

2010 YEAR-END OFAC UPDATE

To Our Clients and Friends:

The year 2010 saw increasing "power ball" fines and an increasing focus on export enforcement at the Office of Foreign Assets Control ("OFAC") within the United States Department of the Treasury. It was perhaps not surprising, then, that OFAC got front-page treatment in *The New York Times* on December 24, 2010 in an article provocatively entitled, "U.S. Has Approved Billions in Business With Blacklisted Nations."^[1] And though it reflects the current social media age, it may have surprised some that Stuart Levey, the Under Secretary for Terrorism and Financial Intelligence -- who recently announced his departure -- chose to publish his response to the *Times* article by using a blog post.^[2] This article reviews OFAC developments in 2010 in four areas -- legislation, Executive Orders, regulatory developments, and enforcement developments -- and assesses what the experience in 2010 suggests about how business practices might evolve to adapt to OFAC's more prominent role.

I. Legislation

The major sanctions legislation enacted in 2010 was the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA")^[3]. CISADA imposed more restrictive sanctions to impede Iran's nuclear ambitions, and responded to human rights abuses in the wake of the 2009 elections in Iran. CISADA imposes new sanctions against Iran (Title I); expands the Iran Sanctions Act (Section 102); enhances OFAC's Iranian Transactions Regulations (Section 103); requires Treasury to issue certain regulations applicable to U.S. financial institutions and their foreign subsidiaries, and affecting foreign financial institutions (Section 104); sets criteria for States to prohibit certain investment involving Iran (Title II); and establishes "Destinations of Diversion Concern" (Title III). CISADA directs significantly increased restrictions on financial transactions, raising the likelihood that Iranian business counterparties will risk loss of U.S. business.

A. Broader Range of Sanctions

The Iran Sanctions Act of 1996^[4] authorized the President to sanction foreign firms that make investments of more than \$20 million per year in Iran's energy sector, or that sell weapons of mass destruction ("WMD") technology or "destabilizing numbers and types" of advanced conventional weapons to Iran. CISADA changes the ISA to make clear that investment in energy pipelines is sanctionable activity. Activities related to refined petroleum were also made sanctionable. The proscribed activities include those involved with the production of refined petroleum products in Iran, or the exportation of refined petroleum products to Iran (or the facilitation thereof). The provisions apply to firms that sell, lease, or provide goods, services, technology, information, or support that assists Iran's refining capacity, or that supply Iran with refined petroleum products.

CISADA also expanded the menu of available sanctions from six to nine, and increased the number of sanctions that the President is required to impose from two to three. The original six sanctions, which remain in effect, are (1) denial of Export-Import Bank assistance; (2) denial of U.S. export authorizations; (3) denial of certain loans (over \$10 million in 12 months) from U.S. financial

institutions; (4) restrictions specific to sanctioned financial institutions; (5) a ban on U.S. Government procurement of goods and services from the sanctioned firm; and (6) import restrictions. The three additions made by CISADA are (1) the prohibition on access to foreign exchange transactions subject to U.S. jurisdiction; (2) the prohibition on transfers of credit or payments subject to U.S. jurisdiction; and (3) the prohibition on transactions with respect to property in which the sanctioned firm has an interest when subject to U.S. jurisdiction. Under the original ISA, the President was required to choose two of the original six sanctions; CISADA now requires the President to choose three from the expanded nine-item list. CISADA also adds new certifications for U.S. Government contracts.

CISADA requires sanctions for amounts exceeding \$1 million in a single transaction, or \$5 million in 12 months. Additionally, CISADA made some formerly discretionary Presidential actions mandatory. Previously, the ISA provided that the President "should initiate" an investigation upon receipt of credible information. But CISADA amended the ISA to provide that the President "shall initiate" an investigation unless the President certifies to Congress that the firm is "no longer engaging in," or has "taken significant verifiable steps toward stopping the activity."[\[5\]](#) The President must also have "received reliable assurances" that the entity will not "knowingly engage" in sanctionable activity in the future (the "Special Rule").[\[6\]](#) CISADA also tightened the required certifications for Presidential waivers. Waivers are now required to be "necessary" to the U.S. national interest, where they were previously required to be only "important."[\[7\]](#) Additionally, sanctions for entities under other governments with primary jurisdiction may be waived on a case-by-case basis for up to 12 months, where the President certifies that the government is closely cooperating with the United States regarding Iranian objectives and the waiver is "vital" to national security interests.

B. Tightening of Import Restrictions

CISADA eliminated the exception that allowed imports from Iran of certain foodstuffs and carpets.[\[8\]](#) But other ITR allowances remained in effect, including the allowance for personal items to enter the United States in accompanied baggage under 31 C.F.R. 560.507, and the allowance for importation of Iranian-origin household goods and personal effects set forth in section 560.524(b). CISADA also codified existing restrictions on exports (but not re-exports) to Iran, and the exceptions to the restrictions.[\[9\]](#) These exceptions included a new general license for services and software related to Internet communications in 31 C.F.R. 560.540.[\[10\]](#)

C. Expansion of Financial Sanctions

CISADA imposed a freeze on assets of certain individuals designated by the President, and on assets transferred to their family members and associates. The law specifically includes diplomats and representatives of other governmental, military, or quasi-governmental institutions, such as Iran's Revolutionary Guard Corps ("IRGC"), and its affiliates. In addition, Section 104(c) of CISADA requires that Treasury issue regulations prohibiting or restricting foreign financial institutions' correspondent or payable-through accounts with U.S. financial institutions.[\[11\]](#) These provisions are triggered when the foreign institution is determined to have engaged in specified activities. Section 104(d) required that Treasury issue regulations prohibiting entities owned or

controlled by a U.S. financial institution from knowingly transacting with, or benefitting, the IRGC, its agents, or affiliates, whose property is blocked under the International Emergency Economic Powers Act.[\[12\]](#),[\[13\]](#) These requirements were implemented in Iranian Financial Sanctions Regulations issued in August 2010. The specific provisions are discussed further in this article. Section 104(e) of CISADA also requires that Treasury issue regulations requiring U.S. financial institutions to police the activities of foreign institutions that maintain correspondent or payable-through accounts.[\[14\]](#) These regulations are still pending.

D. U.S. State and Local Government Involvement

CISADA authorizes state and local governments to conduct divestment of assets, activities not formerly allowed by federal law. Under Section 202, state and local governments are permitted to prohibit investment of public funds in entities that have an investment of \$20 million or more in Iran's energy sector, or that have extended \$20 million or more in credit to an entity for 45 days or more if the entity "will use the credit for investment in the energy sector of Iran."[\[15\]](#) The divestment provisions cover a broad range of energy activities, including contracts for goods or services, activities associated with providing oil or liquified natural gas ("LNG") tankers, or products used to construct or maintain pipelines used to transport oil or LNG. CISADA offers a safe harbor for asset managers who divest from covered investments, and mandates certain procedural requirements. Requirements include that the divestment activities must be based on credible public information, and that the government entity conducting divestment provide 90 days' written notice, and opportunity for a hearing.[\[16\]](#)

E. Requirements for the Director of National Intelligence

Title III of CISADA requires that the Director of National Intelligence compile a list of countries allowing the diversion of goods, services, or technology to Iran.[\[17\]](#) Designation is required when diversion would make a material contribution to Iran's weapons and ballistic missile development, or support for international terrorism. This provision applies to items that are on the Commerce Control List or U.S. Munitions List, or are prohibited by UN Security Council resolutions. Depending on certain circumstances, the President must designate countries as "Destinations of Diversion Concern."[\[18\]](#) Diverted goods, services, and technologies exported to designated countries will require licenses, and applications will be subject to a presumption of denial.

II. Executive Orders

The President issued Executive Orders ("EO") in 2010 establishing or enhancing a number of sanctions programs. The most significant EOs focus on three foreign policy hot spots: namely Iran, North Korea, and Somalia.

Iran:

EO 13553 (Sept. 28, 2010) implements and expands the scope of CISADA and prior EOs to address human rights abuses by the Government of Iran.[\[19\]](#) The order targets persons responsible for "serious human rights abuses" in Iran following the Iranian presidential election in June 2009.

Additionally, it blocked the property of eight current and former senior government officials, including the Commander of the Revolutionary Guard Corps, leading military and police commanders, and the intelligence and interior ministers. The scope of the EO extends to persons designated by the Treasury Secretary who, "on behalf of the Government of Iran," were involved in the post-election abuses, and those who provided material support to the abusers. The traditional exemption for humanitarian assistance is specifically excepted from the EO. Additionally, the EO prohibits the provision or receipt of any "funds, goods, or services" by (or to) any US person to (or from) any designated Iranian party, and imposes visa sanctions on the designated persons.

EO 13553 reflects the Obama Administration's efforts to raise economic pressure on Tehran. It represents a significant expansion of scope by addressing human rights abuses in Iran, in addition to the more traditional foreign policy concerns of weapons proliferation, terrorism, and energy. Additionally, the U.S. Government focused on enforcement across the entire spectrum from building support on an international scale, down to regulating small transactions. An international success was the decision in December 2010 by the Reserve Bank of India (India's central bank) to terminate the use of a regional clearinghouse (the Asian Clearing Union) to settle payments for Iranian oil and gas purchases.[\[20\]](#) On the small-scale or individual level, OFAC removed the general license for certain Iranian imports, including carpets and foodstuffs the week before EO 13553 was published.

North Korea:

EO 13551 (Aug. 30, 2010) blocks the property of designated parties involved in arms sales, money laundering, narcotics trafficking, the procurement of luxury goods, and other "illicit economic activity" supporting the Government of North Korea.[\[21\]](#) The EO expands the scope of the prior presidential designation of a "national emergency" under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1707 (2006) ("IEEPA") (EO 13,466 (June 26, 2008)) with respect to North Korea's nuclear weapons program. The order was issued following a series of destabilizing actions by North Korea, including the sinking of the South Korean Navy ship *Cheonan* in March 2010.

The EO blocked the property of one North Korean national and three entities. One of the entities, identified only as "Office 39," is apparently affiliated with the North Korean Workers' Party and, according to news reports, engages in narcotics trafficking and counterfeiting to raise money for the purchase of luxury goods for the North Korean leadership. Analogous to measures against Iran, the EO also expands U.S. Government policy beyond weapons proliferation to use sanctions provisions to increase economic pressure on the North Korean leadership. For example, the EO targets luxury goods like expensive yachts and automobiles. OFAC issued regulations implementing the EO on November 4, 2010.[\[22\]](#)

Somalia:

EO 13536 (Apr. 12, 2010) established a sanctions program that blocks the property of individuals and entities involved in the violent unrest in Somalia.[\[23\]](#) OFAC promptly issued a final rule in May 2010 implementing this EO (31 C.F.R. 551).[\[24\]](#)

III. Regulations

OFAC published 93 Federal Register notices in 2010. The vast majority of these notices (79) involved designation, blocking, unblocking, or minor technical changes. Five new sanctions programs regulations were issued in 2010 and published in Title 31 of the Code of Federal Regulations. These include the programs for Belarus (Part 548), Somalia (Part 551), Lebanon (Part 549), Iraq Stabilization and Insurgency Sanctions (Part 576), and North Korea (Part 510). One program, the Iraqi Sanctions Regulations (Part 575), was canceled.

A. Belarus Sanctions Regulations, 75 Fed. Reg. 5,502 (Feb. 3, 2010)

These sanctions regulations implemented EO 13405 of June 16, 2006. That EO declared a national emergency to deal with actions by the government of Belarus and other persons to undermine Belarus's democratic processes or institutions. These were manifested in the fundamentally undemocratic March 2006 elections that resulted in the election of President Alexander Lukashenko. The regulations target those who commit human rights abuses related to political repression, including detentions and disappearances. Additionally, it targets those who engage in public corruption, including by diverting or misusing Belarusian public assets, or by misusing public authority. An annex to the EO blocks the property of listed persons. Further, the EO provides for blocking the property of later-designated persons who are found by the Treasury Department, after consultation with the State Department, to be responsible for undermining democratic processes in Belarus, or for human rights abuses. The sanctions do not generally prohibit trade, or the provision of banking or other financial services, to Belarus.

B. Cuban Assets Control Regulations, 75 Fed. Reg. 10,996 (Mar. 10, 2010)

The Trade Sanctions Reform and Export Enhancement Act of 2000^[25] specifies that only "payments of cash in advance" or "financing by third-country financial institutions (excluding U.S. persons and the Government of Cuba entities)" could be used to receive compensation for TSRA exports to Cuba. This Federal Register notice implemented a one-fiscal year change directed by Section 619 of the Consolidated Appropriations Act of 2010^[26], signed on December 16, 2009. To implement the appropriations bill, OFAC changed Section 515.533 of the Cuban Assets Control Regulations ("CACR"). The change expanded the meaning of "payment of cash in advance" for TSRA agricultural exports to mean "payment before the transfer of title to, and control of, the exported items to the Cuban purchaser." The standard TSRA-based provision in the CACR is "that payment is received by the seller or the seller's agent prior to shipment of the goods from the port at which they are loaded," as published by OFAC in February 2005^[27]. The temporary regulations for fiscal year 2010, from October 1, 2009 to September 30, 2010, altered the definition of "payment of cash in advance." The provision applied to goods delivered during fiscal year 2010, or for contracts entered into for fiscal year 2010, if shipment occurs within 12 months of contract signing.

C. Cuban Assets Control Regulations, Sudanese Sanctions Regulations, and Iranian Transactions Regulations, 75 Fed. Reg. 10,997 (Mar. 10, 2010)

These regulations allow for the publication of certain services and software incident to internet-based communications. It followed a December 2009 State Department report that concluded that it is essential to the national interest of the United States to encourage the exchange of personal communication over the Internet.^[28] The regulations permit the exportation of services to Cuba, Sudan, and Iran incident to the exchange of personal communications over the Internet. Covered services include instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, and blogging. An additional requirement is that such services must be publicly available at no cost to the user. In addition, for Sudan and Iran only, the Regulations authorize the exportation of software necessary to enable communications services, provided that such software is classified as "EAR 99" under the Export Administration Regulations ("EAR"), is not subject to the EAR, or is classified by the Department of Commerce as mass-market software. As with the provision of services, the software must be publicly available at no cost to the user. The exportation of software to Cuba is not authorized by this OFAC regulation, because software for Cuba must be separately licensed by the Department of Commerce. In publishing this regulation, OFAC noted that it hoped "to encourage the exchange of personal communications over the internet by persons in Sudan, Iran, and Cuba."^[29]

D. Somalia Sanctions Regulations, 75 Fed. Reg. 24,394 (May 5, 2010)

These regulations implement EO 13536 of April 12, 2010. The order responded to the deterioration of security and persistence of violence in Somalia, and acts of piracy and armed robbery at sea off the coast of Somalia. The EO blocked property of persons listed in the appendix to the Order, and persons that were later designated by the Treasury Department, after consultation with the State Department, who were found to have engaged in acts that threatened the stability, security, or peace in Somalia. The regulation was issued as a "placeholder," since prohibited activities were not specifically listed, and refer only to the terms of the EO. The Federal Register entry states that "OFAC intends to supplement this part 551 with a more comprehensive set of regulations, which may include additional interpretive and definitional guidance and additional general licenses and statements of licensing policy." The regulation includes general prohibitions, definitions, interpretations, and licenses. However, the regulations related to reports to be filed by persons subject to the jurisdiction of OFAC, penalties, and procedures are all designated "reserved." As with the Belarus and North Korea regulations, issuance of these abbreviated form regulations may be responsive to criticism that OFAC has been slow to implement regulations after the President issues EOs. Similarly, OFAC issued full regulations for Lebanon in 2010, three years after the EO that they were based on. The Lebanon regulations are discussed later in this section.

E. Iranian Transactions Regulations, 75 Fed. Reg. 34,630 (June 18, 2010)

This regulation significantly expanded the meaning of the term "Government of Iran" in Section 564.304 of the Iran Transactions Regulations ("ITR"). The ITR prohibits transactions with the Government of Iran, including any entity owned or controlled by the Government of Iran, and

Appendix A of the ITR lists these entities. Initially, only financial institutions were included in Appendix A, with list being subsequently expanded to include institutions controlled by the government. The new ITR update included "(1) the State and the Government of Iran, as well as any political subdivision, agency, or instrumentality, (2) any entity owned or controlled directly or indirectly by the foregoing, and (3) any person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been . . . acting or purporting to act directly or indirectly on behalf of any of the foregoing." The regulation gives OFAC the authority to determine what person is acting in such a manner, meaning that anyone, no matter where they are in the world, and without any formal connection to Iranian authority, can be determined by OFAC to be "Government of Iran." Subsequent action under this regulation included designation of German, Japanese, Belarusian, Luxembourgian, and Italian entities as being included within the "Government of Iran."[\[30\]](#)

F. Lebanon Sanctions Regulations, 75 Fed. Reg. 44,907 (July 30, 2010)

These regulations implement EO 13441 of August 1, 2007, which declared a national emergency regarding activities that undermine Lebanon's legitimate and democratically elected government or democratic institutions. Lebanese institutions had become threatened by politically motivated violence and intimidation, contributions to Syrian interference, and efforts to reassert Syrian control. Additionally, the order was issued in response to activities that infringe upon or undermine Lebanese sovereignty, or to contribute to political and economic instability in Lebanon and the region. The EO blocked property of designated persons, as well as persons later designated by the Department of the Treasury, after consultation with the State Department. By contrast to the 'placeholder' regulations issued for Somalia and North Korea, all subsections of the regulation were issued.

G. Iran Financial Sanctions Regulations, 75 Fed. Reg. 49,836 (Aug. 16, 2010)

This regulatory update implemented Sections 104(c) and (d) of CISADA. The regulations prohibit or impose strict conditions on U.S. correspondent or payable-through accounts for foreign financial institutions. Classes of transactions include those that (1) facilitate the efforts of the Government of Iran, including Iran's Islamic Revolutionary Guard Corps ("IRGC"), its agents, or affiliates, to acquire or develop WMD or delivery systems for WMD, or to provide support for foreign terrorist organizations, or support for acts of international terrorism; (2) facilitate the activities of a person subject to financial sanctions; (3) engage in money laundering to carry out WMD-related or other sanctioned activities; (4) take actions that facilitate efforts by the Central Bank of Iran, or any other Iranian financial institution, to conduct WMD-related or sanctioned activities; (5) or facilitate any significant transaction, or provide significant financial services for the IRGC, its agents or affiliates, whose property or interests in property are blocked pursuant to IEEPA. The provision also applies to financial institutions whose property and interests in property are blocked pursuant to IEEPA in connection with Iran's proliferation of WMD or delivery systems for WMD, or Iran's support for international terrorism. The regulations also prohibit any entity or person owned or controlled by a U.S. financial institution from knowingly engaging in transactions with, or benefiting, the IRGC, its agents, or affiliates. Civil penalties may be imposed upon a U.S. parent of such a foreign financial institution, but only if that U.S. parent knew or should have known of the violation. These

regulations were published well in advance of the statute's 90-day deadline, demonstrating the Administration's commitment to vigorously enforce CISADA.

H. Iraqi Sanctions Regulations and Iraq Stabilization and Insurgency Sanctions Regulations, 75 Fed. Reg. 55,462 and 75 Fed. Reg. 55,463 (both Sept. 13, 2010)

These updates removed Part 575 from the OFAC regulations, thereby implementing EO 13350 of July 29, 2004, which terminated the national emergency with respect to Iraq that had been declared by EO 12722 of August 2, 1990. New Part 576 implements several EOs, including EO 13303 of May 22, 2003, EO 13315 of August 28, 2003, EO 13350 of July 29, 2004, EO 13364 of November 29, 2004, and EO 13438 of July 17, 2007. The net result of the regulatory changes is that most formerly blocked transactions are now unblocked, except for those involving senior officials of the former Iraqi regime, or their immediate family members and persons threatening the peace or stability of Iraq or the Government of Iraq. Additionally, blocking applies to persons undermining efforts to promote economic reconstruction and political reform in Iraq, or who undermine efforts to provide humanitarian assistance to the Iraqi people.

I. Iranian Transactions Regulations, 75 Fed. Reg. 59,611 (Sept. 28, 2010)

These regulations implemented Section 103 of CISADA by removing the license for importation of carpets and foodstuffs previously allowed by Section 560.534. Imports from Iran to the United States are restricted to (1) gifts valued at \$100 or less; (2) information and informational materials; (3) accompanied baggage for personal use normally incident to travel; and (4) household and personal effects of persons arriving in the United States, that were actually used abroad by the importer, or by other family members arriving from the same foreign household. These must be items that are not intended for any other person, or for sale, and must be items that are not otherwise prohibited from importation.[\[31\]](#) OFAC also used the change to the ITR to clarify concerns over which exemptions and licenses in the ITR had survived the enactment of CISADA. OFAC invoked subsection 103(d)(1) of CISADA to indicate that, with the exception of carpets and foodstuffs, the ITR's exemptions and general licenses remained.[\[32\]](#)

J. North Korea Sanctions Regulations, 75 Fed. Reg. 67,912 (Nov. 4, 2010)

These regulations implement EO 13466 of June 26, 2008 and EO 13551 of August 30, 2010. The first of these EOs maintained the blocking of all previously blocked property, and the continuation of restrictions, as the legislative authority for the North Korean program was shifted from the Trading With the Enemy Act[\[33\]](#) to IEEPA. The latter EO followed the sinking of the South Korean ship *Cheonan* and nuclear-missile testing and launch activity. This Executive Order blocked the property of designated persons. Currently this is only a "placeholder regulation," since prohibited activity refers only to the Executive Order. The Federal Register entry states that "OFAC intends to supplement this Part 510 with a more comprehensive set of regulations, which may include additional interpretive and definitional guidance and additional general licenses and statements of licensing policy." As with the Somalia regulations, many parts are "reserved," including the sections for licenses, interpretations, penalties, and procedures.

K. Global Terrorism Sanctions Regulations, Terrorism Sanctions Regulations and Foreign Terrorist Organization Sanctions Regulations, 75 Fed. Reg. 75,904 (Dec. 7, 2010)

These regulations revise sections in the Global Terrorism Sanctions Regulations ("GTSR") and the Terrorism Sanctions Regulations ("TSR") that authorize the provision of certain legal services. Specifically, the Regulations expand the scope of authorized services to cover the initiation and conduct of legal, arbitration, or administrative proceedings before U.S. or state courts. Additionally, OFAC added new general licenses to the GTSR, TSR, and Foreign Terrorist Organizations Sanctions Regulations ("FTOSR"), authorizing U.S. persons to receive specified types of payment for certain authorized legal services. Three payment sources are possible, including (1) payments from funds originating outside the United States, (2) legal defense funds formed to gather donations and dispense funds in connection with payment for legal service; and (3) blocked funds. Blocked funds may only be accessed in a limited way for payment of legal fees and expenses. Specifically, blocked funds can only be used where alternative funding sources are not available when seeking administrative reconsideration or judicial review of the designation of a U.S. person, or the blocking of property and interests in property of a U.S. person. Specific licenses are required for payment in all cases.

IV. Major OFAC Enforcement Actions

The trend in the direction of larger settlements and larger penalties accelerated in 2010. Starting with the significant settlements with two major financial institutions at the end of 2009, OFAC settlements and penalties totaled nearly a billion dollars in a 13-month period. Even factoring out the December 2009 settlements, OFAC's civil penalties were over \$200 million in 2010 alone. Since the comparative 2007 and 2008 annual numbers were about \$5 million, the data from 2009 and 2010 show an order of magnitude change in the level of financial risk involved. Summarized below are some of the noteworthy OFAC enforcement actions of 2010.

A. Agar Corporation, Inc. ("ACI")

OFAC alleged that ACI exported metering equipment valued at \$444,887 to its affiliate in Venezuela from April to June 2005, with knowledge that the equipment would be incorporated into items sent to Sudan, in violation of the Sudanese Sanctions Regulations.[\[34\]](#) The violation was not voluntarily disclosed. ACI settled by payment to OFAC of \$860,000, with a computed base penalty of \$1,967,098. While OFAC considered the alleged violations to be egregious, based on a perceived intent to evade sanctions, the settlement reflected: (1) ACI's cooperation with the Bureau of Immigration and Customs Enforcement and OFAC; (2) a plea agreement with the Department of Justice ("DOJ"), pursuant to which ACI pleaded guilty to one count of violating IEEPA. ACI further agreed to pay a total criminal penalty of \$1,140,000 and accept four years' probation, which included an agreement to implement a comprehensive U.S. sanctions compliance program; and (3) ACI's entry into a tolling agreement with OFAC.

B. United Nations Federal Credit Union (UNFCU)

OFAC alleged that UNFCU violated the Cuban Assets Control Regulations ("CACR") by engaging in unauthorized financial transactions and services on behalf of members/accountholders who were blocked Cuban nationals.[\[35\]](#) The violations were not voluntarily disclosed. UNFCU settled by payment of \$500,000, with a computed base penalty of \$5,237,100. Mitigation was enhanced by UNFCU's: (1) cooperation with OFAC; (2) agreement to conduct a CACR compliance review, and report the results to OFAC; (3) agreement to take remedial measures to augment its OFAC compliance program; (4) the fact that a significant portion of the base penalty amount was attributable to many substantially similar alleged violations; and (5) the absence of prior OFAC violations.

C. Innospec, Inc.

OFAC alleged that Innospec violated the CACR through business transactions in Cuba by an acquired subsidiary, in which the government of Cuba and/or Cuban nationals had an interest.[\[36\]](#) Specifically, the subsidiary ran afoul of the CACR by maintaining local sales offices in Cuba, incurring general operating expenses, and by holding accounts in Cuban financial institutions. The violations were voluntarily disclosed. The matter was settled by payment of \$2,200,000, with a computed base penalty of \$4,447,878. Mitigating factors included: (1) Innospec's cooperation with OFAC's investigation, which included entry into a tolling agreement, as well as the firm's cooperation with investigations of other U.S. and United Kingdom (U.K.) entities; (2) remedial measures, including selling the affected subsidiary to a non-U.S. third party and instituting compliance program enhancements; and (3) the fact that the OFAC settlement was part of a \$40,200,000 comprehensive criminal and civil settlement between Innospec and OFAC, DOJ, the Securities and Exchange Commission, and the U.K.'s Serious Fraud Office involving, among other things, guilty pleas to wire fraud and Foreign Corrupt Practices Act ("FCPA") violations for certain dealings with Iraqi and Indonesian officials.

D. Barclays Bank PLC

OFAC alleged that Barclays circumvented U.S. bank filters, installed to detect transactions with U.S. sanctions targets, in at least 1,285 electronic funds transfers.[\[37\]](#) The transfers, conducted between August 2002 and September 2006 in violation of Sudanese, Iranian, Cuban, and Burmese sanctions, had an approximate aggregate value of \$112,695,000. The violations were voluntarily disclosed. The matter was settled by payment of \$176 million, with a calculated base penalty of \$218,971,000. The obligation was deemed satisfied by Barclays' payment of \$298 million to the DOJ and the New York District Attorney's Office in a related criminal proceeding. Aggravating circumstances included the alleged recklessness of the violations, awareness of the conduct by relevant managers, and Barclays' sophistication. Mitigating factors included: (1) Barclays' substantial cooperation, entry into tolling agreements, and other remedial efforts; (2) the lack of any OFAC penalty notices in the five years preceding the improper transactions; and (3) the fact that a number of the Sudanese transactions involved the export of agricultural products.

E. Balli Group PLC, and Balli Aviation Ltd. ("Balli")

OFAC alleged that Balli exported three commercial airliners from the United States to Mahan Airlines in Iran, and further attempted to export three additional commercial airliners to Mahan, in violation of the ITR and the EAR.^[38] The violations were not voluntarily disclosed. Balli entered a settlement with OFAC and the Commerce Department's Bureau of Industry and Security (BIS). Provisions included: (1) payment of a \$15 million civil penalty (\$2 million of which would be suspended if there were no further export control violations); (2) retention of a third-party consultant to conduct annual external audits of corporate compliance with U.S. export control laws and sanctions regulations for 5 years, including submission of the audit results to BIS and OFAC; and (3) BIS's suspension of Balli's export privileges for 5 years (although BIS agreed to suspend the denial order as long as the penalty was timely paid, and if the company remained compliant with the settlement agreement and the EAR). In a related criminal case, Balli Aviation pleaded guilty and paid a \$2 million fine for illegally exporting commercial aircraft from the U.S. to Iran.

F. Maersk Line, Limited, and its wholly owned U.S. subsidiaries, Farrell Lines Incorporated, and E-Ships, Inc. (collectively, "MLL")

OFAC alleged that MLL violated the Sudanese Sanctions Regulations and the ITR by providing unlicensed shipping services for 4,714 shipments of cargo originating in, or bound for, Sudan and Iran from January 2003 to October 2007.^[39] The violations were not voluntarily disclosed. The matter was settled for \$3,088,400, with a computed base penalty of \$61,768,000. Aggravating factors included MLL's sophistication, and the harm to sanctions program objectives by conferring economic benefits on Sudan and Iran. Mitigating factors included: (1) no violations of OFAC sanctions in the preceding five years; (2) full cooperation with OFAC's investigation of the alleged violations, including entry into two tolling agreements; (3) substantial remediation measures; and (4) the fact that the base penalty amount considered the gross freight charges for shipping the cargo from origin to destination, although the apparent violations involved only a portion of those voyages.

V. (Immediate) Past As Prologue -- Future Directions In OFAC Enforcement

Predictions are necessarily imprecise, but several distinguishing features from OFAC's recent history are worthy of the attention of anyone doing business in the global marketplace. The scope and magnitude of enforcement actions are increasing in response to sanctions violations. Regardless of how large a business is, a fine denominated in the hundreds of millions of dollars is serious money. OFAC enforcements increasingly include criminal dimensions, raising the stakes even further. Global corporate reach can result in more severe penalties, since sophisticated participants in the financial system are held to higher standards. Additionally, the willingness to use sanctions as a behavior-shaping tool in foreign policy has risen, as can be seen by use of sanctions to respond to human rights violations. Taken together with President Obama's focus on exports generally, including through the establishment of the Export Enforcement Coordination Center, the confluence of trends indicate that OFAC's portfolio will only grow.

Businesses must respond to the changing enforcement landscape by establishing effective internal controls. Deep scrutiny of every transaction would be wasteful, but a risk-based approach can identify potential concerns, with minimal impact on operations. Penalty magnitude is strongly influenced by aggravation and mitigation factors, and by whether disclosure of the behavior is voluntary. As a result, prudent internal controls, and swift reporting when potential violations are found, are critical factors in reducing risk. A general list of protective considerations are:

- a. Risk-based assessment of vulnerabilities associated with transactions, based on their magnitude, location, and the history of prior dealing;
- b. Training for personnel involved with cross-border transactions, to sensitize them to the potential risks, and to provide guidance on what procedures should be followed in the event that possible inappropriate activity is discovered;
- c. Escalation provisions that allow senior compliance officials to evaluate unusual situations detected by employees. This allows problems to be avoided, or to be minimized and rapidly reported if they do occur;
- d. Routine monitoring of compliance procedures, to verify operation within established parameters;
- e. Pre-planned responses established by corporate leadership, to ensure that possible violations are correctly reported. Because promptness is a factor, leaders should have had discussions in advance about what will be done, and who will do it, when apparent violations are to be reported. A time-consuming internal investigation to gain greater fidelity about whether a violation actually occurred may not be the most prudent approach.

Well-crafted compliance programs might also consider integration of a wider constellation of risk, since OFAC issues frequently overlap with other U.S. laws that touch on cross-border transactions. FCPA compliance, along with monitoring for International Transactions in Arms Regulations and EAR issues, are examples of additional elements beyond OFAC that might be included in a thoughtfully constructed global transaction compliance program.

[1] Jo Becker, *U.S. Has Approved Billions in Business With Blacklisted Nations*, N.Y. Times, Dec. 24, 2010, at A1, available at <http://www.nytimes.com/2010/12/24/world/24sanctions.html>.

[2] Erika Gudmundson, *FACT CHECK: Under Secretary Levey Responds to the New York Times*, Treasury Notes (Dec. 24, 2010), available at <http://www.treasury.gov/connect/blog/Pages/Under-Secretary-Levey-Responds-to-the-New-York-Times.aspx>.

[3] Pub. L. 111-195, 124 Stat. 1312. ("CISADA").

[4] Pub. L. 104-172, 110 Stat. 1541. ("ISA").

[5] 124 Stat. 1325.

[6] *Id.*

[7] *Id.* at 1322.

[8] See 75 Fed. Reg. 59,611, 59,612 (Sept. 28, 2010)

[9] *Id.* at 1328-29.

[10] *Id.* at 1329.

[11] *Id.* at 1332-33.

[12] *Id.* at 1333.

[13] 50 U.S.C. § 1701 *et seq.* ("IEEPA").

[14] *Id.* at 1333-34.

[15] *Id.* at 1342.

[16] *Id.* at 1343-44.

[17] *Id.* at 1346.

[18] *Id.* at 1347-48.

[19] 75 Fed. Reg. 60,567 (Oct. 1, 2010).

[20] Lydia Polgreen and Heather Timmons, *Move to Curb Transactions for Iranian Oil Leaves Indian Companies Scrambling*, N.Y. Times, Dec. 31, 2010, at A4, available at <https://www.nytimes.com/2010/12/31/world/asia/31india.html>.

[21] 75 Fed. Reg. 53,837 (Sept. 1, 2010).

[22] 75 Fed. Reg. 67,912 (Nov. 4, 2010).

[23] 75 Fed. Reg. 19,869 (Apr. 15, 2010).

[24] 75 Fed. Reg. 24,394 (May 5, 2010).

[25] Pub. L. 106-387, 114 Stat. 1549.

[26] Pub. L. 111-117, 123 Stat. 3034.

[27] 70 Fed. Reg. 9,225 (Feb. 25, 2005).

[28] U.S. Department of State, *Report under the Iran-Iraq Arms Non-Proliferation Act of 1992*, Dec. 15, 2009.

[29] 75 Fed. Reg. 10,997, 10,999 (Mar. 10, 2010).

[30] 75 Fed. Reg. 48,562 (Aug. 11, 2010).

[31] 31 C.F.R. §§ 560.506-508, 560.524, 560.538 (2010).

[32] 75 Fed. Reg. 59,611, 59,612 (Sept. 28, 2010).

[33] 50 U.S.C. App. 1 *et seq.* ("TWEA").

[34] See Press Release, Dep't of Justice, Houston Company Pleads Guilty to Illegally Facilitating Exports to Sudan (June 22, 2010), available at <http://www.justice.gov/usao/txs/releases/June%202010/062210%20Agar%20Corporation%20Inc.htm>; Office of Foreign Assets Control, Enforcement Information for July 15, 2010 (July 15, 2010), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/07152010.pdf>.

[35] See Office of Foreign Assets Control, Enforcement Information for July 15, 2010 (July 15, 2010), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/07152010.pdf>.

[36] See Press Release, Dep't of Justice, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba (Mar. 18, 2010), available at <http://www.justice.gov/opa/pr/2010/March/10-crm-278.html>; Office of Foreign Assets Control, Enforcement Information for March 19, 2010 (Mar. 19, 2010), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/03192010.pdf>.

[37] See Press Release, Dep't of Justice, Barclays Bank PLC Agrees to Forfeit \$298 Million in Connection with Violations of the International Emergency Economic Powers Act and the Trading with the Enemy Act (Aug. 18, 2010), available at <http://www.justice.gov/opa/pr/2010/August/10-crm-933.html>; Office of Foreign Assets Control, Barclays Bank PLC Settles Allegations of Violations of Multiple Sanctions Programs (Aug. 18, 2010), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/barclays08182010.pdf>.

[38] See Press Release, Dep't of Justice, U.K. Firm Pleads Guilty to Illegally Exporting Boeing 747 Aircraft to Iran (Feb. 5, 2010), available at <http://www.justice.gov/opa/pr/2010/February/10-nsd-131.html>; Office of Foreign Assets Control, Enforcement Information for February 5, 2010 (Feb. 5, 2010), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/02052010.pdf>.

[39] See Office of Foreign Assets Control, Enforcement Information for July 28, 2010 (July 28, 2010), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/07292010.pdf>.



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