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D.C. Circuit Affirms OFAC's Broad Enforcement Authority on Exports to Iran – With a Caveat

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June 5, 2017 — On May 26, 2017, the U.S. Circuit Court of Appeals for the District of Columbia upheld the U.S. District Court for the District of Columbia's holding that *knowledge or reason to know* that goods will end up in Iran is sufficient to establish a violation of the Iranian Transactions and Sanctions Regulations ("ITSR"), even if the Office of Foreign Assets Control ("OFAC") cannot or has not established that such goods actually ended up in Iran. The Court, however, went on to hold that OFAC must establish a rational connection between the facts in the administrative record and its decision to impose a civil penalty; in this case, the Court found, OFAC had not provided an explanation for why it did not find potentially exculpatory evidence related to a portion of the subject shipments credible. Because the potentially exculpatory evidence would also have undermined the factual basis for OFAC's application of an aggravating factor in calculating the \$4,037,000 civil penalty it imposed, the Court remanded the penalty calculation, in its entirety, to OFAC.

The case, *Epsilon Electronics, Inc. v. U.S. Department of the Treasury, et al.*, involved 39 shipments of consumer goods from Epsilon Electronics, a California company, to Asra International, a distributor based in Dubai. According to OFAC and the Court, Asra's marketing material and website suggested that it dealt extensively, and for a period exclusively, in Iran. The Court upheld OFAC's finding that Epsilon had reason to know, and in some cases actual knowledge, that Asra was engaged in the resale of goods in Iran.

OFAC's determination that the ITSR prohibits exports to a person in a third country with knowledge or reason to know that such goods are intended specifically for reexportation to Iran, even in the absence of a predicate finding that the goods actually arrived in Iran, is broadly consistent with well-established principles in export compliance. For U.S. businesses, the upshot is clear – if you are exporting items from the United States to third countries with reason to know that the goods' ultimate destination is Iran, the fact that such exports can't conclusively be traced to Iran will not save you.

The Court did hold, however, that OFAC must articulate its thinking when assessing facts in the record and imposing civil penalties. Here, Epsilon had introduced emails between itself and Asra that were contemporaneous with its last five shipments, and which tended to show that Asra was newly engaged in retail operations in Dubai. While the Court itself made no finding as to whether the emails were credible, it held that OFAC itself must go farther and “offer a sufficient explanation for why it did not credit the email evidence.” Small solace, perhaps, for U.S. businesses on the wrong end of an enforcement action; nonetheless, it’s worthwhile to note that OFAC cannot simply disregard potentially exculpatory evidence in the administrative record.

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