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Practice Update

Recent Trends in DOJ Investigations Against Major Financial Institutions Involving U.S. Economic Sanctions

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With the imposition of billion-dollar fines against large financial institutions, the U.S. Department of Justice ("DOJ") is focusing on banks for not only failing to comply with federal laws, but also for willfully violating laws that were meant to protect the sanctity of the U.S. financial markets. These governmental efforts are aimed at preventing illicit proceeds from flowing through financial institutions to criminal organizations to block their access to funds that would further promote wrongdoing and threaten national security.

Attorney General Eric Holder has recently confirmed the DOJ's "firm commitment to enforcing embargoes and other measures designed to protect America's security and our vital national interests," and stated that financial institutions will be held accountable and punished to the fullest extent of the law for violating U.S. embargo laws. The DOJ scrutinizes financial institutions because they are most susceptible to engaging in sanctions violations due to potential facilitation of payment transfers related to prohibited activity.

These recent prosecutions, particularly with respect to U.S. embargo violations, provide guidance on what not to do, and further demonstrate factors the DOJ

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considered in deciding whether to prosecute and seek strict penalties against financial institutions. This article intends to provide guidance to financial institutions aimed at improving their internal anti-money laundering and compliance policies and procedures with regard to possible violations of U.S. economic sanctions.

Overview of U.S. Economic Sanctions

During the past two years, the DOJ has charged at least two major financial institutions with conspiring to violate the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1707, and the Trading with the Enemy Act ("TWEA"), 50 U.S.C. Appx. §§ 1-44, both of which provide the President the authority to issue Executive Orders imposing trade sanctions. See also 31 C.F.R. §§ 500-599.

These prosecutions involved banks that conducted financial transactions with Specifically Designated Nationals ("SDNs") in Cuba, Iran, Sudan, Libya, and Burma. SDNs are individuals and companies specifically designated as having their assets blocked from the U.S. financial system by virtue of being owned or controlled by, or acting for on behalf of, targeted companies, as well as individuals, groups, and entities, such as terrorists and narcotics traffickers.

SDNs are designated as such by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of Treasury. OFAC's list of SDN's is over 900 pages. It is comprehensive and publicly available here.

In general, OFAC maintains a sanctions program against the following countries: Iran, Syria, Cuba, Sudan, Burma (Myanmar), and what it deems to be a "non-comprehensive" sanctions program against the Western Balkans, Belarus, Cote d'Ivoire, Democratic Republic of the Congo, Iraq, Liberia, Libya, North Korea, Somalia, and Zimbabwe, as well as numerous individuals and entities, including, but not limited to

"Persons Undermining the Sovereignty of Lebanon or Its Democratic Processes and Institutions."

To determine whether an individual or company is an SDN, OFAC has provided "due diligence" steps on its website, along with several other resources, a hotline, and answers to frequently asked questions.

Factors Relevant to DOJ Prosecution

The following are some factors that the DOJ appeared to have considered when prosecuting financial institutions for violating U.S. economic sanctions:

1. **Concealment.** Stripping or removing information identifying the embargoed countries or SDNs from internal payment messages; formatting payment messages to prevent bank filters from blocking prohibited payments; structuring transactions to conceal the source of funds; and using non-affiliate or affiliate banks used to create layers in the transaction.
2. **Credible Evidence of Knowledge or Willful Blindness.** Ignoring internal warnings of potential violations, problematic practices, or glitches in the internal blocking filters or accounting systems that could cause or fail to prevent illegal transactions; communications revealing the need to use code language to obfuscate illegal activity; falsifying business records; offering false instruments for filing; and active attempts to destroy evidence or obstruct governmental administration.
3. **Continued Wrongdoing.** Continual processing of financial transactions with sanctioned countries despite repeated indications and the government's warning of U.S. embargo violations.
4. **Weak Compliance and Audit Programs.** Failure to maintain accurate books and records; lack of up to date information technology and monitoring processes; ineffective risk management systems;

and insufficient resources and authority committed to compliance officers.

5. **Value of Funds.** The total amount of funds in financial transactions with SDNs and the period of time in which those funds were transmitted.
6. **Cooperation and Self-Remediation.**
   Whether the bank:
   (a) timely disclosed misconduct (especially after being put on notice of potential violations);
   (b) promptly secured and provided full and complete document;
   (c) conducted a vigorous internal investigation and reported in a timely fashion;
   (d) identified those involved in illegal activity and the internal processes that caused or facilitated the illegal activity; and
   (e) took remedial actions to correct the problems, including disciplining responsible employees and changing internal processes.

Settlement and Plea Deals

Recent U.S. sanctions violation prosecutions reveal the DOJ's willingness to consider pre-indictment plea deals as well as deferred prosecution agreements. Depending on the level of cooperation and efforts to remedy a faulty compliance program, it appears that the DOJ is interested in resolving these enormous and complex financial investigations, yet imposing penalties that send a message of deterrence and respect for the law to promote public safety.

What the DOJ will not tolerate is obstruction of justice, unreasonable delay in responding to document requests, and continued illegal conduct after being placed on notice of potential wrongdoing.

Early Acceptance of Responsibility: Pre-Indictment Deals and Deferred Prosecution Agreements

In a less complex case, the DOJ would present an indictment to the Grand Jury seeking a true bill to file the proposed charges. If a financial institution cooperates early in the government's investigation and is able to negotiate a plea agreement that would likely achieve a similar result in terms of the fine, asset forfeiture, protection of the public, deterrence, and punishment, it seems that the DOJ would likely bypass the indictment process and may be willing to agree to a pre-indictment settlement or deferred prosecution agreement. Where the financial institution is on this scale, depends upon a variety of factors that will be unique to the facts of each case, relationship with outside counsel, and the prosecutors and agencies involved.

Penalties

Regardless of whether charges were actually filed or a deferred prosecution agreement was reached, the DOJ will most likely require the financial institution to agree to the following things:

- **Statement of Facts:** The DOJ and counsel for the financial institution will have to agree upon a detailed statement of facts that will most likely describe, among other facts, the nature of the illegal transactions, the value of funds laundered, evidence of knowledge of wrongdoing, and efforts to conduct an internal investigation. The Statement of Facts may also discuss the financial institution's cooperation, number of documents shared with the government, and amount of money spent on compliance review and improvement.
- **Asset Forfeiture:** The DOJ will require the financial institution to forfeit assets gained from the illegal transactions within a certain time period; usually 90 days after the execution of the plea agreement or deferred prosecution agreement. The amount will have to be traceable and logically related to the value of funds described in the Statement of Facts.

- **Fine:** The financial institution will also be required to pay the Court a fine (again, within a certain time period), as determined by either the U.S. Sentencing Guidelines or statute (18 U.S.C. §§ 3553 and 3572 – stating that the fine should be twice the amount of pecuniary gain)).
- **Five-Year Probationary Period:** For a period of at least five years, the financial institution will be supervised by a designated compliance monitor responsible for reviewing internal procedures, making recommendations, and writing reports to the government.
- **Potential for Imprisonment:** The DOJ is likely to leave room to prosecute individuals as part of the settlement. Therefore, unless otherwise specified, the agreement would not apply to any individuals and imprisonment remains a possibility for those involved in the underlying wrongdoing or obstruction of justice.
- **Ongoing Cooperation:** Cooperation may include further cooperation not only with state and federal prosecutors, but also with state and federal agencies.

Best Practices

- Know your customer and conduct due diligence, particularly with respect to correspondent accounts or any financial transactions conducted that were connected to a foreign country.
- Establish a formal board committee designated to review policies concerning financial transactions with foreign entities and ensure applicable software is operating and up to date. This board committee should meet periodically and maintain detailed and accurate minutes.
- Provide sufficient resources to operate and maintain an effective anti-money laundering and U.S. sanctions compliance program. Implement ongoing board and employee training, keep apprised of recent relevant federal and state regulations, and designate a compliance officer

with regard to foreign financial transactions that may involve countries subject to U.S. Sanctions.

- Monitor the designation and coding of foreign transactions to ensure that they accurately identify the source so that bank filters will block prohibited payments.
- Understand OFAC's Sanctions Program, familiarize yourself with OFAC's SDN List, conduct OFAC's recommended due diligence, sign up for SDN E-mail updates, and create systematic method of keeping track of the information.
- When confronted with notice of an investigation, retain all company files, cooperate with federal and state authorities and have open communication with their investigators, conduct a thorough internal investigation with the assistance of counsel and if necessary, independent counsel.
- Understand what full cooperation to the DOJ means. It may involve providing full access to all files, implementation of a remedial corporate compliance program/voluntary audit of compliance program, and continued cooperation. And, although not required by the government as a matter of policy, cooperation credit may be earned by waiving the attorney-client privilege and providing the government with the results of an internal investigation.
- When in doubt as to whether as transaction would violate the IEEPA or TWEA, obtain a legal opinion and continue to consult with lawyers regarding the progress of that transaction.

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without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.