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.

[1]
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, 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.” 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. 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.

Prohibition on changing operating policies and procedures

In an effort to prevent US companies from circumventing sanctions by simply referring prohibited transactions for approval to their non-US employees of affiliates, many US sanctions schemes expressly prohibit these companies from altering their operating policies or procedures to allow prohibited transactions.[6] Although this prohibition is limited to US persons, non-US companies with US employees should keep this prohibition in mind when setting up their policies and procedures to ensure that they and their employees do not run afoul of US sanctions law. Best practice suggests that non-US companies may want to review and revise their policies and procedures in the normal course of business to address this concern, instead of waiting until a particular transaction arises that may be in conflict with US law.

For example, if a US employee is the sole person with authority to approve contracts in a non-US company, can they simply recuse themselves when a contract with a sanctioned party is at issue? Although it is true that the
prohibition on altering policies is limited to US persons, a tenuous argument could be made that the US employee in this scenario would be altering their company’s policy in violation of US law. However, if a US employee and a non-US employee have joint responsibility for approving contracts, then it may be permissible for the US employee to simply recuse themselves, because the company’s policy would not be altered to allow the transaction to occur. Commentators have voiced the potential conflict between this rule and the purported intention of sanctions law, but for purposes of providing practitioners with guidance on the law, it is enough to suggest that international companies should consider this US sanctions law obligation when setting up their policies and procedures.

Penalties

Historically, OFAC tends to limit criminal prosecutions for sanctions violations to willful violations, meaning that you must be aware that what you were doing was unlawful. Also, the lack of case law would suggest that most criminal sanctions investigations resolve themselves in the form of consent decrees or other settlements with the applicable authorities. But as Secretary of the Treasury Steven Mnuchin said with respect to the reimposition of the sanctions on Iran: “We are sending a very clear message with our maximum pressure campaign that the US intends to aggressively enforce our sanctions.” Moreover, OFAC will frequently pursue civil penalties against any US person who knew, or should have known, that they were engaging in illegal action.

Therefore, all foreign companies should be on notice that a US employee’s involvement in a proscribed transaction can result in a violation and the resultant pursuit of criminal or large civil penalties by the US government. The simple fact that a company is under investigation for potential US sanctions violations can, on its own, create huge reputational damage and business disruptions for the subject company. This is not limited to legal fees. Once it becomes public that a company is under investigation, a knock-on effect can occur with business partners who must satisfy themselves that by continuing their business with your company, they are not subjecting themselves to risk. This can lead to intense scrutiny and enhanced due diligence requirements for the investigated company, sometimes limiting its ability to obtain financing, supplies, licenses, etc. On its own, this is often enough to bring US and non-US companies to the table with the authorities.
Conclusion

In an ideal world, US sanctions law would uniformly define and provide clear guidance on what conduct constitutes illegal facilitation of a prohibited transaction. Unfortunately, this does not exist. Nevertheless, from a broad view on the jurisprudence to date, some basic concepts can be established:

1. US persons should stay away from business decisions, negotiations, and execution of transactions with sanctioned parties;

2. Foreign companies with US employees should carefully review and properly structure their policies and procedures to take into account US sanctions law before any specific transaction with a sanctioned party arises; and

3. US persons should recognize that there is at least some historical and legislative guidance with respect to what constitutes the illegal facilitation of prohibited transactions under US sanctions law.

Takeaways

- US persons cannot facilitate transactions prohibited by US sanctions law, regardless of where they are located or whether their company is subject to US law.

- There is no uniform definition of facilitation under US sanctions law, but guidance can be ascertained.

- Purely clerical or reporting activity that does not further trade with a sanctioned party is usually not considered facilitation.

- US companies cannot simply change their policies and procedures to allow their foreign employees or affiliates to approve otherwise prohibited transactions.

- Foreign companies with US employees should review their policies and procedures to ensure compliance with US sanctions law.
1 See definition in Iranian regulations 31 C.F.R. § 560.314
3 United States v. Desposito, 704 F.3d 221 (2d Cir 2013)
4 31 C.F.R. §538.407
5 31 C.F.R. § 560.101
6 31 C.F.R. § 560.417, 31 C.F.R. § 538.407(c)