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The long arm of United States sanctions law reaches around the globe

The United States is aggressively pursuing foreign companies that violate its export and sanctions laws. The U.S. is able to target foreign companies through violations of U.S. International Traffic in Arms Regulations, Export Administration Regulations or other U.S. Department of the Treasury Office of Foreign Assets Control (OFAC) regulations governing the export of dual-use or U.S.-originated items. For supply chain managers and compliance officers outside the U.S., understanding export and sanctions law—and the vigor with which they are enforced across borders—is critical to avoiding crippling sanctions and costly legal battles.

Violations of U.S. export and sanctions law can include use of the U.S. financial system to move illicit funds, or the sale of U.S. goods, services, or technology to sanctioned entities or individuals. The U.S. has targeted companies using the U.S. financial system in several Foreign Corrupt Practices Act (FCPA) enforcement actions, including a recent action against a Russian/Uzbek mobile telephone company that resulted in a massive fine.

But from a compliance officer's point of view, the most dangerous way the U.S. extends its jurisdiction is through so-called "secondary sanctions," which prohibit U.S. companies and institutions (e.g., financial and logistics firms) from doing business with a non-U.S. company that engages in activities with sanctioned entities. Secondary sanctions can be imposed even if the business activities do not explicitly violate U.S. export control regulations. Secondary sanctions are traditionally rarely imposed, and are enforced only after weighing a host of factors, including the volume and frequency of transactions, any obfuscation of the true relationship of the transactions, and whether or not the transactions further the malign behavior of the sanctioned party.

"[Secondary sanctions] are an example of U.S. extraterritorial jurisdiction at its most extreme," said Thaddeus McBride, partner at Bass, Berry & Sims PLC. "Even if there is no U.S. actor, no goods or parts of U.S. origin, no direct connection whatsoever, the U.S. wants to nevertheless strongly discourage non-U.S. companies from doing business with [sanctioned entities] by, for example, restricting their access to the U.S. market."

Dangerous lack of transparency

Even if the law is quite clear—don't source from North Korea, for example—it's the lack of transparency across supply chains that can result in enforcement actions.

Under the Countering America's Adversaries Through Sanctions Act (CAATSA), any good or service that uses North Korean labor in any way is also subject to sanctions, as cosmetics firm e.l.f. Cosmetics found out. They had been doing business with a Chinese supplier for five years before the company determined that the Chinese partner was sourcing from North Korea.

CAATSA also imposes sanctions on "persons determined to have knowingly engaged in a significant transaction, on or after the date the Act was enacted, with a person that is part of or operating for or on behalf of the defense or intelligence sectors of the Government of the Russian Federation," as well as any person listed on the Specially Designated Nationals List compiled by OFAC.

The risk of unknowingly violating U.S. law is highlighted by the case of Cobham Holdings Inc. The company did

business with a Ukrainian entity, Almaz–Antey Telecommunications LLC, through a subsidiary, Aeroflex/Metelics Inc. The telecommunications company was 51 percent owned by joint-stock company concern Almaz–Antey, which OFAC had blocked and added to the Specially Designated Nationals List on July 16, 2014, two weeks before Aeroflex/Metelics delivered a shipment of goods to Almaz–Antey Telecommunications.

Cobham and Aeroflex/Metelics had conducted several checks against OFAC’s list using third-party software, but nothing popped up—despite the fact that the name of the sanctioned entity closely resembled the company they were doing business with. When Cobham found out they were violating U.S. sanction law, the company voluntarily self-reported and informed OFAC that they had a compliance program and checks in place, but that those checks had failed.

OFAC took those facts into account but still levied a fine of USD 87,507. Part of the agreement between OFAC and Cobham was that Cobham would find more effective screening software to vet partners in the future.

“The ambiguity of the procedures for determining who should be sanctioned furthers the objectives of the U.S. government,” said Erich Ferrari, a sanctions lawyer at Ferrari & Associates. “[The U.S. Treasury Department] wants you to fear the possibility of sanctions. The fear is what makes a compliance officer err on the side of caution.”

Aggressive pursuit

The current U.S. administration has been aggressively enforcing secondary sanctions when the opportunity arises, and has made the sanctions regimes against Iran, North Korea, Venezuela and other entities around the globe a central part of its international policies.

In its most recent actions, the U.S. designated Evrofinance Mosnarbank, a Russian commercial bank, as a prohibited party due to alleged affiliation with Petróleos de Venezuela, S.A., a Venezuelan oil and natural gas company the U.S. recently imposed sanctions against. In February, the Treasury Department announced a USD 5.5 million penalty against a U.S. chemical company based on violations of U.S. sanctions on Cuba committed by the company’s German subsidiary.

“From my perspective, all of these examples and others show how important it is for non-U.S. companies to understand when they may be subject to U.S. law, even when engaging in activities entirely outside the United States,” McBride said. “Failure to understand how far U.S. jurisdiction extends can lead to very significant penalties.”

Takeaways

- The United States will vigorously enforce sanctions against non-U.S. companies that do business with sanctioned entities in order to achieve its national security aims.
- Companies must be aware of U.S. sanctions law and how it applies to their business, to their partners, and to the vendors and suppliers within their global supply chains, or risk serious fines and other penalties.

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