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A New Tool For Extraterritorial Sanctions Enforcement

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Recent Office of Foreign Assets Control and U.S. Department of Justice actions have focused on certain entities — overseas financial institutions — and particular conduct — U.S. dollar clearing and associated "stripping." The DOJ's recent $232 million settlement and negotiated criminal plea with Schlumberger Oilfield Holdings Ltd., however, reflects a break from this trend. Relying on a theory of "facilitation" and wielding aggressive criminal charges, the DOJ dramatically expanded the scope of prior criminal enforcement actions in the OFAC arena. The DOJ's latest stance also signaled to U.S. manufacturing companies: There is more to come.

Change In Enforcement Trends

Over the past few years, foreign financial institutions with U.S. operations have paid billions of dollars to resolve U.S. criminal and regulatory inquiries into sanctions-related activities. Over the past year alone, financial giants BNP Paribas and Commerzbank AG paid $8.83 billion and $258 million to resolve criminal/regulatory investigations regarding their alleged "stripping," i.e. concealing/falsifying documentation regarding transactions involving sanctioned entities/countries. The BNP resolution in particular caused shock waves among white collar and sanctions practitioners, as the company pled guilty in federal and state court to charges including conspiracy and falsifying business records.

The DOJ's recent charges against Schlumberger Oilfield Holdings Ltd. ("Schlumberger Oilfield"), an entity incorporated in the British Virgin Islands, reiterate the DOJ's commitment to pursue criminal actions in the sanctions arena and also reveals an expansion of potential targets of such actions. In this case, looking at the central oversight practices of the Texas-based drilling and management business segment ("D&M") of Schlumberger Ltd., the parent company of Schlumberger Oilfield ("Schlumberger"), the DOJ charged Schlumberger Oilfield with conspiracy to violate the U.S. International Emergency Economic Powers Act and the Iran and Sudan sanctions promulgated thereunder. Particularly, according to the DOJ, by working with D&M employees to receive support for its branches doing business in Iran and Sudan, Schlumberger Oilfield "willfully facilitate[ed]" sanctions violations committed by D&M by failing to segregate the corporate conglomerate's business operations in Iran and Sudan from its U.S.-based operations.

Most relevant for U.S. manufacturing companies with operations in sanctioned countries, the U.S. attorney for the District of Columbia stated that the Schlumberger Oilfield's criminal plea "should send a clear message to all global companies with a US presence: whether your employees are from the US or abroad, when they are in the United States, they will abide by our laws or you will be held accountable."

Expanding Its Sights — A New Trend For Sanctions Enforcement Actions

It is well settled that U.S. sanctions generally require global corporations operating in both the U.S. and sanctioned countries to keep their respective sanctions and nonsanctioned operations isolated from one other. Under a theory of "facilitation," however, U.S. employees or entities can violate sanctions laws by directing, approving or otherwise supporting the company's business in sanctioned countries.

While such regulations have been on the books for many years, enforcement actions against manufacturing companies for such violations have been infrequent. Indeed, they have paled in comparison to enforcement actions against financial institutions for "stripping" or transactions with sanctioned entities. Accordingly, there has been little concrete guidance regarding the type of "facilitation" conduct that warrants an enforcement action, let alone a criminal charge. The case against Schlumberger Oilfield not only provided helpful clarification on facilitation, but provided a roadmap for potential future enforcement actions and an additional lens through which international companies can assess the strengths and weaknesses of their compliance programs.

As noted above, Schlumberger Oilfield is a direct subsidiary of Schlumberger Ltd., a multibillion-dollar oil and gas conglomerate incorporated in the Netherlands Antilles/Curacao. As an entity incorporated in the British Virgin Islands, Schlumberger Oilfield was not directly prohibited by U.S. law from doing business in Iran and Sudan. U.S. sanctions, however, prohibit any non-U.S. company from involving its U.S. branches and personnel in providing services in support of activities in sanctioned countries.

In the charging documents and statement of facts, the DOJ focused on D&M's central processing procedures as the locus of criminal "facilitation." In particular, despite Schlumberger's compliance policies directing otherwise, D&M employees routinely approved capital expenditure requests, made strategic decisions, and provided technical support for Schlumberger Oilfield entities doing business in Iran and Sudan. The DOJ also highlighted that Schlumberger employees (including D&M employees) often concealed the identities or locations of the sanctioned countries to which they provided support. Schlumberger employees, for example, referenced oilfield operations in Iran and Sudan with coded language. While the DOJ did not explicitly link this conduct to the specific elements of the criminal violation, such conduct certainly is the type that can satisfy the "willfulness" requirement in criminal facilitation actions.

Key Takeaways on Facilitation

Many U.S. sanctions programs, including the Iran, Syria and Sudan-related programs, prohibit U.S. persons from "facilitating" prohibited transactions. In other words, sanctions programs prohibit U.S. persons from doing indirectly — i.e. by assisting third party transactions — what they cannot do directly. Under the Sudan sanctions regulations, for example, "facilitation" is defined as any unlicensed action by a U.S. person that "assists or supports" a transaction by, or with, a sanctioned party. Although this definition is not restated in other sanctions regulations, many practitioners understand that it applies across the various U.S. sanctions programs.

The Schlumberger Oilfield settlement underscores the importance of complying with the spirit and letter

of the facilitation prohibitions. This is especially the case for multinational corporations with both a presence in the U.S. and in sanctioned countries. Identifying potential areas of vulnerability requires careful analysis based on the peculiarities of one's business, and the contact (if any) with operations in sanctioned countries.

Although the regulatory definition is general and there have been few enforcement actions under the facilitation theory, various sanctions programs provide a few examples of specific conduct that may constitute facilitation:

- U.S. parties may not approve, finance, insure or guarantee any transaction in which they themselves are prohibited from engaging (Iran Regulations, 31 C.F.R. 560.208; Syria Regulations, 31 C.F.R. 542.413)

- U.S. parties may not provide merchandise to be used in connection with a prohibited transaction or make a purchase for the benefit of a prohibited transaction (Iran Regulations, 31 C.F.R. 560.205; Sudan Regulations, 31 C.F.R. 538.206)

- U.S. parties may not provide services in support of or in connection with prohibited activity (Sudan Regulations, 31 C.F.R. 538.407(a); Iran Regulations, 31 C.F.R. 560.417(b))

- U.S. parties may not provide guidance on prohibited activity (Sudan Regulations, 31 C.F.R. 538.407(b))

- U.S. parties may not alter their corporate policies to allow for prohibited transactions (Iran Regulations, 31 C.F.R. 560.417; Sudan Regulations, 31 C.F.R. 538.407)

- U.S. parties may not refer business to a foreign person that would involve a prohibited transaction (Sudan Regulations, 31 C.F.R. 538.407(d))

- At the other end of the spectrum of conduct, the Sudan regulations indicate that purely clerical or reporting activities, for example, reporting on a subsidiary's trade with a sanctioned country, do not constitute facilitation (Sudan Regulations, 31 C.F.R. 538.407(a)).

Carefully applying these examples to your business can go a long way toward avoiding facilitation violations. In the case of Schlumberger Oilfield, for example, much of the conduct for which the company was charged — the approval of expenses related to business in Iran and Sudan and providing

business strategy and guidance to entities operating in Iran — fall clearly within the examples above.

Of course, many companies — including your own — may know these regulations, have policies set up to address these regulations, and believe these regulations are being followed. Yet as noted below, even companies with strong compliance policies are not immune to this type of criminal conduct. Having an effective compliance function — which is proactive in monitoring employee conduct and company transactions, and conducting internal investigations as necessary — are an essential measure to address these types of issues. This is all the more true given the DOJ's heightened activity in the area of sanctions enforcement and, as demonstrated by the Schlumberger Oilfield plea, the widening of the agency's interests to reach not only financial institutions but international manufacturing companies.

Making Your Compliance Policy Effective

Regulators have remained consistent that the companies best positioned to avoid and mitigate potential sanctions violations are those companies that have robust compliance programs in place. While there are many components to compliance programs, there are at least two hallmarks of a robust program. First, compliance programs must be well tailored to your industry and to your corporation. In this era of sanctions enforcement, where regulators are increasingly sophisticated and sensitive to the most subtle violations of law, multinational corporations need programs based a careful consideration of the nature of their business, their corporate structure and the regions in which they operate. Moreover, an effective policy today is not necessarily an effective policy tomorrow. As your business changes — and as sanctions laws evolve and new trends in enforcement (read, the "facilitation" theory) emerge — your compliance policy must be constantly updated to take those changes into consideration.

Second, policies that work on paper are worth nothing if they are not followed in practice. For a policy to do its job, it must be put into practice. As an example, according to Schlumberger Oilfield's statement of offense, the company had policies and procedures in place to ensure that its employees complied with U.S. sanctions laws (including ones regarding the segregation of U.S. and sanctioned countries' operations), but "failed to train its employees adequately" on those policies. In its press release touting the Schlumberger Oilfield plea as a "landmark case" putting global corporations "on notice that they must respect our trade laws," the DOJ did not criticize the substance of Schlumberger's compliance policies, but it emphasized Schlumberger's failure to adequately train its employees in this area. For multinational corporations operating in the complex world of U.S. sanctions, an essential part of ensuring that compliance policies are followed is to regularly provide training to all employees.

Moreover, as referenced above, the DOJ took great pains to highlight the "countermeasures" that Schlumberger employees took to evade U.S. sanctions laws. Employees communicated in "code" regarding Iranian and Sudanese operations, or simply input false information into company systems when referring to such countries. That Schlumberger's official and unofficial policies did not countenance and condone such practices was no defense. While this may have lessened the penalties to some extent, it goes without saying that the best offense is a good defense.

Similarly, Schlumberger Oilfield's statement of offense indicates that "senior" personnel were involved in D&M's management of other Schlumberger Oilfield entities' business in Iran, indicating that even senior managers were unfamiliar with the company's compliance policies, or perhaps suggesting that the tone from the top was that compliance procedures were not important. To help ensure that company employees are not engaged in similar charades that could expose the company to hundreds of millions of dollars in potential fines/forfeiture, the company's compliance team must undertake efforts to monitor employees conduct and company transactions, and to bolster employee training on these

issues. When necessary, compliance should initiate internal investigations to identify any potential areas of wrongdoing as early in their infancy as possible.

Conclusion

We've likely only seen the beginning of U.S. sanctions regulators' use of "facilitation" as a means to reach multinational corporations. Further, unlike the stripping cases brought in recent years, the DOJ has signaled that "facilitation" charges may be brought against nonfinancial institutions, and particularly global manufacturing companies with a U.S. presence. Prudent multinational corporations must both understand the scope of the DOJ's newest tool and adopt and implement compliance programs that will be effective in avoiding violations in this area.

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