

Export Controls and Economic Sanctions*

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I. Introduction

Predictably, the economic sanctions and export control developments of 2001 are measured in light of the events of September 11. Although there were noteworthy developments before September, the terrorist attacks and subsequent pursuit of Osama bin Laden, the Taliban and other terrorists brought U.S. sanctions programs and export control regimes into much sharper focus. The momentum of the U.S. reaction to the terrorist attacks will carry far into the future.

Sanctions measures have been in the forefront of the U.S. hunt for terrorists, especially programs aimed at identifying and freezing the financial assets of global terrorist networks. The USA PATRIOT Act gave the Executive branch even broader authority in the sanctions area, authority that has been embraced and exercised. By the same token, 2001 saw the implementation of the Trade Sanctions Reform Act, permitting sales of agricultural products, medicine and medical devices on expedited bases. The proper balance between U.S. commercial and national security concerns remained elusive in 2001, despite earnest efforts in both the House and Senate. The statutory extension of the Export Administration Act enacted in November 2000 expired in August 2001. By the end of the year, as through so much of the past decade, export controls were being administered pursuant to Executive Order.

As in past years, this survey examines selected developments. The volume of issues prevents comprehensive treatment. We have retained the structure of past articles, separating sanctions and export controls into separate segments even though they are frequently quite interrelated.

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II. Trade and Economic Sanctions

A. MEASURES TARGETING SPECIFIC COUNTRIES OR REGIONS

1. *Yugoslavia (Serbia and Montenegro)*

The United States has maintained economic sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY (S&M)) since May 1992.¹ These sanctions were significantly relaxed in late 2000 following the peaceful democratic transition in that country.² Shortly thereafter, on January 17, 2001, President Clinton issued Executive Order 13,192, which lifted, on a prospective basis, the majority of U.S. sanctions against the FRY (S&M). On October 3, 2001, the Treasury Department's Office of Foreign Assets Control (OFAC) amended its sanctions regulations against the FRY (S&M) to comply with Executive Order 13,192. OFAC's October 3 regulations were a bit unusual because they implemented not only the January 2001 order lifting sanctions against Serbia but also certain earlier orders expanding and imposing those lifted sanctions. Thus, rather than simply lifting sanctions, the regulations set up a mechanism to block all assets of certain categories, then exempted broad categories of property and transactions from that blocking, as of January 19, 2001.

OFAC also added a new set of regulations, 31 C.F.R. Part 587, that maintains and modifies economic sanctions against former Serbian President Slobodan Milosevic and designated members of his family, supporters, and members of the Serbian government (collectively, "Milosevic Associates"). Thus, with respect to transactions on or after January 19, 2001, and with the exception of transactions involving the property of designated Milosevic Associates and persons under indictment by the International Criminal Tribunal for the Former Yugoslavia (ICTY), U.S. persons are no longer subject to the prohibitions of OFAC's FRY (S&M) Sanctions Regulations. New investment in Serbia is also permitted. Nonetheless, all assets blocked under Executive Order 13,088 of June 9, 1998³ and the Kosovo Sanctions Regulations⁴ remain blocked.

The Bureau of Industry and Security (BIS) also relaxed restrictions on exporting to Serbia. Specifically, on March 1, 2001, BIS published a new rule that permits exports and re-exports to Serbia of: (i) items classified as EAR 99 (i.e., subject to the Export Administration Regulations (EAR), but not categorized under a specific Export Classification Control Number (ECCN) on the Commerce Control List (CCL));⁵ and (ii) items on the CCL that are controlled only for Anti-Terrorism (AT) reasons.⁶ Despite these changes, however, U.S. persons may not export or re-export any item subject to the EAR, including EAR 99 items, to persons specifically designated as Milosevic Associates.⁷

1. See Exec. Order No. 12,810, 57 Fed. Reg. 24,347 (June 5, 1992).

2. See Statement by the President on Lifting Sanctions Against Serbia (Oct. 12, 2000), available at <http://clinton6.nara.gov/2000/10/2000-10-12-statement-by-president-on-lifting-sanctions-against-serbia.html> (last visited Oct. 26, 2002).

3. See Exec. Order No. 13,088, 63 Fed. Reg. 32,109 (June 9, 1998).

4. See Federal Republic of Yugoslavia (Serbia and Montenegro) Kosovo Sanctions Regulations, 31 C.F.R. § 586 (2001).

5. See Export Administration Regulations, Control Policy: End-User and End-Use Based, 15 C.F.R. Part 744 *et seq.* (2001).

6. See Serbia Regulations, available at <http://www.bxa.doc.gov/factsheets/SerbiaReg030101.html> (last visited Jan. 3, 2002).

7. See *id.*

2. *Western Balkans (Kosovo and Macedonia)*

On June 27, 2001, President Bush issued Executive Order 13,219, which blocks the property of "persons who [immediately] threaten international stabilization efforts in the Western Balkans."⁸ OFAC incorporated into its list of Specially Designated Nationals (SDNs) the names of the individuals and entities targeted by Executive Order 13,219. Accordingly, U.S. persons may not provide money, goods, or services to listed individuals, even as donations. Although the executive order preempts licenses and authorizations issued prior to June 27, 2001, it does not preempt transactions permitted under the Berman Amendment (informational materials) or the Trade Sanctions Reform and Export Enhancement Act of 2000 (agricultural and medical sales).⁹

3. *Sierra Leone and Liberia*

In his final days in office, President Clinton issued Executive Order 13,194, which, consistent with U.N. Security Council Resolution 1306, prohibited the import of "conflict" diamonds from Sierra Leone. It is believed that the insurgent Revolutionary United Front (RUF) sells illicit, rough-cut diamonds to fund its activities in Sierra Leone's civil war. Diamonds that are certified through the Government of Sierra Leone's Certificate of Origin regime remain eligible for import into the United States.

On May 23, 2001, President Bush issued Executive Order 13,213 to prohibit importation of rough-cut diamonds from Liberia. This complements President Clinton's executive order pertaining to Sierra Leone because the bulk of RUF diamonds leave Sierra Leone through Liberia. Importantly, neither Executive Order 13,194 nor Executive Order 13,213 affects commercial transactions that are unrelated to diamonds. On January 15, 2002, President Bush extended the prohibition on importing rough-cut diamonds from Liberia and Sierra Leone through January 2003.¹⁰

B. OTHER SANCTIONS DEVELOPMENTS

1. *Specially Designated Global Terrorists (SDGT)*

a. Executive Order 13,224

(i) *Overview*

On September 24, 2001, in the wake of the September 11th terrorist attacks on the United States, President Bush declared a national emergency and issued Executive Order 13,224, which created a list of Specially Designated Global Terrorists (SDGT) and blocked the U.S. assets of terrorists and terrorist organizations on the list.¹¹ Executive Order 13,224, itself, named twenty-seven individuals and organizations, which were simultaneously added to OFAC's list of specially designated nationals (SDNs).¹² In the weeks and months following promulgation of Executive Order 13,224, over 160 additional individuals and organi-

8. See Exec. Order No. 13,219, 66 Fed. Reg. 34,777 (June 29, 2001).

9. *Id.*

10. See Continuation of the National Emergency With Respect to Sierra Leone and Liberia, 67 Fed. Reg. 2547 (Jan. 17, 2002).

11. Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism, 66 Fed. Reg. 49,079 (Sept. 25, 2001) (issuance of Exec. Order No. 13,224 of Sept. 23, 2001) [hereinafter Exec. Order No. 13,224].

12. See generally *id.* at Annex.

zations were added to the SDGT list.¹³ During the same period, more than 120 other countries, including Saudi Arabia, Indonesia, and many European Union Member States, took actions to freeze terrorist assets in their countries, resulting in the blocking of over \$60 million in Taliban and al Qaeda assets worldwide.¹⁴

In addition to freezing the U.S. assets of certain individuals, terrorist leaders, corporations, and nonprofit organizations the executive order gives the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, the authority to freeze the U.S. assets and property of other individuals and organizations that “pose a significant risk of committing, acts of terrorism.”¹⁵ The executive order also permits the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to block the U.S. assets and property of individuals and entities that:

- Are owned or controlled by, or act on behalf of, terrorist organizations;
- Assist, sponsor, or provide support for acts of terrorism; or
- Are “otherwise associated with” individuals or entities whose assets are frozen pursuant to Executive Order 13,224.¹⁶

Section 5 of the executive order expressly permits the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to take “such other actions than the complete blocking of property or interests in property as the President is authorized to take under [the International Emergency Economic Powers Act (IEEPA)] and [the United Nations Participation Act (UNPA)].”¹⁷

The majority of the SDGTs are based in Africa and the Middle East and are believed to be important sources of funding and support for Osama bin Laden and al Qaeda, but the list also targets individuals and organizations outside the Middle East and many that have no connection to al Qaeda, including the Real I.R.A., several groups related to the Basque separatists in Spain, and the Shining Path (Peru). Although Executive Order 13,224 does not represent a radical departure from prior U.S. policy towards suspected terrorists and their assets, it manifests a clear willingness to categorize as prohibited parties foreign nationals who do business with terrorist groups or refuse to cooperate with U.S. efforts.

(ii) *Extraterritorial Aspects*

Although Executive Order 13,224 is not *per se* extraterritorial, Bush administration officials have clearly indicated that it is intended to be broad in scope. Specifically, as noted above, the new order exposes to sanctions those who “associate” with designated terrorists.¹⁸ In a September 24 Rose Garden speech, Treasury Secretary Paul O’Neill explained that the prohibition on “association” with designated terrorists is intended to prohibit foreign banks that do not cooperate with American anti-terrorism investigations from doing busi-

13. See Karen DeYoung, *Citing Links To Terror, U.S. Blocks Some Assets*, WASH. POST, Jan. 10, 2002, at A10, available at <http://www.washingtonpost.com/wp-dyn/articles/A21236-2002Jan9.html> (last visited Jan. 18, 2002).

14. *Id.*; Dan Eggen & Kathleen Day, *U.S. Probe of Sept. 11 Financing Wraps Up: Terror Money Traced Via ATM, Credit Card Usage*, WASH. POST, Jan. 7, 2002, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A6076-2002Jan6.html> (last visited Jan. 18, 2002).

15. Exec. Order No. 13,224, *supra* note 11, § 1(b).

16. Exec. Order No. 13,224, *supra* note 11, § 1.

17. Exec. Order No. 13,224, *supra* note 11, § 5.

18. Exec. Order No. 13,224, *supra* note 11, § 1(d)(ii).

ness in the United States and from accessing U.S. financial markets.¹⁹ It also authorizes the Treasury Department to seize the U.S. assets of foreign banks and other financial intermediaries if terrorists use their offices and equipment even if it is not possible to prove complicity.²⁰

(iii) *Relation to TSRA*

Section 4 of Executive Order 13,224 expressly revokes Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) eligibility for any person or organization designated under the terms of the order.²¹

b. Operation Green Quest

On October 25, 2001, the Treasury Department launched Operation Green Quest, a multi-agency, multi-disciplinary team of agents from OFAC, the U.S. Customs Service, the Secret Service, the Internal Revenue Service, and the Financial Crimes Enforcement Network.²² The purpose of Operation Green Quest is to eliminate current and future terrorist funding sources, including underground financial systems, illicit charities, and corrupt financial institutions. In mid-November, G-20 countries signaled a willingness to implement similar measures, agreeing to make public the lists of terrorists whose assets are subject to freezing and the value of the assets frozen.²³ This action plan on terrorist financing represented a major change, especially for Saudi Arabia and other Middle Eastern countries.

c. Operation Shield America

On December 10, 2001, the U.S. Customs Service announced the launching of a new initiative to prevent terrorists and terrorist organizations from acquiring sensitive U.S. military and commercial "dual-use" technology, weapons, and equipment, including items that could be used to develop or fabricate weapons of mass destruction.²⁴ BIS, the State Department's Office of Defense Trade Controls (ODTC), and other export agencies are supporting Operation Shield America.

Customs has prepared a list of items likely to be of interest to terrorists. Customs agents will visit firms that produce or distribute these items, seeking their cooperation and encouraging them to notify Customs about suspicious attempted transactions. Customs will also intensify its enforcement efforts to prevent exports to terrorists. These efforts will continue to include undercover probes.

19. See President George W. Bush and Secretary Paul H. O'Neill, President Freezes Terrorists' Assets, Remarks in The Rose Garden (Sept. 24, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/> (last visited Jan. 7, 2002).

20. *Id.*

21. See Exec. Order No. 13,224, *supra* note 11, § 4; see also Cuban Democracy, 22 U.S.C.A. § 6004 (Oct. 21, 2002) and accompanying text.

22. See Press Release, Treasury Secretary Dam Remarks at the Launch of Operation Green Quest – Multi-Agency Initiative to Target Sources of Funding for Terrorist Organizations (Oct. 25, 2001), available at <http://www.treas.gov/press/releases/01arch.htm#october> (last visited Jan. 3, 2002).

23. See Press Release, Dep't of Treasury, G-20 Action Plan on Terrorist Financing, PO-807 (Nov. 17, 2001).

24. See Customs Service Press Release, U.S. Customs Launches "Operation Shield America" (Dec. 10, 2001), available at <http://www.customs.treas.gov/hot-new/pressrel/2001/1210-01.htm> (last visited Feb. 18, 2002).

d. Sanctions-Related Aspects of the Patriot Act

On October 6, 2001, President Bush signed the USA PATRIOT Act of 2001 (the "PATRIOT Act").²⁵ Although the PATRIOT Act is designed to provide law enforcement with new and expanded powers to track, detain, and punish suspected terrorists, it also contains numerous sanctions-related provisions. As discussed in more detail below, *inter alia*, the PATRIOT Act permits the government: (i) to deport members of certain terrorist groups and deny them visas;²⁶ (ii) to freeze U.S. assets of individuals and organizations pending investigation into their connections to terrorism and terrorist groups;²⁷ and (iii) to impose unilateral sanctions on medicines, medical devices, and agricultural commodities without Congressional approval.²⁸

The PATRIOT Act also expands the President's authority to impose unilateral sanctions on agricultural commodities and medical devices by creating new exceptions to the Trade Sanctions Reform and Export Enhancement Act (TSRA), which is discussed in more detail below. These exceptions permit the President to impose, without Congressional approval, sanctions on entities involved in terrorist activities, narcotics trafficking, or in the design, development, or production of weapons of mass destruction and to include agricultural products and medical items within the scope of the new sanctions.²⁹

On December 6, 2001, the State Department, in consultation with Attorney General Ashcroft, placed thirty-nine groups on the "Terrorist Exclusion List," a new list that the State Department is promulgating pursuant to the PATRIOT Act.³⁰ Although designation on the Terrorist Exclusion List gives the U.S. government the power to deport members of listed groups and to deny them visas, it does not impose any new financial controls or economic sanctions on listed groups.

On December 14, 2001, OFAC blocked the assets of two organizations—the Global Relief Foundation and the Benevolence Foundation, Inc.—pursuant to Section 106 of the PATRIOT Act, which permits such asset blocking during the pendency of investigations into terrorist activity. The December 14 designations marked the first time that OFAC had blocked assets prior to designating an individual or organization, and it forced OFAC to create a new designation, "blocked pending investigation" (BPI).

2. Trade Sanctions Reform and Export Enhancement Act

On July 12, 2001, BIS and OFAC issued interim regulations to implement TSRA.³¹ The long-anticipated new regulations took effect on Thursday, July 26, 2001. TSRA, enacted in October 2000, relaxed most unilateral U.S. sanctions against the export of agricultural products to Cuba and agricultural and medical products to Iran, Libya, and Sudan.³²

25. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, 115 Stat. 272 (Oct. 26, 2001).

26. *Id.* § 413.

27. *Id.* § 106(1)(b).

28. *Id.* § 221(b).

29. *Id.* § 221(b).

30. See *New Terrorist List Includes 39 Groups*, REUTERS, Dec. 6, 2001, available at <http://www.washingtonpost.com/wp-dyn/articles/A3649-2001Dec6.html> (last visited Jan. 8, 2002).

31. The Trade Sanctions Reform and Export Enhancement Act of 2000, P. L. 106-187 (Oct. 28, 2000); see Export Administration Regulations, 15 C.F.R. Parts 740, 742, 746, 772, and 774 (Oct. 1, 2002); 31 C.F.R. Parts 515, 538, 550, and 560 (Oct. 1, 2002).

32. The export of medicines and medical devices to Cuba continues to be governed by the Cuba Democracy Act, 22 U.S.C. 6004 (Oct. 21, 2002).

Although TSRA has the potential to open previously closed markets to U.S. companies, both OFAC and BIS continue to grapple with numerous implementation issues, such as which pre-sale activities are authorized and which particular agricultural commodities, medicines, and medical supplies are TSRA-eligible. With regard to the latter issue, lists of agricultural commodities, medicines, and medical supplies that are eligible for export and re-export under TSRA are available on BIS's Web site.³³

a. Exports of Agricultural Commodities to Cuba

(i) *New License Exception*

The new BIS regulations establish license exception "Agricultural Commodities" (AGR),³⁴ which permits export and re-export of U.S.-origin agricultural commodities to Cuba, provided that the transactions satisfy all of the following criteria:

The commodity must fall under TSRA's definition of "agricultural commodities" under the BIS:

- The commodity is not specifically listed on the CCL;³⁵
- The commodity is EAR99 (i.e., subject to the EAR, but not categorized under a specific Export Classification Control Number;
- The export or re-export is made pursuant to a written contract, except for commercial samples or donations, which are not subject to this contract requirement;
- The export or re-export is made within twelve months of the signing of an authorized contract.³⁶ This means that all shipments under an authorized contract must be made within the twelve months; and
- The exporter notifies BIS prior to exporting or re-exporting. Only one notification is required for each contract, even if multiple shipments are contemplated.³⁷
- The transaction is financed by: (i) payment of cash in advance; or (ii) by a banking institution located outside the United States or Cuba.³⁸

If these criteria are met, then the exporter need only submit a prior notification to BIS on BIS Form 748P or its electronic equivalent prior to exporting or re-exporting the agricultural commodity pursuant to exception AGR.³⁹

(ii) *Prior Notification Procedures*

Exporters must provide prior notification of exports and re-exports under license exception AGR by submitting a completed BIS Form 748P or its electronic equivalent.

33. Links to these lists are available at <http://www.bxa.doc.gov> (last visited Jan. 9, 2002).

34. See Exports of Agricultural Commodities, Medicines and Medical Devices, 66 Fed. Reg. 36,676 (July 12, 2001).

35. See 15 C.F.R. Part 744 *et seq.* (Oct. 1, 2002).

36. In the case of multiple shipments, all shipments must be made within 12 months of the signing the contract, or within twelve months of notification that BIS received no objections (if no contract is required, as in the case of donations).

37. Export Administration Regulations, License Exceptions, 15 C.F.R. § 740.18 (Oct. 1, 2002).

38. Importantly, this restriction prohibits use of foreign branches and subsidiaries of U.S. banks for the purpose of financing agricultural sales to Cuba. Cuban Assets Control Regulations, Licenses, Authorizations, & Statement of Licensing Policy, 31 C.F.R. § 515.533 (Oct. 1, 2002). Cuba has cited these financing restrictions as its reason for refusing, except in the aftermath of Hurricane Michelle, to purchase agricultural products from the United States.

39. 15 C.F.R. § 740.18(c).

lent.⁴⁰ This form solicits a variety of information about the exporter and the customer, including any intermediate consignees, as well as information about the end-use of the product being exported or re-exported.

(iii) Action by BIS and Review by Other U.S. Government Agencies

Under the new regulations, BIS must refer the notification for inter-agency review within two business days of registration, or return it to the exporter without action if it is incomplete.⁴¹ For purposes of the regulations, "registration" is defined as the moment the notification is electronically entered into BIS's electronic system.⁴²

Following referral from BIS, the Defense Department, the State Department, and other agencies may review the AGR notification.⁴³ These agencies have nine days following BIS's referral to submit their written objections to BIS.⁴⁴ If any reviewing agency informs BIS that the proposed recipient may promote international terrorism⁴⁵ or the transaction raises nonproliferation concerns, the exporter may not rely on license exception AGR, and BIS will treat the notification as a license application, which would be subject to BIS's otherwise applicable licensing policies, including its presumption of denial of requests to license commercial exports to Cuba.⁴⁶ On the other hand, if BIS confirms that no agency has raised an objection within the nine-day period following referral, the exporter may proceed with the transaction, provided that all other requirements of AGR are satisfied.⁴⁷

(iv) Restrictions on License Exception AGR

As noted above, license exception AGR is not available for exports or re-exports of medicines or medical devices to Cuba, and it does not modify controls on any agricultural commodity categorized under a specific ECCN on the CCL.⁴⁸ In addition, license exception AGR is not available for exports or re-exports to any individuals or entities designated by OFAC as a Specially Designated Terrorist, Specially Designated Global Terrorist, or Foreign Terrorist Organization.⁴⁹

(v) Authorized Pre-Sale Activities

Although BIS has primary licensing responsibility for sales of agricultural commodities to Cuba, OFAC has jurisdiction over certain transactions incident to doing business with Cuba, such as pre-sale activities and travel. As part of its implementation of TSRA, OFAC amended its regulations to authorize, by general license, "all transactions incident to exportations from the United States and re-exportations of U.S. origin items to Cuba."⁵⁰

40. *Id.*

41. 15 C.F.R. § 740.18(c)(3).

42. *Id.*

43. Export Administration Regulations, License Exceptions, 15 C.F.R. § 740.18(c)(4) (Oct. 1, 2002).

44. *Id.*

45. Any objection must be aimed at the specific recipient and may not be based on U.S. government designation of Cuba as a terrorism-supporting country. In practice, agricultural exports to Cuba have remained very limited due to Cuba's objections to the financing restrictions of TSRA.

46. 15 C.F.R. § 740.18(c)(4).

47. *Id.*

48. Exports of Agricultural Commodities, Medicines, and Medical Devices, 66 Fed. Reg. 36,676, 36,677 (July 12, 2001).

49. 15 C.F.R. 740.18(b); Exec. Order No. 13,224, 66 Fed. Reg. 49,079, § 4 (Sept. 23, 2001).

50. Cuban Assets Control Regulations, Licenses, Authorizations, & Statement of Licensing Policy, 31 C.F.R. § 515.533 (Oct. 1, 2002).

The regulations require that all employees of U.S. companies and all U.S. citizens or permanent resident employees of foreign companies obtain OFAC licenses to authorize Cuba travel-related transactions directly incident to: (i) marketing; (ii) negotiating sales; (iii) accompanied delivery of product to Cuba; and (iv) servicing of exports and re-exports that appear consistent with BIS licensing policy.⁵¹ OFAC will review applications for such licenses on a case-by-case basis, but exporters need not submit prior notifications to BIS before filing an application for an OFAC license to travel to Cuba. Thus, although pre-sale activities that involve travel to Cuba require OFAC licenses. It remains unsettled exactly which pre-sale activities not involving travel to Cuba U.S. companies and their employees may undertake without an OFAC license.

b. Exports of Agricultural Commodities, Medicines, and Medical Devices to Iran, Libya, and Sudan

OFAC's new regulations amend the Sudanese Sanctions Regulations (SSR),⁵² the Libyan Sanctions Regulations (LSR),⁵³ and the Iranian Transactions Regulations (ITR).⁵⁴ Specifically, the new regulations establish new one-year licenses and prescribe licensing procedures for exports and re-exports to Sudan, Libya, and Iran of agricultural commodities, medicine, and medical devices that are within the scope of OFAC's existing licensing jurisdiction. These licensing procedures cover exports and re-exports to: (i) the governments of Sudan, Iran, and Libya; (ii) any entities in these countries; (iii) any individuals in these countries; and (iv) persons in third countries purchasing specifically for resale to the governments, entities, or individuals listed in (i), (ii), or (iii).⁵⁵

(i) *Pre-Sale Transactions Authorized By General License*

An important provision of the new OFAC regulations grants exporters a general license to engage in certain transactions relating to the sale and export of covered items to Libya, Iran and Sudan prior to obtaining the one-year license. Authorized pre-sale transactions (relating to exports or re-exports to Iran, Libya,⁵⁶ or Sudan) include:

- negotiating and signing executory contracts;
- responding to public tenders on an executory basis;
- making shipping arrangements;
- obtaining insurance from non-U.S. carriers; and
- arranging financing (through non-U.S. institutions other than those controlled by the governments of Iran, Libya, or Sudan).⁵⁷

51. 31 C.F.R. § 515.533(e).

52. Sudanese Sanctions Regulations, 31 C.F.R. Part 538 (Oct. 1, 2002).

53. Libyan Sanctions Regulations, 31 C.F.R. Part 550 (Oct. 1, 2002).

54. Iranian Transactions Regulations, 31 C.F.R. Part 560 (Oct. 1, 2002).

55. 66 Fed. Reg. 36,683, 36,684 (July 12, 2001).

56. Although the regulations do not specifically use the word "re-export" in the context of describing authorized pre-sale transactions with Libya, they address exports to third parties for the purpose of resale into Libya. Therefore, it appears that the regulations contemplate, and authorize, pre-sale transactions pertaining to re-exports to Libya.

57. See 66 Fed. Reg. 36,683, 36,685 (July 12, 2001). The regulations continue to prohibit obtaining financing through U.S. companies or through entities controlled by the governments of Iran, Libya, or Sudan. 31 C.F.R. § 538.525 (Sudan); 31 C.F.R. § 560.532 (Iran); 31 C.F.R. § 550.571 (Libya). U.S. financial institutions may confirm or advise such financing. *Id.* In the public presentation of the TSRA program on July 26, OFAC officials stated that TSRA exports to Iran, Libya or Sudan would basically have to be financed by either:

In undertaking any of the above transactions, exporters must ensure that their dealings with Iran, Libya, or Sudan directly relate to the contemplated TSRA exports and do not stray into other commercial dealings, which remain strictly prohibited.

(ii) *General License for Brokering*

The general license also covers brokerage services performed by U.S. persons on behalf of other U.S. persons in connection with licensed sales of agricultural commodities, medicines and medical devices to Iran,⁵⁸ Libya,⁵⁹ or Sudan.⁶⁰ The general license for brokering does *not* apply to Cuba and does not permit U.S. persons to broker on behalf of non-U.S. persons.

(iii) *Effect on Existing OFAC Licenses*

Under OFAC's regulations, specific licenses issued prior to July 26, 2001 remain in effect until the earlier of the expiration of the license or July 26, 2002.⁶¹ As of July 26, 2001, new contracts for the export or re-export of agricultural commodities, medicines, or medical devices could only be entered into pursuant to the new regulations.⁶²

(iv) *Procedures for Obtaining One-Year OFAC Licenses*

In order to obtain a one-year license under the new regulations, exporters must provide to OFAC a variety of information about the exporter, the items being exported, and the end-user. This information is specified in 31 C.F.R. § 550.569(c) (for Libya); 31 C.F.R. § 538.523(c) (for Sudan); and 31 C.F.R. § 560.530(c) (for Iran). The most significant of the required information is a statement that the item is classified as EAR 99. If the exporter does not know the ECCN of the agricultural commodity it is exporting, it should obtain an official commodity classification from BIS.⁶³

The new regulations require that applications submitted to OFAC be processed promptly. The expedited processing will include, where appropriate, referral of the one-year license request to other government agencies for their evaluation. As with BIS referrals for exports of agricultural commodities to Cuba, the agencies have nine days following referral during which they may object to, or express concern about, an application.⁶⁴ If no objections or concerns are received during the nine-day period, OFAC will issue the one-year license, provided that the request meets the requirements set forth above.⁶⁵ In a public presentation on the TSRA regulations on July 26, OFAC officials stated that the State Department may, within the nine-day period, seek an additional thirty days in which to review an application.⁶⁶

(1) cash in advance; or (2) letters of credit issued by a third-country bank. They acknowledged that U.S. financial institutions may advise or confirm such letters of credit.

58. Iranian Transactions Regulations, 31 C.F.R. § 560.533(a) (Oct. 1, 2002).

59. Libyan Sanctions Regulations, 31 C.F.R. § 550.572(a) (Oct. 1, 2002).

60. Sudanese Sanctions Regulations, 31 C.F.R. § 538.526(a) (Oct. 1, 2002).

61. Exports of Agricultural Products, Medicines, and Medical Devices to Cuba, Sudan, Libya, and Iran; Cuba Travel Related Transactions, 66 Fed. Reg. 36,683, 36,686 (July 12, 2001).

62. *Id.*

63. Submission to OFAC of official BIS commodity classifications is required if the exporter is requesting an OFAC license to export fertilizer, live horses, western red cedar, and medical devices other than basic medical supplies, such as syringes, bandages, gauze, and similar items on the list of "approved" agricultural commodities, medicines, and medical devices.

64. 66 Fed. Reg. 36,683, 36,685 (July 12, 2001).

65. *Id.*

66. U.S. Dep't of Commerce, Meeting With Interested Public on the Export of Agricultural Commodities to Cuba and the Export of Agricultural Commodities, Medicines and Medical Devices to Iran, Libya and Sudan (July 26, 2001); 66 Fed. Reg. 38,416 (July 24, 2001) (announcing meeting).

3. *Iran-Libya Sanctions Act (ILSA) Renewal*

On August 3, 2001, President Bush signed into law the ILSA Extension Act of 2001.⁶⁷ The ILSA Extension Act provides for a five-year extension of ILSA, legislation that threatens to deny U.S. benefits to non-U.S. companies that invest in the development of Iranian or Libyan petroleum resources. (U.S. companies are prohibited from engaging in such activities by various executive orders, which remain in effect). The ILSA Extension Act took effect on August 5, 2001, the date on which ILSA expired, and was enacted in spite of opposition from numerous business groups that claimed that extending ILSA would strain diplomatic relations with important allies and violate U.S. World Trade Organization (WTO) commitments.

Under the ILSA Extension Act, the level of allowed investment in the Iranian energy and Libyan energy sector is \$20 million per country.⁶⁸ Like its predecessor, the ILSA Extension Act provides that the President can waive enforcement of the ILSA sanctions when it is "in the national interest" to do so.⁶⁹

4. *Foreign Narcotics Kingpin Designation Act*

The Foreign Narcotics Kingpin Designation Act (KDA) was signed into law on December 3, 1999.⁷⁰ The KDA identifies and imposes sanctions, on a worldwide basis, against drug traffickers (termed "Significant Foreign Narcotics Traffickers" (SFNT)), their criminal organizations, and the foreign persons who provide support or assistance to those traffickers and their organizations.⁷¹ Substantial penalties are imposed against U.S. persons who knowingly have business transactions with the designated traffickers. President Clinton designated the first group of so-called "Tier I" SFNTs in June 2000, and President Bush added twelve additional names to the list on June 1, 2001. OFAC made its first "Tier II" designations on January 31, 2002, imposing sanctions on foreign persons determined to have "materially assisted" or "supported" an SFNT.⁷²

The KDA has been the subject of substantial criticism, which has subsided somewhat following Congressional action eliminating the KDA's preclusion of judicial review of designation of SFNTs.⁷³ In accordance with the provisions of the KDA, a Judicial Review Commission reviewed the remedies available to U.S. persons affected by the blocking of assets of foreign persons by OFAC. The Commission recommended in December 2000 that Congress should amend the KDA to eliminate the preclusion of judicial review.⁷⁴ Following numerous unsuccessful attempts in the House to amend the KDA as suggested, the Intelligence Authorization Act for fiscal year 2002 included language that struck the ban on judicial review of kingpin designations under the KDA. Other OFAC reforms recommended by the Judicial Review Commission await action by Congress.

67. ILSA Extension Act of 2001, 115 Stat. 199 (Aug. 3, 2001).

68. ILSA Extension Act, § 2(a).

69. *Id.*

70. See International Narcotics Trafficking, 21 U.S.C. §§ 1901-08 (Oct. 21, 2002).

71. See 21 U.S.C. § 1902 (Oct. 21, 2002).

72. See Bulletin from the Office of Foreign Assets Control (Jan. 31, 2002), available at <http://www.treas.gov/ofac/bulletin.txt> (last visited Oct. 22, 2002); Blocking Assets and Prohibiting Transactions, 21 U.S.C. § 1904 (Oct. 21, 2002).

73. Intelligence Authorization Act for Fiscal Year 2002, Pub. L. 107-108, § 307.

74. See Judicial Review Commission on Foreign Asset Control Interim Report to Congress, 13 (Dec. 4, 2000).

5. *Postponement of Helms-Burton Effective Date*

President Bush has postponed the effective date of Title III of the Helms-Burton Act, extending through August 1, 2002, the prohibition on U.S. persons suing in U.S. courts persons believed to be "trafficking" in property confiscated by the Cuban government.⁷⁵ President Bush's waiver was the twelfth consecutive waiver of Helms-Burton's effective date, and the second by President Bush. President Bush's postponement of Title III of the Helms-Burton came one week after his recess appointment of Otto Reich, a prominent Cuban-American leader, to the position of Assistant Secretary of State for Latin America.

6. *The Zimbabwe Democracy and Economic Recovery Act of 2001 (ZDERA)*

Various individuals, organizations, and countries, including the UN Human Rights Commission, U.S. Secretary of State Colin Powell, and Great Britain, have criticized the government of Zimbabwean President Robert Mugabe for human rights violations and the absence of rule of law. The United States responded to the situation in Zimbabwe by enacting the ZDERA, which President Bush signed into law on December 21, 2001. The law requires the United States to vote against aid to the Government of Zimbabwe in international financial institutions unless the President certifies that certain conditions are satisfied or exercises waiver authority. The ZDERA also urges President Bush to consult with Canada, the European Union (EU), and other nations on ways to identify and sanction individuals responsible for the deteriorating situation in Zimbabwe.

Passage of the ZDERA came in the wake of reports that scores of white farmers had been killed or forced from their land by armed black "veterans." According to his detractors, President Mugabe supported the attacks to divert attention from the rampant corruption and lawlessness of his government. As 2001 ended, press reports indicated that Mugabe had introduced legislation to ban foreign journalists and greatly restrict the freedom of Zimbabwean journalists.

III. Export Controls

A. CONTINUATION OF EXPORT ADMINISTRATION ACT UNDER IEEPA

The Export Administration Modification and Clarification Act of 2000 (EAMCA),⁷⁶ which renewed the Export Administration Act (EAA) in November 2000, expired on August 20, 2001. In anticipation of the EAMCA's expiration and pursuant to his powers under the International Emergency Economic Powers Act (IEEPA),⁷⁷ President Bush issued Executive Order 13,222 on August 17, 2001 to extend the EAA and the EAR.

Extension of the EAA and the EAR by executive order became necessary after Congress failed to enact renewal legislation. Although the Senate passed renewal legislation in early September by a large margin,⁷⁸ Senate and House lawmakers had sharp disagreements

75. Statement by the President (Jan. 17, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020117-4.html> (last visited Feb. 4, 2002); Statement by the President on the Cuban Liberty and Democratic Solidarity Act (July 16, 2001), available at <http://www.whitehouse.gov/news/releases/2001/07/20010716-8.html> (last visited Jan. 18, 2002).

76. See Export Administration Modification and Clarification Act of 2000, 114 Stat. 2360 (2000).

77. See 50 U.S.C. §§ 1701-1707 (2001).

78. See S. 149, 107th Cong., 1st Sess. (2001).

regarding the appropriate balance between protecting national security and promoting U.S. exports following the September 11th attacks on the United States.⁷⁹

B. LIFTING OF SANCTIONS AGAINST INDIA AND PAKISTAN

On September 22, 2001, President Bush waived sanctions imposed against India and Pakistan in 1998.⁸⁰ Pursuant to section 9001(b) of the Department of Defense Appropriations Act, 2000,⁸¹ President Bush issued Presidential Determination No. 2001-28, in which he certified to Congress that continued application to India and Pakistan of the sanctions would not further the national security interests of the United States.

On October 1, 2001, BIS amended its rules to implement the President's waiver of sanctions.⁸² Specifically, the new BIS rules remove the presumption of denial of applications for licenses to export or re-export items controlled for nuclear proliferation and missile technology reasons to India and Pakistan and replaced it with case-by-case review.⁸³ The new regulations also reestablish EAR license exceptions for all exports to India and Pakistan and institute a presumption of approval for exports and re-exports of EAR99 items to all Indian and Pakistani entities on BIS's Entity List.⁸⁴ In addition, the new rules establish a policy of case-by-case review of applications to export non-EAR 99 items listed on the CCL.⁸⁵

The new BIS regulations also removed some Indian and Pakistani entities from the Entity List.⁸⁶ However, many entities whose names were deleted actually remained covered by virtue of their inclusion in broader general categories. For example, several listed Indian and Pakistani nuclear reactor facilities were dropped, but they remain covered by the entry for "Nuclear reactors (including power plants) fuel reprocessing and enrichment facilities, heavy water production facilities and any collocated ammonia plants."⁸⁷ As a result, exporters should continue to consult the pre-October 1, 2001 list (in addition to the current list).

On October 27, 2001, President Bush signed legislation that removed restrictions on providing foreign aid to Pakistan. The legislation waives through 2003 provisions of the Foreign Operations, Export Financing, and Related Programs Appropriations Act that prohibited direct U.S. assistance to Pakistan after an October 1999 military coup brought Pakistani President Musharraf to power. The legislation is conditional on a Presidential finding that waiver would: (i) "facilitate the transition to democratic rule in Pakistan;" and (ii) aid U.S. "efforts to respond to, deter, or prevent acts of international terrorism."⁸⁸ The

79. See *Enzi: EAA More Important Than Ever*, THE EXPORT PRACTITIONER, vol. 15, No. 10 (Oct. 2001), at 8.

80. See Presidential Determination No. 2001-28 (Sept. 22, 2001).

81. See Department of Defense Appropriations Act, 2000, Pub. L. 106-79.

82. See *India and Pakistan: Lifting of Sanctions, Removal of Indian and Pakistani Entities, and Revision in License Review Policy*, 66 Fed. Reg. 50,090 (Oct. 1, 2001).

83. *Id.*

84. *Id.*; 15 C.F.R. Part 744 Supp. 4, available at <http://www.bxa.doc.gov/Entities/Default.htm> (last visited Jan. 17, 2002).

85. See 66 Fed. Reg. 50,090.

86. *Id.*

87. *Id.* at 50,093.

88. See An Act To Authorize the President To Exercise Waivers of Foreign Assistance Restrictions with Respect To Pakistan Through September 30, 2003 and For Other Purposes, 115 Stat. 403, § 1 (Oct. 27, 2001).

legislation also exempted Pakistan from certain foreign assistance restrictions that would prohibit U.S. assistance to countries that default on repayments on U.S. loans.⁸⁹

C. LIBERALIZATION OF EAR COMPUTER CONTROLS

In a January 19, 2001 final rule BIS expanded eligibility for License Exception CTP (composite theoretical performance).⁹⁰ The then Clinton administration based the reform on the results of an inter-agency review, which found that computer hardware is increasingly becoming uncontrollable because parties located overseas can easily network clusters of lower performance computers to perform at levels exceeding export control limits. Continuing advances in microprocessor technology have also contributed to the ineffectiveness of computer controls.

The January 19, 2001 final rule made several changes, including abolishing Computer Tier 2 and moving all countries formerly therein (South and Central America countries, South Korea, ASEAN countries, Slovenia, and most of Africa) to Computer Tier 1. Before the January 19 rule, Tier 2 destinations had an upper License Exception CTP limit of 45,000 MTOPS (millions of theoretical operations per second). As before, Tier 1 destinations do not have an upper CTP limit. Second, the rule raised the License Exception CTP Limit for Tier 3 Countries (The People's Republic of China, former Soviet Union, India, Pakistan, all Middle East/Maghreb countries, Vietnam, and Central Europe) from 28,000 to 85,000 MTOPS. (The effect of this change was delayed by the National Defense Authorization Act of 1998 (NDAA) notification requirements described below.)

The rule raised the NDAA ten-day advance notification level for Tier 3 destinations from 28,000 MTOPS to 85,000 MTOPS. At that point, the notification requirement became irrelevant because any shipments of computers above 85,000 MTOPS needed a license. For exports on or after March 20, 2001, the rule eliminated post-shipment reporting for CTP exports to Tier 3 destinations. Reporting changes tracked the revisions made to the NDAA notification requirements.

D. LIBERALIZATION OF EAR CONTROLS ON MICROPROCESSORS, GRAPHIC ACCELERATORS, AND EXTERNAL INTERCONNECTS

In an April 9, 2001 final rule, BIS amended the EAR to relax controls on microprocessors, graphic accelerators, and external interconnects.⁹¹ The regulation implemented some of the changes made to the Wassenaar Arrangement's dual-use control list in December 2000. Decontrolled items remain subject to EAR Antiterrorism (AT) Controls, Column 1.

The April 9, 2001 rule liberalized controls on microprocessors in ECCN 3A001.a.3.a by raising the control level from 3,500 MTOPS to 6,500 MTOPS. Before the April 9 rule, microprocessors under 3A001.a.3 with a CTP equal to or greater than 3,500 MTOPs but no more than 4,500 MTOPS were eligible for License Exception CIV. Because the new computer control level of 6,500 MTOPS exceeded the CIV level of 4,500 MTOPS, BIS decided to eliminate CIV eligibility for microprocessors instead of adjusting the CIV level upwards.

89. See *id.* § 3.

90. See Revisions to License Exception CTP, 66 Fed. Reg. 5443 (Jan. 19, 2001).

91. See Revisions to Microprocessors, Graphic Accelerators and External Interconnects, 66 Fed. Reg. 18,402 (Apr. 9, 2001).

The April 9 rule also increased the control level for graphics accelerators and graphics coprocessors under ECCN 4A003.d from 3 million vectors/sec to 200 million vectors/sec. As was the case with microprocessors, BIS eliminated CIV eligibility for graphics accelerators and graphics coprocessors. With respect to external interconnects, the April 9 rule raised the control level in ECCN 4A003.g from a data rate of 80 Mbyte/sec to 1.25 Gbyte/sec.

E. LICENSING JURISDICTION FOR "SPACE QUALIFIED" ITEMS

In March 1999, BIS and ODTC published regulations that transferred licensing responsibility for commercial communications satellites and related equipment from BIS to ODTC.⁹² Although BIS's regulations defined "related equipment" to include items such as fuel and explosive bolts, the regulations did not specify which agency had licensing jurisdiction over other "space qualified" items, leaving U.S. exporters uncertain about the licensing requirements applicable to their products.⁹³

On August 31, 2001, ODTC, BIS, the Department of Defense, and the National Security Council released the results of their review of licensing jurisdiction over the "space qualified" items. Although certain "space qualified" components remained on the CCL while others were placed on the State Department's U.S. Munition's List, other items could be subject to the licensing jurisdiction of either BIS or ODTC, depending on their technical parameters.⁹⁴ Thus, although the review of "space qualified" items gave U.S. exporters a bit more certainty about the export licensing requirements applicable to their products, the results were less than satisfactory to many who had hoped that a greater percentage of the "space qualified" components would have remained under the jurisdiction of BIS.

F. STATE DEPARTMENT REVISES ITAR CANADIAN EXEMPTION

On February 16, 2001, the Department of State published its long-awaited revision to the International Traffic in Arms Regulations (ITAR) "Canadian Exemption," 22 C.F.R. § 126.5.⁹⁵ The revised ITAR § 126.5 became effective on May 30, 2001. Revisions to the list of defense articles for which a license still needs to be obtained for export to Canada resulted in a net increase of defense articles on the list. There were, however, appreciable relaxations regarding commercial communications satellites.

The revised regulation also tightened slightly the exemption for temporary imports into the United States of unclassified defense articles that originate in Canada. The revised exemption loosened somewhat restrictions on temporary or permanent exports of defense

92. National Defense Authorization Act for Fiscal Year 1999, § 1513(a), H.R. 1962, 105th Cong., 2d Sess. (1998) (enacted).

93. See Testimony of William A. Reinsch Before The Senate Committee on Foreign Relations Subcommittee on International Economic Policy, Export and Trade Promotion, Under Secretary for Export Administration, Department of Commerce (June 24, 1999), available at <http://www.bxa.doc.gov/press/99/ExpContdPolicy.html> (last visited Feb. 6, 2002).

94. See Bureau of Export Administration Release, Jurisdiction for "Space Qualified" Items (Aug. 31, 2001), available at <http://www.bxa.doc.gov/Licensing/SpaceQualifiedDetermination083101.html> (last visited Feb. 6, 2002).

95. See Amendments to the International Traffic in Arms Regulation: Canadian Exemptions, 66 Fed. Reg. 10,576 (Feb. 21, 2001).

articles to Canada (the exemption is no longer limited to unclassified defense articles, for instance), but, in exchange, narrowed authorized end-users under the exemption for temporary and permanent exports to Canadian federal or provincial authorities and “Canadian-registered persons.”

With respect to defense services, the revised ITAR § 126.5(c) provides U.S. exporters little more than what those exporters already received with respect to Canada in the “allies exemptions” published on July 21, 2000 by the State Department.⁹⁶ Somewhat broader than the “allies exemptions” is the section of the revised Canadian Exemption regarding transfer of technical data and the provision of defense services: (1) to a “Canadian registered person” (or a registered U.S. company) preparing a quote or proposal in response to a request from *either* the U.S. or Canadian Governments (including provincial and territorial governments of Canada) or (2) to produce, design, assemble, maintain or service a defense article for use by a registered U.S. company, under a U.S. Government program, or for end use in a Canadian Government program. The revised exemption increases existing documentation requirements, however, and adds a reporting requirement.

G. STATE DEPARTMENT MAKES SWEDEN ELIGIBLE FOR DEFENSE TRADE SECURITY INITIATIVE (DTSI) REFORMS

On July 21, 2000, the State Department published a final rule amending the ITAR to implement several elements of the reforms of DTSI,⁹⁷ which was jointly announced by the State and Defense Departments on May 24, 2000. Effective September 1, 2000, the rule implemented four new comprehensive licensing mechanisms for exports and re-exports of defense items to North Atlantic Treaty Organization (NATO) countries, Australia, and Japan. (In addition to the United States, NATO members, for ITAR purposes, include: Belgium, Canada, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom.) For these same nations, the rule also exempted from licensing requirements transfers of technical data to support the offshore procurement of defense articles for use in the United States and excluded from licensing requirements defense services necessary to perform maintenance on and maintenance training for inventoried U.S.-origin equipment.

On July 10, 2001, the State Department amended the ITAR to make Sweden eligible for the DTSI reforms.⁹⁸ Sweden is also now eligible for the DTSI reforms that were not implemented by regulation, such as expedited processing of items going to a government of a NATO member country, Australia, or Japan in support of the Defense Capabilities Initiative and expedited processing of export requests submitted electronically, using a DSP-5 or DSP-85, from an embassy of a NATO member state, Japan, or Australia.

^{96.} See *Ophthalmic and Topical Dosage Form New Animal Drugs; Selamectin*, 65 Fed. Reg. 45,282 (July 21, 2000).

^{97.} *Id.*

^{98.} See *Amendment to the International Traffic in Arms Regulation: Sweden*, 66 Fed. Reg. 35,899 (July 10, 2001).

H. NEW CHEMICAL AND BIOLOGICAL WEAPONS CONTROL RULES

On September 28, 2001, BIS amended the EAR to implement agreements reached at the October 2000 Plenary meeting of the Australia Group.⁹⁹ The new regulations also clarify the export license requirements and policies for certain toxic chemicals and precursors listed in the Schedules of Chemicals contained within the Annex on Chemicals to the Chemical Weapons Convention (CWC).

The primary changes to the EAR were: (1) to allow, without a license, exports to countries that are parties to the CWC of medical, analytical, diagnostic, and food testing kits containing small quantities of AG-controlled chemicals that are also identified as CWC Schedule 2 or 3 chemicals; (2) a new AG licensing policy on mixtures containing chemicals controlled by ECCN 1C350; and (3) to add Cyprus and Turkey to Country Group A:3 of the EAR, which identifies the countries that participate in the Australia Group.¹⁰⁰

99. See 66 Fed. Reg. 46,920 (Sept. 28, 2001).

100. *Id.*

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