

U.S. District Court Vacates \$2 Million Penalty Imposed by OFAC on Exxon Mobil

Overview

On December 31, 2019, the U.S. District Court for the Northern District of Texas issued a decision vacating a \$2 million penalty that had been imposed by the U.S. Treasury Department's Office of Foreign Asset Control ("OFAC") on Exxon Mobil Corporation (a U.S. company) and certain affiliates (collectively, "Exxon").¹ The basis for the decision was that Exxon had not received fair notice that the penalized conduct was prohibited, in violation of the Due Process Clause of the Fifth Amendment.

OFAC had penalized Exxon for entering into contracts with Rosneft, the Russian oil company. Although Rosneft was not a sanctioned entity, the contracts were signed on behalf of Rosneft by Igor Sechin, a sanctioned individual. The issue was whether Exxon had received fair notice that a U.S. company was prohibited from entering into a contract with a non-sanctioned company where the company's signatory was a sanctioned individual. The court ruled that Exxon had not received fair notice of the prohibition, and vacated the penalty imposed by OFAC. Going forward, however, U.S. companies are on notice that such activity is prohibited.

The Ukraine/Russia Sanctions

In March 2014, in reaction to the Russian government's assertion of authority over Crimea, the Obama Administration issued two Executive Orders (E.O. 13660 and 13661) imposing economic sanctions on persons and entities contributing to the situation in the Ukraine.² The Executive Orders authorized the Treasury Department to designate individuals and entities for inclusion on OFAC's list of Specially Designated Nationals and Blocked Persons ("SDNs").³ Such designation results in the immediate blocking of property and interests in property of the designee in the United States or in the

¹ *Exxon Mobil Corp. v. Mnuchin*, No. 3:17-CV-1930-B, 2019 U.S. Dist. LEXIS 222825 (N.D. Tex. Dec. 31, 2019).

² Exec. Order No. 13660, 79 Fed. Reg. 13,493 (Mar. 6, 2014); Exec. Order No. 13661, 79 Fed. Reg. 15,535 (Mar. 16, 2014).

³ Exec. Order No. 13660, Sec. 1; Exec. Order No. 13661, Sec. 1.

possession, custody, or control of a U.S. person.⁴ Moreover, among other prohibitions, a U.S. person may not receive services from an SDN.⁵

In conjunction with E.O. 13661, the White House Office of the Press Secretary released a “Fact Sheet” that stated: “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.*”⁶ The same office issued a “Background Briefing by Senior Administration Officials on Ukraine,” which stated: “[O]ur current focus is to identify these cronies of the Russian government and target their personal assets and wealth, *rather than the business entities and industries they may manage or oversee.*”⁷

About a month later, in April 2014, pursuant to E.O. 13661, OFAC placed Igor Sechin, the CEO and Chairman of the Management Board of Rosneft, on the SDN list. In announcing the sanctions on Sechin, the Treasury Department pointed out that “Rosneft is a state-owned company and has not been sanctioned,” but that transactions by U.S. persons “involving” Sechin or other SDNs were “generally prohibited.”⁸

On May 14, 2014, OFAC issued regulations that further implemented the Executive Orders.⁹

The Alleged Violation of the Sanctions

On May 23, 2014, Exxon executed eight contracts with Rosneft. Exxon had been doing business in Russia, including with Rosneft, for over twenty years. Sechin signed each contract as Rosneft’s representative.

In July 2014, OFAC issued an administrative subpoena to Exxon, seeking information about the contracts with Rosneft.

⁴ OFAC defines “United States person” as “any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.” Exec. Order. No. 13661, Sec. 6(c).

⁵ *Id.*, Sec. 4.

⁶ The White House, Office of the Press Secretary, Fact Sheet: Ukraine-Related Sanctions (Mar. 17, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/03/17/fact-sheet-ukraine-related-sanctions> (emphasis added).

⁷ The White House, Office of the Press Secretary, Background Briefing by Senior Administration Officials on Ukraine (Mar. 17, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/03/17/background-briefing-senior-administration-officials-ukraine> (“Background Briefing”) (emphasis added).

⁸ U.S. Dept. of Treas., Announcement of Additional Treasury Sanctions on Russian Government Officials and Entities (Apr. 28, 2014), <https://www.treasury.gov/press-center/press-releases/Pages/j12369.aspx>.

⁹ 31 C.F.R. § 589.201.

In August 2014, OFAC published FAQs 398 and 400 in connection with the Ukraine sanctions. FAQ No. 398 explained that “persons should be cautious in dealings with ... a non-blocked entity to ensure that they are not, for example, dealing with a blocked person representing the non-blocked entity, such as entering into a contract that is signed by a blocked person.”¹⁰ FAQ 400 cautioned 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 ... U.S. persons may not, for example, enter into contracts that are signed by a blocked individual.”¹¹

In July 2017, OFAC issued a Penalty Notice against Exxon, imposing a civil penalty of \$2 million.

The Litigation

Exxon promptly filed a lawsuit in the U.S. District Court for the Northern District of Texas against OFAC and officials of the Treasury Department, challenging the penalty.¹² Exxon asserted several grounds for vacating the penalty, including that it had lacked fair notice that its conduct was prohibited, in violation of the Due Process Clause of the Fifth Amendment.

The court’s analysis of the Due Process issue revolved primarily around two factors: (1) the text of the regulations, and (2) public statements made by officials of the U.S. government. The court also addressed Exxon’s failure to seek guidance from OFAC before signing the contracts.

(1) The Text of the Regulations

The court first considered whether the text of the regulations gave Exxon fair notice that the conduct was prohibited. E.O. 13661 authorizes the Treasury Secretary to promulgate regulations relating to Russia’s activities with respect to Crimea, and to designate as SDNs persons and entities involved in those activities. E.O. 13661 prohibits “the receipt [by U.S. persons] of any contribution or provision of . . . services” from such an SDN.¹³

The regulations incorporate the prohibitions of E.O. 13661. They also define “property” and “property interest” broadly, to include “services of any nature whatsoever [and] contracts of any nature whatsoever”¹⁴

¹⁰ OFAC FAQ No. 398.

¹¹ OFAC FAQ No. 400.

¹² *Exxon Mobil Corp. v. Mnuchin, et al.*, No. 3:17-CV-1930-B.

¹³ Exec. Order No. 13661, Sec. 4(b).

¹⁴ 31 C.F.R. §§ 589.308.

The court found that E.O. 13661 unambiguously prohibited a U.S. person from receiving “services” from an SDN. The court then examined whether Sechin’s signing of the contracts constituted a service received by Exxon. The court noted that Black’s Law Dictionary defines “service” as labor performed in the interest of others, and that Sechin’s act of signing was performed in the interest of Rosneft. The crucial question was whether Sechin’s act of signing was also performed in the interest of Exxon, and was therefore a service received by Exxon. The court concluded that the answer was unclear, because the regulations do not address what constitutes a “receipt” of services.

The court also noted that OFAC’s “50% Rule,” which provides that an entity owned 50% or more by one or more SDNs is itself deemed an SDN, would apply to any company in which Sechin held a 50% or greater interest. But Sechin did not own 50% or more of Rosneft, so the 50% Rule did not provide fair notice.

The court concluded that the text of the regulations was insufficiently clear that the conduct was prohibited, and therefore did not provide Exxon with fair notice that entering into a contract signed by Sechin on behalf of Rosneft would violate the regulations.

(2) The U.S. Government’s Public Statements

Next, the court examined the public statements issued by the Executive Branch of the U.S. government. The court concluded that the various statements were not consistent with each other, and that certain statements (including the White House Fact Sheet and Background Briefing) suggested that the conduct at issue was not prohibited. The court ruled that a regulated party, in good faith, could rely on statements issued by the Executive Branch, even if not issued by OFAC.

The court also noted that, while OFAC had published FAQs 398 and 400, which clarified that the conduct at issue was prohibited, this was *after* Exxon had entered into the contracts, and therefore did not provide fair notice at the relevant time.

OFAC argued that a different FAQ, published in 2013, was sufficient to provide Exxon with fair notice. That FAQ was published in connection with sanctions against Burmese government officials. It addressed the question of the effect on a Burmese government ministry of SDN designation of the minister who heads it, and explained that 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.”¹⁵ The court rejected OFAC’s argument that this FAQ provided Exxon with fair notice. Both the Burma regulations and the Ukraine regulations expressly state that “Differing foreign policy

¹⁵ OFAC FAQ No. 285 (this FAQ is no longer on OFAC’s website because the Burma sanctions are no longer in effect, *see* 31 C.F.R. § 537 (2017); *see also* Removal of Burma Sanctions Regulations, 82 Fed. Reg. 27,613-01 (June 16, 2017)).

and national security circumstances may result in differing interpretations of similar language among the parts of this chapter.”¹⁶ The court held that “[b]y including such a disclaimer in both the Burma and Ukraine sanctions regulations, OFAC forfeited its right to claim that the interpretation of the former provided fair notice of its interpretation of the latter.”¹⁷

(3) Exxon’s failure to seek guidance from OFAC before proceeding with its transactions

The court considered Exxon’s failure to seek guidance from OFAC as to the legality of the proposed transactions with Sechin to be a “relevant factor” in assessing whether there was fair notice. The court observed that “Exxon’s decision to proceed with the contracts absent guidance from OFAC was risky—and perhaps imprudent,” but concluded that OFAC had not met its burden of proving fair notice.¹⁸

Conclusion

The *Exxon* decision serves as a rebuke to OFAC, which has been criticized for being opaque in its pronouncements. Perhaps the decision will lead to greater transparency on the part of the agency. As for U.S. companies, any situation in which an SDN plays a role is fraught with risk. Such situations should be carefully vetted by experienced counsel.

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¹⁶ See 31 C.F.R., § 589.101 (Ukraine); 31 C.F.R. § 537.101 (2017) (Burma).

¹⁷ *Exxon*, 2019 U.S. Dist. LEXIS 222825, at *37.

¹⁸ *Id.* at *50.

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