

Case Study

When and How to Submit Voluntary Disclosures

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Agenda

- **Step 1: Fact Gathering**
- **Step 2: Identifying Potential or Actual Violations**
- **Step 3: Assessing the Costs and Benefits of Disclosing**
- **Step 4: Filing an Initial Notification of Voluntary Disclosure**
- **Step 5: Identifying Root Causes and Developing Corrective Actions**
- **Step 6: Preparing the Final Report**
- **Step 7: Finalizing the Final Report**
- **Step 8: Filing the Final Report**
- **Post-Disclosure Considerations**
- **Questions**



Step 1: Fact Gathering

- You are in charge of the International Trade Compliance (“ITC”) Office of a publically-traded U.S.-headquartered global widget manufacturing company, ABC Corp. (the “Company”). On any given day, the Company processes thousands of transactions across the world.
- The Company’s Middle East Regional Compliance Officer informs you that the Company’s India subsidiary was involved in the sale of widgets to an Indian customer (“123 Corp.”), some of which the Indian subsidiary exported to 123 Corp.’s customer in Iran. Specifically, the subsidiary received orders for widgets from 123 Corp., retrieved the widgets from the subsidiary’s warehouse and shipped them to 123 Corp.’s customer in Iran.
- The widgets are not sensitive items; for our purposes here, assume there are no widget-specific export restrictions that apply.

Step 2: Identifying Potential or Actual Violations

- ITRA = Iran Threat Reduction and Syria Human Rights Act of 2012 (22 U.S.C. § 8725)
- ITSR = Iranian Transactions and Sanctions Regulations as amended (31 C.F.R. Part 560)

Effective October 9, 2012:

- Foreign Person under US Person ownership/control are prohibited without a license from engaging in transactions or dealings in or related to:
 - Goods or services of Iranian origin or owned or controlled by the Government of Iran;
 - Goods, technology or services for exportation, reexportation, sale or supply directly or indirectly to Iran or the Government of Iran; and
- US Person CANNOT guarantee foreign person's transaction if engaging in it would be prohibited for a US person or in the U.S.
- Grace Periods for Winding Down Activities: February 6, 2013; March 8, 2013

Step 2: Step 2: Identifying Potential or Actual Violations

- After further review, you learn that 123 Corp. terminated its contract with the Indian subsidiary effective October 2013 and currently the Indian subsidiary has no ties to the customer.
- Managers at the Indian subsidiary determined the shipments occurred as follows:
 - Before October 2012 = 1,000 exports to Iran;
 - October 2012 to March 2013 = 500 exports to Iran; and
 - After March 2013 = 250 exports to Iran.

Step 3: Assessing the Costs and Benefits of Disclosing

■ Penalties Assessment

- International Emergency Economic Powers Enhancement Act (“IEEPA”) sets forth penalties for Iranian sanctions violations:
 - Civil penalties
 - \$250,000 per violation OR 2x transaction value (whichever is greater)
 - Criminal penalties
 - \$1,000,000 per violation + (for natural persons) up to 20 years imprisonment
- The OFAC Economic Sanctions Enforcement Guidelines (“Guidelines”) establish factors that OFAC will use to evaluate cases and, if a civil penalty is warranted, to calculate the amount of the penalty.

Step 3: Assessing the Costs and Benefits of Disclosing

■ **Factors to determine whether violations are egregious or non-egregious:**

- Willful or reckless violation of law;
- Awareness of the conduct giving rise to the violations;
- Harm caused to the objectives of the particular sanctions program; and
- The individual characteristics of the company.

		Base Penalty Matrix	
		Egregious Case?	
		NO	YES
VSD ?	YES	(1) One-Half of Transaction Value (capped at \$125,000 per violation / \$32,500 per TWEA violation)	(3) One-Half of Applicable Statutory Maximum
	NO	(2) Applicable Schedule Amount (capped at \$250,000 per violation / \$65,000 per TWEA violation)	(4) One-Half of Applicable Statutory Maximum

Step 3: Assessing the Costs and Benefits of Disclosing

■ Mitigating Factors:

- Substantial cooperation;
- First violation;
- Strong compliance program;
- Adequate staffing to execute program; or
- Stable, well-known customer base.

■ Aggravating Factors:

- Prior sanctions history;
- Repeat failures;
- Actual or constructive knowledge;
- Persistent lack of compliance processes and procedures;
- Failure to deal with easily preventable errors; or
- Evidence showing a lax culture or sensitivity to compliance.

■ Other Factors to Consider

Case Study: New Facts

- After reporting your findings to the Company's CEO, you are asked to coordinate with the implicated subsidiary and authorized to engage outside counsel to launch an independent review into the reasons for the violations.
- You are to recommend steps that the Company and its subsidiary must take to correct the issues, and then prepare and submit a voluntary disclosure to OFAC.

Step 4: Filing an Initial Notification of Voluntary Disclosure

■ Elements of an Initial Notice

- Brief overview of facts.
- Investigation is ongoing and will culminate in a Final Report.
- Company is availing itself of protections and mitigations afforded by voluntary self-disclosure process.
- Include Freedom of Information Act (“FOIA”) exemption language to protect Confidential Business Information (“CBI”).

Case Study: More Facts

- ABC Corp. and its subsidiaries largely operate as completely separate entities, each with their own IT-infrastructure, networks, databases and processes. International trade and regulatory compliance issues are primarily handled at the local level.
- Managers at the Indian subsidiary report there was widespread confusion about whether and to what extent the OFAC sanctions regulations applied to their activities. Because the subsidiary is based out of India and operates independently in most respects from ABC Corp., the personnel involved in processing the transactions failed to realize that U.S. sanctions laws applied to them.
- Furthermore, because of the mundane, non-sensitive character of the widgets, the employees did not consider the transactions as out of the ordinary. Managers indicated that no automated systems were in place to screen customers, identify red flags or prevent problematic transactions from being completed.

Step 5: Identifying Root Causes and Developing Corrective Actions

- Discovery of relevant root causes may require changes in scope and level of detail in Final Report
- Multiple levels of causation → Drill down to foundational problem
- Closely tie Corrective Actions to Root Causes
- Corrective Actions should be specific and supported by the record
- DON'T over-promise / under-deliver
- Avoid any appearances of a lax compliance culture

Step 5: Identifying Root Causes and Developing Corrective Actions

- Corrective Actions should be viewed with short and long-term objectives in mind.
 - Immediate stop-gap remedial measures:
 - Freeze on all transaction processing relating to certain customers;
 - Freeze on any related funds collection/disbursements efforts;
 - Freeze on any pending shipments; and/or
 - Hold notices to clearly communicate and document Company actions.
 - Longer term solutions to prevent recurrences.
- Make sure all relevant personnel are on board.

Step 6: Preparing the Final Report

■ Elements of a Final Report

- Background
- Discovery of the Issue
- Findings
- Regulatory Analysis
- Root Causes and Corrective Actions
- Mitigating Factors
- Conclusion

Step 7: Finalizing the Final Report

- Keep a record of all iterations of the disclosure if/when questions arise on content-specific decisions.
- Exclude all privileged information that need not be disclosed.
- Ensure exhibits confirm the facts presented and there are no contradictions.
- Did all individuals / parties who needed to review the disclosure review it and sign off?
- Empowered Official must sign the disclosure.
- Post-Disclosure Plan
 - Corrective Actions Implementation
 - OFAC Communication Strategy

Step 8: Filing the Final Report

- Either mail in (with proof of mailing) OR arrange for a courier to hand-deliver 2 signed originals of the voluntary disclosure printed on letterhead to:

Mr. Adam J. Szubin
Director, Office of Foreign Assets Control
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW.-Annex
Washington, DC 20220

- Get receptionist to sign / initial, date-stamp, and return 1 of the originals. (This is your proof of submission.)
- Retain both electronic and hardcopy versions of the date-stamped original for 5 years.

Post-Disclosure Considerations

- OFAC Questions and Requests
- Statute of Limitations Waiver
- Meeting with OFAC
- Setting Aside a Reserve
- SEC Reporting
- Settlement

Questions?

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