014 09:47 AM by [M. Maureen Murphy](#) | [Share Sidebar](#)

Category: [Banking](#)

Related Policy Issue(s): [Financial Market Regulation](#), [Consumer Protection](#)