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Americans abroad: Compliance with the US sanctions law facilitation principle

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On November 5, 2018, the United States fully reimposed sanctions on Iran that had been lifted or waived under the Obama-era Joint Comprehensive Plan of Action. This action by the US, together with changes to the Specially Designated Nationals List and the sanctioning of hundreds of additional persons, entities, aircraft, and vessels reminds us of the need to keep up with current laws and regulations regarding US sanctions. This is especially important with the rapidly moving foreign policy changes by the US government. Still, despite these fluid times, some principles in US sanctions law remain. One of these principles is that under almost all sanctions regimes, US persons (e.g., US citizens, permanent US residents, any person in the US, or entities organized under the laws of the US)^[1] are prohibited from “facilitating” prohibited transactions, no matter where they are located.

This holds true regardless of whether a US person’s employer is subject to US law. Indeed, when a US person’s employer is not subject to US law, a situation arises where it may become illegal for the US person to do what is perfectly legal for their non-US employer to do. It is no defense to US persons that they are located outside the US or that their employer is not subject to US law. It always remains unlawful for US persons to provide support to or assist foreign persons in transactions that are prohibited by US sanctions law.

Defining facilitation

The definition of “facilitating” a prohibited transaction has historically been opaque – at best. For years, the dearth of case law or legislative guidance on what constitutes improper facilitation has caused confusion and concern among the many US citizens working at non-US companies. Still, following a number of high-profile prosecutions by the Office of Foreign Assets Control (OFAC) over the last ten years, it is clear that foreign-based Americans must stay diligent to ensure that they comply with US law. Therefore, US persons and their non-US employers must understand the boundaries that have been set in addressing what constitutes (and what does not constitute) a violation of the prohibition against facilitation under US sanctions law.

What is facilitation?

The Supreme Court has held that in criminal statutes, the word *facilitate* is synonymous with aid, abet, and assist,^[2] and the Second Circuit has cited Black’s Law Dictionary defining *facilitation* as “in criminal law, the act of making it easier for another person to commit a crime.”^[3] Unfortunately, under US sanctions law there are no cases, statutes, regulations, or OFAC enforcement actions that provide a uniform definition of facilitation. But one can find some guidance on how US authorities might interpret the prohibition on facilitation by looking at the former Sudanese sanctions regulations.^[4] For example, these regulations explained that facilitating a prohibited transaction with Sudan would include US persons engaging in business and legal planning; decision

making; designing, ordering, or transporting goods; financial, insurance, and other risks; or for US persons to refer to foreign persons purchase orders, requests for bids, or similar business opportunities involving the government of Sudan. Although not exhaustive, these prohibited activities can provide a good frame of reference.

What is *not* facilitation?

Similarly, the former Sudanese regulations explained that activity of a purely clerical or reporting nature that does not further trade with a sanctioned party is not considered facilitation, including reporting on the results of a subsidiary's trade with a sanctioned country. In addition to the former Sudanese regulations, there are sometimes express exceptions to the facilitation prohibition listed in applicable regulations or legislation. Typically, US lawyers are permitted to advise their foreign employers on US law when their company is working on a transaction with a sanctioned party. But the lawyer must be cautious; this work is normally limited to providing advice on the transaction's compliance with US sanctions regimes (i.e., does the transaction, on its own, violate US law). The same US lawyer cannot negotiate the terms of the contract pursuant to the transaction or provide advice on how to structure the transaction with the sanctioned party, because that would amount to an improper facilitation of the prohibited transaction. US sanctions law is not uniform in its language, and each set of regulations stands on its own. The Iranian Transactions and Sanctions Regulations provide that they are "separate from, and independent of" other sanctions regulations.^[5] Still, when looking for some form of general guidance on US sanctions law, prosecutors would be hard pressed to explain a reasonable basis for rejecting a US person's reliance on the above examples when a US person is seeking to comply with sanctions regulations that prohibit facilitation, but do not provide a definition of the word.

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