



March 14, 2006

Via E-mail

Barbara Hammerle
Acting Director
Office of Foreign Assets Control
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Second Floor, Annex Building
Washington, D.C. 20220

Re: *Economic Sanctions Enforcement Procedures for Banking Institutions*

Dear Ms. Hammerle:

The Securities Industry Association ("SIA")¹ appreciates this opportunity to comment on the proposed Economic Sanctions Enforcement Procedures for Banking Institutions ("Enforcement Procedures") issued by the Office of Foreign Assets Control ("OFAC").² At the outset, SIA applauds OFAC's efforts to make its enforcement process more transparent, and SIA views the publication of the proposed Enforcement Procedures as an indicator of enhanced OFAC openness with and outreach to the financial services industry. We are commenting to provide responses to your specific requests for comment from entities regulated by the Securities and Exchange Commission ("SEC") because you intend to issue separate enforcement procedures for these entities.

SIA suggests that to further government-industry cooperation, OFAC should make several changes to the proposed Enforcement Procedures. First, OFAC should provide enhanced transparency of the enforcement action decision-making process, as described below. Second, OFAC should clarify alternative resolutions to enforcement investigations that are available in situations that do not warrant the initiation of civil enforcement action. Third, OFAC should clarify those mitigating and aggravating factors that it will consider in determining whether to initiate enforcement actions and in assessing enforcement sanctions. Fourth, OFAC should make civil penalty decisions within 180 days of receiving a response from an alleged violator.

¹ The Securities Industry Association brings together the shared interests of approximately 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (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. According to the U.S. Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93 million investors directly and indirectly through corporate, thrift, and pension plans. In 2004, the industry generated \$236.7 billion in domestic revenue and an estimated \$340 billion in global revenues. (More information about the SIA is available on its home page: <http://www.sia.com>.)

² These comments respond to the interim final rule at 71 Fed. Reg. 1971 (Jan. 12, 2006).

In addition, SIA recommends that OFAC provide further clarification regarding how the Enforcement Procedures will be applied to complex corporate structures, including how regulatory reporting should be handled, the collateral consequences to global firms for apparent violations of a particular affiliate, and how conflicts of laws issues will be dealt with.

Finally, we urge OFAC to provide safe harbor procedures – compliance program “best practices” – that, if followed, would afford a safe harbor against liability and also consider the unique characteristics of shared customer relationships within the securities industry and the complexities relating to OFAC reporting.

I. Suggested Enhancements to OFAC’s Enforcement Procedures

A. Provide Enhanced Transparency of OFAC’s Enforcement Decision Making Process

SIA applauds OFAC’s efforts to increase the transparency of OFAC’s procedures for enforcing sanctions programs pursuant to Presidential and Congressional mandates as well as to better inform the regulated community. However, SIA believes that it would be helpful for the regulated community to understand the chain of review and which departments are involved in the decision making process. SIA recommends that OFAC consider including in the Enforcement Procedures an enhanced description of the process undertaken within OFAC to determine to initiate an enforcement investigation, informally contact the banking institution regarding OFAC’s preliminary assessment of the appropriate action, and provide written notification to a banking institution of OFAC’s proposed action. It is a cumbersome process for the regulated community to attempt to contact OFAC during investigations without a clear understanding of the chain of review and which departments are involved in each step of the decision making process.

B. Clarify Alternative Resolutions to OFAC’s Enforcement Investigations

SIA strongly agrees with OFAC’s statement from its 2003 proposal that there are circumstances in which alternative resolutions “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 it would further the goal of providing enhanced transparency of OFAC’s Enforcement Procedures to clarify the alternative resolutions to OFAC’s enforcement investigations.

Given that these Enforcement Procedures supercede OFAC’s prior rule proposal relating to Economic Sanctions Enforcement Guidelines (issued on January 29, 2003), SIA believes that it would be helpful for OFAC to clarify whether license suspension, cautionary letters and warning letters remain viable alternative resolutions to enforcement investigations under OFAC’s Enforcement Procedures. Further, SIA urges OFAC to make clear in which types of situations these types of alternative resolutions may be used.

C. Provide Guidance on Mitigating and Aggravating Factors

SIA strongly supports the publication of mitigating and aggravating factors that will be evaluated in determining an appropriate sanction, as was provided in OFAC's 2003 rule proposal relating to Economic Sanctions Enforcement Guidelines. It is unclear whether OFAC's Enforcement Procedures incorporate a similar evaluation of mitigating and aggravating factors and what such factors might be. Although OFAC states that, under the revised procedures, prior to taking enforcement actions OFAC will "generally review apparent violations by a particular institutions over a period of time, rather than evaluating each apparent violation independently" and that it will "periodically evaluate a banking institution's apparent OFAC-related violations in the context of the institution's overall OFAC compliance program and specific OFAC compliance record", it does not indicate what factors will be considered in determining whether an action should be taken or the mitigating or aggravating factors that will be evaluated in order to determine an appropriate sanction.

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

SIA encourages OFAC to include in the Enforcement Procedures a statement that OFAC generally will make civil penalty decisions within 180 days after receiving a response from the alleged violator. As time passes, information 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 firms to secure closure on matters that are pending before OFAC.

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 Procedures 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.

II. Considerations Relating to OFAC's Enforcement Process For Complex Corporate Structures

A. Explain How Regulatory Reporting Should Be Handled

A consistent theme of SIA's comments to regulators regarding the promulgation of rules and interpretive guidance relating to regulatory reporting obligations is to avoid requirements that are duplicative. As OFAC states in its interim final rule, OFAC's Enforcement Procedures apply to "banking institutions that may be part of a larger corporate structure, with a parent holding company."³ Within such complex structures are affiliated entities that may have shared customer relationships or shared responsibility for transaction processing. In this regard, OFAC should provide clear guidance as to which entities have reporting obligations and work with the industry to streamline reporting requirements to make the reporting process efficient for the industry, but also to conserve regulatory resources by

³ See 71 Fed. Reg. 1971, 1973 (Jan. 12, 2006).

limiting the possibility of reviews and investigations relating to duplicative and/or inconsistent filings.

B. Incorporate a Balanced and Measured Approach in Determining the Collateral Consequences to a Global Firm for Apparent Violations of a Single Affiliate

SIA urges OFAC to carefully consider, within the context of complex corporate structures, the collateral consequences of apparent violations by a single affiliate to the global firm. Depending upon whether the structure of the complex incorporates a centralized or decentralized process for OFAC reviews and reports, it may or may not be appropriate to consider, as part of the process for determining whether to initiate an enforcement action, the apparent violations by a single affiliate as indicative of weakness within the global firm's compliance program. SIA believes that a balanced and measured approach to reviewing a global firm's OFAC compliance program and record is necessary not only with respect to apparent violations of a single affiliate, but to determine whether the historical OFAC compliance record remains relevant to the adequacy of the global firm's compliance program given the passage of time, the potential for changes in ownership or control of the corporate structure resulting from mergers or acquisitions, or changes in applicable regulatory requirements.

C. Provide Guidance on Conflicts of Laws for Global Firms

As acknowledged by OFAC in the interim final rule release, complex corporate structures pose challenges for assessing compliance programs and making determinations about enforcement actions when there are apparent violations. In this regard, SIA believes that it would be helpful for OFAC to provide the industry with guidance relating to the following:

- How will conflicts of laws issues will be dealt with in making determinations regarding enforcement actions and imposition of sanctions?
- Will transactions that violate economic sanctions laws in foreign jurisdictions be considered in determining the adequacy of a global firm's OFAC compliance program?
- Will foreign regulatory assessments of the compliance program and internal controls to detect and deter violations of applicable economic sanctions laws of a global firm, or one of its affiliates, be considered by OFAC in assessing compliance programs and making determinations regarding enforcement actions?

III. Recommendations Relating to OFAC's Enforcement Procedures for the Securities Industry

A. OFAC Should Clarify "Best Practices" for OFAC Compliance Programs and Related Safe Harbors

SIA applauds OFAC's efforts to increase the transparency of OFAC's enforcement decisions. However, in order to avoid interaction with OFAC's enforcement mechanisms

in the first place, it would be helpful for OFAC to provide a set of compliance program "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 compliance program and internal controls system in place to detect, identify, and report prohibited transactions, but where a technical violation nevertheless occurs.⁴

As we have pointed out previously, the creation of safe harbors from liability is consistent with the Treasury Department's previous implementation of regulations to deter and prevent violations of economic sanctions laws. In particular, SIA directs OFAC to the regulatory safe harbor created as part of the Treasury Department's implementation of sections 313 and 319 of the USA PATRIOT Act.⁵ 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 business and regulatory risks associated with 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 OFAC.

B. Modify Concept of "Voluntary Disclosure" to Account for Shared Customer Relationships

OFAC's Enforcement Procedures provide that a voluntary disclosure of a violation will be considered by OFAC in its enforcement decisions. SIA applauds OFAC for incorporating this factor into its enforcement action decision making process; however, we believe that the Enforcement Procedures define "voluntary disclosure" too narrowly.

In particular, OFAC's Enforcement Procedures state that a disclosure is not voluntary if another party is "required to file a report concerning the same transaction" whether or not that other party actually files with report.⁶ It is, in SIA's view, unreasonable to preclude the possibility of a "voluntary disclosure" merely because another business has an obligation to report an event to OFAC, regardless of whether it actually does file the required report. As we have previously discussed with OFAC, within the securities

⁴ See Letter from Alan E. Sorcher, Vice President and Associate General Counsel, to Larry D. Thompson, Chairman, Judicial Review Commission on Foreign Asset Control, at 5 (Nov. 16, 2000); *see also* Letter from Alan E. Sorcher, Vice President and Associate General Counsel, to Chief of Records, Office of Foreign Assets Control (Mar. 31, 2003).

⁵ See 67 Fed. Reg. 60,562, 60,568-69 (Sept. 26, 2002) (codified at 31 C.F.R. 103.177(b)).

⁶ See 71 Fed. Reg. 1971, 1973 (Jan. 12, 2006).

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industry, there are far too many situations where entities share customer relationships and where reporting responsibilities may be concurrent to apply this definition of "voluntary disclosure." For example, in the context of an introducing and clearing broker-dealer relationship, a transaction by a shared customer would conceivably be the reporting obligation of both firms. Similar situations arise in the context of prime brokerage relationships and secondary trading of loans.

Not only does it seem unfair to insist that a "voluntary disclosure" cannot occur if there is a concurrent reporting obligation 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 OFAC. The proposed limitation on the definition of "voluntary disclosure" 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 OFAC's policy goals by creating appropriate incentives for full disclosures to OFAC by all persons concerned.

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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,

Alan E. Sorcher
Vice President and
Associate General Counsel
Securities Industry Association
(202) 216-2000

cc: Dennis Wood
Assistant Director
Office of Foreign Assets Control