Bloomberg Law

Corporate Law & Accountability Report™

CORPORATE LIABILITY

Sanctions Year in Review

BY MICHAEL CASEY, ZACH BREZ, AND KIM NEMIROW

The past year has been among the most significant in U.S. history from a sanctions perspective. A host of impactful regulatory changes occurred, ranging from new Congressional sanctions directed at Russia, North Korea, and Iran, to the imposition of a novel sanctions program targeting Venezuela's government, to the lifting of the U.S.'s long-standing embargo of Sudan. Furthermore, President Donald Trump refused to certify that the Joint Comprehensive Plan of Action (''JCPOA'') was in the U.S.'s national interest, and he has threatened to make more changes to the landmark nuclear agreement with Iran in the coming months.

Kirkland & Ellis partner Mike Casey's practice focuses on representing clients in investigations, transactions, and regulatory matters related to economic sanctions, export controls, money laundering, international corruption, customs, and the CFIUS review process. He is also a Bloomberg Law contributor.

Partner Zach Brez works with companies and individuals to investigate, mitigate, and advise on complex enforcement and regulatory matters.

Partner Kim Nemirow has extensive experience advising multinational organizations and individuals in a wide variety of U.S. DOJ and SEC investigations, internal investigations, and compliance matters. All three lawyers are in Kirkland's Government & Internal Investigations Group.

Precedent setting trends have emerged within the sanctions enforcement space as well. After focusing its enforcement efforts on financial institutions for the last decade, OFAC has begun to bring high-profile cases against nonfinancial institutions. In the most important sanctions case of the year, the U.S. Treasury Department's Office of Foreign Assets Control (''OFAC'') entered into a settlement agreement with Zhongxing Telecommunications Equipment Corp. (''ZTE'') that included the largest civil penalty ever imposed against a nonfinancial institution. OFAC has taken aggressive positions with respect to interpreting the sanctions regulations in other recent actions as well.

1. Policy Developments

(a) Congressional Sanctions

Congress passed—and, in August, President Trump signed into law—the Countering America's Adversaries Through Sanctions Act (''CAATSA''). This bipartisan-supported legislation imposed new sanctions on Russia, Iran, and North Korea, as well as certain foreign entities that participate in specific types of transactions with those countries.

CAATSA is a complicated and wide-ranging law with many interesting features. For example, CAATSA codified and expanded the scope of sectoral sanctions aimed at Russian oil projects, Russian energy companies, and Russian financial institutions. CAATSA also requires the President to impose mandatory secondary sanctions on foreign persons that engage in specified activities involving Russia and North Korea. Furthermore, CAATSA requires the President to block the property interests of persons that engage in arms sales or training to Iran and to designate Iran's Islamic Revolutionary Guard Corps (''IRGC'') pursuant to Executive Order 13224.

(b) Iran

Since President Trump took office in January, OFAC has added dozens of individuals and entities to the Specially Designated Nationals and Blocked Persons List (''SDN List'') for supporting Iran's ballistic missile development programs, Iran's military, and Iran's IRGC.

President Trump has also called into question the U.S.'s continued participation in the JCPOA. He labelled the multilateral agreement—in which Iran agreed to limit the development of its nuclear weapons in exchange for sanctions relief—''the worst deal ever negotiated'' in the run-up to the 2016 election. He subsequently described the JCPOA as ''one of the worst and most one-sided transactions the United States has ever entered into'' during a speech at the U.N. General Assembly in September. In October, President Trump declined to certify the JCPOA, but stopped short of withdrawing the U.S. from the multilateral agreement. Congress has until Dec. 15 to decide whether to reimpose the sanctions suspended pursuant to the JCPOA.

(c) North Korea

The U.S. has ratcheted up economic pressure on North Korea throughout the year. OFAC designated a number of Chinese nationals and entities for supporting North Korea's efforts to develop weapons of mass destruction. In addition, the Treasury Department's Financial Crimes Enforcement Network (''FinCEN'') issued a final rule that subjected the Chinese Bank of Dandong to special measures pursuant to Section 311 of the USA PATRIOT Act. These special measures effectively cut off the bank from the U.S. financial system. FinCEN took this step because the bank purportedly acted as a conduit for the North Korean government to access the U.S. financial system.

In September, President Trump issued an executive order that authorizes OFAC to sanction North Korean nationals, as well as foreign companies and banks that do business with North Korea. Most notably, this order permits OFAC to freeze the assets of foreign entities that have engaged in significant cross-border transactions with North Korea. In addition, foreign financial institutions that provide banking services to North Korea could be subject to asset freezes or restricted access to the U.S. financial system. The new sanctions are aggressive because they provide OFAC with the power to sanction foreign companies and banks that engage in commercial transactions with North Korea that are unrelated to its nuclear or ballistic missile programs. In November, President Trump designated North Korea as a state sponsor of terrorism and sanctioned various Chinese persons for supporting the country.

(d) Sudan

Just days before leaving office, President Barack Obama temporarily suspended comprehensive sanctions targeting Sudan. In October, the Trump administration permanently lifted the embargo, which had been in place for two decades. U.S. firms can now transact with Sudanese government officials and do business in the Sudanese oil and gas sector.

While the sanctions relief provides new opportunities for U.S. companies, challenges remain to doing business in Sudan. A number of individuals and companies within Sudan continue to be targeted by sanctions, restrictions on exporting U.S. products and technology to Sudan remain in place, and Sudan suffers from widespread corruption. Furthermore, U.S. and European banks might not be willing to participate in transactions involving Sudan, which would create practical difficulties for American companies to do business in that country.

(e) Cuba

In June, President Trump announced a Cuba policy directive that will undo some—but not all—of the sanctions relief that the Obama administration provided to Cuba during the last three years. In November, OFAC amended the Cuban Asset Control Regulations to implement these changes. OFAC tightened some existing general licenses that authorized U.S. citizens to travel to Cuba, and eliminated one such license altogether. Through these changes, the Trump administration appears to be attempting to stop U.S. citizens from utilizing general licenses to travel to Cuba for unauthorized purposes (*e.g.*, tourism).

Another change prohibits U.S. persons from engaging in direct financial transactions with entities on the Cuba Restricted List. Maintained by the State Department, the Cuba Restricted List includes entities that are controlled by, or act on behalf of, the Cuban military, intelligence, or security services and with which transactions would disproportionately benefit those government agencies. The revised sanctions contain a ''grandfathering'' provision that allows U.S. persons to continue to do business with Cuban counterparties on the Cuba Restricted List if the U.S. persons had a commercial relationship before the Cuban counterparty was listed. These prohibitions do not extend to indirect financial transactions (*i.e.*, where a U.S. person does not act as the originator or beneficiary on a transfer of funds involving an entity on the Cuba Restricted List).

(f) Venezuela

The U.S. has utilized sanctions to respond to the ongoing Venezuelan crisis. Between May and August, OFAC designated a number of Venezuelan nationals—including Nicolas Maduro, the President of Venezuela, and Tareck El Aissami, the Vice President of Venezuela. In August, President Trump issued a new executive order targeting Venezuela. These sanctions contain a number of discrete prohibitions that limit American citizens and firms from dealing in certain types of debt issued by the Government of Venezuela and PDVSA, the state-owned oil and gas company. In addition, American companies cannot directly or indirectly purchase securities from the Government of Venezuela.

The new Venezuelan sanctions are similar to the sectoral sanctions the U.S. imposed on Russia in 2014. The use of such sanctions with respect to Venezuela indi-

  CARE ISSN 2330-6300

cates that OFAC views sectoral sanctions to be an effective tool in various contexts. These sanctions have been consequential: Venezuela has had difficulty restructuring or refinancing its outstanding sovereign debt in part because these sanctions prohibit U.S. firms from dealing in newly issued Venezuelan sovereign debt.

2. Enforcement Trends

(a) Targeting of Nonfinancial Institutions

Following a decade in which the majority of sanctions enforcement actions were brought against financial institutions, this year OFAC has focused its enforcement efforts on nonfinancial institutions, having announced settlements with 14 nonfinancial institutions operating in a variety of industry sectors, including oil and gas, telecommunications, health care, automotive, and international logistics. Enforcement actions targeting nonfinancial institutions have accounted for all but two of the settlements announced in 2017, as well as over 99 percent of the civil penalties.

The year's most important sanctions matter involved ZTE.

The year's most important sanctions matter involved ZTE. The Chinese-based telecommunications company entered into settlement agreements with OFAC, the Department of Justice, and the Bureau of Industry and Security for allegedly evading U.S. sanctions and export control laws by building, operating, and servicing telecommunications in Iran using U.S.-origin equipment and software. ZTE agreed to pay a total of $892 million to resolve its potential liability, with OFAC collecting over $100 million. This penalty is the largest civil penalty that OFAC has ever imposed on a nonfinancial institution.

The ZTE matter was just one of several noteworthy enforcement actions brought against a nonfinancial institution. In July, OFAC announced the imposition of a $2 million penalty on ExxonMobil. OFAC determined that ExxonMobil had committed eight egregious violations of the Ukrainian sanctions by finalizing eight legal documents with the Russian energy firm Rosneft that were executed by Igor Sechin, an individual included on the SDN List. OFAC and ExxonMobil did not agree to settle this matter, so OFAC issued a penalty notice that ExxonMobil subsequently has challenged in federal district court. The parties' litigation remains ongoing.

OFAC and TransTel, a Singapore-based technological services company that supports participants in the oil and gas industry, entered into a settlement agreement in which TransTel agreed to pay over $12 million to resolve its potential liability for violating the Iranian Transactions and Sanctions Regulations (''ITSR''). TransTel originated wire transfers for a USD-denominated bank account to third-party vendors participating in oil and gas projects in Iran. Through these payments, TransTel caused financial institutions in the U.S. to export financial services to Iran in contravention of the ITSR. TransTel ultimately agreed to pay the third largest sanction penalty by a nonfinancial institution in connection with this matter.

(b) Aggressive Enforcement

(i) Extraterritorial Enforcement. OFAC has investigated and brought proceedings against foreign companies for violating U.S. sanctions. Foreign firms entered into approximately half of the civil sanctions settlements announced this year. Some of these foreign firms had minimal connections to the U.S. For instance, OFAC issued a finding of violation to Taiwan-based B Whale Corp. (''BWC'')—whose only apparent connection to the United States was as a party in bankruptcy proceedings—because one of its vessels received a transfer of Iranian crude oil in international waters. Similarly, OFAC determined that several entities organized under foreign law—including ZTE, TransTel, and COSL Singapore—incurred liability by *causing* U.S. companies or financial institutions to violate the ITSR.

(ii) Expansive Interpretations of Sanctions Regulations. Throughout the year, OFAC has adopted aggressive interpretations of the sanctions regulations. For example, OFAC concluded that BWC was a ''U.S. person,'' as defined by the ITSR, because it was participating in a U.S. bankruptcy proceeding. In that case, OFAC also determined the vessel-to-vessel transfer of Iranian oil that occurred in international waters constituted an importation from Iran to the U.S. In another matter, OFAC found that Epsilon Electronics, a U.S.-based audio electronics company, had committed egregious violations of the ITSR by exporting audio and video equipment to a Dubai-based purchaser with knowledge that the Dubai-based entity would reexport the products to Iran, even though OFAC could not establish that the Dubai-based purchaser actually did so.

(iii) OFAC-Initiated Investigations. Nearly all of the announced settlements stemmed from government investigations. Only four companies that settled with OFAC voluntarily reported they had run afoul of U.S. sanctions. The other matters—including the high-profile settlements involving ZTE, ExxonMobil, and COSL Singapore—resulted from government investigations. These matters are yet another sign that OFAC is actively pursuing sanctions violators, including foreign entities that commit relatively small-dollar infractions.

3. Conclusion

The previous year has seen a number of significant developments with respect to sanctions policy and enforcement. Further changes and new enforcement actions undoubtedly will occur in 2018, in light of the ongoing foreign policy challenges facing the U.S. and OFAC's aggressive enforcement posture.