

## CLIENT ALERT

### District Court Overturns OFAC's \$2 Million Fine Against Exxon Mobil

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On December 31, 2019, a federal district court in Texas (the "District Court, or "Court") overturned a \$2 million fine levied by the Office of Foreign Assets Control ("OFAC") against Exxon Mobil Corporation ("Exxon") for alleged violations of the Ukraine-Related Sanctions Regulations ("URSR"). OFAC had assessed that Exxon received a prohibited service from a designated person when it allowed Igor Sechin, a Specially Designated National ("SDN"), to sign eight contracts with Exxon in his official capacity as the President and Chairman of the Board of Russian state-owned oil company Rosneft, which was not itself designated as an SDN. The case ultimately turned on the narrow question of whether Exxon had received fair notice that it was prohibited for U.S. persons like Exxon to deal with companies that are not designated by engaging with designated persons acting in their capacity as officials of the non-designated company. While the Court concluded that Exxon did not receive that notice, thereby overturning OFAC's penalty, OFAC now has clarified its position on this issue through guidance issued after Exxon's contested actions, limiting the ultimate significance of the substantive aspects of the decision. The Court's decision could, however, have potential collateral effects on OFAC's and other Administration official's willingness to offer contemporaneous statements about the scope and meaning of recently issued sanctions.

#### Background

OFAC designated Sechin on April 28, 2014 pursuant to Executive Order 13661 of March 16, 2014 ("EO 13661"). As a result, all of Sechin's "property and interests in property" in the United States or within the possession or control of any U.S. person were "blocked," and prohibited from being "transferred, paid, exported, withdrawn, or otherwise dealt in." EO 13661, § 1. These prohibitions in section 1 included "the receipt of any contribution or provision of ... services from any [designated] person." *Id.* at § 4.

Sechin signed the eight contracts for Rosneft between roughly May 14 and May 23, 2014 ("Exxon Contracts"). On August 13, 2014, OFAC issued frequently-asked-question ("FAQ") 400, explaining that "OFAC sanctions generally prohibit transactions involving, directly or indirectly, a blocked person, absent authorization from OFAC, even if the blocked person is acting on behalf of a non-blocked entity. Therefore, U.S. persons should be careful when conducting business with non-blocked entities in which blocked individuals are involved; U.S. persons may not, for example, enter into contracts that are signed by a blocked individual." OFAC, FAQ 400, August 13, 2014.

On July 20, 2017, OFAC announced that it had assessed a \$2 million civil penalty against Exxon for accepting the eight Exxon Contracts signed by Sechin.

## The District Court's Decision

The District Court agreed with Exxon's argument, on cross motions for summary judgment, that OFAC violated Exxon's constitutional right to Due Process by failing to provide fair notice that entering into the Exxon Contracts signed by Sechin was prohibited.

First, the Court held the text of the applicable OFAC regulations failed to provide fair notice that Exxon's conduct was prohibited. Although it determined that the applicable regulations prohibited the receipt of services from an SDN like Sechin, it held that they were not clear about when Exxon would be deemed to have received such a service. In particular, the Court found that the rules were not clear about whether an action by an SDN that provides any incidental benefit to a U.S. person, as it found Sechin's signing of the contracts had provided for Exxon, constituted "receipt," or instead whether the service must have been undertaken specifically for the benefit of the U.S. person, which it found had not been true because Sechin acted in response to instructions from Rosneft.

Second, after finding that the text of the regulation did not provide fair notice, the Court considered the impact of public guidance and statements from OFAC and other Executive branch officials, and found that these also failed to provide fair notice. The Court reasoned that OFAC could not rely on a previous FAQ from its Burma sanctions (FAQ 285) articulating its position that U.S. persons could have no dealings with the designated head of an undesignated entity, because OFAC's Russia sanctions regulations specifically stated that "differing foreign policy and national security circumstances may result in different interpretations of similar language among the parts of this chapter."

Exxon and the Government also argued over the significance of a number of statements by executive branch officials regarding the Russia sanctions program and the specific designation of Sechin. Exxon pointed to statements by White House spokespersons and other Executive Branch officials, including but not limited to Treasury Department officials, that the designations were intended to target specific Russian persons and their personal assets and not companies they manage on behalf of the Russian state. While the government argued that none of these public statements changed the plain meaning of the relevant regulations, the Court concluded that a "regulated party," such as Exxon, would be "entirely justified to rely in good faith" upon these publicly released statements. The confusion generated by these statements therefore created a further lack of fair notice. (By contrast, the Court held that Exxon could not rely on media characterizations of the regulation based on interviews with unnamed Treasury officials, or on a comment by the White House Deputy National Security Advisor in a PBS NewsHour interview.)

Finally, the Court considered Exxon's failure to inquire as to the meaning of the applicable regulations as a point against its argument that it lacked fair notice. Ultimately, however, the Court held that the burden remains with the government agency to provide fair notice and that the other evidence that it had not done so weighed in favor of a finding that there had not been fair notice.

## Practical Considerations

OFAC usually wins challenges to its sanctions, and this decision is noteworthy because it did not do so here. Overall, however, the significance of the decision for the particular interpretive question at issue appears limited. The District Court did not determine that OFAC could not interpret its regulations to prohibit Exxon's conduct, only that it had not made such a prohibition

clear at the time that Exxon took its actions. OFAC has addressed this issue going forward, at least with respect to its Russia sanctions, with FAQ 400 and a related FAQ 398.

Unless OFAC chooses to appeal the decision, its real impact is more likely to be broader and more practical. Going forward, OFAC and other Executive branch agencies may be less willing to provide commentary on the meaning of OFAC sanctions regulations outside of carefully-vetted guidance such as OFAC's FAQs, or formally requested interpretive guidance. To the extent possible, the agency may also seek to ensure other administration officials do not opine on the scope or meaning of OFAC's regulations without a similar level of careful vetting. The agency may take greater care in FAQs and other formal guidance to explain the scope of its interpretations across its programs. Retrospectively, the agency may look for dated guidance that might be read to contradict its current interpretations and seek to amend or withdraw such guidance. Finally, it is possible that OFAC may heighten its scrutiny of proposed penalties before imposing them, and in particular may be more hesitant to impose a penalty where a regulated party can point to published guidance or remarks that contradict the agency's position. Regulated parties facing potential violations may wish to draw such contradictory guidance to OFAC's attention where it exists in an effort to mitigate potential penalties. In general, however, this decision does not substantially change or limit OFAC's authority to broadly interpret the breadth of the sanctions regulations it is tasked with enforcing.

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