

International Trade Alert

August 10, 2017

Key Points

- The U.S. government has used the charging theory of “causing” violations to assert broader jurisdictional reach over non-U.S. entities engaging in transactions that have no direct contact with the United States, other than making payments in U.S. dollars.
- Payments in U.S. dollars in transactions involving sanctioned countries should be a heightened compliance and enforcement risk for all persons involved in the transaction, including non-U.S. persons.
- This case represents the first time that OFAC has penalized a non-financial institution outside the United States for engaging in a transaction with a sanctioned country where the only nexus with U.S. jurisdiction is that the transaction is conducted in U.S. dollars.



OFAC Pushes New Limits on Jurisdiction of U.S. Sanctions by Penalizing Non-U.S. Companies for “Causing” Violations by Making U.S. Dollars Payments

On July 27, 2017, the U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) announced the civil settlement with CSE TransTel Pte. Ltd. (“TransTel”) and CSE Global Limited (“CSE Global”) in the amount of \$12,027,066 for potential civil liability for apparent violations of the U.S. economic sanctions against Iran. Past enforcement actions based upon similar facts have targeted the non-U.S. financial institution involved in the transaction, rather than the non-U.S. company. This case represents the first time that OFAC has penalized a non-financial institution outside the United States where the sole nexus was settling a transaction with a sanctioned country in U.S. dollars, which OFAC has stated thereby resulted in the non-U.S. entity causing a violation of U.S. sanctions by a financial institution.

The enforcement action is noteworthy for several reasons and marks a continued effort by the U.S. government to assert jurisdiction over transactions among non-U.S. entities solely due to payment being conducted in U.S. dollars and the indirect involvement of U.S. financial institutions in such transactions:

- U.S. dollar transfers in transactions involving sanctioned countries should be a heightened compliance and enforcement risk for all persons, including non-U.S. persons.

- The U.S. government is continuing to use the charging theory of “causing” violations to assert greater jurisdictional reach over non-U.S. entities that otherwise have no direct contact with the United States.

First, the existence of U.S. dollar transfers in transactions involving at least one sanctioned country, Iran, should be a heightened compliance and enforcement risk for all persons, including non-U.S. persons. TransTel and CSE Global are both foreign companies, and the enforcement action alleges no basis for U.S. jurisdiction over the entities other than that the entities are alleged to have “caused six separate financial institutions to engage in the unauthorized exportation or reexportation of financial services from the United States to Iran” in violation of 31 C.F.R. 560.204. In short, there is no allegation of U.S. persons (U.S. citizens or permanent residents, or entities) involved in the transactions, no allegation of non-U.S. persons engaged in the transactions while in the United States and no allegation of U.S. origin goods. There is also no explanation of how the U.S. financial institutions were presumably involved in clearing these payments. Instead, the alleged violation asserted by OFAC (and agreed to as part of the settlement by TransTel and CSE Global) is that a non-U.S. company “caused” a non-U.S. financial institution to, in turn, cause a U.S. financial institution to provide financial services, the benefit of which was received in Iran.

The settlement indicates that TransTel and CSE were banking with a non-U.S. financial institution located in Singapore, and maintained with this Singapore bank individual U.S. dollar and Singaporean dollar accounts. TransTel received purchase orders from multiple Iranian companies to deliver and install telecommunications equipment for several energy projects in Iran and, as part of fulfilling the purchase orders, engaged third-party vendors to provide goods and services for the purchase orders. OFAC’s enforcement action highlights that TransTel and CSE Global represented to the Singapore bank that it would “undertake not to route any transactions related to Iran through [the Bank], whether in Singapore or elsewhere.” Despite this representation, TransTel is alleged to have originated U.S. dollar funds transfers from its U.S. dollar-denominated account with its Singapore bank that were related to its Iranian business beginning no later than June 2012 and failed to mention references indicating the payments for Iranian projects or parties. There is no allegation beyond the representation made by the companies to the Singapore bank that they were legally required to mention Iran projects or parties on the payments. Nonetheless, OFAC admonishes in the penalty announcement:

When signing letters of attestation or making other representations and warranties to financial institutions that provide access to the U.S. financial system, individuals and entities should consider carefully whether they are willing and able to act within the parameters of such agreements.

Second, the U.S. government is continuing to use the charging theory of “causing” violations to assert greater jurisdictional reach over non-U.S. entities. 31 C.F.R. 560.204 provides that:

the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any goods, technology, or services to Iran or the

Government of Iran is prohibited, including the exportation, reexportation, sale, or supply of any goods, technology, or services to a person in a third country undertaken with knowledge or reason to know that [the goods or services are intended for Iran or the government of Iran].

Section 203 of these regulations prohibits any transaction that “causes a violation.” The statute authorizing this regulation to be issued—the International Emergency Economic Powers Act (IEEPA)—provides for civil and criminal liability if one were to “attempt to violate, conspire to violate or cause a violation” of the regulations. The civil and criminal maximum penalties can be severe. This case was treated by OFAC as an “egregious” case under its Enforcement Guidelines, in part, due to the fact that the companies had not initiated voluntary self disclosures. Other factors leading to this determination included that (i) TransTel “willfully and recklessly caused apparent violations of U.S. economic sanctions by engaging in, and systematically obfuscating, conduct it knew to be prohibited, including by materially misrepresenting to its bank that it would not route Iran-related business through the bank’s branch in Singapore or elsewhere, and by engaging in a pattern or practice that lasted for 10 months”; (ii) TransTel’s then-senior management had actual knowledge of—and played an active role in—the conduct underlying the apparent violations; (iii) TransTel’s actions conveyed significant economic benefit to Iran and/or persons on OFAC’s List of Specially Designated Nationals and Blocked Persons by processing dozens of transactions through the U.S. financial system that totaled \$11,111,812 and benefited Iran’s oil, gas and power industries; and (iv) TransTel is a commercially sophisticated company that engages in business in multiple countries.

Non-U.S. clients that choose to engage in transactions involving sanctioned persons or countries and are doing so on the basis that the transactions are concluded with non-U.S. counterparties, with payment through non-U.S. financial institutions, for non-U.S. origin goods or services, should carefully assess the jurisdictional assumptions in light of the expansive theory expressed in this enforcement action and an apparent continued willingness by the U.S. government to assert these theories in enforcement actions against non-U.S. individuals and companies. Although the TransTel case highlights the alleged misrepresentation to its Singapore bank, it remains unclear what evidence TransTel is alleged to have seen that would place the company on notice that it was causing the exportation of a financial service from the United States (e.g., by a U.S. financial institution) other than the mere knowledge that the underlying transactions were denominated in U.S. dollars.

This fact missing from the allegations remains a concern, given that the U.S. Treasury Department in the prior administration stated on multiple occasions that the mere existence of U.S. dollars is not sufficient to assert jurisdiction. Recent enforcement actions suggest that it may be too fine of a line for non-U.S. clients to parse as to when U.S. jurisdiction does and does not exist if U.S. dollars are being used, but where the use of U.S. dollars may nevertheless involve or “cause” indirectly a U.S. financial institution to violate economic sanctions. The most prudent route would be for clients to presume, for sanctions compliance purposes, that U.S. jurisdiction either exists, or could be asserted by the U.S. government, any time a transaction is denominated in U.S. dollars.

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