



Texas District Court Vacates \$2 Million OFAC Penalty Against EXXON

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On December 31, 2019, the Court in the Northern District of Texas vacated the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) \$2 million penalty against Exxon Mobil Corporation (Exxon). In its Order, the Court concluded that Plaintiffs, Exxon, lacked fair notice that their conduct was prohibited. Although we would expect OFAC to appeal the decision, the Order remains significant because: (1) it calls for greater transparency from OFAC with respect to establishing prohibited activity; (2) reinforces the need for open dialogue between the private and government sectors to timely address nuances of increasingly complicated sanctions programs; and (3) encourages U.S. businesses to challenge OFAC's decisions where appropriate.

OFAC imposed the \$2 million penalty against Exxon for violations of the U.S. sanctions targeting Russia/the Ukraine. In its published penalty notice, OFAC found that:

between on or about May 14, 2014 and on or about May 23, 2014, ExxonMobil violated §589.201 of the Ukraine Related Sanctions Regulations when the presidents of its U.S. subsidiaries dealt in services of an individual whose property and interests in property were blocked, namely, by signing eight legal documents related to oil and gas projects in Russia with Igor Sechin . . .

OFAC took the position that Sechin—a Specially Designated National (SDN)—cannot be the negotiator or signatory to a contract with a U.S. Person because that activity would constitute a provision of a prohibited service to a U.S. Person. In determining to vacate the penalty, the Court found that OFAC had not provided fair notice as to this nuance.

Background on the transactions leading to the imposition of an OFAC penalty

Exxon is a publicly traded oil-and-gas company that includes, in relevant part, two subsidiary companies. Exxon has done business with Russia, including with Rosneft (not a prohibited entity) for over twenty years. Following the imposition of the sanctions targeting certain persons in Russia in 2014, this permissible business did not halt. Exxon proceeded to execute eight contracts with Rosneft. Sechin, as a representative of Rosneft, signed each of these eight contracts on May 23, 2014.

Background on the sanctions regulations targeting Igor Sechin

On March 6, 2014, President Obama issued Executive Order 13660, which declared that the “actions and policies . . . who have asserted government authority in the Crimea Region without the authorization of the Government of Ukraine . . . constitute an unusual and extraordinary threat to the national security policy of the United States.” Subsequently, President Obama expanded Executive Order 13660 through the issuance of Executive Order 13661, which found that “the actions and policies of the Government of the Russian Federation with respect to Ukraine” were also a threat to the United States.

Executive Order 13661 authorizes the Secretary of the Treasury to promulgate regulations, as well as to designate individuals and entities as SDNs whose property would be “blocked” based on their ties to the Russian government. Under Section 1 of the Order, “blocked” property that is “within the possession or control” of any US person cannot “be transferred, paid, exported, withdrawn, or otherwise dealt in” by these individuals or entities. One day after the issuance of Executive Order 13661, the White House Office of the Press Secretary released a “Fact Sheet” on the Ukraine-related sanctions, which indicated: “Our current focus is to identify these individuals and target their personal assets, but not companies that they may manage on behalf of the Russian State.”

On April 28, 2014, OFAC designated Igor Sechin as an SDN pursuant to Executive Order 13661. Sechin is the President and Chairman of the Management Board of Rosneft. In announcing Sechin’s designation, OFAC also noted that Rosneft “had not been sanctioned.” On the same day, the White House Office of the Press Secretary released a transcript of a conference call, which stated, “We are imposing sanctions on Sechin . . . individually.” Similarly, in an interview with *PBS NewsHour*, the White House Deputy National Security Advisor stated that “U.S. companies will not be able to do business with designated individuals in their individual capacities.” Further, the Advisor noted that Rosneft was not designated—Sechin “was in his individual capacity,” but the Advisor had already seen “an impact on the company itself.” Several major news outlets echoed this individual-capacity distinction.

On May 14, 2014, OFAC issued the Ukraine-related sanctions regulations pursuant to Executive Orders 13660 and 13661.

Exxon’s Alleged Violations of the Regulations:

On July 22, 2014, OFAC issued an administrative subpoena to Exxon based on OFAC’s reason to believe that Exxon violated the Regulations. On August 13, 2014, OFAC published Frequently Asked Questions (FAQs) 398 and 400. In FAQ 398, OFAC clarified that an entity controlled by a blocked person is not automatically blocked, but OFAC may nevertheless choose to designate such an entity. FAQ 400 reiterates that “OFAC sanctions generally prohibit transactions involving, directly or indirectly, a blocked person . . . even if the blocked person is acting on behalf of a non-blocked entity. Though the guidance came *after* Exxon’s alleged violations, FAQ 285, published in 2013, contained similar statements, albeit with respect to a different sanctions program. FAQ 285 stated:

Q: If a Burmese Government minister is an SDN, how does that impact the ministry he leads?

A: U.S. persons should . . . be cautious in dealings with the ministry to ensure that they are not, for example entering into any contracts that are signed by the SDN.

Among other relevant FAQs cited by Exxon in the proceedings, OFAC published FAQ 3 in 2006, which included the caveat that “because each sanctions program is based on different foreign policy and national security goals, prohibitions may vary between programs.”

In June of 2015, OFAC issued a Prepenalty Notice (PPN) to Exxon based on its execution of the eight contracts—alleged violations of the Regulations. The PPN proposed a penalty of \$2,000,000. After Exxon responded to the PPN and presented its defense to OFAC in person, OFAC published its Penalty Notice, which imposed a civil penalty of \$2,000,000. On the same day, Exxon filed suit.

Exxon challenged OFAC’s penalty decision on three grounds including that there was a lack of fair notice in violation of the Due Process Clause of the Fifth Amendment. Because the Court agrees that OFAC failed to provide fair notice

and vacates the penalty on this ground, the Court declined to address the remaining grounds set forth in Exxon’s motion.

Although the Court considered Exxon’s failure to seek guidance from OFAC to be a relevant factor in its fair-notice analysis, the Court found that burden of providing fair notice remains with the agency—not the regulated party. Fair notice requires that the agency have stated with ascertainable certainty what is meant by the standards it has promulgated. Exxon claimed that because FAQ 285 was specific to the Burma sanctions program, and did not pertain to the Ukraine-related Regulations of 2014, “is plainly inapposite here.” “OFAC, however, claimed that it is relevant for the interpretation of a later sanctions program corresponding to an executive order that is identical in material respects. The Court disagreed and concluded that FAQ 285 does not provide fair notice of the Government’s interpretation of the Regulations.”

Although we expect this this decision to be appealed by OFAC, it sets precedent and remains a significant case in light of the so few businesses that challenge OFAC decisions. The Court’s reference to the need to consult with OFAC also is significant because license applications and requests for guidance—except in limited circumstances—can remain pending for 12 months or longer.

If you have any questions about this case or OFAC sanctions programs in general, please do not hesitate to contact the authors or relevant professionals below.

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