Memorandum

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VIA EMAIL

Date:	March 14, 2011
To:	Clients and Friends
From:	Stanley J. Marcuss
Re:	U.S. Economic Sanctions Against Libya Cause Legal Head-Scratching

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You are not alone if you have struggled over the past week to understand and apply the U.S. executive order imposing sanctions against Libya. The problem is attributable to the use of a so-called blocking order that is not really suitable for the burden it is being asked to bear.

The sanctions are intended to prohibit dealings with Qadhafi and his cronies, the government of Libya and any entity controlled by the government of Libya. The method employed, however, is a requirement that property or interests in property of those targeted by the sanctions be frozen if the property or interests in property are in the United States or in the possession or control of U.S. persons. Use of a blocking order of this kind, however, creates difficult issues of interpretation and has consequences that seem inconsistent with U.S. policy.

It is one thing, for example, to regard a U.S. bank holding Libyan government deposits or a U.S. manufacturing company holding equipment sold to the Libyan government as being Libyan government property that must be frozen.

But the property that must be frozen includes property in which Qadhafi and the Libyan government have an interest regardless of whether anyone else also has an interest in the property.

The consequence is that the blocking order frequently deprives U.S. companies of their property rights while doing nothing to advance the goal of U.S. policy. Examples are legion:

The U.S. company that is owed money under a contract with the Libyan government cannot collect the money because the contract is property in which the Libyan government has an interest; the U.S. company that receives payment from the Libyan government on a contract cannot deal with it free and clear if the Libyan government has a right to return of the funds if there is a failure of contract performance; the U.S. company that has money on deposit with a Libyan government-controlled bank organized under Libyan law cannot withdraw that money because the Libyan bank, as debtor, has an interest in the account; the U.S. company that has equipment in Libya that it wants to withdraw cannot pay exit fees to the government of Libya because the payments would constitute property in which the government of Libya has an interest; the U.S. company that needs to pay income or other taxes or royalties to the Libyan government or else face expropriation or confiscation cannot do so because the payments constitute property in which the government of Libya has an interest.

Compounding the problem is the requirement to report frozen property to the U.S. government. Does the government of Libya, for example, have an interest in goods on a U.S. assembly line being manufactured for it? How about contracted-for services that cannot be performed because of the blocking order? In what sense are services that will never be performed "frozen?" And what value is to be assigned in reports to OFAC on the value of contracts that are incapable of being performed?

Most issues like these would never arise if the U.S. government simply prohibited dealings with Qadhafi and his government instead of requiring that their property interests be frozen. This, by and large, is the approach taken by the EU, which requires freezing only of property "belonging to, owned, held or controlled by" the sanctioned target.

OFAC seems not to be aware that more than one party frequently has an interest in any given piece of property: Contracts have two or more parties; two or more parties have interests in property subject to a lien; two or more parties have an interest in bank accounts. When the other party in interest is a U.S. person, a freeze order like the one at issue here often inflicts more harm on the U.S. person than the target of the sanctions. You would think OFAC would have learned by now, but alas it apparently has not.