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Commerzbank, Schlumberger Settlements Mark Acceleration of Sanctions-Related Enforcement Activities

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It has been a busy March for officials charged with enforcing U.S. sanctions, anti-money laundering, and export controls laws. In rapid succession, the U.S. Department of Justice ("DOJ"), the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"), and allied federal and state agencies announced several sizeable settlements, including:

- On March 11, Commerzbank AG entered into a deferred prosecution agreement with DOJ and settlements with OFAC, the Board of Governors of the Federal Reserve System ("FRB"), the New York Department of Financial Services ("DFS"), and the New York County District Attorney's Office ("NYCDA"), agreeing to pay nearly $1.45 billion (including $718 million for alleged OFAC sanctions violations, and the remainder for alleged Bank Secrecy Act/anti-money laundering and related deficiencies). The DFS settlement also required the termination of several Commerzbank employees who had "central roles" in the cited conduct.
- On March 25, Schlumberger Oilfield Holdings Ltd. ("SOHL"), a subsidiary of Schlumberger Ltd., reached an agreement with DOJ to pay $232.7 million in fines and forfeiture penalties to settle allegations that SOHL, a non-U.S. company, facilitated and supported prohibited transactions with Iran and Sudan via its U.S. operations.

Common to these actions was an asserted failure to implement and enforce adequate and effective internal controls to identify and curtail transactions involving sanctioned parties. In the case of Commerzbank, authorities alleged that the Germany-based financial institution processed thousands of transactions in a manner that omitted or obscured sanctioned-party customers and counterparties, despite concerns and warnings from the bank's legal and compliance personnel. The Schlumberger settlement identified SOHL program deficiencies that enabled U.S.-based employees to facilitate alleged sanctions violations involving projects in Iran and Sudan by approving and disguising capital expenditure requests, making and implementing business decisions concerning such projects, and providing technical support for the projects.

While sizable, the penalties paid in these cases pale in comparison to the blockbuster $8.9 billion settlement reached last June between BNP Paribas S.A. and DOJ, FRB, DFS, and NYCDA for alleged violations of the Iran, Sudan, Cuba, and Burma sanctions programs. However, the recent actions should cause companies active in international transactions to take notice: criminal and civil enforcement actions in the trade controls space are accelerating, the average size of settlements is increasing, and U.S. federal and state regulators and law enforcement authorities are becoming increasingly aggressive in pursuing these types of cases, including asserting broad jurisdiction over non-U.S. entities and operations.[1]

Two phenomena in particular are emerging.

First, the recent run of significant settlements—particularly those involving non-U.S. financial institutions—is now establishing in the sanctions arena what in the context of the Foreign Corrupt Practices Act and other sources of corporate criminal liability our colleague Michael Levy has termed "prosecutorial common law." Specifically, when large companies in several cases elect to settle and pay a significant penalty rather than litigate sweeping charges of sanctions violations (for reasons that often have little to do with the strengths or merits of the charges and available defenses), prosecutors begin to view such settlements as a "proof of concept" that their theories of liability and jurisdiction reflect the correct application of the law. This experience typically hardens the government's position and increases the pressure on subsequent targets to capitulate and pay comparable amounts to resolve their own cases. We have seen this play out at both the federal and state levels (the latter most recently at the DFS). Global companies can reasonably expect enforcement activity to continue, and average settlements to increase, in the sanctions, Bank Secrecy Act/anti-money laundering (BSA/AML), and export controls areas.

Second, authorities are not only becoming more comfortable and more emboldened to bring large criminal cases, they are also armed with more information about how global business is conducted than at any previous time in the history of the sanctions and export controls enforcement programs. To understand why this is the case, the details of the Schlumberger plea agreement reveal several important points. Along with the usual stipulations waiving indictment, accepting the factual narrative of the government and agreeing to pay fines and forfeiture penalties, both SOHL (the defendant) and Schlumberger Ltd. (its parent) agreed to sweeping provisions allowing the government extraordinary access to their operations. For example, SOHL and its parent agreed to disclose and, "as requested by the Government," provide all non-privileged information and materials, and to make available for government interviews and testimony all personnel, in connection with "any and all matters concerning any act within the scope of or related to the conduct" that was the subject of the investigation "or relating to other potential violations of sanctions pursuant to" the International Economic Emergency Powers Act occurring during a three-year probationary period.

Stipulations of cooperation of this kind are not unusual in plea agreements. But in the context of the current raft of trade controls prosecutions, they underscore that the government's body of knowledge is growing about how transnational companies conduct global business, including with sanctioned jurisdictions. There can be little doubt that the investigations of today are generating substantial leads for the enforcement actions of tomorrow.

The cooperation of defendants is also not the sole source of information available to government agencies about sanctions and export control violations in cross-border trade activities. In this environment of significant prosecutions and settlements, companies are concluding with increasing frequency that they should avail themselves of the mitigating impacts of voluntary disclosure.

Another rich vein of information was opened with the implementation of Section 219 of the Iran Threat Reduction and Syria Human Rights Act of 2012. This provision added a new requirement to Section 13 of the Securities Exchange Act of 1934 mandating that an issuer disclose specified dealings by it or an affiliate subject to Iran sanctions. Schlumberger Ltd.'s annual report for 2012 (filed in January 2013) catalogued a number of Iran projects, including a contract with the National Iranian Oil Company that featured prominently in the government's statement of offense in the settlement.

Finally, companies cannot discount the fact that they are operating in an era where whistleblowers can have greater impact than at any time in the history of the U.S. sanctions program. Recent significant investigations involving NCR, Inc. (FCPA and OFAC violations), HSBC (anti-money laundering, tax), and other actions and inquiries reportedly include elements that were brought to the government's attention by existing and/or former employees.

Articles discussing recent enforcement cases in the sanctions and export controls arena often close by citing the complexity and broad reach of these regulations and admonishing companies to review their compliance programs to ensure that they are adequately training and monitoring for risk of violations. This is indeed good guidance, and it bears repeating; companies should pay careful attention to their existing OFAC, BSA/AML, and related compliance programs to assess existing vulnerabilities and potential areas in which improvements should be made.

But there is a final and important piece of practical advice to be gleaned from the recent increase in enforcements actions, federal and state coordinated investigative activity, and resulting settlements: Pay attention not only to what is going on within your company but also to the investigations and enforcement activity occurring within your industry; understand who is being investigated and why; and determine whether conduct at your company that in prior periods might have been viewed as falling within industry norms is now sowing the seeds of future legal exposure. Law enforcement and regulatory authorities are already actively engaging in reviews across various industries using information that they have learned—and continue to learn—from recent investigations, settlements, and cooperation agreements. Companies with any significant international exposure must take this into account when assessing risks and taking appropriate and timely action to address program weaknesses and deficiencies.

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Paul Hastings attorneys regularly advise U.S. and foreign persons, including financial institutions and financial services companies, on matters involving cross-border transactions and OFAC compliance. If you have any questions regarding OFAC compliance or related issues, please contact any of the following Washington, D.C. attorneys:

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[1] They also underscore that authorities are looking well beyond the financial services industry for targets of enforcement actions. Cases have recently been brought for such broad-flung activity as the purchase of Cuban-origin nickel (http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20141113_esco.pdf); the exports intended for drilling rigs in Iranian waters (http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20141031_indam.pdf); and provision of healthcare insurance to persons on the SDN List (http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20141029_bupa.pdf).