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May 18, 2022

# US Sanctions and Export Controls: Implications for New Zealand

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## US Sanctions and Export Controls: Implications for New Zealand



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New Zealand Trade & Enterprise  
18 May 2022

## Perry Bechky

- ▣ > 25 years as international lawyer, mainly international trade and investment
- ▣ Started career at US Treasury, long experience at top global firms
- ▣ Former law professor
- ▣ Current focus mainly sanctions (OFAC) and investment reviews (CFIUS)
- ▣ Boutique firm with international focus





## Road Map

- ▣ OFAC – Office of Foreign Assets Control
  - ▣ Treasury Department
  
- ▣ ITAR – International Traffic in Arms Regulations
  - ▣ State Department, Directorate of Defense Trade Controls (DDTC)
  
- ▣ EAR – Export Administration Regulations
  - ▣ Commerce Department, Bureau of Industry and Security (BIS)
  
- ▣ DOJ – Department of Justice
  - ▣ Criminal prosecutions

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This talk is only a summary.  
It does not substitute for obtaining proper legal advice.

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# Introduction to US Sanctions

Part 1



## 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.
- ▣ BIS can cut off US suppliers.
- ▣ OFAC / some BIS

### Secondary Sanctions

- ▣ Economic “sticks” to encourage 3d-country companies to avoid business with sanctioned countries and persons
  - ▣ Often “menu based”
- ▣ Biggest “stick”: Asset freeze and near-total bar on doing business with US
  - ▣ **SDN List**
- ▣ OFAC or State Dept



## OFAC Overview

- ▣ Main statute – IEEPA
  - ▣ International Emergency Economic Powers Act
  
- ▣ Main targets today
  - ▣ Cuba
  - ▣ Iran
  - ▣ North Korea
  - ▣ Russia/Occupied parts of Ukraine
  - ▣ Syria
  - ▣ Venezuela
  - ▣ SDN List and 50% Rule
  
- ▣ Details vary widely and can change without notice



## Common OFAC Prohibitions

- ▣ Blocking
  - ▣ Freezes assets
  - ▣ Effectively prohibits virtually all dealings
- ▣ Import and export/**reexport** restrictions
  - ▣ Includes goods, services, and tech
- ▣ Restrictions on investment, lending & other financial transactions
- ▣ Approval and **facilitation**
- ▣ Evasion, attempt, conspiracy, and **causing violations**
- ▣ Travel (Cuba only)





## 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



## 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



## Example

- ▣ Toll Holdings of Australia paid \$6MM penalty in 4/22
- ▣ About 3000 payments in USD to SDNs and sanctioned countries (Iran, North Korea, Syria). Total \$44MM.
- ▣ Could have been found egregious because ignored warnings and an employee ordered stripping of sanctioned names from future invoices
- ▣ Saved by voluntary self-disclosure and significant steps to improve compliance
- ▣ **Also:** ANZ Bank's \$6MM penalty in 2009



## More examples

- ▣ Ericsson AB settlement for causing its US subsidiary to provide engineering support for a project in Sudan
  - ▣ “Do not use that word ;) “
  - ▣ Botswana or East Africa
  
- ▣ UAE company (Essentra) settlement and DPA for receiving payments for selling cigarette filters to North Korea into an account at a foreign branch of a US bank
  - ▣ “Don’t mention that customer is in my country”
  - ▣ “China or where else”

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## Secondary Sanctions

Part 2



## Secondary Sanctions Overview

- ▣ Started 1996
  - ▣ Helms-Burton Act (Cuba)
  - ▣ Iran & Libya Sanctions Act
  
- ▣ Once rare and controversial
  
- ▣ Now commonplace
  - ▣ >20 triggers re Iran alone
  - ▣ Nearly all foreign policy bills in Congress now include



## Cuba

- ▣ 180 day rule on vessels
  - ▣ Cuban Democracy Act, 1992
- ▣ HBA rules on trafficking in confiscated property
  - ▣ Restrictions on travel to US (Title IV)
  - ▣ Lawsuits (Title III)
- ▣ Title III entered effect in 2019
  - ▣ But main impact on US companies and other companies based in US



## Russia

- Facilitating significant transaction for sanctioned person or close relative
- Other triggers too
- Expect more to come





## Significant Transaction

Totality of the facts and circumstances, which **may** include:

- ▣ size, number, and frequency of the transaction
- ▣ nature of the transactions
- ▣ level of awareness of management / pattern of conduct
- ▣ nexus between the transactions and a blocked person
- ▣ impact on statutory objectives
- ▣ involve deceptive practices?
- ▣ **such other factors deemed relevant on a case-by-case basis**



## Iran - Examples

- ▣ Investment in Iran's energy sector
- ▣ Buying oil or petrochemical products from Iran
- ▣ Transporting Iranian crude oil
- ▣ Helping Iran evade sanctions
- ▣ Selling, supplying, or transferring to or from Iran precious metals, graphite, aluminum, steel, certain other metals, coal, and software for integrating industrial processes
- ▣ Mining, producing, or transporting Iranian uranium



## Iran – More Examples

- ▣ Engaging in or facilitating a significant transaction with IRGC or its affiliates
- ▣ Dealings with many Iranian SDNs
- ▣ Providing certain goods or services to the Iranian automotive sector
- ▣ Buying, or facilitating dealings in, Iranian bonds & other sovereign debt
- ▣ Helping Iran acquire US banknotes
- ▣ Supporting, assisting, or providing certain goods or services to the Central Bank of Iran
- ▣ Various banking transactions with Iran, including transactions in rials
- ▣ Various insurance and reinsurance transactions



## Sectoral Sanctions

- ▣ Limited start in Russia in 2014
- ▣ Spreading in more countries and more sectors
- ▣ Operating in the Venezuelan energy sector
  - ▣ Applied as secondary sanctions
  - ▣ Similar language elsewhere, not yet applied the same way

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## Export Controls

Part 3



## Dan Fisher-Owens

- Over 20 years in private practice
- Focus on export controls and trade sanctions (EAR, ITAR, OFAC)
- Boutique firm with international focus





## US Export Controls Overview

- Three primary regulators
  - Department of State – International Traffic in Arms Regulations
  - Department of Commerce – Export Administration Regulations
  - Department of Treasury – OFAC Trade Control Sanctions
- All three regimes apply extraterritorial jurisdiction to varying degrees



## ITAR Extraterritoriality

- The ITAR regulates military items and defense services, which generally require a specific license from the State Department to all destinations
- ITAR licenses are conditioned on accepting jurisdiction over
  - Reexports and transfers of US-origin ITAR-controlled items
  - Export, reexport, and transfer of foreign direct products (FDPs) of US-origin ITAR-controlled technology and software
- ITAR FDP Rule applies to all reexports/retransfers
- Thus, foreign recipients of US-origin ITAR items generally must apply for State Department licenses to reexport, retransfer, and even dispose of covered items





## EAR Extraterritoriality - Overview

- ▣ Reexports of US-origin goods, technology or software
- ▣ Foreign-made items with more than specified US-origin content
  - ▣ 10% for terrorist-designated countries / 25% for rest of world
  - ▣ Only content that requires a license for the destination in question counts towards de minimis level



## EAR Extraterritoriality - Overview

- National Security FDP Rule applies to foreign-made direct products of
  - US-origin national-security controlled technology or software
  - US-designed national-security controlled production equipment
  - Applies only when the items are destined for National Security target countries or embargoed countries
  
- Broader FDP rules for Russia/Belarus, Russia/Belarus military end-users and Huawei Entity List
  - Apply to FDPs of lower-sensitivity US technology, software, production equipment



## EAR Extraterritoriality

- ▣ The EAR has more flexibility, even when items are subject to reexport/retransfer jurisdiction
- ▣ Reexport controls apply if a license would be required for a direct export
  - ▣ Whether a license is required depends on the combination of an item's sensitivity and destination
    - ▣ Almost no EAR items require a license for Canada
    - ▣ Few EAR items require a license for close allies like NZ, AU, EU, UK, NATO, etc.
    - ▣ Most EAR items require a license for China
    - ▣ Almost all items require a license for embargoed countries



## EAR Extraterritoriality

- License Exception Additional Permissive Reexports (APR) – EAR 740.16
  - In many cases, a license from a Wassenaar Arrangement country (like New Zealand) can be sufficient EAR authorization
  - Careful reading of License Exception provisions needed
  - BIS proposed removing key sections in 2020, but so far proposed changes have not been implemented
  
- Second Incorporation Rule
  - When acquiring non-US- manufactured products at arms-length from a non-US supplier, and incorporating such items into a higher-level assembly outside the United States, it is possible to disregard US-origin content that was incorporated in the first product
  - Does not apply to intracompany supply chains



## EAR Extraterritoriality

- De minimis calculations
  - Cost of US-origin controlled content divided by sale price of foreign-made item in relevant destination
  - If 10% or less, exempt from EAR jurisdiction worldwide
  - If 25% or less, exempt from EAR jurisdiction, except terrorist-designated countries (Cuba, Iran, North Korea, Syria)
  - Calculation guidelines in Supp. No. 2 to EAR Part 734
  - Some items ineligible for de minimis exemption based on ECCN (4A003, 5E002, 9E003, other military/satellite items), so any amount triggers US jurisdiction



## EAR Extraterritoriality

- EAR FDP Rules are more narrowly scoped than ITAR FDP Rule
- National Security FDP Rule applies only if covered item is intended for National Security target countries or embargoed countries (Country Group D:1, E:1, E:2)
- 9X515 FDP Rule applies only if covered item is destined for arms embargoed countries (Country Group D:5, E:1, E:2)
- 600 Series FDP Rule applies only if covered item destined for National Security/Counterproliferation target countries and embargoed countries (Country Group D:1-D:5, E:1, E:2)
- Huawei FDP Rule applies worldwide, but only to direct products of certain Export Control Classification Numbers (ECCNs) and if a Huawei company on Entity List is involved in the transaction



## EAR Extraterritoriality

- Russia/Belarus FDP Rule applies for direct products of certain ECCNs, and the items are directly or indirectly intended for Russia/Belarus
- Russia/Belarus MEU FDP Rule applies to direct products of any US technology/software/production equipment, but only if a Russian Entity List party with FN 3 designation is involved
- The Russia/Belarus & Russia/Belarus MEU FDP Rules don't apply to exports from countries that are identified as cooperating with United States on export controls/sanctions against Russia/Belarus
  - Includes New Zealand and Australia
  - See Supp. No. 3 to EAR Part 746



## OFAC Extraterritoriality – Goods/Technology/Software

- OFAC jurisdiction over exports, reexports, and transfers of goods overlaps with the EAR for several sanctions programs, especially
  - Iran
  - Occupied Areas of Ukraine
- The overlap can prevent US persons from being involved in trade transactions that do not involve items subject to the EAR
- So, when dealing with OFAC embargoed destinations, participation of US persons can trigger license requirements, even intermediaries like banks, carriers, and cloud service providers





## Reexport Enforcement

- Nordic Maritime (Sing.) - \$31M penalty for bringing US-origin seismic survey equipment into Iranian waters for use in offshore oil & gas survey
  - “... where you break American export law by illicitly helping Iran develop its natural resources, you help fund terrorism and you will pay the gravest of prices.”
- Avnet Asia - \$3,229,000 – for reexports of US-origin electronics to Iran and to a company on the BIS Entity List
  - Company held responsible for acts of employees who knowingly circumvented EAR, because company failed to establish internal controls to prevent diversion
  - “Individuals and companies that violate the Export Administration Regulations can be criminally prosecuted, administratively fined, or both.”



## Bringing it all Together

- ▣ SAP (Germany) non-prosecution agreement with DOJ and administrative agreements with BIS and OFAC
- ▣ \$8MM penalties for thousands of violations
  - ▣ Plus remediation cost \$27MM and ongoing audit and compliance obligations
- ▣ Allowed downloads in Iran and by front companies
- ▣ Access to US cloud services from Iran
- ▣ Voluntary Self Disclosure – “Would have been far worse”



## Compliance Strategies

- US export control jurisdiction can pop up in many ways
  - Classification/jurisdiction are key to determining licensing requirements
  
- Non-US companies need to be vigilant for
  - Sourcing of parts, components, and software from the United States
  - Foreign-made parts, components, and software that incorporate US-origin items
  - Foreign-made products that are direct products of US-origin technology and software, or that were made with US-designed production equipment
  - Participation of US persons (for embargoed country transactions)



## Questions





Thank you!

Please do not hesitate to contact me:



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## Glossary

Appendix



## Commerce Department

- ▣ BIS – Bureau of Industry and Security
- ▣ CCATS – Commodity Classification and Tracking System (formal BIS classification ruling)
- ▣ CCL – Commerce Control List
- ▣ EAR – Export Administration Regulations
- ▣ EAR99 – Items that are subject to the EAR, but not specifically listed on the CCL
- ▣ ECRA – Export Controls Reform Act
- ▣ ECCN – Export Control Classification Number



## State Department

- ▣ AECA – Arms Export Control Act
- ▣ CJ – Commodity Jurisdiction (formal State Department ruling whether an item subject to ITAR or EAR)
- ▣ DDTC – Directorate of Defense Trade Controls
- ▣ DSP-5 – Export license form for exports of hardware & discrete technical data
- ▣ DSP-83 – Non-transfer assurance form signed by non-US recipient of defense articles
- ▣ DS-2032 – Form to register as a manufacturer, exporter, or broker of ITAR-controlled items
- ▣ ITAR – International Traffic in Arms Regulations
- ▣ MLA – Manufacturing License Agreement
- ▣ TAA – Technical Assistance Agreement (authorizes exports of technical data & defense services)
- ▣ USML – United States Munitions List





## Treasury Department

- ▣ IEEPA – International Emergency Economic Powers Act (authority for most US sanctions programs)
- ▣ OFAC – Office of Foreign Assets Control
- ▣ NS-CMIC List – List of Chinese companies supporting civil-military fusion
- ▣ SDN List – List of Specially Designated Nationals and Blocked Persons
- ▣ SSIL List – Sectoral Sanctions Identification List (Russia sanctions)
- ▣ TSRA – Trade Sanctions Reform Act of 2000 (authority for agricultural & medical licensing)
- ▣ TWEA – Trading With the Enemy Act (authority for Cuba sanctions)