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Export Controls and Economic Sanctions

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I. Introduction

This article summarizes the most significant changes in U.S. law concerning dual-use export controls, arms export controls, and economic sanctions in 2009. This article also reports on the past year's movements towards reform of the U.S. export control regime as well as highlighting developments in Canada's export control regime, which may be of interest to the U.S. export control community.

II. Dual-Use Export Controls

A. RULE CHANGES

1. *Cuba Sanctions Regulations Amended to Ease Travel and Telecommunications Restrictions*

On September 3, 2009, the Department of Commerce's Bureau of Industry and Security (BIS) amended the Export Administration Regulations (EAR) to implement aspects of the President's new Cuba sanctions policy announced in April 2009.¹ The changes are intended to improve telecommunications connections between Cuba and the United States and to make it easier for U.S. persons to visit and remit funds to family members in Cuba.²

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1. Cuba: Revisions to Gift Parcel and Baggage Restrictions, Creation of License Exception for Donated Consumer Communications Devices and Expansion of Licensing Policy Regarding Telecommunications, 74 Fed. Reg. 45,985 (Sept. 8, 2009) (to be codified at 15 C.F.R. pts. 736, 740, and 746) [Cuba EAR Revisions].

2. *Id.*

a. Telecommunications Services

BIS has revised its Cuba licensing policy at 15 C.F.R. Part 746 to provide for case-by-case review of all applications to export or reexport items necessary to provide efficient and adequate telecommunications links, including satellite radio and satellite television, between the United States and Cuba.³ The rule extends to exports of products intended for links through third countries where such links are necessary to ensure adequate connections between Cuba and the United States.

BIS has also implemented a new EAR license exception, Consumer Communications Devices (CCD) (EAR Section 740.19) to authorize the export or reexport to Cuba of donated consumer communications devices such as mobile phones, standard personal computers, and related software products necessary to provide efficient and adequate telecommunications services between the United States and Cuba.⁴

b. Travel to Cuba and Remittances

BIS also expanded the type and amount of commodities that may be sent to individuals and religious, educational, or charitable organizations in gift parcels to Cuba under License Exception GFT.⁵ The list now includes computers and other communications-related devices controlled under Export Control Classification Numbers (ECCN) 4A994, 4D994, 5A991, 5A992, 5D991, and 5D992.⁶ BIS also removed the weight limit previously imposed on personal baggage authorized under License Exception BAG.⁷

These changes represent a deliberate measured easing of Cuba sanctions. Further easing of sanctions will likely depend on the Cuban regime's response.

2. *Conformance of EAR Trade Controls to U.S. Economic Sanctions*

In 2009, BIS promulgated several new rules affecting reexports by foreign parties and expanding the extraterritorial reach of the EAR. Similar OFAC regulations control U.S. party behavior.

a. Iran

On January 15, 2009, BIS published an interim final rule amending the EAR to establish new license requirements for the export and reexport of certain items to Iran consistent with OFAC-imposed economic sanctions.⁸ EAR Section 742.8 now includes a reexport license requirement for items controlled for Anti-Terrorism (AT) reasons to Iran.⁹ The amendment eliminates a carve-out that had previously exempted these items

3. *Id.*

4. *Id.* at 45,986.

5. *Id.* at 45,988. Corresponding revisions to the Office of Foreign Assets Controls' ("OFAC") travel and remittance rules were made to 31 C.F.R. pt. 515.

6. *Id.*

7. *Id.* at 45,986.

8. License Requirements Policy for Iran and for Certain Weapons of Mass Destruction Proliferators, 74 Fed. Reg. 2,355-8 (Jan. 15, 2009) (to be codified at 15 C.F.R. pts. 742, 744, and 746).

9. ECCNs 2A994, 3A992.a, 5A991.g, 5A992, 6A991, 6A998, 7A994, 8A992.d, .e, .f, and .g, 9A990.a and .b, 9A991.d and .e.

from regulation as controlled U.S. content when incorporated into foreign-manufactured items being exported from abroad into Iran.

BIS further revised EAR Section 746 to add eight ECCNs to the list of items that require export and reexport licenses.¹⁰ Also, in accordance with OFAC's Iranian Transaction Regulations, 31 C.F.R. Part 560, BIS stated a policy of granting Iranian-related license applications, on a case-by-case basis, for transactions in connection with humanitarian activities or the safety of civil aviation and safe operation of U.S.-origin aircraft.¹¹

b. Weapons of Mass Destruction Proliferation

On January 15, 2009, BIS established a license requirement under new EAR Section 744.8, applying to the export or reexport of any item subject to the EAR to any Specially Designated Nationals (SDN) and Blocked Persons designated by OFAC as proliferators of weapons of mass destruction, labeled [NPWMD]. BIS also announced a policy of denying applications for such transactions.¹² Section 744.8 does not appear to prohibit any transactions that are not already prohibited to U.S. persons by Executive Order 13382,¹³ which blocks the property of proliferators and which is administered by OFAC. The EAR provision is significant, however, in that it also applies to non-U.S. persons, including foreign subsidiaries of U.S. companies.

c. Burma

On January 8, 2009, BIS issued a final rule under Section 744.22 adding new targets to existing EAR restrictions on exports and reexports to parties designated by OFAC as Burmese SDNs.¹⁴ BIS clarified that exports and reexports of EAR-controlled items to Burmese SDNs, i.e., to parties identified on the SDN list as "[BURMA]," require a license.¹⁵ In addition, the rule explicitly applies not only to exports or reexports to Burmese entities on the SDN list, but—consistent with OFAC policy—also to entities in which a blocked Burmese SDN owns a fifty percent or greater interest, even if that entity is not specifically named on the SDN list.¹⁶

3. Entity List—Transfers (In Country)

On September 8, 2009, BIS published a final rule in Part 744 clarifying trade controls with respect to persons and entities named on the Entity List.¹⁷ Supplement No. 4 to Part

10. ECCNs 0A982, 0A985, 0E982, 1C355, 1C395, 2A994, 2D994, and 2E994.

11. License Requirements Policy, *supra* note 8.

12. *Id.*

13. Exec. Order No. 13,382, 70 Fed. Reg. 38,567-38,570 (July 1, 2005).

14. Burma: Revision of Restrictions on Exports, Reexports and Transfers to Persons Whose Property and Interests in Property Are Blocked Pursuant to Executive Orders, 74 Fed. Reg. 770 (Jan. 8, 2009) (to be codified at 15 C.F.R. pt. 744).

15. *Id.* at 771.

16. *Id.* at 772; OFFICE OF FOREIGN ASSETS CONTROL, GUIDANCE ON ENTITIES OWNED BY PERSONS AND ENTITIES WHOSE PROPERTY IS BLOCKED (2008), available at http://www.ustreas.gov/offices/enforcement/ofac/programs/common/licensing_guidance.pdf.

17. Revisions to Certain End-User Controls Under the Export Administration Regulations; Clarification Regarding License Requirements for Transfers (in country) to Persons Listed on the Entity List, 74 Fed. Reg. 45,990 (Sept. 8, 2009) (to be codified at 15 C.F.R. pt. 744).

744 names persons or entities whose involvement in a transaction may trigger BIS authorization, and furnishes specific licensing requirements with respect to each listed entity.¹⁸ Although BIS already imposed restrictions and license obligations concerning exports and reexports to parties on the Entity List, these amendments explicitly extend these requirements to “transfers (in country),” that is, to transactions commonly referred to as “deemed reexports,” and can apply to non-U.S. persons outside of the United States.

4. *Validated End-User: People's Republic of China and India*

On April 29, 2009, and July 2, 2009, BIS promulgated final rules regarding additionally approved end-user entities and eligible ECCNs under authorized Validated End-User (VEU) programs for the People's Republic of China (PRC)¹⁹ and India,²⁰ respectively. These VEU programs eliminate export licensing requirements for certain EAR-controlled items, designated by specific ECCNs in the rules, exported or reexported to authorized end-users.²¹ VEU program authorizations are indefinite but may be revised, suspended, or revoked under EAR Section 748.15(a)(3).²² A PRC or Indian entity may only be recognized as a VEU if it has an adequate export control compliance program and willingness to allow U.S. Department of Commerce representatives to visit on-site.²³

5. *Encryption Exports*

On October 15, 2009, BIS published a final rule correcting errors and resolving inconsistencies in the interim rule it issued on October 3, 2008, significantly revising its encryption export regulations.²⁴ The clarifications primarily affect EAR Sections 734.4(b) (*De minimis* standard) and 740.17(b) (License Exception ENC).

6. *Civil Aircraft Equipment*

BIS also clarified its jurisdiction over certain civil aircraft equipment. As reported in the 2008 Year in Review, the U.S. Department of State, Directorate of Defense Trade Controls (DDTC), amended Part 121 (Category VIII(h) note) of the International Traffic in Arms Regulations (ITAR) to clarify how Section 17(c) of the EAA applies in relation to the ITAR.²⁵ On December 3, 2008, BIS issued a companion rule explaining that, even if

18. *Id.*

19. Additions and Revisions to the List of Approved End-Users and Respective Eligible Items for the People's Republic of China (PRC) Under Authorization Validated End-User (VEU), 74 Fed. Reg. 19,382 (Apr. 29, 2009) (to be codified at 15 C.F.R. pt. 748).

20. Authorization Validated End-User (VEU): List of Approved End-Users and Respective Eligible Items for India, 74 Fed. Reg. 31,620-2 (July 2, 2009) (to be codified at 15 C.F.R. pt. 748).

21. *Id.*

22. *Id.*

23. India's recent entry into an “End Use Monitoring” agreement on military sales with the United States reflects important geopolitical developments and may, in time, portend a gradual shift in U.S. export policy towards that country. See Dept. of State, Bureau of Public Affairs, U.S.-India Joint Statement (July 20, 2009), available at <http://www.state.gov/r/pa/prs/ps/2009/july/126230.htm> (noting that “both sides had reached agreement on End Use Monitoring for U.S. defense articles”).

24. Encryption Simplification Rule: Final, 74 Fed. Reg. 52,880 (Oct. 15, 2009); see also BIS, Encryption Simplification, 74 Fed. Reg. 57,061 (Nov. 4, 2009). (revising an error included in the October 2009 Federal Register notice).

25. See James E. Bartlett III et al., *Export Controls and Economic Sanctions*, 43 INT'L LAW. 311, 322 (2009).

parts were originally designed for a military aircraft or helicopter, a component that is not considered Significant Military Equipment under Category VIII or controlled under another United States Munitions List (USML) Category will be subject to the EAR and not the ITAR so long as it is: (1) “standard equipment” as defined by the regulation; (2) covered by a civil aircraft type certificate issued by the Federal Aviation Administration (subject to certain exceptions); (3) an “integral part” of such civil aircraft; and (4) not to be exported to a controlled country.²⁶

B. ENFORCEMENT

1. *DHL Accepts \$ 9.4 Million Penalty and Audit Requirement*

On August 6, 2009, BIS announced that it and OFAC entered into a joint settlement agreement with DPWN Holdings (USA), Inc. (formerly DHL Holdings (USA), Inc.) and DHL Express (USA), Inc. (collectively DHL).²⁷ The settlement resolved allegations that DHL unlawfully aided and abetted the illegal export of goods to Syria, Iran, and Sudan and failed to comply with OFAC and EAR record keeping requirements.²⁸ Under the settlement agreement, DHL agreed to pay a civil penalty of \$9,444,744 and to independent export/sanctions audits covering exports to Iran, Syria, and Sudan from March 2007 through December 2011.²⁹ This represents the largest ever joint BIS and OFAC settlement and may reflect the increased penalties authorized by the IEEPA Enhancement Act of 2007.³⁰ The audit requirement suggests that investigations of the companies and individuals that used DHL to make the exports may soon follow.

III. Arms Export Controls

A. RULE CHANGES

The U.S. Department of State’s Directorate of Defense Trade Controls (DDTC) made two substantive amendments to the International Traffic in Arms Regulations (ITAR) in 2009.

1. *South Korea*

On August 3, 2009, DDTC amended the ITAR to grant South Korea the same favored status held by North Atlantic Treaty Organization member countries, Japan, Australia, and New Zealand for purposes of reexport and retransfer authorizations, Congressional

26. Clarification of Export Control Jurisdiction for Civil Aircraft Equipment Under the Export Administration Regulations, 73 Fed. Reg. 73,547-01, 73-549 (Dec. 3, 2008).

27. Press Release, Bureau of Industry and Security, DHL Signs \$9.44 Million Joint Settlement Agreement with BIS and OFAC (Aug. 6, 2009), available at http://www.bis.doc.gov/news/2009/bis_press08062009.html.

28. *Id.*

29. *Id.*

30. See International Emergency Economic Powers Enhancement Act, Pub. L. No. 110-96, 121 Stat. 1011 (Oct. 17, 2007).

certifications, proposals for the sales of significant military equipment, and brokering rules.³¹

2. *Body Armor*

On August 6, 2009, DDTC amended the ITAR to add an exemption authorizing the unlicensed temporary export of body armor for exclusive personal use in specified circumstances.³²

B. ENFORCEMENT

1. *Civil Settlements*

a. Qioptiq Accepts \$25 Million Penalty

In a consent agreement effective December 19, 2008, Qioptiq S.a.r.l. (Qioptiq) agreed to civil penalties of \$25 million and to take a number of remedial actions to settle charges of 163 violations of the ITAR and the Arms Export Control Act (AECA)³³ involving exports and reexports of night vision technical data and hardware.³⁴ The alleged violations arose from the conduct of several Thales High Technology Optic Group companies that Qioptiq purchased on December 22, 2006.³⁵ DDTC charged that these companies: unlawfully exported technical data and hardware to Singapore, Israel, and France; reexported technical data and hardware to China and other countries; retransferred technical data to dual/third-country nationals and subcontractors in Singapore; transferred classified information to an unsecured facility in the United Kingdom; and filed a misleading export authorization application.³⁶ As aggravating evidence of “systemic compliance problems,” DDTC cited several episodes suggesting inadequate ITAR awareness within the acquired companies.³⁷

b. Analytical Methods Accepts \$500,000 Penalty

In a consent agreement effective on February 18, 2009, Analytical Methods, Inc. (Analytical Methods) agreed to a \$500,000 fine and to take corrective measures to settle allegations of twenty-nine ITAR and AECA violations.³⁸ DDTC charged that Analytical Methods: unlawfully exported technical data and defense services in connection with sales

31. Amendment to the International Traffic in Arms Regulations: Congressional Certification Regarding South Korea, 74 Fed. Reg. 38,342 (Aug. 3, 2009) (to be codified at 22 C.F.R. pts. 123, 124, 126, and 129).

32. Amendment to the International Traffic in Arms Regulations: Temporary Export Exemption for Body Armor, 74 Fed. Reg. 39,212 (Aug. 6, 2009) (to be codified at 22 C.F.R. pt. 123).

33. 22 U.S.C. § 2778 (2004).

34. Consent Agreement, In re Qioptic S.a.r.l., U.S. Dept. of State, Bureau of Politico-Military Affairs, Dec. 19, 2008, http://pmddtc.state.gov/compliance/consent_agreements/pdf/Qioptiq_ConsentAgreement.pdf.

35. Letter from David C. Trimble, Office of Def. Trade Controls Compliance, to Benoit Bazire, CEO, Qioptiq S.a.r.l. (Dec. 4, 2008), available at http://pmddtc.state.gov/compliance/consent_agreements/pdf/Qioptiq_ProposedChargingLetter.pdf.

36. *Id.* at 10-12.

37. *Id.* at 6.

38. Consent Agreement, In re Analytical Methods, Inc., U.S. Dept. of State, Bureau of Politico-Military Affairs, Feb. 18, 2009, http://pmddtc.state.gov/compliance/consent_agreements/pdf/AnalyticalMethods_ConsentAgreement.pdf.

of computational fluid dynamic software to customers in China, Israel, Turkey, the United Kingdom, and Singapore; failed to notify DDTC of exports of controlled technical data to China; failed to register with DDTC; and made false statements in export control documents regarding the jurisdiction of certain software.³⁹ DDTC emphasized that although some of the transactions at issue involved software not subject to the ITAR, they nevertheless constituted exports of ITAR-controlled defense services because the software and related assistance were used in analyses of military technologies for non-U.S. end-users.⁴⁰

2. *Significant Criminal Developments and Case Law*

a. *United States v. Pulungan*

On June 15, 2009, the Seventh Circuit reversed Doli Pulungan's conviction for the attempted unlicensed export of Mark 4 CQ/T riflescopes to Indonesia.⁴¹ At issue was whether the prosecution had proved that Pulungan possessed sufficient knowledge that these particular riflescopes were controlled by the USML to commit a criminally "willful" violation of the AECA. The Seventh Circuit concluded that while DDTC's decision to place a category of defense articles and services on the USML is not subject to judicial review, its determination that a particular item falls within a USML category is reviewable in a criminal case where the defendant's knowledge of applicable law is dispositive. The court reasoned that Section 2778(h) makes unreviewable only designations of defense articles or services issued in regulations, and the sole regulatory language here was the category of "riflescopes manufactured to military specifications" appearing on the USML. DDTC's internal conclusion that the Mark 4 CQ/T riflescopes fell within this category was not a regulation and was therefore subject to judicial review in a criminal trial. Judge Frank H. Easterbrook observed that a "designation by an unnamed official, using unspecified criteria, that is put in a desk drawer, taken out only for use at a criminal trial, and immune from any evaluation by the judiciary, is the sort of tactic usually associated with totalitarian regimes."⁴² The court further noted that Pulungan would prevail even if the Mark 4 CQ/T were, in fact, subject to the ITAR. The prosecution conceded that the word "willfully" in Section 2778(c) of the AECA requires proof that the defendant knew not only the material facts, but also the applicable legal rules. The court ruled that prosecutors had not introduced sufficient evidence to prove that Pulungan had actual knowledge that the Mark 4 CQ/T riflescopes were "manufactured to military specifications" and that a license was therefore required for export.⁴³

b. *United States v. Roth*

On July 1, 2009, a U.S. district court sentenced former University of Tennessee Professor John Roth to forty-eight months imprisonment for fifteen ITAR and AECA violations

39. Letter from David Trimble, Office of Def. Trade Controls Compliance, to J. Michal Summa, President, Analytical Methods, Inc. (Dec. 19, 2008), *available at* http://www.pmdtc.state.gov/compliance/consent_agreements/pdf/AnalyticalMethods_ChargingLetter.pdf.

40. *Id.* at 5-6.

41. *United States v. Pulungan*, 569 F.3d 326 (7th Cir. 2009).

42. *Id.* at 328.

43. *Id.* at 331.

arising from unlicensed exports of defense technical data.⁴⁴ The exports primarily consisted of transfers to a visiting Chinese student of technical information about plasma actuators being developed for use in unmanned aerial vehicles.⁴⁵ On July 28, 2009, the court granted Roth's motion for release pending appeal of his conviction, concluding that Roth had raised on appeal a substantial question of law or fact in contesting the standard of willful intent applied during his trial.⁴⁶ The court noted that other circuits were split on the definition of "willfully" in the AECA and that the Sixth Circuit had not ruled on the matter.⁴⁷

IV. Economic Sanctions

A. RULE CHANGES

1. *Non-proliferation*

On April 13, 2009, OFAC issued the Weapons of Mass Destruction Proliferators Sanctions Regulations⁴⁸ to implement Executive Order 13382.⁴⁹ In relevant part, these regulations block the property and interests in property of certain persons found to be engaged in the proliferation of weapons of mass destruction; persons providing financial, material, technological, or other support for those persons; and persons determined to be owned or controlled by, or acting for, or on behalf of any of the above.

2. *Burma (Myanmar)*

On January 15, 2009, OFAC added two individuals and fourteen entities to the SDN List⁵⁰ pursuant to the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008 and Executive Orders 13,448 and 13,464.⁵¹ These designations targeted financial backers of the Burmese regime in response to the junta's continuing efforts to "suppress democratic dissent" and "unwillingness to abide by international commitments."⁵²

44. Press Release, Dep't of Justice, Former Univ. of Tenn. Professor John Reece Roth Sentenced to 48 Months in Prison for Illegally Exporting Military Research Technical Data (July 1, 2009), *available at* <http://knoxville.fbi.gov/dojpressrel/pressrel09/kx070109.html>.

45. *Id.*

46. United States v. Roth, 642 F. Supp. 2d 796 (E.D. Tenn. 2009).

47. *Id.* at 799.

48. Weapons of Mass Destruction Proliferators Sanctions Regulations, 74 Fed. Reg. 16,771 (Apr. 13, 2009) (to be codified at 31 C.F.R. pt. 544).

49. Exec. Order 13,382, 70 Fed. Reg. 38,567, *supra* note 13.

50. Additional Designations of Individuals and Entities Pursuant to Executive Order 13448 or Executive Order 13464 and Identifications of Individuals and Entities Blocked Pursuant to the JADE Act, 74 Fed. Reg. 4,299 (Jan. 23, 2009).

51. See Tom Lantos Block Burmese Jade (Junta's Anti-democratic Efforts) Act of 2008, Pub. L. No. 110-286, 122 Stat. 2632 (2008); Press Release, U.S. Dep't of the Treasury, Treasury Targets Financial Networks of Key Supporters of the Burmese Junta (Jan. 15, 2009), *available at* <http://www.treas.gov/press/releases/hp1355.htm>.

52. Press Release, U.S. Dep't of the Treasury, *supra* note 51.

3. *Congo*

On March 4, 2009, OFAC added five leaders of the Forces Démocratiques de Libération du Rwanda—an armed group that has been blamed for instability in the eastern Democratic Republic of the Congo—to the SDN List⁵³ pursuant to Executive Order 13,413.⁵⁴ On May 28, 2009, OFAC issued the Democratic Republic of the Congo Sanctions Regulations⁵⁵ to implement Executive Order 13,413.⁵⁶ These regulations block all property and interests in property in the United States or in the possession or control of U.S. persons of those determined to be leaders of, or to have assisted, various foreign or Congolese armed groups in the Congo and those designated to have committed violations of international law involving children in armed conflict.⁵⁷

4. *Côte d'Ivoire (Ivory Coast)*

On April 13, 2009, OFAC issued the Persons Contributing to the Conflict in Côte d'Ivoire Sanctions Regulations⁵⁸ to implement Executive Order 13,396.⁵⁹ These regulations require U.S. persons to block the property and interests in property of persons determined to contribute to the conflict in Côte d'Ivoire.⁶⁰ They also codify OFAC's Guidance On Entities Owned By Persons Whose Property And Interests In Property Are Blocked, originally issued in February 2008.⁶¹

5. *Cuba*

On March 11, 2009, President Obama signed the Omnibus Appropriations Act of 2009 (Omnibus Act), which, *inter alia*, loosens Cuban travel and remittance restrictions.⁶² That

53. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPT. OF THE TREASURY, RECENT OFAC ACTIONS (2009), available at <http://www.treas.gov/offices/enforcement/ofac/actions/0090304.shtml>.

54. Exec. Order 13,413, 71 Fed. Reg. 64,105 (Oct. 31, 2006); Press Release, U.S. Department of the Treasury, Treasury Designates Five Individuals for Contributing to the Conflict in the Democratic Republic of the Congo (Mar. 4, 2009), available at <http://www.treas.gov/press/releases/tg49.htm>.

55. Democratic Republic of the Congo Sanctions Regulations, 74 Fed. Reg. 25,439 (May 28, 2009) (to be codified at 31 C.F.R. pt. 547).

56. Exec. Order 13,413, 71 Fed. Reg. 64,105, *supra* note 54.

57. Democratic Republic of the Congo Sanctions Regulations, *supra* note 55.

58. Persons Contributing to the Conflict in Côte d'Ivoire Sanctions Regulations, 74 Fed. Reg. 16,763 (Apr. 13, 2009) (to be codified at 31 C.F.R. pt. 543). OFAC amended these regulations to change their heading to the "Côte d'Ivoire Sanctions Regulations" for the sake of consistency with other sanctions regulations. See Persons Contributing to the Conflict in Côte d'Ivoire Sanctions Regulations, 74 Fed. Reg. 35,802 (July 21, 2009) (to be codified at 31 C.F.R. pt. 543).

59. Exec. Order 13,396, 71 Fed. Reg. 7,389 (Feb. 10, 2006).

60. Persons Contributing to the Conflict in Côte d'Ivoire Sanctions Regulations, *supra* note 58.

61. 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" regardless of whether the entity itself is designated as an SDN. OFAC also advises U.S. persons to use caution when considering whether to enter into transactions with non-blocked entities that are controlled by or have a significant ownership amount of less than fifty percent by a blocked person as they may be designated by OFAC as blocked persons in the future. GUIDANCE ON ENTITIES OWNED BY PERSONS WHOSE PROPERTY AND INTERESTS IN PROPERTY ARE BLOCKED, *supra* note 16.

62. Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524 (2009). The Omnibus Act, among other things: (i) authorizes U.S. persons to travel to Cuba for activities relating to commercial sales of agricultural and medical goods (Section 620); (ii) prevents the use of appropriated funds for administering,

same day, OFAC also issued a general license⁶³ to the Cuban Assets Control Regulations (CACR) ⁶⁴ implementing the family travel provisions of the Omnibus Act.⁶⁵

On April 13, 2009, the President further directed the Secretaries of State, Treasury, and Commerce to lift certain travel, remittance, and telecommunications-related restrictions on Cuba.⁶⁶ On September 3, 2009, OFAC amended the CACR to implement the President's initiative.⁶⁷

U.S. travelers may now visit "close relatives" ⁶⁸ in Cuba, with no limit on the duration or frequency of such visits.⁶⁹ OFAC also increased expenditure limits for travel within Cuba to match the current State Department "per diem rate" for Havana, plus amounts directly incident to travel to visit close relatives in Cuba. ⁷⁰ Further, family travelers may now carry up to \$3,000 in remittances to close relatives⁷¹ and make remittances from depository institutions, which may now establish testing arrangements and exchange authenticator keys with Cuban financial institutions.⁷² OFAC also authorized certain telecommunications services, contracts, related payments, and travel-related transactions by general licenses. ⁷³ Finally, the Omnibus Act amends the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) to authorize travel-related transactions incident to agricultural and medical sales under TSRA.⁷⁴

6. Iran

On July 23, 2009, OFAC amended the Iranian Transactions Regulations' (ITR) definition of "Iranian accounts" to allow U.S. financial institutions to provide account services to clients who are not residents of Iran but who are temporarily in Iran at the time of a requested payment or other account service.⁷⁵

implementing, or enforcing certain Cuba-related travel restrictions (Section 621); and (iii) prohibits the use of appropriated funds for administering, implementing, or enforcing payment restrictions on certain exports to Cuba (Section 622).

63. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPT. OF THE TREASURY, CUBA ASSETS CONTROL REGULATIONS, GENERAL LICENSE FOR VISITS TO CLOSE RELATIVES IN CUBA (2009), *available at* http://www.treas.gov/offices/enforcement/ofac/programs/cuba/gl_omni2009.pdf.

64. 31 C.F.R. § 515.561 (2009).

65. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPT. OF THE TREASURY, GUIDANCE ON IMPLEMENTATION OF CUBA TRAVEL AND TRADE-RELATED PROVISIONS OF THE OMNIBUS APPROPRIATIONS ACT 2009 (2009), *available at* http://www.treas.gov/offices/enforcement/ofac/programs/cuba/omni_guide.pdf.

66. Press Release, The White House, Fact Sheet: Reaching out to the Cuban People (Apr. 13, 2009), *available at* http://www.whitehouse.gov/the_press_office/Fact-Sheet-Reaching-out-to-the-Cuban-people/.

67. Cuban Assets Control Regulations, 74 Fed. Reg. 46,000 (Sept. 8, 2009) (to be codified at 31 C.F.R. pt. 515).

68. See 31 C.F.R. § 515.339 (2009) (defining "close relative" to mean "any individual related to [another person] . . . by blood, marriage, or adoption who is no more than three generations removed from that person or from a common ancestor with that person.").

69. 31 C.F.R. § 515.561 (2009).

70. *Id.* § 515.560.

71. *Id.*

72. *Id.* § 515.572.

73. *Id.* § 515.542.

74. Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. §§ 7201-7211 (2009); *see also* 31 C.F.R. § 515.533 (2009).

75. Iranian Transactions Regulations, 74 Fed. Reg. 36, 397 (July 23, 2009) (to be codified at 31 C.F.R. pt. 560).

7. *North Korea*

In 2009, OFAC added three North Korean entities to the SDN list pursuant to Executive Order 13382:⁷⁶ Korea Hyoksin Trading Corporation, Korea Kwangson Banking Corp., and Amroggang Development Bank.⁷⁷ All three entities have ties to North Korean companies blacklisted by the United Nations Security Council for their involvement in weapons proliferation.⁷⁸

8. *Sudan*

On September 9, 2009, OFAC issued a general license⁷⁹ to the Sudanese Sanctions Regulations (SSR)⁸⁰ authorizing U.S. persons to “export[] and reexport[] agricultural commodities, medicine, and medical devices to the Specified Areas of Sudan.”⁸¹ U.S. persons may engage in related transactions under this license provided that such transactions neither: (i) involve any property or interests in property of the Sudanese Government; (ii) relate to any of the petroleum or petrochemical industries in Sudan; nor (iii) transit through any non-Specified Areas of Northern Sudan.⁸²

B. SIGNIFICANT OFAC GUIDANCE

1. *New Guidance on Certain Financial Institution Obligations*

On February 14, 2008, OFAC issued a FAQ on financial institutions’ obligations with regard to property that is directly or indirectly subject to fifty percent or greater ownership by persons “whose property and interests in property are blocked pursuant to an Executive Order or regulations administered by OFAC.”⁸³ Financial institutions had sought guidance out of concern that they would be held strictly liable for processing wire transactions involving non-account parties owned, directly or indirectly, by an SDN.⁸⁴

76. Exec. Order No. 13,382, 70 Fed. Reg. 38,567, *supra* note 13. Executive Order 13,382 freezes the assets of proliferators of weapons of mass destruction and their supporters, and prohibits U.S. persons from engaging in any transactions with them, thereby isolating them from the U.S. financial and commercial systems.

77. Designation of an Entity Pursuant to Exec. Order No. 13382, 74 Fed. Reg. 41,783 (Aug. 18, 2009); Designation of an Entity Pursuant to Exec. Order No. 13382, 74 Fed. Reg. 41,782 (Aug. 18, 2009); OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPT. OF THE TREASURY, RECENT OFAC ACTIONS (2009), *available at* <http://www.treas.gov/offices/enforcement/ofac/actions/20091023.shtml>.

78. Press Release, U.S. Department of the Treasury, Treasury Designates Financial Institution Tied to North Korea’s WMD Proliferation (Aug. 11, 2009), *available at* <http://www.treas.gov/press/releases/tg260.htm>; Press Release, U.S. Department of the Treasury, Treasury Designates North Korean Bank and Banking Official As Proliferators of Weapons of Mass Destruction (Oct. 23, 2009), *available at* <http://www.treas.gov/press/releases/tg330.htm>.

79. Sudanese Sanctions Regulations, 74 Fed. Reg. 46,361 (Sept. 9, 2009) (to be codified at 31 C.F.R. pt. 538) [hereinafter Sudanese Sanctions Regulations].

80. 31 C.F.R. § 538 (2007).

81. The Specified Areas of Sudan are defined as “Southern Sudan, Southern Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur, and marginalized areas in and around Khartoum.” 31 C.F.R. § 538.320.

82. Sudanese Sanctions Regulations, *supra* note 79.

83. Office of Foreign Assets Control, U.S. Dept. of the Treasury, Frequently Asked Questions and Answers (Feb. 24, 2009), *available at* <http://www.treas.gov/offices/enforcement/ofac/faq/answer.shtml#116>.

84. *Id.*

OFAC advises that it will not pursue an enforcement action where a U.S. bank “[i)] operates solely as an intermediary, [(ii)] does not have any direct relationship with the entity (e.g., the entity is a non-account party), and [(iii)] does not know or have reason to know of the entity’s ownership or other information demonstrating the blocked status of the entity’s property.”⁸⁵ OFAC nonetheless reserves the right to determine, case-by-case, whether those three factors apply.

2. *Economic Sanctions Enforcement Guidelines*

On November 9, 2009, OFAC published its “Economic Sanctions Enforcement Guidelines” as a final rule (Final Guidelines).⁸⁶ Of particular note is OFAC’s clarification that it continues to expect “Subject Persons” to maintain risk-based compliance programs.⁸⁷ Other significant points include clarifications regarding OFAC’s treatment of voluntary disclosures, including that the refusal to sign such an agreement will not be an aggravating factor, but that an agreement to sign will be treated as cooperation potentially resulting in a lower penalty.⁸⁸ OFAC also clarified that it will limit its review of a Subject Person’s compliance history to the five years preceding the transaction at issue.⁸⁹ Under the Final Guidelines, OFAC also reserves the right to determine “transaction value” on a case-by-case basis when making penalty determinations.⁹⁰ This provides OFAC maximum flexibility, but leaves a Subject Person with little ability to determine the realistic potential range for penalties. Finally, OFAC amended the Guidelines to provide for a penalty of up to \$50,000 for failure to maintain records in conformance with OFAC’s regulations.⁹¹ U.S. persons may be obliged to maintain all transaction-related data for a five-year period regardless of the likelihood that a sanctioned entity is involved.⁹²

85. *Id.*

86. Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57,593 (Nov. 9, 2009) (to be codified at 31 C.F.R. pt. 501). OFAC published an interim final rule that set forth similar guidelines on September 8, 2008. See Economic Sanctions Enforcement Guidelines, 73 Fed. Reg. 51,933 (Sept. 8, 2008) (to be codified at 31 C.F.R. pt. 501).

87. “Subject Person” is defined to mean “an individual or entity subject to any of the sanctions programs administered or enforced by OFAC.” *Id.*

88. The Final Guidelines clarify that: (i) on a case-by-case basis, OFAC will consider a disclosure to a second agency to be eligible for voluntary self-disclosure mitigation; (ii) OFAC will provide mitigation where a disclosure has been filed and where a third party is required to report, but does not; and (iii) where a Subject Person files a suspicious activity report with the Financial Crimes Enforcement Network and later files a voluntary self-disclosure with OFAC, unless OFAC discovers the apparent violation before the disclosure is filed; and (iv) in response to concerns that U.S. persons are not receiving appropriate mitigation for disclosures that are not voluntary under the Guidelines, OFAC noted that where a Subject Person provides substantial information regarding the apparent violation, the base penalty can be reduced between twenty-five and forty percent and it will publish notice of the Subject Person’s cooperation. The difference in penalties can be significant since, for a non-egregious, voluntary disclosure, OFAC starts the base penalty at a maximum of \$125,000. Where a transaction is non-egregious but disclosure is not voluntary, the base penalty is capped at \$250,000. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

C. ENFORCEMENT ACTIONS, SETTLEMENTS, AND CASES

1. *Australia and New Zealand Bank Group, Ltd.*

On August 24, 2009, OFAC announced its settlement of Australia and New Zealand Bank Group, Ltd.'s (ANZ) alleged violations of the SSR and the CACR.⁹³ The \$5.75 million penalty against ANZ is significant not only for its size, but also in demonstrating OFAC's ongoing assertion of jurisdiction over non-U.S. entities' actions outside the United States and its willingness to provide mitigation credit in certain circumstances.⁹⁴ According to OFAC, the violations involved ANZ's processing of financial transactions through correspondent accounts at U.S. banks.⁹⁵ OFAC found that ANZ deleted references to Sudan and entities subject to U.S. sanctions from messages related to these transactions, thus "impeding the ability of U.S. banks to detect these violations."⁹⁶

2. *Lloyds TSB Bank Plc*

On January 9, 2009, Lloyds TSB Bank Plc (Lloyds), a UK entity, entered into "deferred prosecution agreements [(DPAs)] with the Department of Justice [(DOJ)] and the New York County District Attorney's Office," agreeing to pay a total of \$350 million in fines and forfeitures to resolve a criminal case involving the evasion of U.S. economic sanctions.⁹⁷ According to the DOJ, Lloyds processed approximately \$350 million in payments for Iranian and Sudanese banks, using a process that stripped identifying information from payment messages sent to unaffiliated U.S. processing banks.⁹⁸ The factual statement accompanying the DPAs states that "[n]one of the USD payments processed on behalf of OFAC-sanctioned parties were processed by Lloyds' U.S. branches."⁹⁹ As such, Lloyds would appear to have entered into the DPAs to resolve a case involving solely actions by its non-US operations.

3. *Credit Suisse AG*

On December 16, 2009, Credit Suisse AG ("Credit Suisse") entered into agreements with the DOJ, the New York County District Attorney's Office, OFAC, and the Board of Governors of the Federal Reserve System, agreeing to forfeit a total of \$536 million as well as significant undertakings to resolve alleged violations of U.S. economic sanc-

93. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPT. OF THE TREASURY, EXHIBIT A (2009), available at <http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/08242009.pdf>.

94. OFAC mitigated the total penalty based on ANZ's "substantial cooperation, its prompt and thorough remedial response, and the fact that ANZ had not been subject to an OFAC enforcement action in the five years preceding the transactions at issue." *Id.*

95. *Id.*

96. *Id.*

97. Press Release, U.S. Department of Justice, Lloyds TSB Bank Plc Agrees to Forfeit \$350 Million in Connection with Violations of the International Emergency Economic Powers Act (Jan. 9, 2009), available at <http://www.justice.gov/archive/opa/pr/2009/January/09-crm-023.html>.

98. *Id.*

99. Exhibit A to Deferred Prosecution Agreement at 3, United States v. Lloyds TSB Bank Plc, 1:09-cr-00007-ESH (D.D.C. Jan. 9, 2009).

tions.¹⁰⁰ According to the public information, Credit Suisse processed “hundreds of millions of dollars illegally through banks in Manhattan on behalf of clients subject to U.S. sanctions.”¹⁰¹ The majority of these alleged violations involved Iran, although alleged violations of US sanctions on Sudan, Libya, Burma, Cuba, and the former Liberian regime of Charles Taylor were also mentioned in the public information.¹⁰²

4. DHL

As noted above, DHL entered into a settlement agreement with BIS and OFAC in which it agreed to pay a civil penalty of over \$9 million to settle alleged violations of the EAR and OFAC regulations.¹⁰³ OFAC alleged that DHL exported, or attempted to export, unlicensed shipments of merchandise from the United States to Sudan and Iran, imported an unlicensed shipment from Iran to the United States, and failed to maintain appropriate records in accordance with the ITR.¹⁰⁴

5. *KindHearts for Charitable Humanitarian Development v. Geithner*

On August 18, 2009, a federal district court in Ohio found that OFAC violated KindHearts for Charitable Humanitarian Development, Inc.’s (KindHearts) Fourth Amendment rights when OFAC “seized” KindHearts’ assets without probable cause and without issuance of a warrant for such seizure.¹⁰⁵ The Court found that OFAC “arbitrarily and capriciously violated the Administrative Procedures Act” by blocking KindHearts’ funds and limiting access to those funds for the payment of legal counsel.¹⁰⁶ KindHearts is an Ohio charitable corporation that OFAC blocked on February 19, 2006 while determining whether that entity was providing material support to Hamas, a “Specially Designated Global Terrorist” organization.¹⁰⁷ A Treasury Department press release stated that KindHearts’ officials and fundraisers “ha[d] coordinated with Hamas leaders and made contributions to Hamas-affiliated organizations.”¹⁰⁸

100. Press Release, U.S. Department of Justice, Credit Suisse Agrees to Forfeit \$536 Million in Connection with Violations of the International Emergency Economic Powers Act and New York State Law (Dec. 16, 2009), available at <http://www.justice.gov/opa/pr/2009/December/09-ag-1358.html>.

101. Press Release, New York County District Attorney’s Office, (Dec. 16, 2009), available at <http://manhattanada.org/whatsnew/press/2009-12-16.shtml>.

102. Press Release, U.S. Department of the Treasury, U.S. Treasury Department Announces Joint \$536 Million Settlement with Credit Suisse AG (Dec. 16, 2009), available at <http://www.ustreas.gov/press/releases/tg452.htm>.

103. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPT. OF THE TREASURY, ENFORCEMENT INFORMATION FOR AUGUST 6, 2009 (2009), available at <http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/08062009.pdf>.

104. *Id.*

105. *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, No. 3:08CV2400, 2009 WL 2514057 (N.D. Ohio Aug. 18, 2009).

106. *Id.*

107. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPT. OF THE TREASURY, RECENT OFAC ACTIONS (2006), available at <http://www.treas.gov/offices/enforcement/ofac/actions/20060219.shtml>.

108. Press Release, U.S. Department of the Treasury, Treasury Freezes Assets of Organization Tied to Hamas (Feb. 19, 2006), available at <http://www.treas.gov/press/releases/js4058.htm>.

V. Trends in Export Control Reform

The year 2009 saw calls for reforms to the export control system from inside and outside of government.

A. THE FORTRESS AMERICA REPORT

In January, an ad hoc committee of the National Research Council of the National Academies issued a report entitled *Beyond "Fortress America": National Security Controls on Science and Technology in a Globalized World* (the Report).¹⁰⁹ The Report declared the U.S. export control system "fundamentally broken" because of the increased convergence of military and civilian technologies,¹¹⁰ further concluding that: (1) the current export control system harms national and homeland security while impeding economic competitiveness; (2) the export control system cannot be fixed by actions taken below the presidential level; (3) "U.S. national security and economic prosperity depend on full global engagement in science, technology, and commerce;"¹¹¹ and (4) "[a] new system of export controls can be more agile and effective, recognizing that, under current global conditions, risks to national security can be mitigated but not eliminated."¹¹²

The Report makes two major recommendations regarding export controls:

First, it calls for the President to "restructure the export control process within the federal government."¹¹³ Stressing the interdependence of national security and economic competitiveness, the Report proposes decontrolling items controlled for unilateral reasons unless the relevant agency finds that the item presents a "substantial" national security risk.¹¹⁴ The Report also calls for a new coordinating agency to adjudicate license applications and an independent panel to resolve licensing disputes and oversee the sunset of unilateral controls.¹¹⁵

Second, the Report also urges the Departments of State and Commerce to administer the AECA and EAA so as to "assure the scientific and technological competitiveness of the United States."¹¹⁶ Accordingly, it proposes an "economic competitiveness exemption" for dual-use technologies available without restriction from foreign sources to parallel the "fundamental research" exemption for unclassified research in National Security Decision Directive 189.¹¹⁷

109. Press Release, National Research Council, National Security Controls on Science and Technology Are Broken and Should Be Restructured (Jan. 8, 2009), available at <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=12567>. The Committee was chaired by former National Security Adviser Brent Scowcroft and Stanford University President John Hennessy.

110. Nat'l Research Council of the Nat'l Acad., *Beyond "Fortress America": National Security Controls on Science and Technology in a Globalized World* 4 (2009).

111. *Id.*

112. *Id.* at 4-5.

113. *Id.* at 6.

114. *Id.* at 6-7.

115. *Id.* at 7-10.

116. *Id.* at 10.

117. *Id.*

B. PRESIDENTIAL REVIEW OF EXPORT CONTROLS

The Report was well-timed. On August 13, 2009, the Obama Administration announced a comprehensive review of U.S. export controls, which will be conducted by the National Security Council (NSC) and National Economic Council and focus on both dual-use and military items.¹¹⁸

1. *Dual-Use Controls*

The Obama Administration has announced that export controls “must be updated to address the threats we face today and the changing economic and technological landscape.”¹¹⁹ In a speech at BIS’s annual Update Conference, Secretary of Commerce Gary Locke announced that BIS would begin examining the elimination of dual-use license requirements for “allies and partner nations” and begin implementing a “fast-track process” for licenses for “other key countries that do not pose a significant threat and have a strong history of export control compliance.”¹²⁰ BIS has also proposed that the review include the Commodity Jurisdiction (CJ) process and the proposed Intra-Company Transfer (ICT) license exception.¹²¹ License Exception ICT, which would allow parent companies and their wholly-owned or controlled entities to export and reexport most items on the CCL after receiving prior approval from BIS, was first proposed under the Bush Administration’s dual-use export control directives in 2008.¹²²

In 2007, BIS announced a review of the CCL and made substantive changes to various Export Control Classification Numbers in 2008.¹²³ This review appears slated to continue as Secretary Locke has publicly instructed BIS to scour the EAR for items whose export no longer poses a national security risk.¹²⁴

2. *Arms Export Controls*

Prior to the announcement of the presidential review, DDTC had itself, in March 2009, petitioned the NSC to review the different treatment afforded dual nationals by DDTC and BIS.¹²⁵ (BIS views nationality simply as a question of current citizenship or permanent residency, whereas DDTC considers country of birth a critical factor in assess-

118. See Statement of the Press Secretary, Office of the Press Secretary, The White House (Aug. 13, 2009), available at http://whitehouse.gov/the_press_office/Statement-of-the-Press-Secretary.

119. *Id.*

120. Hon. Gary Locke, Sec’y of Commerce, Remarks at Bureau of Industry and Security Update Conference on Export Controls (Oct. 1, 2009), available at http://www.commerce.gov/NewsRoom/SecretarySpeeches/PROD01_008477.

121. See *id.*

122. For proposed rule, see Export Administration Regulations: Establishment of License Exception Intra-Company Transfer (ICT), 73 Fed. Reg. 57,544 (Oct. 3, 2008) (to be codified at 15 C.F.R. pts. 740, 772).

123. See Request for Public Comments on a Systematic Review of the Commerce Control List, 72 Fed. Reg. 39,052 (July 17, 2007); Revisions to the Export Administration Regulations Based Upon a Systematic Review of the CCL, 73 Fed. Reg. 58,033 (Oct. 6, 2008) (to be codified at 15 C.F.R. pts. 742, 744, and 774).

124. See Locke, *supra* note 120.

125. Washington Tariff & Trade Letter, State Asks NSC to Review Policies on Foreign Nationals (Apr. 13, 2009), available at <http://www.wttlonline.com/ht/a/GetDocumentAction/i/35798>.

ing nationality.¹²⁶) DDTC sought the review in response to allied countries' concerns that controls on dual nationals conflict with their human rights laws.¹²⁷ DDTC officials have also noted the possibility that satellites and satellite components could be removed from the USML and transferred to the Commerce Control List for regulation under the EAR, but warn that such a change would require Congressional approval.¹²⁸

C. DEFENSE TRADE ADVISORY GROUP ACTIVITIES

The Defense Trade Advisory Group (DTAG) also called for change in the past year, proposing modifications to the ITAR definitions section and priorities for DDTC.¹²⁹

1. *ITAR Definitions Working Group*

DTAG established an ITAR Definitions Working Group to examine all of the defined, undefined, and missing terms in the ITAR. The Working Group recommended modifications to the Policy on Designating Defense Articles and Commodity Jurisdiction in 22 C.F.R. §§ 120.3-4, as well as the definitions of such existing key terms as "Defense Article," "Defense Service," "Technical Data," and "Public Domain," and new definitions for terms such as "Military Purpose," "Manufacturing Know-How," and "Employee."¹³⁰ These recommendations are under consideration by DDTC.¹³¹

2. *DTAG Proposed Priorities*

At the April 2009 DTAG Plenary, DTAG recommended that DDTC prioritize USML revision, reassess the designation of certain items as Significant Military Equipment, and update ITAR exemptions. DTAG is likely to make further recommendations on numerous exemptions, including for exports, to U.S. forces worldwide, crash investigations, and an exemption for foreign exchange personnel embedded in DOD offices.¹³²

126. *Compare* Revisions and Clarification of Deemed Export Related Regulatory Requirements, 71 Fed. Reg. 30840 (May 31, 2006), with Directorate of Defense Trade Controls, Frequently Asked Questions (FAQs) - Licensing of Foreign Persons Employed by a U.S. Person (2009), available at http://www.pmddtc.state.gov/faqs/license_foreignpersons.html (last visited Feb. 9, 2010).

127. *Id.*

128. Section 826 of the Foreign Relations Authorization Act, Fiscal Years 2010 and 2011 would allow the President to transfer satellites and related components from the USML to the CCL, with the exception of those satellites and related components transferred to or launched by China. See H.R. 2410, 111th Cong. (2009) (1st Sess.).

129. DTAG is a Federal Advisory Committee that provides the DDTC with a "formal channel for regular consultation and coordination with U.S. private sector defense exporters and defense trade specialists." U.S. Dept. of State, The Defense Trade Advisory Group, available at <http://www.pmddtc.state.gov/DTAG/index.html> (last visited Jan. 19, 2010).

130. See DTAG ITAR DEFINITIONS WORKING GROUP REPORT (2009), available at http://www.pmddtc.state.gov/DTAG/documents/ITARDefinitions_26Jun09.pdf.

131. *Id.*

132. See Defense Trade Advisory Group's New Priorities Discussion (Apr. 7, 2009), <http://www.pmddtc.state.gov/DTAG/documents/NewPriorities>.

VI. Developments In Canadian Export Controls

A. AMENDMENTS TO CANADA'S EXPORT CONTROL LIST

Canada's *Export Control List* (ECL) identifies the goods and technology that require a permit prior to being exported or transferred from Canada. On April 30, 2009, the ECL was amended, finally bringing into force the 2007 version of the *Guide to Canada's Export Controls*.¹³³ New items were added to Group 1 of the ECL (dual-use), in the advanced materials, materials processing, electronics, telecommunications, navigation and aerospace categories; Group 2 (munitions); Group 3 (nuclear); Group 6 (missile control), in the propulsion, propellant, materials, instrumentation, launch support, testing, and stealth categories; and Group 7 (chemical and biological weapons). Controls were also removed or revised in Groups 1, 6, and 7.¹³⁴

B. NEW EXPORT CONTROLS HANDBOOK

In February of 2009, the Export Controls Division of Foreign Affairs and International Trade Canada (ECD) issued, and in May of 2009 reissued, its Export Controls Handbook.¹³⁵ Particularly significant is the Handbook's provision for voluntary disclosures to ECD. It provides that disclosures of non-compliance with the *Export and Import Permits Act* (EIPA) may be made to ECD in writing, specifies the information required,¹³⁶ and notes that ECD will look "favorably upon disclosures if. . . satisfied that the exporter has fully cooperated and no further action is warranted."¹³⁷ Depending on the circumstances, ECD may refer matters to the Canadian Border Services Agency (CBSA) or the Royal Canadian Mounted Police. Although provision for voluntary disclosure may offer some comfort for exporters who have potential violations, they should also carefully consider whether a separate voluntary disclosure to CBSA may also be appropriate, as that agency is responsible for the enforcement of related requirements under both the *Customs Act* and the EIPA.

C. CHANGES TO CANADA'S UNITED NATIONS SANCTIONS PROGRAMS

During 2009, Canada amended a number of its regulations governing business with UN-sanctioned countries, including the following:

133. See ORDER AMENDING THE EXPORT CONTROL LIST, SOR/2009-128 (Can.).

134. Details on the specific additions, removals, and revisions to items on the ECL can be found on ECD's website at http://www.international.gc.ca/controls-controles/about-a_propos/export/guide.aspx?menu_id=72&menu=R.

135. EXPORT CONTROLS DIVISION, EXPORT CONTROLS HANDBOOK (2009), available at <http://www.international.gc.ca/controls-controles/assets/pdfs/documents/ExportControlHandbook-eng.pdf>.

136. See *id.* at 49.

137. *Id.* at 48.

1. *North Korea*

Canadian sanctions were amended effective July 30, 2009, to reflect the UN Security Council's strengthening of measures against North Korea.¹³⁸ The amendments expand the embargo on arms and related technical assistance, prohibit certain financial transactions and the provision of services to vessels believed to be carrying sanctioned cargo, and expand the list of sanctioned items.¹³⁹

2. *Rwanda*

Measures which had previously imposed an arms embargo against Rwanda were repealed effective June 4, 2009.¹⁴⁰

3. *Somalia*

On March 12, 2009, Canada implemented new regulations regarding an arms embargo, a prohibition on technical, financial, and other related assistance, and an asset freeze against designated persons.¹⁴¹

4. *Liberia*

On January 29, 2009, sanctions were amended to provide exceptions to the existing arms embargo and to repeal the ban on imports of rough diamonds, round logs, and timber products from Liberia.¹⁴²

D. INCREASED SCRUTINY ON DOING BUSINESS WITH IRAN

There were strong signals during 2009 that Iranian-related transactions were being carefully scrutinized for consistency with existing Canadian sanctions measures. Canadian authorities have publicly expressed concern about the export of nuclear-related items from Canada to Iran and the transshipment of U.S.-origin goods or technology to Iran through the United Arab Emirates, Malaysia, Singapore, Hong Kong, and other countries.¹⁴³

In February 2009, Canada's Office of the Superintendent of Financial Institutions warned that financial transactions involving Iran should be viewed as "potentially suspicious" and that financial institutions with correspondent banking relationships with Iranian banks should be implementing "stringent enhanced due diligence measures."¹⁴⁴

138. Regulations Amending the Regulations Implementing the United Nations Resolution on the Democratic People's Republic of Korea, SOR/2009-232 (Can.).

139. *Id.*

140. Regulations Repealing the United Nations Rwanda Regulations, SOR/2009-0170 (Can.).

141. Regulations Implementing the United Nations Resolutions on Somalia, SOR/2009-92 (Can.).

142. Regulations Amending the United Nations Liberia Regulations and the Regulations Implementing the United Nations Resolution on Lebanon, SOR/2009-23 (Can.). Minor amendments correcting administrative errors were made to sanctions measures against Lebanon.

143. *Id.*

144. OSFI Notice: Financial Transactions Related to Iran, Uzbekistan, Pakistan, Sao Tome & Principe, Turkmenistan and Azerbaijan (Feb. 27, 2009), available at http://www.osfi-bsif.gc.ca/app/DocRepository/1/eng/issues/terrorism/fatf/2009_02_27_e.pdf.

In April 2009, in what appears to be the first case of its kind, Canadian authorities arrested and charged a Toronto man with violating Canada's Iran sanctions¹⁴⁵ and other measures, including the *Customs Act*. It is alleged that he attempted to export U.S.-origin pressure transducers, which can have commercial or military applications, from Canada to Iran for use in the enrichment of weapons-grade uranium. A trial is expected in 2010.

145. See Press Release, Royal Canadian Mounted Police, Police Intercept Illicit Export of Nuclear Technology (Apr. 17, 2009), available at <http://www.rcmp-grc.gc.ca/on/news-nouvelles/2009/09-04-17-ce-da-eng.htm>; see also Regulations Implementing the United Nations Resolution on Iran, SOR/2007-44 (Can.).