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Top 10 Topics for Directors in 2018: Trade and sanctions

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By: Christian C. Davis

U.S. directors should be particularly mindful of new changes to U.S. sanctions and avoid actions that could violate these restrictions. This risk is particularly acute for U.S. persons who serve on the boards of non-U.S. companies. For example, although non-U.S. companies that are not owned or controlled by U.S. companies are not generally subject to U.S. comprehensive sanctions against Iran, U.S. directors at these companies must comply with these restrictions. Accordingly, non-U.S. companies should consider establishing blanket recusal policies that require U.S. directors to exclude themselves from engaging in any activities that might implicate U.S. sanctions and wall them off from meetings, discussions, decisions or other dealings related to such activities. Moreover, given the current dynamic sanctions environment, directors should take care to understand how changes to U.S. sanctions may present potential risk, taking into account the industry, customers and geographic footprint of their respective companies.

As mentioned above, 2017 ushered in significant changes in the complex U.S. sanctions environment. In particular, the Trump administration has tightened U.S. sanctions against Cuba, including some that were relaxed under the Obama administration; implemented complex new sanctions that restrict certain debt-, equity- and securities- related transactions involving the government of Venezuela; and established new sanctions targeting non-U.S. persons that engage in business with North Korea, which was also re-designated a State Sponsor of Terrorism. With respect to Russia, Congress passed legislation codifying earlier Obama-era restrictions and imposing new sanctions targeting the Russian energy sector; certain entities operating in the defense or intelligence sectors of Russia; privatization of state-owned assets; and other activities. In contrast to these new restrictions, the Trump administration has also lifted most sanctions against Sudan. Finally, while the administration has not rescinded U.S. commitments to the Joint Comprehensive Plan of Action (JCPOA) (i.e., the Iran nuclear agreement), President Trump's decision to "decertify" Iran's compliance with the JCPOA injects significant uncertainty regarding whether the United States will reimpose sanctions targeting non-U.S. companies that were lifted under the JCPOA.

Combined with these significant changes, the Trump administration has continued to vigorously enforce U.S. sanctions. In 2017, the aggregate value of civil penalties imposed on companies was more than five times the total in 2016. While most enforcement actions in 2017 involved Iran-related sanctions, OFAC has pursued cases involving an array of sanctioned countries against companies operating in a variety of industries. The agency also continues to track the actions of high-ranking officials in companies to assess penalties. Specifically, an individual's knowledge of, or involvement in, a prohibited transaction is a factor that may influence civil penalty amounts, and a finding that an individual acted willfully in violation of sanctions laws could trigger a referral to the DOJ for criminal prosecution.

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