U.S. GOVERNMENT ENTERS $21 MILLION SANCTIONS SETTLEMENT WITH DUTCH AVIATION SERVICES COMPANY ARISING OUT OF VOLUNTARY SELF-DISCLOSURE

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The recent $21 million U.S. government sanctions settlement with Fokker Services BV ("Fokker"), a Dutch aerospace services provider, signifies an increasing appetite on the part of U.S. regulators to go after non-U.S. companies dealing in sanctioned countries and raises questions concerning the government's treatment of companies that come forward to voluntarily disclose sanctions violations. Following its submission of a voluntary self-disclosure of potential sanctions violations, Fokker entered into a deferred prosecution agreement with the U.S. Department of Justice, in which it agreed to continue cooperating with the government and to forfeit $10.5 million in criminal penalties. In addition to the criminal penalties, the company also agreed to forfeit an additional $10.5 million civil penalty to settle related investigations by the U.S. Department of the Treasury, Office of Foreign Assets Control ("OFAC"), and the U.S. Department of Commerce, Bureau of Industry and Security ("BIS").

Background and Relevant Facts of the *Fokker* Case

Fokker has subsidiaries in The Netherlands, Singapore, and the United States.[1] Since the company's formation in 1996, its clients have reportedly included eleven Iranian customers, four Sudanese customers, and four Burmese customers.[2] The federal government charged Fokker with conspiracy to unlawfully export U.S.-origin goods and services to all three sanctioned countries.[3] For approximately eight years, Fokker allegedly sent shipments to U.S. repair shops knowing those shipments contained (1) parts and technology derived from aircraft controlled by Fokker customers located in U.S.-sanctioned countries or (2) U.S.-origin parts or technology that were subject to U.S. export licensing requirements under U.S. law at the time of shipment.[4]

Aggravating Factors Cited by the Government

The referral by OFAC and BIS of a voluntary self-disclosure for criminal enforcement was likely attributable to a number of aggravating factors cited by the government-

First, senior management, including members of the company's Compliance department, were reported to have purposefully disregarded warnings that Fokker's operations were at risk of violating U.S. export control and sanctions laws. Over approximately eight years, Fokker senior managers allegedly:

- ignored warnings from in-house counsel that the company's growing Iranian customer base could put it at potential risk of violating U.S. export control laws;[5]

[1] Criminal Complaint at ¶¶ 2-3 and 6-8, United States of America v. Fokker Services B.V., (No. 1:14-cry-00121), (D.D.C.) June 6, 2014).
[2] *Id.* at ¶¶6-8.
[3] *Id.* at 1.
[4] *Id.* at ¶7.
[5] *Id.* at ¶ 20.

- became aware that U.S. export control laws prohibited U.S. repair shops from fixing parts intended for a customer in a sanctioned country when a U.S. repair shop refused to return an aircraft part intended for a sanctioned country customer;[6]
- assembled a formal working group known as the "export compliance working group" to review the company's export compliance policies and subsequently published an internal "work instruction" detailing steps Fokker employees should take to evade U.S. sanctions and avoid detection by U.S. authorities, such as choosing only U.S. repair shops that do not request end-user statements and instructing employees on how to repackage parts to remove indications that the parts have come from a customer in a U.S.-sanctioned country;[7]
- ignored warnings from Dutch authorities that Dutch authorities would not be able to defend Fokker if it encountered problems with U.S. authorities concerning possible non-compliance with U.S. export control laws and subsequently resumed operations with Iran;[8]
- ignored Fokker in-house counsel's advice that the company could not request its U.S. subsidiary to ship parts intended for Iran;[9]

Second, Fokker management and employees reportedly engaged in several deliberate, overt acts to evade, or conceal evasion of, U.S. export control and sanctions laws. Such acts allegedly included:

- supplying parts to Iran after OFAC denied Fokker a license to export such parts to Iran;[10]
- deliberately withholding aircraft tail numbers or providing false tail numbers to U.S. and U.K. companies as an intentional means to conceal the customers' locations in U.S.-sanctioned countries;[11]
- creating and regularly updating a "black list" to track U.S. companies that were vigilant about export controls and directing business to those U.S. companies not on the list;[12]
- deleting references to Iran in materials sent to Fokker's U.S. subsidiaries and U.S. repair shops in keeping with an apparent policy of "what they don't know won't hurt them," changing the internal Fokker parts-tracking database to delete fields related to the ultimate end-user, and directing employees to hide activities and documents related to Iranian transactions when U.S. Federal Aviation Administration inspectors audited Fokker's Dutch warehouse.[13]

Key Takeaways for U.S. and Non-U.S. Companies

First, this case highlights the need for effective compliance responses to known legal risks. The government cited numerous instances in which Fokker senior management were apparently made aware that current policies risked violating U.S. law, and the government made

[6] *Id.* at ¶15.
[7] *Id.* at ¶24.
[8] *Id.* at ¶¶26-27.
[9] *Id.* at ¶31.
[10] *Id.* at ¶¶19-21.
[11] *Id.* at ¶33.
[12] *Id.* at ¶33.
[13] *Id.* at ¶33.

much of the fact that, although certain orders were suspended temporarily, the company eventually returned to the *status quo* with respect to its Iranian operations. This alleged "flouting" of U.S. law was likely the basis for the criminal referral. Therefore, this settlement is intended to signal that companies should take seriously compliance warnings from in-house and external counsel and not ignore that advice for the sake of business interests. As indicated in this and other settlements, turning a blind eye to business operations that potentially violate such laws and regulations will be considered an aggravating factor by the U.S. government.

Second, in dealing with U.S. suppliers and service providers, a non-U.S. company must not assume that just because it is not directly subject to U.S. law that it need not adhere to and cooperate with its U.S. suppliers' compliance policies. Arguably the most problematic conduct in this case involved the company's high-level instruction to evade U.S. supplier's compliance policies through the creation of a "black list" of compliant companies. In pursuing this case against Fokker, the U.S. government continues to extend the extraterritorial reach of sanctions enforcement to non-U.S. companies whose operations involving sanctioned countries have a U.S. nexus.

Third, by entering this settlement the U.S. government rejects Fokker's reported policy of "what [our U.S. suppliers] don't know won't hurt them" and highlights the important role that U.S. companies and their compliance mechanisms play in enforcing U.S. sanctions policy. As this case signifies, it is critical that companies conduct thorough due diligence of transactions to minimize the risk of dealing with parties seeking to circumvent U.S. laws. Moreover, in the event that a U.S. company inadvertently becomes involved in potential violations of U.S. laws, the failure to exercise due diligence may be considered an aggravating factor.

Finally, while this settlement signals that voluntary disclosures will not always be settled administratively, not every voluntary disclosure will be referred for criminal prosecution. The aggravating factors in the Fokker case serve to distinguish this case from cases involving a misunderstanding or misinterpretation of the requirements of U.S. law. With over 1,153 alleged violations, each of which could have resulted in up to a $1 million in criminal penalties, it appears that the Fokker' voluntary disclosure, in conjunction with its cooperation during the government's investigation, played a significant role in reducing the penalty amount and resulted in a deferred prosecution agreement rather than a felony plea.