

Export Controls and Economic Sanctions*

I. Introduction

Foreign policy considerations of terrorism, national security, and non-proliferation continued to influence export control and sanctions issues in 2007. Agencies created pools of approved entities and countries, while creating new procedures to identify other entities and countries as problematic. Congress substantially increased the fines for dual-use and economic sanctions violations. This article contains a summary of selected developments from 2007 in the areas of dual-use controls, arms export controls, and economic sanctions.¹

II. Dual-Use Export Controls

A. ENHANCED IEEPA PENALTIES

On October 16, 2007, President George W. Bush signed into law the International Emergency Economic Powers Enhancement Act (IEEPA Enhancement Act), to increase the deterrent of export control violations.² The IEEPA Enhancement Act amends the International Emergency Economic Powers Act (IEEPA) to increase civil and criminal penalties for persons or entities. It increases the maximum civil penalty from \$50,000 to the greater of \$250,000 per violation or an amount that is twice the amount of the violating transaction.³ Additionally, the law increases criminal penalties to \$1,000,000 per violation, though prison terms of up to twenty years remain unchanged.⁴ Since IEEPA provides the authority for both the U.S. Export Administration Regulations (EAR) and most of the economic sanctions regimes (discussed *infra*, at Section IV), the IEEPA Enhancement Act substantially increases fines for a significant portion of U.S. export control and sanctions regimes.

These increased fines may be imposed retroactively. For civil penalties, the new penalties apply to violations "with respect to which enforcement action is pending or commenced on or after" October 16, 2007.⁵ The criminal penalties apply to violations "with

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1. For additional information on developments from 2006, including changes to the respective regulations, see ABA Export Controls and Economic Sanctions Committee, <http://www.abanet.org/dch/committee.cfm?com=IC716000> (last visited Feb. 1, 2008).

2. International Emergency Economic Powers Enhancement Act, Pub. L. No. 110-96, 121 Stat. 1011 (2007) [hereinafter IEEPA Enhancement Act].

3. 50 U.S.C. § 1705(b) (2007).

4. *Id.* at § 1705(c).

5. IEEPA Enhancement Act, *supra* note 2, at § 2(b).

respect to which enforcement action is commenced on or after the date of the enactment.”⁶

On November 1, 2007, the U.S. Department of Commerce Bureau of Industry and Security (BIS) published guidance that explained that the higher fines would not be imposed on violations for which a valid Voluntary Self-Disclosure (VSD) initial notification was submitted, a charging letter or settlement offer was issued or approved, or a statute of limitations waiver was executed prior to October 16, 2007.⁷ At the twentieth annual Update Conference on Export Controls and Policy (BIS Update 2007), however, BIS specifically stated that new voluntary disclosures would be subject to the new enhanced penalties even if they included violations that took place when the civil fine level was at \$50,000 or even \$11,000.⁸

Prior to passage of the legislation, several members of Congress were concerned that the government would not take into account unintentional, accidental, or inadvertent violations. The U.S. Departments of Commerce and Treasury assured Congress in writing that they would not abuse the new authority provided by the IEEPA Enhancement Act.⁹ In a letter to Congressman Manzullo dated September 26, 2007, Mario Mancuso, Under Secretary of Commerce for Industry and Security explained that “[BIS’s] intent is not to punish any business unfairly for minor, accidental violations.”¹⁰ Under Secretary Mancuso assured the Congressman that small businesses will not be hindered inappropriately due to the new penalties, indicating that BIS Penalty Guidelines “allow BIS to take into account company size and the nature of the specific violations in a way that would warrant smaller penalty amounts.”¹¹

B. CHINA MILITARY END-USE RULE

On July 6, 2006, BIS issued a proposed rule to the EAR to prevent exports that would materially contribute to the military capability of the People’s Republic of China (PRC).¹²

6. *Id.*

7. See Fact Sheet, U.S. Bureau of Indus. & Sec., BIS’s Charging and Penalty Practices (Nov. 1, 2007), available at <http://www.bis.doc.gov/news/2007/factsheet11012007.pdf>.

8. Kevin A. Delli-Colli, Deputy Assistant Secretary for Export Enforcement, U.S. Bureau of Indus. & Sec., Report at the BIS Update Conference 2007, Washington, DC, (Nov. 2, 2007).

9. Kay C. Georgi, Arent Fox Export Control Alert: Substantial Increase in Penalties to \$250K Per Civil; \$1M Per Criminal (Oct. 16, 2007), http://www.arentfox.com/publications/index.cfm?fa=legalUpdateDisp&content_id=1305.

Kevin I. Fromer, Assistant Treasury Secretary for Legislative Affairs, in a letter to Congressman Lantos dated September 25, 2007 addressed the Office of Foreign Asset Control’s (OFAC) implementation of the new penalties. “In a great number of instances, OFAC does not impose the maximum penalty per count, and it will continue to apply its authorities in a judicious and responsible manner under an increased penalty system.”

Id.

10. 153 Cong. Rec. H11086 (daily ed. Oct. 2, 2007) (statement of Rep. Manzullo).

11. *Id.*

12. See James E. Bartlett III, et al., *U.S. Export Controls and Economic Sanctions*, 41 INT’L LAW. 215, 216 (2007) (discussing Revisions and Clarification of Export and Reexport Controls for the People’s Republic of China (PRC); New Authorization Validated End-User, 71 Fed. Reg. 38,313 (proposed July 6, 2006) (to be codified at 15 C.F.R. pts. 740, 742, 744, 748)).

After reviewing fifty-seven comments totaling 1,012 pages,¹³ BIS issued the final rule on June 19, 2007, entitled Revisions and Clarifications of Export and Reexport Controls for the People's Republic of China (the China Rule).¹⁴

In the China Rule, BIS sought to "make clear that the overall policy of the United States for exports to the PRC of these items is to approve exports for civil end-uses but generally to deny exports that will make a direct and significant contribution to Chinese military capabilities."¹⁵ Specifically, the China Rule established a license requirement for the export and reexport to China of items covered by thirty-one Export Control Classification Numbers (ECCNs)¹⁶ on the Commerce Control List (CCL) that ordinarily would not require a license to China when the exporter or reexporter knows or has reason to know the item will be used in a "military end-use." "Military end-use," in turn, is defined as "incorporation into a military item described on the U.S. Munitions List (USML),"¹⁷ "listed under ECCNs ending in 'A018' on the CCL," appearing on the International Munitions List (IML),¹⁸ "or for the "use," "development," or "production" of such items, or for the "deployment" of commodities under ECCN 9A991.¹⁹ In short, companies that export these thirty one ECCNs to China should conduct additional inquiries into their end-use to determine if a license is now required.

In addition, the China Rule established the proposed Validated End User Program (VEU).²⁰ Under the program, VEU authorization will allow the "export, reexport, and transfer" of eligible items to specified end-users in China without a license.²¹ On October 2, 2007, BIS added India to the list of countries eligible for the VEU Program,²² and later that month, BIS announced the names of the first approved end-users and eligible items in

13. See U.S. Bureau of Industry and Security, Record of Comments: Proposed Rule Revisions and Clarification of Export and Reexport Controls for the People's Republic of China (PRC); New Authorization Validated End-User (Dec. 21, 2006), <http://efoia.bis.doc.gov/pubcommn/china-rule-dec-4-2006/china-rule-rin-0694-ad75.pdf>.

14. See Revisions and Clarification of Export and Reexport Controls for the People's Republic of China (PRC); New Authorization Validated End-User; Revision of Import Certificate and PRC End-User Statement Requirements [hereinafter China Rule], 72 Fed. Reg. 33,646 (June 19, 2007) (to be codified at 15 C.F.R. pts. 742-44, 748, 750, 758).

15. *Id.* at 33,646.

16. The thirty-one ECCNs subject to the new military end-use control, which cover twenty distinct product groups and their associated software and technologies, are: 1A290, 1C990, 1C996, 1D993, 1D999, 1E994, 2A991, 2B991, 2B992, 2B996, 3A292.d, 3A999.c, 3E292, 4A994, 4D993, 4D994, 5A991, 5D991, 5E991, 6A995, 6C992, 7A994, 7B994, 7D994, 7E994, 8A992, 8D992, 8E992, 9A991, 9D991, and 9E991. China Rule, *supra* note 14, at 33,658-659 (to be codified at 15 C.F.R. pt. 744, supp.2).

17. The USML is part of the International Traffic in Arms Regulations (ITAR). See 22 C.F.R. pt. 121 (2007).

18. The IML is set out on the Wassenaar Arrangement website. Wassenaar Arrangement, <http://www.wassenaar.org/controllists/index.html> (last visited Feb. 1, 2008).

19. See China Rule, *supra* note 14, at 33,658. Deployment is defined as "placing in battle formation or appropriate strategic position" and applies only to commodities under ECCN 9A991, which for purposes of the Final Rule, includes only civil aircraft and gas turbine engines. *Id.*

20. The VEU Program will be codified at 15 C.F.R. pt. 748.15.

21. China Rule, *supra* note 14, at 33,660.

22. See Authorization Validated End-User: Addition of India as an Eligible Destination, 72 Fed. Reg. 56,010 (Oct. 2, 2007) (to be codified at 15 C.F.R. pt. 748).

the PRC.²³ Finally, the China Rule also revised the Import Certificate and PRC End-User Statement Requirements.²⁴

C. NORTH KOREA DEVELOPMENTS

On January 26, 2007, BIS re-imposed licensing requirements on all exports and re-exports to the Democratic People's Republic of North Korea (North Korea), with the exception of food and medicine not listed on the CCL.²⁵ The changes were intended to implement United Nations Security Council Resolutions on North Korea (UNSCR 1695 and UNSCR 1718), but in fact imposed additional licensing requirements. Prior to this regulation (from June 19, 2000 until January 26, 2007), exports and reexports of EAR99 items to North Korea did not require a license unless they were to a prohibited end-use or a prohibited end-user.

The new regulations apply a policy of denial to luxury,²⁶ arms, and related materiel; items identified by the United Nations as contributing to North Korea's Weapons of Mass Destruction (WMD) programs; items controlled for Nuclear Nonproliferation (NP) and Missile Technology (MT) reasons (except ECCN 7A103); and multilateral regime controlled items. Humanitarian items (e.g., blankets, basic footwear, heating oil) intended for the benefit of the North Korean people and agricultural commodities or medical devices items are subject to a policy of approval.

D. COUNTRY GROUP "C"

On February 26, 2007, BIS announced that it planned to add a Country Group C for countries that are "Destinations of Diversion Concern."²⁷ BIS noted that it would consider the following in designating countries with the scarlet "C": "[t]ransit and transshipment volume, inadequate export/reexport controls, [d]emonstrated inability to control diversion activities, [g]overnment not directly involved in diversion activities, [g]overnment unwilling or unable to cooperate with the U.S. in interdiction efforts."²⁸ BIS intimated that designation as a "C" country would "likely change" the licensing policy for the country.²⁹ BIS's announcement was widely viewed as a tool to persuade other governments, particularly in known transshipment points, to improve export control laws and enforcement efforts. No country has been listed to date.

23. See Approved End-Users and Respective Eligible Items for the People's Republic of China (PRC) Under Authorization Validated End-User (VEU), 72 Fed. Reg. 59,164 (Oct. 19, 2007); Approved End-Users and Respective Eligible Items for the People's Republic of China (PRC) Under Authorization Validated End-User (VEU), Correction, 72 Fed. Reg. 60,408 (Oct. 24, 2007); Approved End-Users and Respective Eligible Items for the People's Republic of China (PRC) Under Authorization Validated End-User (VEU), Correction, 72 Fed. Reg. 61,512 (Oct. 31, 2007).

24. See China Rule, *supra* note 14, at 33,659-660.

25. See North Korea: Imposition of New Foreign Policy Controls, 72 Fed. Reg. 3722 (Jan. 26, 2007) (to be codified at 15 C.F.R. pts. 732, 738, 740, 742, 746, 772, 774).

26. See 15 C.F.R. pt. 746 (Supp. 1 2007).

27. See Country Group C: Destinations of Diversion Concern, 72 Fed. Reg. 8,315 (Feb. 26, 2007) (to be codified at 15 C.F.R. pt. 740).

28. *Id.*

29. *Id.*

E. CHANGES TO ENTITY LIST PROCEDURES

On June 5, 2007, BIS proposed a rule that would create a new reason for BIS to add entities to the Entity List.³⁰ Previously, BIS added entities suspected of being engaged in various proliferation activities, usually associated with WMD. The proposed rule would authorize BIS to add entities that “BIS has reasonable cause to believe . . . have been, are or pose a risk of being involved in activities that are contrary to the national security or foreign policy interests.”³¹

F. BURMA DEVELOPMENTS

On October 24, 2007, BIS amended the EAR to “move Burma into more restrictive country groupings and impose a license requirement for exports, reexports or transfers of most items subject to the EAR to persons listed in or designated pursuant to Executive Orders 13310 and 13448” (discussed in Section IV, *infra*).³² The regulation also moves Burma from Computer Tier 1 to 3, restricting access to high-performance computers and related software/technology under License Exception APP; and from Country Group B (countries raising few national security concerns) to Country Group D:1 (countries raising national security concerns), which further limits the number of license exceptions available for exports to Burma.³³

G. DEEMED EXPORT DEVELOPMENTS

BIS also published supplementary guidance on its deemed export clarification of May 2006.³⁴ In addition to explaining when deemed exports of EAR99 technology to foreign

30. See Authorization to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States, 72 Fed. Reg. 31,005 (June 5, 2007) (to be codified at 15 C.F.R. pts. 744, 772).

31. *Id.* at 31,006. The proposed rule provides the following examples:

Supporting persons engaged in acts of terror; (ii) Actions that could enhance the military capability of, or the ability to support terrorism of governments that have been designated by the Secretary of State as having repeatedly provided support for acts of international terrorism; (iii) Transferring, developing, servicing, repairing, or producing conventional weapons in a manner that is contrary to United States national security or foreign policy interests or enabling such transfer, development, service, repair or production by supplying parts, components, technology, or financing for such activity; (iv) Deliberately failing or refusing to comply with an end use check conducted by or on behalf of BIS or the Department of State, Directorate of Defense Trade Controls by denying access, by refusing to provide information about parties to a transaction, or by providing information about such parties that is false or that cannot be verified or authenticated; and (v) Engaging in conduct that poses a risk of violating the EAR and raises sufficient concern that prior review of exports or reexports involving the party and the possible imposition of license conditions or license denial enhances BIS's ability to prevent violations of the EAR.

Id.

32. See Burma: Revision of the Export Administration Regulations, 72 Fed. Reg. 60,248 (Oct. 24, 2007) (to be codified at 15 C.F.R. pts. 740, 744).

33. *Id.*

34. Bureau of Industry and Security, Questions and Answers to Supplement Clarification of Deemed Export Related Regulators Requirements, <http://www.bis.doc.gov/deemedexports/deemedexportssupplementq.html> (last visited Feb. 1, 2008).

nationals who are citizens of U.S. embargoed countries require a license, the guidance reiterates the May 2006 clarification of what constitutes “use” technology:

The “EAR defines ‘use’ technology as specific information necessary for the ‘operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing’ of a product. If the technology available to the foreign national does not meet all six of these attributes, then it is not ‘use’ technology for deemed export licensing purposes.”³⁵

In another deemed export development, on September 12, 2007, regulatory changes were made to provide that “deemed” exports of “technology” and “source code” for animal pathogens—previously eligible for export under a license—may no longer be released to a foreign national when a license would be required to the home country of the foreign national.³⁶

Finally, on December 20, 2007, BIS released the long-awaited report of the Deemed Export Advisory Committee, which had been established by the Secretary of Commerce under the terms of the Federal Advisory Committee Act.³⁷ Finding that an “entirely new approach” to deemed exports is warranted because leadership in science and technology is a “globally shared and highly interdependent perishable asset,” and because “seismic changes” have “engulfed” the planet since the first deemed export regime was promulgated in 1979,³⁸ the Committee recommended that the EAR’s deemed export licensing scheme be replaced with a new process “based on building high walls around small fields comprised only of the most militarily consequential technologies.”³⁹ To that end, the Committee recommended, among other things, (1) that BIS establish a category of “Trusted Entities,” which would enable companies that met specified compliance criteria to qualify for special, streamlined processing of license applications that did not involve classified or military significant information; and (2) that a panel of outside experts in the fields of science and engineering conduct annual “sunset” reviews to thin out the list of technologies on the CCL.⁴⁰ Although the Report is not binding, it is reasonable to expect that BIS will propose regulations that attempt to adopt some of the Report’s recommendations, although other recommendations, particularly vis-à-vis changes to licensing procedures, may prove more difficult to implement.

H. ANTIBOYCOTT PENALTY GUIDELINES

On July 17, 2007, BIS published its final policy concerning voluntary self-disclosures of violations of the antiboycott and related recordkeeping regulations.⁴¹ The rule, which

35. *Id.*

36. See Implementation of the Understandings Reached at the June 2007 Australia Group (AG) Plenary Meeting; Addition to the List of States Parties to the Chemical Weapons Convention (CWC), 72 Fed. Reg. 52,000-001 (Sept. 12, 2007) (to be codified at 15 C.F.R. pts. 738, 740, 745, 772, 774).

37. Dep’t of Commerce, Deemed Export Advisory Committee, The Deemed Export Rule in the Era of Globalization (2007), <http://tac.bis.doc.gov/2007/deacreport.pdf> (last visited Feb. 1, 2008).

38. *Id.* at 2-4.

39. *Id.* at 32.

40. *Id.* at 21-22.

41. See Antiboycott Penalty Guidelines, 72 Fed. Reg. 38,999 (July 17, 2007) (to be codified at 15 C.F.R. pts. 730, 764, 766); Export Administration Regulations, 15 C.F.R. § 760, 762 (2007).

codifies administrative practice, outlines the factors that BIS considers when deciding whether to pursue administrative charges or settle allegations, as well as the factors that BIS considers when deciding what level of administrative penalty to seek.⁴²

I. ENFORCEMENT AND SELECT CASES

In 2007, the Office of Export Enforcement (OEE) continued to target proliferation of WMD and missile delivery systems, terrorism and state sponsors of terrorism, and diversions of dual-use goods to unauthorized military end-uses.⁴³ BIS reports that during Fiscal Year (FY) 2007 (October 1, 2006, through September 30, 2007), it closed sixty-five administrative enforcement cases resulting in the imposition of \$5.8 million in administrative penalties.⁴⁴ These numbers are reduced from FY 2006 and FY 2005, when ninety-six and seventy-four cases resulted in fines of \$13 and \$6.7 million, respectively.⁴⁵ In FY 2007, BIS reports that OEE investigations resulted in sixteen convictions⁴⁶ and \$25.3 million in criminal fines,⁴⁷ compared with thirty-four convictions in 2006 and thirty-one convictions in 2005, and \$3 million in criminal fines in 2006 and \$7.7 million in 2005.⁴⁸

One decision departed from the U.S. federal sentencing guidelines.⁴⁹ In *United States v. Sevilla*,⁵⁰ Juan Sevilla pleaded guilty to one count of violating OFAC's Iranian Transactions Regulations for attempting to export an EAR99 Testing Machine to Iran. The Court considered that "Sevilla's conduct occurred on only one occasion, . . . he [had] no other criminal history [, and] [t]he volume of commerce was minimal."⁵¹ The Court found that there was "no evidence that [the] attempted export was made with criminal or terrorist intent," or that it was "a product that threatened controls relating to the proliferation of nuclear, biological, or chemical weapons."⁵² The Court reduced Sevilla's sentence from fifty-one to sixty-three months in prison to six months home confinement, along with monitoring, probation, a \$10,000 fine, and community service.⁵³

An important development subsequent to *United States v. Quinn*⁵⁴ occurred in 2007. In that case, Quinn was sentenced to thirty-nine months in prison for exports to Iran of forklift truck parts. The IEEPA Enhancement Act provided a legislative fix to the earlier

42. Antiboycott Penalty Guidelines, 72 Fed. Reg. at 38,999.

43. See Bureau of Industry and Security, Major Case List, October 2007, <http://www.bis.doc.gov/complianceand enforcement/Majorcaselist.pdf> [hereinafter October 2007 Major Case List].

44. Delli-Colli report, *supra* note 8.

45. Bureau of Industry and Security, Annual Report for Fiscal Year 2005, at 7, available at http://www.bis.doc.gov/news/2006/annualReport/BIS_annualReportComplete05.pdf (last visited Feb. 1, 2008) [hereinafter 2005 BIS Annual Report]; Bureau of Industry and Security, Annual Report for Fiscal Year 2006, at 12, available at http://www.bis.doc.gov/news/2007/annReport06/BIS07_all.pdf (last visited Feb. 1, 2008) [hereinafter 2006 BIS Annual Report].

46. Delli-Colli Report, *supra* note 8.

47. *Id.* However, of this total, \$25 million resulted from the Chiquita case (see Section IV *infra*). Thus, there was a decline in criminal fines for violations of the EAR.

48. See 2005 BIS Annual Report, *supra* note 45, at 7; 2006 BIS Annual Report, *supra* note 45, at 12.

49. See U.S. Sentencing Commission, *Guidelines Manual*, (Nov. 2007) (U.S.S.G.).

50. *U.S. v. Sevilla*, No. 04-0171, 2006 WL 3486872, at *1 (N.D. Ill. Nov. 29, 2006).

51. *Id.* at *3.

52. *Id.*

53. *Id.*

54. *U.S. v. Quinn*, 475 F.3d 1289 (D.C. Cir. 2007).

Quinn ruling that conspiracy was not authorized under IEEPA,⁵⁵ specifically providing that it is now a civil violation to “conspire to violate, or cause a violation”⁵⁶ of IEEPA. Quinn filed a motion for a new trial in March 2007.

J. PERSONNEL CHANGES

Mario Mancuso was confirmed by the U.S. Senate on May 24, 2007, as Under Secretary of Commerce for Industry and Security. Kevin Delli-Colli joined BIS as Director of OEE in August 2007, the same month in which Wendy Wysong, the former Deputy Assistant Secretary of Commerce for Export Enforcement, left for private practice.

III. Arms Export Controls

A. AGREEMENTS WITH U.K. AND AUSTRALIA

The United States signed two defense trade cooperation treaties in 2007: one with the United Kingdom⁵⁷ on June 21, the other with Australia⁵⁸ on September 5. If ratified, the treaties will permit license-free exporting of certain ITAR-controlled items and services in specified programs to members of an “Approved Community” of governments and companies in each country. Transfers outside the Approved Community would remain subject to State Department licensing. U.K. government employees and employees of eligible U.K. entities may have access to defense articles (which would include, for example, exports or deemed exports of controlled technical data) if they meet certain criteria including U.K. security accreditation and need-to-know. The U.S. Approved Community would include companies registered with the U.S. Department of State’s Directorate of Defense Trade Controls (DDTC) under ITAR Part 122. The U.K. Government will not require licenses to export defense articles to members of the U.S. Community, and may permit such exports under blanket or open authorizations. The Australia treaty text is not yet public, but the governments have described it as generally similar in terms to the UK treaty. For both treaties, specific procedures and parameters will be described in implementing arrangements currently being negotiated.

The treaties state that they are self-executing upon ratification, but implementing regulations will identify which recipients and defense articles will be eligible. The U.S., U.K., and Australian governments have stated their intent to present the treaties to their respective legislative processes and to develop implementing arrangements promptly thereafter.

55. *United States v. Quinn*, 401 F. Supp. 2d 80, 93 (D.D.C. 2005) (“[E]ven if the bulk of the EAR remained in effect by virtue of Executive Order 13,222, the conspiracy provisions of the EAR were rendered inoperative by the lapse of the EAA and could not be repromulgated by executive order under the general powers that IEEPA vests in the President.”).

56. 50 U.S.C. § 1705(a) (2007).

57. Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation, U.S.-U.K., June 26, 2007, S. TREATY DOC. NO. 110-7, available at <http://www.state.gov/t/pm/rls/othr/misc/92770.htm> (last visited Feb. 1, 2008).

58. Treaty Between the Government of Australia and the Government of the United States of America Concerning Defense Trade Cooperation, U.S.-Austl., Sep. 5, 2007, S. TREATY DOC. NO. 110-10, available at http://www.defence.gov.au/publications/DefenceTradeCooperation_Treaty.pdf (last visited Feb. 1, 2008).

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

1. *International Traffic in Arms Regulations*

The ITAR was amended six times, and new restrictions were imposed on exports to Lebanon⁵⁹ and Fiji⁶⁰ without amending the ITAR. Major changes to the ITAR's brokering provisions were expected at year's end.

2. *Libya and Venezuela*

On February 7, 2007, 22 C.F.R. §§ 126.1(a) and (d) were amended⁶¹ to make it easier to obtain DDTC approval of exports to or imports from Libya of non-lethal defense articles and defense services and non-lethal safety-of-use defense articles as spare parts for lethal end-items. Venezuela was added to 22 C.F.R. § 126.1(a) as a denial country due to its designation⁶² as a country not cooperating fully with anti-terrorism efforts.

3. *Vietnam*

On April 3, 2007, 22 C.F.R. § 126.1 was amended⁶³ to permit the license of sales, leases, exports, and other transfers of non-lethal defense articles and services destined for or originating in Vietnam.

4. *Somalia*

On May 22, 2007, 22 C.F.R. § 126.1 was amended⁶⁴ to prohibit exports or imports of defense articles and services destined for or originating in Somalia that do not conform to the provisions of U.N. Security Council Resolution 1744,⁶⁵ which amended the embargo of Resolution 733,⁶⁶ to permit such exports to Somalia when intended for U.N. approved purposes. However, ITAR exemptions with respect to exports to Somalia cannot be used without prior DDTC authorization.

59. See Bureau of Political-Military Affairs; Embargo on Arms Exports to Lebanon, 71 Fed. Reg. 75,609 (Dec. 15, 2006).

60. See Press Release, U.S. Dep't of State, Fiji: U.S. Measures in Response to Military Coup (Dec. 19, 2006), available at <http://www.state.gov/r/pa/prs/ps/2006/78042.htm> (last visited Feb. 1, 2008).

61. See Amendment of the International Traffic in Arms Regulations: Policy With Respect to Libya and Venezuela, 72 Fed. Reg. 5,614 (Feb. 7, 2007) (to be codified at 22 C.F.R. pt. 126).

62. See Bureau of Political-Military Affairs: Revocation of Defense Export Licenses to Venezuela, 71 Fed. Reg. 47,554 (Aug. 16, 2006).

63. See Amendment of the International Traffic in Arms Regulations: Policy With Respect to Vietnam, 72 Fed. Reg. 15,830 (Apr. 3, 2007) (to be codified at 22 C.F.R. pt. 126).

64. See Amendment of the International Traffic in Arms Regulations: Policy With Respect to Somalia, 72 Fed. Reg. 28,602 (May 22, 2007) (to be codified at 22 C.F.R. pt. 126).

65. See S.C. Res 1744, U.N. Doc. S/RES/1744 (Feb. 20, 2007).

66. See S.C. Res 733, U.N. Doc. S/RES/733 (Jan. 23, 1992).

5. *QRS-11*

On June 7, 2007, 22 C.F.R. § 121.1, Category VIII(e) was amended⁶⁷ by revising Note (1)(i) to add the term "primary" to references to a commercial standby instrument system. As a result, Categories XII(d) and VIII(e) no longer include quartz rate sensors, provided such items are integrated into and included as an integral part of a commercial primary or standby instrument system for use on civil aircraft before export or exported solely for integration into such systems.

6. *Radiation-Hardened Microcircuits*

On July 17, 2007, 22 C.F.R. § 121.1, Category XV, Spacecraft Systems and Associated Equipment, was amended⁶⁸ to clarify ITAR licensing jurisdiction for radiation-hardened micro circuits by changing one of the five performance characteristics that define ITAR-controlled radiation-hardened microelectronic circuits.

7. *Voluntary Disclosure*

On December 13, 2007, 22 C.F.R. § 127.12, Voluntary Disclosures, was amended⁶⁹ to impose a 60-day deadline after the initial notification to submit a full disclosure of suspected violations, to clarify what identifying information should be provided, and to identify who should sign the voluntary disclosure.

8. *Listing of U.N. Embargoed Countries*

On December 18, 2007, 22 C.F.R. 126.1(c) was amended⁷⁰ to list eleven countries for which exports and sales of certain weapons are restricted by United Nations Security Council embargoes.

9. *Dual and Third Country Nationals*

On December 19, 2007, 22 C.F.R. 124.12 and 124.16 were amended⁷¹ to allow access to defense articles and services for dual and third country nationals of certain countries

67. See Amendment of the International Traffic in Arms Regulations: U.S. Munitions List, 72 Fed. Reg. 31,452 (June 7, 2007) (to be codified at 22 C.F.R. 121.1 Cat VIII(e)). This transfer was accepted by BIS in Expanded Licensing Jurisdiction for QRS11 Micromachined Angular Rate Sensors, 72 Fed. Reg. 62,768 (Nov. 7, 2007).

68. See Amendment to the International Traffic in Arms Regulations: U.S. Munitions List, 72 Fed. Reg. 39,010 (July 17, 2007) (to be codified at 22 C.F.R. 121.1 Cat. XV(d)); *see also* Export Licensing Jurisdiction for Microelectronic Circuits, 72 Fed. Reg. 39,009 (July 17, 2007) (corresponding BIS regulation).

69. See Amendment to the International Traffic in Arms Regulations: Voluntary Disclosures, 72 Fed. Reg. 70,777 (Dec. 13, 2007) (to be codified at 22 C.F.R. 127.12).

70. See Amendment to the International Traffic in Arms Regulations: Regarding Dual and Third Country Nationals, 72 Fed. Reg. 71,785 (Dec. 19, 2007) (to be codified at 22 C.F.R. 126.1(c)). The countries are Cote d'Ivoire, Democratic Republic of Congo, Iraq, Iran, Lebanon, Liberia, North Korea, Rwanda, Sierra Leone, Somalia, and Sudan.

71. See Amendment to the International Traffic in Arms Regulations: U.N. Embargoed Countries, 72 Fed. Reg. 71,575 (Dec. 18, 2007) (to be codified at 22 C.F.R. 124.12 and 124.16). The countries are those that are members of NATO, the European Union, Australia, Japan, New Zealand, and Switzerland.

through revisions in procedures for technical assistance agreements and manufacturing licensing agreements.

C. ENFORCEMENT

1. *Lockheed Martin Sippican*

On December 12, 2006, Lockheed Martin Corporation agreed⁷² to pay \$3 million and to take internal compliance actions to settle allegations of ITAR violations by its subsidiary Sippican, Inc., during development of a missile decoy for joint use by the U.S. Navy and the Australian government. According to the charging letter, Sippican continued to provide technical data after a technical assistance agreement (TAA) had expired, provided technical data to parties not authorized under the TAA, and provided classified technical data at a level excluded by a proviso to one of the TAAs.⁷³ Sippican justified some of the transfers by stating that they were required by a Navy contract, which prompted the following response from DDTC in the charging letter:

Sippican also failed to recognize that contractual obligations, even with U.S. Government agencies, do not take precedent [sic] over the Regulations . . . After numerous requests for additional information and several meetings with Department personnel, Sippican acknowledged that a contract with a U.S. Government Agency is not a substitute for any export authorizations that may be required.⁷⁴

2. *Security Assistance International, Inc. and Henry L. Lavery III.*

On December 12, 2006, Security Assistance International, Inc. and its president, Henry L. Lavery III agreed⁷⁵ to a \$75,000 civil penalty (to be suspended on condition of adherence to the remaining terms of the settlement) and a one-year administrative debarment to settle alleged ITAR violations consisting of omitting material facts on export license applications and aiding and abetting export violations during the course of preparing export license applications for exporters of defense articles. This Consent Agreement follows a similar settlement that the company entered in June 1999.⁷⁶

72. See Consent Agreement between U.S. Dep't. of State and Lockheed Martin Corporation (Dec. 12, 2006), available at http://www.pmdtc.state.gov/Consent%20Agreements/2006/lockheed_martin_sippican/Consent_Agreement.pdf.

73. Draft Charging Letter re: Lockheed Martin Sippican from David C. Trimble, Director, Office of Def. Trade Controls Compliance, to Scott W. MacKay, Vice President & Deputy Gen. Counsel, Litigation and Compliance, Lockheed Martin Corp., available at http://pmdtc.state.gov/Consent%20Agreements/2006/lockheed_martin_sippican/Draft_Charging_Letter.pdf.

74. *Id.* at ¶¶ 31-32.

75. See Consent Agreement between U.S. Dep't. of State, Security Assistance International, Inc., and Henry L. Lavery III (Dec. 12, 2006), available at http://www.pmdtc.state.gov/Consent%20Agreements/2006/security_assistance_international/Consent_Agreement.pdf.

76. See Consent Agreement between U.S. Dep't. of State and Security Assistance International (June 3, 1999), available at <http://pmdtc.state.gov/Consent%20Agreements/1999/Security%20Assistance%20International/Consent%20Agreement.pdf>.

3. *ITT*

On March 28, 2007, ITT Corporation entered a guilty plea in the U.S. District Court for the Western District of Virginia to two felony counts of willful export of defense articles without a license, in violation of Section 38 of the Arms Export Control Act (AECA), 22 U.S.C. § 2778 and Sections 127.1(a) and 127.3 of the ITAR, and entered a deferred prosecution with respect to a third felony count. The violations resulted from the illegal transfer of classified and controlled night vision technology to the People's Republic of China, Singapore, and the United Kingdom and omitting material facts from required reports. As part of the plea, ITT agreed to pay a total of \$100 million in criminal fines, forfeitures, and restitution and to subject itself to independent monitoring. The plea agreement was the first conviction of a major U.S. defense contractor for violation of the ACEA.⁷⁷ On April 11, 2007, DDTC announced the statutory debarment of ITT's Night Vision Division from participating in exporting defense articles or furnishing defense services for three years, subject to certain exceptions and with the possibility of reinstatement upon request one year after the date of debarment.⁷⁸

4. *United States v. Chi Mak*

In May 2007, Chi Mak was convicted on charges of attempting to export certain technical information to China.⁷⁹ A key issue in this case was whether the technical information fell within the "public domain" exception to the ITAR⁸⁰ because it had previously been presented at a public conference.⁸¹ Mak filed a motion for retrial.

5. *United States v. Xiaodong Sheldon Meng*

In August 2007, Xiaodong Sheldon Meng pleaded guilty to one count of violating the AECA for illegally exporting military source code and to one count of violating the Economic Espionage Act (EEA) for possessing a trade secret and knowing and intending that it would benefit China.⁸² The conviction is noteworthy because it represents the first AECA conviction involving the export of source code. The conviction relating to the

77. See Statement of John Brownlee, U.S. Attorney, W. Dist. of Va., U.S. Dep't. of Justice, Mar. 27, 2007, available at http://www.usdoj.gov/nsd/pdf/itt_statement_by_usattorney.pdf (last visited Feb. 1, 2008); see also Criminal Information, Plea Agreement, Deferred Prosecution Agreement, and Statement of Facts in *United States v. ITT Corp.* (W.D. Va. Mar. 27, 2007), available at <http://www.secinfo.com/drD1f.u24.d.htm>.

78. See Bureau of Political-Military Affairs, Statutory Debarment of ITT Corporation Pursuant to the Arms Export Control Act and the International Traffic in Arms Regulations, 72 Fed. Reg. 18,310 (April 11, 2007), available at http://www.pmdtc.state.gov/exporter_guidance_itt_debarment.htm.

79. See Press Release, Fifth Family Member Pleads Guilty to Export U.S. Defense Articles to China, U.S. Dep't of Justice (June 6, 2007), available at <http://losangeles.fbi.gov/dojpressrel/pressrel07/la060607usa.htm> (last visited Feb. 1, 2008).

80. See 22 C.F.R. § 120.11(a)(6).

81. Cf. *United States v. Posey*, 864 F.2d 1487, 1496 (9th Cir. 1989) (holding that the public availability of information is not a defense to an export of military information that has been restricted for national security reasons).

82. See PRESS RELEASE, U.S. DEP'T OF JUSTICE, FORMER CHINESE NATIONAL CONVICTED FOR COMMITTING ECONOMIC ESPIONATE TO BENEFIT CHINA NAVY RESEARCH CENTER IN BEIJING AND FOR VIOLATING THE ARMS EXPORT CONTROL ACT (AUG. 2, 2007), available at <http://sanfrancisco.fbi.gov/dojpressrel/2007/sf080207a.htm> (last visited Feb. 1, 2008).

EEA violation is also of interest because it is only the second conviction under the EEA⁸³ and just the third case in which a violation of the EEA has been charged.⁸⁴

6. *United States v. Alexander Latifi and Axion Corporation*

In October 2007, charges against Axion Corporation and its president Alexander Nooredin Latifi relating to violations of the AECA were dismissed after a seven-day trial.⁸⁵ Axion and Latifi had been indicted for allegedly making an unlicensed export of technical drawings for a UH-60 Black Hawk helicopter part and for making false statements in connection with this export.⁸⁶ The Court ruled that “the evidence was insufficient to sustain a conviction.”⁸⁷

D. PERSONNEL CHANGES

John Hillen, Assistant Secretary of State for Political-Military Affairs, left his position in January 2007. Stephen D. Mull was appointed as Acting Assistant Secretary and Frank J. Ruggiero was appointed Deputy Assistant Secretary for Defense Trade Controls, replacing Gregory Suchan, who retired May 31, 2007. Robert “Turk” Maggi left his position as Director, Defense Trade Controls Management, on May 7, 2007, to serve in Afghanistan. In September 2007, Terry Davis became the Acting Director, Defense Trade Controls Licensing.

IV. Economic Sanctions

During 2007, the Office of Foreign Assets Control of the United States Department of the Treasury (OFAC) followed its trend of recent years by continuing to emphasize targeted programs against specific individuals, activities, and companies in lieu of adopting new broad-based economic sanctions programs.⁸⁸

83. See Press Release, U.S. DEP'T OF JUSTICE, Two Men Plead Guilty to Stealing Trade Secrets from Silicon Valley Companies to Benefit China (Dec. 14, 2006), available at <http://www.usdoj.gov/criminal/cybercrime/yePlea.htm> (last visited Feb. 1, 2008) (press release relating to *United States v. Fei Ye* (No. 5:02-CR-20145 (9th Cir. 2007))).

84. *Id.* See also Press Release, U.S. Dep't of Justice, Scientist Pleads Guilty to Providing False Statements Regarding Trade Secret Theft from [sic] (May 1, 2002), available at <http://www.justice.gov/criminal/cybercrime/serizawaPlea.htm> (last visited Feb. 1, 2008); Press Release, U.S. Dep't of Justice, First Foreign Economic Espionage Indictment; Defendants Steal Trade Secrets from Cleveland Clinic Foundation (May 8, 2001) available at http://www.justice.gov/criminal/cybercrime/Okamoto_SerizawaIndict.htm (last visited Feb. 1, 2008) (press releases relating to *United States v. Okamoto* (No. 1:01-CR-00210 (N.D. Ohio 2007))).

85. See Order Granting Motion for Judgment of Acquittal, *United States v. Latifi*, No. 61 CR 07-J-98-NE (N.D. Ala. Oct. 31, 2007).

86. See *United States v. Latifi*, No. 9 5:07-CR-98-IPJ-PWG (N.D. Ala. May 2, 2007) (superseding indictment).

87. See Order Granting Motion for Judgment of Acquittal, *supra* note 85.

88. Of the first forty-eight public releases published on the OFAC website in 2007, twenty-four related primarily to OFAC's list of Specially Designated Nationals. See <http://www.treas.gov/offices/enforcement/ofac/actions/index.shtml>.

A. BURMA

In response to the Burmese government's repression of public protests in September 2007, President Bush issued Executive Order 13448, which added eleven individuals to the Specially Designated Nationals (SDN) list and authorized the designation of additional persons deemed to have materially supported the Burmese military regime or participated in Burmese human rights abuses, political repression, or public corruption.⁸⁹ This Executive Order followed OFAC's designation of fourteen other SDNs, which occurred just weeks earlier.⁹⁰ While these actions generally tightened sanctions against the ruling Burmese military regime, certain restrictions under the Burmese Sanctions Regulations also were relaxed to establish a new licensing policy for the U.S. importation of Burmese-origin animals and specimens, in sample quantities, for bona fide scientific research and analysis.⁹¹

B. COLOMBIA

Effective February 16, 2007, OFAC established a more permissive licensing policy⁹² for two former Specially Designated Narcotics Traffickers⁹³ that more recently came under control of the central government of Colombia. Also, on May 4, 2007, OFAC issued a special report on the effectiveness of U.S. economic sanctions against Colombian drug cartels.⁹⁴

C. CUBA

In 2007, economic sanctions for Cuba⁹⁵ remained largely unchanged, except for updates to OFAC's list of authorized providers of air, travel, and remittance forwarding services.⁹⁶

89. See Exec. Order 13,448, 72 Fed. Reg. 60,223 (Oct. 18, 2007).

90. See Additional Designations of Individuals Pursuant to Executive Order 13,110, 72 Fed. Reg. 60,713 (Oct. 25, 2007). These earlier, additional designations were authorized under Exec. Order 13,110, Blocking Property of the Government of Burma and Prohibiting Certain Transactions, 68 Fed. Reg. 44,853 (July 30, 2003).

91. See Burmese Sanctions Regulations, 72 Fed. Reg. 34,376 (June 22, 2007) (to be codified at 31 C.F.R. pt. 537).

92. See Office of Foreign Assets Control (OFAC), Statement of Licensing Policy Regarding Transactions with Two Colombian Entities Designated Pursuant to E.O. 12978 (Feb. 16, 2007), available at http://www.treas.gov/offices/enforcement/ofac/programs/narco/sdn_lic_pol_021607.pdf (last visited Feb. 1, 2008). The two named entities in the Statement of Licensing Policy are G.L.G. S.A. (NIT # 800023807-8) and Ramal S.A. (NIT # 800142109-5). *Id.*

93. See Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (Oct. 24, 1995).

94. See OFAC, Impact Report on Economic Sanctions Against Colombian Drug Cartels (Mar. 2007), available at http://www.treas.gov/offices/enforcement/ofac/reports/narco_impact_report_05042007.pdf (last visited Feb. 1, 2008).

95. Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (2007).

96. See OFAC, List of Authorized Providers of Air, Travel and Remittance Forwarding Services to Cuba (May 21, 2007), available at http://www.treas.gov/offices/enforcement/ofac/programs/cuba/cuba_tsp.pdf (last visited Feb. 1, 2008).

D. IRAQ

On July 17, 2007, President Bush issued Executive Order 13438,⁹⁷ empowering OFAC to block the assets of any person who, directly or indirectly, threatens or undermines the peace, stability, economic reconstruction, political reform, or provision of humanitarian assistance in Iraq or to the Iraqi people. No parties were immediately named under this Executive Order.

E. IRAN

On September 30, 2006, the Iran Freedom Support Act (IFSA) was enacted to revise and replace the Iran and Libya Sanctions Act of 1996 (ILSA).⁹⁸ While IFSA's enactment effectively lifted ILSA's restrictions on Libyan investment, IFSA maintained these restrictions with regard to Iran and, moreover, introduced new sanctions against persons who contribute materially to Iran's chemical, biological, or nuclear weapons capabilities or to Iran's ability to develop destabilizing types and quantities of advanced conventional weapons.⁹⁹ On April 3, 2007, OFAC amended the Iranian Transactions Regulations to authorize the export or reexport from the United States or by a United States person of any goods or technology to a third-country government, or to its agents, for shipment to Iran via a diplomatic pouch.¹⁰⁰

In 2007, OFAC continued its recent trend of blocking assets within the Iranian sanctions regime¹⁰¹ and began using the non-proliferation and anti-terrorism sanctions programs to target Iranian entities. On January 9, 2007, OFAC designated Bank Sepah and Bank Sepah International PLC as SDNs under its non-proliferation sanctions program,¹⁰² and, on October 25, 2007, OFAC blocked the assets of certain named individuals, companies, and state-owned banks (including their subsidiaries) as well as the Islamic Revolutionary Guard Corps and Iran's Ministry of Defense and Armed Forces Logistics.¹⁰³

97. See Exec. Order 13,438, 72 Fed. Reg. 39,719 (July 19, 2007).

98. See Iran Freedom Support Act of 2006, Pub. L. No. 109-293, 120 Stat. 1344 (2006); Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996). These new sanctions apply to activities occurring or existing on or after June 6, 2006.

99. IFSA continues to impose restrictions on U.S. and non-U.S. companies that invest more than \$20 million per year in efforts that directly and significantly contribute to the enhancement of Iran's ability to develop its petroleum resources. IFSA extends these sanctions, and its new restrictions, until December 31, 2011. 50 U.S.C.A. § 1701.204.

100. See Iranian Transactions Regulations, 72 Fed. Reg. 15,831 (Apr. 3, 2007) (to be codified at 31 C.F.R. pt. 516).

101. While these designations follow the recent trend of implementing blocking requirements against Iranian entities that began with last year's actions against Bank Saderat, they also reflect a deviation from a historical aversion to implementing blocking requirements against Iranian entities following the Algiers Accords that were agreed between the United States and Iran in 1979. See Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979). Moreover, these designations also mark the first time that a branch of a sovereign government has been targeted for its support of international terrorism under Executive Order 13,382. See Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (June 28, 2005).

102. See Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (June 28, 2005).

103. See *id.*; Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

F. LEBANON

On August 1, 2007, President Bush issued Executive Order 13441,¹⁰⁴ which empowers OFAC to block property of persons that threaten Lebanese democracy, sovereignty, security, or stability. The Executive Order explicitly targets persons engaged in politically motivated violence. Although no persons or entities were immediately designated, OFAC subsequently designated four individuals under this program on November 5, 2007.¹⁰⁵

G. LIBERIA—THE FORMER LIBERIAN REGIME OF CHARLES TAYLOR

On May 23, 2007, OFAC issued the Former Liberian Regime of Charles Taylor Sanctions Regulations.¹⁰⁶ These sanctions codify Executive Order 13348¹⁰⁷ and block the assets of certain immediate family members, senior government advisors/officials, and associates of Charles Taylor, the former President of Liberia. In addition to the twenty-eight named individuals who were immediately subjected to these blocking requirements, these sanctions also block the assets of other persons controlled by them or who are determined to have “materially assisted” or otherwise contributed to the unlawful depletion and removal of resources from Liberia.

H. NORTH KOREA

On February 2, 2007, OFAC amended the Foreign Assets Control Regulations¹⁰⁸ to prohibit United States persons from registering vessels in the Democratic Republic of Korea or otherwise obtaining authorization for a vessel to fly the North Korean flag.

I. PALESTINIAN AUTHORITY

On June 20, 2007, OFAC issued a general license¹⁰⁹ authorizing all transactions with the Palestinian Authority (led by President Abbas and Prime Minister Fayyad) that might be otherwise prohibited under OFAC’s various anti-terrorism sanctions programs.¹¹⁰ OFAC codified this general license within the various anti-terrorism sanctions regimes on October 31, 2007.¹¹¹

104. See Exec. Order No. 13,441, 72 Fed. Reg. 43,499 (Aug. 3, 2007).

105. See OFAC, Recent OFAC Actions (Nov. 5, 2007), available at <http://www.treas.gov/offices/enforcement/ofac/actions/20071105.shtml> (last visited Feb. 1, 2008).

106. See Former Liberian Regime of Charles Taylor Sanctions Regulations, 72 Fed. Reg. 28,855 (May 23, 2007) (to be codified at 31 C.F.R. pt. 593).

107. See Exec. Order No. 13,348, 69 Fed. Reg. 44,885 (July 27, 2004).

108. See Foreign Assets Control Regulations, 31 C.F.R. pt. 500 (2007). This follows OFAC’s recent amendment to the Foreign Assets Control Regulations on May 8, 2006, which prohibited United States persons from owning, leasing, operating, or insuring any vessel flagged by North Korea.

109. See OFAC, General License No. 7 (June 20, 2007), available at <http://www.treas.gov/offices/enforcement/ofac/programs/terror/gls/gl7.pdf> (last visited Feb. 1, 2008).

110. Global Terrorism Sanctions Regulations, 31 C.F.R. pt. 594 (2007); Terrorism Sanctions Regulations, 31 C.F.R. pt. 595; Foreign Terrorist Organizations Sanctions Regulations, 31 C.F.R. pt. 597 (2007).

111. See 72 Fed. Reg. 61,517 (Oct. 31, 2007). The added sections consist of 31 C.F.R. §§ 594.516, 595.514, and 597.512.

J. SUDAN

On November 17, 2006, OFAC issued interpretative guidance¹¹² regarding compliance with Executive Order 13412,¹¹³ which was issued in tandem with the Darfur Peace and Accountability Act of 2006.¹¹⁴ The guidance clarified that the existing exemption for southern Sudan¹¹⁵ did not affect OFAC licensing requirements for exports of agricultural commodities, medicine, and medical devices—even in cases where these items are destined for exempt areas of Sudan.¹¹⁶ It also explained that the exemption would not apply to transactions involving the exempt area if they entailed transshipment through, or incidental transactions in, non-exempt areas of Sudan.¹¹⁷ On October 31, 2007, the Sudanese Sanctions Regulations were amended to incorporate the changes effected by Executive Order 13412, the Darfur Peace and Accountability Act, as well as this interpretive guidance.¹¹⁸

On April 3, 2007, OFAC amended the Sudanese Sanctions Regulations to authorize the export or reexport from the United States or by a United States person, wherever located, of any goods or technology to a third-country government, or to its contractors or agents, for shipment to non-exempt regions of Sudan via a diplomatic pouch.¹¹⁹ In addition, numerous States adopted or updated sanctions legislation targeting Sudan in 2007.¹²⁰ Of

112. See OFAC, Interpretative Guidance: Prohibitions Imposed by Executive Order 13412; Transshipments of Goods and Financial Transactions Conducted through Certain Areas of Sudan, *available at* http://www.treas.gov/offices/enforcement/ofac/programs/sudan/int_guide/su111706.pdf (last visited Feb. 1, 2008).

113. See Exec. Order No. 13,412, 71 Fed. Reg. 61,369 (Oct. 17, 2006). This Executive Order effectively terminated pre-existing sanctions for the area and regional government of southern Sudan, except for transactions in which the Government of Sudan otherwise has an interest. Even in exempt areas, however, the Government of Sudan is presumed to have an interest in all transactions involving the petroleum and petrochemical industries, including oilfield services and oil or gas pipelines; therefore, the exemption would never apply to these types of transactions. *Id.*

114. See Darfur Peace and Accountability Act of 2006, Pub. L. No. 109-344, 120 Stat. 1869 (Oct. 13, 2006).

115. The region of Sudan exempted from the Sudanese sanctions is "Southern Sudan, Southern Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur, or marginalized areas in and around Khartoum." Exec. Order No. 13,412, 71 Fed. Reg. 61,369 (Oct. 17, 2006). The definition of this area is left to the discretion of the U.S. Secretary of State to be defined in future regulations.

116. See Sudanese Sanctions Regulations, 31 C.F.R. pt. 538.523 (2007). See also Trade Sanctions Reform and Export Enhancement Act §7205(l), 22 U.S.C.A. §7205 (2001) [hereinafter Trade Sanctions].

117. The OFAC guidance states, "Although Section 538.405 of the SSR provides that transactions 'ordinarily incident to a licensed transaction' are authorized, this provision does not apply to transactions exempted by Section 4(b) of E.O. 13412. Thus, while transshipments or supporting financial transactions may be considered 'ordinarily incident' to exports licensed by OFAC, they are not deemed to be ordinarily incident to transactions in the exempt areas of Sudan and therefore require authorization from OFAC." See OFAC, Interpretative Guidance: Prohibitions Imposed by Executive Order 13412; Transshipments of Goods and Financial Transactions Conducted through Certain Areas of Sudan, *available at* http://www.treas.gov/offices/enforcement/ofac/programs/sudan/int_guide/su111706.pdf (last visited Feb. 1, 2008).

118. Sudanese Sanctions Regulations, 72 Fed. Reg. 61,513 (Oct. 31, 2007). The updated or added sections consist of 31 C.F.R. §§ 538.210, 538.212, 538.305, 538.320, 538.417, 538.418, 538.530, 538.531.

119. See Sudanese Sanctions Regulations, 72 Fed. Reg. 15,831 (Apr. 3, 2007) (to be codified at 31 C.F.R. pt. 538).

120. These states included Arkansas, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Minnesota, New Jersey, Rhode Island, and Texas. In other states, such as New York and Vermont, overseers of state pension funds have made certain divestment decisions with regard to Sudan. See, e.g., Ark. Sen. Conc. Res. 20 (2007); Colo. Rev. Stat. 24-51-201 (2007); Colo. Rev. Stat. 24-54.8-101 et seq. (2007); Fla. Stat. § 215.473 (2007); Ind. Pub. L. No. 149 (2007); Senate File 361, 2007 Ia. A.L.S. 39 (2007); 2007 Kan. Sess. Laws 191; Md. Code

particular importance, Illinois was forced to revise its Sudanese sanctions statute¹²¹ in response to a federal district court ruling (discussed *infra*).¹²²

K. SPECIALLY DESIGNATED NATIONALS

In addition to actions discussed elsewhere, OFAC frequently updated the SDN list under a variety of programs, particularly under the Narcotics Trafficking Sanctions Regulations.¹²³

L. TERRORISM

Under the Global Terrorism Sanctions Regulations, OFAC may designate additional persons "otherwise associated with" already designated persons and subject the assets of these associated persons to blocking requirements.¹²⁴ Effective January 26, 2007, amendments to these regulations clarify that this class of associated persons refers only to those persons who own or control such designated persons or who attempt or conspire to assist such designated persons.¹²⁵ In addition, OFAC also added forty-three parties to, and removed twenty-seven parties from, its list of Specially Designated Global Terrorists over

Ann., [State Person. & Pensions Code] § 21-123.1 (2007); 2007 Minn. Sess. Law Serv. 117 (West); N.J. Stat. Ann. § 52:18A-89.9 (2007); 2007 R.I. Pub. Laws 79 (effective Jun. 22, 2007); Tex.[Gov't] Code Ann. § 806.001 et seq. (2007).

121. 15 Ill. Comp. Stat. 520/22.5-6 (2005); 40 Ill. Comp. Stat. 5/1-110.5 (2005).

122. The revised Illinois statute as well as most of the other Sudanese sanctions programs recently adopted by other states appear to be limited to the divestment of state-managed assets and, therefore, appear to comply with requirements established by National Foreign Trade Council v. Giannoulias (discussed *infra*). See Sudan Divestment Task Force, The State of Sudan Divestment, available at <http://www.sudandivestment.org> (last visited Feb. 1, 2008).

123. See generally U.S. Dep't of the Treasury, 2006 Recent OFAC Actions, available at <http://www.treas.gov/offices/enforcement/ofac/actions/2006.shtml> (last visited Feb. 1, 2008); see also U.S. Dep't of the Treasury, 2007 Recent OFAC Actions, available at <http://www.treas.gov/offices/enforcement/ofac/actions/2007.shtml> (last visited Feb. 1, 2008). From October 2006 through November 2007, these designations included: 302 additions under the Narcotics Trafficking Sanctions Regulations, 31 C.F.R. pt. 536 (2007); the Foreign Narcotics Kingpin Sanctions Regulations, 31 C.F.R. pt. 598 (2007); thirty-four additions under the Sudanese Sanctions Regulations, 31 C.F.R. pt. 538 (2007); Exec. Order 13,400, 71 Fed. Reg. 25,483 (May 1, 2006); seventeen additions under the Weapons of Mass Destruction Trade Control Regulations, 31 C.F.R. pt. 539 (2007); nine additions under Exec. Order 13,413, 71 Fed. Reg. 64,105 (Oct. 31, 2006); four additions under Exec. Order No. 13,405, 71 Fed. Reg. 35,485 (June 20, 2006). In addition, OFAC made sixteen removals under the anti-narcotics sanctions regulations, three removals under the non-proliferation sanctions programs, and twenty-seven removals under the various anti-terrorism programs.

124. Global Terrorism Sanctions Regulations, 31 C.F.R. §594, 594.201 (2007).

125. *Id.* at § 594.316. In addition, this set of amendments also prescribed that any person whose property or interests in property are blocked under the Global Terrorism Sanctions Regulations due to mistaken identity may seek to have those assets unblocked pursuant to the same procedures that would apply under other OFAC blocking programs. Reporting and Procedures Regulations, 31 C.F.R. § 501.806 (2007).

the past year,¹²⁶ as well as released a report in September 2007 on the effectiveness of its asset blocking programs in combating international terrorism.¹²⁷

M. ENFORCEMENT ACTIONS AND SETTLEMENTS

In 2007, OFAC continued its practice of periodically posting important informational documents,¹²⁸ final agency Penalty Notices, and relevant case reports¹²⁹ on its website, including guidance on the application of increased penalties under the IEEPA Enhancement Act. According to OFAC's website, thirty-five companies agreed to or received penalties for violations of the Burmese, Cuban, Iranian, Iraqi, Libyan, Sudanese, terrorism, and non-proliferation sanctions programs between October 2006 and November 2007. During the same period, nineteen individuals were penalized, primarily for Cuban travel-related violations.

In one of the largest criminal settlements of the year, Chiquita Brands International, Inc., (Chiquita) pleaded guilty in March 2007 to one count of engaging in transactions with a Specially Designated Global Terrorist¹³⁰ and, under the terms of the plea agreement, Chiquita will pay a \$25 million fine, implement and maintain an effective compliance and ethics program, and be placed on five years of probation.¹³¹

126. See U.S. Dep't of the Treasury, 2006 Recent OFAC Actions, available at <http://www.treas.gov/offices/enforcement/ofac/actions/2006.shtml> (last visited Feb. 1, 2008); see also U.S. Dep't of the Treasury, 2007 Recent OFAC Actions, available at <http://www.treas.gov/offices/enforcement/ofac/actions/2007.shtml> (last visited Feb. 1, 2008).

127. See OFAC, Terrorist Assets Report: Calendar Year 2006-Fifteenth Annual Report to Congress on Assets in the United States of Terrorist Countries and International Terrorism Program Designees (2007), available at <http://www.treas.gov/offices/enforcement/ofac/reports/tar2006.pdf> (last visited Feb. 1, 2008). The report noted that programs targeting international terrorist organizations have resulted in the blocking of \$16 million of U.S. assets and that more than \$310 million in assets are blocked under sanctions imposed against the five designated state sponsors of terrorism.

128. In addition, OFAC issued several publications regarding the Trade Sanctions Reform and Export Enhancement Act of 2000 (including answers to frequently asked questions and an acknowledgement of licensing delays), as well as disclosing a new informational exchange program with the Office of Commissioner of Financial Institutions of the Commonwealth of Puerto Rico. See Trade Sanctions, *supra* note 116; see also OFAC, Memorandum of Understanding between OFAC and the Office of the Commissioner of Financial Institutions of the Commonwealth of Puerto Rico (2006), available at http://www.treas.gov/offices/enforcement/ofac/reg_mou/ocfi_mou.pdf (last visited Feb. 1, 2008).

129. OFAC, Civil Penalties and Enforcement Information, available at <http://www.treas.gov/offices/enforcement/ofac/civpen/index.shtml> (last visited Feb. 1, 2008). Notable actions involved Travelocity.com, which was fined \$182,750 to settle allegations that it provided travel services in which Cuba or Cuban nationals had an interest (Aug. 3, 2007), and Tyco Valves, which paid the largest penalty of the period, \$450,905, after voluntarily disclosing that it had sold goods to Iran from outside the United States (Feb. 2, 2007).

130. See Press Release, U.S. Dep't of Justice, Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay \$25 Million Fine, available at http://www.usdoj.gov/opa/pr/2007/March/07_nsd_161.html (last visited Feb. 1, 2008). The U.S. government designated the "Autodefensas Unidas de Colombia" (AUC) as a Foreign Terrorist Organization in September 2001 and as a Specially Designated Global Terrorist in October 2001. *Id.* According to the Criminal Information, Chiquita had made payments from 1997 through February 4, 2004, to the AUC through its wholly-owned Colombian subsidiary known as "Banadex." *Id.* Chiquita reportedly ignored advice of its outside counsel not to engage in these transactions and disregarded statements by the U.S. Department of Justice that the payments were illegal and could not continue. *Id.*

131. Since entering into the plea agreement, at least three lawsuits have been filed against Chiquita in the United States under the Alien Tort Claims Act. See, e.g., *Carrizosa v. Chiquita Brands Int'l*, No. 07 Civ. 60821

According to an OFAC release dated September 7, 2007, National Australia Bank Ltd. (NAB) remitted \$100,000 to settle allegations of violations of OFAC's Burma, Sudan, and Cuba regulations, which occurred between November 2003 and December 2005 and involved the processing of several transactions through the United States.¹³² This settlement is of interest for two reasons. First, although some of the subject transactions were processed through NAB's New York branch office, "the majority were processed through correspondent accounts held by it at other U.S. banks."¹³³ Second, "[d]ue to the significant remediation taken by the bank, including major upgrades to its worldwide compliance policies, as well as the fact that the violations were voluntarily disclosed, OFAC mitigated the potential penalties for these transactions by nearly 90%."¹³⁴

N. COURT CASES INVOLVING OFAC PROGRAMS

In addition to significant activity at the agency, the past year also saw significant court activity. These rulings reinforced the U.S. federal government's ability to apply its economic sanctions across international boundaries but, nevertheless, limited the ability of individual U.S. states to apply their own, even more stringent, economic sanctions upon foreign activities. In particular, the U.S. Court of Appeals for the District of Columbia ruled that the assets of a U.S. affiliate of a Specially Designated Global Terrorist can be frozen, even when that U.S. affiliate is not designated,¹³⁵ and the U.S. District Court for the District of Columbia held that OFAC's decisions to grant or deny a license generally are not subject to judicial review.¹³⁶

(S.D. Fla. Nov. 13, 2007); *Doe v. Chiquita Brands Int'l*, No. 2:07-cv-03406 (D.N.J. filed July 18, 2007); *Does v. Chiquita Brands Int'l*, No. 1:07-cv-10300-HB (S.D.N.Y. filed Nov. 14, 2007). For further information about these cases, see the article in this volume by the Committee on Corporate Social Responsibility.

132. See OFAC, Enforcement Information for September 7, 2007, available at <http://www.ustreas.gov/ofac/enforcement/ofac/civpen/penalties/09072007.pdf> (last visited Feb. 1, 2008).

133. *Id.*

134. *Id.*

135. See *Islamic American Relief Agency v. Gonzales*, 477 F. 3d 728 (D.C. Cir. 2007). Plaintiff charity urged that the test for asset freezing under the Global Terrorism Sanctions Regulations, 31 C.F.R. pt. 594, should be the same test applied to alias designations under the Foreign Terrorist Organizations Sanctions Regulations, 31 C.F.R. pt. 597. Under the latter regulations, the test follows agency theory criteria, such as whether the foreign entity exerted "domination and control." Siding with the government, however, the Court found that the U.S. and foreign entities were so intricately connected that they formed a single global organization, and, thus, no showing of control by the foreign SDT was needed for the plaintiff to have its assets included in the freeze. However, this expansive trend may have been tempered in another case when a federal jury failed to reach a verdict on a variety of issues, including the meaning of "providing material support"; see also *United States v. Holy Land Foundation*, Superseding Indictment of July 26, 2004, No. 3:04-CR-240-G (filed Nov. 30, 2005), available at <http://www.nefafoundation.org/hlfdocs.html> (last visited Feb. 1, 2008). In this case, the judge declared a mistrial after the jury deadlocked on a number of charges levied against a U.S.-based charity and five of its top officers for tax fraud, money laundering, and providing material support and funds to the Specially Designated Terrorist organization, Hamas. *Id.* Hamas was itself designated as a terrorist organization and had its assets frozen by Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 2007).

136. See *Cubaexport v. Office of Foreign Assets Control*, 516 F. Supp. 2d (D.D.C. 2007). This case involved efforts by Empresa Cubana Exportadora de Alimentos y Productos Varios (Cubaexport), a Cuban state-owned entity, to renew its registration of the "Havana Club" trademark in the United States. Among other things, Cubaexport sought a ruling on whether "OFAC's denial of a specific license was consistent with U.S. foreign policy and its own prior licensing decisions." *Id.* at 58.

In *National Foreign Trade Council v. Giannoulis*,¹³⁷ the District Court for the Northern District of Illinois held that the Illinois Act to End Atrocities and Terrorism in Sudan¹³⁸ was unconstitutional on several grounds, including various forms of federal preemption with regard to economic sanctions. Nevertheless, the ruling appeared to continue to allow states to regulate certain investment decisions, which are limited to situations in which the State acts as a market participant and not as a market regulator.

137. See *Nat'l Foreign Trade Council v. Giannoulis*, 2007 WL 627630 (N.D. Ill. 2007). In this case, the Illinois statute prohibited all state investment, including the holding of public pension assets and investment by municipalities, in Sudan or in "forbidden entities"—companies that fail to certify that they conducted no business with or in Sudan. The Act also barred the state of Illinois from maintaining deposits in banks that did not require loan applicants to certify that they were not "forbidden entities." Relying upon the Supremacy Clause's grant of ultimate authority to the federal government in its reserved domains, including foreign affairs and commerce, Giannoulis found that Congress had intended to "occupy the field" of Sudanese sanctions and that simultaneous compliance with federal and state law was not possible because the state law targeted substantially more entities and transactions. *Id.* In addition, this part of the Illinois law infringed upon the federal government's exclusive power to manage foreign affairs, since Illinois had undermined the U.S. federal government's flexibility to influence the government of Sudan. The Court further ruled that the pension prohibition and divestment provisions relating to state assets did not violate the Supremacy Clause or the foreign affairs power. The court, however, did find that the pension prohibition and divestment provisions violated the Foreign Commerce Clause because Illinois' law required its municipalities to divest their assets as well. While the state of Illinois as a market participant was free to divest its own assets, the Court ruled that Illinois could not require sub-state entities to divest. Previous jurisprudence had held that sub-state entities, such as municipalities, act as distinct market participants.

138. 15 Ill. Comp. Stat. 520/22.5-6 (2005); 40 Ill. Comp. Stat. 5/1-110.5 (2005).