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# Potential benefits of cooperation with OFAC

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Recent settlements in civil enforcement proceedings brought by the Office of Foreign Assets Control (OFAC) suggest that cover-ups, not crimes, may invite the stiffest penalties. Frequently, companies that cooperate with OFAC investigations, admit wrongdoing and take remedial actions to prevent future violations escape the enforcement process with mild punishments. Indeed, even companies that *eventually* cooperate after some initial resistance fare well in OFAC's administrative enforcement process and often avoid criminal penalties altogether — penalties that, aside from the reputational damage, carry much more severe consequences, including prison time for individuals and massive financial impact.

Thus, it is useful for practitioners to understand the OFAC cooperation process. Stated simply, cooperation often yields leniency, and practitioners need to understand how to navigate the process in order to provide their clients with a comprehensive set of options for dealing with a potential sanctions violation. And even for violators who — whether or not they choose to cooperate with OFAC — become the targets of criminal investigations, the administrative penalties dispensed by OFAC provide an important comparison that defense attorneys should use while trying obtain the lowest possible sentence for their clients.

OFAC has issued relatively mild punishments for violations of economic sanctions where the violators cooperate with OFAC's investigation. Cooperation in these circumstances does not require self-reporting. It does not even seem to require immediate cooperation upon learning of OFAC's investigation. There is a wide disparity between the administrative punishments dispensed by OFAC and the criminal penalties to which entities might be exposed.

**OFAC guidelines**

The guidelines for OFAC's economic sanctions can be found in Appendix A to 31 C.F.R. 501. Each prohibited transaction is viewed as a separate violation, and, depending on a transaction's value, carries an "applicable schedule amount" between $1,000 and $250,000. The "transaction value" is generally the "domestic value in the United States" of the goods or services involved or, in a case where an entity transfers or attempts to transfer funds, the amount of the funds to be transferred.

When OFAC determines a violation warrants a civil penalty, it first prepares a pre-penalty notice. This pre-penalty notice is not a final agency action, and thus there is no judicial review at this time (31 C.F.R. § 501.703). The notice will contain a "base penalty" based upon the total "schedule amount," adjusted by two factors: whether the violation is "egregious," and whether the infraction was "disclosed through a voluntary self-disclosure."

- Whether an infraction is classified as "egregious" depends on "an analysis of the applicable General Factors," which basically amounts to a totality-of-the-circumstances determination. Reckless conduct, and violations that harm the objectives of the sanctions programs (*e.g.*, selling weapons to hostile nations) are more likely to be classified as egregious than cases involving, for

example, unknowing violations or innocuous infractions (such as regular business transactions with an entity inside a sanctioned country). Efforts to cover-up wrongdoing may enhance the odds of earning an "egregious" tag.

- The second classification is voluntary self-disclosure. To satisfy "voluntary self-disclosure," an entity must notify OFAC of the infraction "prior to or at the same time" that OFAC, or any other government entity, "discovers the apparent violation or another substantially similar apparent violation." A voluntary self-disclosure may allow a violator to reduce its base penalty by 50 percent.

Once the base penalty is set, it is adjusted for "Applicable Relevant General Factors." These factors include "substantial cooperation" with OFAC, which earns a 25-40 percent discount, but for entities that voluntarily self-disclosed (and thus already cut their bill in half), it is just deemed a "further mitigating factor." "First-time" offenders — defined as entities with a clean OFAC record over the prior five years — "generally" receive a 25 percent reduction. Importantly, neither of these discounts is mutually exclusive. Thus, cooperative "first-time" offenders can receive the benefit of both reductions. OFAC can even further adjust the penalty calculation downward on the basis of any other relevant information, including any remedial measures taken and the impact/severity of the violation.

**Recent penalties issued to cooperating entities**

Several recent examples suggest that OFAC rewards cooperating entities with mild penalties.

*ATP Tour, Inc.*

In June 2013, OFAC reached a settlement of $48,600 with ATP Tour, Inc. for alleged violations of the Iranian sanctions program. ATP, the governing body of men's professional tennis, paid the salary of a tournament official who resided in Iran. ATP did not voluntarily self-disclose these payments, and there were additional aggravating factors in the case, such as: eight of the eighteen payments at issue occurred after OFAC issued a warning letter to ATP, ATP's management knew about the payments, and ATP had no compliance program when it made the payments. Despite those considerations, ATP settled for one-third of the $135,000 base penalty amount. In announcing the settlement, OFAC commented on a number of mitigating factors that contributed to the lenient settlement, including: ATP was a "first-time" offender, ATP eventually cooperated with OFAC's investigation, the payments amounted to "relatively low harm" to the goals of the sanctions program, the payments were likely eligible for a license from OFAC, ATP is a non-profit organization, and ATP has since instituted a compliance program.

*American Steamship Owners Mutual Protection & Indemnity Association*

In May 2013, OFAC reached a settlement of $348,000 with the American Steamship Owners Mutual Protection and Indemnity Association (the "American Club"). The American Club found itself on OFAC's radar after processing insurance claims involving Cuba, Sudan, and Iran. The company did not voluntarily self-disclose, and it faced a base penalty of $1,729,000 for this "non-egregious" case. Explaining the settlement — for only about 20 percent of the base penalty amount — OFAC noted that the American Club was a "first-time" offender, that it cooperated with OFAC after becoming aware of OFAC's investigation, and that the transactions likely would have been eligible for a license from OFAC had the American Club applied. OFAC also noted that other "individual characteristics," including the entity's size and financial condition, also contributed to the lenient settlement.

*Offshore Marine Laboratories*

In February 2013, OFAC settled an enforcement action against Offshore Marine Laboratories (OML), which exported parts and supplies to the UAE to be used in an offshore drilling rig in Iranian waters. The base penalty for this offense, which was not voluntarily disclosed and which OFAC classified as "non-egregious," was $167,000. Ultimately, OML settled the matter for $97,695 — a reduction of over 40 percent. OFAC noted the aggravating factors that OML harmed the objectives of the sanctions program

by aiding Iranian petroleum and that OML had no compliance program at the time the violation occurred. On the other side of the ledger, however, OML was a first time offender, it cooperated with OFAC, and it implemented a compliance program after the violation came to light, all of which convinced OFAC to allow the company to settle the case at a substantial discount.

*Toyota Motor Credit Corporation*

OFAC has even been lenient to even sophisticated companies whose inadequate compliance measures resulted in easily-preventable violations. For example, a drug kingpin listed on OFAC's Specially Designated Nationals List received automobile financing from Toyota Motor Credit Corporation. Despite Toyota's failure to investigate this relationship, failure to self-report this violation, its inadequate compliance system, and its status as a commercially sophisticated entity, the base penalty was only $26,000, and Toyota settled the case on April 25, 2013 for $23,400.

**Recent penalties issued to non-cooperating entities**

OFAC does not deal only with cooperating entities, of course. On one hand, non-cooperating entities certainly run a risk that OFAC will refer their violations to criminal authorities. But even a non-cooperator can receive benefits, even grudgingly, under OFAC's administrative-penalty regime — especially compared to companies that become targets of criminal prosecution and the severe penalties attendant to that process. That comparison between administrative and criminal punishments of non-cooperating entities, as discussed *infra*, may yield useful, persuasive data to criminal defense lawyers representing an entity under criminal investigation.

In February 2013, OFAC disciplined a non-cooperating entity that committed *new* violations even after learning of OFAC's investigation. American Optisurgical (AO) exported unlicensed medical goods and services to Iran, or to third parties knowing the exports were intended for Iran. AO also failed to respond adequately to OFAC's investigation and subpoenas. AO did not voluntarily disclose this violation, which OFAC deemed "non-egregious," and OFAC noted that the conduct at issue was reckless, that senior management was involved, that AO actively concealed the fact that Iran was the ultimate destination, and that AO continued this conduct even after OFAC issued subpoenas. Based on all of these aggravating factors, OFAC determined that the base penalty was $449,000. Nonetheless, AO was a "first-time" offender and received a 10 percent discount. OFAC allowed AO to settle the matter for $404,100.

Also in February 2013, OFAC imposed a penalty *above* the base penalty amount on a non-cooperating entity, but that entity nevertheless received credit under OFAC's formulas as a first-time offender. The Bank of Guam originated a wire transfer for the delivery costs associated with the shipment of furniture to Iran, but a bank further along the transactional path rejected the wire based on sanctions concerns. The Bank, in an effort to complete the transaction, instructed the customer to hide any reference to Iran in the payment instructions. Despite the Bank's intentional violation of U.S. sanctions, the small dollar value of the transaction gave rise to a low base penalty amount: $20,000.

On Feb. 22, 2013, OFAC settled the Bank of Guam case for $27,000, a 35 percent premium over the base penalty amount. OFAC noted several aggravating factors justifying this premium, including that the Bank failed to catch the payment initially, it then instructed the customer to strip information in order to circumvent the sanctions program, and it did not voluntarily self-disclose the violation. Such actions undermined the sanctions regime, and also prevented the correspondent bank from properly assessing the transaction. Nonetheless, the effect of these aggravating factors was diminished by OFAC's decision to award a discount to the Bank for being a "first-time" offender.

**Lessons for Practitioners**

Practitioners should draw two main lessons from the foregoing discussion:

1. OFAC regulations provide several opportunities to reduce any administrative penalty that may be assessed for violations of U.S. sanctions. Practitioners should actively seek these discounts even if their clients did not voluntarily self-report their misconduct or even cooperate in the early stages of OFAC's investigation. Companies or individuals facing OFAC investigations should seek counsel from experienced practitioners who can navigate this process; and

2. Criminal defense attorneys should point to the relatively light administrative penalties imposed by OFAC when urging Department of Justice officials or sentencing judges to impose lenient criminal penalties. Criminal prosecutions carry far greater penalties than OFAC's administrative enforcement actions — including felony convictions, jail time, massive fines, and deportation for non-citizens — but there is no clear prescription for employing one mechanism versus the other. Thus, a violator facing criminal penalties should cite examples of OFAC's administrative settlements for factually analogous violations in an effort to convince a judge (or prosecutors in settlement negotiations) that severe criminal punishment would constitute disparate treatment of similar conduct. Judges are expressly instructed to avoid such extreme variations in punishment.

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