Berliner Corcoran & Rowe LLP

From the SelectedWorks of Perry S. Bechky

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US Sanctions & Export Controls: Implications for China

Perry S. Bechky









Export Controls (briefly)

State

- US Munitions List
- Defense articles and services
- Export and reexport Includes deemed exports
- Complete ban for China

Commerce

- Commodity Controls List
- Dual-use goods and tech
- Export and reexport
 Includes deemed exports
- Many restrictions for China
- BIS Entity List Ex: ZTE
- Duplicative penalties with OFAC

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Two Main Types of Sanctions

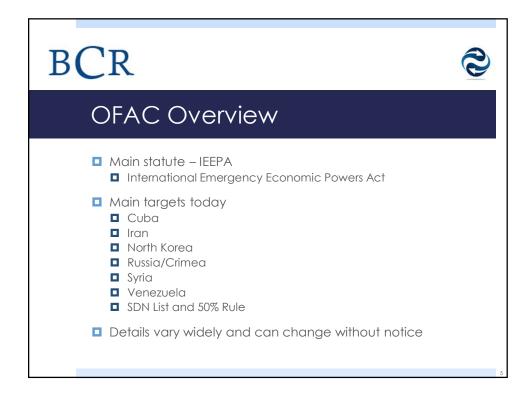
Primary Sanctions

- Violations punished by criminal prosecution and civil penalties
- Mainly restrict activities by US persons, but with important exceptions affecting non-US persons. For some violations, BIS can cut off US suppliers.
- OFAC / some overlap w BIS

Secondary Sanctions

- Economic "sticks" to encourage 3d-country companies to avoid business with sanctioned countries and persons
- Biggest "stick": Asset freeze and near-total bar on doing business with US
- OFAC or State Dept

2







Key Term – US Person

- US citizens
- US permanent residents (green card holders)
- Entities organized under US law
 - Includes US subsidiaries of foreign companies
 - Includes foreign branches of US companies
 - Cuba and Iran sanctions reach foreign subsidiaries too
- Persons located in the US
 - Includes temporary travelers
 - Includes US branches of foreign companies

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Extraterritorial Effects

- Re-export controls
 - Includes controls on certain non-US goods with US inputs
- Causing violations by US persons
 - Especially banks
 - Can include customers, suppliers, employees, etc
 - Can include own US subsidiary
- Increasing criminal prosecution of willful violations by non-US persons

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North Korea Case Study 1

- 31 Jan 2019 ELF Cosmetics paid \$1MM penalty for importing 156 shipments of false eyelashes from China containing DPRK-origin materials
- No actual knowledge of the DPRK-origin materials
- Failed to exercise "sufficient supply chain due diligence while sourcing products from a region that poses a high risk to the effectiveness" of sanctions against DPRK
- ELF started supply chain audits to verify origin of materials (including checking suppliers' bank records) and requires suppliers to sign certificates of OFAC compliance

9





North Korea Case Study 2

- 2016 Dandong Hongxiang Industrial Development Co. Ltd. (DHID) and 4 associated individually criminally charged for helping DPRK bank send payments through the US
- Named as SDNs
 - Can be named as an SDN (among other reasons) for materially assisting an SDN or for engaging "in at least one significant importation from or exportation to North Korea of any goods, services, or technology" (EO13810)
- Forfeiture suit to seize funds in 25 Chinese accounts

10



More Extraterritorial Effects

- Contractual commitments to comply
 - Especially required by banks
 - ELF likely to accelerate
- Securities offerings
 - Use of proceeds restrictions
 - Enhanced disclosures

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Compliance

- OFAC expects businesses including non-US businesses to have compliance programs based on self assessment of sanctions risks
 - Living programs, implemented in practice, with updates and training
- Need internal controls capable of assuring compliance with legal obligations and voluntary commitments. Either refrain from business lawful for non-US persons or take care with all US connections
 - Ensure that US persons are not involved, including recusal policies
 - Due diligence
 - Segregate funds
 - Segregate US-origin or target-origin goods
 - Account for percentage of US-origin input
 - Account for percentage of sales to target countries
- Need different policies at level of US subsidiary and non-US parent

12

