The Iran Deal and OFAC Regulations: What to Tell Clients about Potential Liability

By Sarah Jane Hughes

Future relief for Iran from some U.S. and UN economic sanctions has been in the news since the July 14, 2015, conclusion of the Joint Comprehensive Plan of Action (JCPOA), signed between Iran and the G-5 +1 group. But, as noted in Roland L. Trope’s August 2015 article in Business Law Today, with the JCPOA and the still-outstanding Joint Plan of Action (JPOA), the devil is in the details. Many economic sanctions statutes, regulations, and executive orders will continue to govern transactions with Iran after the implementation date, likely some time in 2016.

Other U.S. economic regimes will continue to govern transactions with states such as Syria and Cuba, and others will block deals with individuals and groups in Russia, Palestine, and those involved in narcotics trafficking, human trafficking, and proliferation of weapons of mass destruction (WMD) activities. The Department of the Treasury’s Office of Foreign Assets Control (OFAC) enforces the statutes, regulations and executive orders through which the United States imposes economic sanctions.

U.S. economic sanctions statutes like those that have blocked transactions with Iran generally apply to “U.S. persons.” This includes every U.S. citizen, including corporations and their corporate affiliates and subsidiaries abroad, engaged in the following lines of business:

- export of goods, including virtual goods and software
- transportation, including shipping companies, freight forwarders and travel agents
- banks and nonbanks and their domestic and foreign subsidiaries, including remittance providers
- insurance companies

Any person in the above categories must have solid OFAC compliance programs in place. U.S. persons may violate these laws unknowingly by embarking on business transactions with third parties who are representatives of or suppliers to persons with whom U.S. persons may not legally engage. Clients may realize they have been drawn into transactions with persons here and abroad that violate the laws OFAC enforces too late to avoid liability—and that is what lawyers should help clients avoid.

OFAC Authority in a Nutshell


Voluntary self-disclosures made prompt-
ly, and particularly before any counterparty or financial institution reports concerns about the transaction, go a long way to reducing penalties that OFAC may seek. Self-disclosure, however, does not alter OFAC’s right to obtain many remedies from those who violate the laws that OFAC enforces. For more information about voluntary self-disclosure procedures, see Roland L. Trope’s essays presented with the 2015 CLEs mentioned in the author’s biography.

OFAC announces the sanctions settlements it concludes at www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/OFAC-Recent-Actions.aspx. (The enforcement actions are shown by date, in reverse chronological order.) Factors OFAC uses to determine civil penalties it seeks include post-discovery remediation efforts and improvements of its compliance policies and procedures, substantial cooperation with OFAC’s investigation, history of prior OFAC violations, and agreements to toll the statute of limitations.

Among the factors that cause penalties to rise are:

- “egregious cases,” such as willful violations of the WMD sanctions;
- specific efforts to conceal the identity of sanctions targets;
- a long-term pattern of violations;
- reckless disregard for U.S. sanctions regulations;
- senior employees’ knowledge or reason to know that violations were occurring;
- willingness to assist targets in obtaining substantial economic benefit; and
- level of sophistication of the entities involved.

Penalty-mitigating factors include cooperation with investigations, agreements to toll statutes of limitations, and other efforts by successors in interest to address violations. (For examples, review the press releases for OFAC’s 2013 settlements with Ellman International, Inc., and Dal-Tech Devices, Inc. [dba Microwave Distributors] available from the website mentioned above.)

The following list shows the range of penalties, compliance responsibilities and other issues that U.S. persons who are being investigated by OFAC or the FBI may encounter:

1. Criminal monetary penalties and possible imprisonment

The government may seek criminal penalties from businesses of up to $1 million and for individuals up to $100,000 or imprisonment for not more than 10 years or both, if the business or individual is convicted of willfully committing violations or willfully conspiring or aiding or abetting the commission of a violation.

The maximum penalties for willful violations of Sections 91–92 of the Atomic Energy Act include a fine of $2 million and imprisonment for not less than 25 years and up to life. Individuals, officers, directors and employees who commit willful violations of 42 U.S.C. § 2273 are also subject to these penalties. U.S. persons convicted of one or more intentional violations of the Atomic Energy Act should expect the government to seek life imprisonment. (42 U.S.C. §§ 2272–2273.)

2. Civil monetary penalties

OFAC can assess civil penalties of not more than $250,000 or twice the value of the transaction that violates the IEEPA for each violation via administrative proceedings. The amount of civil penalties that OFAC seeks often depends on whether the accused made satisfactory, voluntary self-disclosures of violations in accordance with 31 C.F.R. Part 501, app. A. The base penalty can dwarf the value of the claimed violations. For example, in 2014, Bank of America, N.A. paid a $16,562,700 civil penalty for 208 transactions that totaled $91,192 on behalf of ten individuals on the Specially Designated Nationals and Blocked Persons” (SDN) list. (Office of Foreign Asset Control, U.S. Dep’t of the Treasury, Office of Foreign Asset Control, Settlement Agreement Between the U.S. Department of the Treasury’s Office of Foreign Asset Control and Bank of America, N.A. (July 24, 2014).)

3. Forfeiture or disgorgement

OFAC has authority to seek forfeiture or disgorgement of “any property, funds, securities, papers, or other articles or documents, or any vessel, together with its tackle, apparel, furniture, and equipment.” OFAC may reduce the amount of forfeiture to the extent that the violator made payments in good faith to uninvolved third parties; payments made to lawyers assisting clients with voluntary self-disclosures are not subject to forfeiture if they in fact have been made. OFAC often opts not to pursue forfeiture in addition to the penalties it can impose, according to former OFAC senior official David Brummond, now counsel to DLA Piper.

4. Additional future compliance plans, compliance monitoring, employee training, and compliance auditing

OFAC often requires firms to create satisfactory sanctions and export compliance plans and to train and monitor their employees for compliance. OFAC often requires third-party monitors of such compliance programs and training. Other federal agencies may require stepped-up, system-wide compliance programs, such as the ones the Office of the Comptroller of the Currency and Board of Governors of the Federal Reserve System imposed in cease-and-desist orders in connection with HSBC’s December 2012 government-wide settlement that included $1.256 billion in civil penalties.

5. Costs of investigations that may last for years

Clients who discover OFAC violations should understand that investigations may last years, not months. Mr. Brummond confirms that OFAC’s investigations are likely to be lengthy. Thus, clients need to set aside suitable reserves for investigation, negotiation, and settlement costs.

6. Blocked assets

Assets involved in the violations being investigated will be “blocked” and tied up during the pendency of OFAC investigations and may be unblocked only follow-
ing other proceedings that OFAC controls. Blocked assets may cause great hardships to the U.S. persons who expected payments and may expose U.S. persons to threats of litigation to obtain their property or services or to retrieve funds sent for them.

7. Reimbursement of FBI investigatory expenses
The FBI may require reimbursement of all investigatory expenses incurred.

Selected Recent OFAC’s Civil Enforcement Settlements
Recent settlements by OFAC and FinCEN cover apparent violations by giant multinational banks, multinational businesses including money transmitters, and small providers of medical and radio-frequency measurement devices destined for Iran via intermediaries and transshipments or provided to entities covered by other U.S. economic sanctions regimes. Some highlight the risks of acquiring entities with prior or ongoing unsettled violations.

OFAC announced 13 settlements of sanctions violations for the period from January 1 through November 6, 2015. The entities involved ranged from internationally prominent banks to large and small providers of goods and services, including insurance. Each of these settlements can be reviewed using the URL mentioned in Part II above.

Settlements in 2015 that involved sophisticated entities included:

1. Credit Agricole Corporate and Investment Bank (October 20, 2015). Civil Penalty: $329,593,585 for 4,297 violations dating from 2003 into 2008. Credit Agricole (CA-CIB) agreed to settle violations arising out of use of payment practices that interfered with the enforcement of U.S. economic sanctions by financial institutions inside the United States. In all, 4,297 transactions from 2003 to 2008 were cited in violation of the Sudan, Burma, Cuba and Iran Sanctions Regulations. CA-CIB also settled actions pending with the Department of Justice (DOJ), Board of Governors of the Federal Reserve System, New York State Department of Financial Services, and New York County District Attorney’s Office.

2. UBS AG (August 27, 2015). Civil Penalty: $1,700,100 for 222 apparent violations of the Global Terrorism Sanctions Regulation. The transactions occurred from January 2008 to January 2013 and allegedly related to securities held in custody in the United States for or on behalf of an individual customer in Switzerland who OFAC had designated in October 2001 under Executive Order 13224, “Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism.”

3. PayPal, Inc. (March 25, 2015). Civil penalty: $7,658,300 for 486 apparent violations into 2013 of the Weapons of Mass Destruction Proliferators Sanctions Regulations, the Iranian Transactions and Sanctions Regulations, the Cuban Assets Control Regulations, the Global Terrorism Sanctions Regulations, and the Sudanese Sanctions Regulations. Into 2013, charges included failure to employ adequate screening technology and procedures to identify targets of sanctions regulations in payments transactions and failure to reject or block payments transactions. Also, between October 20, 2009, and April 1, 2013, PayPal processed 136 transactions worth $7,091.77 to or from a PayPal account registered to an individual on OFAC’s SDN list as a proliferator of Weapons of Mass Destruction. PayPal’s automated interdiction filter allegedly failed to identify the account holder from the SDN list, and did not act upon alerts on six occasions after failing to obtain or review documentation verifying the individual’s identity. OFAC described PayPal’s WMD violations as “egregious.”

4. Commerzbank AG (March 12, 2015). Civil penalty: $258,660,796 to OFAC and other federal agencies. Commerzbank AG settled charges that it deleted or omitted information that would have identified participants as Iranian financial institutions and routed transactions for manual processing by bank employees in 1,596 transactions between 2005 and 2010 in apparent violation of the Iranian Transactions and Sanctions Regulations, the Sudanese Sanctions Regulations, the Weapons of Mass Destruction Proliferators Sanctions Regulations, the Cuban Assets Control Regulations, the Burmese Sanctions Regulations(31 C.F.R. Part 537), and Executive Order 13382 of June 28, 2005. Commerzbank AG did not voluntarily self-disclose its violations in accordance with 31 C.F.R. Part 501, App. A. This settlement was concurrent with Commerzbank AG’s simultaneously settled actions brought by the DOJ, the New York County District Attorney’s Office, the Board of Governors of the Federal Reserve System, and the New York State Department of Financial Services.

5. Schlumberger Oilfield Holdings, Ltd. (August 7, 2015). Schlumberger Oilfield Holdings, Ltd., a British Virgin Islands’ wholly owned subsidiary of Houston-headquartered Schlumberger Ltd., pled guilty in March 2015 to willful facilitation of illegal transactions with Iran and Sudan. It agreed to pay a fine of $232.7 million. The OFAC settlement was published on August 7, 2015. OFAC cited violations from 2004 to June 2010 as a factor in determining the penalty, but also noted Schlumberger’s cooperation with its investigation and the absence of a prior history of violations as mitigating factors. The plea agreement with the DOJ also included a criminal fine of
Conclusion
U.S. persons should expect continued rigorous enforcement by the federal government of statutes, executive orders, and regulations that have been in effect and will remain in effect after the JCPOA is implemented. We must assume that the pipeline of investigations pending will be roughly as long as the periods shown in the examples cited above. Fresh violations may occur, and yield more investigations—particularly if U.S. persons fail to appreciate the range of the statutes, executive orders, and regulations OFAC will continue to enforce.

All U.S. persons and other entities engaging in transactions subject to OFAC’s jurisdiction should review and revamp, if necessary, their existing OFAC compliance programs and engage in appropriate training and monitoring of compliance by their subsidiaries, divisions, and employees. The need for compliance programs, training and compliance monitoring is as important for smaller companies and nonbank payments services providers, as it is for sophisticated organizations such as those mentioned in this article. Additionally, U.S. persons in merger and acquisition negotiations should conduct due diligence reviews of their partners’ OFAC compliance programs and pending violations to avoid assuming liabilities they did not expect.

Sarah Jane Hughes is on the faculty of the Maurer School of Law at Indiana University. The views expressed here are the author’s and do not necessarily reflect the positions of the Trustees of Indiana University. Longer versions of this article, including discussion of anti-money-laundering regulations enforced by Treasury’s Financial Crimes Enforcement Network (FinCEN) and useful citations, were provided in connection with ABA CLEs sponsored by the International Law Section on May 1, 2015, and by the Business Law Section’s Cyberspace and Banking Law Committees on September 19, 2015. Ms. Hughes thanks Roland Trope, David Brummond, Hal Burman, and Alaina Gimbert for their insights into OFAC’s recent settlements. ©2015 All Rights not conveyed to the American Bar Association reserved.

ADDITIONAL RESOURCES
For other materials related to this topic, please refer to the following.

Business Law Today
Surprise in the Package Deal with Iran
By Roland L. Trope
Vol. 24 No.12 August 2015

Avoiding Still Sanctionable Dealings with Iran and Cuba—‘Look Out for Icebergs!’ (PDF) (Audio)
Presented by: Cyberspace Law, Banking Law, Corporate Counsel
Location: 2015 Annual Meeting