

# OFAC penalties



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Since April 2003, the US Treasury Department's Office of Foreign Assets Control (OFAC) has published information on its website relating to civil penalties and informal settlements. Since 2008, penalties and settlements totalling \$1.689bn have been imposed. US citizens who have bought Cuban cigars have attracted the ire of the US authorities. However, penalties of a few hundred dollars pale into significance when compared with the penalties imposed on corporates. US and foreign banks in particular have been heavily penalised.

		Breach of Regulations in relation to:	\$
19/12/2005	ABN Amro Bank	Iran, Libya	80m
11/12/2007	Chevron	Iraq	30m
31/07/2008	Minxia Non Ferrous Metals	Cuba	1.2m
06/08/2009	DHL	Iran, Sudan, Syria	9.444m
24/08/2009	Australia & New Zealand Bank Group	Sudan, Cuba	5.75m
1/10/2009	Gold & Silver Reserve Inc	Iran	2.95m
16/12/2009	Credit Suisse	Iran, Sudan, Libya, Burma, Cuba, Liberia	536m
22/12/2009	Lloyds TSB Bank	Iran, Sudan, Libya	350m
05/02/2010	Balli Group	Iran	15m
19/03/2010	Innospec	Cuba	2.2m
15/07/2010	Agar Corporation	Sudan	2m
18/08/2010	Barclays Bank	Sudan, Iran, Burma, Cuba	298m
25/08/2011	JP Morgan Chase Bank	Cuba, WMD, Iran, Sudan, Liberia	88.3m
14/10/2011	Sunrise Technologies & Trading Companies	Iran	2.9m
24/02/2012	Online Micro LLC	Iran	2.95m
12/06/2012	ING Bank NV	Cuba, Burma, Sudan, Libya, Iran	619m

OFAC has wide powers and its investigations can lead to requests for additional information, the issuance of a cautionary letter, or the refusal, suspension or modification of permissive licences. Additionally, OFAC can issue a 'cease and desist' order, make a finding of a violation, impose a civil monetary penalty on a subject person or refer the matter for criminal investigation/prosecution.

When determining whether a violation of US sanctions law has taken place, OFAC will consider the following areas, which in turn may influence the level of any penalty imposed:

1. Wilful conduct, for example, with knowledge that action would be a breach of US law.
2. Reckless conduct, including failure to exercise minimal caution.
3. Concealment of conduct in order to mislead OFAC or embarking upon a pattern of conduct in violation of US law.
4. Level of management or supervisory involvement.

5. Level of actual or ostensible knowledge.
6. Harm to US sanctions programme objectives.
7. Commercial sophistication, size and financial condition of the subject person.
8. Volume of transactions and history of any previous breaches of sanctions over the previous five years.
9. Existence, nature and adequacy of risk-based OFAC compliance programme.
10. Remedial response and level of co-operation with OFAC, including whether a violation was voluntarily disclosed.

OFAC has issued guidelines upon the level of penalties that OFAC can impose. A failure to maintain adequate records or comply with a request for information can result in a penalty up to \$50,000. Civil monetary penalties are assessed on a case-by-case basis, but commonly they are calculated as a proportion of a 'base' penalty amount. The base penalty can be increased if OFAC considers the sanctionable conduct was egregious, for example, involving a particularly serious violation of the law requiring a strong enforcement response. OFAC encourages voluntary self-disclosure; this allows OFAC to deploy its resources efficiently and permits companies and individuals to militate against potential penalties. The following chart provides further guidance:

Base penalty matrix		
	Egregious case	
	NO	YES
<b>YES</b> <b>Voluntary self-disclosure</b>	1. One-half of Transaction Value (Capped at \$125,000 per violation \$32,500 per Trading with the Enemy Act violation)	3. One-half of Applicable Statutory Maximum
<b>NO</b>	2. Applicable Schedule amount (capped at \$250,000 per violation/\$65,000 per Trading with the Enemy Act violation)	4. Applicable Statutory Maximum

Mitigating or aggravating factors will impact upon the final level of the penalty. For example, substantial co-operation (albeit in the absence of voluntary self-disclosure) will generally reduce the base penalty by between 25 and 40%. Also, a first violation will generally attract a reduction of 25%. When assessing risks, OFAC's risk matrix considers various factors that will attract a high-risk category, including:

- large/fluctuating client base in an international environment
- large number of high-risk customers
- overseas branches or multiple correspondent accounts with foreign banks
- international transactions
- management disengagement from OFAC compliance risks.

ING BV has recently agreed to settle its potential liability for violations of multiple US sanction programmes. The company agreed to pay \$619m. The base penalty under OFAC's guidelines was approximately \$666m, but the statutory maximum penalty was approximately \$1.329bn. Members should continue to be wary of the non-monetary impact an OFAC investigation and penalty assessment can have upon their business, including reputational issues and distraction of key management personnel. When combined with the possible level of penalties, members are well advised to exercise high levels of caution when dealing with sanctioned regimes/individuals/entities.