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U.S. SANCTIONS COMPLIANCE: WHEN IN DOUBT, ASK

U.S. companies face increasingly complex sanctions regulations from the Office of Foreign Assets Control (OFAC) of the U.S. Department of Treasury. Failure to comply can result in significant fines — OFAC fined 22 companies more than US$ 1.2 billion in 2019.

Complying with these regulations is not easy. OFAC often writes regulations broadly, leaving questions about their scope. OFAC and other executive officials too often send seemingly inconsistent messages about these regulations, and the press accounts regarding them may not always be entirely accurate. Consequently, U.S. companies are often uncertain about whether they can conduct a certain transaction or do business with certain foreign individuals or companies.

A recent court order in *ExxonMobil Corporation et al. v. Steven Mnuchin et al*. vacating an OFAC civil penalty aids in navigating U.S. sanctions.

I. *ExxonMobil Corporation et al. v. Steven Mnuchin et al.*

A. Ukraine-Related Sanctions Regime

In 2014, the Obama administration issued Executive Order 13661 imposing sanctions in response to Russia's annexation of Crimea. Specifically, the Treasury Department listed certain entities and individuals tied to the Russian government as Specially Designated Nationals (SDNs). As a result of the SDN classification, U.S. persons (individuals and entities) are legally prohibited from contracting or transacting with such SDNs.

The executive order specifically prohibited "the receipt of any contribution or provision of funds, goods, or services from [an SDN]." The next day, the White House announced that the order targeted the designated individuals and their "personal assets, but not companies that they may manage on behalf of the Russian state."

The Treasury Department designated Igor Sechin as an SDN under E.O. 13661. He was and remains the President and Chairman of Rosneft, Russia's largest oil and gas company. In contemporaneous public announcements, the Treasury Department explained that it sanctioned Sechin in his "individual capacity" and that Rosneft was not sanctioned.

B. OFAC Penalizes ExxonMobil for Entering into Contracts with Rosneft

After Sechin's designation as an SDN, ExxonMobil executed contracts with Rosneft. This was consistent with its prior course of conduct. ExxonMobil had done business in Russia, including with Rosneft, for more than 20 years. Sechin signed the contracts at issue here on behalf of Rosneft. This

prompted OFAC to commence administrative proceedings to determine whether ExxonMobil had violated E.O. 13661 because Sechin, an SDN, signed the contracts.

At the conclusion of the administrative process, OFAC issued a US$ 2 million penalty notice. OFAC reasoned that ExxonMobil "received services" from Sechin because he signed the contracts. ExxonMobil appealed to a U.S. District Court in Texas on various constitutional grounds.

C. Court Vacates OFAC's Penalty Notice

The court vacated OFAC's penalty notice. Because the issue was dispositive, the court limited its inquiry to whether OFAC provided fair notice of its interpretation of E.O. 13661 to prohibit U.S. companies from contracting with Rosneft when Sechin signed on its behalf. Thus, the court had to decide whether ExxonMobil could determine with ascertainable certainty that E.O. 13661's prohibition against "receipt of a service" included entering into a contract with Rosneft when signed by Sechin.

The court first noted that E.O. 13661 prohibits a U.S. person from receiving services from an SDN. The court then examined the plain meaning of "service" and determined that signing a contract could be a "service" because it is labor performed in the interest of others. However, the court found E.O. 13661's use of the word "receipt" — meaning "take," "come into possession," or "get" — did not fairly address whether ExxonMobil was receiving a service from an SDN like Sechin when he signed contracts enabling ExxonMobil to contract with Rosneft, a non-blocked entity. Thus, the court determined that the plain language of the executive order failed to provide ExxonMobil with "ascertainable certainty" of the prohibited conduct.

Under the fair-notice doctrine, the court also had to consider other facts that would nevertheless support a finding that ExxonMobil had fair notice of OFAC's interpretation that ExxonMobil could not enter into a contract with Rosneft when Sechin was signing. This includes analyzing facts such as public statements by OFAC and other executive branch officials. Beyond considering such public statements, the court entertained the notion of whether ExxonMobil attempted to seek guidance from OFAC before executing the contracts with Rosneft. The court adopted this new consideration from another legal theory — void-for-vagueness — using the relationship between the two as justification. However, because OFAC had the burden to show that it gave fair notice of its interpretation, the court found this new factor was not dispositive but rather one of several factors to consider.

Following this decision, should a company challenge an OFAC penalty notice asserting that it did not receive fair notice of OFAC's interpretation, courts may now take into account whether that company had sought OFAC's guidance before engaging in the allegedly prohibited conduct.

II. Takeaways

U.S. sanctions are not easy to navigate. The U.S. government often issues regulations that are not wholly clear as to their scope or application. Even with an adequate training and compliance program, companies may still struggle when assessing the propriety of a proposed transaction.

For ExxonMobil, nothing in the regulations prohibited contracting with Rosneft. In fact, executive branch officials publicly said that such action was permissible. And the regulations did not clearly state that ExxonMobil could not execute a contract with Rosneft if Sechin was signing on its behalf. Yet, OFAC advanced an interpretation of the sanction that ExxonMobil would be "receiving a service" from Sechin when he signed the contracts for Rosneft.

The decision in *ExxonMobil Corporation* shows that penalty notices from OFAC are not immune from challenge. If the application of a sanction is not clear, companies can challenge OFAC's interpretation for failing to give fair notice. The court reaffirmed that two long-standing considerations — the text of the sanctions and public statements by OFAC and other executive branch officials — remain part of the fair notice inquiry.

However, this court determined that seeking guidance from OFAC is now part of the fair notice inquiry. If other courts follow this reasoning, U.S. companies may have to consider consulting with OFAC before entering into certain transactions. Imposing obligations on U.S. companies to consult with OFAC where uncertainties surround sanctions creates a host of issues for both OFAC and U.S. companies. In some respects, the court's decision has created additional uncertainty with regard to what U.S. companies now need to do to ensure compliance with U.S. sanctions.

For more information on navigating U.S. sanctions or seeking guidance from OFAC, please contact one of the attorneys listed below.

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