Securities Industry Association

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March 31, 2003

VIA Facsimile and U.S. Mail

Chief of Records
Attn: Request for Comments Office
of Foreign Assets Control U. S.
Treasury Department
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Re: Economic Sanctions Enforcement Guidelines

Ladies and Gentlemen:

The Securities Industry Association ("SIA,,)l appreciates this opportunity to comment on OFAC's proposed Economic Sanctions Enforcement Guidelines.2 SIA applauds OFAC's efforts to make its enforcement process more transparent, and SIA views the publication of the proposed Enforcement Guidelines as a hopeful indicator of enhanced OFAC openness with and outreach to industry.

SIA suggests that to further government-industry cooperation, OFAC should make several changes to the proposed Enforcement Guidelines. First, OFAC should expand the circumstances in which it issues "warning letters" rather than pursuing civil penalties. Second, OFAC should modify its list of mitigating and aggravating factors, as detailed below. Third, OFAC should make civil penalty decisions within 180 days of receiving a response from an alleged violator. Fourth, OFAC should provide safe harbor procedures -compliance "best practices" that, if followed, would afford safe harbor against liability. And finally, when OFAC

The Securities Industry Association brings together the shared interests of more than 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. The U.S. securities industry manages the accounts of nearly 93 million investors directly and indirectly through corporate, thrift, and pension plans. In the year 2001, the industry generated $198 billion in U.S. revenue and $358 billion in global revenues. Securities firms employ approximately 750,000 individuals in the United States. (More information about the SIA is available on its home page: http://www.sia.com.)

These comments respond to the proposed rule at 68 Fed. Reg. 4422 (Jan. 29, 2003).

issues proposed civil penalty notices, the proposed penalties should reflect all mitigating circumstances of which OFAC is aware.

I. Expand the Use of Warning Letters in Place of Pursuing Civil Penalties

SIA strongly agrees with OFAC's statement that there are circumstances in which a warning letter "may achieve the same result as a monetary penalty insofar as future compliance with OFAC regulations is concerned." 68 Fed. Reg. at 4426. SIA believes that a warning letter, rather than a civil penalty, is the appropriate enforcement mechanism when an alleged violator has a compliance program in place and makes other reasonable efforts to ensure compliance. Specifically, SIA suggests that if a broker-dealer has a compliance program in place and a violation occurs, a warning letter is appropriate if: (1) the violation was inadvertent; or (2) the violation was mitigated by corrective measures, such as voluntary disclosure to OFAC and changes reasonably necessary, if any, to prevent similar violations in the future.

The Enforcement Guidelines list circumstances in which warning letters are more appropriate than civil penalties, but the examples provided are too narrowly drawn and, taken together, do not seem to create a reasonable standard for the issuance of warning letters instead of civil penalties. The Enforcement Guidelines provide, for example, that a warning letter would be appropriate where a clerk accidentally hits a "release" key instead of a "block" key and then tries to recall the funds, or where an electronic filter does not catch a blocked party because the name of the blocked party is spelled slightly differently from the entry on OFAC's SDN list. SIA fully concurs that these wholly inadvertent violations do not merit OFAC enforcement actions and should give rise, at most, to warning or cautionary letters.

But SIA urges OFAC to make clear that warning letters may be used in situations going beyond the inadvertent mistakes covered by the examples provided in the proposed Enforcement Guidelines. SIA urges modification of the Enforcement Guidelines to state that OFAC will issue warning letters rather than pursuing civil penalties in circumstances in which an alleged violator has a reasonable compliance program in place and makes reasonable efforts to correct a compliance problem or issue.

Further, SIA believes strongly that no penalty should result when a violation involves a person or entity that does not appear on any OFAC list. As OFAC is well aware, the volume and complexity of modern financial transactions combined with the complexity of the economic sanctions regime administered by OFAC require broker-dealers and other financial services firms to rely on automated processes to ensure OFAC compliance. These automated systems must be constructed from authoritative lists provided by OF AC, and it is not reasonable to expect that these systems will block parties not so listed.

II. OFAC Should Modify the List of Mitigating and Aggravating Factors

SIA strongly supports the publication *of* mitigating and aggravating factors, but believes that OFAC should modify the factors listed in the Enforcement Guidelines *to* produce fairer results and *to* avoid creating disincentives *to* full disclosures and educational and compliance measures. In particular, OFAC should (1) broaden the definition *of* a "voluntary disclosure," which is a particularly important mitigating factor; (2) change the aggravating factor described as "second *or* subsequent offense" *to* "pattern *of* offenses"; and (3) eliminate entirely "familiarity with economic sanctions programs" as an aggravating factor.

A. *V voluntary Disclosures*

The Enforcement Guidelines provide that a voluntary disclosure *of* a violation generally will result in at least a 50-percent mitigation *of* the penalty that otherwise would have been deemed appropriate. SIA applauds OFAC *for* announcing this mitigation factor, but the Enforcement Guidelines define "voluntary disclosure" too narrowly. They provide that a disclosure is not voluntary if OFAC previously received information from another source concerning the transaction in question. It is, in SIA's view, unreasonable to preclude the possibility *of* a "voluntary disclosure" merely because another business detects the violation first and reports it *to* OF AC. In many instances, a firm may be unaware *of* the disclosure from the other business.

Not only does it seem unfair to insist that a "voluntary disclosure" cannot occur if there has been a prior disclosure by another firm, but such a narrow definition also fails to encourage complete factual disclosures. OFAC presumably wants to create incentives for all firms with information about a potential violation to disclose that information *to* OF AC. The proposed limitation on the definition *of* "voluntary disclosure" as a mitigating factor does not create such incentives.

The standard for determining whether a disclosure is voluntary should be whether a person *or* business reports the violation within a reasonable time after first learning *of* the alleged violation (allowing the violator a reasonable period *to* investigate and confirm initial reports *or* suspicions). This standard is not only fair to industry participants but also advances OF AC' s policy goals by creating appropriate incentives for full disclosures *to* OFAC by all persons concerned.

B. *Second or Subsequent Offense*

SIA believes that it is unfair to list "second or subsequent offense" as an aggravating factor. In light of the volume of transactions handled by many large financial services fifll1s and the complexity of the economic sanctions programs administered by OF AC, many large financial services fifll1s will have had one or more technical and inadvertent OFAC violations in the past. Evidence of such past offenses is not indicative of deficient compliance regimes or a disregard for OFAC sanctions.

SIA suggests that OFAC instead include "pattern of offenses" as an aggravating factor. This phrase properly connotes insufficient care in developing, refining and implementing an OFAC compliance program, and it is this insufficient care -rather than the mere fact of one or more unrelated past violations -that should constitute an aggravating factor,

C. *Familiarity~ with Economic Sanctions Programs*

SIA also suggests that familiarity with economic sanctions programs should not constitute an aggravating factor. Presumably OFAC wants to encourage fifll1S to become knowledgeable about OFAC's sanctions pr9grams and to develop sound compliance programs based on such knowledge. Penalizing fifll1s by making "familiarity with economic sanctions programs" an aggravating factor not only seems unfair but also could create a disincentive to initiate educational and compliance measures that OFAC should encourage, Accordingly,
OFAC should eliminate "familiarity with economic sanctions programs" as an aggravating factor.

III. OFAC Should Make Civil Penalty Decisions Within 180 Days of Receiving a Response from the Alleged Violator

SIA encourages OFAC to include in the Enforcement Guidelines a statement that OFAC generally will make civil penalty decisions within 180 days after receiving a response from the alleged violator. As time passes, infofll1ation that may be relevant to a settlement or appeal of a penalty decision may become difficult or impossible to obtain as memories fade and documents become dated. In addition, it is important for fifll1s to secure closure on matters that are pending before OF AC.

It is prejudicial to the fact-finding mission, and to the interests of justice, if a decision is delayed longer than six months, Accordingly, SIA suggests that OFAC include in the Enforcement Guidelines a statement indicating that, except in extraordinary cases, OFAC will make civil penalty decisions within 180 days after receiving a response from the alleged violator.

IV. OFAC Should Provide Safe Harbor Procedures

While SIA applauds OFAC's efforts to increase the transparency of OFAC's enforcement decisions, SIA notes that each of its member firms wants to develop sufficient compliance procedures to avoid interaction with OFAC's enforcement mechanisms. As a practical matter, however, this will happen only if OFAC provides a set of compliance "best practices," which, if followed, would afford a safe harbor against liability.

SIA previously has expressed concern regarding the potential liability that firms may face for genuinely innocent mistakes, and SIA has noted the need for a defense from sanctions where an institution has a system in place to detect, identify, and report prohibited transactions, but where a technical violation nevertheless occurs.3

Further to this point, SIA directs OFAC to the regulatory safe harbor created as part of the Treasury Department's implementation of sections 313 and 319 of the Patriot Act. *See* 67 Fed. Reg. 60,562, 60,568-69 (Sept. 26, 2002) (codified at 31 C.F .R. 1 03.177(b)). These statutory sections prohibit certain financial institutions from maintaining "correspondent accounts" with foreign "shell banks" and also require financial institutions to collect information regarding all of the correspondent accounts maintained for foreign banks. Recognizing the difficulty of determining whether a foreign bank is a "shell bank" and the burdens entailed in obtaining information from large numbers of foreign banks, Treasury appropriately provided a safe harbor for financial institutions that obtain prescribed certifications from their foreign correspondent banks.

SIA encourages OFAC similarly to reduce the risks and burdens entailed in complying with OFAC's complex set of economic sanctions programs. OFAC can accomplish this by creating a safe harbor that would apply to firms that choose to follow compliance "best practices" as defined by OF AC.

V. Consider All Known Mitigating Factors Before Issuing a Proposed Civil Penalty

When OFAC decides to pursue a civil penalty, the Enforcement Guidelines provide that OFAC will issue a proposed penalty notice that is "the lesser of either the statutory maximum or the dollar value of the transaction involved"; the final penalty may then be lessened after consideration of various mitigating factors.

SIA respectfully suggests that giving a penalty "ceiling" as the proposed penalty is misleading if OFAC is aware of mitigating factors that OFAC will take into account before

See Letter from Alan E. Sorcher, Vice President and Associate General Counsel, to Lally D. Thompson, Chairman, Judicial Review Commission on Foreign Asset Control, at 5 (Nov. 16,2000).

issuing a final penalty. The ceiling may affect settlement discussions if an alleged violator is unaware that OFAC normally takes into account certain mitigating factors. Accordingly, any proposed penalty should take into account all mitigating factors of which OFAC is aware, and then the alleged violator can argue that there are additional reasons that the proposed penalty should be lessened. To this end, SIA urges OFAC to make clear how the proposed penalty was determined.

SIA hopes that these comments help OFAC implement its statutory mandates in a manner that encourages industry cooperation and furthers U.S. foreign policy and national security objectives. If you wish to receive additional information related to our comments, please feel free to contact the undersigned.

Sincerely,

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