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DC FOCUS
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CAPITOL PRACTICES

Washington, DC, capital of the United States of America, is home to Congress and the Senate, the Department of Justice, the Directorate of Defense Trade Controls, the Bureau of Industry and Security within the Department of Commerce, and the Office of Foreign Assets Control. It's no surprise that DC has the largest concentration of export controls and sanctions lawyers in the world – and they're busier than ever. *WorldECR* visits the home of trade controls.

With a population of less than one million people, it is still possible to stroll around Washington, DC and conclude that one's pitched up in a sleepy provincial town, proud of its folksy history and monuments and its architectural heritage – all the while forgetting how powerfully decisions made on and around Capitol Hill reverberate across the world.

Notwithstanding the distance-shrinking impact of modern communication technologies, there is a pool of lawyers whose day-to-day

concerns are with the crucial nexus between the needs of business and national security and foreign policy concerns, including trade security, export controls, sanctions and CFIUS applications.

For this 'band of brothers' (and sisters), DC is not the only place to build a practice, but it possesses the distinct advantage of proximity to the agencies and institutions charged with making, enforcing and interpreting a suite of legal regimes that can change with remarkable rapidity.

'This must be the best place in the

world to be a sanctions and export control lawyer – and a great time to be practising,' says Sidley Austin partner Rob Torresen. 'So much of what we do is coloured by what's happening within the agencies or on Capitol Hill. Alongside that, it's the fact that there's a very large community of practitioners, probably the world's greatest concentration of sanctions and export control lawyers, so we can share ideas and information and discuss trends.'

Torresen says that all branches of what might be called trade and

national security law, not only sanctions and export controls, but anti-boycott, anti-money laundering ('AML'), Committee on Foreign Investment into the United States. ('CFIUS'), Homeland Security and Foreign Corrupt Practices Act ('FCPA') have grown rapidly as practice areas in the years since the terrorist attacks on the World Trade Center and DC is the natural hub of those activities.

It is of course the seat of the legislative branch of government, the White House, Congress, and Senate. It's also where the trade associations naturally congregate and, alongside them, many of the think tanks and policy institutes, each with their own

political stripes, and in their own way a part of the ecosystem of national security.



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Key agencies involved in export control and sanctions policy

Most of the key agencies and institutions involved in the development, debating of, imposition and enforcement of embargo and export control policies are based in Washington, DC. These include: **The Office of the President (White House)**: Authority vested in the office of the President empowers the holder to issue Executive Orders that take immediate effect on issue. The lead role in developing and implementing foreign policy, including policy relating to sanctions is however, taken by The Department of State – within which, key offices include those of:

- **The Under Secretary of State for Arms Control and International Security** – currently headed by Rose E. Gottemoeller – and which leads the policy process on nonproliferation and manages global U.S. security policy, principally in the areas of nonproliferation, arms control, regional security and defence relations, and arms transfers and security assistance.
- **The Bureau of Political-Military Affairs ('PM')**, headed by Assistant Secretary Puneet Talwar – which is the Department of State's principal link to the Department of Defence, and provides policy direction in the areas of international security, security assistance, military operations, defence strategy and plans, and defence trade.
- **The Directorate of Defense Trade Controls ('DDTC')** which is charged (in accordance with the International Traffic in Arms Regulation – ITAR) with controlling the export and temporary import of defence articles and defence services covered by the United States Munitions List (USML).
- **The Bureau of Arms Verification and Compliance ('AVC')** which advances national and international security through the negotiation and implementation of effectively verifiable and diligently enforced arms control and disarmament agreements involving weapons of mass destruction and their means of delivery as well as certain conventional weapons.

Other key agencies include the **Office of Foreign Assets Control ('OFAC')**, which sits within the U.S. Treasury, and the role of which is to 'administer and enforce economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States.'

OFAC 'acts under Presidential national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze assets under U.S. jurisdiction. Many of the sanctions are based on United Nations and other international mandates, are multilateral in scope, and involve close cooperation with allied governments.'

The Bureau of Industry and Security ('BIS') sits within the Department of Commerce and regulates the export of sensitive goods and dual-use goods, i.e. goods that are on the Commerce Control List ('CCL') through the issuance of the Export Administration Regulations ('EAR') and thus can be classified according to the Export Control Classification Number ('ECCN') system, and thus require a licence from the Commerce Department prior to export.

Department of Justice ('DOJ'), the various organs of the U.S. State Department, including the Directorate

of Defense Trade Controls ('DDTC') responsible for the administration of the International Traffic in Arms Regulations ('ITAR'); the Bureau of Industry and Security ('BIS') within the Department of Commerce, under the auspices of which the Export Administration Regulations ('EAR') functions, and the Office of Foreign Assets Control ('OFAC'), part of the U.S. Treasury.

Thompson Coburn partner Robert Shapiro points out that while its trade group operates out of the Washington, DC office, his firm is actually headquartered in the city of St. Louis, Missouri – one of the cities in United States' industrial heartlands. While that has advantages, enabling the firm to keep a finger on the pulse of its core client base, 'DC is where the regulators are. A lot of [export control sanctions practice] is about relationship building – as much, even, as legal argument. It's a really important thing,' he says.

An office in DC puts the law firm at the heart of the action. As Larry E. Christensen of Miller & Chevalier notes of current pressures, 'The nearly daily policy and regulatory interpretation developments on the Ukraine/Russia front require close contacts with OFAC, BIS and DDTC, and that is typical of every new regulatory response to an international hot spot.'

Being in close physical proximity means being able to read between the lines of rules that are complex, new and untried. Covington & Burling's Kim Strosnider explains: 'One of the main advantages of a Washington presence lies in the ability to interact on a less formal basis with the enforcement agencies. You've got to remember that there's very little or no "case law" or other published materials on, for example, licensing decisions and the little that is published is heavily

redacted. Having these kinds of contacts, which are built up over time, enables you, as an adviser, to anticipate problems on your client's behalf. It also paves the way for more formal

officer for OFAC included advising on sanctions and anti-terrorism legislation and drafting UN Security Council Resolutions and related executive orders, says that that



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requests, by having addressed any sensitivities earlier on.'

Amongst the kinds of issues that Strosnider is referring to would be: What might constitute 'facilitation' in a given circumstance – or how should a particular specially designated national ('SDN') be properly interpreted? 'The FAQs [on the agency websites] are good,' says Strosnider, 'but they don't have all the answers.'

Grayson Yeargin, a partner at Nixon Peabody, concurs: 'If, for example, you're working on a disclosure, you're going to get better results if you have face-to-face interactions with, say, OFAC or BIS. It really can make a great deal of difference if you can show that you're on the straight and narrow. But it also helps to be able to ask questions directly.'

Perhaps to a greater extent than in other areas of legal practice, many export controls/sanctions lawyers enter private practice having cut their teeth within the agencies themselves. Amongst the lawyers spoken to for the purposes of this Focus, Amit Mehta of Zuckerman Spaeder LLP was previously a public defender for the District of Columbia; Cari Stinebower of Crowell & Moring is a former counsel and programmes officer at OFAC; Mario Mancuso of Fried, Frank, Harris, Shriver & Jacobson LLP is a former Under Secretary of Commerce for Industry and Security; Steve Pelak of Holland and Hart was National Coordinator of Export Control/Embargo Enforcement from 2007 until 2013. Firms are anxious to recruit lawyers who have experience on the other side of the fence, whether within the Treasury, OFAC, Commerce, or the intelligence services. Stinebower, whose experience as a programmes

experience 'certainly opened the curtains on how things "work" in government'.

Converging expertise

But there are other convergences within the export controls/sanctions rubric. In the course of researching these articles, practitioners have spoken of how they often provide what could be described as specialist auxiliary support to colleagues within their firms with quite separate skills sets, such as banking, M&A, data protection or employment. They say it is time to 'unbundle' the perception of export controls and sanctions practice and to recognise the overlap that exists with other areas of trade compliance – with many firms creating a wider 'trade security' umbrella that also includes FCPA, CFIUS and anti-money laundering.

CFIUS is a good case in point. As in the case of sanctions and embargo-related practice, the tension

control/sanctions colleagues. Clients often see CFIUS as being in a separate workstream but ultimately, the vast majority of CFIUS reviews have a trade control/sanctions element to them. Also we're seeing more foreign investments from China and a higher percentage of those are seen as risky, compared for example, to investments from, say, the UK, EU or Canada.'

'There's a convergence in all these matters,' says Dechert's Jeremy Zucker, co-chair of the firm's International Trade and Government Regulation practice. 'I recently advised a Middle Eastern entity on an issue where its dealings with Iran were under discussion. And that involved speaking to multiple agencies – the Commerce Department, the Treasury – and the intelligence community. Think of it this way: respectively, they are concerned with the flow of items, funds and people.'

It could plausibly be argued that over the course of the past decade or two there's been a sea-change in the way that business conducted overseas – particularly in or with so-called 'exotic' destinations – is now perceived. Behaviour once considered out of sight and thus out of mind has been brought into the fold not only of the increasing territoriality of some regulatory regimes, but also what might be called the moral censure of an increasingly globally aware world community. Bribery, for example is now regarded both in law and public opinion as no less 'corrupt' if it happens abroad than in the United States or Europe.



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Kay Georgi, Arent Fox

underpinning CFIUS is between national security concerns, and national economic interest. Mark Plotkin, co-chair of Covington's National Security and Defense Industry Group notes, for example, that: 'We on the CFIUS team find ourselves often working surprisingly closely with our export

And it can be a bellwether for other forms of malfeasance – all of which may fall within the purview of the Washington lawyer.

Primarily an international trade lawyer, Arent Fox partner Kay Georgi also sits on the firm's cross-practice area FCPA group. There's a lot of overlap with sanctions and export controls here.

What's the biggest FCPA issue? Third parties. And experience suggests that if a company is being lax about who it's doing business with in one area, e.g. under the terms of the FCPA, it's



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To fail to see each of these legal regimes (i.e., sanctions, export controls, CFIUS, anti-money laundering, etc) as related to a common core of national security or foreign policy concerns would be a mistake, cautions Fried Frank's Mario Mancuso. 'Each of these is a discrete regulatory regime, but they move together, rather like figure skaters

on an ice-rink. Ultimately, they are designed to advance, in different commercial contexts, the same national security or foreign policy objectives.'

Kathryn Cameron Atkinson of

Miller & Chevalier believes the changes can be easily explained: 'There are several reasons for the trend, but the effect of 9/11 is probably most important. 9/11 highlighted the need for coordinated enforcement, because it laid bare the connections between and among these regimes. Corruption funds other international crimes. Money laundering facilitates the

movement of illicitly obtained funding, whether sourced from corruption or other criminal activity. To conduct business, terrorists and other criminals require funding, means of communication, and access to items subject to export controls, whether they be weapons controlled under the ITAR, or dual-use items controlled under the EAR. Economic sanctions target specific activities of concern, and seek to block criminals' access to these items and pathways. Companies recognise that a risk in one area can breed risk in another. Thus, lawyers need to be able to help companies identify and manage these risks. To do so efficiently, it's best to consider them together rather than piecemeal.'

It is this kind of deeper understanding – and also of how policy translates into regulation (albeit sometimes bluntly) – that empowers a DC law firm to deliver strong advice pertaining not only to sanctions and export controls, but beyond.



Ken Schulze