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April 19, 2010

Attn: Request for Comments (Enforcement Guidelines)
Office of Foreign Assets Control
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: Comments on OFAC's Enforcement Guidelines; FR Doc. E8-20704

Dear Sir/Madam:

On behalf of the American Bar Association, Section of International Law, we are submitting the following comments for your consideration regarding the Economic Sanctions Enforcement Guidelines, issued as an interim final rule on September 8, 2008 (73 Fed. Reg. 51933) and subsequently published in the *Federal Register* as a final rule on November 9, 2009 (74 Fed. Reg. 57593). Although these comments are being submitted after publication of the final rule, we nonetheless hope that OFAC will take them into consideration as it implements its enforcement policy and practice going forward.

At the outset, the Section applauds the efforts of the Office of Foreign Assets Control ("OFAC") to issue detailed guidance to the public with regard to sanctions enforcement and the penalty regime that is being implemented pursuant to the International Emergency Economic Powers Enhancement Act ("the Act"). The substantial increase in penalties wrought by the Act has generated considerable attention and concern among U.S. companies that responsibly pursue compliance with the web of sanctions programs administered by OFAC. Therefore, clarity as to how those penalties will be applied in situations of non-compliance is critical.

The Section has reviewed the interim rule, and wishes to offer a few specific comments for consideration by OFAC. By and large, the Economic Sanctions Enforcement Guidelines provide detailed information regarding how OFAC will respond to infractions of its regulations, the process for resolving enforcement actions, the quantum of penalties that will be imposed under certain circumstances, and the factors that will dictate the final penalty amounts assessed by OFAC. At the same time, we believe there are a few areas where greater clarity and some adjustments would serve the public interest. The Section has organized its comments in conformity with the four questions set forth by OFAC in its September 8, 2008 *Federal Register* notice.

1. Are the General Factors the appropriate factors that should be considered in determining the type of enforcement response to an apparent violation and amount of civil penalty?



The Section views the effort to set forth the range of potential responses and the listing of General Factors to be a positive development. We appreciate that the final rule specifically mentions risk-based compliance efforts as a mitigating factor that would be considered in determining the appropriate penalty level in the event of an infraction. We also are appreciative that OFAC has stated that it will consider as a General Factor whether compliance with certain U.S. sanctions requirements conflicts with obligations or restrictions under other applicable laws such as “blocking statutes” that have been implemented by many close U.S. allies.

2. Is the definition of an “egregious” case appropriate?

OFAC has indicated in its Guidance that it will consider a case to be “egregious” when an analysis of the General Factors “indicates that the case represents a particularly serious violation of the law calling for a strong enforcement response.” In making such a determination, OFAC has stated that it will give “substantial weight” to the following General Factors: (A) willfulness or reckless violation of the law, (B) awareness of the conduct at issue, (C) harm to the objectives of the sanctions that have been violated, and (D) other individual characteristics. OFAC’s Guidance indicates that General Factors A and B will be given particular emphasis.

The Section believes that General Factors A and C should be the exclusive factors for determining whether a case is “egregious.” General Factor A speaks for itself, and we concur that willful or reckless conduct should be a key factor in determining whether a case is considered “egregious.” While OFAC and a respondent may disagree with regard to how conduct should be characterized, if the evidence clearly indicates that a U.S. person has engaged in willful or reckless activity (e.g., conscious disregard for the legal consequences of a particular course of action), then this should be considered in determining whether the case is “egregious.”

With regard to General Factor B, in many instances individuals within an organization will have actual or subjective knowledge of the conduct at issue. However, they often will not have a full appreciation of whether the conduct violates U.S. sanctions, particularly when the variety and complexity of the various OFAC rules are taken into account. The economic sanctions regulations administered by OFAC are not always clear in their meaning or scope, and even sophisticated companies often struggle with how the sanctions are applied in specific factual circumstances. Testimony to this can be seen in the significant resources that are devoted to sanctions compliance – by ever increasing in-house counsel and compliance personnel, the significant number of law firms that provide sanctions compliance services, the significant number of CLE courses that focus on this topic, and the many questions that OFAC receives in writing or otherwise for specific guidance. Therefore, we do not view “awareness of the conduct” to be an appropriate factor for determining whether a case should be treated as “egregious,” even though we agree that it is a factor that should be considered in the overall decision on how to resolve an enforcement action.

The Section believes that General Factor C should be the other principal concern of OFAC in determining what is considered an “egregious” case. Apart from willful or reckless disregard for the legal consequences of a particular action (i.e., General Factor A, which focuses on the intent and integrity of the actor), conduct that seriously undermines the objective of the sanctions (i.e., General Factor C, which focuses on the effect of the violation) is an appropriate consideration. We believe such a determination should be made on a case-by-case basis – examining whether the specific conduct at issue seriously prejudices U.S. national interests, based on a realistic assessment of the benefit that is received by the sanctioned country, entity, or person as a result of the infraction.

We also do not believe that the specific elements of General Factor D, as described in the OFAC Guidance, are particularly relevant to whether a case should be considered “egregious.” If too rigidly applied, commercial sophistication, size of operations and financial health, volume of transactions, and even compliance history can be unreliable or misleading factors when seeking to determine whether an infraction should be considered “egregious.” Even commercially-sophisticated companies can make innocent and non-egregious errors in sanctions compliance, and in some instances they may reasonably rely on third parties who make mistakes. Similarly, a large corporation that is financially healthy should not be assumed to have committed an “egregious” violation when it fails to comply. The volume of transactions also seems to be a potentially misleading factor, in that a single compliance failure can lead to multiple, repeat infractions; at the same time, a company experiencing one infraction in the context of 100 transactions should not be presumed to be more culpable than a company having one infraction in 1000 transactions. And even a company’s history of sanctions non-compliance can be a misleading factor, given that such a history may be more a reflection of aggressive self-policing and self-reporting than empirical evidence of greater non-compliance. Of course, where companies have a record of past willful or reckless misconduct, then it would be appropriate to take that factor into account under the “recklessness” prong of General Factor A. Again, we agree with OFAC that all of the considerations under General Factor D should be considered when deciding how to resolve an enforcement action; the Section however does not believe they are appropriate for purposes of defining an “egregious” case.

3. Are the proposed base penalty amounts appropriate for the types of cases to which they are applicable?

A. *Base penalty amounts relating to voluntary self disclosures:*

While the selection of a base penalty category depends only on egregiousness and voluntary self-disclosure, the actual base penalty amount will often be determined by the “Transaction Value” and “Applicable Schedule Amount,” two new concepts included in the Guidelines. The transaction value is intended to represent the dollar value of the transaction. Where the value of the transaction is not easily determined (for example, where there is no import/export, or seized or blocked property), 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.” While the Section understands the need for discretion in certain circumstances, we observe that the exercise of discretion could produce unusual results in specific instances, such as where the underlying violation involves “facilitating” a transaction by a non-U.S. person. In many circumstances where “facilitation” could be the infraction, the U.S. person’s involvement may be quite tangential, inconsequential, and unintentional when viewed in the broader circumstances of an offshore transaction. Therefore, we believe OFAC must be careful in considering the “market value” or “economic benefit” so as not to impose an undue penalty in such circumstances.

The “Applicable Schedule Amount” is based on a schedule set forth in the Guidelines, which has several levels from \$1,000 to \$250,000, each linked to ranges of transaction values. The Applicable Schedule Amount is typically higher than the transaction value. Thus, base penalty amounts could be significant even in self-disclosed cases involving infractions with Transaction

Value at the lower end of the Applicable Schedule Amount. In the future OFAC may wish to consider giving greater credit for voluntary disclosures in order to encourage such disclosures.

4. Is the new pre-penalty process an improvement and how can it be further improved?

Overall, it is our view that the newly described pre-penalty process will provide companies, individuals, and their counsel with greater information regarding OFAC's assessment of violations, including the relevant aggravating and mitigating factors. This should afford respondents with greater due process, facilitate rebuttal of the aggravating factors that OFAC considered, and provide an understanding of the mitigating factors that OFAC has taken into account.

However, if OFAC has already determined that a respondent warrants a penalty under the General Factors, it may be difficult to reverse the penalty determination altogether, short of submitting new evidence. OFAC stated in the final rule that it typically provides a potential respondent with notice of a possible enforcement action prior to the issuance of a pre-penalty notice. OFAC should make clear in the regulations when, consistent with long-standing OFAC practice, it will inform the subject individual or entity of the possible enforcement action 30 days prior to the issuance of a pre-penalty notice, and when it will not provide such notice. This will facilitate the ability of the subject company/individual to provide OFAC with relevant information, and also will afford an opportunity to engage in settlement discussions with OFAC prior to the issuance of any pre-penalty notice. From this perspective, we believe the prior practice of OFAC to resolve cases before a pre-penalty notice is issued to be desirable.

The Section wishes to again commend OFAC for issuing the Enforcement Guidelines, which we believe provide needed and important guidance to the public on how the agency will pursue and resolve enforcement actions. The comments above are offered in the spirit of improving upon the substantial effort OFAC has undertaken in this regard.

Sincerely,



Glenn Hendrix
Chair, ABA Section of International Law