

2009

Export Controls and Economic Sanctions

James E. Bartlett III

J. Daniel Chapman

Jack R. Hayes

Meredith Rathborne

Peter Lichtenbaum

See next page for additional authors

Recommended Citation

James E. Bartlett et al., *Export Controls and Economic Sanctions*, 43 INT'L L. 311 (2009)
<https://scholar.smu.edu/til/vol43/iss2/5>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Export Controls and Economic Sanctions

Authors

James E. Bartlett III, J. Daniel Chapman, Jack R. Hayes, Meredith Rathborne, Peter Lichtenbaum, Scott E. Sullivan, and Petra A. Vorwig

Export Controls and Economic Sanctions*

JAMES E. BARTLETT III, J. DANIEL CHAPMAN, JACK R. HAYES, MEREDITH RATHBONE,
PETRA A. VORWIG, PETER LICHTENBAUM, AND SCOTT E. SULLIVAN.

I. Introduction

The year 2008 was an active year in the export controls and sanctions field. President Bush issued a directive on the reform of export controls, spawning regulatory proposals and revisions. Sanctions programs were modified and, in the case of North Korea, eliminated. There was an increasing trend, both in the export controls and sanctions areas, toward restrictions targeting named individuals and entities. The government continued to actively enforce export controls and sanctions regulations. This article summarizes the most significant changes to dual-use export controls, arms export controls, and economic sanctions in 2008.

II. Dual-Use Export Controls

A. PRESIDENTIAL DIRECTIVE ON DUAL-USE EXPORT CONTROL REFORM

On January 22, 2008, President Bush announced directives to reform dual-use export control policies to protect U.S. national security while also facilitating U.S. economic and technological leadership.¹ The directives stated that the dual-use export control system should increasingly focus on foreign end-users of U.S. high technology products so as to facilitate trade with trustworthy foreign customers while denying sensitive technologies to weapons proliferators, terrorists, and others acting contrary to U.S. national security and foreign policy interests. The directives sought to advance these policies by implementing a Validated End User (VEU) program for reliable foreign companies and expanding the U.S. Department of Commerce Bureau of Industry and Security's (BIS) Entity List.

* By James E. Bartlett III, Northrop Grumman Corporation, McLean, VA; J. Daniel Chapman, Baker Hughes Incorporated, Houston, TX; Jack R. Hayes, Meredith Rathbone and Petra A. Vorwig, Steptoe & Johnson LLP, Washington, DC; Peter Lichtenbaum, BAE Systems Inc., Rockville, MD, and Scott E. Sullivan, Flowserve Corporation, Irving, TX. The authors also wish to extend their thanks to Cecily Rose and Julia Court Ryan of Steptoe & Johnson LLP, Washington, DC for their contributions to this article.

1. See Statement by the Press Secretary, Office of the Press Secretary, The White House, U.S. Export Control Reform Directives (Jan. 22, 2008), *available at* http://www.bis.doc.gov/pdf/us_export_control_reform_directives.pdf; see also BUREAU OF INDUS. & SEC., U.S. DEP'T OF COMMERCE, FACT Sheet: Dual-Use Export Control Initiative, <http://www.bis.doc.gov/controlreformdirectives.html> (last visited Feb. 25, 2009).

The directives also required a regular process for systematic review of the Commerce Control List (CCL), reducing controls on intra-company transfers, revising controls on encryption products, and reviewing reexport controls. The directives also require BIS to publish advisory opinions on BIS' website as well as lists of foreign parties warranting higher scrutiny.

Amendments to the Export Administration Regulations (EAR)², discussed below, implemented many of these initiatives in 2008.

B. DEEMED EXPORT ADVISORY COMMITTEE RECOMMENDATIONS

1. *Deemed Export Advisory Committee Report*

On December 20, 2007, a federal advisory committee, the Deemed Export Advisory Committee (DEAC), submitted recommendations to the Secretary of Commerce to modernize and reform dual-use deemed export and reexport controls, such as to make the CCL less encompassing, streamline deemed export rules, promote awareness of deemed export controls among academic institutions and relevant industries, and reconsider the criteria utilized to assess threats posed by foreign nationals.³ Of significance, the DEAC recommended that the existing rule for determining the nationality of a non-U.S. person for "Deemed Export purposes," based on the person's most recent or current citizenship or permanent residency should be reconsidered as "superficial."⁴ Instead, the DEAC proffered a more holistic approach to the deemed export analysis, whereby an overall assessment of the probable loyalty of a foreign individual of interest should be conducted, including consideration of the length, character, and nature of past and present foreign ties.⁵ As part of its "implementing construct," the DEAC recommended that such information should be submitted to the U.S. Government for review and approval or disapproval,⁶ implying that U.S. exporters should not make these "loyalty" determinations on their own. If such a review indicates a "tie" to a sanctioned or terrorist supporting country, or if any other "significant" loyalty concerns exist, a deemed export or reexport license application could be denied. The DEAC also recommended that this consideration should include other factors, such as the nature of the items, software, or information proposed for transfer.

2. *Public Comments Regarding BIS' Deemed Export Policy*

BIS sought public comments on two specific DEAC recommendations with respect to BIS' deemed export licensing policy.⁷ First, BIS asked whether the scope of technologies

2. 15 C.F.R. §§ 730-774 (2008).

3. See Dep't of Commerce, DEEMED EXPORT ADVISORY COMMITTEE, THE DEEMED EXPORT RULE IN THE ERA OF GLOBALIZATION 15-19 (Dec. 20, 2007), available at <http://www.fas.org/sgp/library/deemedexports.pdf>.

4. See *id.* at 19.

5. *Id.* at 21.

6. See *id.* at 24-30.

7. See Request for Public Comments on Deemed Export Advisory Committee Recommendations: Narrowing the Scope of Technologies on the Commerce Control List Subject to Deemed Export Licensing Requirements and Implementing a More Comprehensive Set of Criteria for Assessing Probable Country Affiliation for Foreign Nationals, 73 Fed. Reg. 28,795 (May 19, 2008).

on the CCL subject to deemed export requirements should be narrowed, and if so, which technologies should remain subject to deemed export licensing requirements. The DEAC recommended that BIS narrow the CCL to focus on technologies having the greatest national security implications and to eliminate those having little concern. This recommendation contributed to the creation of the Emerging Technology and Research Advisory Committee (ETRAC), discussed below in section III.⁸

Second, BIS sought comments on whether more comprehensive criteria should be used to analyze country affiliation for foreign nationals regarding deemed exports, as proposed by the DEAC. As of November 30, 2008, BIS has not published a preliminary or final rule revising existing deemed export licensing policy.

C. MANDATORY USE OF ELECTRONIC FILING VIA SNAP-R

On August 21, 2008, BIS amended the EAR to require that, effective October 20, 2008, export and reexport license applications, classification requests, encryption review requests, License Exception Agricultural Commodities (AGR) notifications, and related documents be submitted via the Simplified Network Application Process (SNAP-R) system.⁹ This requirement does not apply to applications for Special Comprehensive Licenses, advisory opinion requests, or other situations where BIS authorizes paper submissions.¹⁰

D. REVISIONS TO THE ENCRYPTION RULES

In an interim final rule published on October 3, 2008,¹¹ BIS revised the encryption-specific rules in the EAR to liberalize some of the restrictions that apply to encryption hardware, software, and technology. The amendment removes the need to notify BIS of hardware, software, and technology classified under Export Control Classification Numbers (ECCNs) 5A992, 5D992, and 5E992 before such items can be exported or reexported using "no license required" or "NLR." The following are some of the noteworthy changes.

1. Exclusions

BIS adopted two additional "exclusions" from the review and reporting requirements for certain "ancillary cryptography" commodities and software and certain "personal area

8. See *infra* note 27 and accompanying text.

9. See Mandatory Electronic Filing of Export and Reexport License Applications, Classification Requests, Encryption Review Requests, and License Exception AGR Notifications, 73 Fed. Reg. 49,323 (Aug. 21, 2008) (to be codified at 15 C.F.R. pts. 740, 742, 744, 748, 750, 754, 764, & 772). Previously, part 748 of the EAR set forth procedures to submit to BIS the documents required from parties wishing to engage in certain transactions or seeking advice on the proper classification of items subject to the EAR. Parties could submit license applications, encryption review requests, and required notifications to BIS either via the SNAP-R system, the Electronic License Application Information Network (ELAIN), or the paper BIS Multipurpose Application Form BIS 748-P.

10. As implemented, the rule amended EAR parts 748.1, 748.3, 748.6, and other provisions related to the paper forms.

11. See Encryption Simplification, 73 Fed. Reg. 57,495 (Oct. 3, 2008) (to be codified at 15 C.F.R. pts. 732, 734, 738, 740, 742, 744, 746, 748, 750, 762, 770, 772, & 774).

network” items, which are defined in part 772. Additionally, license exception Encryption Commodities and Software (ENC) now excludes wireless personal area network items with certain specifications from the review and reporting requirement.

2. *Strong Encryption Items*

Section 740.17(b) of the EAR defines strong encryption items that require prior review by BIS. The provision explains when a thirty day waiting period is required prior to exports and reexports, adds favored countries for export purposes and retains distinctions for non-favored countries, government end-users and non-government end-users. BIS also has raised the threshold of items exempt from the thirty-day period to include encryption items with symmetric algorithms having key lengths up to eighty bits. Finally, the provision authorizes temporary ENC treatment for items pending mass-market review.

3. *Restrictions*

The rule expands the list of ENC Restricted (government end-users in non-favored countries) network infrastructure software and commodities to include “digital packet telephony/media (voice/video/data) over internet protocol.”¹²

4. *Foreign Produced Products*

BIS revised license exception ENC to clarify that foreign products developed with or incorporating U.S.-origin encryption source code, components, or toolkits are eligible for the review and reporting exclusion only if (1) BIS previously reviewed and authorized the U.S.-origin encryption items they contain (2) the cryptographic functionality of those components has not been changed.

5. *Reporting*

The reporting requirements for license exception ENC are now split into two sections—one dealing with the semiannual reporting requirement of exports made under ENC and another for reporting key length increases. The rule also lays out what information shall be included in the reports for exports to distributors, individual consumers, and foreign manufacturers.

E. COUNTRY-RELATED ISSUES AND THE EAR

1. *Preventing Diversion to Iran*

On September 24, 2008, BIS issued guidance concerning actions that exporters can take to prevent the illicit diversion of items to Iran’s nuclear weapons or ballistic missile programs.¹³ The guidance is part of an effort to counter Iran’s pursuit of technology that could enable it to develop weapons of mass destruction (WMD) and the means to deliver

12. *Id.*

13. See BUREAU OF INDUST. & SEC., U.S. DEP’T OF COMMERCE, GUIDANCE ON ACTIONS EXPORTERS CAN TAKE TO PREVENT ILLICIT DIVERSION OF ITEMS TO SUPPORT IRAN’S NUCLEAR WEAPONS OR BAL-

them. It followed enforcement and administrative actions already taken by BIS and other agencies against seventy-five entities involved in a global procurement network that sought to illegally acquire U.S.-origin dual-use and military components for the Iranian Government.¹⁴

2. *Expansion of Authorization for Temporary Exports/Reexports to Sudan*

BIS issued a final rule on February 28, 2008,¹⁵ amending the EAR to expand authorization for temporary exports and reexports to Sudan under EAR License Exception Temporary Imports, Exports, and Reexports (TMP).¹⁶ The new regulation for TMP now authorizes reexports. Additionally, exports and reexports of exempted items can continue to accompany persons on travel (either hand carried or as checked baggage), or they can be sent to Sudan by an "eligible user" via a method reasonably calculated to assure delivery to a permissible end-user. TMP also now authorizes export or reexport of software to be used solely for servicing or in-kind replacement of software legally exported or reexported. The software must remain loaded on exempted equipment while in Sudan. The list of items authorized for export to Sudan pursuant to TMP was expanded to include items controlled under certain ECCNs.

The revised exception retains the restrictions previously applied to permissible end-users; permissible end-uses; and the requirement to return the temporary items to the United States within one year or obtain permanent re-transfer, reexport, or disposal authorizations for the items in Sudan.

F. AMENDMENTS TO THE DE MINIMIS REGULATIONS

BIS published an interim final rule revising the EAR with regard to the *de minimis* rule to foreign-produced products containing U.S.-origin software and technology.¹⁷ This amendment reflects a significant change from the prior rules to determine when U.S. reexport jurisdiction applies to items made abroad containing U.S.-controlled content. Most notably, the regulation makes changes to the following areas:

1. *Bundling*

Section 734.4 is amended to exclude, in certain cases, foreign-made commodities "bundled" with *de minimis* amounts of U.S.-origin software from the jurisdiction of the EAR. U.S.-origin software will remain subject to the EAR when exported or reexported sepa-

LISTIC MISSILE PROGRAMS, <http://www.bis.doc.gov/complianceandenforcement/iranguidance.htm> (last visited Mar. 24, 2009).

14. See BUREAU OF INDUSTRY & SEC., U.S. DEP'T OF COMMERCE, COMMERCE DEPARTMENT, GOVERNMENT PARTNERS, BREAK UP IRANIAN RING CHARGED WITH PROCURING IED COMPONENTS (Sept. 17, 2008), http://www.bis.doc.gov/news/2008/bis_press09172008.htm (last visited Mar. 24, 2009).

15. See Expanded Authorization for Temporary Exports and Reexports of Tools of Trade to Sudan, 73 Fed. Reg. 10,668-70 (Feb. 28, 2008) (to be codified at 15 C.F.R. pt. 740). Previously, TMP only allowed for the personally accompanied temporary export (and not the reexport) of a limited scope of commodities used only for humanitarian assistance (and not specific related support activities) in Sudan.

16. *Id.* (to be codified at 15 C.F.R. pt. 740.9).

17. See *De Minimis* U.S. Content in Foreign Made Items, 73 Fed. Reg. 56,964 (Oct. 1, 2008) (to be codified at 15 C.F.R. pts. 730, 732, 734, 736, 762, & 774).

rately from (i.e., not incorporated or bundled with) a foreign made commodity, and exports or re-exports of software for additional users and upgrades are considered separate transactions for export control purposes. The "bundling" concept applies to "software that is configured for a specific commodity, but is not necessarily physically integrated into the commodity."¹⁸ Only certain U.S.-origin software falls within the scope of bundling for foreign made commodities. The rule applies exclusively to software controlled for Anti Terrorism (AT) reasons or that is classified as "EAR99." Therefore, software that is controlled for other reasons, such as ECCN 5D002 encryption software or software that might be associated with specific products and controlled for reasons other than anti-terrorism controls, will not be considered bundled with foreign-produced items and shall remain subject to the EAR.

2. *Revised De Minimis Calculations*

Supplement No. 2 to part 734 of the EAR, which includes guidelines for calculating *de minimis* values as defined by section 734.4, was amended in various respects. The amendment clarifies the previous rule on "controlled" content, noting that U.S.-origin content need be included in the *de minimis* calculation only if it is controlled for re-export to the end destination, and stipulating that part 744 controls should *not* be considered in making this assessment.¹⁹ Special rules on encryption in section 734.4(b) are retained. The guidance also clarifies that costs should be determined by the local market costs in the country of export, and that cost depreciation for components is not permitted.

3. *Definition of "Incorporated"*

Supplement No. 2 to part 734 was amended to clarify that U.S.-origin controlled content is considered "incorporated" for *de minimis* purposes if the item is: (1) "essential to the functioning of the foreign equipment"; (2) "customarily included in sales of the foreign equipment"; and (3) "reexported with the foreign produced item."²⁰ BIS has removed the "rack mounted" and "cable connected" concepts previously utilized to determine the extent to which U.S.-origin content is incorporated into foreign produced items.

4. *One Time Report*

Based on prior reporting history, BIS removed the one-time reporting requirement for foreign-made software that incorporated controlled U.S.-origin software. But BIS is maintaining the one-time report requirement for foreign-made technology that incorporates controlled U.S.-origin technology.

G. RULE FOR AMENDMENTS TO ENTITY LIST

On August 21, 2008, BIS published a final rule amending the EAR concerning export and reexport requirements for persons and entities designated on the Entity List (Supple-

18. *Id.* at 56,966.

19. *Id.*

20. *Id.*

ment No. 4 to part 744).²¹ A newly established, inter-agency End-User Review Committee (Committee) will have the discretion to add, remove, or modify a party's designation on the Entity List. An entity may be added to the Entity List where there is reasonable cause to believe that it has been involved in, or poses a risk of being involved in, activities against U.S. national security or foreign policy interests, or is acting on behalf of such an entity. Examples of conduct the Committee may view as grounds for designating parties on the Entity List include: (1) "supporting persons engaged in acts of terror;" (2) enhancing the military capability of, or supporting terrorism sponsored by, foreign governments designated by the State Department as providing support for acts of terror; (3) "[t]ransferring, developing, servicing, repairing, or producing conventional weapons," or enabling such action "by supplying parts, components, technology, or financing" for weapons, contrary to U.S. national security and foreign policy interests; (4) "preventing [the] accomplishment of an end use check conducted by or on behalf of BIS or the Directorate of Defense Trade Controls;" or (5) "engaging in conduct that poses a risk of violating the EAR when such conduct raises sufficient concern that prior review of exports or reexports involving the party, and the possible imposition of license conditions or license denial, enhances BIS ability to prevent violations of the EAR."²²

Finally, the rule amended section 744.16 and adds new Supplement No. 5 to part 744, allowing a party listed on the Entity List to request that its designation be removed or modified, and providing procedures for making such requests, which will be considered by the newly-established Committee.

BIS also amended the EAR by adding 108 additional persons to the Entity List who the U.S. Government determined to be acting contrary to the national security or foreign policy interests of the United States.²³

H. PROPOSED RULE ON LICENSE EXCEPTION FOR INTRA-COMPANY TRANSFERS

BIS published a proposed rule amending the EAR to add a new license exception entitled Intra-Company Transfer (ICT).²⁴ ICT would allow for license-free exports and reexports to and among affiliated entities as long as certain requirements are met. The exception would not be available automatically. Instead, a parent company must first submit an internal control plan, among other information, which BIS would review to determine whether the company merits use of the exception. Even then, ICT would be restricted to pre-approved subsidiaries and ECCNs. There also would be reporting, auditing, and recordkeeping requirements for companies that make use of this license exception. Further details on the proposed rule for ICT are provided below:

21. See *Authorization to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States*, 73 Fed. Reg. 49,311 (Aug. 21, 2008) (to be codified at 15 C.F.R. pts. 730, 744, & 756).

22. *Id.* at 49,311-312; 15 C.F.R. § 744.11(b) (2008).

23. See *Addition of Certain Persons to the Entity List and Removal of General Order from the Export Administration Regulations (EAR)*, 73 Fed. Reg. 54,499 (Sept. 22, 2008) (to be codified at 15 C.F.R. pts. 736 & 744).

24. See *Export Administration Regulations: Establishment of License Exception Intra-Company Transfer (ICT)*, 73 Fed. Reg. 57,554 (Oct. 3, 2008) (to be codified at 15 C.F.R. pts. 740 & 772).

1. *Eligible Entities*

Only a parent company would be authorized to apply for use of ICT, although it does not have to be an ultimate parent company. The parent company must be incorporated in or have its principal place of business in the United States or one of thirty-seven other countries listed in Supplement No. 4 to part 740 of the EAR. Eligible users and recipients under this license exception include wholly-owned or controlled in-fact-subsidaries or branches of the parent company.

2. *Restrictions*

ICT may not be used to export, reexport, or transfer items to any countries (or nationals thereof) in Country Group E or North Korea. Items exported, reexported, or transferred under ICT may be subsequently exported, reexported, or transferred in accordance with the EAR but not under license exception APR (Additional Permissive Reexports). The license exception also does not apply to items controlled for Encryption Items (EI) or Significant Items (SI) reasons, nor can it be used to transfer technology to foreign national employees without valid work authorization or those on any U.S. Government end-user list of concern.

3. *Reporting Requirements*

Approved companies must submit an annual report to BIS, including the following information: (1) data on foreign national employees that received technology or source code under license exception ICT during that year; (2) data on foreign national employees that terminated their employment during that year; and (3) a certification that all approved eligible users and recipients are in compliance with the applicable terms and conditions, including the results of the self-evaluations.²⁵

4. *Audits*

BIS will conduct biennial audits of approved companies, eligible users, and eligible recipients.

I. ESTABLISHMENT OF EMERGING TECHNOLOGY & RESEARCH COMMITTEE

On May 23, 2008, BIS announced the creation of a new Emerging Technology and Research (ETRAC) Advisory Committee and invited public and private sector experts to apply for membership.²⁶ The ETRAC has a mandate to identify emerging technologies and research and development activities that may be of interest from a dual-use perspective; prioritize new and existing controls related to deemed exports to determine which are of greatest consequence to national security; and examine how research is performed to understand the impact that the EAR have on academia, federal laboratories, and industry.

25. Michael Gershberg & Edward Krauland, Steptoe & Johnson, International Law Advisory—BIS Publishes Proposed Rule on License Exception for Intra-Company Transfers (Oct. 6, 2008), <http://www.steptoelaw.com/publications-5614.html>.

26. See Establishment of the Emerging Technology and Research Advisory Committee, 73 Fed. Reg. 30,048 (May 23, 2008).

J. EXPANSION OF ELIGIBLE ITEMS UNDER LICENSE EXCEPTIONS TMP AND BAG

On December 12, 2007, BIS issued a final rule²⁷ amending the EAR to expand and clarify eligibility under two widely-used EAR license exceptions, TMP²⁸ and License Exception BAG (Baggage).²⁹ The revisions allow for the export or reexport of technology and technical information subject to the EAR by U.S. persons to U.S. persons or their employees traveling or temporarily assigned abroad, subject to certain important limitations. Previously, TMP and BAG focused only on hardware and software and did not authorize technology exports and reexports. The eligible items now include technology, in the form of actual shipments, transmissions, or other “releases.” The other categories of exports/reexports authorized under TMP and BAG apart from “tools of trade” continue to be limited to hardware and software. The “tools of trade” provisions in TMP and BAG are subject to a number of limitations as described in further detail by the rule.

K. FOREIGN AVAILABILITY ASSESSMENT PROCESS

On September 2, 2008, BIS announced a ninety-day study to assess the foreign availability of uncooled thermal imaging cameras in the People’s Republic of China.³⁰ BIS initiated the study in response to a petition filed by the Sensors and Instrumentation Technical Advisory Committee (SITAC) asserting that uncooled thermal imaging cameras are widely available in China and render U.S. export controls ineffective in achieving their purpose.³¹ If foreign availability exists, the Department may remove the license requirement, unless the President determines that this would be detrimental to national security.

L. BIS STUDY ON HIGH PRECISION MACHINE TOOLS

On May 19, 2008, BIS initiated a systematic study of the U.S. 5-axis simultaneous control machine industry.³² BIS intends to assess the health and competitiveness in the industry and the impact of export control practices and foreign availability on the industry. Further, BIS will examine the capability of U.S. and foreign members of this industry to meet U.S. national security needs.

M. ENFORCEMENT ACTIONS / PENALTY ENHANCEMENTS FOR 2008

In Fiscal Year 2008, BIS’s Office of Export Enforcement (OEE) continued to focus on violations relating to proliferation of weapons of mass destruction and missile delivery

27. See Revisions to License Exceptions TMP and BAG: Expansion of Eligible Items, 72 Fed. Reg. 70,509 (Dec. 12, 2007) (to be codified at 15 C.F.R. pts. 740 & 772). These revisions to the EAR are effective immediately. There is no formal comment period for the regulation, but BIS has invited public comments on a continuing basis.

28. 15 C.F.R. § 740.9 (2008).

29. 15 C.F.R. § 740.14 (2008).

30. See Foreign Availability Assessment: Uncooled Thermal Imaging Cameras Incorporating Microbolometer Focal Plane Arrays, 73 Fed. Reg. 51,271 (Sept. 2, 2008).

31. *Id.*

32. See Press Release, Bureau of Indus. and Sec., U.S. Dep’t of Commerce, Commerce Department Undertakes Industry Study of High Precision Machine Tools (May 19, 2008), http://www.bis.doc.gov/news/2008/5axis_05192008.htm.

systems, terrorism, and diversions of dual-use goods to military end uses. In Fiscal Year 2008, BIS closed nine enforcement cases where the recently-increased maximum civil penalty amount (\$250,000) was available pursuant to enhancements under the International Emergency Economic Powers Act (IEEPA).³³ Of those cases, two involved criminal charges, and none of the parties voluntarily disclosed the violations. Each case resulted in a settlement. The average penalty paid per case was \$95,982 in non-criminal cases and \$266,595 in criminal cases.³⁴

In addition to penalizing U.S. persons and entities, BIS focused its enforcement efforts on foreign entities. For example, on July 17, 2008, BIS sentenced a French company, Cryostar SAS, to a criminal fine of \$500,000 and two years probation for its role in a conspiracy to sell cryogenic pumps to Iran.³⁵ Cryostar, together with two other French companies, had developed a plan to conceal the sale of the pumps to an Iranian customer.

III. Arms Export Controls

A. TREATIES WITH THE UNITED KINGDOM AND AUSTRALIA

The United States moved toward implementation of two defense trade cooperation treaties signed in 2007, one with the United Kingdom and the other with Australia. If ratified, the treaties will permit license-free exporting of certain International Traffic in Arms Regulation (ITAR) controlled items and services in specified programs to members of an "Approved Community" of governments and companies in each country. Transfers outside the Approved Community would remain subject to U.S. State Department licensing. Exports expected to benefit from the treaties include those supporting the "combined military and counter-terrorism operations; joint research, development, production and support programs"³⁶ and certain other projects where the end user is the government of the United States, the United Kingdom, or Australia. The Approved Community would include companies registered with the U.S. State Department's Directorate of Defense Trade Controls (DDTC) under ITAR part 122, unless debarred. The U.K. government will not require licenses to export these defense articles to members of the Approved Community and may permit such exports under blanket or open authorizations. The Australia treaty text is generally similar to the U.K. treaty.

For both treaties, specific procedures and parameters are described in bilateral implementing arrangements finalized in 2008. The State Department developed draft regulations for the U.K. treaty and posted these on the DDTC website for comment. In September 2008, the Chairman and Ranking Member of the U.S. Senate Foreign Relations Committee wrote to the U.S. Secretary of State Condoleezza Rice, stating that the Committee continues to support the objectives of the two treaties but would not be able

33. See BUREAU OF INDUSTRY & SECURITY, U.S. DEP'T OF COMMERCE, CASES CLOSED WITH \$250,000 MAXIMUM PENALTY—NO CARVE-OUT EXCEPTION (FY 2008 Final Orders \$250,000 Chart), *available at* <http://www.bis.doc.gov/complianceandenforcement/closedcases.pdf>.

34. *Id.*

35. See BUREAU OF INDUS. & SEC., U.S. DEP'T OF COMMERCE, MAJOR CASES LIST (Oct. 2008), *available at* <http://www.bis.doc.gov/complianceandenforcement/majorcaselist/mcl102008.pdf>.

36. Hearing on Defense Trade Cooperation Treaties with the United Kingdom and Australia Before the S. Comm. on Foreign Relations, 110th Cong. 3 (2008) (statement of John C. Rood, Acting Under Secretary for Arms Control and International Security, U.S. Department of State).

to approve the two treaties during the current Congressional session.³⁷ The U.K. government has ratified the U.K. treaty. In Australia, the Parliamentary Joint Standing Committee on Treaties has made its recommendations and legislation necessary to give effect to the treaty is expected to be submitted to the Federal Parliament in 2009 for passage.

B. U.S. MUNITIONS LIST AND INTERNATIONAL TRAFFIC IN ARMS REGULATIONS

The ITAR was amended once in late December 2007 and eight times in 2008.

1. *Dual and Third Country Nationals*

On December 19, 2007, 22 C.F.R. sections 124.12 (a) (1) and 124.16 were amended³⁸ to allow access to defense articles and services for dual and third country nationals of certain countries through revisions in procedures for technical assistance agreements and manufacturing licensing agreements. This regulatory change was intended to reduce the burden on exporters of defense articles and on foreign parties to the agreements by reducing the number of individual Non Disclosure Agreements (NDAs) that must be executed and maintained on file.

2. *Sri Lanka*

On March 24, 2008, 22 C.F.R. section 126 was amended³⁹ to make it a policy to deny licenses and other approvals to export or otherwise transfer defense articles and defense services to Sri Lanka except, on a case-by-case basis, for technical data or equipment made available for the limited purposes of maritime and air surveillance and communications.

3. *NATO Organizations*

On March 26, 2008, 22 C.F.R. section 123.9(e) was amended to clarify U. S. policy to allow for reexports or retransfers of U.S.-origin components incorporated into a foreign defense article to the North Atlantic Treaty Organization (NATO), and its agencies, as well as to NATO member governments.⁴⁰

37. Letter from Joseph R. Biden, Chairman, U.S. Senate Foreign Relations Committee, & Richard G. Lugar, Ranking Member, U.S. Senate Foreign Relations Committee, to Condoleezza Rice, U.S. Secretary of State (Sept. 17, 2008).

38. Amendment to the International Traffic in Arms Regulations: Regarding Dual and Third Country Nationals, 72 Fed. Reg. 71,785 (Dec. 19, 2007) (to be codified at 22 C.F.R. pt. 124).

39. Amendment to the International Traffic in Arms Regulations: Sri Lanka, 73 Fed. Reg. 15,409 (Mar. 24, 2008) (to be codified at 22 C.F.R. pt. 126).

40. Amendment to the International Traffic in Arms Regulations: North Atlantic Treaty Organization (NATO), 73 Fed. Reg. 15,885 (Mar. 26, 2008) (to be codified at 22 C.F.R. pt. 123).

4. *U.S. Munitions List Correction*

On May 19, 2008, 22 C.F.R. part 121.1(b) was corrected⁴¹ by adding an asterisk to indicate that the paragraph refers to Significant Military Equipment.⁴²

5. *Registration Renewals*

On July 8, 2008, 22 C.F.R. section 122.3 was amended to limit the registration period to one year and to require registrants to submit renewal packages within sixty days before their current expiration date.⁴³

6. *U.S. Munitions List Civil Aircraft Components*

On August 14, 2008, 22 C.F.R. section 121.1, Category VIII (b), (h), and the Note, were amended to clarify how the criteria of section 17(c) of the Export Administration Act of 1979 are implemented in accordance with the Arms Export Control Act.⁴⁴ This rule reinstated the section 17(c) reference in the ITAR to assist exporters in understanding the scope and application of the section 17(c) criteria to parts and components for civil aircraft. It also clarified that

any part or component that (a) is standard equipment; (b) is covered by a civil aircraft type certificate (including amended type certificates and supplemental type certificates) issued by the Federal Aviation Administration for civil, non-military aircraft ([expressly excluding] military aircraft certified as restricted and any type certification of Military Commercial Derivative Aircraft, defined by FAA Order 8110.101 effective date September 7, 2007 as "civil aircraft procured or acquired by the military"); and (c) is an integral part of such civil aircraft, is subject to the jurisdiction of the [EAR]. Where such part or component is not Significant Military Equipment ("SME"), no Commodity Jurisdiction (CJ) determination is required to determine whether the item meets these criteria for exclusion under the United States Munitions List (USML) unless doubt exists as to whether these criteria have been met. However, where the part or component is SME, a CJ determination is always required, except where a SME part or component was integral to civil aircraft prior to the effective date of this rule.

Additionally, this proposed rule [added] language in a new Note after Category VIII(h) to provide guidelines concerning the parts or components meeting these criteria. The change to Category VIII*(b) also identifies and designates certain sensitive military items, heretofore controlled under Category VIII(h), as SME.⁴⁵

41. Correction to the Amendment to the International Traffic in Arms Regulations: The United States Munitions List, 73 Fed. Reg. 28,863 (May 19, 2008) (to be codified at 22 C.F.R. pt. 121).

42. "Significant military equipment means articles for which special export controls are warranted because of their capacity for substantial military utility or capability." 22 C.F.R. § 120.7(a) (2008).

43. Amendment to the International Traffic in Arms Regulations: Renewal of Registration, 73 Fed. Reg. 41,258 (July 18, 2008) (to be codified at 22 C.F.R. pt. 122).

44. Amendment to the International Traffic in Arms Regulations: The United States Munitions List Category VIII, 73 Fed. Reg. 47,523 (Aug. 14, 2008) (to be codified at 22 C.F.R. pt. 121).

45. *Id.*

7. *U.S. Munitions List Toxicological Agents*

On September 9, 2008, 22 C.F.R. section 121.1(c), was amended to add Note 5 to Category XIV—Toxicological Agents—to clarify that certain anti-tumor drugs are not within the definition of “chemical agents.” But, the definition retained the know-how for production of nitrogen mustards or their salts on the U.S. Munitions List.⁴⁶

8. *Rwanda*

On September 25, 2008, 22 C.F.R. section 126.1(c) was amended to remove Rwanda from the list of prohibited countries as a result of United Nations Security Council Resolution 1823, which terminated remaining arms sanctions against Rwanda.⁴⁷

9. *Increased Registration Fees*

On September 25, 2008, 22 C.F.R. parts 122 and 129 were amended to increase registration fees charged to persons required to register with the Directorate of Defense Trade Controls under section 38 of the Arms Export Control Act,⁴⁸ change the registration renewal period, and make other minor administrative changes.⁴⁹

C. MAJOR ENFORCEMENT ACTIONS

1. *Major Civil Settlements*

a. Northrop Grumman

On March, 14, 2008, Northrop Grumman Corporation of Los Angeles, California, agreed to pay civil penalties of fifteen million dollars and take additional corrective actions to settle 110 ITAR violations that it and its predecessor in interest, Litton Industries, Inc. (which Northrop acquired in April 2001), allegedly committed between 1994 and 2003 in connection with unauthorized exports of modified versions of its commercial LTN-72 and LTN-92 Inertial Navigation Systems (INS), related software source code, and related defense services.⁵⁰

b. Boeing

On June 9, 2008, the Boeing Company of Chicago, Illinois, agreed to pay civil penalties of three million dollars and take additional corrective actions to settle forty alleged ITAR

46. Amendment to the International Traffic in Arms Regulations: U.S. Munitions List Interpretation, 73 Fed. Reg. 54,314 (Sept. 19, 2008) (to be codified at 22 C.F.R. pt. 121).

47. Amendment to the International Traffic in Arms Regulations: Rwanda, 73 Fed. Reg. 55,441 (Sept. 25, 2008) (to be codified at 22 C.F.R. pt. 126).

48. 22 U.S.C. § 2778 (2006).

49. Amendment to the International Traffic in Arms Regulations: Registration Fee Change, 73 Fed. Reg. 55,439 (Sept. 25, 2008) (to be codified at 22 C.F.R. pts. 122 & 129).

50. See Consent Agreement, In re Northrop Grumman Corporation (Bureau of Political-Military Affairs, U.S. Dep't of State, Mar. 14, 2008), available at http://www.pmdtdc.state.gov/compliance/consent_agreements/pdf/NorthropGrummanCorp_ConsentAgreement.pdf.

violations in connection with the administration of Manufacturing License Agreements (MLAs) and Technical Assistance Agreements (TAAs).⁵¹

c. Lockheed Martin

On July 24, 2008, Lockheed Martin Corporation of Arlington, Virginia, agreed to pay civil penalties of four million dollars and take additional corrective actions to settle eight alleged ITAR violations in connection with unauthorized export of classified and unclassified technical data to United Arab Emirates, export of classified technical data related to Hellfire missiles to foreign persons, export of classified technical data relating to the Joint Air-To-Surface Standoff Missile to a major non-NATO ally, failure to notify DDTC of proposals for the sale of significant military equipment, and failure to obtain a Non-transfer & Use Certificate for export of classified technical data.⁵²

2. *Major Criminal Convictions*

a. Roth

On September 3, 2008, a jury in the Eastern District of Tennessee convicted former University of Tennessee Professor J. Reece Roth of fifteen counts of violating the Arms Export Control Act (AECA) by exporting controlled technical data, and one count of conspiring with Atmospheric Glow Technologies, Inc. (AGT) to unlawfully export controlled technical data.⁵³ The controlled technical data in this case related to plasma actuators for unmanned aerial vehicles or drones that were developed under a U.S. Air Force research and development contract. Roth provided this technical data to Chinese and Iranian foreign nationals who were students at the University of Tennessee. Roth also carried documents containing controlled military data with him on a trip to China, and he caused other controlled military data to be emailed to an individual in China. Sentencing in this case is scheduled for January 7, 2009.⁵⁴ AGT pleaded guilty on August 20, 2008, to charges of illegally exporting U.S. military data about drones to a Chinese citizen in violation of the AECA.⁵⁵

b. Meng

On June 18, 2008, a judge in the Northern District of California sentenced a Canadian citizen, Xiaodong Sheldon Meng, to two years in prison, three years of supervised release,

51. See Consent Agreement, In re Boeing Company (Bureau of Political-Military Affairs, U.S. Dep't of State, June 9, 2008), available at http://www.pmddtc.state.gov/compliance/consent_agreements/pdf/Boeing_ConsentAgreement_08.pdf.

52. See Consent Agreement, In re Lockheed Martin Corporation (Bureau of Political-Military Affairs, U.S. Dep't of State, July 24, 2008), available at http://www.pmddtc.state.gov/compliance/consent_agreements/pdf/LockheedMartinCorp_ConsentAgreement_08.pdf.

53. Press Release, James R. Dedrick, U.S. Att'y, E. Dist. of Tenn., Dep't of Justice, Retired University of Tennessee Professor Convicted of Arms Export Control Violations (Sept. 3, 2008), available at <http://www.usdoj.gov/usao/tne/pr/2008/September/Roth%20Guilty%20Press%20Release.htm>.

54. *Id.*

55. *Id.*; Plea Agreement of Defendant Atmospheric Glow Techs., Inc. at ¶¶ 5(b)-(h), United States v. Roth, No. 3:08-CR-69 (E.D. Tenn. Aug. 20, 2008).

and a \$10,000 fine.⁵⁶ On August 1, 2007, Meng had pleaded guilty to committing economic espionage and to violating the AECA. Meng had misappropriated a trade secret involving night vision software for pilots "from his former employer, Quantum 3D, Inc., [and he had done so] with the intent to benefit" China's Navy Research Center in Beijing.⁵⁷ He had also illegally exported military source code pertaining to a program for training military fighter pilots. This case is the first to result in a conviction for exporting military source code under the AECA. In addition, Meng is the first defendant to be sentenced under the Economic Espionage Act.⁵⁸

c. Mak

On March 24, 2008, a judge in the Central District of California sentenced Chi Mak, a U.S. citizen, to twenty-four years and five months in prison, and a \$50,000 fine for conspiracy to obtain and send ITAR-controlled technical data relating to U.S. naval warship technology to China.⁵⁹ Mak, who was formerly an engineer with a U.S. navy contractor, was convicted of conspiracy to violate the AECA, attempting to violate the AECA, acting as an unregistered agent for a foreign government, and making false statements to federal investigators. Mak's co-conspirators in China had requested U.S. naval research on nuclear submarines, among other information. The four co-defendants, who included his brother and wife, also pleaded guilty and have been sentenced to terms of imprisonment.⁶⁰

d. Euro Optics, Ltd.

On March 17, 2008, Euro Optics, Ltd. pleaded guilty "to illegally exporting advanced combat gun sights to Sweden and Canada."⁶¹ "On July 24, [the judge] in the Middle District of Pennsylvania [sentenced Euro Optics] to a \$10,000 corporate fine, \$800 special assessment, and five years of corporate probation."⁶²

IV. Economic Sanctions

During 2008, the Office of Foreign Assets Control of the U.S. Department of the Treasury (OFAC) continued its trend of recent years by emphasizing targeted programs against specific individuals, activities and companies in lieu of adopting new, broad-based economic sanction programs.⁶³

56. Press Release, Dep't of Justice, Chinese National Sentenced for Economic Espionage (June 18, 2008), <http://www.usdoj.gov/opa/pr/2008/June/08-nsd-545.html> (last visited Feb. 22, 2009).

57. *Id.*

58. *Id.*; Judgment in a Criminal Case, United States v. Meng, No. 5:04-CR-20216-JF (N.D. Cal. June 24, 2008).

59. Press Release, Dep't of Justice, Chinese Agent Sentenced to Over 24 Years in Prison for Exporting United States Defense Articles to China (Mar. 24, 2008), http://www.usdoj.gov/opa/pr/2008/March/08_nsd_229.html.

60. *Id.*; Judgment & Probation/Commitment Order, United States v. Mak, No. 8:05-CR-00293-CJC (C.D. Cal. Mar. 27, 2008).

61. Press Release, Dep't of Justice, Fact Sheet: Major U.S. Export Enforcement Prosecutions During the Past Two Years (Oct. 28, 2008), <http://www.usdoj.gov/opa/pr/2008/October/08-nsd-959.html>.

62. *Id.*; Judgment in a Criminal Case, United States v. Euro Optics, Ltd., No. 4:07-CR-0407 (M.D. Pa. July 31, 2008).

63. Of the first seventy-eight public releases published on the OFAC website in 2008, forty related primarily to OFAC's list of Specially Designated Nationals. See U.S. DEP'T OF THE TREASURY, OFFICE OF FOR-

A. BELARUS

On September 4, 2008, OFAC issued a new general license⁶⁴ that authorized transactions between U.S. persons and two of the three entities that had been only recently designated under the Belarus sanctions program on May 15, 2008.⁶⁵ But all property and interests in property of these two entities, Lakokraska OAO or Polotsk Steklovotkno OAO, that were previously blocked pursuant to Executive Order 13405 remained blocked.⁶⁶

B. BURMA

On May 6, 2008, and May 9, 2008, OFAC issued two new general license exceptions to the Burmese Sanctions Regulations.⁶⁷ The first of these licenses authorized the exportation and reexportation of certain financial services to Burma in support of not-for-profit humanitarian or religious activities in Burma of U.S. or third-country non-governmental organizations.⁶⁸ Subsequently, OFAC authorized U.S. financial institutions to process certain transfers of funds, of any amount, for non-commercial, personal remittances "to or from Burma or for or on behalf of an individual ordinarily resident in Burma," in excess of the previous limit of three hundred dollars per Burmese household for any consecutive three-month period.⁶⁹

EIGN ASSETS CONTROL, 2008 OFAC RECENT ACTIONS, <http://www.treas.gov/offices/enforcement/ofac/actions/2008.shtml> (last visited Mar. 25, 2008) [hereinafter 2008 OFAC].

64. U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, BELARUS SANCTIONS, GEN. LICENSE NO. 1 (Sept. 4, 2008), *available at* http://www.treas.gov/offices/enforcement/ofac/programs/belarus/gls/belarus_gl_1.pdf.

65. U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, RECENT OFAC ACTIONS (May 15, 2008), <http://www.treas.gov/offices/enforcement/ofac/actions/20080515.shtml> (last visited Mar. 25, 2009).

66. *See* Exec. Order No. 13,405, 71 Fed. Reg. 35,485 (June 16, 2006) (implementing new economic sanctions against "certain members of the Government of Belarus and other persons [believed to have] undermine[d] Belarus' democratic processes or institutions," primarily during the country's March 2006 elections, as well as to have "commit[te]d human rights abuses" and to have "engage[d] in public corruption").

67. Press Release, U.S. Dep't of the Treasury, Treasury Authorizes Unlimited Personal Remittances to Burma (May 12, 2008), <http://www.treas.gov/press/releases/hp974.htm>; *see also* Burmese Sanctions Regulations, 31 C.F.R. pt. 537 (2008), *available at* <http://www.treas.gov/offices/enforcement/ofac/programs/burma/gls/burmas.html>.

68. U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, BURMESE SANCTIONS REGS., GEN. LICENSE NO. 14 (May 6, 2008), *available at* http://www.treas.gov/offices/enforcement/ofac/programs/burma/gls/burmagl14_amend.pdf; U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, BURMESE SANCTIONS REGS., GEN. LICENSE NO. 15 (May 9, 2008), *available at* <http://www.treas.gov/offices/enforcement/ofac/programs/burma/gls/burmagl15.pdf>. Also, on May 9, 2008, and then again on July 11, 2008, OFAC issued amendments to General License No. 14 to authorize, for a period of 120 days each, funding to any organization or individual engaged in not-for-profit humanitarian or religious activities in Burma through January 4, 2009. The previously issued General License No. 14 only authorized the transfer of funds in support of not-for-profit humanitarian or religious activities in Burma only if they involved U.S. or third-country non-governmental organizations. Upon the expiration of these extension periods, the terms of the original General License No. 14 remain in effect.

69. *Id.*

C. CUBA

In 2008, OFAC updated its list of authorized providers of air, travel, and remittance forwarding services⁷⁰ and made several automation improvements to expedite the processing of Cuban travel licenses and requests for the release of blocked funds.⁷¹ In addition, on July 29, 2008, OFAC issued a notice clarifying that the transfer of a claim against the Government of Cuba, even if certified by the Foreign Claims Settlement Commission, generally requires OFAC authorization.⁷²

D. IRAN

Effective November 10, 2008, OFAC amended the Iranian Transactions Regulations to revoke its previous authorization allowing U.S. depository institutions to process "U-turn" transfers. A "U-turn" transfer is a transaction that is initiated offshore as a dollar-denominated transaction by order of a foreign bank's customer, is then transferred from a correspondent account for that foreign bank, is further transferred to a correspondent account held by the same or another domestic bank for a second foreign bank, and is then returned offshore as a transfer to a dollar-denominated account of the second foreign bank's customer.⁷³ The amendment, however, did not revoke certain "U-turn" transactions that are authorized by a specific or general license or are exempt or not otherwise prohibited by the Iranian Transaction Regulations.

E. NORTH KOREA

On June 26, 2008, the President signed a proclamation⁷⁴ stating that the application of the Trading With the Enemy Act⁷⁵ was no longer in the U.S. national interest.⁷⁶ As a result of this action, the Foreign Assets Control Regulations and the Transaction Control Regulations no longer apply to North Korea.⁷⁷ But contemporaneously with the release of the proclamation, the President also issued an executive order⁷⁸ continuing certain re-

70. U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, LIST OF AUTHORIZED PROVIDERS OF AIR, TRAVEL AND REMITTANCE FORWARDING SERVICES TO CUBA (Jan. 16, 2009), available at http://www.treas.gov/offices/enforcement/ofac/programs/cuba/cuba_tsp.pdf.

71. U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, RECENT OFAC ACTIONS (Sept. 12, 2008), <http://www.treas.gov/offices/enforcement/ofac/actions/20080912a.html>.

72. See U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, NOTICE REGARDING THE TRANSFER OF CLAIMS AGAINST CUBA CERTIFIED BY THE FOREIGN CLAIMS SETTLEMENT COMMISSION (July 29, 2008), available at <http://www.treas.gov/offices/enforcement/ofac/programs/cuba/fcsc.pdf>.

73. Iranian Transactions Regs., 73 Fed. Reg. 66,541 (Nov. 10, 2008) (to be codified at 31 C.F.R. pts. 560.516, 560.405 and 560.532).

74. Proclamation No. 8271, 73 Fed. Reg. 36,785 (June 26, 2008) [hereinafter President's Proclamation].

75. Trading With the Enemy Act, 50 U.S.C. app. §§ 1-44.

76. President's Proclamation, *supra* note 74.

77. Foreign Assets Control Regs., 31 C.F.R. §§ 500.101-901 (2008); Transaction Control Regs., 31 C.F.R. §§ 505.01-60 (2008).

78. Exec. Order No. 13466, 73 Fed. Reg. 36,787 (June 26, 2008) (declaring a new national emergency, under the authority of the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706, "to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States" posed by "the current existence and risk of the proliferation of weapons-usable fissile material on the Korean Peninsula").

strictions with respect to North Korea that otherwise would have been lifted pursuant to the proclamation.⁷⁹ These restrictions included the continued blocking of “property and interests . . . that . . . were blocked as of June 16, 2000,” as well as the prohibition against U.S. persons registering “vessel[s] in North Korea, obtain[ing] authorization for a vessel to fly the North Korean flag, or own[ing], leas[ing], operat[ing], or insur[ing] any vessel flagged by North Korea.”⁸⁰

F. SPECIALLY DESIGNATED NATIONALS

In addition to actions discussed elsewhere, OFAC frequently updated the Specially Designated National List under a variety of programs. Of note, designations in 2008 were particularly directed toward designating global terrorists.⁸¹

G. ROUGH DIAMONDS

On May 21, 2008, OFAC issued a notice amending the Rough Diamonds Control Regulations⁸² to enhance the collection of statistical data on importations and exportations of rough diamonds.⁸³ Specifically, these amendments (i) add a new note to section 592.301 of the regulations explaining that U.S. Customs and Border Protection (CBP) will not release shipments of rough diamonds unless the import paperwork conforms with CBP’s formal entry for consumption requirements set forth in CBP’s regulations⁸⁴ and (ii) add a new section to these regulations, which requires rough diamond importers and exporters to file an annual report with the Department of State detailing their import, export and stockpiling information.

H. TERRORISM

Under the Global Terrorism Sanctions Regulations,⁸⁵ OFAC may designate additional persons “otherwise associated with” already designated persons and subject the assets of these associated persons to blocking requirements. OFAC added forty-one parties to, and removed nine parties from, its list of Specially Designated Global Terrorists over the past year⁸⁶ and released a report in October 2008 on the effectiveness of its asset blocking programs in combating international terrorism.⁸⁷

79. *Id.*

80. *Id.*

81. See generally Global Terrorism Sanctions Regs., 31 C.F.R. §§ 594.101-901 (2008); Terrorism Sanctions Regs., 31 C.F.R. §§ 595.101-901 (2008); Terrorism List Gov’ts Sanctions Regs., 31 C.F.R. §§ 596.101-901 (2008); Foreign Terrorist Orgs. Sanctions Regs., 31 C.F.R. §§ 597.101-901 (2008).

82. Rough Diamonds Control Regs., 31 C.F.R. §§ 592.101-801 (2008).

83. Rough Diamonds Control Regs., 73 Fed. Reg. 29,433 (May 21, 2008) (to be codified at 31 C.F.R. pts. 592.301 and 592.502).

84. See Entered for Consumption, 19 C.F.R. § 141.0a(f) (2008).

85. Global Terrorism Sanctions Regulations, 31 C.F.R. §§ pt. 594.101-201 (2008).

86. See 2008 OFAC, *supra* note 63.

87. See OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREASURY, TERRORIST ASSETS REPORT: SIXTEENTH ANNUAL REPORT TO CONGRESS ON ASSETS IN THE UNITED STATES OF TERRORIST COUNTRIES AND INTERNATIONAL TERRORISM PROGRAM DESIGNEES (2008), available at <http://www.treas.gov/offices/enforcement/ofac/reports/tar2007.pdf>. The report noted that “programs targeting international terrorist organizations [have] resulted in the blocking” of \$20 million of U.S. assets and that more

I. TRADE SANCTIONS REFORM AND EXPORT ENHANCEMENT ACT

On November 7, 2008, OFAC updated its guidelines for submitting applications under the Trade Sanctions Reform and Export Enhancement Act of 2000 for licenses to export agricultural commodities, medicine, and medical devices to Iran and Sudan.⁸⁸

J. OTHER OFAC REGULATORY PRONOUNCEMENTS

In addition to the other OFAC regulatory pronouncements described herein, OFAC issued guidance regarding the release of blocked funds as well as new guidance directed toward the securities industry.

1. Release of Blocked Funds

OFAC issued *Guidance on the Release of Limited Amounts of Blocked Funds for Payment of Legal Fees and Costs Incurred in Challenging the Blocking of U.S. Persons in Administrative or Civil Proceedings* (July 21, 2008)⁸⁹ and *Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked* (Feb. 14, 2008).⁹⁰ The July guidance

provides for the issuance of specific licenses [by OFAC], on a case-by-case basis, to authorize the release of a limited amount of blocked funds [(not full compensation)] for the payment of legal fees and costs incurred in seeking administrative reconsideration or judicial review of the designation of U.S. persons or the blocking of [their] property and interests

pursuant to Executive Orders and OFAC regulations where such persons do not have access to alternative funding sources.⁹¹ It also sets forth several licensing requirements that designated or blocked parties must satisfy (e.g., evidence of U.S. person status and itemization of legal fees) and describes the monetary limitations regarding caps on legal fees and hourly rates consistent with federal legislation.⁹²

OFAC issued the February guidance in response to multiple inquiries received by the agency. OFAC broadly defined "blocked property" to include any property or interest in property, whether tangible or intangible, future or contingent, or direct or indirect.⁹³ Ac-

than "\$315 million in assets are blocked [under] sanctions imposed" against the "five designated state sponsors of terrorism." *Id.* at 2.

88. See OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, LICENSE APPLICATION GUIDELINES FOR EXPORTS TO IRAN AND SUDAN OF AGRICULTURAL COMMODITIES, MEDICINE, AND MEDICAL DEVICES, available at <http://www.treas.gov/offices/enforcement/ofac/programs/common/tsraapp.pdf>.

89. See OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, GUIDANCE ON THE RELEASE OF LIMITED AMOUNTS OF BLOCKED FUNDS FOR PAYMENT OF LEGAL FEES AND COSTS INCURRED IN CHALLENGING THE BLOCKING OF U.S. PERSONS IN ADMINISTRATIVE OR CIVIL PROCEEDINGS, available at http://www.treas.gov/offices/enforcement/ofac/licensing/guidance/legal_fee_guide.pdf [hereinafter July Guidance].

90. See OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, GUIDANCE ON ENTITIES OWNED BY PERSONS WHOSE PROPERTY AND INTERESTS IN PROPERTY ARE BLOCKED, available at http://www.treas.gov/offices/enforcement/ofac/programs/common/licensing_guidance.pdf [hereinafter February Guidance].

91. July Guidance, *supra* note 89.

92. *Id.*

93. February Guidance, *supra* note 90.

according to the Guidance, regardless of whether the entity itself is listed, U.S. persons generally may not engage in any transactions with an entity in which a blocked person "owns, directly or indirectly, a 50 [percent] or greater interest."⁹⁴ OFAC also cautions U.S. persons to be careful in transacting business with non-blocked entities that are controlled by or have a significant ownership amount of less than fifty percent by a blocked person⁹⁵ as they may in the future be designated by OFAC as blocked persons.⁹⁶

2. *OFAC Compliance for the Securities Industry*

On November 6, 2008, OFAC issued guidance relating to OFAC-related due diligence procedures in the securities industry, particularly in connection with the client acceptance process, and the selection of new investments or transactions.⁹⁷ Of note, the guidance emphasized that securities firms should document the results of their transaction screening processes as well as conduct adequate due diligence regarding the beneficial ownership of certain types of accounts, including, particularly, omnibus accounts.⁹⁸ In addition, this guidance included a list of risk factors, which may warrant a heightened level of scrutiny, associated with (a) international transactions, including wire transfers, (b) foreign customers/accounts, (c) foreign broker-dealers who are not subject to OFAC regulations, (d) investments in foreign securities, (e) certain forms of investment funds and accounts creating an intermediary relationship, (f) third-party introduced business and (g) confidential accounts.⁹⁹

K. ENFORCEMENT ACTIONS, SETTLEMENTS, AND POLICY DEVELOPMENTS

In 2008, OFAC continued its practice of periodically posting important informational documents and final agency Penalty Notices and relevant case reports¹⁰⁰ on its website, including guidance on the application of increased penalties under the IEEPA Enhance-

94. *Id.*

95. *Id.*

96. *Id.*

97. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, OPENING SECURITIES AND FUTURES ACCOUNTS FROM AN OFAC PERSPECTIVE, *available at* http://www.treas.gov/offices/enforcement/ofac/articles/securities_future_accounts_11052008.pdf [hereinafter *Opening Securities*]; OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, RISK FACTORS FOR OFAC COMPLIANCE IN THE SECURITIES INDUSTRY (2008), *available at* http://www.treas.gov/offices/enforcement/ofac/policy/securities_risk_11052008.pdf [hereinafter *Risk Factors*].

98. *Opening Securities*, *supra* note 97.

99. *Risk Factors*, *supra* note 97.

100. See U.S. Dep't of the Treasury, Office of Foreign Assets Control, Civil Penalties Enforcement Information, <http://www.treas.gov/offices/enforcement/ofac/civpen/2008.shtml> (last visited Mar. 26, 2009) [hereinafter *Civil Penalties*]. Notable actions involved York International Corporation (May 2, 2008), which was fined "\$669,507 to settle allegations" that it sold "equipment to Iran and Sudan by foreign nationals employed at a foreign branch of York, and improper payments made to the Government of Iraq in connection with licensed sales of refrigeration equipment to Iraq under the United Nations Oil-for-Food Program;" Engineering Dynamics Inc. (May 2, 2008), which was fined \$132,791.39 "as part of a multi-agency settlement" related to allegations that it "acted in a knowing and willful manner by importing and exporting unauthorized goods and services to and from Iran . . . to assist in the design of offshore oil and gas structures;" and Minxia Non-Ferrous Metals, Inc. (July 11, 2008), which paid the largest penalty of the period, "\$1,198,000 to settle allegations" that it acted without an OFAC license or outside the scope of its license by purchasing or otherwise dealing in Cuban metals." OFAC Enforcement Information for May 2, 2008, <http://www.treas.gov/offices/>

ment Act and new economic sanctions enforcement guidelines. According to OFAC's website, fifty-four companies agreed to or received penalties for violations of the Burmese, Cuban, Former Liberian Regime of Charles Taylor, Iranian, Iraqi, Libyan, Sudanese, terrorism and narcotics trafficking sanctions programs between January 4, 2008, and September 5, 2008.¹⁰¹ During the same period, seven companies were penalized \$100,000 or more, and thirty-seven individuals were penalized, primarily for dealing in property in which Cuba or a Cuban national had an interest.¹⁰²

In addition, on June 10, 2008, OFAC published its final rule amending the civil penalty provisions affecting seventeen parts of the OFAC regulations for which IEEPA provides civil penalty authority.¹⁰³ The amendments are technical updates to reflect the substantial increase in civil penalty authority resulting from the enactment in October 2007 of the IEEPA Enhancement Act; i.e. they modify the relevant civil penalty provisions to reflect that the current maximum civil penalty is the greater of \$250,000 or twice the amount of the transactions that is the basis of the violation.

Furthermore, on September 8, 2008, OFAC issued its Economic Sanctions Enforcement Guidelines¹⁰⁴ following the enactment of the IEEPA Enhancement Act. These guidelines establish the new framework by which OFAC will determine the appropriate response to any apparent violations and, if a civil penalty is warranted, assess the amount of the penalty.¹⁰⁵

According to the guidelines, the two most important factors affecting OFAC's penalty assessment are whether the case is "egregious" or "non-egregious" and whether a voluntary self-disclosure was made.¹⁰⁶ OFAC will utilize a two-pronged approach to penalty assessment: one for "egregious" cases and another for "non-egregious" cases. The guidelines also indicate that OFAC generally intends to limit the use of the \$250,000 statutory maximum as a penalty basis for what it determines to be "egregious" cases.¹⁰⁷ Whether a case will be deemed "egregious" will be based on a case-by-case evaluation of what OFAC calls "General Factors",¹⁰⁸ four of which will be given substantial weight in any such determination: willful or reckless violation, "awareness of the conduct . . . , harm to sanctions program objectives, and individual characteristics of the" parties involved, such as commercial sophistication, size of business operations and volume of transactions.¹⁰⁹ OFAC will place particular emphasis on the first two factors.

The second major element to be considered by OFAC is the submission of a voluntary self-disclosure. In egregious cases, submitting a voluntary self-disclosure will reduce the penalty to one-half of the \$250,000 statutory maximum, while submitting a voluntary self-

enforcement/ofac/civpen/penalties/05292008.pdf; OFAC Enforcement Information for July 11, 2008, <http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/07312008.pdf>.

101. Civil Penalties, *supra* note 100.

102. *Id.*

103. Int'l Emergency Econ. Powers Act Civ. & Crim. Penalties, 73 Fed. Reg. 32,650 (June 10, 2008) (to be codified at 31 C.F.R. pts. 535-42, 545, 560, 585-88, and 593-95).

104. Econ. Sanctions Enforcement Guidelines, 73 Fed. Reg. 51,933 (Sept. 8, 2008) (to be codified at 31 C.F.R. pt. 501).

105. *Id.*

106. *Id.*

107. *Id.*

108. The term "General Factors" replaces the use of "mitigating" and "aggravating" factors.

109. 73 Fed. Reg. 51,933.

disclosure in a non-egregious case will reduce the penalty to one-half of the actual transaction value capped at \$125,000 per violation.¹¹⁰ The guidelines also provide for a variety of enforcement measures short of issuing monetary penalties, including the issuance of "Findings of Violation" where a violation has occurred but a monetary penalty is not warranted, and a Cautionary Letter where OFAC has been unable to determine, based on the evidence, that a violation has occurred, but OFAC is concerned that the underlying conduct is problematic for sanctions compliance.¹¹¹

L. COURT CASES INVOLVING OFAC PROGRAMS

In addition to significant activity at the agency, the past year also saw significant court activity. These rulings reinforced the U.S. federal government's ability to apply its economic sanctions across international boundaries but limited the ability of individual states to apply their own, even more stringent, economic sanctions upon foreign activities.

In *Faculty Senate of Florida International University v. Roberts*,¹¹² the District Court for the Southern District of Florida held that provisions of the 2006 Florida Travel Act are unconstitutional because they constitute an impermissible sanction on designated state sponsors of terrorism and "serve[] as an obstacle to the objectives of the federal government."¹¹³ The court held that the Travel Act's restrictions on the use of non-state funds constitute more than an "incidental or indirect" effect on foreign affairs and therefore infringe upon foreign affairs power of the federal government.¹¹⁴ In addition, the Court held that the "Act's restriction[s] on [non-state] funds, [as well as] nominal state funds necessary to administer [such non-state] funds," are unconstitutional because they "impe[d] the President's authority to speak with one voice for the Nation in dealing with state sponsors of terrorism."¹¹⁵

The District Court for the Northern District of California in *Lawyers' Committee for Civil Rights of San Francisco Bay Area v. U.S. Department of the Treasury* ordered the Treasury Department to disclose, under the Freedom of Information Act (FOIA), certain OFAC records regarding its Specially Designated Nationals List.¹¹⁶ In particular, the

110. *Id.*

111. *Id.*

112. *Faculty Senate of Fla. Int'l University v. Roberts*, 574 F. Supp. 2d 1331 (S.D. Fla. 2008).

113. *Id.* Florida Travel Act, 2006 Fla. Sess. Law Serv. ch. 2006-54 (S.B. 2434) (West), an Act relating to travel to terrorist states, restricted state universities from spending state and "non-state" funds on activities related to travel to a "terrorist state," meaning any state designated by the U.S. State Department as a state sponsor of terrorism. According to the Act, "[n]one of the state or nonstate funds made available to state universities may be used to implement, organize, direct, coordinate, or administer, or to support the implementation, organization, direction, coordination, or administration of, activities related to or involving travel to a terrorist state." *Roberts*, 574 F. Supp. at 1336. In addition, "[t]ravel expenses of public officers of employees for the purpose of implementing, organizing, directing, coordinating, or administering, or supporting the implementation, organization, direction, coordination, or administration of, activities related to or involving travel to a terrorist state shall not be allowed under any circumstances." *Id.*

114. *Roberts*, 574 F. Supp. at 1335. The Court found that these provisions of the Travel Act are preempted by federal law regarding state sponsors of terrorism, including TWEA, CACR, IEEPA, the Iran and Libya Sanctions Act, as well as several regulations relating to travel to Iran, North Korea, Sudan, and Syria.

115. *Id.* at 1354.

116. *Lawyers' Comm. for Civil Rights of San Francisco Bay Area v. U.S. Dep't of the Treasury*, 534 F. Supp. 2d 1126, 1136 (N.D. Cal. 2008).

Court required the Treasury Department to disclose delisting petitions after determining that the documents did not fall under any of the relevant FOIA exemptions to disclosure.¹¹⁷

117. The Court held that the Treasury Department was not entitled to withhold the delisting petitions because it had not shown that the disclosure of the petitions “could reasonably be expected to interfere with enforcement proceedings,” or “could reasonably be expected to endanger the life or physical safety of any individual,” as required under 5 U.S.C. §§ 552(b)(7)(A) and (F), respectively. In addition, the Court held that the Treasury Department was not entitled to relief under six other exemptions (under 5 U.S.C. §§ 552(b)(6), (7)(C), (7)(D), (3), and (4)) because the Treasury Department did not meet its burden of demonstrating the portions of the petitions to which the exemptions should be applied. Furthermore, the Court was unable to determine the portions of the petitions to which the exemptions should apply because the Treasury Department did not submit a Vaughn index, which would have identified each document withheld and the statutory exemption claimed and would have explained how the disclosure of the particular portion of the document would damage the interest protected by the claimed exemption.

