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Economic Sanctions and Export Controls

WILLIAM M. MCGLONE AND CHARLES F. ABERNATHY*

I. Introduction

U.S. export controls and economic sanctions laws in 2000 continued to reflect the push-and-pull dynamics that shape U.S. national security, trade, and foreign policies. On one level, we saw dramatic extensions of a liberalizing trend to ease controls on encryption exports and to eliminate restrictions on food and medicine exports to embargoed countries. On another level, however, economic sanctions and export control laws maintained their grip on both Congress and the Executive Branch, which still view these rules as critical instruments of national security and foreign policy. We also saw a number of high profile enforcement actions that served to dramatize the importance of these control regimes and underscore the vigor with which the rules are administered.

The following survey touches on a number of important legal and policy developments. It is neither comprehensive nor exhaustive. As in prior years, export controls and sanctions were implemented last year by a number of government agencies, acting under various statutory authorities. Consistent with similar surveys in prior issues, we have divided these developments into two general categories: (1) sanctions, which tend to be directed at particular countries or groups; and (2) export controls, which generally apply to a broader range of transactions based on the nature of the products or technology being transferred.

II. Trade and Economic Sanctions

A. MEASURES TARGETING SPECIFIC COUNTRIES

I. *Iran*

a. Import Restrictions Loosened

On March 17, 2000, U.S. Secretary of State Madeleine Albright announced that the United States would partially relax its economic sanctions against Iran to permit U.S. per-

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sons to purchase and import Iranian-origin carpets and foodstuffs, such as caviar, dried fruits, and nuts into the United States.¹ The Office of Foreign Assets Control (OFAC) issued two general licenses and an interpretation on April 28, 2000 to implement this limited relaxation of the Iran embargo.² This policy shift and OFAC's regulatory amendments³ did not in any way loosen the export embargo on Iran or other restrictions on commercial activities by U.S. persons and companies involving Iran.

Although largely symbolic, these changes were originally viewed as the first signal of a possible thaw in U.S.-Iran relations, largely in response to power gains by moderates within the Iranian government. Any momentum toward further liberalization of U.S. sanctions in the wake of relaxing the import ban, however, slowed to a standstill. As of December 31, 2000, no steps toward further liberalization appeared imminent.

b. Continued Inaction Under ILSA

As in prior years, the Clinton Administration declined to impose any sanctions under the Iran and Libya Sanctions Act of 1996 (ILSA).⁴ Designed to pressure U.S. trading partners to restrict their business activities involving Iran and Libya, this highly controversial law requires the president to impose sanctions against any person—including any foreign individual or company—that, among other things, engages in certain levels of investment in the Iranian or Libyan petroleum sectors.⁵

ILSA is due to expire on August 5, 2001.⁶ Two critical questions for 2001 are whether the Bush Administration will follow President Clinton's lead in not imposing ILSA sanctions and whether Congress will seek to renew the controversial law.⁷

2. North Korea

On June 19, 2000, the U.S. government issued regulations that allowed U.S. companies—for the first time in a half-century—to engage in a broad range of business activities in-

1. See Madeleine K. Albright, Remarks before the American-Iranian Council (Mar. 17, 2000), available at <http://secretary.state.gov/www/statements/2000/000317.html>.

2. See Iranian Transactions Regulations, 65 Fed. Reg. 25,642 (May 3, 2000) (to be codified at 31 C.F.R. pt. 560); see also Guidance on Sponsorship of Certain Conferences, available at <http://www.treas.gov/ofac/iranconf.pdf>.

3. OFAC added or modified the following regulations: 31 C.F.R. §§ 560.405(b), (d)-(e); 560.524(b); 560.534; 560.535 (2000).

4. See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996).

5. See *id.*

6. See *id.*, § 13, 110 Stat. 1548.

7. The Bush Administration will face similar questions under another controversial sanctions law with a broad extraterritorial reach, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (also known as "Helms-Burton"); Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified in 22 U.S.C. §§ 6021-6091). Since the passage of the Helms-Burton legislation in 1996, the Clinton Administration issued a series of waivers that prevented private lawsuits under Title III of the law, which would allow a certified U.S. claimholder to seek treble damages against foreign companies that are "trafficking" in property expropriated from the U.S. litigant by the Cuban government. See *id.* § 302(a)(3)(C)(ii). The latest six-month suspension of Title III is due to expire in July 2001. See Letter from the President to the Chairmen and Ranking Members of the House Committees on Foreign Relations and Appropriations and the Senate Committees on International Relations and Appropriations (Jan. 16, 2001), available at <http://clinton6.nara.gov/2001-01-17-letter-from-the-president-on-the-cuban-liberty-and-libertad.html>. At that point, the new Administration will likely be under intense political pressure to allow Title III suits to go forward, a step that would refuel a long-standing battle with U.S. trading partners that have threatened to challenge the measure at the World Trade Organization.

volving North Korea.⁸ Regulations were issued by the two agencies with primary responsibility for administering the fifty-year-old embargo: the Treasury Department's OFAC⁹ and the Commerce Department's Bureau of Export Administration (BXA).¹⁰ As is often the case, persons and companies subject to U.S. law must ensure that a proposed transaction is permitted under both sets of regulations before engaging in transactions involving North Korea.

Under a new OFAC general license (or exception) property in which North Korea, or its nationals, acquires an interest *on or after* June 19, 2000, is no longer subject to blocking.¹¹ Subject to certain limitations, this means that new investment, brokering, and other transactions are now permitted, as long as they do not involve previously blocked property or imports of North Korean products, which still require prior OFAC approval.

Importing North Korean goods into the United States is still subject to restrictions. No imports of North Korean goods are permitted without prior approval from OFAC.¹² In a specific license request, importers must provide information that will allow OFAC to determine if the goods were produced by:

- (A) A foreign person whose actions triggered import sanctions under sections 73 and 74 of the Arms Export Control Act;
- (B) An activity of the government of North Korea relating to the development or production of any missile equipment or technology; or
- (C) An activity of the government of North Korea affecting the development or production of electronics, space systems or equipment, and military aircraft.¹³

Absent one or more of these factors, the import licensing policy is presumably favorable.

Under the Commerce Department's regulations, U.S. exporters and foreign re-exporters of U.S.-origin items are now authorized to ship products and technology classified under Export Control Classification Number (ECCN) EAR99 to North Korea without a license from BXA.¹⁴ This significant liberalization in export policy is limited slightly by the creation of new categories of restricted items, including certain low-level processing equipment, software, and materials.¹⁵ Accordingly, items previously classified under ECCN EAR99 should be reviewed under the newly created ECCN to determine whether the classification of the item has been modified.

Exports and re-exports of non-EAR99 products or technology remain subject to licensing requirements.¹⁶ In those cases, a presumption of licensing denial applies to all items that are controlled for national security, anti-terrorism, or non-proliferation reasons, or items that are destined for a military end-user in North Korea.¹⁷ In addition, any exports of semiconductor manufacturing equipment controlled under ECCN 3B991, digital computers with a Composite Theoretical Performance (CTP) above 2,000, microprocessors with

8. See Easing of Export Restrictions on North Korea, 65 Fed. Reg. 38, 148 (June 19, 2000) (to be codified at 15 C.F.R. pt. 730 *et seq.*; see also 44 C.F.R. pt. 403).

9. See Foreign Assets Control Regulations, 65 Fed. Reg. 38,165 (June 19, 2000) (to be codified at 31 C.F.R. pt. 500).

10. See 65 Fed. Reg. 38,148; see also 44 C.F.R. pt. 403.

11. See 65 Fed. Reg. 38,165-66.

12. See *id.*

13. *Id.* at 38,166.

14. See 65 Fed. Reg. 38,148.

15. See 15 C.F.R. § 742.19 (2001); see also 15 C.F.R. pt. 742 (Supp.II 2001); see also 15 C.F.R. pt. 774 (2000).

16. See 65 Fed. Reg. 38,148.

17. See *id.*

a CTP of 550 or above, or any encryption items or software will be subject to a general policy of denial.¹⁸

3. Yugoslavia

In the fall of 2000, the Clinton Administration took steps to ease trade and economic sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY).¹⁹ These sanctions, which have ebbed and flowed over much of the past decade, have been administered by both OFAC under its Kosovo Sanctions Regulations (KSR),²⁰ and the Commerce Department, under its Export Administration Regulations (EAR).²¹

During 2000, the strength of the opposition movement in Serbia grew substantially, culminating in President Milosevic's ousting in the presidential elections in the fall and newly elected President Vojislav Kostunica's implementation of democratic initiatives.²² On October 12, 2000, in response to these developments, President Clinton directed the relevant agencies to begin relaxing U.S. sanctions against Serbia;²³ Montenegro was already carved out of these sanctions pursuant to a general license.²⁴ This action followed the European Union's parallel relaxation of its sanctions against Serbia.²⁵ Nonetheless, as of December 31, 2000, the United States had taken only limited steps to ease the broad economic sanctions on Serbia. Indeed, the piecemeal approach taken in late 2000 meant that most transactions remained subject to restrictions under U.S. law.

In late 2000, OFAC took three steps to ease the sanctions against Serbia: (1) it issued General License No. 5 authorizing certain transactions relating to commercial air travel;²⁶ (2) pursuant to General License No. 6, it authorized (subject to certain limitations) all transactions relating to the sale, supply, export, or re-export of petroleum and petroleum products (but apparently not oil field equipment or services) to the FRY or its government;²⁷ and (3) it announced a favorable specific licensing policy for those transactions not otherwise authorized.²⁸

18. See *id.* at 38,153, 38,157.

19. See Exec. Order No. 13,088, 63 Fed. Reg. 32,109 (June 9, 1998); see also Federal Republic of Yugoslavia (Serbia and Montenegro) Kosovo Sanctions Regulations, 31 C.F.R. § 586 (2001) (the KSR); see also Exec. Order No. 13,121, 64 Fed. Reg. 24,021 (Apr. 30, 1999).

20. See 31 C.F.R. § 586.

21. See 15 C.F.R. § 746.9.

22. See Jane Perlez, *Showdown in Yugoslavia: In Washington*, N.Y. TIMES, Oct. 7, 2000, at A7.

23. See Statement by the President (Oct. 12, 2000), available at <http://clinton6.nara.gov/2000/10/2000-10-12-statement-by-president-on-lifting-sanctions-against-serbia.html>.

24. See General License No. 5, 31 C.F.R. pt. 586, available at <http://www.ustreas.gov/ofac/archive/2000arch.html>.

25. See *The EU and the Federal Republic of Yugoslavia*, available at http://europa.eu.int/comm/external_relations/see/fry/index.htm.

26. See General License No. 5, 31 C.F.R. pt. 586, available at <http://www.ustreas.gov/ofac/archive/2000arch.html>.

27. See General License No. 6, 31 C.F.R. pt. 586, available at <http://www.ustreas.gov/ofac/archive/2000arch.html>.

28. See U.S. Dep't of the Treasury Office of Foreign Assets Control, *What You Need To Know About U.S. Sanctions: A Summary Involving the Federal Republic of Yugoslavia (Serbia & Montenegro)*, available at <http://www.ustreas.gov/ofac/t2lyugo.pdf>. According to an October 26, 2000 announcement on OFAC's official website,

Applications for specific licenses will be considered on an expedited, case-by-case basis for activities, transactions, or dealings prohibited by Executive Order 13088 of June 9, 1998, Executive Order 13121 of April 30, 1999, or the Federal Republic of Yugoslavia (Serbia and Montenegro) Kosovo Sanctions Regulations (31 C.F.R. Part 586) and not otherwise authorized by the Office of Foreign Assets Control.

BXA, which controls exports and re-exports to Serbia, took no formal steps in 2000 to implement President Clinton's directive. Late in the year, BXA circulated a draft regulation for interagency comment that would create a general license or exception for exports and re-exports of items classified as ECCN EAR99 (i.e., relatively low technology items that are not specifically classified on the Commerce Control List) to Serbia.²⁹ While the regulation remained unpublished, however, U.S.-origin products (even if classified as EAR99) could not be exported or re-exported to Serbia without a license. In the meantime, BXA maintained an informal policy of accepting license applications and issuing licenses on a case-by-case basis, judging each application on its merits.

B. OTHER SANCTIONS DEVELOPMENTS

1. *Trade Sanctions Reform and Export Enhancement Act*

On October 28, 2000, President Clinton signed the Trade Sanctions Reform and Export Enhancement Act of 2000 (the Act) into law.³⁰ Building on the Clinton Administration's policy embodied in the 1999 "AgMed Amendments"³¹ to avoid using food and medicine as sanctions levers and congressional desire to prevent U.S. agricultural and medical suppliers from losing sales to foreign competitors, the Act purports to prevent using unilateral agricultural and medical sanctions except in extraordinary circumstances. To this end, the Act first restricts the President's ability to impose new agricultural and medical sanctions.³² Generally, it then requires the President to terminate any unilateral agricultural or medical sanction already in place.³³

Though potentially significant in terms of increased business opportunities in the agricultural and medical sectors, the practical effect of this new law will depend on the resolution of numerous complex legal and policy questions. Government regulators charged with administering the Act have acknowledged that they are currently wrestling with literally scores of implementation issues.

2. *Judicial Review Commission*

On December 4, 2000, the Judicial Review Commission on Foreign Asset Control (the Commission) submitted an interim report³⁴ to the Permanent Select Committee on Intelligence, the Senate Committee on the Judiciary, and the Senate Committee on Foreign Relations³⁵ analyzing whether the International Emergency Economic Powers Act (IEEPA)³⁶ and the Foreign Narcotics Kingpin Designation Act (Kingpin Act)³⁷ provided adequate due process protections and otherwise comported with the requirements of the

29. See Sanctions on Serbia, available at <http://www.bxa.doc.gov/PageTwo.html#Serbia> (last visited Jan. 2, 2001).

30. See Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. § 7201 *et seq.* (2001) ("Act").

31. See 31 C.F.R. pts. 538, 550, 560 (1999).

32. See Act, 22 U.S.C. § 7202(a).

33. See *id.* § 9202(b).

34. The Commission will submit a final report to Congress in January 2001.

35. As required by 21 U.S.C. § 1908(g).

36. See 50 U.S.C. §§ 1701-07.

37. See 21 U.S.C. §§ 1901-08. For a review of the Kingpin Act, see William M. McGlone & Michael Burton, *Economic Sanctions and Export Controls*, 34 INT'L LAW. 383, 396 (2000).

United States Constitution. The principal catalyst for the Commission was a statutory preclusion of judicial review with respect to designations made under the Kingpin Act.³⁸ In creating the Commission, Congress sought guidance on the lawfulness and appropriateness of this standard, along with a range of other practices under U.S. trade and economic sanctions programs.³⁹

The Kingpin Act authorizes the president to identify and impose sanctions on significant foreign narcotics traffickers.⁴⁰ The Act provides for a multidepartment and agency consultation process in which the Secretary of the Treasury, the Attorney General, the Secretary of Defense, the Secretary of State, and the Director of Central Intelligence present the president with information to prepare a report that publicly identifies foreign persons whom he should sanction.⁴¹ Persons determined to have played a significant role in international narcotics trafficking are "Tier 1" targets.⁴² As required by the statute, the initial list of twelve foreign individuals was made public on June 1, 2000. These names, together with various aliases, have been added to the Treasury Department's website listing of "Specially Designated Nationals and Blocked Persons" but, as of December 31, they had not yet been formally promulgated in a *Federal Register* notice.⁴³

Once the president identifies a Tier 1 designee, the Kingpin Act authorizes the Treasury Department to identify additional foreign persons, so-called Tier 2 designees, that it determines, after consultation with other specified federal agencies, have "materially assisted" or "supported" a designated narcotics trafficker or designated supporter; or who are "owned, controlled or directed by, or acting for or on behalf of" a designated narcotics trafficker or supporter; or who are "playing a significant role in international narcotics trafficking."⁴⁴ None of the determinations, identifications, findings, or designations made under the Kingpin Act is subject to judicial review.⁴⁵

As in other sanctions regimes administered by OFAC, the Kingpin Act's primary sanctioning tool is its asset blocking provision. Under the Act, all property and interests in

38. See 21 U.S.C. § 1906(c) (2000).

39. See *id.* § 1908.

40. See *id.* § 1902.

41. See *id.* § 1903.

42. See *id.* § 1904.

43. According to "Changes to List of Specially Designated Nationals and Blocked Persons Since January 1, 2000," which is published exclusively on the Treasury Department's Office of Foreign Assets Control Web page:

This publication of Treasury's Office of Foreign Assets Control (OFAC) is designed as a reference tool providing *actual* notice of actions by OFAC with respect to Specially Designated Nationals and other entities whose property is blocked, to assist the public in complying with the various sanctions programs administered by OFAC. The latest changes may appear here prior to their publication in the *Federal Register*, and it is intended that users rely on changes indicated in this document that post-date the most recent *Federal Register* publication with respect to a particular sanctions program in the appendices to chapter V of Title 31, *Code of Federal Regulations*.

Office of Foreign Assets Control, Changes to List of Specially Designated Nationals and Blocked Persons (2000). While OFAC should be commended for its efforts to provide *actual* notice via its Web page, it must recognize, as a general matter, that *legal* notice is only accomplished through publication in the *Federal Register*, a step that often comes many months after posting of the same information on the Web page.

44. 21 U.S.C. § 1904 (2000).

45. See *id.* § 1904(f).

property within the United States, or within the possession or control of any U.S. persons, which are owned or controlled by a Tier 1 or Tier 2 designee, shall be blocked.⁴⁶ The statute and regulations further provide that, unless licensed, any transaction or dealing by a U.S. person, or within the United States, in property or interests in property of a Tier 1 or Tier 2 designee is prohibited.⁴⁷ The Act also prohibits any transactions that evade or avoid the Act's prohibitions and prohibits any conspiracy to violate any of the prohibitions.⁴⁸

Following the publication of notice in the *Federal Register*,⁴⁹ the Commission held four days of public hearings in late September and early October. Witnesses who appeared before the Commission included government officials, representatives of the business community, legal scholars, and members of the private bar.⁵⁰ The Commission also received written statements from a number of sources, including the American Bar Association's Section of International Law and Practice.⁵¹

In its interim report, the Commission determined that blocking assets of foreign persons "implicates the Due Process Clause of the Fifth Amendment," although such blocking does not raise concerns under the Takings Clause of the Fifth Amendment.⁵² The Commission further determined that there was no legal basis for regarding blocking designations as unconstitutional bills of attainder.⁵³ Finally, the Commission found that the Kingpin Act's prohibition on judicial review of statutory claims regarding the designation process is not unconstitutional.⁵⁴ Beyond its legal conclusions, however, the Commission determined that "the sound administration . . . of sanctions laws would benefit from greater openness and responsiveness by OFAC and from formal administrative review of final OFAC actions" ⁵⁵ It also held that the preclusion of judicial review, "while not unconstitutional, is both unnecessary and inconsistent with the accountability of government actions inherent in sanctions programs established pursuant to IEEPA and in numerous other regulatory schemes."⁵⁶

To address its due process concerns, and to add to the transparency of the designation process, the Commission made several recommendations to Congress, including the following. First, Congress should amend the Kingpin Act to allow judicial review under the Administrative Procedure Act (APA) of OFAC "Tier 2" designations of foreign individuals.⁵⁷ Second, Congress should clarify the standards used by OFAC to make "Tier 2" designations and provide for administrative review of those designations.⁵⁸ Third, the civil penalties for violations of the Kingpin Act should be amended to conform more closely to the civil penalty provisions in IEEPA.⁵⁹ Fourth, OFAC should promulgate regulations, open

46. *See id.* § 1904(b).

47. *See id.* § 1904(c).

48. *See id.* § 1904(c)(2).

49. *See* 65 Fed. Reg. 55,643 (Sept. 14, 2000).

50. *See* Judicial Review Commission on Foreign Asset Control Interim Report to Congress 9–10 (Dec. 4, 2000).

51. *Id.* at 10, note 25.

52. *Id.* at 2.

53. *See id.*

54. *See id.*

55. *Id.* at 3.

56. *Id.*

57. *See id.* at 13.

58. *See id.* at 16–23.

59. *See id.* at 33.

to public notice and comment, that reflect current internal policies.⁶⁰ Fifth, "OFAC should take steps to expand and enhance the 'transparency' of its operations and decision-making standards in order to facilitate greater understanding of, and compliance with, the sanctions laws it administers."⁶¹

The Commission is scheduled to publish its final report in January 2001. What remains to be seen is how receptive Congress will be to the Commission's recommendations, and what steps it and OFAC will be willing to take to adopt the recommended changes.

3. *State and Local Sanctions*

The legal status of state and local sanctions was partially clarified in 2000, although not fully resolved, when the United States Supreme Court issued a unanimous decision⁶² striking down as unconstitutional a 1996 Massachusetts law designed to penalize U.S. companies that conducted business with Burma. In 1996, Massachusetts adopted "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)," which listed persons doing business with Burma and then prohibited any State entity from doing business with those persons.⁶³ Three months later, the Federal Government enacted the Foreign Operations, Export Financing, and Related Programs Appropriations Act,⁶⁴ which imposed various federal sanctions on Burma, including a ban on aid to the Government of Burma⁶⁵ and a prohibition on new investment by U.S. persons and companies in Burma.⁶⁶

In April 1998, the National Foreign Trade Council⁶⁷ filed a lawsuit⁶⁸ challenging the constitutionality of the Massachusetts law.⁶⁹ On June 22, 1999, the Court of Appeals for the First Circuit upheld the District Court,⁷⁰ finding that the state's "Burma Law" improperly intrudes on the Federal Government's exclusive authority to conduct foreign affairs, violates the dormant Foreign Commerce Clause, and is preempted by the federal sanctions against Burma.⁷¹

60. See *id.* at 35, 37.

61. *Id.* at 39.

62. The majority opinion was authored by Justice Souter. See *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). Justices Scalia and Thomas joined the judgment of the Court, but not the opinion, apparently on the grounds that the opinion unnecessarily cited legislative history, and contained an excessive number of footnotes. See *id.* at 3690.

63. See MASS. GEN. LAWS ANN. ch. 7, § 7:22G-7:22M, 40 F 1/2 (1997).

64. See 110 Stat. 3009-166, § 579 (codified by the Omnibus Consolidated Appropriations Act, 1997, 110 Stat. 3009-121 to 3009-172).

65. See *id.* § 570(a)(1).

66. See *id.* § 570 (b).

67. National Foreign Trade Council is a broadly based trade association that focuses on U.S. public policy affecting international trade and investment. Its membership consists of more than 550 U.S. manufacturing corporations, financial institutions, and other U.S. firms having substantial international operations or interests.

68. See *Complaint for Declaratory, Injunctive and Other Relief, Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998); see also Michael S. Lelyveld, *Industry Group Takes Massachusetts to Court Over Myanmar Sanctions*, J. COM., May 1, 1998. Burma has been renamed Myanmar by the current regime, but many observers continue to use the former name.

69. See Act of June 25, 1996, ch. 10, § 1, 1996 Mass. Acts 210, codified at MASS. GEN. LAWS ANN., ch. 7, § 22G-22M (1999). The law allows procurement from companies on the "restricted purchase list" only if the procurement is "essential," the purchase is medical supplies, or there is no comparable low bid. *Id.* § 22H(b).

70. See *Baker*, 26 F. Supp. 2d at 287.

71. See *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999). The individual holding the relevant State Office changed three times during the litigation process, resulting in the three different captions for the case.

On June 19, 2000, the Supreme Court upheld the First Circuit's determination that the Massachusetts law was unconstitutional because it was preempted by the Federal Burma Sanctions and thus was in violation of the Supremacy Clause.⁷² Although there is no express preemption clause in the Federal Burma Sanctions,⁷³ the Court found the Massachusetts law imposed stiffer penalties and greater restrictions on individuals than the federal statute⁷⁴ and made negotiations, which were required by the federal statute, more difficult for the president to conduct.⁷⁵

The Court did not reach the issues of whether the Massachusetts law infringed on the Federal Government's authority to conduct foreign affairs, or whether it violated the dormant Foreign Commerce Clause. Thus, the possibility that local and state sanctions laws could be held constitutional when not preempted by federal legislation remains undecided by the Supreme Court.

III. Export Controls

A. PARED-DOWN EAA RENEWAL LEGISLATION

In the fall of 2000, after years of wrangling on Capitol Hill, Congress passed legislation that renewed the long-expired Export Administration Act (EAA).⁷⁶ When President Clinton signed the new EAA bill (H.R. 5239) into law on November 13, he brought back to life a statute that had lapsed under its own terms in 1994.⁷⁷ But the new EAA falls far short of the comprehensive overhaul that has been the subject of intensive debate over the years. Moreover, the reborn EAA could itself prove to have a short shelf life, as it is set to expire again on August 20, 2001.

The reauthorization of the EAA has effectively raised penalty levels for violations. Each "knowing" violation of the EAA (or the EAR promulgated there under) is once again subject to a fine level of up to \$50,000 or five times the value of the export involved, whichever is greater, or a prison term of up to five years, or both. "Willful" violations of the law are subject to fines as high as \$1,000,000 in the case of companies or, in the case of individuals \$250,000 and imprisonment up to ten years. When combined with the Commerce Department's long-standing practice of "parsing" multiple violations from a single transaction, these penalty levels are potentially draconian.

The new law also plugs a statutory hole with respect to the government's handling of confidential business information received from exporters. Under the old EAA, Section 12(c) expressly exempted from public disclosure under the Freedom of Information Act (FOIA) confidential business information in support of export license requests, such as the identities of the parties, the nature of the items, pricing, and other information.⁷⁸ Since the

72. See *Crosby*, 530 U.S. at 363.

73. See *id.* at 385.

74. See *id.* at 376.

75. See *id.* at 377.

76. Export Administration Modification and Clarification Act of 2000, Pub. L. No. 106-508, 114 Stat. 2360 (2000).

77. Ever since the lapse of the Export Administration Act (EAA) in 1994, the Commerce Department's EAR have been extended on a temporary, ad hoc basis under separate statutory authority, the International Emergency Economic Powers Act (IEEPA). See 50 U.S.C. §§ 1701-1707 (2001). Although 1999 saw several efforts to implement a new and updated version of the EAA, those efforts were ultimately unsuccessful. Proposed EAA renewal legislation, sponsored by Senator Enzi (R-Wy.), Chair of the Senate's Subcommittee on International Trade and Finance of the Senate Banking Committee, failed to get through the Senate.

78. See 50 U.S.C. App. § 2411(c)(1) (2001).

lapse of the EAA in 1994, the Commerce Department has continued to treat such information as exempt from FOIA disclosure, even though the replacement statutory authority under IECPA contained no such exemption. The Department's practice was challenged in recent months in lawsuits filed by news organizations and a public interest group seeking the release of information gathered by the Department during the EAA lapse.⁷⁹ Although the lawsuits continue, the White House press release signed by President Clinton asserted that this new law "confirms the Department's ability to keep export licensing information obtained during the lapse of the EAA from public disclosure, which is a critical part of the Department's export control system"⁸⁰

The fate of the EAA—and the broader policy questions that remain to be addressed in more comprehensive legislation—is in the hands of the next Congress. It will also depend on the policy inclinations of the Bush Administration and the degree to which the White House is willing and able to help balance the often competing national security and commercial interests that are at the core of the debate.

B. CONTINUING ENCRYPTION DECONTROLS

1. *Elimination of Most Licensing Requirements*

In January 2000, the Commerce Department amended EAR to allow U.S. companies to export products with unlimited strength encryption to most end-users worldwide.⁸¹ Although the regulations removed export licensing requirements for most exports of encryption hardware, software, and technology the new rules were extremely complex. Government review of products prior to export was required in most cases, and additional reporting requirements were imposed.

The new framework allowed exporting encryption hardware, software, technology, licensed source code, components, and toolkits under one of two vehicles: (1) classification under ECCNs 5A992, 5D992, or 5E992; or (2) eligibility for use of an expanded License Exception "ENC." Determining which of these vehicles applies to a particular item will depend on the strength of the encryption and a number of other factors.⁸² License Exception "ENC" was expanded considerably to allow exporting encryption products of *any strength* to individuals, commercial firms, and other non-government end-users after a one-time technical review by the Commerce Department. Most exports under this license exception became subject to biannual reporting. Hardware or software exports to government entities could also become eligible for export under License Exception "ENC" if they are approved separately under a special "retail" license exception.⁸³

Notwithstanding the breadth of the January liberalizations, several significant limitations remain. For example, eligibility for favorable export treatment, in most circumstances, is

79. See *Times Publ'g Co. v. U.S. Dept. of Commerce*, 104 F. Supp. 2d 1361 (M.D. Fla. 2000) *rev'd and remanded*, 2001 U.S. App. LEXIS 57 (11th Cir. 2001); *Wisconsin Project on Nuclear Arms Control v. U.S. Dept. of Commerce*, No. 99-02673 (D.D.C. filed Oct. 8, 1999).

80. Statement by the President on Signing Reauthorization of Export Admin. Act, The White House (November 13, 2000), available at <http://www.usembassey.ro/USIS/Washington-File/100/00-11-13/eur104.htm>.

81. See Revisions to Encryption Items, 65 Fed. Reg. 2492 (January 14, 2000) (amending 15 C.F.R. pts. 734, 740, 742, 770, 772, 774).

82. See *id.* at 2497-98.

83. See *id.* at 2497.

contingent on applying for and obtaining a written technical classification from the Commerce Department.⁸⁴ Moreover, the new rules imposed post-shipment reporting requirements for most exports of products with a key length greater than 64-bits.⁸⁵ As a result, this imposed reporting requirements on categories of exports that previously had not been subject to reporting.

2. Notification-Only Requirements for Certain Countries

On October 19, 2000, BXA issued further liberalizations of the encryption export rules.⁸⁶ Once again, although the revised regulations significantly loosened export policies in a variety of areas, they also added a layer of complexity by creating new notification requirements for exporters.

Most notably, BXA amended the EAR to allow U.S. companies to export encryption products of any strength to companies and individuals in European Union (EU) Member States and eight other friendly countries immediately upon submission of an export classification request.⁸⁷ This initiative was prompted by significant liberalizations to the EU's encryption export policy and is designed to allow U.S. exporters to remain competitive with EU encryption manufacturers. The revised framework still allows for the export of encryption hardware, software, technology, licensed source code, components, and toolkits under one of two vehicles: (1) classification under ECCNs 5A992, 5D992, or 5E992; or (2) eligibility for License Exception "ENC."⁸⁸ The process required for use of these export vehicles, however, has been modified in several respects.

Under the January 2000 regulations, all new encryption products required a one-time technical review by BXA prior to export. Now, subject to certain limitations, exporters can avoid Commerce Department review and, instead, "self-classify" products under ECCN 5A992, 5D992, and 5E992.⁸⁹ If they self-classify their products, exporters must submit a notification letter to BXA, prior to export, certifying that they have met all of the requirements for classification under one of the specified ECCN.⁹⁰ Eligibility criteria for classification under these ECCN have not changed. The categories still cover products that are limited to 56-bit DES and equivalent algorithms, 512-bit (or lower) asymmetric algorithms, or 64-bit mass-market products.⁹¹ Exports under these ECCN are permitted to all destinations except Cuba, Iran, Iraq, Libya, North Korea, Sudan, Syria, Afghanistan, and Serbia, and do not require reporting to the U.S. government.⁹²

The new regulation also modifies export procedures under License Exception ENC. Exports to Austria, Australia, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, The Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, and the United Kingdom (EU + 8) are permitted after submission of a one-time classification request to BXA.⁹³ U.S.

84. *See id.* at 2498.

85. *See id.* at 2498-99.

86. *See* Revisions to Encryption Items, 65 Fed. Reg. 62,600 (Oct. 19, 2000) (amending 15 C.F.R. pts. 734, 740, 742, 748, 770, 772, 774).

87. *See id.* at 62,605.

88. *See id.*

89. *See id.* at 62,608.

90. *See id.*

91. *See id.*

92. *See id.* at 62,605.

93. *See id.* at 62,606-07.

exporters do not need to wait for BXA confirmation for approval of applications, and they may export to government or non-government end-users in any of the countries named above immediately upon submission of an export classification request to BXA.⁹⁴ Of course, exporters still need to wait thirty days before proceeding with exports to non-government entities outside of the EU + 8 group⁹⁵ and wait for a formal approval from BXA to ship to government entities outside of the EU + 8.⁹⁶ Most exports under this license exception are still subject to biannual reporting.⁹⁷

In addition, the revised regulations finally correct an anomaly that has existed since encryption controls were transferred to the Commerce Department from the State Department. The regulations now allow certain encryption commodities, components, and software to be eligible for *de minimis* treatment, thus allowing foreign-produced products to use U.S.-designed browsers, operating systems, or chips without necessarily subjecting the finished item to U.S. export control laws.⁹⁸ The regulations do not change the current *de minimis* test, but simply allow approved encryption products to be treated in the same manner as any other U.S.-origin product or software. As noted, only certain products will qualify for this treatment. Exporters will need to apply for a *de minimis* review and get approval from BXA before relying on these provisions.⁹⁹

C. FINAL AMENDMENTS TO SED RULES

On July 10, 2000, BXA published final rules that clarified the responsibilities of parties to export and re-export transactions.¹⁰⁰ By amending the requirements related to the execution and filing of the Shipper's Export Declaration (SED), BXA sought to "ensure that for every transaction subject to the EAR, some party to the transaction is clearly responsible for determining licensing authority . . . and for obtaining the appropriate license or other authorization."¹⁰¹ Among other things, the new rule requires foreign parties that assume export license responsibilities to designate an agent in the United States as the "exporter" for export control purposes. In the absence of such a written undertaking by the foreign party, the U.S. seller would be treated as "the exporter, with all attendant responsibilities."¹⁰² In addition, the new rule requires export licensees to communicate license conditions to

94. See *id.* at 62,606.

95. See *id.* at 62,606-07.

96. See *id.* at 62,607.

97. See *id.*

98. See *id.* at 62,604.

99. In addition, U.S. exporters had not been permitted to use License Exception TMP to allow beta tests of encryption software outside of the United States. The regulations now allow such beta testing, provided that the exporter notifies the Commerce Department prior to export. See *id.* at 62,600, 62,604-05. The final version of the product will still require a one-time technical review.

100. See 65 Fed. Reg. 42,565 (July 10, 2000) (amending 15 C.F.R. pts. 732, 740, 743, 748, 750, 752, 758, 762, 772, and 774). The EAR amendments accompanied corresponding changes to the Foreign Trade Statistics Regulations maintained by the Commerce Department's Bureau of the Census (which gathers and maintains foreign trade statistics). See 65 Fed. Reg. 42,556 (July 10, 2000) (amending 15 C.F.R. pt. 30). The new SED requirements became effective October 1, but exporters were granted a 180-day grace period (to April 1, 2001) before they would be required to use the new form. See Revisions to Shipper's Export Declaration, 65 Fed. Reg. 75,667, 75,668 (Dec. 4, 2000).

101. *Id.* at 42,565.

102. *Id.*

affected parties and, when required by the license, to obtain written acknowledgment of receipt of the conditions.¹⁰³

D. LOOSENING RESTRICTIONS ON ARMS EXPORTS TO FRIENDLY COUNTRIES

On July 21, 2000, the State Department's Bureau of Political-Military Affairs issued a Final Rule that liberalizes export licensing requirements on shipments of defense articles, technical data, and defense services to the members of NATO, Australia, and Japan.¹⁰⁴ First, Section 124.2 of the International Traffic in Arms Regulations (ITAR) was amended to allow license-free exports of most maintenance services to these countries.¹⁰⁵ To be eligible for this new exemption, the defense services must be limited to "maintenance training or the performance of maintenance"; any activity that would result in a modification, upgrade, or alteration or improvement that enhances the defense article falls outside the exemption and still requires specific licensing approval.¹⁰⁶

Second, Section 125.4 was amended to allow transfers of certain unclassified technical data to the members of NATO, Australia, and Japan when the transfers are "for the purposes of responding to a written request from the Department of Defense for a quote or bid proposal."¹⁰⁷ As a result, specified categories of otherwise-controlled technical data can now be exported to these favored nations for the purpose of procuring defense articles for sale to the U.S. military, but only after the Department of Defense has made such a request.¹⁰⁸

Finally, Section 126.9 was amended and a new Section 126.14 was added to provide four comprehensive authorizations that should limit the number of license requests for defense articles going to NATO countries, Australia, or Japan.¹⁰⁹ These general authorizations are available when "the full parameters of a commercial export endeavor including the needed defense exports can be well anticipated and described in advance . . ."¹¹⁰ Authorizations can be granted for exports to the NATO countries, Australia, and Japan for (1) "major project authorization" that involves multiple U.S. suppliers and a foreign government; (2) "major program authorization" that involves the provision by a single U.S. exporter of all aspects of the necessary support including development, hardware, technical data, defense services, manufacturing, and logistics; (3) "global project authorization" for the provision of defense articles, technical data, and defense services in support of government to government research and development projects and actual production projects, if the project is undertaken pursuant to either an agreement between the U.S. government and the government of one of the favored nations, or a memorandum of understanding between the Department of Defense and the equivalent department in one of the favored countries; and (4) "technical

103. *See id.*

104. *See* Foreign Assets Control Regulations in North Korea; Final Rule, 65 Fed. Reg. 45,282 (July 21, 2000).

105. *See id.* at 45,283-84.

106. *Id.*

107. *Id.* at 45,284.

108. *See id.*

109. *See id.* at 45,285-86.

110. *Id.* at 45,285.

data supporting an acquisition, teaming arrangement, merger, [or] joint venture authorization," which would allow the export of technical data in support of a U.S. supplier entering into any of these arrangements.¹¹¹ The entity seeking authorization under the first two general authorizations must supply "detailed information concerning the scope of the project, including other exporters, U.S. subcontractors, and planned exports (including re-exports) of defense articles, defense services, and technical data . . ."¹¹²

111. *See id.* at 45,285.

112. *Id.*