

## Government Contracts Advisory

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### ***Holding U.S. Companies Liable for the Actions of Their Foreign Subsidiaries: An Analysis of the Varying Standards of Liability Under OFAC Administered Sanctions Programs***

Functioning more like a high-stakes game of pin-the-tail-on-the-donkey than a coherent and comprehensible set of regulations, Office of Foreign Assets Control (OFAC) sanctions programs present U.S. companies with the undesirable task of predicting when they will be held liable for the actions of their foreign subsidiaries.<sup>1</sup> Recent litigation has made it clear that U.S. companies cannot avoid liability by turning a blind eye to the actions of their foreign subsidiaries. Regardless of the jurisdictional reach of each country-specific sanctions program, OFAC has made it clear that a U.S. company will be subject to civil or criminal penalties of up to \$250,000 or twice the value of the transaction (whichever is higher), if it, at the very least, *facilitates* the actions of a foreign subsidiary that run counter to OFAC prohibitions.<sup>2</sup> To the chagrin of U.S. companies, OFAC definitions of "facilitation" are not even consistent in their inconsistencies. This advisory will first describe the OFAC country-specific programs and then trace the varying levels of coverage these programs prescribe over the actions of foreign subsidiaries of U.S. companies.

The extent to which U.S. sanction programs regulate the foreign subsidiaries of U.S. parent companies depends, in part, on the statutory basis of each program. U.S. sanctions programs derive their authority from either the Trading with the Enemy Act (TWEA) or the International Emergency Economic Powers Act (IEEPA). The sanctions programs against Cuba and North Korea are based on TWEA statutory authority. Likewise, the IEEPA provides statutory authority for the programs against the Balkans, Belarus, Burma, Ivory Coast, Democratic Republic of the Congo, Iran, Liberia, Sudan, Syria and Zimbabwe. For each program, there is a separate set of country-specific regulations administered by OFAC. Accordingly, each program's jurisdictional coverage over U.S. companies and their foreign subsidiaries is set forth in OFAC's country-specific regulations.<sup>3</sup>

#### **TWEA-Based Sanctions Programs**

TWEA and IEEPA sanctions programs differ in their jurisdictional reach over the foreign subsidiaries of U.S. companies. In general, one can safely say that TWEA-based sanctions programs cover the actions of foreign subsidiaries of U.S. companies. First, the actual text of TWEA grants the President authority over "any person, or with respect to any property, subject to the jurisdiction of the United States."<sup>4</sup> The courts have broadly construed this provision to give OFAC nearly complete deference in applying it.<sup>5</sup>

The country-specific regulations over Cuba (Cuban Asset Control Regulations or CACRs) and North Korea (North Korean Asset Control Regulations or NKACRs) set forth equally expansive language. The CACRs - whose jurisdictional language is entirely mirrored in the NKACRs - state that a "person subject to the jurisdiction of the United States" includes not only foreign branches of U.S. companies but also any "owned or controlled" foreign subsidiaries, wherever incorporated.<sup>6</sup> The concepts of ownership and control are not further defined in the regulations, but OFAC has taken the position that a wholly or majority-owned foreign subsidiary is covered by the regulations.<sup>7</sup> Moreover, OFAC has determined that sufficient control exists over a foreign subsidiary when the U.S. company enters into a joint-venture/management agreement or gains the right to name senior management or board members.<sup>8</sup>

As to their specific prohibitions, the CACRs generally bar the exporting and importing of goods, services

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and technology to or from Cuba or Cuban entities/persons.<sup>9</sup> In addition, the CACRs require U.S. persons to "block" or "freeze" any property owned by Cuba or Cuban nationals.<sup>10</sup> These broad prohibitions would cover, for instance, the buying of a Cuban cigar in a foreign country.<sup>11</sup> OFAC has also indicated that the CACRs would prohibit a foreign subsidiary from carrying out a transaction with another foreign company that would hypothetically take place only after the lifting of the U.S. embargo on Cuba.<sup>12</sup> One commentator has mockingly noted that OFAC would likely prevent a McDonald's franchise in Europe from selling cheeseburgers and fries to Cuban nationals.<sup>13</sup>

Even though parallel jurisdictional coverage exists in the NKACRs, their substantive prohibitions are much less encompassing. In general, the NKACRs prohibit the *importation* of goods or services of North Korean origin into the United States either directly or through a third country, without the prior notification to and approval by OFAC.<sup>14</sup> The June 19, 2000 amendments to the Foreign Asset Control Regulations ended the ban on *exports* to North Korea, provided that those exports or re-exports are licensed or authorized by the Department of Commerce.<sup>15</sup>

Because OFAC provides only minimal descriptions of its enforcement actions, it is difficult to determine exactly when a company's actions will violate a specific sanctions program. OFAC has made available a few of its TWEA-based enforcement actions involving foreign subsidiaries. In 2007, General Electric reached a settlement with OFAC based on allegations that its subsidiary, InVision, acted without an OFAC license by exporting goods and services to Cuba.<sup>16</sup> In 2005, Acher Daniels Midland Co. settled with OFAC based on allegations that its wholly owned subsidiary entered into a contract with an entity in which the Government of Cuba had an interest.<sup>17</sup> And lastly, in an interpretive ruling, OFAC stated that the foreign subsidiary of U.S. company cannot use a foreign website to book transportation and hotel reservations for persons not subject to U.S. jurisdiction.<sup>18</sup>

### **IEEPA-Based Programs**

A main difference between TWEA and the IEEPA-based programs is that the latter do not explicitly cover foreign subsidiaries that are "owned or controlled" by U.S. parent companies.<sup>19</sup> However, this does not mean that a U.S. company can take its immunity for granted when its foreign subsidiaries operate under IEEPA-based programs. To overcome the IEEPA's lack of explicit coverage over foreign subsidiaries, OFAC holds U.S. companies liable under the general criminal principles of "agency, accomplice and conspiracy" and the more vague concepts of "facilitation" and "approval."<sup>20</sup>

Thus, OFAC prohibits U.S. parent companies from facilitating or approving actions that the U.S. company itself could not take.<sup>21</sup> When read for their "plain meaning," the country-specific IEEPA-based regulations are not consistent in their use of the concept of facilitation. Therefore, it is important for U.S. companies to know the specific regulations of each IEEPA-based program. Substantively, the IEEPA-based programs are less restrictive in their prohibitions than those based in TWEA authority. Only the Iran and Sudanese programs set forth comprehensive trade sanctions, while the remaining programs target specific industries.<sup>22</sup>

The most stringent definition of facilitation is found in the Sudanese regulations, which state that facilitation occurs when a U.S. person "assists" or "supports" trade with Sudan.<sup>23</sup> In the interpretive section of the Sudanese regulations, OFAC states that facilitation of "purely clerical or reporting" activities that do not further trade with Sudan do not constitute facilitation.<sup>24</sup> More specifically, reporting the actions of a foreign subsidiary's trades with Sudan would not constitute facilitation but financing or insuring such trade would constitute facilitation.<sup>25</sup> Facilitation would also exist when a U.S. person refers "to a foreign person purchase orders, request for bids, or similar business opportunities involving Sudan ... which the United States person could not directly respond as a result of the prohibitions."<sup>26</sup>

With slightly less strict language, the Iranian program prevents U.S. persons from approving, financing, facilitating, or guaranteeing any transactions by a foreign person.<sup>27</sup> Foreign subsidiaries are included in the definition of foreign persons.<sup>28</sup> Moreover, the Iranian program prohibits a U.S. person from altering her policies "to permit a foreign affiliate to accept or perform a specific contract ... where such transaction previously required approval by the United States person."<sup>29</sup> Likewise, the Burmese program prohibits U.S. persons from approving or facilitating actions where such actions would constitute barred new investment in Burma.<sup>30</sup> This prohibition covers U.S. persons who broker, finance, guarantee or approve such activities.<sup>31</sup>

The remaining IEEPA-based sanctions programs, including those covering Iraq,<sup>32</sup> Syria,<sup>33</sup> Zimbabwe,<sup>34</sup> the Balkans,<sup>35</sup> and the former regime of Charles Taylor of Liberia,<sup>36</sup> contain provisions prohibiting "evasions, attempts, and conspiracies." These "inchoate" prohibitions - derived from ordinary criminal law - are more narrow in scope than the prohibitions against facilitation and approval.<sup>37</sup>

As with the TWEA-based programs, there are very few publicly available OFAC enforcement actions based on IEEPA violations involving foreign subsidiaries.<sup>38</sup> In 2006, OFAC reported an assessment of a bank whose overseas branches removed references to entities in which Libya and Iran had an interest.<sup>39</sup> In 2005, Stolt-Nielsen Transportation Group agreed to settle based on allegations that it paid a foreign affiliate's port expenses in Iran by wire transfer.<sup>40</sup> Additionally, in an interpretive ruling, OFAC stated that no license would be required if a U.S. company's foreign subsidiary were to sell testing systems to a foreign company in a foreign country that would be used during the manufacturing of products which may be sold to Iran.<sup>41</sup>

## General Recommendations

As previously discussed, OFAC currently publishes the names of companies prosecuted for sanctions violations, and only since 2005 has it provided a brief description of the specific actions punished.<sup>42</sup> To make matters worse, applicable case law provides little guidance to U.S. companies.<sup>43</sup> Interestingly, for all of the differences between IEEPA-based programs, OFAC has ruled that the same concept of "facilitation" should apply to all IEEPA-based programs.<sup>44</sup> In general, because OFAC interprets the regulations in a strict, plain-meaning manner, it is wise for U.S. companies to do the same.<sup>45</sup>

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<sup>1</sup> *U.S. v. Brodie*, 403 F.3d 123, 158 (3rd Cir. 2005) ("[T]he government's evidence paints a convincing picture of the Defendant as a company president who deliberately stuck his head in the sand regarding the involvement of the U.S. entity in the prohibited transactions.").

<sup>2</sup> For the specific penalties, see Department of Treasury, "Foreign Assets Control Regulations for Exporters and Importers," available at <http://www.treasury.gov/offices/enforcement/ofac/regulations/facei.pdf>. It should be noted that on October 16, 2007, the President signed into law the IEEPA Enhancement Act, Pub. L. No. 110-96, which, *inter alia*, increased the civil penalties for IEEPA violations.

<sup>3</sup> It should be noted that OFAC has taken the position that certain differences between country-specific programs should not be read to mean that some regulations are more lenient than others. More specifically, OFAC contends that the prohibitions against facilitation are common to all IEEPA-based programs, even if the country-specific regulations omit the term. See Terence J. Lau, *Triggering Parent Company Liability Under United States Sanctions Regimes: the Troubling Implications of Prohibiting Approval and Facilitation*, 41 *AM. BUS. L.J.* 413, 447 (2004) (hereafter "Triggering Parent Company Liability").

<sup>4</sup> The Trading With the Enemy Act, 50 U.S.C. App. § 5(b)(1)(B). This provision was incorporated into the Cuban and North Korean regulations, respectively, at 31 C.F.R. § 515.201(b) (1998) and 31 C.F.R. §§ 500.201(b) (1998).

<sup>5</sup> *Triggering Parent Company Liability*, 442. See also, *United States v. Broverman*, 180 F. Supp. 631, 636 (S.D.N.Y. 1959); Lucinda A. Low and William M. McGlone, *Avoiding Problems under the Foreign Corrupt Practices Act, U.S. Antiboycott Laws, OFAC Sanctions, Export Controls, and the Economic Espionage Act*, *American Bar Association* at 21 (hereafter "Avoiding Problems") (noting that the Department of Treasury considers the regulations to ban activity with only an attenuated connection to the covered country, such as an aircraft lease to a third-country airline if some of the subject aircraft will be used, in part, for routes to and from Cuba.), available at <http://www.abanet.org/intlaw/hubs/programs/Annual0314.01-14.03.pdf>.

<sup>6</sup> 31 U.S.C. § 515.329 (2004).

<sup>7</sup> *Avoiding Problems*, at 16.

<sup>8</sup> *Triggering Parent Company Liability* at 426; *Avoiding Problems* at 16.

<sup>9</sup> 31 U.S.C. § 515.201 (2004)

<sup>10</sup> 31 U.S.C. § 515.201 (2004)

<sup>11</sup> Office of Foreign Asset Control, *Cuba--What You Need To Know About the U.S. Embargo--An Overview of the Cuban Assets Control Regulations*, available at <http://www.treasury.gov/offices/enforcement/ofac/programs/cuba/cuba.pdf> (last visited November 26, 2007).

<sup>12</sup> *Id.*

<sup>13</sup> *Triggering Parent Company Liability* at 427.

<sup>14</sup> 31 C.F.R. § 500.554(b).

<sup>15</sup> All property blocked as of June 16, 2000 remains blocked. 31 C.F.R. § 500.586(b)(1). Likewise, all transactions arising after June 16, 2000 are authorized subject to license application requirements under regulations administered by other federal agencies. 31 C.F.R. § 500.586. A caveat to this authorization is the shipment of "strategic goods" from a foreign country to North Korea by persons "within the United States" remains prohibited. 31 C.F.R. S 505.10. This provision covers foreign subsidiaries "owned or controlled" by U.S. companies. 31 C.F.R. 505.20 refers to 31 C.F.R. 500.330(a) for its definitions.

<sup>16</sup> Office of Foreign Assets Control, *Enforcement Action for September 7, 2007, "GE Security Settles Cuban Embargo Program Allegations."*

<sup>17</sup> Office of Foreign Assets Control, *Enforcement Action for October 12, 2005, "Archer Daniels Midland Company Settles Allegations of Cuban Embargo Transactions."*

<sup>18</sup> Office of Foreign Assets Control, OFAC Interp. Ruling 020416-FACRL-CU-01 (Apr. 16, 2002).

<sup>19</sup> Triggering Parent Company Liability at 433; Avoiding Problems at 16.

<sup>20</sup> J. Ellicot, "Sovereignty and the Regulation of International Business in the Export Control Arena," 20 CAN.-U.S. L. J. 133, 136 (1994). See also, *Nye & Nissen v. United States*, 336 U.S. 613, 618-19 (1949); *Morgan v. United States*, 149 F.2d 185, 187 (5th Cir. 1945).

<sup>21</sup> Triggering Parent Company Liability at 435. It should be noted that the sanctions programs also include prohibitions on "evasion."

<sup>22</sup> Triggering Parent Company Liability at 429-433.

<sup>23</sup> 31 C.F.R § 538.407(a) (2004)

<sup>24</sup> 31 C.F.R § 538.407(a) (2004)

<sup>25</sup> 31 C.F.R § 538.407(a) (2004)

<sup>26</sup> 31 C.F.R § 538.407(d) (2004)

<sup>27</sup> 31 C.F.R § 560.208 (2004)

<sup>28</sup> Office of Foreign Asset Control, *Iran--What You Need To Know About the U.S. Economic Sanctions--An Overview of O.F.A.C Regulations involving Sanctions against Iran*, available at <http://www.treasury.gov/offices/enforcement/ofac/programs/iran/iran.pdf> (last viewed November 26, 2007).

<sup>29</sup> 31 C.F.R § 560.417(a) (2004)

<sup>30</sup> 31 C.F.R § 537.202 (2004)

<sup>31</sup> 31 C.F.R § 537.409(b) (2004)

<sup>32</sup> 31 C.F.R § 575.211 (2004)

<sup>33</sup> 31 C.F.R § 542.205(2004)

<sup>34</sup> 31 C.F.R § 541.204 (2004)

<sup>35</sup> 31 C.F.R § 588.204 (2004)

<sup>36</sup> 31 C.F.R § 593.206 (2004)

<sup>37</sup> Triggering Parent Company Liability at 433-34.

<sup>38</sup> There is, however, a decent amount of publicly available prosecutions based on IEEPA violations. See, e.g., *U.S. v. Ehsan*, 163 F.3d 855 (4th Cir. 1998) (prosecution based on purchasing of oil and gas analysis systems that were shipped to Iran via Dubai); *U.S. v. Arch Trading Co.*, 987 F.2d 1087 (4th Cir. 1993) (prosecution based on trade with Iraqi government).

<sup>39</sup> Office of Foreign Assets Control, Enforcement Action for January 3, 2006, "ABN AMRO Bank, N.V. Consents to Order of Assessment with Respect to Libyan and Iranian Program Violations."

<sup>40</sup> Office of Foreign Assets Control, Enforcement Action for October 12, 2005, "Stolt-Nielsen Transportation Group Agrees to Settle Iranian Program Allegations."

<sup>41</sup> OFAC Interp. Ruling, 030509-IA-05 (May 9, 2003).

<sup>42</sup> Office of Foreign Assets Control, *Civil Penalties and Enforcement Information*, available at <http://www.treasury.gov/offices/enforcement/ofac/civpen/index.shtml>.

<sup>43</sup> Triggering Parent Company Liability at 442.

<sup>44</sup> OFAC Interp. Ruling 030428-FACRL-LI-01 (Apr. 28, 2003). Likewise, the Sudanese regulations state that they are meant to apply to all IEEPA-based programs. 31 C.F.R § 538.407(a) (2004)

<sup>45</sup> Triggering Parent Company Liability at 447.

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