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Court Vacates $2 Million OFAC Penalty Imposed on Exxon Mobil in Ukraine Sanctions Case

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In a rare litigation defeat for the Office of Foreign Assets Control (OFAC) at the U.S. Department of the Treasury, a federal district court on December 31, 2019 vacated a $2 million civil penalty notice that OFAC had issued to Exxon Mobil Corporation, ExxonMobil Development Company, and ExxonMobil Oil Corporation (collectively "Exxon Mobil") for violating OFAC's Ukraine-related sanctions regulations ("the Regulations"). The U.S. District Court for the Northern District of Texas ruled that Exxon Mobil lacked fair notice that its conduct was prohibited under the Regulations.

At issue was the Russian signatory to multiple contracts that Exxon Mobil executed in May 2014 with Rosneft, a major petroleum company in Russia, following OFAC's issuance of the Regulations. That signatory was Igor Sechin, whom OFAC previously had designated a Specially Designated National (SDN) pursuant to Executive Order 13661, issued by President Obama in March 2014.

Notwithstanding this court decision, however – which has limited precedential impact – a U.S. company considering a business transaction with a non-designated foreign entity should exercise additional caution where an SDN has any involvement with a transaction. Optimally, companies should consult with OFAC in advance, thereby minimizing the risk of an enforcement action. And in circumstances where OFAC regulations regarding a sanctions regime are ambiguous, companies should carefully evaluate enforcement and litigation risks if they proceed with a transaction in which an SDN is involved.

Procedural Background

On March 6, 2014, President Obama issued Executive Order 13660, which declared that the "actions and policies of persons…who have asserted government authority in the Crimea region without the authorization of the Government of Ukraine…constitute an unusual and extraordinary threat to the national security and foreign policy of the United States…." Ten days later, President Obama issued Executive Order 13661, which found that "the actions and policies of the Government of the Russian Federation with respect to Ukraine" also constituted a threat to the United States. Executive Order 13661 also authorized the Secretary of the Treasury to promulgate implementing regulations and to designate individuals and entities as SDNs. Among other things, Executive Order 13661 prohibited the "the receipt of any contribution or provision of…services" by any entity or individual designated as an SDN.

One day after Executive Order 13661 was issued, the White House Office of the Press Secretary issued a "Fact Sheet" stating, in pertinent part, that "[o]ur focus is to identify these individuals and their personal assets, but not companies that they may manage on behalf of the Russian state." The White House also released a background briefing containing similar language, although it also stated that "U.S. persons are prohibited from doing business with [designated persons.]"

On April 28, 2014, the Department of the Treasury designated Igor Sechin as an SDN pursuant to Executive Order 13661, describing him as the President and Chairman of the Management Board for Rosneft, characterized as "a state-owned company" and "Russia's leading petroleum company." The press release stated that Rosneft itself "has not been sanctioned," but added that "transactions by U.S. persons or within the United States involving the individuals and entities designated…are generally prohibited." Contemporaneous statements by White House officials seemed aimed at reaffirming that the sanctions applied to Sechin in his individual capacity – not to doing business with Rosneft. The White House Office of the Press Secretary released a statement that "[w]e are imposing sanctions on Sechin….individually," and in a news interview the Deputy National Security Advisor commented that "U.S. companies will not be able to do business with [designated individuals] in their individual capacities."

On May 14, 2014, OFAC issued the Regulations implementing the two Executive Orders. Among other things, the Regulations provided that transactions prohibited under Executive Order 13661 with respect to "property" and a "property interest" "include, but are not limited to…services of any nature whatsoever [and] contracts of any nature whatsoever…."

Exxon Mobil had a longstanding business relationship with Rosneft. On May 23, 2014, the company entered into eight contracts with Rosneft, all signed by Sechin – an SDN – on behalf of Rosneft. All eight of these agreements related to prior agreements entered into in 2013, before the imposition of any Ukraine-related sanctions. Prior to executing the May 2014 agreements, Exxon did not seek any guidance from OFAC.

OFAC Enforcement Action and Subsequent Public Guidance

On July 22, 2014, OFAC issued an administrative subpoena to Exxon Mobil based on OFAC's "reason to believe" that Exxon Mobil had violated the Regulations. Specifically, OFAC found that the agreements Exxon Mobil executed with Rosneft (all signed by Sechin) violated Section 4 of Executive Order 13661, which prohibits the receipt of services from a blocked individual. After unsuccessful negotiations, OFAC issued a Prepenalty Notice proposing a penalty of $2 million, rejected Exxon Mobil's defense, and issued a Penalty Notice imposing the same civil penalty. Companies confronting OFAC Penalty Notices rarely choose to litigate the matter, as the government almost always prevails in such litigation. But on the same day OFAC issued the Penalty Notice in this matter, Exxon Mobil sued in federal court.

On August 13, 2014, OFAC published Frequently Asked Questions (FAQs) regarding its interpretation of the Regulations. One FAQ advised that while an entity controlled by a blocked person is not automatically blocked, "persons should be cautious in dealings with a such a non-blocked entity to ensure that they are not, for example, dealing with a blocked person representing the non-blocked entity, such as entering into a contract that is signed by the blocked person." Correspondingly, another FAQ advised that "OFAC sanctions generally prohibit transactions involving, directly or indirectly, a blocked person…even if the blocked person is acting on behalf of a non-blocked entity….U.S. persons may not, for example, enter into contracts that are signed by a blocked individual." OFAC had issued similar guidance in 2013, but in connection with sanctions

against Burma.

Litigation

Exxon Mobil challenged OFAC's penalty decision on the grounds, among other things, that it failed to receive fair notice of OFAC's interpretation of law in accordance with the Due Process Clause of the Fifth Amendment. Quoting the U.S. Supreme Court's decision in *FCC v. Fox Television, Inc.*, 567 U.S. 239, 253 (2012), the district court observed that "[u]nder the Due Process Clause…laws that regulate individuals or entities 'must give fair notice of conduct that is forbidden or required.'" Relying on a 2016 decision by the Fifth Circuit, the court explained that "[a]n agency's failure to provide fair notice 'justifies setting aside the imposed fine' resulting from the alleged violation of a regulation." In the administrative context, the district court stated, "fair notice requires an agency to have 'stated with ascertainable certainty what is meant by the standards [it] has promulgated.'" (*quoting ExxonMobil Pipeline Co. v. U.S. Dept. of Transp*., 867 F.3d 564, 578 (5th Cir. 2017) (other citations omitted)).

The court agreed with OFAC's position that Executive Order 13661 prohibited the receipt of any provision of services from a blocked person, and that the signing of a contract could be such a service. But it determined, based on a variety of factors, that Exxon Mobil did not have fair notice that Sechin's signing of the contracts was a service received by Exxon Mobil, and therefore was prohibited under the Regulations and Executive Order 13661. The court began by considering the plain language of the Regulations. In that regard, the court found that the text of the Regulations did not provide fair notice of OFAC's interpretation, as the text failed to "provide fair notice that a U.S. entity is prohibited from signing contracts that are also signed by an SDN."

The court considered whether Exxon Mobil's failure to seek guidance from OFAC undermined its fair notice argument. The government, for its part, argued that Exxon Mobil could have sought guidance from OFAC, and relied on prior cases analyzing void-for-vagueness challenges in which courts considered a party's ability to seek clarity from the government about the meaning of an ordinance or regulation. Exxon Mobil countered that the government bears the burden of conveying its interpretation of regulations to the public with sufficient clarity so that the public can comply, maintaining that the government's position "turns the fair-notice standard on its head."

Here, the court sided with Exxon Mobil, citing a previous Fifth Circuit decision for the proposition that "the burden of providing fair notice remains with the agency – not the regulated party." Still, the court manifested some skepticism about Exxon Mobil's conduct, observing at the outset that "[t]his is an administrative case prompting the Court to determine which party receives the benefit of having its cake and eating it, too – the regulating agency that failed to clarify, or the regulated party that failed to ask." Ultimately, , the court assessed that Exxon Mobil's failure to seek such guidance was "a relevant – though not dispositive – factor in assessing whether Exxon Mobil received fair notice of OFAC's interpretation of the Regulations." Indeed, the court found that Exxon Mobil's failure to seek guidance from OFAC "weigh[ed] in favor of a finding of fair notice…." Thus, it may be inferred that forgoing the opportunity to obtain advance guidance from OFAC in future cases is a risk factor in undertaking litigation against the government. The significance of this factor in this case, however, appeared to be outweighed by the nature and consequences of public statements by OFAC and executive branch officials.

The court rejected OFAC's argument that the FAQs which OFAC had issued in 2013 regarding the Burma sanctions regulations supported a finding of fair notice. Both the Regulations at issue and the Burma sanctions regulations, the court noted, contained "a disclaimer" that "[d]iffering foreign policy

and national security circumstances may result in differing interpretations of similar language among the parts of this chapter" (referring to chapter 5 of title 31 of the Code of Federal Regulations, in which OFAC regulations regarding multiple sanctions programs are set forth). Thus, "OFAC forfeited its right to claim that the interpretation of the [Burma sanctions regulations] provided fair notice of [the subsequent Ukraine-related regulations]." Regulated parties, the court observed, should not be expected to know that OFAC interprets different sanctions programs "identically without OFAC's explicit clarification." This indicates that U.S. companies reasonably may construe a given set of FAQs to apply only to the specific sanctions regime for which they are issued, and that OFAC must explicitly indicate such FAQs have broader implications if that is the agency's intent.

With respect to whether Exxon Mobil reasonably could rely on sources outside of the Regulations in support of its fair notice argument, the court agreed with the government that regulated parties cannot reasonably rely, in good faith, upon statements from third-party news outlets referencing unnamed government sources. Exxon had cited news articles published by the *New York Times* and the *Wall Street Journal*, among others, indicating that U.S. persons could still conduct business with Rosneft notwithstanding Sechin's position on the company's board, as long as a given transaction concerned Rosneft business and not Sechin's personal business.

In contrast, the court determined that "a regulated party, in good faith, might rely upon statements issued by the executive branch, even if not necessarily issued by OFAC itself." In that regard, the court considered whether the public statements issued by the White House Office of the Press Secretary, and statements issued by the Department of the Treasury, "provide[d] ascertainable certainty" regarding OFAC's interpretation of the Regulations. Taken as a whole, the court determined that these public statements did not provide such certainty, and therefore did not provide fair notice to Exxon Mobil that its conduct was prohibited. Some of the statements, such as a background briefing and fact sheet issued by the White House Office of the Press Secretary, "suggest[ed] that an SDN may transact on behalf of a non-blocked entity without subjecting a U.S. entity, as a party to the transaction, to sanctions." Other government statements emphasized that Sechin "was targeted as an individual" and that Rosneft had not been sanctioned. The court acknowledged that "the Regulations and public statements, taken together, would likely lead a regulated party, acting in good faith, to hesitate before completing transactions like [Exxon Mobil's]." But these sources "[did] not create ascertainable certainty that such conduct would be prohibited."

Implications

Although a rare and noteworthy defeat for the government in a sanctions enforcement case, the district court's vacating of OFAC's penalty against Exxon Mobil has limited consequences with respect to the enforceability of future OFAC civil enforcement penalties. The decision is not binding on other district courts in the United States (even within the Fifth Circuit, in which the U.S. District Court for the Northern District of Texas is located), and it presents a rather unique set of facts. U.S. companies knowingly entering into agreements signed by SDNs – even on behalf of non-designated entities – will be currying risk, as in future circumstances the record before a court in the event an OFAC penalty is litigated may not contain as ample a litany of government actions supporting a finding that a company lacked fair notice that its conduct was prohibited.

It is not uncommon for sanctions regimes to lack sufficient clarity in their application, and it may be tempting for U.S. companies to "push the envelope" in lucrative transactions where OFAC regulations are ambiguous and FAQs are unhelpful. It would be generally unwise, however, for companies to rely on ambiguities in OFAC sanctions regulations, or inadequacies in FAQs, as a shield from government enforcement action, or from a court decision upholding such action.

Thus, best practices when a U.S. entity is on notice of an SDN's involvement in a contemplated financial transaction counsel in favor of consulting with OFAC in advance, thereby minimizing the risk of an enforcement action. Companies assessing whether to pursue business transactions involving designated parties based on ambiguous regulations should carefully evaluate enforcement and litigation risks. At the same time, this court decision serves notice on OFAC, and on future Administrations, regarding the consequences of muddled public messaging about the rollout of a new sanctions regime, and the benefit of issuing contemporaneous, explicit policy guidance in FAQs upon the issuance of new sanctions regulations to provide fair notice to regulated parties.

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