

EXPORT CONTROL AND SANCTIONS PROSECUTIONS OF CORPORATIONS

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Counterintelligence and Export Control Section (CES)

- One of two litigating sections within DOJ's National Security Division (NSD)
 - Export Control and Sanctions Prosecutions
 - Espionage Prosecutions
 - Economic Espionage Prosecutions
 - Cyber Crimes tied to state actors
 - Approximately 25 attorneys
- Oversee and approve all export control and sanctions prosecutions nationwide
 - Lead prosecutors are in the various U.S. Attorneys' offices nationwide – 93 U.S. Attorney offices in 94 judicial districts

Initiating a Criminal Case

- Criminal Complaint
 - Necessary for obtaining an arrest warrant
 - Supported by affidavit establishing probable cause of a violation
 - Defendant is entitled to a preliminary hearing within 14 days of initial appearance (if in custody) or within 21 days (if not in custody)
 - Indictment must be obtained within 30 days of initial appearance
- Indictment – a constitutional right to charge by indictment for all felonies (sentence greater than a year)
 - Returned by a grand jury comprised of 23 members of the community who hear the evidence, are instructed in the law, and determine whether there is probable cause that a crime was committed
 - At least 12 members of the grand jury must vote in favor of the indictment
- Information – used in charging misdemeanors (sentence of up to a year) or if a defendant waives indictment (usually if there is a plea agreement)
- At trial, the government must prove a defendant guilty beyond a reasonable doubt – standard is much higher than in administrative proceedings

Criminal Export and Sanctions Statutes

Arms Export Control Act (AECA), 22 U.S.C. § 2778

International Traffic in Arms Regulations (ITAR), 22 C.F.R. Parts 120-130

Export Enforcement Act (EAA), 50 U.S.C. App. § 2401 *et seq.*

Export Administration Regulations (EAR), 15 C.F.R. Part 700

Executive Order 13222 (August 22, 2001)

International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1705

Trading with the Enemy Act (TWEA), 50 U.S.C. App. § 16

Elements of an Export Offense

- 1) That an export or attempted export occurred;
- 2) That the item exported was a defense article on the U.S. Munitions List, was on the Commerce Control List, or went to a prohibited destination;
- 3) That the defendant failed to get a license from the Department of State, Department of Commerce, or Department of the Treasury; and
- 4) That the defendant acted willfully

Willfulness Defined

- An act is done willfully if it is committed with the knowledge that it was prohibited by law or was done in disregard of a known legal obligation. The Government must prove that the defendant acted with knowledge that his conduct was unlawful. While the Government must show that the defendant knew that his conduct was unlawful, it is not necessary for the Government to show that the defendant was aware of the specific law or rule that his conduct may have violated

Willfulness Defined

- In other words, the Government need not prove that the defendant had read, was aware of, or had consulted the [United States Munitions List/Commerce Control List/embargo regulations], or the licensing provisions of [ITAR/EAR/OFAC]. The Government, however, must prove beyond a reasonable doubt, by reference to facts and circumstances surrounding the case, that the defendant knew that his conduct was unlawful
- Bryan v. United States, 524 U.S. 184, 191 (1998)

CES' Export Control and Sanctions Enforcement Priorities

- Violations involving WMD and missile technology
- Violations relating to terrorist activities
- Violations relating to China's Defense Establishment
- Cyber exfiltration of export-controlled data
- Violations by corporate entities and officials
 - "Individual Accountability for Corporate Wrongdoing" memorandum issue on September 9, 2015, by Deputy Attorney General Yates

Types of Corporate Resolutions

- Guilty Plea
 - Filing of criminal information
 - Payment of fine and forfeiture – up to 3X gross gain
 - Period of probation
 - Possible appointment of monitor or outside consultant
 - Potential collateral consequences
- Deferred Prosecution Agreement (DPA)
 - Filing of criminal information
 - Payment of fine and forfeiture
 - Period for compliance/cooperation
 - Possible appointment of monitor or outside consultant
 - After successfully completing period for compliance/cooperation, case is dismissed
- Non-prosecution Agreement (NPA)

Principles of Federal Prosecution of Business Organizations -- USAM § 9-28.000 ("Filip Factors")

- The nature and seriousness of the offense;
- The pervasiveness of the wrongdoing, and whether corporate management was complicit in the wrongdoing
- The company's history of similar misconduct
- The company's timely and voluntary disclosure of the wrongdoing and its willingness to cooperate in the investigation
- The existence and effectiveness of the company's pre-existing compliance program

Principles of Federal Prosecution of Business Organizations -- USAM § 9-28.000 ("Filip Factors")

- The company's remedial actions
- Collateral consequences;
- The adequacy of prosecution of individuals responsible for the company's malfeasance; and
- The adequacy of remedies such as civil or regulatory enforcement actions

U.S. v. Schlumberger Oilfields Holding Co.

- Schlumberger Ltd. (SLB) – largest oilfield services company in the world
 - 115,000 employees from 140 countries
 - Drilling and Measurements (D&M) – business segment based in Sugar Land, Texas, that provides oilfield drilling and measurement technology to oilfields throughout the world
 - SLB could lawfully do business in Iran and Sudan, but could not transship U.S. origin commodities and could not involve U.S. persons in the business in these sanctioned countries
 - U.S. person defined: U.S. citizen, lawful permanent resident, and anyone (regardless of immigration status or nationality) present in the U.S.

U.S. v. Schlumberger Oilfields Holding Co.

- Between February 2014 and June 2010, D&M violated U.S. law by facilitating transactions with Iran and Sudan and by exporting and causing the export of services to Iran and Sudan
 - Systematically approved in the U.S. capital expenditure (CAPEX) requests for Iran and Sudan
 - Involvement of senior managers in business decisions related to Iran and Sudan
 - Provided certain technical services in order to troubleshoot mechanical failures and to sustain oilfield equipment in Iran and Sudan

U.S. v. Schlumberger Oilfields Holding Co.

- In April 2015, SOHL pled guilty to an Information charging a conspiracy to violate IEEPA
- SOHL agreed to pay a total penalty of \$232 million, which included the largest criminal fine (\$155 million) ever in an IEEPA prosecution
- Under the plea agreement, SLB agreed to:
 - Cease operations in Iran and Sudan
 - Notify the government of credible evidence of potential sanctions violations
 - Upgrade compliance program
 - Hire an outside consultant to review the company's internal sanctions policies and procedures and issue reports based on review
 - General counsel will certify on an annual basis that the company remains in compliance with plea agreement and has continued to maintain its trade compliance program

U.S. v. Fokker Services B.V.

- Egregious conduct over a 5-year (2005-2010) period – 1,147 violations of the Iran, Sudan, and Burma sanctions
- June 2010 Voluntary Self-Disclosure
- Resolution
 - DPA for 18 months
 - Continued cooperation
 - Payment of \$10.5 million forfeiture plus \$10.5 million in administrative penalties to BIS and OFAC – \$21 million represents all of the revenue generated by the illegal conduct

Voluntary Self-Disclosure

- The voluntary disclosure occurs prior to an imminent threat of outside disclosure or government investigation
- The company discloses the conduct within a reasonably prompt time after becoming aware of the offense, with the burden being on the company to demonstrate timeliness
- The company discloses all relevant facts known to it, including all relevant facts about the individuals involved in any export control or sanctions violation
- Full cooperation
- Because of the national security interests the illegal conduct implicates, export and sanctions violations are different from other corporate crimes and may result in less lenient resolutions

Questions?