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JOHN BOSCARIOL, STEVEN BROTHERTON, MATTHEW A. GOLDSTEIN, DAVID T. HARDIN, VALENTIN A. POVARCHUK, AND NICHOLAS M. ROEGNER\*

## I. Introduction

This article summarizes significant changes to U.S. export controls and economic sanctions occurring in 2011.<sup>1</sup> A specific focus is on proposed and final rules published in furtherance of President Obama's Export Control Reform Initiative, the goal of which is a single control list administered and enforced by a single licensing agency on a single information technology platform.<sup>2</sup> The article also discusses changes implemented in response to political unrest in the Middle East and North Africa, and summarizes recent developments in Canadian trade controls.

## II. International Traffic in Arms Regulations

### A. PROPOSED RULES

#### 1. *Transfer of United States Munitions List Items*

The U.S. Department of State Directorate of Defense Trade Controls (DDTC) and the U.S. Department of Commerce Bureau of Industry and Security (BIS) originally identified bright lines of jurisdictional control, structural alignment of the U.S. Munitions List (USML) and the Commerce Control List (CCL), and the tiering of items to levels of increasing sensitivity as necessary steps to establishment of a single control list.<sup>3</sup> In 2011,

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1. This article does not include changes occurring after December 1, 2011. An expanded version can be found at the ABA Section of International Law Committee on Export Controls and Economic Sanctions website at <http://www.abanet.org>. For developments during 2010, see Michael L. Burton et al., *Export Controls and Economic Sanctions*, 45 INT'L LAW. 19 (2010). For developments during 2009, see John Boscariol et al., *Export Controls and Economic Sanctions*, 44 INT'L LAW. 25 (2010).

2. Robert M. Gates, Then-Sec'y of Def., Speech Before the Business Executives for National Security (Apr. 20, 2010), <http://www.defense.gov/speeches/speech.aspx?speechid=1453>.

3. Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VII, 75 Fed. Reg. 76,930 (proposed Dec. 10, 2010) (to be codified at 15 C.F.R. pt. 121); Commerce

the agencies delayed plans to structurally align and tier the USML<sup>4</sup> while continuing reviews of USML items to determine which should remain on the USML and which can be transferred to the CCL.

In 2011 the agencies proposed a framework for the Category VII items (tanks and military vehicles) previously proposed for transfer in 2010<sup>5</sup> and proposed the transfer of items in Category VIII (aircraft and associated equipment).<sup>6</sup> Officials also reported ongoing reviews to transfer items in categories VI (vessels of war and special naval equipment), XI (military electronics), XV (spacecraft systems and associated equipment), and XX (submersible vessels, oceanographic and associated equipment).<sup>7</sup>

Final rules implementing transfers cannot issue until requisite notifications to Congress are provided under section 38(f) of the Arms Export Control Act (AECA).<sup>8</sup> Transfer of Category XV items will also require legislation,<sup>9</sup> but a bill was introduced in Congress on November 1, 2011, to avoid this requirement by returning authority over Category XV items to the President.<sup>10</sup>

## 2. Definition for “Specially Designed”

On May 3, 2011 DDTC informally introduced a draft definition for “specially designed” to replace the current International Traffic in Arms (ITAR) term “specifically designed” and to harmonize the term with the EAR and multilateral agreements.<sup>11</sup> The proposed term has two parts.<sup>12</sup> One part applies to end items on the USML and CCL that, as a result of “development,” have “properties peculiarly responsible for achieving or

Control List: Revising Descriptions of Items and Foreign Availability, 75 Fed. Reg. 76,664 (proposed Dec. 9, 2010) (to be codified 15 C.F.R. pt. 774).

4. Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VIII, 76 Fed. Reg. 68,694 (proposed Nov. 7, 2011) (to be codified at 15 C.F.R. pts. 120-21); Revisions to the Export Administration Regulations (EAR): Control of Aircraft and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. 68,675, 68,679 (proposed Nov. 7, 2011) (to be codified at 15 C.F.R. pts. 738, 740, 742, 770, 772, and 774).

5. Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. 41,958 (proposed July 15, 2011) (to be codified at 15 C.F.R. pts. 730, 732, 734, 738, 740, 742, 743, 744, 746, 748, 756, 762, 770, 772, and 774); Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VII, 75 Fed. Reg. 76,930 (proposed Dec. 10, 2010).

6. Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VIII, 76 Fed. Reg. 68,694 (proposed Nov. 7, 2011).

7. Andrew Shapiro, Assistant Sec’y, Bureau of Political-Military Affairs, Remarks Before the Def. Trade Advisory Grp. (Nov. 9, 2011), <http://www.state.gov/t/pm/rls/rm/176925.htm>; Kevin J. Wolf, Assistant Sec’y for Export Admin., Remarks at U.S. Dep’t of Commerce Bureau of Indus. & Sec. Update 2011 Conference (July 19, 2011), [http://www.bis.doc.gov/news/2011/wolf\\_update.htm](http://www.bis.doc.gov/news/2011/wolf_update.htm).

8. Arms Export Control Act of 1979 § 38(f), 22 U.S.C. § 2778(f) (2010).

9. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, 112 Stat. 1920 (1998).

10. Safeguarding United States Satellite Leadership and Security Act of 2011, H.R. 3288, 112th Cong. (2011).

11. Def. Trade Advisory Grp. Plenary Minutes (May 3, 2011), [http://www.pmdtc.state.gov/dtag/documents/plenary\\_minutes\\_05\\_11.pdf](http://www.pmdtc.state.gov/dtag/documents/plenary_minutes_05_11.pdf); Proposed Revisions to the Export Administration Regulations, 76 Fed. Reg. 41,958 (proposed July 15, 2011).

12. Robert Kovac, Managing Dir. of Def. Trade Controls, Presentation to Def. Trade Advisory Grp. (May 3, 2011), [http://www.pmdtc.state.gov/dtag/documents/plenary\\_May2011\\_SpeciallyDesigned.ppt](http://www.pmdtc.state.gov/dtag/documents/plenary_May2011_SpeciallyDesigned.ppt).

exceeding the controlled performance levels, characteristics, or functions of the referenced item identified in the USML.”<sup>13</sup> The other applies to CCL parts and components used “in or with” a USML item. The definition also contains five exclusions that describe items not considered “specially designed.”

### 3. *Scope of Defense Services*

On April 13, 2011 DDTC published a proposed rule to clarify the scope of defense services and add related definitions.<sup>14</sup> Part of the proposed amendment would control the furnishing of certain forms of assistance to foreign persons using “other than public domain data.”<sup>15</sup> Assistance based solely upon the use of public domain data would not constitute defense services under this part. The proposed definition also includes a list of activities that do not constitute defense services. These include training in the basic operation or basic maintenance of a defense item; mere employment of a U.S. citizen by a foreign person; and providing law enforcement, physical security, or personal protective training, advice, or services to or for a foreign person using only public domain data.

### 4. *Exemption for Temporary Export of Chemical Agent Protective Gear*

On March 23, 2011, DDTC published a proposed rule to add an exemption at ITAR section 123.17 for the temporary export of chemical agent protective gear exclusively for personal use to destinations not subject to section 126.1 restrictions, and to Afghanistan and Iraq under specified conditions.<sup>16</sup>

### 5. *Exemption for Replacement Parts and Incorporated Articles*

On March 15, 2011 DDTC published a proposed rule to amend ITAR parts 123 and 126 to create an exemption that, in specified circumstances and under specified conditions, would eliminate the need for a license to export certain parts and components for systems approved in previous license requests.<sup>17</sup>

### 6. *Defense Trade Treaties Exemptions*

On November 22, 2011 DDTC published a proposed rule to add exemptions implementing defense trade treaties with Australia and the United Kingdom.<sup>18</sup> The proposed rule also seeks to add Israel to the list of countries with shorter certification periods and higher dollar thresholds for congressional notification.<sup>19</sup>

13. Def. Trade Advisory Grp. Plenary Minutes, *supra* note 11.

14. International Traffic in Arms Regulations: Defense Services, 76 Fed. Reg. 20,590 (proposed Apr. 13, 2011) (to be codified at 15 C.F.R. pts. 120, 124).

15. *Id.*

16. International Traffic in Arms Regulations: Exemption for Temporary Export of Chemical Agent Protective Gear, 76 Fed. Reg. 16,353 (proposed Mar. 23, 2011) (to be codified at 15 C.F.R. pt. 123).

17. Amendment to the International Traffic in Arms Regulations: Replacement Parts/Components and Incorporated Articles, 76 Fed. Reg. 13,928 (proposed Mar. 15, 2011) (to be codified at 15 C.F.R. pts. 123, 126).

18. Implementation of Defense Trade Cooperation Treaties, 76 Fed. Reg. 72,246 (proposed Nov. 22, 2011) (to be codified at 15 C.F.R. pts. 120, 123, 124, 126, 127, and 129).

19. *Id.*

## B. FINAL RULES

1. *Exemption for Transfers to Dual National and Third-Country National Employees*

On May 16, 2011 DDTC added ITAR section 126.18, which provides a limited exemption for companies unable to use the 124.16 exemptions for intra-company, intra-organization, and intra-government transfers.<sup>20</sup> The new exemption permits transfers of unclassified defense articles to dual nationals or third-country nationals who are bona fide regular employees directly employed by an authorized foreign consignee or end-user. Among other conditions to its use, the exemption requires that employees have a government security clearance or undergo diversion risk screening. DDTC issued guidance on changes to agreements relating to the exemption, use of security clearances from other countries, and methods to meet screening requirements.<sup>21</sup>

2. *Libya*

On May 24, 2011 DDTC amended ITAR section 126.1 to update its policy with respect to Libya and incorporate recent United Nations Security Council (UNSC) arms embargo resolutions.<sup>22</sup> Thereafter, on November 4, 2011 DDTC published a final rule implementing a limited conditional exception to the embargo passed by the UNSC for exports of certain arms and related items destined for exclusive use by UN personnel, media representatives, and humanitarian and development workers.<sup>23</sup>

3. *Sudan*

On November 9, 2011 DDTC published a final rule amending ITAR § 126.1 to revise “Sudan,” a proscribed country subject to UNSC arms embargoes, to the “Republic of the Sudan,” and to clarify that the new Republic of South Sudan is not a proscribed country.<sup>24</sup>

4. *Sierra Leone and Other Countries*

On August 8, 2011 DDTC amended ITAR § 126.1 to update country policies for Afghanistan, Cote d'Ivoire, Cyprus, the Democratic Republic of the Congo, Eritrea, Fiji, Iraq, Lebanon, Liberia, North Korea, Sierra Leone, Somalia, Sri Lanka, Yemen, and

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20. International Traffic in Arms Regulations: Dual Nationals and Third-Country Nationals Employed by End-Users, 76 Fed. Reg. 28,174 (May 16, 2011) (to be codified at 15 C.F.R. pts. 120, 124, and 126).

21. U.S. DEP'T OF STATE, GUIDELINES FOR PREPARING ELECTRONIC AGREEMENTS (REVISION 3.0) (Aug. 17, 2011), [http://www.pmdtc.state.gov/licensing/documents/Guidelines%20for%20Preparing%20Electronic%20Agreements%20Revision%203%20\(2\).pdf](http://www.pmdtc.state.gov/licensing/documents/Guidelines%20for%20Preparing%20Electronic%20Agreements%20Revision%203%20(2).pdf); U.S. DEP'T OF STATE, GUIDELINES FOR IMPLEMENTING NEW DUAL NATIONAL/THIRD-COUNTRY NATIONAL POLICY FOR AGREEMENTS (July 25, 2011), [http://www.pmdtc.state.gov/licensing/documents/D-TCN\\_AG\\_GuidanceFinal.pdf](http://www.pmdtc.state.gov/licensing/documents/D-TCN_AG_GuidanceFinal.pdf); U.S. DEP'T OF STATE IMPLEMENTATION CONSIDERATIONS: DUAL/THIRD NATIONAL RULE (July 26, 2011), [http://www.pmdtc.state.gov/licensing/documents/D-TCN\\_Policy\\_ImplementationFinal.pdf](http://www.pmdtc.state.gov/licensing/documents/D-TCN_Policy_ImplementationFinal.pdf).

22. Amendment to the International Traffic in Arms Regulations: Libya, 76 Fed. Reg. 30,001 (May 24, 2011) (to be codified at 22 C.F.R. pt. 126.1).

23. Amendment to the International Traffic in Arms Regulations: Libya and UNSCR 2009, 76 Fed. Reg. 68,313 (Nov. 4, 2011) (to be codified at 22 C.F.R. pt. 126.1).

24. Amendment to the International Traffic in Arms Regulations: Sudan, 76 Fed. Reg. 69,612 (Nov. 9, 2011) (to be codified at 22 C.F.R. pt. 126.1).

Zimbabwe.<sup>25</sup> As part of the update, Sierra Leone was removed from the list of countries subject to a UNSC arms embargo and is no longer considered an ITAR proscribed country.

### C. SUBMISSION PROCESSING

In 2011 DDTTC began posting the weekly status of commodity jurisdiction cases<sup>26</sup> and final commodity jurisdiction determinations on the DDTTC website.<sup>27</sup> It also transitioned to electronic payment of registration fees,<sup>28</sup> changed requirements for return of licenses,<sup>29</sup> revised online submission forms, and updated various guidelines to include those for electronic agreements<sup>30</sup> and requests for proviso reconsideration.<sup>31</sup>

### D. ENFORCEMENT

The DDTTC Enforcement Division reports that violations in 2011 are consistent with those in previous years and that they continue to see inefficient procedures and failures to integrate compliance programs into actual operations.<sup>32</sup>

#### 1. Civil

On May 16, 2011 BAE Systems PLC (BAES)<sup>33</sup> agreed to a \$79 million civil penalty to settle 2,591 alleged violations of the Arms Export Control Act (AECA) and ITAR arising from unauthorized brokering activities, failure to register as a broker, failure to file annual broker reports, causing unauthorized brokering, failure to report payment of fees or com-

25. Amendment to the International Traffic in Arms Regulations: Updates to Country Policies, and Other Changes, 76 Fed. Reg. 47,990 (Aug. 8, 2011) (to be codified at 22 C.F.R. pt. 126.1).

26. DDTTC is now posting on a weekly basis the status of Commodity Jurisdiction cases in process. See *Announcement Archives: 2011*, U.S. DEP'T OF STATE, <http://www.pmdtcc.state.gov/archives2011.html> (last visited Feb. 7, 2012).

27. Commodity Jurisdiction Final Determinations are now available to view on DDTTC website. See *Commodity Jurisdiction Final Determinations*, U.S. DEP'T OF STATE, [http://www.pmdtcc.state.gov/commodity\\_jurisdiction/determination.html](http://www.pmdtcc.state.gov/commodity_jurisdiction/determination.html) (last visited Feb. 7, 2012).

28. International Traffic in Arms Regulations: Electronic Payment of Registration Fees, 76 Fed. Reg. 45,195 (July 28, 2011) (to be codified at 22 C.F.R. pts.120, 122, 123, and 129).

29. Amendment to the International Traffic in Arms Regulations: Filing, Retention, and Return of Export Licenses and Filing of Export Information, 76 Fed. Reg. 68,311 (Nov. 4, 2011) (to be codified at 15 C.F.R. pt. 123).

30. See GUIDELINES FOR PREPARING ELECTRONIC AGREEMENTS (REVISION 3.0), *supra* note 21.

31. REQUESTS FOR PROVISIO RECONSIDERATION AND/OR CLARIFICATION, U.S. DEP'T OF STATE (June 21, 2011), [http://www.pmdtcc.state.gov/licensing/documents/gl\\_proviso.pdf](http://www.pmdtcc.state.gov/licensing/documents/gl_proviso.pdf).

32. Glenn E. Smith, Chief, Enforcement Div., Directorate of Def. Trade Controls, Nat'l Council on Int'l Trade Dev. Panel, Presentation on Compliance Consent Agreements (Oct. 12, 2011), <http://www.scribd.com/doc/68891888/DDTTC-DTCC-Enforcement-Stats-101211>.

33. BAE Systems plc., (U.S. Dep't of State, Bureau of Political Military Affairs, May 16, 2011) (consent agreement), available at [http://www.pmdtcc.state.gov/compliance/consent\\_agreements/pdf/BAES\\_CA.pdf](http://www.pmdtcc.state.gov/compliance/consent_agreements/pdf/BAES_CA.pdf). See also Proposed Charging Letter from U.S. Dep't of State to David Parkes, Co. Sec'y, BAE Systems (May 2011), available at [http://www.pmdtcc.state.gov/compliance/consent\\_agreements/pdf/BAES\\_PCL.pdf](http://www.pmdtcc.state.gov/compliance/consent_agreements/pdf/BAES_PCL.pdf). This proposed charging letter and other case documents do not relate to or represent violations of BAE Systems, Inc., and its subsidiaries.

missions, and failure to maintain records.<sup>34</sup> This case represents the largest civil penalty and the largest number of alleged violations in DDTC civil enforcement history. According to the proposed charging letter, aggravating factors included the company's failure to cooperate in the investigation and authorization of conduct by senior management.<sup>35</sup> The underlying conduct also relates to a \$400 million criminal penalty agreed to by BAES in a March 2011 plea agreement with the Department of Justice for alleged violations of the AECA, ITAR, and the Foreign Corrupt Practices Act.<sup>36</sup>

## 2. *Criminal*

In 2011 pleas, convictions, and sentences were entered in cases involving illegal exports to § 126.1 countries, exports of missile and nuclear technologies, spacecraft equipment, military aircraft components, and other sensitive technologies.<sup>37</sup> A significant number of prosecutions were mounted against individuals involved in supplying ammunition, assault rifles, and other weapons to Mexican drug cartels.<sup>38</sup>

Constitutional challenges to criminal prosecutions on due process grounds had mixed results. Denying a challenge to conviction in *United States v. Roth*, 628 F.3d 827 (6th Cir. 2011) *cert. denied*, 132 S. Ct. 94 (U.S. 2011) the Sixth Circuit held that the AECA's scienter requirement of "willfulness" was satisfied by proof that a defendant knew an underlying action was unlawful, and that specific knowledge by a defendant that subject items are on the USML is not required.<sup>39</sup> Similarly, in *United States v. Zhen Zhou Wu et al.* No. 08-10386-PBS, 2011 WL 31345 (D. Mass. Jan. 4, 2011), the court denied a procedural due process challenge to an AECA conviction where evidence showed that the defendants were warned of export control requirements, noting that "actual notice from any source that conduct is illegal can support a finding of scienter."<sup>40</sup> But the court vacated counts found in violation of due process and the ex post facto clause where evidence showed: (1) an item was subject to a post-export inter-agency jurisdiction dispute; (2) a distributor gave notice to defendants that the part was dual-use; (3) no notice that the item would be designated on the USML was given; and (4) it was not self-evident that the part was on the USML.<sup>41</sup>

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34. BAE Systems plc., Consent Agreement, and Proposed Charging Letter from U.S. Dep't of State to David Parkes, Co. Sec'y, BAE Systems, *supra* note 33.

35. Proposed Charging Letter from U.S. Dep't of State to David Parkes, *supra* note 33.

36. Press Release, Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), available at <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>.

37. Press Release, Dep't of Justice, Summary of Major U.S. Export Enforcement and Embargo-Related Criminal Prosecutions: 2007 to the Present (Sept. 2011), available at <http://www.justice.gov/nsd/docs/summary-eaca.pdf>.

38. *Id.*

39. *United States v. Roth*, 628 F.3d 827, 834 (6th Cir. 2011) *cert. denied*, 132 S. Ct. 94 (U.S. 2011).

40. *United States v. Zhen Zhou Wu*, Crim. No. 08-10386-PBS, 2011 WL 31345, at \*7 (D. Mass. Jan. 4, 2011).

41. *Id.* at \*12.

### III. Export Administration Regulations

On June 3, 2011 a bill<sup>42</sup> was introduced in the House of Representatives to reauthorize the lapsed Export Administration Act of 1979 (EAA).<sup>43</sup> The bill went to committee and the EAA remains in lapse. On August 12, 2011 President Obama issued a notice of continuing emergency to continue the Export Administration Regulations (EAR) under the International Emergency Economic Powers Act (IEEPA).<sup>44</sup>

#### A. COMMERCE MUNITIONS LIST 600 SERIES

On July 15, 2011 BIS proposed the framework for transferring items no longer controlled on the revised USML to a new “600 Series” on the CCL.<sup>45</sup> The 600 Series will essentially create a “Commerce Munitions List” (CML) by establishing several distinct new Export Control Classification Numbers within each CCL category. Among other things, the 600 series will be populated by items transferred from the USML, defense articles already controlled under the EAR (*i.e.*, “018” items), and items “specially designed” for certain items controlled on the CML or USML.<sup>46</sup>

Under the proposed framework, CML items will no longer be subject to the see-through rule and other ITAR restrictions, and the EAR’s de minimis rules will apply to re-exports of CML items incorporated into foreign-made end items.<sup>47</sup> CML items will also be subject to a general policy of denial to destinations subject to U.S. arms embargos and specific license and exception restrictions will apply.<sup>48</sup>

#### B. FINAL RULES

##### 1. License Exemption Strategic Trade Authorization

On June 16, 2011 BIS published a final rule amending EAR Part 740 to add “License Exception Strategic Trade Authorization” (STA), which is expected to work with the new

42. See generally Export Administration Renewal Act of 2011, H.R. 2122, 112th Cong. (2011), available at <http://www.govtrack.us/congress/bill.xpd?bill=h112-2122>.

43. 50 U.S.C. app. §§ 2401–2420 (2000).

44. Presidential Document, Continuation of Emergency Regarding Export Control Regulations, 76 Fed. Reg. 50,661 (Aug. 12, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-08-16/html/2011-20939.htm>.

45. Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. 41,958 (proposed July 15, 2011). The proposed rule addresses proposed transfers of Category VII items (tanks and military vehicles) from the USML and serves as a template for revisions of other USML categories. See also Revisions to the Export Administration Regulations (EAR): Control of Aircraft and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. 68,675 (Nov. 7, 2011) (describing proposed transfers of Category VIII articles (aircraft and related items)).

46. Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41,960 (proposed July 15, 2011).

47. *Id.* at 41,965.

48. U.S. DEP’T OF COMM., BUREAU OF INDUS. & SEC., FACT SHEET: PLAN FOR CONTROLLING ITEMS TRANSFERRED FROM THE USML TO THE CCL (July 18, 2011), available at [http://www.bis.doc.gov/news/2011/transfer\\_fact\\_sheet.pdf](http://www.bis.doc.gov/news/2011/transfer_fact_sheet.pdf).

CML to alleviate license requirements on many exports to U.S. allies.<sup>49</sup> Among other things, the exception authorizes the unlicensed export, re-export, or transfer of items or technology classified under one of sixty ECCNs to thirty-six countries viewed as close allies of the United States and as destinations of low diversion risk.<sup>50</sup> An additional eight countries are also eligible for STA so long as the exported or re-exported item or technology is subject only to national security controls.

Only items and technology subject solely to national security, chemical or biological weapons, nuclear nonproliferation, regional stability, crime control, or significant items control, are eligible for the new exception. Among other conditions to its use, parties must complete specific forms of notifications and certifications described in the rule and exporters must maintain records of the notifications, certifications, and of each shipment associated with use of the exception.

## 2. *South Sudan*

Following independence from the Republic of Sudan (Sudan), South Sudan received its own listing on the Commerce Country Chart on July 13, 2011 and is now assigned Country Group B.<sup>51</sup> For the corresponding Sudanese Sanctions Regulations (SSR), the U.S. Department of Treasury Office of Financial Assets Control (OFAC) previously issued guidance on April 12, 2011 noting continuation of the SSR against Sudan and warning that certain activities in Southern Sudan that benefit or otherwise relate to Sudan are still prohibited.<sup>52</sup>

## C. TRANSSHIPMENT BEST PRACTICES

On August 31, 2011 BIS published a set of “best practices,” to guard against diversion risks in transshipment.<sup>53</sup> The practices focus on increased attention to BIS’s previously issued Red Flag Indicators, vetting of parties to a transaction, and effective communication of export control information.

## D. ENFORCEMENT

On May 12, 2011 BIS announced a change to its enforcement philosophy, which has in the past typically focused on sanctioning companies.<sup>54</sup> Under its new philosophy, BIS will

49. Export Control Reform Initiative: Strategic Trade Authorization License Exception, 76 Fed. Reg. 35,276 (June 16, 2011) (to be codified at 15 C.F.R. pts. 732, 738, 740, 743, and 774).

50. *Id.* at 35,277.

51. Addition of the New State of the Republic of South Sudan to the Export Administration Regulations, 76 Fed. Reg. 41,046 (July 13, 2011) (to be codified at 15 C.F.R. pts. 738 and 740).

52. Sudanese Sanctions Regulations, 31 C.F.R. pt. 538 (2011).

53. *Best Practices for Preventing Unlawful Diversion of U.S. Dual-Use Items Subject to the Export Administration Regulations, Particularly through Transshipment Trade*, U.S. DEP’T OF COMM., BUREAU OF INDUS. & SEC., [http://www.bis.doc.gov/complianceandenforcement/bestpractices.htm#2011\\_best\\_practices](http://www.bis.doc.gov/complianceandenforcement/bestpractices.htm#2011_best_practices) (last visited Feb. 7, 2012).

54. *Export Controls, Arms Sales, and Reform: Balancing U.S. Interests, Part 1: Hearing Before the H. Comm. on Foreign Affairs*, 112th Cong. 7 (2011) (statement of Eric L. Hirschhorn, Under Secretary of Commerce, Bureau of Industry and Security), available at [http://www.bis.doc.gov/news/2011/ehirschhorn\\_testimony05122011.pdf](http://www.bis.doc.gov/news/2011/ehirschhorn_testimony05122011.pdf).

consider heavy fines, imprisonment, and denial of export privileges against an individual where a violation arises from the individual's deliberate action. Accordingly, enforcement actions in 2011 included indictments and civil settlements against individuals. These actions, and those against companies, primarily involved unlawful exports of nuclear proliferation-related items to end-users in Pakistan on the BIS Entity List; aircraft, missile, and computer-related components to Iran; and nuclear and missile proliferation-related materials to China.<sup>55</sup>

Significant enforcement actions in 2011 include the following:

#### 1. *PPG Industries*

In 2011, following \$3.75 million in combined fines against PPG Industries, Inc. and its foreign subsidiary, PPG Paints Trading (Shanghai) Co., Ltd. (PPG Paints Trading), for alleged unlawful exports of high-performance coatings to Pakistan for use in a nuclear reactor,<sup>56</sup> the Department of Justice indicted the former Managing Director of PPG Paints Trading. BIS entered into a \$250,000 settlement with Xun Wang for her alleged role in the violations.<sup>57</sup> In addition, BIS entered into civil settlements with the former Regional Sales Manager and Director of Business Development and Support at PPG Industries for \$500,000 and \$250,000 respectively, for their alleged roles in the violations.<sup>58</sup>

#### 2. *Flowserve Corporation*

In September and October 2011 OFAC and BIS announced that they settled charges with Flowserve Corporation (Flowserve) involving, among other things, unlawful exports of pumps, valves, and related component parts as well as supplies to Iran by Flowserve's domestic and foreign affiliates. It also involved unlawful exports of pump components to Sudan by Flowserve's foreign affiliates and transactions involving property in which Cuba or a Cuban national had an interest.<sup>59</sup> The settlements involved payment of \$2.5 million in fines to BIS to settle violations of the EAR and \$502,408 in fines to OFAC to settle violations of the Iranian Transactions Regulations (ITR), SSR, and the Cuban Assets Con-

55. See generally *Press Releases*, U.S. DEP'T OF COMM., BUREAU OF INDUS. & SEC., <http://www.bis.doc.gov/news/index.htm#prs> (last visited Feb. 7, 2012).

56. Press Release, Dep't of Justice, Foreign Subsidiary of PPG Industries, Inc. Pleads Guilty To Illegally Exporting High-Performance Coatings To Nuclear Reactor in Pakistan Company Agrees to Pay \$3.75 Million in Fines and Forfeit \$32,319 (Dec. 21, 2010), available at <http://www.bis.doc.gov/news/2010/doj12212010.htm>.

57. Press Release, Dep't of Justice, Former Managing Director of PPG Paints Trading (Shanghai) Co., Ltd. Pleads Guilty to Conspiring to Illegally Export High-Performance Coatings to Nuclear Reactor in Pakistan (Nov. 15, 2011), available at <http://www.bis.doc.gov/news/2011/doj11152011.htm>.

58. Curtis L. Hickcox, (U.S. Dep't Of Comm., Bureau Of Indus. & Sec. June 20, 2011) (order and settlement agreement), available at <http://efoia.bis.doc.gov/exportcontrolviolations/e2210.pdf>; Howard L. Combs, (U.S. Dep't Of Comm., Bureau Of Indus. & Sec. Aug. 26, 2011) (order and settlement agreement), available at <http://efoia.bis.doc.gov/exportcontrolviolations/e2221.pdf>.

59. Press Release, U.S. Dep't of Comm., Bureau of Indus. & Sec., Texas Firm and its Foreign Affiliates Settle 288 Charges of Unlicensed Exports and Reexports to Iran, Syria, and Other Countries (Oct. 3, 2011), available at [http://www.bis.doc.gov/news/2011/bis\\_press10032011.htm](http://www.bis.doc.gov/news/2011/bis_press10032011.htm); Enforcement Information for September 30, 2011, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/flowserve09302011.pdf>.

Control Regulations (CACR).<sup>60</sup> As part of the settlement with BIS, Flowserve must conduct an external compliance audit and submit the results to BIS.<sup>61</sup>

### 3. *United States v. Guo*

On March 17, 2011 the Ninth Circuit Court of Appeals denied a challenge to the EAR as unconstitutionally vague due to complexity of the regulations, holding *inter alia*, that “the regulations apprise those who take the time and effort to consult them as to what may and may not be taken to other countries without a license and do not allow for arbitrary enforcement . . .”<sup>62</sup>

### 4. *Antiboycott Enforcement*

In 2011 BIS reported settlement agreements with thirteen companies for alleged anti-boycott violations.<sup>63</sup> Fines ranged from \$6,600 to \$32,500 and typically involved multiple violations, including failure to report receipt of boycott requests and negative certificates of origin.<sup>64</sup>

## IV. Other Export Control Developments

### A. GAO DEEMED EXPORT REPORT

In February 2011 the Government Accountability Office (GAO) issued a report restating many concerns and conclusions originally stated in its 2002 report criticizing the U.S. deemed export-licensing system.<sup>65</sup> In the report, the GAO states how relevant agencies have still not implemented key recommendations from the initial and subsequent reports to strengthen the deemed export system.

### B. CLOUD COMPUTING

On January 11, 2011<sup>66</sup> BIS reaffirmed a 2009 Advisory Opinion in which it concluded that “providing computational capacity [through grid or cloud computing] would not be subject to the EAR as the service provider is not shipping or transmitting any commodity, software, or technology to the user.”<sup>67</sup> BIS also addressed the issue of cloud computing in

60. Press Release, U.S. Dep’t of Comm., Bureau of Indus. & Sec., Texas Firm and its Foreign Affiliates Settle 288 Charges, *supra* note 59.

61. *Id.*

62. *United States v. Guo*, 634 F.3d 1119, 1120–23 (9th Cir. 2011) *cert. denied*, 131 S. Ct. 3041 (U.S. 2011).

63. *Press Releases*, U.S. DEP’T OF COMM., BUREAU OF INDUS. & SEC., *supra* note 55.

64. Press Release, U.S. Dep’t of Commerce, Bureau of Indus. & Sec., Four Companies Settle Antiboycott Charges (Oct. 1, 2010), *available at* <http://www.bis.doc.gov/news/2010/bispress10012010.htm>.

65. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-354, EXPORT CONTROLS: IMPROVEMENTS NEEDED TO PREVENT UNAUTHORIZED TECHNOLOGY RELEASES TO FOREIGN NATIONALS IN THE UNITED STATES (2011), *available at* <http://www.gao.gov/new.items/d11354.pdf>.

66. U.S. DEP’T OF COMM., BUREAU OF INDUS. & SEC., CLOUD COMPUTING AND DEEMED EXPORTS (2011), *available at* [http://www.bis.doc.gov/policiesandregulations/advisoryopinions/jan11\\_2011.pdf](http://www.bis.doc.gov/policiesandregulations/advisoryopinions/jan11_2011.pdf).

67. U.S. DEP’T OF COMM., BUREAU OF INDUS. & SEC., APPLICATION OF EAR TO GRID AND CLOUD COMPUTING SERVICES (2009), *available at* [http://www.bis.doc.gov/policiesandregulations/advisoryopinions/jan13\\_2009\\_ao\\_on\\_cloud\\_grid\\_computing.pdf](http://www.bis.doc.gov/policiesandregulations/advisoryopinions/jan13_2009_ao_on_cloud_grid_computing.pdf).

the context of deemed exports, stating that “[b]ecause the [cloud computing] service provider is not an ‘exporter,’ [it] would not be making a ‘deemed export’ if a foreign national network administrator monitored or screened . . . user-generated technology subject to the EAR.”<sup>68</sup>

In February 2011 the Committee on Foreign Investment in the United States blocked a Chinese telecommunications company, Huawei Technologies Ltd., from acquiring the cloud computing-related technology and employees of an insolvent U.S. firm, 3Leaf Systems, due to national security concerns.<sup>69</sup>

### C. EXPORT CONTROL CERTIFICATION ADDED TO FORM I-129

The U.S. Citizenship and Immigration Services (USCIS) Form I-129 Petition for Non-immigrant Worker is extensively used by employers to petition for a foreign national to come to the United States to work or receive training under the most common types of visas.<sup>70</sup> In 2010 USCIS released a new version of the Form I-129 that includes a new Part 6 export control certification.<sup>71</sup> Part 6 became effective February 20, 2011, and now requires petitioners to certify and answer questions on export control compliance with respect to the technology or technical data they will release or otherwise provide access to the foreign national.<sup>72</sup>

BIS and USCIS have released guidance addressing information on deemed export requirements and other issues related to the new Part 6 certification.<sup>73</sup> Although the deemed export rule applies to foreign persons in any visa status, the new Form I-129 Part 6 limits the export controls certification to those petitions by non-immigrant workers for H-1B and H-1B1 (specialty occupation minimally requiring a bachelor’s degree), L-1 (intra-company transferee), or O-1A (extraordinary ability in science, arts, education, business or athletics).

68. U.S. DEP’T OF COMM., BUREAU OF INDUS. & SEC., CLOUD COMPUTING, *supra* note 66.

69. Adam Goldberg & Joshua Galper, *Where Huawei Went Wrong in America*, WALL ST. J., Mar. 3, 2011, available at <http://online.wsj.com/article/SB10001424052748703559604576175692598333556.html>.

70. The Form I-129 is used to petition for an H-1B, H-1C, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-1S, P-2, P-2S, P-3, P-3S, Q-1 or R-1 nonimmigrant worker. The form may also be used to request an extension of stay or change of status for an alien as an E-1, E-2, or TN nonimmigrant.

71. *I-129 Petition for a Nonimmigrant Worker*, U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/files/form/i-129.pdf> (last visited Feb. 7, 2012); U.S. DEP’T OF COMM., BUREAU OF INDUS. & SEC., FACT SHEET: REVISED FORM I-129 FORM REQUIRES PETITIONERS CERTIFY COMPLIANCE WITH EXPORT CONTROLS REGARDING THE RELEASE OF TECHNOLOGY OR TECHNICAL DATA TO FOREIGN PERSON BENEFICIARIES (Feb. 18, 2011) [hereinafter I-129 FACT SHEET], [http://www.bis.doc.gov/deemedexports/BIS\\_DDTC\\_joint\\_fact\\_sheet\\_I-129.pdf](http://www.bis.doc.gov/deemedexports/BIS_DDTC_joint_fact_sheet_I-129.pdf).

72. DEP’T OF HOMELAND SEC., USCIS FORM I-129 PETITION FOR A NONIMMIGRANT WORKER (2011).

73. See generally I-129 FACT SHEET, *supra* note 71; *Frequently Asked Questions about Part 6 of Form I-129, Petition for a Nonimmigrant Worker*, U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e666f614176543f6d1a/?vgnnextoid=4c20ec2f88c9f210VgnVCM100000082ca60aRCRD&vgnnextchannel=13ad2f8b69583210VgnVCM100000082ca60aRCRD> (last visited Apr. 28, 2011); *Telecon Recap: Export Controls Requirements on Form I-129: A Conversation with the Commerce Department*, U.S. DEP’T OF HOMELAND SEC. (May 11, 2011), <http://www.dhs.gov/files/programs/cisomb-telecon-export-controls-commerce-dept.shtm>.

## D. DEPARTMENT OF ENERGY REGULATIONS

On September 7, 2011 the U.S. Department of Energy published a notice of a proposed rule to clarify restrictions on unclassified atomic energy assistance and nuclear technology transfers.<sup>74</sup> Among other things, the proposed rule identifies countries and territories to which a general authorization applies and identifies activities subject to a specific authorization.

## V. Trade Embargoes and Economic Sanctions

In 2011, OFAC used its sanction authority as a flexible instrument of foreign policy in the wake of changes in the global political landscape brought by the Arab Spring revolutions. In addition, OFAC relaxed some of its existing sanctions programs in 2011 to better achieve U.S. foreign policy goals.

## A. FINAL RULES AND PROGRAM CHANGES

1. *Cuba*

On January 28, 2011 OFAC published a final rule amending the CACR to implement President Obama's policy to increase people-to-people contact and enhance the free flow of information with the Cuban people.<sup>75</sup> Among other things, the rule creates general licenses for certain specified travel for educational and religious activities and new general licenses authorizing certain forms of remittances to Cuban nationals and religious organizations in Cuba.

2. *Iran*

One of the most significant policy changes by OFAC in 2011 was the October 12 publication of a final rule amending the Iranian Transactions Regulations (ITR) adding a general license for the exportation of food to Iran, including bulk agricultural commodities, with certain exceptions.<sup>76</sup> This general license replaced the policy of issuing one-year specific licenses for commercial exports of food and agricultural commodities, however, OFAC retained the requirement that export or re-export of food take place within the twelve-month period following the signing of the contract for export or re-export.<sup>77</sup>

On February 11, 2011 OFAC published a final rule implementing the Iranian Human Rights Abuses Sanctions Regulations, codifying Executive Order 13553 of September 28, 2010.<sup>78</sup> In addition, on November 19, 2011, in response to an International Atomic Energy Agency report on continued Iranian nuclear weapon development activities, Presi-

74. Assistance to Foreign Atomic Energy Activities, 76 Fed. Reg. 55,278 (proposed Sept. 7, 2011) (to be codified at 10 C.F.R. pt. 810).

75. Cuban Assets Control Regulations, 76 Fed. Reg. 5,072 (Jan. 28, 2011) (to be codified at 31 C.F.R. pt. 515).

76. Sudanese Sanctions Regulations; Iranian Transactions Regulations, 76 Fed. Reg. 63,191, 63,192 (Oct. 12, 2011) (to be codified at 31 C.F.R. 538, 560).

77. *Id.*

78. Iranian Human Rights Abuses Sanctions Regulations, 76 Fed. Reg. 7,695 (Feb. 11, 2011) (to be codified at 31 C.F.R. pt. 562).

dent Obama issued Executive Order 13590, expanding existing sanctions to target certain exports, services, and other support for Iranian petroleum resources and the Iranian petrochemical industry, as well as designating additional Specially Designated Nationals (SDNs).<sup>79</sup> Finally, on December 31, 2011, President Obama signed into law National Defense Authorization Act of 2012, section 1245 of which requires the freezing of assets of all Iranian financial institutions, leaving uncertainty as to how payments for the authorized exports of food and medicine could be made.<sup>80</sup>

### 3. *Libya*

In 2011, OFAC took a variety of actions in response to the Libyan revolution. On February 25, 2011 President Obama issued Executive Order 13566, blocking all transactions of the Government of Libya and designating Muammar Qadhafi and several members of his family as SDNs.<sup>81</sup> Additional SDN designations of Libyan persons and entities followed, and general licenses were issued authorizing certain transactions with Libyan diplomatic missions in the United States, the provision of certain legal services, and transactions with investment funds in which the Government of Libya had a non-controlling minority interest.<sup>82</sup> Thereafter, OFAC authorized certain transactions related to purchases of oil, gas, and petroleum products with Libyan companies operating under the auspices of the Transitional Council of Libya (TNC),<sup>83</sup> authorized transactions with the TNC,<sup>84</sup> and on September 19, three weeks after TNC's rebel forces succeeded in overthrowing Qadhafi's dictatorship, OFAC removed the prohibition on transactions with the Government of Libya.<sup>85</sup>

### 4. *North Korea*

On April 18, 2011 President Obama issued Executive Order 13570, prohibiting the direct or indirect importation of any goods, services, or technology from North Korea.<sup>86</sup> This action probably targeted Sino-North Korean joint ventures. On June 20, 2011 OFAC published final rules amending the North Korea Sanctions Regulations with the prohibitions of Executive Order 13570 under the authority of IEEPA.<sup>87</sup>

79. Exec. Order No. 13,590, 76 Fed. Reg. 72,609 (Nov. 23, 2011).

80. See National Defense Authorization Act for the Fiscal Year 2012, Pub. L. 112-81, § 1245(c) (2011).

81. Exec. Order No. 13566, 76 Fed. Reg. 11,315 (Feb. 25, 2011).

82. 2011 OFAC Recent Actions, U.S. DEP'T OF TREASURY, <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/ofac-actions-2011.aspx> (last visited Feb. 7, 2012).

83. Exec. Order No. 13,566, 31 C.F.R. 570 (2011).

84. *Id.*

85. *Id.*

86. Exec. Order No. 13570, 76 Fed. Reg. 22,291 (Apr. 18, 2011).

87. Foreign Assets Control Regulations; Transaction Control Regulations (Regulations Prohibiting Transactions Involving the Shipment of Certain Merchandise Between Foreign Countries), 76 Fed. Reg. 35,739 (June 20, 2011) (to be codified at 31 C.F.R. pts. 500, 505); North Korea Sanctions Regulations, 76 Fed. Reg. 35,740, 35,741 (June 20, 2011) (to be codified at 31 C.F.R. pt. 510).

### 5. *Sudan*

On April 12, 2011 OFAC issued guidance that Southern Sudan will be excluded from the territory of Sudan and therefore not subject to the sanctions imposed on Sudan.<sup>88</sup> However, in practice most of trade with Southern Sudan became possible only after December 8, 2011, when OFAC published a notice of amending the Sudanese Sanctions Regulations by issuing two general licenses that authorize all activities and transactions relating to the petroleum and petrochemical industries in the Republic of South Sudan and related financial transactions and the transshipment of goods, technology, and services through Sudan to or from the Republic of South Sudan and related financial transactions.<sup>89</sup> In addition, as it did for Iran, the SSRs were amended in 2011 to add a general license for the exportation of food to Sudan with certain exceptions.<sup>90</sup>

### 6. *Syria*

As the Syrian government's suppression of protesters worsened in 2011, OFAC increased pressure on Syrian leadership by ramping up sanctions. On April 29, 2011 President Obama issued Executive Order 13572, prohibiting transactions with top Syrian military and intelligence officials and organizations.<sup>91</sup> This was followed by Executive Order 13573 on May 18, 2011, which prohibited transactions with Syria's President Bashar Al-Assad and several other top officials.<sup>92</sup> Executive Order 13582 was then issued on August 18, 2011, prohibiting: (1) all transactions by U.S. persons involving the Government of Syria; (2) new investment in Syria by U.S. persons; (3) exports and services by U.S. persons to Syria; (4) importation of Syrian-origin petroleum or petroleum products; and (5) any transaction or dealing by U.S. persons related to petroleum or petroleum products of Syrian origin.<sup>93</sup> OFAC then issued fourteen general licenses ranging from routine authorizations, such as for transactions with Syrian diplomatic missions in the United States, to less routine authorizations, such as authorization for winding down of contracts with the Government of Syria.<sup>94</sup>

## B. ENFORCEMENT

OFAC assessed total civil penalties in excess of \$90,000,000 in 2011.<sup>95</sup> The vast majority of these related to the enforcement of the ITR. Significant enforcement actions are separately noted below.

88. Sudanese Sanctions Regulations, 31 C.F.R. pt. 538 (2011).

89. Sudanese Sanctions Regulations; Iranian Transactions Regulations, 76 Fed. Reg. 76,617 (Dec. 8, 2011).

90. Sudanese Sanctions Regulations; Iranian Transactions Regulations, 76 Fed. Reg. 63,191 (Oct. 12, 2011).

91. Exec. Order No. 13,572, 76 Fed. Reg. 24,787 (Apr. 29, 2011).

92. Exec. Order No. 13,573, 76 Fed. Reg. 29,143, 29,144 (May 18, 2011).

93. Exec. Order No. 13,582, 76 Fed. Reg. 52,209 (Aug. 17, 2011).

94. *Syria Sanctions*, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/resource-center/sanctions/Programs/pages/syria.aspx> (last visited Nov. 30, 2011).

95. *Civil Penalties and Enforcement Information*, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx> (last visited Dec. 20, 2011).

1. *JPMorgan Chase Bank, N.A.*

On August 25, 2011 OFAC entered into an \$88,300,000 settlement agreement with JPMorgan Chase Bank, N.A. for apparent violations of the ITR, CACR, and other sanction regulations.<sup>96</sup> Among other things, the settlement involved 1,711 wire transfers in violation of the CACR, and the transfer of 32,000 ounces of gold bullion valued at approximately \$20,560,000 to the benefit of a bank in Iran in violation of the ITR.<sup>97</sup>

2. *Al Haramain Islamic Foundation v. U.S. Dep't of the Treasury*

In 2011 the Ninth Circuit ruled on an appeal of an unsuccessful challenge to OFAC SDN designations and other matters.<sup>98</sup> The Ninth Circuit found that, although OFAC's designation of certain plaintiffs as SDNs violated procedural due process rights, this was a harmless error because substantial evidence supported the designations.<sup>99</sup> The court also found that OFAC's failure to obtain a warrant for the blocking of funds, based on the facts of the case, constituted an unreasonable seizure in violation of the Fourth Amendment.<sup>100</sup>

3. *United States v. Amirnazmi*

Also in 2011, the Third Circuit Court of Appeals, on an appeal of a conviction under the ITR, held that IEEPA was a constitutional delegation of legislative authority to the Executive and that OFAC's interpretation of IEEPA's informational-materials exemption was valid.<sup>101</sup>

## VI. Key Developments in Canadian Trade Controls

During 2011, there were several key developments in Canadian trade control law and policy impacting cross-border business.

### A. ARAB SPRING BRINGS MORE SANCTIONS

Uprisings across the Arab world, and attempts to quash them, led to a number of new Canadian economic sanction measures, having an impact on companies both inside and outside the target countries. Continued concerns regarding Iran's nuclear progress also drove Canadian action in this area.

Targets of Canadian sanctions during 2011 include:

96. *JPMorgan Chase Bank, N.A.*, MUL-546197 (U.S. Dep't of the Treasury Aug. 25, 2011), available at <http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/jpmorgan.pdf>.

97. *JPMorgan Chase Bank N.A. Settles Apparent Violations of Multiple Sanctions Programs*, US DEP'T OF THE TREASURY (Aug. 25, 2011), <http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/08252011.pdf>.

98. *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 660 F.3d 1019, 1029 (9th Cir. 2011).

99. *Id.* at 1054.

100. *Id.*

101. *United States v. Amirnazmi*, 645 F.3d 564, 574 (3d Cir. 2011).

1. *Egypt and Tunisia*

On March 23, 2011 the Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations came into force, specifically targeting dealings involving former leaders, listed family members, and associates.<sup>102</sup>

2. *Iran*

On November 21, 2011, in coordination with the United States and United Kingdom, Canada significantly expanded economic sanctions against Iran to include: (i) “prohibition[s] against providing or acquiring any financial services to or for the benefit of, or on the direction or order of, Iran or any person in Iran;” and (ii) supplying to Iran any goods used in the petrochemical, oil or natural gas industry.<sup>103</sup> There were also numerous additions to the designated persons list and the prohibited goods list.<sup>104</sup>

3. *Libya*

On February 27, 2011 Canada implemented a very broad range of measures against the Libyan government.<sup>105</sup> On August 31, 2011 and September 23, 2011, these measures were largely withdrawn.<sup>106</sup> Limited measures remain, including restrictions on certain property subject to asset freeze before September 16, 2011, a prohibition on dealings with Qadhafi family members and associates, and a military embargo.<sup>107</sup>

4. *Syria*

On May 24, 2011 Canada imposed sanctions against Syria, including prohibitions against dealings with designated individuals and entities associated with the Syrian regime, and a ban on exporting or transferring any controlled goods or technology.<sup>108</sup> On August 13, 2011, “additional individuals and entities, including the Commercial Bank of Syria and Syriatel, were added to the list of designated persons.”<sup>109</sup> Effective October 4, 2011 various dealings with Syria in petroleum products, excluding natural gas, became prohibited, and several entities and individuals were added to the list of designated persons.<sup>110</sup>

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102. John Boscarriol, *New Sanctions Measures Prohibit Dealings With Corrupt Foreign Officials*, MCCARTHY TÉTRAULT (Apr. 18, 2011), [http://www.mccarthy.ca/article\\_detail.aspx?id=5376](http://www.mccarthy.ca/article_detail.aspx?id=5376).

103. John Boscarriol et al., *Canada Expands Economic Sanctions Against Iran*, MCCARTHY TÉTRAULT (Nov. 22, 2011), [http://www.mccarthy.ca/article\\_detail.aspx?id=5642](http://www.mccarthy.ca/article_detail.aspx?id=5642).

104. *Id.*

105. John Boscarriol et al., *Canada Lifts Most Economic Sanctions Against Libya*, MCCARTHY TÉTRAULT (Sept. 26, 2011), [http://www.mccarthy.ca/article\\_detail.aspx?id=5545](http://www.mccarthy.ca/article_detail.aspx?id=5545).

106. *Id.*

107. *Id.*

108. John Boscarriol et al., *Canada Imposes Additional Economic Sanctions Against Syria*, MCCARTHY TÉTRAULT (Oct. 5, 2011), [http://www.mccarthy.ca/article\\_detail.aspx?id=5557](http://www.mccarthy.ca/article_detail.aspx?id=5557).

109. *Id.*

110. *Id.*

## B. ITAR DUAL AND THIRD COUNTRY NATIONALS

As noted above, as of May 16, 2011, ITAR section 126.18 allows for the transfer of unclassified defense articles to dual and third country nationals employed by foreign consignees or end-users if such individuals have a government security clearance or have been screened for substantive contacts with ITAR-proscribed countries.<sup>111</sup> This new provision will hopefully resolve the conflict between Canadian human rights and privacy laws due to DDTTC's past policy of denying access based on nationality or country of birth.

On October 1, 2011 Canada's Controlled Goods Directorate (CGD) began implementing its Enhanced Security Strategy to strengthen security screening in Canada and to assure Canadian companies qualifying under the Controlled Goods Program (CGP) would also meet the requirements under section 126.18.<sup>112</sup> A CGP registrant's designated official is now required, inter alia, to conduct thorough background screenings of employees, which include an extensive review of very detailed personal information.

Notwithstanding the section 126.18 exemption for individuals who have obtained a government security clearance, such individuals must still be security screened under the CGP if they are to have access to controlled items in Canada.<sup>113</sup> It is also important to note that section 126.18 does not contain an exemption for individuals who have been cleared under Canada's CGP and not issued a security clearance.<sup>114</sup> But DDTTC states that it has "high regard for the CGP as a means to mitigate the risks of diversion."<sup>115</sup>

## C. EXPORT AND TECHNOLOGY TRANSFER CONTROLS

Significant developments in the area of Canadian export and technology transfer controls include the following:

### 1. *New Crypto Multiple Destination Permit*

On February 2, 2011 Canada's Export Controls Division (ECD) announced the availability of a new "EU+5" multiple destination permit (MDP) for the export or transfer of information security goods and technology, including source codes to the countries of the European Union (except Cyprus), Australia, Japan, New Zealand, Norway, and Switzerland.<sup>116</sup>

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111. *Notice to Controlled Goods Program Registrants Regarding International Traffic in Arms Regulations Amendment*, PUB. WORKS AND GOV'T SERVS. CAN. (May 16, 2011), <http://ssi-iss.tpsgc-pwgsc.gc.ca/dmc-cgd/actualites-news/itar-eng.html>.

112. *Overview of the Enhanced Security Strategy*, PUB. WORKS AND GOV'T SERVS. CAN. (Oct. 1, 2011), <http://ssi-iss.tpsgc-pwgsc.gc.ca/dmc-cgd/actualites-news/apercu-overview-eng.html>.

113. *Id.*

114. *See id.*

115. *Exchange of Letters between the Department of Public Works and Government Services of Canada and the U.S. Department of State Directorate of Defense Trade Controls*, PUB. WORKS AND GOV'T SERVS. CAN. (Aug. 25, 2011), <http://ssi-iss.tpsgc-pwgsc.gc.ca/pdf/dmc-cgd/ltr-eng.pdf>.

116. John Boscaroli & Orlando Silva, *Encryption Alert: New Permit for Exports and Technology Transfers to EU Plus Five Countries*, MCCARTHY TETRAULT (Feb. 3, 2011), [http://www.mccarthy.ca/article\\_detail.aspx?id=5263](http://www.mccarthy.ca/article_detail.aspx?id=5263).

2. *Amendment to Catch-all Controls*

In March of 2011 item 5505 was amended to broadly control all goods and technology if “their properties and any information made known to the exporter . . . would lead a reasonable person to suspect that they will be used” in connection with Weapons of Mass Destruction (WMD) or in any WMD facility.<sup>117</sup>

3. *New Dual-use Multiple Destination Permit*

On May 3, 2011, ECD announced the availability of an MDP allowing for the transfer of certain Group 1 and item 5504 goods and technology to twenty-eight countries.<sup>118</sup>

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117. *Export Controls over Goods and Technology for Certain Uses*, FOREIGN AFFS. & INT’L TRADE CAN. (Mar. 2011), <http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/176.aspx?lang=eng&view=d>.

118. *Multiple destination permit for dual-use items*, FOREIGN AFFS. & INT’L TRADE CAN. (May 3, 2011), <http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/177.aspx?lang=eng&view=d>.