

# The Metropolitan Corporate Counsel

www.metrocorpcounsel.com

Volume 20, No. 2

© 2012 The Metropolitan Corporate Counsel, Inc.

February 2012

## Navigating The Complex Web Of U.S. Sanctions And Embargoes Affecting Trade, Including With The Middle East

*The Editor interviews Mark J. Biros, Partner, Proskauer.*

**Editor:** Please tell us about your background and experience.

**Biros:** For nearly 25 years I've been a defense attorney. Prior to that, I was an investigative attorney for the U.S. Senate Watergate Committee, which investigated President Nixon. I served in the Pennsylvania Attorney General's Office of Special Prosecutor in Philadelphia, where I prosecuted police and political corruption. I was an assistant U.S. attorney in Washington, DC for over 11 years and tried over 100 jury trials. The last three years in the United States Attorney's Office, I supervised an undercover operation run by U.S. Customs focusing on illegal international transfers of arms, technology and goods in violation of U.S. economic embargoes and sanctions. Now, I represent entities and individuals under investigation for allegedly violating federal and state criminal laws including the economic embargoes and sanctions. A portion of my practice includes counseling companies on how to comply with U.S. economic embargoes and sanctions. Lastly, I've been an adjunct professor at Georgetown University Law Center for nearly 30 years, where I teach Advanced Criminal Procedure.

**Editor:** Where do you see investment opportunities as a result of the Arab Spring?

**Biros:** It's hard to answer that question definitively because businesses, including my clients, generally dislike uncertainty in the economic and political

environments in which they operate. Because the Arab Spring has caused uncertainty, increases in investment during the short run are unlikely. However, places like the United Arab Emirates, which is uniformly regarded as a reliable shipping and commercial business partner, will grow in importance.



Mark J. Biros

**Editor:** What U.S. regulatory agencies are responsible for promulgating sanctions and embargoes affecting U.S. business dealings abroad, including in the Middle East?

**Biros:** The Office of Foreign Assets Control of the Treasury Department (OFAC) administers U.S. economic sanction programs established under the International Emergency Economic Powers Act and Trading with the Enemy Act. The Bureau of Industry and Security of the Commerce Department (BIS) implements the Export Administration Regulations. The Directorate of Defense Trade Controls in the State Department (DDTC) oversees application of the Arms Export Control Act and International Traffic in Arms Regulations (ITAR) covering defense articles and services.

**Editor:** Tell us more about OFAC.

**Biros:** OFAC administers the U.S. embargoes and sanctions that are imposed to achieve certain goals of U.S. foreign policy. Regulations are promulgated by the Secretary of the Treasury,

and OFAC enforces them.

The legal basis for OFAC's activities is the International Emergency Economic Powers Act and the Trading with the Enemy Act. Those two laws grant the President the power to impose sanctions and embargoes as well as other trade restrictions through executive orders. Federal regulations promulgated pursuant to these executive orders form the legal basis for OFAC to act. The regulations set forth prohibitions against doing business with various governments and their nationals. Iran is probably the most notable example because of the recent publicity concerning its attempt to develop the capability to build nuclear weapons. OFAC also administers sanctions called blocking provisions that preclude U.S. persons from transacting business with certain individuals and entities.

**Editor:** Describe some of the collective enforcement actions that take place because the U.S. is also part of groups of nations that share in imposing sanctions.

**Biros:** The primary collective effort comes from the United Nations. UN sanctions, emanating from the Security Council, are enforced as if they were U.S. domestic law. The U.S. attempts also to enlist the coordinated efforts of the European Union sometimes successfully, sometimes not so successfully.

Obviously what we're watching with Iran now is a coordinated effort by the administration to get not just the UN and the U.S. to impose sanctions but also other entities worldwide, including the European Union.

*Please email the interviewee at [mbiros@proskauer.com](mailto:mbiros@proskauer.com) with questions about this interview.*

**Editor: What is the Specially Designated Nationals (SDN) list? Who is on this list, and how can U.S. companies remain compliant with its requirements?**

**Biros:** The SDN list is created by the Treasury Department, and OFAC enforces its provisions. It contains thousands of names of individuals and entities. Individuals and entities are added to the list when the U.S. government determines that putting them on the list is consistent with a particular sanction or embargo program. For example, there is one portion of the SDN list that relates to antiterrorism; there is one that relates to nuclear nonproliferation; and another that relates to narcotics kingpins. There are portions of the SDN list that relate to countries – such as Somalia, Sudan, Belarus and Burma, among others.

U.S. persons may not do business with those on the list nor deal in property in which those on the list have an interest. U.S. persons are defined in the federal regulations promulgated under the International Emergency Economic Powers Act as U.S. citizens, permanent resident aliens and entities organized under U.S. law, including foreign branches plus persons or entities located within the territorial jurisdiction of the U.S. Generally, foreign subsidiaries of U.S. businesses organized under non-U.S. law and operating outside the territorial jurisdiction of the U.S. are not U.S. persons. Regulations promulgated under the Trading with the Enemy Act, which covers Cuba, define “U.S. person” more broadly.

Companies can assure that they don’t do business with persons on the SDN list in one of two ways: they can use the federal government’s Internet site where the SDN list is set out, or they can use commercially available software programs that allow them to compare the names of potential customers against the names on the list.

**Editor: As the economy grows globally, international law issues will take on greater importance. Please tell us about situations in which you have represented companies that were not sufficiently mindful of U.S. embargoes.**

**Biros:** The biggest issue for U.S. companies is to appreciate the very broad scope of U.S. embargoes and sanctions. The regulations are broadly phrased and

applied very liberally. Generally, one cannot do something indirectly that cannot be done directly. So, for example, when a U.S. business sells a product to a customer in the domestic market, title to that product is transferred to the customer, and the customer may sell the product further without creating liability on the part of the entity from which it purchased the goods. A manufacturer who sells product to a distributor which in turn sells it to a U.S. business that, let’s say, cannot lawfully purchase the product has no liability for the distributor’s sale. When dealing with U.S. economic sanctions and embargoes, the manufacturer can be culpable where it had reason to know the distributor was going to sell its product to an embargoed or sanctioned entity or in such a country. The transshipment of goods through a legal third party to a sanctioned end user contravenes the regulations.

**Editor: Does that mean that you have to investigate your customer?**

**Biros:** You have to know your customer and, if practicable, the ultimate end user of the product. The regulations ban facilitation of transactions prohibited by them. This is an extraordinarily broad concept. It could include a situation where an individual from Cuba or Iran contacted a U.S. company, and the company, knowing it could not do the business lawfully, referred the matter to a non-U.S. business to conduct the business. What I’ve found is clients run into difficulties because they don’t understand the concept of facilitation. Some believe that by selling the product through, or by referring the matter to, a third person, they are protected against violations of the regulations, and that is just not true.

**Editor: If I were corporate counsel of one of your clients, I might want to come to you and ask you to help me set up a program to assure compliance with U.S. embargoes. Is that something that your firm could do?**

**Biros:** We routinely provide that kind of counseling to organizations because it is easy to run afoul of the regulations without understanding their breadth and application. We learn the nature of the client’s business and how, if at all, the business is impacted by the U.S. embar-

goes and sanction programs, and then we suggest policies and procedures to help the client comply with the regulations.

It is most helpful if companies have an actively enforced and effectively communicated compliance program in advance of learning of any potential violation. Under those circumstances, the company can present itself to the government as having a culture of compliance and assert that any transgression was an anomaly. If a company lacks such a compliance program and becomes the target of an enforcement action brought by OFAC or BIS, we have found that it is helpful for that company – indeed, such is usually expected by the government as part of its remedial efforts – to set up such a program.

While the existence of a compliance program does not immunize the company from prosecution, it is a factor the government takes into consideration in determining what sanctions should be imposed, if any.

**Editor: Should companies contemplating a cross-border merger or acquisition undertake an investigation to determine the impact of U.S. government sanctions and embargoes on the business of the merger partner or acquisition candidate?**

**Biros:** It’s critical that before a U.S. company undertakes such a transaction, it understands how, if at all, the target entity’s business may be impacted by U.S. economic sanctions and embargoes. A very important aspect of effective due diligence includes this component. For example, while a U.S. person cannot do business with Iran or its nationals, a foreign subsidiary operating outside the U.S. can conduct such business provided there is no active U.S. person involved in those activities. Understanding the interaction between the parent and subsidiary is critical then.

**Editor: So, in making an acquisition or investment, consideration of U.S. governmental sanctions and embargoes can be extremely important.**

**Biros:** Absolutely. It’s critical because the value of your acquisition or investment may be significantly affected by the U.S. government sanctions and embargoes.