



ECONOMIC SANCTIONS DEVELOPMENTS

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New US Economic Sanctions Enforcement Guidelines

The U.S. Treasury's Office of Foreign Assets Control (OFAC) Introduces New Enforcement Guidelines Packing Powerful Penalty Punch

Willful, knowing, egregious violators of U.S. economic sanctions laws and regulations administered by OFAC have plenty to be concerned about -- even just at the civil monetary penalty level. The IEEPA Enhancement Act, signed into law last October, increased the maximum civil penalty applicable to each violation under most of OFAC's sanctions programs to the greater of \$250,000 or twice the amount of the transaction. Criminal penalties under the new law increased to up to \$1 million per count, and/or up to 20 years imprisonment. The issuance of the new enforcement guidelines, on September 8, 2008 (effective upon issuance), was prompted, in part, by concerns about the manner in which OFAC would use its newly-augmented penalty powers.

The new guidelines not only carry the punch of the IEEPA Enhancement Act, but they also reflect a significantly new approach in the civil penalty process. The guidelines give OFAC greater flexibility in the choice of enforcement response to apparent violations and provide for sensible and meaningful standards for the enforcement response in a given case, and for the amount of civil monetary penalties, if any.

The core concept of the new guidelines is the use of General Factors that OFAC will consider in making enforcement determinations. The General Factors replace the aggravating and mitigating factors approach used in the past to determine the assessment of penalties. The General Factors, which are to be used in a genuinely

case-by-case fashion, in a “holistic consideration” of all the facts and circumstances, should provide assurance to those facing an OFAC enforcement action that their case will receive a fair consideration. The new guidelines, which supersede previous guidelines and apply across-the-board to all of OFAC’s sanctions programs, reflect OFAC’s further retreat from a “one-size fits all” formulaic approach to a much more sensible and balanced consideration of all the relevant circumstances of a specific case.

Essentially, OFAC will use a two-step process in considering each enforcement matter. First, it will decide which of several possible enforcement responses are appropriate in the matter. The available options include a *cautionary letter*, a *finding of violation without a civil monetary penalty*, or *civil monetary penalty*. Second, OFAC will consider the appropriate amount of monetary penalty, when warranted, and will apply a schedule of “base amounts.” Determinations regarding the base amount will be informed by an “egregious/non-egregious” analysis and consideration of whether the matter came to OFAC’s attention through a self-disclosure. The criteria contained in the General Factors will be used in both steps. These factors focus, among other things, on such matters as willfulness, economic benefit to the sanctions target as a result of the violation, harm to sanctions objectives, impact on U.S. policy, the violator’s compliance program, remedial action, cooperation with OFAC, and voluntary disclosure.

The new guidelines are quite detailed and clear. Only time will tell how they will be implemented in practice. At this time, few if any cases have been decided under the new guidelines. We surmise that many cases, especially those deserving large penalties, may be awaiting treatment under the new guidelines. Both OFAC and the private sector face a new enforcement environment without much precedent for guidance, which presents challenges and opportunities for both sides. OFAC is entertaining comments on the new guidelines until November 7, 2008.

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The Eren Law Firm is an economic sanctions, anti-money laundering, bank regulation, and international trade regulation boutique serving U.S. and non-U.S. financial institutions, U.S. and non-U.S. companies, and sovereign governments. Mr. Pinter and Mr. Eren of the Firm served in senior positions at the U.S. Treasury’s Office of Foreign Assets Control for a combined 25 years prior to entering private law practice, respectively 6 and 8 years ago. More information about The Eren Law Firm can be found at: www.erenlaw.com

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