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OFAC Asks Non-U.S. Persons To Advance U.S. Foreign Policy

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In recent years, U.S. prosecutors and regulators have shown increasing interest in prosecuting people and entities with little or no connection to the United States. This trend has been especially pronounced in the context of the Foreign Corrupt Practices Act (FCPA). *See,* Harry Sandick & Devon Hercher, "New FCPA Decision Limits DOJ's International Reach," *Business Crimes Bulletin* (May 2020; https://bit.ly/2RYmp5H) (stating that a majority of firms charged with FCPA violations are non-U.S. firms). This trend extends beyond the FCPA to the prosecution of white-collar crime more generally. *See,* Harry Sandick & Jeff Kinkle, "The Global Reach of U.S. Law Enforcement," *N.Y. Law Journal* (Dec. 10, 2018; https://bit.ly/3gwaV3d).

Of late, we have seen this "mission creep" carry over into the arena of trade sanctions, which are enforced by the Treasury Department's Office of Foreign Assets Control (OFAC; https://bit.ly/341yn12). According to OFAC, these programs are meant to advance "U.S. foreign policy and national security goals." One might find it surprising that OFAC regards it as the responsibility of individuals outside of the United States to work to advance the nation's foreign policy and national security goals. And yet that seems to be the case. Indeed, 23 of the 67 settlements and enforcement actions OFAC has brought since May of 2017 — more than one-third of OFAC's announced cases — have targeted non-U.S. companies.

That OFAC would have such a heavy focus on foreign actors is not self-evident from its policy statements. For example, in its website's FAQ section, OFAC addresses the question of "[w]ho must comply with OFAC regulations," and emphasizes that U.S. individuals and entities must comply. (*See*, https://bit.ly/3owNKIl.) It states that U.S. persons and permanent residents must comply with OFAC regulations, as well as "all persons and entities within the United States, all U.S. incorporated entities and their foreign branches." In addition, "foreign subsidiaries owned or controlled by U.S. companies also must comply" with certain sanctions programs. Finally, OFAC states that "[c]ertain programs also require foreign persons in possession of U.S.-origin goods to comply." (*See*, https://bit.ly/3vbb4NG.) Consistent with this, most of the cases that have been brought against non-U.S. entities are brought against those who transact in U.S.-origin goods (such as the 2/26/20 SITA settlement, the 8/24/17 COSL settlement, the 3/7/17 Zhongxing settlement, and the 1/12/17 Aban settlement) or involve non-U.S. financial institutions who interact with U.S. financial institutions for purposes of clearing U.S. dollar transactions (such as the 1/14/21 UBAF settlement and the 9/17/19 BACB settlement).

In recent years, we have seen OFAC take actions against another category of non-U.S. persons — with much more tenuous connections to the United States — under what observers have called a "causing" theory. Under this theory, if a non-U.S. person or business "causes" a U.S. person to violate U.S. sanctions law, it can be liable itself for a violation of U.S. law. 50 U.S.C. §1705(a) ("It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or *cause* a violation of any license, order, regulation, or prohibition issued under this chapter.") (emphasis added). This approach drastically expands the universe of who can potentially run afoul of OFAC.

This theory was first used by OFAC in July 2017 in civil enforcement proceedings against a Singapore telecommunications company, CSE Global Limited, and its subsidiary, CSE TransTel (together, TransTel). Press Release, United States Department of Treasury, Enforcement Information for July 27, 2017 (July 27, 2017) (https://bit.ly/3elx3uB). The government alleged that TransTel installed telecommunications equipment in Iran and that it used a U.S. dollar-denominated account at a non-U.S. bank to make payments in connection with the contract. *Id.* By using a dollar account, the result was to "cause" U.S. financial institutions to process the transactions, in violation of the Iran sanctions program. *Id.* This investigation was resolved by settlement (without TransTel admitting any wrongdoing) and so the legal theory

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behind the charges was never briefed by the parties or decided by a court. *Id*.

While OFAC had in the past charged non-U.S. banks with sanctions violations for engaging in U.S. dollar transactions, this was the first known instance of a non-U.S., non-financial institution being penalized for violating OFAC sanctions. Since the TransTel settlement, we have seen a number of other cases against such non-US persons on this same causing theory.

In July of 2020, OFAC settled with Essentra FZE, a UAE-based cigarette filter and tear tape manufacturer. Essentra FZE exported cigarette filters to North Korea, and received payments for those exports into its bank accounts at the foreign branch of a U.S. bank. This "caused" a U.S. person to violate the North Korea sanctions regime. Later, in January of 2021, OFAC settled with PT Bukit Muria Jaya (BMJ), an Indonesia-based manufacturer of paper products. BMJ exported cigarette paper to North Korea, and directed payments for these exports to a U.S. dollar account at a non-U.S. bank. OFAC alleged that this "caused" U.S. banks to clear wire transfers for the non-U.S. bank related to the exports, and thus violated U.S. sanctions. This was OFAC's conclusion even though BMJ did not use a U.S. bank for its transactions. Most recently, in March of 2021, OFAC settled with Nordgas S.r.l., an Italian gas boiler systems manufacturer. OFAC alleged that Nordgas reexported dozens of shipments of goods from a U.S. company to Iran. While this was an enforcement action premised on a U.S.-origin goods theory, OFAC added a "causing" theory as well. This is notable because the causing theory was not relied upon in other recent U.S.-origin goods cases.

These enforcement actions demonstrate that OFAC now regards the causing theory as a significant weapon in its arsenal of sanctions enforcement, and it may seek to use it to aggressively pursue actors with only tangential connections to the United States. Foreign companies and their counsel should thus familiarize themselves with the contours of this doctrine and the OFAC sanctions programs that their business activities may touch upon. This is no easy task: OFAC currently has approximately 35 different sanctions programs.

The causing theory more broadly is familiar to U.S. criminal defense lawyers. Under 18 U.S.C. §2(b), for example, a person can be held criminally liable if he or she "willfully causes" a criminal act "to be done." This is the sister statute to 18 U.S.C. §2(a), which prohibits the aiding or abetting of the commission of a crime. Some courts have often rejected the use of Section 2 where it would result in non-US persons being charged with a crime that was meant to apply only to U.S. persons. For example, in *United States v. Chalmers*, 474 F.Supp. 2d 555 (S.D.N.Y. 2007), the court rejected the government's aiding and abetting theory of liability and dismissed charges against a Bahamian company that the government contended had aided and abetted a U.S. person in violating 18 U.S.C. §2332d (which prohibits U.S. persons from conducting financial transactions with countries engaged in international terrorism). Similarly, in *United States v. Yakou*, 428 F.3d 241 (D.C. Cir. 2005), the court rejected the use of the aiding and abetting statute to expand the reach of 22 U.S.C. §2778 (which restricts arms exports and imports) to non-U.S. persons.

Two district courts have rejected analogies to *Chalmers* and *Yakou* in the context of the International Emergency Economic Powers Act (IEEPA) and the Iranian Transaction Sanctions Regulations (ITSR), which were promulgated by OFAC pursuant to IEEPA. In *United States v. Zarrab*, 2016 WL 6820737 (S.D.N.Y. Oct. 17, 2016), the court declined to rely on those cases, noting the lack of an explicit textual limitation of IEEPA to U.S. persons. And in *United States v. Tajideen*, 319 F.Supp. 3d 445 (D.D.C. 2018), the court relied on the analysis in *Zarrab* to reach the same conclusion. There is thus some support for OFAC's causing theory, especially in light of the fact that IEEPA and the ITSR do not have an express limitation to U.S. persons.

However, no appellate court has addressed this precise issue to date, leaving the viability of OFAC's approach far from a settled question. And notably, both *Zarrab* and *Tajideen* were decided before the Second Circuit's decision in *United States v. Hoskins*, 905 F.3d 97 (2d Cir. 2018). In *Hoskins*, the Second Circuit made the point that courts should carefully scrutinize the statutory meaning and legislative intent when non-U.S. persons are held responsible for violations of U.S. law based on theories of accomplice liability. *Hoskins* was an FCPA case, and is thus not directly applicable in the OFAC context. Still, it demonstrates that some courts have been willing to clip the government's wings when its theories of extraterritorial jurisdiction become too expansive. Companies and individuals wishing to challenge OFAC's potential overreach might use *Hoskins* as a roadmap to press courts to engage with the statutory text, legislative purpose, and structure of IEEPA to ensure that OFAC's reading of the statute is actually justified.

Apart from the legal questions associated with OFAC's approach, one does wonder whether OFAC should have such a heavy focus on non-U.S. persons. Is it reasonable to expect that people all around the world will follow U.S. law, based on only the thinnest and most indirect of connections to the United States? In addition, this focus will impose substantial uncertainty and compliance costs on companies that have little reason to believe that they would be subject to American jurisdiction, and may also discourage companies from transacting business in dollars, preferring to use a currency that does not carry with it the risk of criminal prosecution in a foreign country. Until there is more litigation or regulatory action to settle these unresolved issues, foreign companies with no presence or affiliation with the United States should be alert that if they are in engaging in transactions with even a remote connection to the United States or its financial institutions, they could draw the attention of OFAC's apparently all-seeing eye.

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