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First Edition

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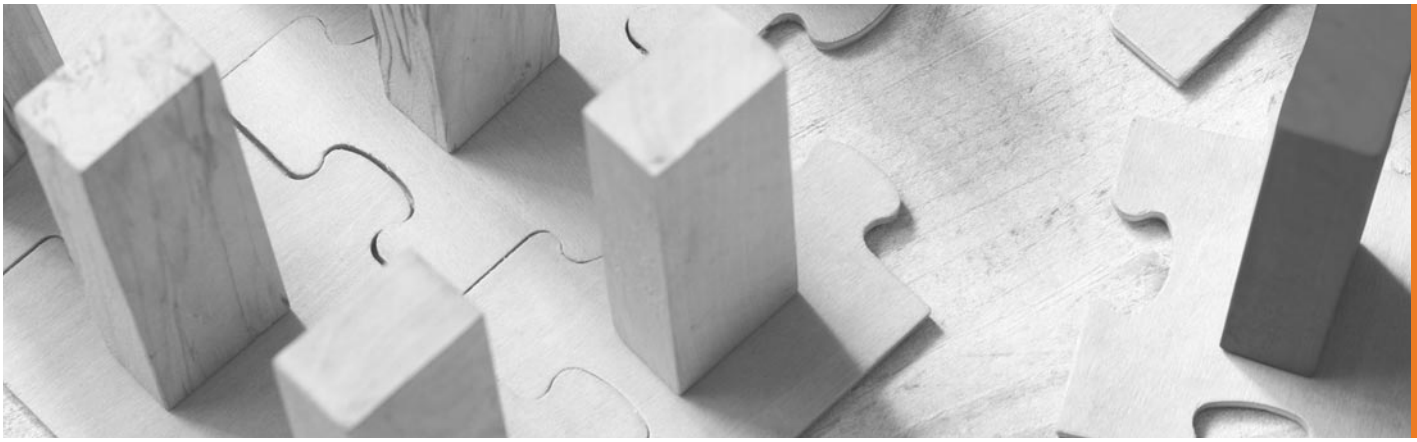

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Navigating the Complex Relationship Between Voluntary Self-Disclosure and Enforcement


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Introduction

Companies that discover potential sanctions violations inevitably confront the question whether to voluntarily self-disclose the violations. The answer may seem straightforward, given the Office of Foreign Assets Control's ("OFAC") public pronouncements on the issue – that voluntary self-disclosure ("VSD") can significantly mitigate penalties and the failure to self-disclose violations has severe consequences. But in many cases, the conduct involved falls into a grey area where it is not clear that an actual violation occurred, and the questions are whether and how to disclose conduct that falls short of an actual violation. In those cases, the analysis is highly fact-specific and involves a host of considerations that may be difficult to balance.

This chapter sets forth a framework to understand the complex relationship between VSD and OFAC's enforcement response. Specifically, the chapter provides an overview of OFAC's guidance on VSD, considers empirical data on the relationship between self-disclosure and enforcement, analyses the principles underlying certain OFAC enforcement decisions, and weighs the costs and benefits of VSD in various contexts.

Voluntary Self-Disclosure

Definition

Voluntary self-disclosure is a self-initiated notification to OFAC about an "apparent violation" committed or otherwise participated in by an individual or entity subject to any of the sanctions programmes administered or enforced by OFAC.[1] OFAC defines "apparent violation" as an actual or possible violation of U.S. economic sanctions laws administered or enforced by OFAC.[2] To determine whether a self-initiated notification about an apparent violation constitutes a VSD, OFAC considers a number of factors.

1. Timing of Notification and Third-Party Notifications

First, voluntary self-disclosure must be initiated *before* OFAC independently learns of the apparent violation.[3] The definition of VSD specifically excludes disclosures of violations when "a third party is required to notify OFAC of the apparent violation or a substantially similar apparent violation because a transaction was blocked or rejected by that third party" in accordance with OFAC's regulations.[4] This is consistent with OFAC's longstanding approach that there is no need to incentivise self-disclosure when OFAC would otherwise have learned of the apparent violation. But if an entity voluntarily notifies OFAC about an apparent violation, and a third party that would be required to report that violation fails to do so, OFAC may still consider such a self-initiated notification to be a VSD as long as the third party does not report the apparent violation before OFAC makes a final decision on enforcement.[5]

In 2009, various trade, industry, and professional groups pressed OFAC to revise its rules to broaden the definition of VSD by focusing on the good faith of the self-disclosing party without regard to whether another entity was required to notify OFAC of the violation.[6] These groups argued that assessing one entity's voluntariness through the prism of another entity's reporting obligations may discourage self-disclosures. But OFAC rejected the good-faith standard as unworkable and settled on a "more readily administrable" bright-line rule that simply asks whether OFAC would otherwise have learned of the apparent violation, without the self-disclosure.[7] The self-disclosing party's good faith is irrelevant under OFAC's guidelines.

2. Material Completeness

Second, for a notification to be considered a VSD, it must be materially complete. OFAC permits an initial disclosure that is not materially complete in cases where the disclosing party is concerned that an apparent violation may be discovered by a third party with reporting obligations, which would preclude VSD credit for the disclosing party. However, to qualify for a VSD, the initial notification must be "followed within a reasonable period of time by[ ] a report of sufficient detail to afford a complete understanding of an apparent violation's circumstances".[8] Indeed, the definition of VSD excludes only disclosures that, "when considered along with [any] supplemental information", are materially incomplete.[9] OFAC also judges the completeness of the VSD by the entity's responses to OFAC's enquiries during the investigation.

3. False and Misleading Information

Third, a VSD may not include false or misleading information.[10] As with third-party notifications, OFAC does not take into account the good faith of the notifying entity in determining whether to award VSD credit for notifications containing false or misleading information.[11] As OFAC has explained, the good faith standard is "difficult to administer" and less preferable than the bright line rule that a self-initiated notification containing false or misleading information should not be considered a VSD.[12] A simple mistake in the factual description accompanying a disclosure could mean the disclosing party receives no credit for a VSD. OFAC has noted, however, that it considers "the totality of the circumstances" in assessing whether the inclusion of false or misleading information precludes the finding of a VSD.[13]

4. Regulatory Suggestion

Fourth, a self-disclosure made at the "suggestion or order" of a government agency does not constitute a VSD.[14] Although the word "suggestion" is ambiguous and subjective, OFAC views a disclosure prompted even at a mere suggestion of an official as not completely self-initiated and therefore not voluntary.

5. Authorisation by Management

Finally, a VSD must be made with the knowledge and authorisation of a company's senior management. Disclosures made by whistleblowers do not constitute VSDs.[15] This is because, in OFAC's view, disclosures made without the authorisation of a firm's management are merely third-party disclosures, and do not reflect the intent of that entity as a whole to make a self-disclosure.[16]

How VSDs Impact OFAC's Enforcement Decisions

As the U.S. government's chief sanctions enforcement arm, OFAC is responsible for administering U.S. sanctions programmes across the globe. Given the scope of OFAC's mandate and the number of entities to which OFAC's broad (and often extraterritorial) jurisdiction applies, self-policing and self-disclosures are a critical part of that global enforcement effort. The reality is that OFAC cannot root out all sanctions violations on its own. Consistent with the broader trend in government enforcement – where private companies are generally expected to look for and report unlawful conduct – promoting the value of self-disclosure is an important enforcement tool for OFAC. Not surprisingly, OFAC considers many factors relating to VSDs when responding to an apparent violation and determining the amount of any civil monetary penalty. In fact, in nearly every published enforcement action, OFAC notes whether the charged entity self-disclosed the conduct.

VSDs can benefit companies at two stages of OFAC's sanctions administration process. First, a VSD may help a company avoid an enforcement action altogether. OFAC may decline to initiate a civil enforcement action, issuing a cautionary letter instead if "a Finding of Violation or a civil monetary penalty is not warranted under the circumstances", or take no action at all if the disclosed conduct does not constitute a violation.[17] Second, even if OFAC does bring an enforcement action, VSD is considered as a mitigating factor in calculating the penalty, which can reduce the maximum base penalty by as much as 50%.[18]

While commentators suggest that companies should always err on the side of disclosure, the actual benefits resulting from VSDs are difficult to predict and measure. The decision to self-disclose a potential violation – and how to disclose it – needs to be carefully considered in light of the facts and circumstances of a particular case.

Indeed, there is much uncertainty about the extent to which self-disclosure impacts the nature of OFAC's enforcement response. For instance, while OFAC initiates as many as 24% of its enforcement actions following an entity's VSD of an apparent violation,[19] there is no data on how many VSDs did not result in enforcement actions.

VSD, of course, constitutes only one of many factors OFAC considers in deciding whether to institute an enforcement action. But a review of OFAC's published enforcement actions suggests that VSDs neither determine the nature of OFAC's enforcement action, nor do they have any particular value in predicting the type of enforcement action.

Empirical studies of OFAC's enforcement behaviour across administrations and sanctions regimes suggest a few general findings about OFAC's enforcement trends. For example, studies show that VSD is arguably more beneficial for foreign companies, as OFAC tends to punish them more severely than U.S. entities.[20] Some data also shows that companies in the financial sector have been targeted more frequently with enforcement actions than those in other sectors.[21] For instance, between 2003 and 2017, companies in the manufacturing, logistics providers, shipping, and medical sectors were less likely to face enforcement actions.[22] In that same period, violations of certain regimes, such as the Cuban and Iranian sanctions programmes, were more likely to result in enforcement actions than violations of sanctions targeting Iraq and North Korea.[23]

But experience counsels that these trends have shifted considerably in recent years. Indeed, studies find that "that the enforcement of economic sanctions is significantly affected by the political prerogatives of presidential administrations", because of the fact that in the dynamic field of sanctions enforcement, "the political will to enforce various sanctions regimes changes" rapidly and frequently with each new administration, making historical data of limited value.[24]

While these factors may affect the enforcement strategy OFAC adopts in any particular case, they offer no guarantees. OFAC's past enforcement actions make it clear that the agency's decisions are painstakingly situation-specific. General observations from past enforcement responses are a good starting point, but are not that useful in the end and offer little insight into the specific reasons why a company may have opted to disclose a potential violation in a particular case.

The relationship between VSD and enforcement is complex and cannot be generalised from empirical data points. Accordingly, the actual consequences of a VSD in any particular case are hard to predict. OFAC needs to retain a measure of discretion in pursuing actions it believes are necessary to enforce U.S. foreign policy. OFAC does not (and cannot) guarantee favourable treatment to every company that voluntarily self-discloses a potential violation. As with prosecutorial discretion, OFAC's discretion is similarly guided by policies and informed by past enforcement actions, but ultimately gives the self-disclosing parties no certainty about the outcome.

Thus, entities contemplating VSD must assess whether, and how, to voluntarily self-disclose a potential violation based on the specific facts and circumstances of each case, and fully understand the particular risks, costs, and benefits of disclosure in that case.

What To Consider in a Voluntary Self-Disclosure

General Considerations

The decision on whether to voluntarily self-disclose, assessed against OFAC's enforcement guidelines and past enforcement actions, should be tailored to the entity considering disclosure. In some cases, this could require a thorough internal investigation. In other cases, it could mean considering factors that include past violations and the history of compliance of the self-disclosing entity, the existence and maintenance of an effective compliance programme, the egregiousness of the conduct at issue, and any harm to U.S. foreign policy or other public policy. In other cases, important factors include the individual characteristics of the disclosing entity and its industry, including the sophistication of the disclosing entity, management's knowledge about the violation and its involvement in it, and whether there have been any attempts to conceal the violation.

It is also important to consider any remedial steps taken in relation to the apparent violation, the extent to which the entity benefitted from the apparent violation, the entity's willingness to enter into an agreement tolling the statute of limitations, and the length of time between the apparent violation and the entity's discovery of that violation as well as the length of time between the discovery of the violation and its anticipated disclosure.

Effective Sanctions Compliance Programmes

Recently, the decision to self-disclose a potential violation has been further complicated by OFAC's new *de facto* requirement for companies to maintain sanctions compliance programmes.

In May 2019, OFAC released "A Framework for OFAC Compliance Commitments" (the "Framework"), suggesting for the first time that companies have an affirmative obligation to maintain an effective sanctions compliance programme ("SCP").[25]

Although failing to implement an SCP is not itself a violation of OFAC's regulations, and, historically, OFAC has provided little guidance for companies on what it expects as part of an effective compliance programme, maintaining an effective SCP has always been a mitigating factor in the assessment of monetary penalties in OFAC enforcement actions. The Framework, however, goes one step further. It marks the first time that OFAC has provided explicit guidance to companies on what constitutes an effective SCP, signalling that companies must now comply with OFAC's SCP expectations by taking affirmative steps to understand and effectively address their sanctions risks. In other words, a compliance programme that does not comport with the Framework may now be viewed as a separate aggravating factor leading to increased monetary penalties in the event of a violation.[26]

Companies must be mindful that a VSD will not only notify OFAC of a possible violation, but will also expose a company's sanctions compliance programme to scrutiny, and deficient SCPs that do not comport with the Framework run the risk of becoming an aggravating factor in any enforcement action. In particular, companies considering VSD should evaluate whether the apparent violation would not have occurred if the company had a compliant SCP, and take immediate steps to remediate any deficiencies and bring its SCP into compliance.

Given OFAC's newfound emphasis on compliance programmes, self-disclosure of a violation that stems from the absence of an effective SCP may be more likely to result in an enforcement action even if the problems with the compliance programme have been fixed at the time of the disclosure. Accordingly, companies considering VSD of apparent violations should be aware that the quality of their OFAC compliance programme may influence whether OFAC decides to institute an enforcement action, even if the company's disclosure is otherwise thorough and it cooperates fully.

OFAC's "Teachable Moments" Strategy

Over the years, OFAC has chosen to bring enforcement actions where the action will raise awareness of OFAC's policies, regulations, and priorities, and increase compliance.[27] But another consequence of this "teachable moment" approach to enforcement means that some self-disclosing companies make more attractive targets for enforcement than others.

1. Foreshadowing New Guidance and Requirements

In a case involving Kollmorgen Corporation, a U.S. company and its Turkish affiliate, OFAC brought an enforcement action despite the company's "extensive" internal investigation, "preventative and remedial"[28] efforts, and a "thorough" VSD.[29] In many ways, the case was unremarkable as it involved non-egregious violations and a low fine of $13,381.[30] However, in connection with the enforcement, OFAC for the first time designated a foreign individual – the Turkish affiliate's managing director – a Foreign Sanctions Evader.[31] As OFAC explained, such a designation constituted "a marked change" in OFAC's handling of misconduct of senior executives.[32] OFAC wanted to send a "clear warning"[33] to senior executives about commitment to a culture of compliance, a commitment that, just a few months later, was announced by OFAC to be a pillar of an effective compliance programme.[34]

Similarly, in an effort to signal that parent companies should better incorporate OFAC compliance into the due diligence review of acquisitions, OFAC brought an action against Illinois Tool Works, Inc. ("ITW") for transactions of its newly acquired foreign subsidiary, AppliChem, that violated Cuban sanctions.[35] Although ITW voluntarily self-reported the violations to OFAC and thoroughly cooperated with the investigators, OFAC singled ITW out for its failure to implement "risk-based controls, such as regular audits, to ensure subsidiaries are complying with their obligations under OFAC's sanctions regulations". In punishing ITW's failure to specifically tailor ITW's compliance programme to the company's risk profile, OFAC focused on what it later announced to be one of several essential elements of effective compliance programmes.[36]

2. Displaying New Enforcement Tools

In 2010, Barclays Bank agreed to a global settlement pursuant to which it paid nearly $300 million to the United States for nearly 1,300 transactions involving entities in several sanctioned countries, including Burma, Cuba, Iran, Libya, and Sudan.[37] Barclays voluntarily self-disclosed the violations, cooperated with OFAC, and took immediate and extensive remedial action upon discovering the prohibited transactions, all of which served as mitigating circumstances in the calculation of the penalty. The case is notable, however, because OFAC included in the settlement a requirement that Barclays retain an "independent consultant" to conduct a yearly review of the bank's "policies and procedures and their implementation" and perform "an appropriate risk-focused sampling of USD payments". In short, OFAC built into the settlement a novel audit mechanism "to ensure that [the bank's] OFAC compliance program is functioning effectively to detect, correct, and report OFAC-sanctioned transactions when they occur", and effectuate the provisions of the settlement. The independent-consultant provision in the settlement is significant because it originates from a similar practice by the Department of Justice to impose corporate monitors in corporate-plea and deferred-prosecution agreements "to address and reduce the risk of recurrence of the corporation's misconduct".[38]

3. Reinforcing Central or New Rules

Shortly after issuing its final rules delineating the boundaries of the definition of VSD in 2009, OFAC charged Credit Suisse despite the bank's apparent self-disclosure of the violations.[39] The enforcement action stemmed from a scheme to circumvent sanctions regimes to provide access to the U.S. banking system for the bank's Iranian and Sudanese customers, among others. The bank agreed to forfeit $536 million to the United States and the New York County District Attorney's Office, the largest ever forfeiture at the time in a sanctions case. Significantly, OFAC determined that the bank's notification to OFAC of the violations could not be considered a *voluntary* self-disclosure under the new guidelines because Credit Suisse did not come forward until after the New York County District Attorney's Office discovered the prohibited conduct and transactions, even though the bank's self-disclosure was seemingly made in good faith.

Similarly, in an effort to underscore its message about the importance of effective sanctions compliance programmes, on May 28, 2019, OFAC issued a Finding of Violation to State Street Bank and Trust Co. ("SSBT") for violations of the Iranian Transactions and Sanctions Regulations without imposing a monetary penalty on SSBT.[40] OFAC noted that its decision not to impose a penalty was appropriate given that SSBT self-reported the violations to OFAC, self-disclosed deficiencies in its compliance programme, and amended the programme to incorporate a centralised screening platform and a revised escalation procedure for sanctions-related issues. OFAC's decision to issue a finding of violation without imposing a monetary penalty is rare and noteworthy and was likely intended to signal OFAC's new-found emphasis on sanctions compliance programmes.

Relative Costs and Benefits of Voluntary Self-Disclosure

In considering whether to disclose an apparent violation, a company must take into account the benefits, costs, and consequences of a VSD, as well as the risks of non-disclosure.

VSD of a possible violation will inevitably result in the disruption of business operations. Legal expenses, heightened government

scrutiny, reputational harm, and damage to employee morale may also follow. Further, a disclosure to OFAC may result in the initiation of enforcement actions by other government agencies, both in the U.S. and abroad. Indeed, in recent years we have seen a sharp increase in global enforcement actions and increased cooperation among enforcement authorities in the United States and abroad, targeting many financial institutions. For example, a recent enforcement action against Standard Chartered Bank, related to alleged money laundering and violations of financial sanctions, involved not only OFAC, but also the U.S. Department of Justice, the New York Department of Financial Services, the New York County District Attorney's Office and the Board of Governors of the Federal Reserve System, and, in the U.K., the Financial Conduct Authority, which resulted in over $1 billion in total fines.[41] Given the increased global cooperation by state, federal, and foreign enforcement agencies, engaging counsel capable of handling simultaneous cross-border investigations and enforcement actions involving complex legal issues is critical to making VSD decisions.

Self-disclosing companies must also consider the likely discovery of additional previously unknown violations of OFAC's sanctions programmes or other laws that OFAC may be required to report to other agencies. And it is important to remember that OFAC's determination that an entity's self-notification constitutes a VSD does not confer immunity from other enforcement or prosecutions. OFAC has made clear that its VSD rules "are not applicable to penalty or enforcement actions by other agencies based on the same underlying course of conduct".[42]

On the other hand, when considering the consequences of non-disclosure, companies must assess and consider the likelihood that a possible violation will be discovered by OFAC or another agency independently, and that OFAC or another agency would view that conduct as an actual sanctions violation. Companies should be on the lookout for disclosures by whistleblowers or regulated entities with a reporting obligation. Companies must also consider any reputational damage stemming from OFAC's independent discovery of undisclosed violations.

Once an entity makes the decision to voluntarily self-disclose a possible violation, it must carefully consider the method of self-disclosure. Self-disclosure is an important opportunity for advocacy. How a VSD is framed and presented could mean the difference between getting charged in an enforcement action and walking away with no penalty and a non-public resolution. This makes it critical to engage the right sanctions counsel even where it is unclear that a sanctions violation occurred. Any VSD should be coupled with an effort to fully cooperate with OFAC to lessen any potential penalties. Following a decision to self-disclose an apparent violation, it is especially important for that company to immediately take all appropriate remedial actions and disclose them to OFAC.

Conclusion

In considering voluntary self-disclosure, one size does not fit all. Self-disclosure is frequently the best long-term strategy for any company that, following an exhaustive investigation, discovers an actual violation of a sanctions regime. The more difficult task is to assess the costs and benefits of disclosure in cases where the conduct could possibly, but does not necessarily, amount to a sanctions violation. In those cases, a company considering self-disclosure should carefully examine the facts and circumstances of the violation and seek legal advice that is tailored to the specific situation facing the company.

Endnotes

1. OFAC Economic Sanctions Enforcement Guidelines, 31 C.F.R. pt. 501, App. A, ¶ I(I) (2009) [hereinafter Guidelines].
2. *Id.* ¶ I(A).
3. *Id.* ¶ I(I).
4. Final Rule, OFAC Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57,593, 57,595 (Nov. 9, 2009) (codified at 31 C.F.R. pt. 501, App. A) [hereinafter Final Rule], https://www.treasury.gov/resource-center/sanctions/Documents/fr74_57593.pdf.
5. Guidelines, *supra* note 1, ¶ I(I).
6. Final Rule, *supra* note 4, at 57,595. These groups included: the American Bar Association; the Association of Corporate Credit Unions; the American Insurance Association; the British Bankers' Association; the Clearing House Association; the Credit Union National Association; the Industry Coalition on Technology Transfer; the Institute of International Bankers; the National Foreign Trade Council; the Securities Industry and Financial Markets Association; the American Bankers Association; and the Bankers Association for Finance and Trade.
7. *Id.*
8. Guidelines, *supra* note 1, ¶ I(I).
9. *Id.*
10. *Id.*
11. Final Rule, *supra* note 4, at 57,596.
12. *Id.*
13. *Id.*
14. Guidelines, *supra* note 1, ¶ I(I).
15. *Id.*
16. Final Rule, *supra* note 4, at 57,596.
17. Guidelines, *supra* note 1, ¶¶ II(A)–(G), III(G).
18. *Id.* ¶ IV(B)(a). A voluntary self-disclosure in cases of egregious violations results in the reduction of the base penalty by one-half of the applicable statutory maximum, and in cases of non-egregious violations results in the penalty constituting one-half of the value of the violating transaction at issue, capped at $250,000. *Id.*
19. Bryan R. Early & Keith Preble, *Enforcing Economic Sanctions: Analyzing How OFAC Punishes Violators of U.S. Sanctions*, at 18–19 (December 1, 2018) [hereinafter *Enforcing Economic Sanctions*], https://ssrn.com/abstract=3306653. This percentage constitutes an average across three presidential administrations – during George W. Bush's Administration, 22% of OFAC's enforcement actions were initiated following voluntary self-disclosures: under the Obama Administration, 33%; and under the Trump Administration, 25% so far. *Id.*
20. *Id.* at 41.
21. *Id.* at 15.
22. *Id.* at 23.
23. *Id.* at 25–26.
24. *Id.* at 14.
25. Dep't of the Treasury, Office of Foreign Assets Control, *A Framework for OFAC Compliance Commitments* (May 2, 2019), https://www.treasury.gov/resource-center/sanctions/ Documents/framework_ofac_cc.pdf.
26. As the Framework explains, an effective SCP contains five essential components: risk assessment; management commitment; internal controls; testing and auditing; and training. *Id.* at 2–8.
27. *See* Final Rule, *supra* note 4, at 57599 ("[T]he purpose of enforcement action includes raising awareness, increasing compliance, and deterring future violations, and not merely punishment of prior conduct").
28. Dep't of the Treasury, *Enforcement Information for February 7, 2019*, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190207_kollmorgen.pdf.
29. Dep't of the Treasury, *Treasury Sanctions Turkish National as Foreign Sanctions Evader Due To Repeated Violations of U.S. Sanctions Against Iran* (Feb. 7, 2019) [hereinafter *Treasury Sanctions Turkish National*], https://home.treasury.gov/news/press-releases/sm606 (last visited Sept. 7, 2019).
30. *Enforcement Information for February 7, 2019*, *supra* note 28.

31. Foreign Sanctions Evaders are foreign individuals and entities determined to have violated, attempted to violate, conspired to violate, or caused a violation of U.S. sanctions on Syria or Iran pursuant to Executive Order 13608, or foreign persons who have facilitated deceptive transactions for or on behalf of persons subject to U.S. sanctions. OFAC prohibits transactions by U.S. persons or within the United States involving Foreign Sanctions Evaders. *See* Dep't of the Treasury, *Resource Center: Foreign Sanctions Evaders (FSE) List*, https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/fse_list.aspx (last visited Sept. 7, 2019).
32. *Treasury Sanctions Turkish National*, *supra* note 29.
33. *Id.*
34. *See supra* note 25.
35. Dep't of the Treasury, *Enforcement Information for February 14, 2019*, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190214_applichem.pdf.
36. *See supra* note 25.
37. Dep't of the Treasury, Settlement Agreement dated Aug. 18, 2010, http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/08182010.pdf.
38. Dep't of Justice, Craig S. Morford, *Selection and Use of Monitors in Deferred prosecution Agreements and Non-Prosecution Agreements with Corporations* (Mar. 7, 2008), http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf; *see also* Dep't of Justice, U.S. Attorneys Manual 9-28.1300, *Principles of Federal Prosecution of Business Organizations*, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.1000.
39. Dep't of the Treasury, Settlement Agreement dated Dec. 16, 2009, http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/12162009.pdf.
40. Dep't of the Treasury, *Enforcement Information for May 28, 2019*, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190528_ssbt.pdf.
41. Dep't of the Treasury, *Enforcement Information for April 9, 2019*, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190408_scb_webpost.pdf.
42. Final Rule, *supra* note 4, at 57,594.

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