

Clark Hill Thorp Reed
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How Companies and Executives Run Afoul
of Trade Sanctions: The Impact of
Trade Sanctions on Business

May 23, 2013
The Racquet Club of Philadelphia

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Why do we care about Trade Sanctions in 2013?

- New enforcement approach, David Cohen, Undersecretary for Terrorism and Financial Intelligence, Treasury



- “Although sanctions enforcement cases involving financial institutions have typically concluded with civil penalties at the corporate level, *individuals can and do face liability...when they are personally responsible for sanctions violations*, and Treasury’s Office of Foreign Assets Control will take appropriate enforcement action in these circumstances.”
 - » March 2013
- Enforcement against individual executive in Essie Cosmetics for selling to an Iranian distributor; settled for \$450,000.
 - » April 2012

What are the liabilities?

Criminal liability

- Corporations and natural persons
 - up to a maximum of \$ 1,000,000 fine
- Natural persons
 - up to 20 years imprisonment and/or
 - up to a maximum of \$ 1,000,000 fine

- » International Emergency Economic Powers / IEEPA
 - » 50 U.S.C. § 1705

Civil liability
















- Corporations and natural persons:
 - up to a maximum of \$ 250,000
 - or
 - up to an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed

- » International Emergency Economic Powers / IEEPA
 - » 50 U.S.C. § 1705










What were the civil penalties in 2012 - 2013?

- Enforcement in 2012 and 2013

Civil Penalties Information Chart

Detailed Penalties Information	Aggregate Number of Penalties or Settlements	Monthly Penalties/Settlements Total in USD
12/12/2012 	1	8,571,634
12/11/2012 	1	375,000,000
12/10/2012 	1	132,000,000
11/15/2012 	2	181,170
10/19/2012 	1	18,900
08/22/2012 	1	402,000
07/10/2012 	1	1,347,750
06/14/2012 	1	855,000
06/12/2012 	1	619,000,000
05/21/2012 	1	112,500
04/25/2012 	1	126,000
04/10/2012 	1	450,000
02/24/2012 	1	1,054,388
02/21/2012 	1	9,000
02/07/2012 	1	30,385
Year to date totals:	16	1,139,158,727

Civil Penalties Information Chart

Detailed Penalties Information	Aggregate Number of Penalties or Settlements	Monthly Penalties/Settlements Total in USD
04/25/2013 	1	23,400
04/12/2013 	1	22,500
03/21/2013 	1	20,800
03/05/2013 	1	139,650
02/22/2013 	2	70,875
02/21/2013 	1	404,100
02/01/2013 	1	97,695
01/18/2013 	1	10,000
01/02/2013 	1	191,700
Year to date totals:	10	980,720

Civil Penalties and Enforcement Information

What intent is required for liability?

Criminal liability

- A person who willfully commits, attempts, or conspires to commit
 - IEEPA; 50 U.S.C. § 1705
 - Export smuggling; 18 U.S.C. § 554
 - Filing false statements with an agency of the United States ; 18 U.S.C. § 1001
- Meaning of willfully

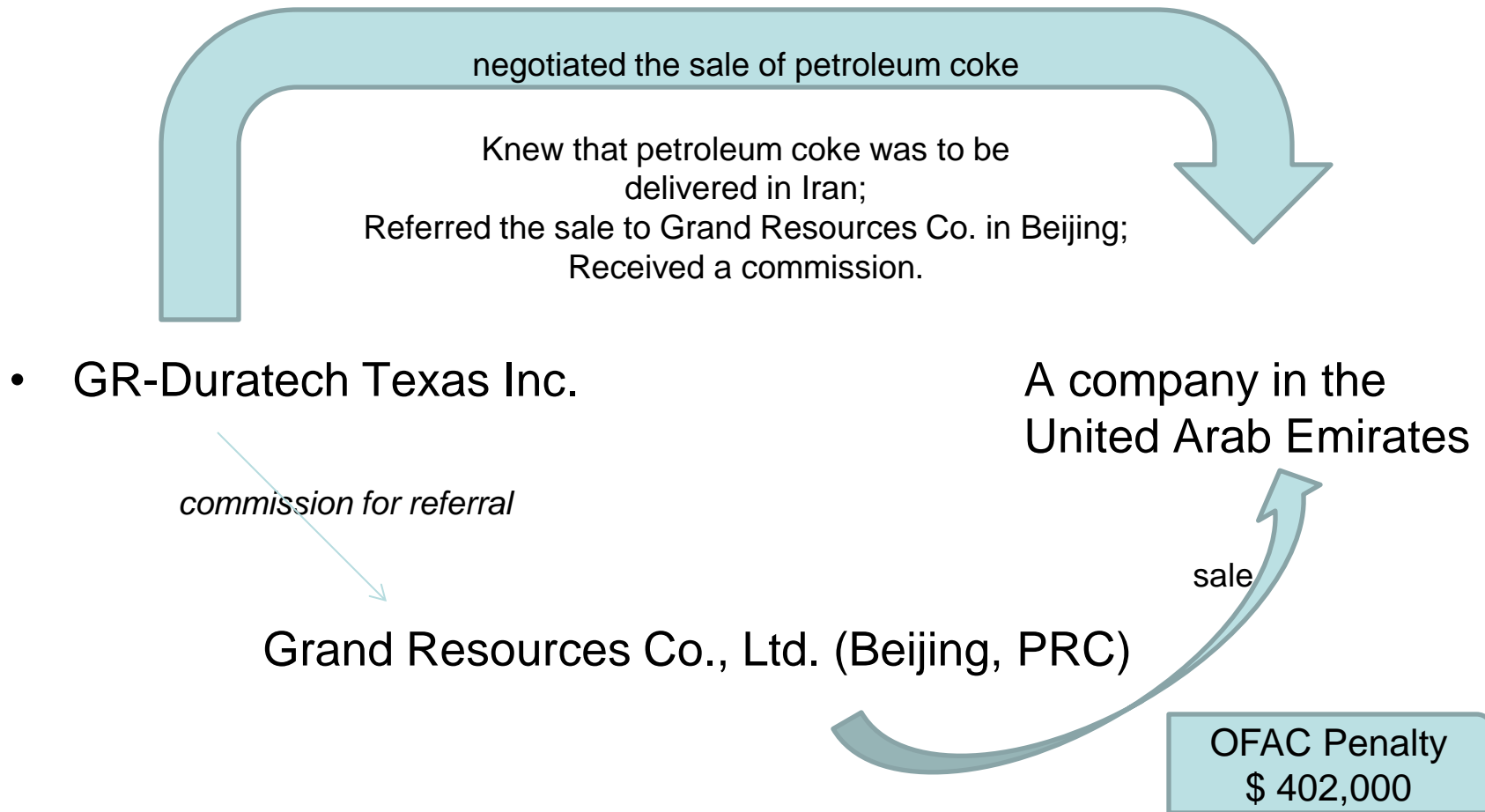
Civil liability

- Strict liability
 - Import prohibition under Iran Transactions Regulations; 31 C.F.R. Part 561
- Reasonable knowledge / “knowingly”
 - Export prohibition under Iran Transactions Regulations
 - exportation from US, or by US person, wherever located, of goods, technology, services to Iran undertaken with knowledge or reason to know that they are for Iran
 - Iran Financial Sanctions Regulations; 31 C.F.R. 561.314
 - Foreign subsidiaries of US companies are prohibited from knowingly engaging in transaction that would be prohibited for US person or in the US; Iran Threat Reduction Act (ITRA)
 - no scienter for parent required

Who was violating Sanction Programs and how?

- ING Bank NV, Standard Chartered Bank, HSBC Holdings plc
 - foreign and sophisticated financial groups
- Smaller US companies and, sometimes, their corporate officers
- US transactions that involved Specially Designated Nationals (“SDNs”) residing in US or abroad
 - Used US corresponding banks when transferring funds in violation of US sanctions; “Stripping”; egregious violations.
 - Sales/exports: nail care products, computer related goods, barley malt, medical supplies, medical equipment.
 - Loan account, sale of property in US.

Grand Resources USA / GR-Duratech Texas Inc.



Genesis Asset Managers, LLP

Genesis Asset Managers, LLP (US) – GAM US

Investment manager of Genesis Emerging Markets Fund
(Guernsey)

OFAC Penalty:
\$112,500

Contracts with London Subsidiary, Genesis Investment
Management, LLP (UK) – GIM UK – provides investment
advice

According to the Investment Advisory Agreement, GIM
UK has the authority to act as an agent for GAM US

GIM UK purchases \$3 million of shares for GAM US in
First Persian Equity Fund, Cayman Islands

The First Persian Equity Fund invests exclusively in
Iranian securities

How do Trade Sanctions get their reach?

- (Former) Government boycott
 - e.g., initial Iran Sanctions: blocking of government assets in the US
 - e.g., sanctions against former Liberian president Charles Taylor, family members, and former government officials
- Country boycott
 - e.g., Cuba, Iran, ...
- Particular entities and individuals
 - e.g., Specially Designated Nationals (SDNs)
 - drug traffickers, terrorists, blocked entities
- Particular commodities
 - e.g., rough diamond trade / Kimberly process certification scheme

Overview Trade Sanctions

OFAC Sanctions Programs:

[Balkans-Related Sanctions](#)

[Belarus Sanctions](#)

[Burma Sanctions](#)

[Cote d'Ivoire \(Ivory Coast\)-Related Sanctions](#)

[Counter Narcotics Trafficking Sanctions](#)

[Counter Terrorism Sanctions](#)

[Cuba Sanctions](#)

[Democratic Republic of the Congo-Related Sanctions](#)

[Iran Sanctions](#)

[Iraq-Related Sanctions](#)

[Lebanon-Related Sanctions](#)

[Former Liberian Regime of Charles Taylor Sanctions](#)

[Libya Sanctions](#)

[Magnitsky Sanctions](#)

[Non-Proliferation Sanctions](#)

[North Korea Sanctions](#)

[Rough Diamond Trade Controls](#)

[Somalia Sanctions](#)

[Sudan Sanctions](#)

[Syria Sanctions](#)

[Transnational Criminal Organizations](#)

[Yemen-Related Sanctions](#)

[Zimbabwe Sanctions](#)

Overview Trade Sanctions (Cont'd)

- Specially Designated Nationals List (SDNs) Specially Designated Nationals List (SDN)



OFFICE OF FOREIGN ASSETS CONTROL

Specially Designated Nationals and Blocked Persons List

May 16, 2013

101 DAYS CAMPAIGN (a.k.a. CHARITY COALITION; a.k.a. COALITION OF GOOD; a.k.a. ETELAF AL-KHAIR; a.k.a. ETILAFU EL-KHAIR; a.k.a. I'TILAF AL-KHAIR; a.k.a. I'TILAF AL-KHAYR; a.k.a. UNION OF GOOD), P.O. Box 136301, Jeddah 21313, Saudi Arabia [SDGT].

2000 DOSE E.U. (a.k.a. DOMA E M), Calle 31 No. 1-34, Cali, Colombia; NIT # 805015749-3 (Colombia) [SDNT].

2000-DODGE S.L., Calle Gran Via 80, Madrid, Madrid, Spain; C.I.F. B83149955 (Spain) [SDNT].

2904977 CANADA, INC. (a.k.a. CARIBE SOL; a.k.a. HAVANTUR CANADA INC.), 818 rue Sherbrooke East, Montreal, Quebec H2L 1K3, Canada [CUBA].

A A TRADING FZCO, P.O. Box 37089, Dubai, United Arab Emirates [SDNTK].

A K DIFUSION S.A. PUBLICIDAD Y MERCADEO, Calle 28N No. 6BN-54, Cali, Colombia; NIT # 900015699-8 (Colombia) [SDNT].

A K EDUCAL S.A. EDUCACION CON CALIDAD, Calle 28N No. 6BN-54, Cali, Colombia; NIT # 900015704-7 (Colombia) [SDNT].

Iran Sanctions



Limited Iran Sanctions 1979 - 1995

- Limited sanctions until March 1995
 - President Carter: blocked Iran government's assets in US (1979 until today)
 - President Reagan: prohibited imports from Iran by Executive Order of Oct. 29, 1987
 - President Clinton: prohibited transactions related to development of Iranian petroleum resources in March 1995; installed comprehensive sanctions in May 1995, consolidated in 1997
 - Executive Order 12959
 - Executive Order 13059



Comprehensive Iran Sanctions

May 1995



importation into the US, or its financing, of any goods or services of Iranian origin



exportation from US to Iran, or its financing, of goods, technology, or services and re-exportation to Iran if direct exportation needs license



any transaction (sale, transportation, swap, financing, or brokering), by a US person relating to goods or services of Iranian origin



new investments by a US person in Iran or in property controlled by the Government of Iran



approval or facilitation by a US person of the entry into or performance by an entity owned or controlled by a US person of a prohibited transaction, or relating to its financing

Comprehensive Iran Sanctions May 1995 (Cont'd)

Define: “United States Person”



- United States citizen,
- permanent resident alien,
- entity organized under the laws of the United States (including foreign branches), or
- any person in the United States

Not included in definition: foreign subsidiaries

- Iran Threat Reduction Act (August 2012): expands to foreign subsidiaries of US company:
 - parent owns or controls foreign company (50% shares, majority of board seats, other form of control over policies)

How do Iran Sanctions cast their net?



US Iran Sanctions

- **Territory: location of goods / origination of services:**
 - Goods / Services from US to Iran or vice versa
 - Any person located in US
- **Citizenship and Permanent Residency:**
 - Transactions by a US person relating to Iran goods
 - Facilitation of prohibited transactions
- **Ownership / 'Corporate Citizenship':**
 - Mere branches of US company (incorporation in US)
 - Controlled foreign subsidiaries (incorporation abroad)

Impact of Trade Sanctions on Business

- Most sanctions:
 - Compliance
 - Contracting
 - Merger / sales due diligence item
 - Managing a sanctions violation investigation
 - Risk of personal liability of directors and officers
 - » D&O liability Insurance
 - » Indemnification agreement
- Comprehensive Sanctions: Example of Iran Sanctions
 - Corporate Governance Impact
 - » recusal policy; board composition
 - SEC reporting
 - Effect on foreign companies owned/controlled by US person

Corporate impact

- Corporate Governance Impact
 - Section 219 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA) imposes new SEC filing obligations.
 - US citizens / permanent residents are members of the board of a foreign corporation dealing with restricted countries:
 - OFAC: best practice to have a recusal policy
 - warn employees in the foreign entity that US citizens should not be involved, also not unknowingly, in any prohibited transaction
- Compliance Program: due diligence
 - Transaction does not involve a restricted country or person
 - Verify that foreign buyers are not SDNs / know your counterparty
 - transaction does not involve the property or funds of an SDN listed person (may be a payment from foreign debtor to a US creditor too)

Compliance impact

- Compliance Program:
 - written OFAC policy that requires cross-reference to various OFAC lists and bans all transactions with restricted persons or countries without prior approval
 - require special pre-approvals for any restricted transaction
 - appoint OFAC compliance person
 - monitor sanctions lists
 - train staff
 - when an issue arises, contact counsel / OFAC
- Investigation: cooperate

How do you manage a Sanctions Violations investigation?

- Know the context of the investigation
 - Is it directed to your company or another?
 - Is it civil or criminal?
 - What are the specific allegations?
- Think before you act
 - Review any documents before tendering them
 - Speak with the employees before you speak with or tender documents to the government
 - Know exactly the purpose of the inquiry
 - Speak to an attorney

Contracting impact

- Contract:
 - certification from each buyer located outside of US that the goods will not be resold to countries against which sanctions are in place.
- Due diligence item during sale or merger of a company / red flag

Are the EU Iran Sanctions similar?

- Proliferation of arms and nuclear program
- Examples:
 - Blocking of assets of designated entities involved in nuclear proliferation
 - Export and import ban on arms
 - Export and import ban on technology related to nuclear enrichment weapons
 - Ban on imports of crude oil and petroleum products from Iran
 - Ban on imports of petrochemical products from Iran
 - Export ban on key equipment and technology for the oil and gas industries
 - Ban on investment in the Iranian oil and gas industries

European Union - EEAS (European External Action Service) | The European Union and Iran

- European courts intervene
 - EU General Court annulled sanctions against Sina Bank, Bank Mellat, and Bank Saderat; several more cases pending.

Why should insurers care about Trade Sanctions?

Perception = increased risk of personal liability of directors and executives

Allen & Overy and Willis Re, April 2013 survey, "D&O: It's getting personal"

Directors / officers may be unaware:

- personal exposure and strict liability (no excuses or defenses)
- perception that enforcement agencies are willing to hold directors and officers accountable

Increased attention to Directors & Officers Liability Insurance (D&O)

How is a D&O liability insurance policy affected by Trade Sanctions?

– Coverage

- Early stages of investigation
 - Stages before formal investigation, sometimes without ever leading to a formal investigation

– Internal investigation

- Hiring of independent counsel by directors and officers
- Exclusions (criminal conduct as opposed to no-fault strict liability)
- Restrictions imposed by law

– Aggregate limit for directors and executives

Syria and North Korea

- Syria
 - Several sanctions in place
 - Since August 2011
 - export ban of US origin goods
 - listing of individuals and entities as SDNs
- North Korea
 - Limited sanctions in place

Questions?

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