

## **CONTRACT CLAUSES ARE NOT A SAFE HARBOR FOR OFAC COMPLIANCE**

### **OFAC's recent settlement with Comtech Telecommunications Corp. and Comtech EF Data Corp transmits important compliance lessons to companies.**

On September 17, 2020, OFAC announced a settlement with New York-based Comtech Telecommunications Corp. ("**Comtech**") and its wholly owned subsidiary based in Arizona, Comtech EF Data Corp ("**EF Data**"). The settlement related to the alleged "indirect export" of warranted satellite equipment and services and training to the Sudan Civil Aviation Authority ("**SCAA**"), which was prohibited by OFAC's Sudanese Sanctions Regulations, 31 C.F.R. part 538 ("**SSR**") at the time of the transactions in 2014/2015.

OFAC determined that Comtech and EF Data voluntarily self-disclosed the apparent violations and that the apparent violations constituted an egregious case. The base civil monetary penalty was \$584,386; however, due to alleged aggravating circumstances OFAC imposed a higher penalty of \$894,111.

The settlement has a number of key takeaways:

- You cannot contract away your OFAC compliance responsibilities. The settlement agreement indicates that EF Data, through its wholly owned Canadian subsidiary, Memotec, Inc. ("**Memotec**"), sold the satellite equipment to an unnamed "Canadian Company." The Canadian Company then incorporated the items into an Aeronautical V-SAT Network, which it sold and shipped to SCAA. The ultimate end user was known to Memotec and EF Data, and Memotec employees trained SCAA employees on how to use the satellite technology. Despite this knowledge, ED Data tried to "solve" the issue by including in the sales contract that the Canadian Company was responsible for compliance with any applicable regulations, including obtaining any necessary licenses or authorizations. OFAC's settlement makes it clear that you cannot contract your way out of OFAC compliance.
- The benefits of a self-disclosure can be undermined by uncooperative conduct during the investigation. OFAC notes that in response to administrative subpoenas the companies not only provided "shifting explanations," but that a former Export Compliance Official at EF Data "manipulated" and "doctored" emails provided to OFAC to omit language

indicating knowledge that Sudan was the end use destination of the equipment. OFAC adds that the companies actions in failing to provide and inaccurately providing information to OFAC, required OFAC to "expend significant additional time and resources" which appears to be reflected in the final penalty amount which was greater than the base amount that OFAC could have imposed. Interestingly, OFAC did not withhold voluntary disclosure credit, which it could have under its discretion under the Enforcement Guidelines. The public settlement does not provide an explanation for OFAC's decision, but perhaps OFAC sought to balance its desire to encourage voluntary disclosures while penalizing the post-disclosure conduct. The last time that OFAC required a company to pay higher than the base penalty amount was in the February 2019 settlement with Kollmorgen Corporation, there due to the egregious nature of the underlying conduct rather than the level of cooperation in the investigation.

- Ongoing Compliance Undertakings. The settlement also reinforces OFAC's unwavering expectations that companies commit to robust compliance programs, requiring that Comtech and EF Data agree, as part of the settlement to maintain for at least five years "sanctions compliance measures that are designed to minimize the risk of recurrence of similar conduct in the future." As part of the settlement, Comtech and EF Data must provide on an annual basis for the next five years a certification confirming that they have implemented and continue to maintain the sanctions compliance measures outlined in the settlement agreement. OFAC has required this five-year period of certification in settlements this year with other companies, including Eagle Shipping International (USA) LLC and Essentra FZE Company Limited.

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