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WHITE COLLAR



Part 2: As a matter OFAC

What every company should know about complying with the agency's complicated sanctions programs

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What are the potential consequences arising out of an OFAC investigation?

OFAC views itself as playing an integral party in protecting U.S. national security and it therefore takes its sanctions programs very seriously. It punishes violations that are intentional and those that are merely accidental. When its enforcement office believes it appropriate, it will make criminal referrals to the Department of Justice. The Department of Justice has authority to prosecute criminally certain violations of sanctions programs, and often does so through its local U.S. Attorney's Offices. One notable OFAC investigation resulting in criminal prosecutions involved the United Nations' Oil-For-Food Program in Iraq. Therefore, the receipt of an OFAC subpoena should be treated as a potential white-collar criminal matter and with an appropriate level of care.

The criminal and civil penalties for violating the terms of an OFAC sanctions program can be harsh. In recent years, some OFAC sanctions violators have faced tens of millions of dollars in penalties. Even in smaller cases, the penalties may far exceed the value of the prohibited transaction, as OFAC views its penalties as serving a deterrent purpose. Depending on the statute that underlies the particular sanctions program, violators can face maximum criminal penalties of 20 years' imprisonment and a fine of \$1 million, as well as asset forfeiture provisions that can allow the government to claim property involved in the violation. Civil penalties can be as high as \$250,000 or an amount equal to twice the amount of the transaction that is the basis of the viola-

tion. Also, these civil penalties are per violation, so if there are multiple transactions, the maximum penalty can be quite high.

How does OFAC determine what penalties to impose?

OFAC assesses different potential violations in accordance with its Economic Sanctions Enforcement Guidelines, which became effective in November 2009. OFAC has broad discretion to take different types of enforcement actions depending on the particular facts involved, including sending a cautionary letter, imposing a civil monetary penalty, or issuing a cease and desist order. OFAC's exercise of discretion is informed by many "general factors" including whether the violation was willful or reckless, the harm to the underlying sanctions goals, the existence of an OFAC compliance program, the company's remedial response to the violation, and the company's cooperation with OFAC during the investigation. If OFAC imposes a civil penalty, the amount of the base penalty is calculated primarily based on two key determinations: First, was the violation "egregious"? This term is not defined by OFAC. Second, was there a voluntary self-disclosure of the violation? A voluntary disclosure will result in a 50% decrease in the base penalty imposed by OFAC. Once the base penalty is determined, OFAC will then consider mitigating and aggravating factors in increasing or decreasing the amount before a final penalty determination is made. Parties are permitted to submit letters identifying mitigating factors and advocating for a lower penalty.

How should you handle an OFAC subpoena?

An OFAC subpoena should be treated with the utmost seriousness, much as one would treat a grand jury subpoena or a subpoena from the Securities and Exchange Commission. Perhaps even more so than in these other contexts, the recipient should consider retaining an attorney with specialized knowledge of the various OFAC sanctions programs, the exceptions to the programs, and the art of making a mitigation submission to OFAC in advance of an assessment of a civil penalty. After receipt of the subpoena, your company's attorney should contact the OFAC Enforcement personnel who issued the subpoena in order to find out as much information about the nature of the investigation as they are willing to provide.

¹ The authors are both in the White Collar Defense and Investigations practice group at Patterson Belknap Webb & Tyler LLP. The authors also both served as Assistant U.S. Attorneys in the Southern District of New York, where Mr. Sandick was Deputy Chief Appellate Attorney and Mr. Ruzumna was Acting Chief of the Major Crimes Unit. In private practice, both have represented clients in OFAC-related cases in connection with both criminal and civil investigations.