

Export Controls And Economic Sanctions

JOHN W. BOSCARIOL, MATTHEW A. GOLDSTEIN, DAVID T. HARDIN,
BRETT W. JOHNSON, BROOKE M. RINGEL, AND NICHOLAS M. ROEGNER*

I. Introduction

This review summarizes significant changes to U.S. export controls and economic sanctions occurring in 2012.¹ A specific focus is on proposed rules published in furtherance of President Obama's Export Control Reform Initiative, the stated goal of which is a single control list, administered by a single licensing agency, with a single primary enforcement coordination agency, and a single information technology platform (known as the "Four Singularities"). The article also summarizes recent developments in Canadian trade controls.

II. Export Control Reform

A. THREE NEW EXPORT CONTROL ENTITIES

The Export Enforcement Coordination Center (E2C2), chaired by the Department of Homeland Security, began operations in March 2012 and now serves as the primary agency coordinating export enforcement activities of other agencies.² In 2012, details were also provided on two new units within the Department of Commerce Bureau of Industry and Security (BIS): the Information Triage Unit, established to coordinate export licensing intelligence information outside of the E2C2;³ and the Munitions Control

* By John W. Boscariol, McCarthy Tétrault LLP; Matthew A. Goldstein, BAI, Inc.; David T. Hardin, Miller & Chevalier Chartered; Brett W. Johnson, Snell & Wilmer, LLP; Brooke M. Ringel, Kelley Drye & Warren LLP; and Nicholas M. Roegner, Jackson Meade.

1. This article does not include changes occurring after December 1, 2012. For developments during 2011, see John Boscariol et al., *Export Controls and Economic Sanctions*, 46 INT'L LAW. 23 (2012). For developments during 2010, see Michael L. Burton et al., *Export Controls and Economic Sanctions*, 45 INT'L LAW. 19 (2011).

2. Press Release, Office of the Press Sec'y, Fact Sheet: Latest Steps to Implement the President's Export Control Reform Initiative (Mar. 7, 2012), <http://www.whitehouse.gov/the-press-office/2012/03/07/fact-sheet-latest-steps-implement-presidents-export-control-reform-initi>.

3. *Id.*

Division, established to administer the proposed Commerce Munitions List (CML) under the Export Administration Regulations (EAR).⁴

B. PROPOSED LIST TRANSFERS

Rules were previously issued for transfers of items from International Traffic in Arms Regulations (ITAR) U.S. Munitions List (USML) categories VI (vessels of war and naval equipment), VII (tanks and military vehicles), VIII (aircraft and associated equipment), XIX (gas turbine engines under categories VI, VII, and VIII), and XX (submersible vessels and oceanic equipment) to the CML, denominated by 600 series export control classification numbers.⁵ In 2012, rules were proposed for transfers of items under USML categories V (explosives and energetic materials),⁶ IX (military training equipment),⁷ X (protective personnel equipment and shelters),⁸ XI (military electronics),⁹ and XIII (auxiliary military equipment).¹⁰ As written, the proposals will also transfer many EAR Commerce Control List (CCL) items to the USML.

BIS also issued a final rule establishing ECCN series "0Y521" to control items not identified in an existing ECCN for which BIS determines that control is warranted "because it provides a significant military or intelligence advantage to the United States or

4. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-613, EXPORT CONTROLS: U.S. AGENCIES NEED TO ASSESS CONTROL LIST REFORM'S IMPACT ON COMPLIANCE ACTIVITIES 43 (2012), available at <http://www.gao.gov/assets/600/590287.pdf>; Kevin J. Wolf, Assistant Sec'y for Exp. Admin., Remarks at U.S. Dep't of Commerce Bureau of Indus. and Sec. Update 2012 Conference (July 17, 2012), http://www.bis.doc.gov/news/2012/wolf_update_2012.htm [hereinafter Wolf Remarks].

5. See Boscarior et al., *supra* note 1, at 29.

6. Revisions to the Export Administration Regulations (EAR): Control of Energetic Materials and Related Articles That the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 77 Fed. Reg. 25,932, 25,932 (proposed May 2, 2012) (to be codified at 15 C.F.R. pts. 742, 774); Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category V, 77 Fed. Reg. 25,944, 25,944 (proposed May 2, 2012) (to be codified at 22 C.F.R. pt. 121).

7. Revisions to the Export Administration Regulations (EAR): Control of Military Training Equipment and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 77 Fed. Reg. 35,310, 35,310 (proposed June 13, 2012) (to be codified at 15 C.F.R. pts. 742, 774); Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category IX, 77 Fed. Reg. 35,317, 35,317 (proposed June 13, 2012) (to be codified at 22 C.F.R. pt. 121).

8. Revisions to the Export Administration Regulations (EAR): Control of Personal Protective Equipment, Shelters, and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 77 Fed. Reg. 33,688, 33,688 (proposed June 7, 2012) (to be codified at 15 C.F.R. pts. 740, 742, 774); Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category X, 77 Fed. Reg. 33,698, 33,698-99 (proposed June 7, 2012) (to be codified at 22 C.F.R. pt. 121).

9. Revisions to Export Administration Regulations: Control of Military Electronic Equipment and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List, 77 Fed. Reg. 70,945, 70,945 (proposed Nov. 28, 2012) (to be codified at 15 C.F.R. pt. 774); Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XI and Definition for "Equipment", 77 Fed. Reg. 70,958, 70,958 (proposed Nov. 28, 2012) (to be codified at 22 C.F.R. pt. 121).

10. Revisions to the Export Administration Regulations: Auxiliary and Miscellaneous Items That No Longer Warrant Control Under the United States Munitions List and Items on the Wassenaar Arrangement Munitions List, 77 Fed. Reg. 29,564, 29,564 (proposed May 18, 2012) (to be codified at 15 C.F.R. pts. 742, 772, 774); Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XIII, 77 Fed. Reg. 29,575, 29,575 (proposed May 18, 2012) (to be codified at 22 C.F.R. pt. 121).

[for] foreign policy reasons.”¹¹ The agencies have also reportedly completed preparation of the “Beast Rule,” a consolidated set of final rules for transfers of certain items in categories VIII and XIX, and implementation of transition rule elements, to include a definition for “specially designed” (discussed further below).¹²

Public comments to the scope of the proposed transfers were both positive and negative. Commenters objected to proposals involving transfers of civil items on the EAR Commerce Control List (CCL) to the USML.¹³ In addition, several members of Congress expressed concern regarding the scope of reform.¹⁴ Interagency disagreements on the scope of transfers were also reported.¹⁵

Final rules implementing transfers cannot issue until requisite notifications to Congress are provided under section 38(f) of the Arms Export Control Act (AECA).¹⁶ Transfer of Category XV (spacecraft) items also will require legislation. Several measures were introduced in Congress to address this latter requirement, two of which were contained in the annual National Defense and Foreign Relations reauthorization acts. These passed the House and remained pending with the Senate in the final lame duck session of Congress at the end of 2012.¹⁷ Among other things, the measures seek to empower the President to remove commercial satellites from the USML. Each act also seeks to amend Section 38(f) of the AECA to require advanced notifications of transfers to include, “to the extent practicable, an enumeration of the item or items to be removed.”¹⁸ BIS advised that this provision would “delay or cripple” reform.¹⁹

C. TRANSITION RULE

On June 21, 2012, BIS issued a proposed rule (known as the “Transition Rule”) to harmonize EAR license exceptions for government uses (GOV), repair and replacement parts (RPL), temporary exports (TMP), and technology and software (TSU) with similar ITAR license exemptions; clarify the validity period for existing ITAR license authoriza-

11. Revisions to the Export Administration Regulations (EAR): Export Control Classification Number OY521 Series, Items Not Elsewhere Listed on the Commerce Control List (CCL), 77 Fed. Reg. 22,191, 22,191 (proposed Apr. 13, 2012) (to be codified at 15 C.F.R. pts. 732, 734, 738, 740, 742, 774).

12. *BIS to Change Specially Designed Definition in Response to Comments*, INT’L TRADE TODAY (Sept. 11, 2012), <http://www.brokerpower.com/subscriber/article?id=58542&s=21422>.

13. *Export Control Reform News, Public Comments for USML Categories IX, X, and XIII Published Online*, EXPORT.GOV (Oct. 11, 2012), http://build.export.gov/main/ecr/eg_main_043652 (comment 3 in category X, and comments 2, 4, and 6 in category XIII).

14. Rep. Ileana Ros-Lehtinen, Chairman of the House Foreign Affairs Comm., Opening Statement at Export Control Reform Hearing (May 12, 2011), <http://archives.republicans.foreignaffairs.house.gov/news/story/?1820>; Kate Brannen, *Lawmakers See Threat to Oversight Role As Obama Pushes Export Reform*, DEFENSE NEWS (Apr. 21, 2012), <http://www.defensenews.com/article/20120421/DEFREG02/304210002/Lawmakers-Sec-Threat-Oversight-Role-Obama-Pushes-Export-Reform>.

15. Adam Entous & Evan Perez, *White House Efforts to Relax Gun Exports Face Resistance*, WALL ST. J. (May 1, 2012, 9:57 PM), <http://online.wsj.com/article/SB10001424052702304868004577378421787264242.html>.

16. See 22 U.S.C. § 2778(f) (2006).

17. H.R. 4310, 112th Cong., 126 Stat. 1632 (2013) (enacted); Foreign Relations Authorization Act, Fiscal Year 2013, H.R. 6018, 112th Cong. (2012).

18. H.R. 4310 § 1243; H.R. 6018 § 526.

19. Eric L. Hirschhorn, Under Sec’y for Indus. and Sec., Remarks at U.S. Dep’t of Commerce Bureau of Indus. and Sec. Update 2012 Conference (July 17, 2012), http://www.bis.doc.gov/news/2012/hirschhorn_update_2012.htm.

tions on items being transferred to the CML; establish a twenty-five percent de minimis rule for CML items generally and a zero percent de minimis rule on exports of CML items to ITAR-embargoed countries; and to require Congressional notification of proposed sales of CML items exceeding specific threshold amounts.²⁰ The proposed zero percent de minimis and Congressional notification requirements are strongly opposed by industry.²¹

D. SPECIALLY DESIGNED

The BIS issued a revised proposed definition for “specially designed” for use throughout the CCL and in lieu of “specifically” on the USML.²² Similar to the earlier 2011 proposal, the revised definition sets forth a multistage “catch and release” process that requires exporters to choose among three possible definitions and determine whether an item falls within one of several carve-outs.²³ It was subject to substantial negative public comments. In acknowledging that the definition is difficult to apply and inconsistent with the goal of establishing a positive list,²⁴ BIS sought comments on positive descriptions to replace current CCL listings using the term.²⁵

III. Other Export Administration Regulations Developments

Other significant changes to the EAR in 2012 include the addition of new license requirements for certain microwave and millimeter wave electronic components;²⁶ changes conforming the EAR with the termination of United Nations sanctions against Rwanda;²⁷ changes to implement agreements reached at the 2011 Wassenaar Arrangement (Wassenaar) Plenary Meeting, to include the revision of over forty ECCNs to conform to changes to the Wassenaar List of Dual-Use Goods and Technologies, to raise Adjusted Peak Performance parameters for high performance computers, and to add Mexico to the

20. Proposed Revisions to the Export Administration Regulations: Implementation of Export Control Reform; Revisions to License Exceptions after Retrospective Regulatory Review, 77 Fed. Reg. 37,524, 37,524 (proposed June 21, 2012) (to be codified at 15 C.F.R. pts. 734, 736, 740, 740, 742-44, 750, 758, 762, 764, 774).

21. See Export Control Reform News, *Public Comments on the BIS and DDTC Proposed Transition Rules Are Now Available Online*, EXPORT.GOV (Aug. 15, 2012), http://build.export.gov/main/ecr/eg_main_043652 (e.g., comments 12, 14, and 17).

22. “Specially Designed” Definition, 77 Fed. Reg. 36,409, 36,409 (proposed June 19, 2012) (to be codified at 15 C.F.R. pts. 772, 774); Amendment to the International Traffic in Arms Regulations: Definition for “Specially Designed”, 77 Fed. Reg. 36,428, 36,428 (proposed June 19, 2012) (to be codified at 22 C.F.R. pt. 120).

23. 77 Fed. Reg. at 36,411; 77 Fed. Reg. at 36,429-430.

24. Wolf Remarks, *supra* note 4.

25. Feasibility of Enumerating “Specially Designed” Components, 77 Fed. Reg. 36,419, 36,419 (proposed June 19, 2002) (to be codified at 15 C.F.R. pt. 774).

26. Export and Reexport License Requirement for Certain Microwave and Millimeter Wave Electronic Components, 77 Fed. Reg. 1,017, 1,017 (proposed Jan. 9, 2012) (to be codified at 15 C.F.R. pts. 740, 742, 774).

27. Export and Reexport Controls to Rwanda and United Nations Sanctions Under the Export Administration Regulations, 77 Fed. Reg. 42,973, 42,973 (proposed July 23, 2012) (to be codified at 15 C.F.R. pts. 732, 738, 746, 774).

list of Wassenaar participant states;²⁸ and changes to Category 1 biological agents and Category 2 equipment to implement understandings reached at the 2011 Australia Group Plenary Meeting.²⁹ Also in 2012, BIS issued a proposed rule to establish a 180-day deadline for final narrative accounts of EAR violations reported in initial voluntary disclosures.³⁰

BIS further issued proposed rules for administrative changes. These included a proposal to reclassify certain miscellaneous military items currently classified under ECCNs 0A018, 0A918, and 0E018 under proposed CML ECCNs 0A617 and 0E617;³¹ and a proposal to correct spelling mistakes, modify CCL references to the terms “parts” and “components,” and remove fourteen ECCNs for items subject to the exclusive jurisdiction of the Nuclear Regulatory Commission.³²

IV. Other International Traffic in Arms Developments

A. DEFENSE TRADE TREATIES

On March 21, 2012, the Department of State Directorate of Defense Trade Controls (DDTC) published a final rule amending the ITAR to implement the Defense Trade Cooperation Treaty between the United States and the United Kingdom.³³ Thereafter, following the exchange of diplomatic notes between the United States and the United Kingdom on April 13, 2012, DDTC issued a final rule announcing the entry into force of the Treaty and effectiveness of the implementing regulations.³⁴ The regulations incorporate a supplement of exclusions to the Treaty, which also includes a section for exclusions applicable to the Canadian exemption and adds Israel to the list of countries with shorter certification periods and higher dollar thresholds for congressional notification.

28. Wassenaar Arrangement 2011 Plenary Agreements Implementation: Commerce Control List, Definitions, New Participating State (Mexico) and Reports, 15 C.F.R. §§ 734, 738, 740 (2012).

29. Implementation of the Understandings Reached at the 2011 Australia Group (AG) Plenary Meeting and Other AG-Related Clarifications to the EAR, 77 Fed. Reg. 39,162, 39,162 (proposed July 2, 2012) (to be codified at 15 C.F.R. pt. 774).

30. Time Limit for Completion of Voluntary Self-Disclosures and Revised Notice of the Institution of Administrative Enforcement Proceedings, 77 Fed. Reg. 66,777, 66,777 (proposed Nov. 7, 2012) (to be codified at 15 C.F.R. pts. 764, 766).

31. Revisions to the Export Administration Regulations: Auxiliary and Miscellaneous Items That No Longer Warrant Control Under the United States Munitions List and Items on the Wassenaar Arrangement Munitions List, 77 Fed. Reg. 29,564, 29,564 (proposed May 18, 2012) (to be codified at 15 C.F.R. pts. 742, 772, 774).

32. Revisions to the Export Administration Regulations (EAR) To Make the Commerce Control List (CCL) Clearer, 77 Fed. Reg. 71,214, 71,214 (proposed Nov. 29, 2012) (to be codified at 15 C.F.R. pts. 734, 740, 772, 774).

33. Implementation of the Defense Trade Cooperation Treaty Between the United States and the United Kingdom, 77 Fed. Reg. 16,592, 16,592 (proposed Mar. 21, 2012) (to be codified at 22 C.F.R. pts. 120, 123-24, 126-27, 129).

34. Announcement of Entry Into Force of the Defense Trade Cooperation Treaty Between the United States and the United Kingdom, 77 Fed. Reg. 33,089, 33,089 (June 5, 2012) (to be codified at 22 C.F.R. pts. 120, 123, 124, 126, 127, 129).

The Australian Parliament passed legislation implementing the Defense Trade Cooperation Treaty between the United States and Australia in 2012.³⁵ But DDTC has not yet published the final rule implementing the Treaty.

B. CHEMICAL PROTECTIVE GEAR EXEMPTION

DDTC published a final rule on March 23, 2011, amending the exemption at ITAR Section 123.17 to permit the temporary export of chemical agent protective gear for personal use, subject to certain conditions.³⁶ The exemption applies to exports to Section 126.1 countries subject to additional specified conditions.

C. SECTION 126.1 COUNTRY CHANGES

In 2012, DDTC amended Section 126.1 to permit exports to Sri Lanka for assistance for aerial and maritime surveillance³⁷ and to clarify that the Coast Guard of Haiti is an eligible end user.³⁸ It also removed Yemen from the list of 126.1 countries to permit the issuance of license and other approvals for exports to Yemen on a case-by-case basis.³⁹

D. BROKERING

On February 27, 2012, DDTC published over one hundred seventy pages of highly critical public comments received in response to its 2011 proposed rule to amend ITAR Part 129 brokering regulations.⁴⁰ Among other things, the comments criticized the proposed rule as unclear, overly broad, redundant, and unduly burdensome. A November 28, 2012 Defense Trade Advisory Group (DTAG) meeting focused on further efforts to revise the brokering regulations, and a DTAG working group on the subject made various recommendations to DDTC regarding the same.⁴¹

35. *Australia Moves on U.S. Defense Trade*, IStockANALYST (Nov. 1, 2012), <http://www.istockanalyst.com/business/news/6118869/australia-moves-on-u-s-defense-trade>.

36. Amendment to the International Traffic in Arms Regulations: Exemption for Temporary Export of Chemical Agent Protective Gear, 77 Fed. Reg. 25,865, 25,865 (May 2, 2012) (to be codified at 22 C.F.R. pts. 123, 126).

37. Amendment to the International Traffic in Arms Regulations: Sri Lanka, 77 Fed. Reg. 16,670, 16,670 (Mar. 22, 2012) (to be codified at 22 C.F.R. pt. 126).

38. Amendment to the International Traffic in Arms Regulations: Haiti, 77 Fed. Reg. 12,201, 12,201 (Feb. 29, 2012) (to be codified at 22 C.F.R. pt. 126).

39. Amendment to the International Traffic in Arms Regulations: Yemen, 77 Fed. Reg. 39,392, 39,392 (July 3, 2012) (to be codified at 22 C.F.R. pt. 126).

40. *Regulations and Laws, Comments to Regulations and Laws: Public Comments Received in Response to the Proposed Rule to Amend ITAR Part 129, Registration and Licensing of Brokers, Brokering Activities, and Related Provisions*, U.S. DEP'T OF STATE (Feb. 27, 2012), <http://www.pmdtc.state.gov/archives2012.html#feb>.

41. See *DTAG Activity 2012*, U.S. DEP'T OF STATE (Nov. 28, 2012), <http://www.pmdtc.state.gov/dtag/index.html> (follow the "Documents and presentations from the November 28 Plenary meeting have been posted" hyperlink).

V. Trade Embargoes and Economic Sanctions

In 2012, the U.S. Government continued to increase restrictions on Iran and Syria, loosened restrictions on Burma (Myanmar), and imposed restrictions with respect to Yemen.

A. IRAN

Under the 2012 National Defense Authorization Act (NDAA), all Iranian financial institutions were designated as subject to sanctions in early 2012.⁴² The President further issued Executive Order 13599 on February 5, 2012 designating the Iranian government and Central Bank of Iran as blocked entities.⁴³

The President issued Executive Order 13606 on April 22, 2012, designating as blocked entities parties that operate or direct the operation of technology that “facilitates computer or network disruption, monitoring, or tracking that could assist in or enable serious human rights abuses by or on behalf of” the Iranian government, as well as parties that provide goods, services, or technology in support of such activities.⁴⁴

The President issued Executive Order 13608 on May 7, 2012, targeting foreign parties who violate or cause a violation of any pre-existing Iran sanction or facilitates a “deceptive transaction” for any party subject to such sanctions.⁴⁵ The term “deceptive transaction” refers to any transaction “where the identity of any [party] subject to the United States sanctions concerning Iran . . . is withheld or obscured from other[s] . . .”⁴⁶ Unlike most Department of Treasury Office of Foreign Assets Control (OFAC) blocking programs, the Executive Order does not block the assets of foreign parties that engage in those acts, but prohibits their entry into the U.S. and their ability to engage in transactions with U.S. parties.⁴⁷

The President issued Executive Order 13622 on July 30, 2012, to prohibit the maintenance of bank accounts in the United States by foreign financial institutions that knowingly engage in a significant financial transaction with the National Iranian Oil Company (NIOC), Naftiran Intertrade Company (the NICO), or with any party for the purchase of petroleum products from Iran.⁴⁸ It also designates any party, including non-financial institutions, that supports the NIOC, NICO, or the CBI, or that helps Iran purchase U.S. bank notes or precious metals.⁴⁹ In addition, the Executive Order imposes sanctions on any party that knowingly engages in a significant transaction for the purchase of petroleum products from Iran.⁵⁰

The Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA) was enacted on August 10, 2012, representing a landmark expansion of Iran sanctions that extends

42. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, § 1245 (2011).

43. Exec. Order No. 13,599, 77 Fed. Reg. 6,659, § 1(b) (Feb. 8, 2012).

44. Exec. Order No. 13,606, 77 Fed. Reg. 24,571, § 1(b) (Apr. 22, 2012).

45. Exec. Order No. 13,608, 77 Fed. Reg. 26,409, § 1(a)-(b) (May 1, 2012).

46. *Id.* at 26,410, § 7(d).

47. *Id.* at 26,409-10, § 1(b).

48. Exec. Order No. 13,622, 77 Fed. Reg. 45,897, § 1 (Aug. 2, 2012).

49. *Id.* § 5.

50. *Id.* § 2.

sanctions to foreign subsidiaries of U.S. companies.⁵¹ Under ITRA, foreign entities owned or controlled by U.S. parties are now prohibited from engaging in any transaction with the Iranian government or a party subject to Iranian jurisdiction that would be prohibited if performed by a U.S. party.⁵² The prohibition was implemented on October 9, 2012 through Executive Order 13628.⁵³

Among other requirements, the ITRA also: (1) requires U.S. security issuers to disclose certain activities involving Iran in quarterly or annual reports;⁵⁴ (2) expands the Iran Sanctions Act, as amended by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, (ISA) by, among other things, enlarging the menu of sanctions available under that law and increasing the type of activities subject to such sanctions;⁵⁵ (3) imposes sanctions against parties who, among other things, engage in censorship or related activities in Iran or Syria, or supply Iran or Syria with goods or technology for human rights abuses, such as rubber bullets, tear gas, or jamming or surveillance equipment;⁵⁶ and (4) adds additional restrictions on foreign financial institutions' business related to blocked parties or activities prohibited under the ISA,⁵⁷ which were incorporated as amendments to the Iranian Financial Sanctions Regulations on November 8, 2012.⁵⁸

On October 22, 2012, OFAC issued an amended version of the Iranian Transactions Regulations (ITR) and renamed those regulations the Iranian Transactions and Sanctions Regulations (ITSR).⁵⁹ As expected, the ITSR continues the ITR's prohibitions and adds new ones, mostly to codify the NDAA and Executive Order 13599.⁶⁰ Notably, the ITSR adds a general license for the export and re-export of medicine and medical supplies to Iran, but establishes exacting conditions for such transactions.⁶¹

B. SYRIA

The U.S. government continued to apply pressure on Syria in response to the Syrian government's violent crackdown on its people. Building upon significant actions in 2011, Executive Orders 13606 and 13608 (discussed above) apply to Syria as well.⁶²

C. BURMA

In response to the Burmese government's democratic reforms, OFAC eased sanctions against Burma on July 11, 2012 by issuing General License Nos. 16 and 17, which author-

51. Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8725 (2006).

52. *Id.*

53. Exec. Order No. 13,628, 77 Fed. Reg. 62,139, § 4 (Oct. 12, 2012).

54. 22 U.S.C. § 220 (2006).

55. *Id.* §§ 201-02, 204.

56. *Id.* §§ 402, 703.

57. *Id.* §§ 214-16.

58. Iranian Financial Sanctions Regulations, 77 Fed. Reg. 66,918 (Nov. 8, 2012) (to be codified at 31 C.F.R. pt. 561).

59. Iranian Transactions Regulations, 77 Fed. Reg. 64,664, 64,664 (Oct. 22, 2012) (to be codified at 31 C.F.R. pt. 560).

60. *See, e.g., id.* at 64,669.

61. *See, e.g., id.* at 64,682.

62. *See* Exec. Order No. 13,606, 77 Fed. Reg. 24,571 (Apr. 24, 2012); *see also* Exec. Order No. 13,608, 77 Fed. Reg. 26,407 (May 3, 2012).

ize the export of financial services to and new investment in that country, respectively.⁶³ The licenses explicitly exclude from their scope the Burmese Ministry of Defense and other parties and impose reporting requirements.⁶⁴ In conjunction with the general licenses, the President issued Executive Order 13619, which blocks the property of parties that engage in acts threatening the peace, security, or stability of Burma.⁶⁵ Thereafter, on November 16, 2012, OFAC issued General License No. 18, which authorizes imports of Burmese-origin goods into the United States, except certain goods such as jadeites and rubies mined in Burma and jewelry containing such jadeites or rubies.

D. YEMEN

On May 16, 2012, the President issued Executive Order 13611, blocking the property of parties that engage in acts threatening the peace, security, or stability of Yemen.⁶⁶ OFAC issued regulations on November 9, 2012 codifying the Yemen sanctions program.⁶⁷

VI. EAR Enforcement

BIS enforcement actions in 2012 reflect a continuation of BIS policy, announced in 2011, focusing on civil and criminal sanctions against individuals in addition to companies.⁶⁸ Criminal actions in 2012, including indictments, sentencing, and guilty pleas, involved a range of activities and destinations. Several actions dealt with illegal exports to Iran, including the export of computer equipment, petrochemical supplies, missile components, restricted military technology, aircraft equipment, and aviation fluids. Other cases involved exports of aerospace and defense goods and technology to China. Additional criminal enforcement actions punished the unlawful export of nuclear materials to Pakistan, and military equipment to Singapore and Hong Kong.⁶⁹

Significant civil and criminal enforcement actions in 2012 included the following:

63. U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, BURMESE SANCTIONS REGULATION, GENERAL LICENSE NO. 16 AUTHORIZING THE EXPORTATION OR REEXPORTATION OF FINANCIAL SERVICES TO BURMA (July 11, 2012) [hereinafter GENERAL LICENSE NO. 16]; U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, BURMESE SANCTIONS REGULATION, GENERAL LICENSE NO. 17 AUTHORIZING NEW INVESTMENT IN BURMA (July 11, 2012) [hereinafter GENERAL LICENSE NO. 17].

64. GENERAL LICENSURE NO. 16, *supra* note 63; GENERAL LICENSURE NO. 17, *supra* note 63.

65. Exec. Order No. 13,619, 77 Fed. Reg. 41,243, § 1 (July 13, 2012).

66. Exec. Order No. 13,611, 77 Fed. Reg. 29,533 (May 16, 2012).

67. Yemen Sanctions Regulations, 77 Fed. Reg. 67,276, 67,276 (Nov. 9, 2012) (to be codified at 31 C.F.R. pt. 552).

68. David W. Mills, Assistant Sec'y for Exp. Enforcement, Remarks at U.S. Dep't of Commerce Bureau of Indus. & Sec. Update 2012 Conference (July 18, 2012), http://www.bis.doc.gov/news/2012/mills_update_2012.htm.

69. Press Release, U.S. Dep't of Justice, Massachusetts Man Pleads Guilty to Conspiracy to Export Military Antennae to Singapore and Hong Kong (Jan. 20, 2012), <http://www.bis.doc.gov/news/2012/doj01202012.htm>; *see also* Press Release, U.S. Dep't of Justice, Pakistani Nat'l Sentenced in Scheme to Illegally Export Restricted Nuclear Materials to Pakistan (Jan. 6, 2012), http://www.bis.doc.gov/news/2012/akhtar_nadeem_sentence_pr_02292012.pdf.

A. ARC ELECTRONICS, INC., APEX SYSTEM, L.L.C., AND INDIVIDUALS

In October 2012, the Department of Justice announced the indictment of eleven individuals, a Texas-based company (Arc Electronics, Inc.), and a Russia-based company (Apex System, L.L.C.) for operating a complex procurement network to obtain and export microelectronics—such as analog-to-digital converters, static random access memory chips, microcontrollers, and microprocessors—from the United States to Russian military and intelligence agencies.⁷⁰ These products can be used in military radar, surveillance, missile guidance, and detonation systems. The U.S. government has alleged a significant conspiracy and concealment effort by the network.⁷¹ BIS also added 165 associated foreign persons and companies to the BIS Entity List.⁷²

B. AKRION SYSTEMS, LLC

In June 2012, Akrion Systems, LLC entered into a settlement agreement with BIS concerning 144 violations of the EAR for exporting controlled pumps, valves, and components to Taiwan, Singapore, Malaysia, and China without the required export licenses.⁷³ Akrion agreed to a civil penalty of \$900,000, all but \$100,000 of which is suspended provided Akrion commits no violations of the EAR in the next two years. Akrion voluntarily disclosed the violations to BIS.

C. ERICSSON DE PANAMA S.A.

In May 2012, Ericsson de Panama S.A. settled BIS charges for 262 violations of the EAR for the unlawful transshipment and re-export of telecommunications equipment from Cuba over the course of three years.⁷⁴ Items from Cuba were reportedly repackaged in Panama, sent to the United States for repair, and then returned to Cuba through Panama. The final settlement included a civil penalty of \$1.753 million and a required company-wide export audit of all transactions with Cuban customers.⁷⁵ Ericsson voluntarily disclosed the violations.

70. Press Release, U.S. Dep't of Justice, Russian Agent and 10 Other Members of Procurement Network for Russian Military and Intelligence, Operating in the U.S. and Russia, Indicted (Oct. 3, 2012), <http://www.bis.doc.gov/news/2012/doj10032012.htm>.

71. *Id.*

72. Addition of Certain Persons to the Entity List, 77 Fed. Reg. 61,249 (Oct. 9, 2012) (to be codified at 15 C.F.R. pt. 744).

73. U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. & SEC, ORDER RELATING TO AKRION SYSTEMS, LLC (June 6, 2012), available at <http://efoia.bis.doc.gov/exportcontrolviolations/e2269.pdf>.

74. Press Release, U.S. Dep't of Commerce, Bureau of Industry & Security, Ericsson de Panama Pays \$1.753 Million to Settle Charges of Unlicensed Transshipments to Cuba (May 25, 2012), http://www.bis.doc.gov/news/2012/bis_press05252012.htm.

75. *Id.*

D. MATTSON TECHNOLOGY, INC.

In April 2012, Mattson Technology, Inc. entered into a settlement agreement with BIS related to forty-seven violations of the EAR.⁷⁶ BIS found that Mattson acted with knowledge of a violation when it exported controlled pressure transducers to customers in Israel, Malaysia, China, Singapore, and Taiwan without the required export licenses notwithstanding being informed of the license requirement by a supply chain partner. The settlement agreement included a civil penalty of \$850,000, all but \$250,000 of which would be suspended provided Mattson commits no violations in the next year.⁷⁷

E. ANTIBOYCOTT ENFORCEMENT

In 2012, BIS reported settlement agreements with seven companies for alleged anti-boycott violations involving furnishing information in support of a foreign boycott or failing to report receipt of a boycott request. The assessed civil penalties totaled \$107,400 and ranged from \$8,000 to \$27,000 per company.⁷⁸ BIS also issued warning letters to three companies for failing to report the receipt of boycott requests. One of these three companies voluntarily disclosed its violations.⁷⁹

VII. ITAR Enforcement

DDTC entered into three consent agreements in 2012, two of which were related. Meanwhile, the Department of Justice increased criminal prosecutions for cases involving AECA violations.⁸⁰ These included prosecutions for unlawful exports of weapons, high-tech micro-electronics, F-16 airplane parts, thermal imaging cameras, night vision goggles, missile technical data, aerospace carbon fibers, anti-aircraft and anti-tank weapons, gyroscopes, lasers, stealth and drone technology, and related defense services.⁸¹

A. UNITED TECHNOLOGIES

The major case of 2012 involved United Technologies Corporation's (UTC) subsidiaries, including Pratt & Whitney Canada, Hamilton Sundstrand Corporation, and Sikorsky

76. U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. & SEC., ORDER RELATING TO MATTSON TECHNOLOGY, INC. (Apr. 30, 2012), available at <http://efoia.bis.doc.gov/exportcontrolviolations/e2263.pdf>.

77. *Id.*

78. See U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. & SEC., ALLEGED ANTIBOYCOTT VIOLATIONS (2012), <http://efoia.bis.doc.gov/antiboycott/violations/tocantiboycott.html>.

79. Letter from Edward O. Weant, Dir., Office of Antiboycott Compliance, U.S. Dep't of Commerce, Bureau of Indus. & Sec., to Alliant Techsystems, Inc. (Mar. 30, 2012), http://efoia.bis.doc.gov/antiboycott/warningletters/2012/2012_warning_letters.pdf; see also Letter from Edward O. Weant, Dir., Office of Antiboycott Compliance, U.S. Dep't of Commerce, Bureau of Indus. & Sec., to Pitcon Architectural Materials, LLC (Mar. 7, 2012), http://efoia.bis.doc.gov/antiboycott/warningletters/2012/2012_warning_letters.pdf; see also Letter from Edward O. Weant, Dir., Office of Antiboycott Compliance, U.S. Dep't of Commerce, Bureau of Indus. & Sec., to PBS&J Int'l Inc. (Feb. 1, 2012), http://efoia.bis.doc.gov/antiboycott/warningletters/2012/2012_warning_letters.pdf.

80. U.S. DEP'T OF JUSTICE, SUMMARY OF MAJOR U.S. EXPORT ENFORCEMENT, ECONOMIC ESPIONAGE, TRADE SECRET AND EMBARGO-RELATED CRIMINAL CASES (2012), available at www.pmdtc.state.gov/compliance/documents/OngoingExportCaseFactSheet.pdf.

81. *Id.*

Aircraft Corporation, which disclosed hundreds of ITAR violations dating back to 2002.⁸² Although the violations varied, a major focus was Pratt & Whitney Canada's sale of engine software for military attack helicopters to China. To resolve the charges, Pratt & Whitney Canada entered a guilty plea to violating the AECA and ITAR, and UTC, Hamilton Sundstrand Corporation, and Sikorsky Aircraft Corporation entered into Deferred Prosecution Agreements. The "global settlement" for all the criminal and civil penalties totaled \$55 million, \$20 million of which is suspended if used by UTC for remedial action.⁸³

B. UNITED STATES V. CHI MAK

In April 2012, the Ninth Circuit Court of Appeals issued a decision in the matter of *United States v. Chi Mak*, upholding AECA technical data provisions against a constitutional challenge.⁸⁴ In the case, Chi Mak, a defendant convicted for conspiracy to violate the AECA and attempting to export a compact disk containing U.S. Navy technology to China, appealed his conviction, alleging, among other things, that his First Amendment constitutional rights were violated because the technical data at issue was protected speech.⁸⁵

The Ninth Circuit applied an intermediate level of scrutiny and concluded that the AECA was not prior restraint or unconstitutionally vague. Rather, the court found the AECA is "content neutral" and the speech at issue can be regulated because it advances an important government interest. Further, Chi Mak's additional argument that the trial court failed to provide proper jury instructions concerning the government's burden on whether the technical data was in the public domain was denied by the Ninth Circuit, which noted the trial court's allowance of witness testimony on the public domain issue and the issuance of relevant jury instructions.⁸⁶

C. ALPINE AEROSPACE AND TS TECH TRADE

In March 2012, Alpine Aerospace Corporation and TS Trade Tech Incorporated entered into consent agreements for violations of the AECA arising from unauthorized exports of defense articles.⁸⁷ The companies were fined \$30,000 and \$20,000, respectively.⁸⁸

82. U.S. DEP'T OF STATE, BUREAU OF POLITICAL-MILITARY AFFAIRS, CONSENT AGREEMENT IN THE MATTER OF UNITED TECHNOLOGIES ¶¶ 27-29 (June 19, 2012), available at http://www.pmdtc.state.gov/compliance/consent_agreements/pdf/UTC_CA.pdf.

83. *Id.* ¶ 20.

84. *United States v. Chi Mak*, 683 F.3d 1126, 1130 (9th Cir. 2012).

85. *Id.* at 1136.

86. *Id.* at 1138.

87. U.S. DEP'T OF STATE, BUREAU OF POLITICAL-MILITARY AFFAIRS, CONSENT AGREEMENT IN THE MATTER OF ALPINE AEROSPACE CORP. (2012), available at http://www.pmdtc.state.gov/compliance/consent_agreements/pdf/Alpine_CA.pdf [hereinafter ALPINE CONSENT AGREEMENT]; see also U.S. DEP'T OF STATE, BUREAU OF POLITICAL-MILITARY AFFAIRS, CONSENT AGREEMENT IN THE MATTER OF TS TRADE TECH INC. (2012), available at http://www.pmdtc.state.gov/compliance/consent_agreements/pdf/AlpineTSTrade_CA.pdf [hereinafter TS TRADE CONSENT AGREEMENT].

88. ALPINE CONSENT AGREEMENT, *supra* note 87, ¶ 6; TS TRADE CONSENT AGREEMENT, *supra* note 87, ¶ 6.

Both fines were suspended on the condition that the respective amounts are used for directed remedial actions.

VIII. OFAC Enforcement

By mid-November 2012, OFAC had assessed almost \$625 million in fines in thirteen enforcement actions.⁸⁹ Of this amount, \$619 million was related to an enforcement action against ING Bank N.V., which agreed to forfeit \$619 million to the Department of Justice and New York County District Attorney's Office for engaging in more than 20,000 transactions, totaling more than \$2 billion, through the U.S. financial system on behalf of sanctioned Cuban and Iranian entities.⁹⁰

Of the remaining enforcement actions, the majority involved the ITR, including a \$1,054,388 settlement against Online Micro, LLC.⁹¹ Other notable enforcement actions included a \$1,347,750 settlement against Great Western Malting Co. for violations of the Cuban Asset Control Regulations⁹² and an \$855,000 settlement against the National Bank of Abu Dhabi for violations of the Sudanese Sanctions Regulations.⁹³

Additionally, 2012 saw a significant and surprising sanctions enforcement action delivered by a novel regulator, the New York State Department of Financial Services (DFS). On August 6, 2012, DFS charged Standard Chartered Bank (SCB), a wholly-owned subsidiary of Standard Chartered plc., for numerous violations of the ITR.⁹⁴ The parties quickly settled, with SCB agreeing to a civil monetary payment of \$340 million. SCB also agreed to install an on-site Compliance Monitor at its New York branch to review and assess internal controls relating to the banks' OFAC and BSL/AML compliance programs.⁹⁵ The Compliance Monitor's term will extend for two years, during which the Monitor shall identify corrective actions to address "identified flaws, weaknesses or other deficiencies in the compliance programs" at SBC's New York branch.⁹⁶ It remains to be seen whether DFS shall continue to play an active role in enforcement of sanctions regulations.

89. As of November 20, 2012, the exact amount was \$623,587,093. 2012 Enforcement Information, U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL (Jan. 2, 2013, 11:31 AM), <http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/2012.aspx>.

90. Press Release, U.S. Dep't of Justice, ING Bank N.V. Agrees to Forfeit \$619 Million for Illegal Transactions with Cuban and Iranian Entities (June 12, 2012), <http://www.bis.doc.gov/news/2012/doj06122012.htm>.

91. U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, SETTLEMENT AGREEMENT BETWEEN OFAC AND ONLINE MICRO (Feb. 16, 2012), available at http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/02242012_onlinemicro_settlement.pdf.

92. U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, GREAT WESTERN MALTING CO. SETTLES APPARENT VIOLATIONS OF CUBAN ASSETS CONTROL REGULATIONS (July 10, 2012), available at http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/07102012_great_western.pdf.

93. U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, NATIONAL BANK OF ABU DHABI SETTLES POTENTIAL LIABILITY FOR APPARENT VIOLATIONS OF THE SUDANESE SANCTIONS REGULATIONS (June 14, 2012), available at http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/06142012_nbad.pdf.

94. Consent Order, *In re* Standard Chartered Bank, 2012 WL 5194361 (N.Y. Bnk. Dept. Sept. 21, 2012), available at <http://www.dfs.ny.gov/banking/ea120921.pdf>.

95. *Id.* ¶ 9.

96. *Id.*

IX. Key Developments in Canadian Trade Controls

In 2012, the most significant changes to Canadian economic sanctions and export controls were in the Export Control List (ECL), expanded sanctions against Syria, relaxation of sanctions against Burma, and further liberalization of controls over information security exports.

A. SIGNIFICANT CHANGES TO THE EXPORT CONTROL LIST

Although they were not officially published until January of 2012, on December 19, 2011, Foreign Affairs and International Trade's Export Controls Division (ECD) announced a number of changes to the ECL, which had become effective December 16, 2011.⁹⁷ This caused significant concerns among a number of exporters.

The latest list of controlled goods and technology are now set out in a new "Guide to Canada's Export Controls (2010)."⁹⁸ Accordingly, the "Guide to Canada's Export Controls (2007)" is no longer in force. These changes were made to update Canada's controls in accordance with its commitments as of 2010 under various multilateral export control regimes, including the Wassenaar.

The amendments to the ECL include the addition of numerous goods and technology, which now require an export permit for their transfer from Canada. The amendments also include the removal of various items from control as well as clarifications regarding existing controlled items. Goods and technology that are affected by these changes include items in ECL Group 1 (dual use items), Group 2 (munitions list), Group 5 (miscellaneous items), Group 6 (missile technology), and Group 7 (chemical and biological weapons items).⁹⁹

Because of concerns expressed with the timing of the publication and the coming into force of these changes, ECD has indicated that the next set of changes (to bring the ECL up to date with more recent changes under the Wassenaar) will not come into force until thirty days after they are announced. This is currently anticipated to occur in early 2013.

B. EXPANDED SANCTIONS MEASURES AGAINST SYRIA

Effective March 5, 2012, Canada expanded its economic sanctions against Syria by imposing a financial services ban.¹⁰⁰ The ban prohibits persons in Canada and Canadians outside of Canada from providing or acquiring financial or other related services to, from, or for the benefit of or on the direction or order of Syria or any person in Syria. There are some exemptions, including those for:

97. *A Guide to Canada's Export Controls—Changes and Corrections*, FOREIGN AFFS. & INT'L TRADE CAN., http://www.international.gc.ca/controls-controles/about-a_propos/expor/guide.aspx?view=d (last modified Jan. 16, 2013).

98. See *A Guide to Canada's Export Controls*, FOREIGN AFFS. & INT'L TRADE CAN., http://www.international.gc.ca/controls-controles/about-a_propos/expor/guide-2010.aspx?lang=eng&view=d (last modified Nov. 6, 2012).

99. *A Guide to Canada's Export Controls—Changes and Corrections*, *supra* note 97.

100. Press Release, Foreign Affairs & Int'l Trade Can., Canada Further Expands Sanctions Against Syria's Assad Regime (Mar. 5, 2012), <http://www.international.gc.ca/media/aff/news-communiques/2012/03/05a.aspx?view=d>.

- “loan repayments to any person in Canada, or any Canadians abroad, in respect of loans entered into before March 5, 2012” as well as “enforcement of security in respect of [such] loans, or payments by guarantors guaranteeing [such] loans;”¹⁰¹
- “financial services that are required to be provided or acquired further to a contract entered into before March 5, 2012;”¹⁰² and
- “financial services in respect of non-commercial remittances of \$40,000 or less sent to or from Syria, or any person in Syria, if the person providing the financial services keeps a record of the transaction.”¹⁰³

On May 17, 2012, Canada further imposed a ban on exporting, selling, supplying, or shipping to Syria or any person in Syria any luxury goods.¹⁰⁴ These are defined to mean “goods such as jewelry, gems, precious metals, watches, cigarettes, alcoholic beverages, perfume, designer clothing and accessories, furs, sporting goods, private aircraft, gourmet foods and ingredients, lobster, computers, televisions and other electronic devices.”¹⁰⁵

Sanctions against Syria were again expanded on July 5, 2012 with the implementation of a prohibition against the export, sale, supply, or shipping to Syria of goods that can be used for internal repression or in the production of chemical and biological weapons.¹⁰⁶

In addition, throughout the year, dozens of companies, government entities, and individuals were listed as “designated persons” under Canadian sanction measures against Syria. Canadian companies and individuals are prohibited from engaging in a wide range of dealings with designated persons under Canada’s sanctions regime. Canadians are also subject to reporting requirements in respect of property owned or controlled by designated persons and related proposed or actual transactions.

C. SANCTIONS AGAINST BURMA RELAXED

On April 24, 2012, most of Canada’s economic sanctions against Burma were repealed.¹⁰⁷ Enacted in 2007 and touted as being among the most aggressive in the world, Canada’s sanctions and export controls had prohibited most activities with Burma, including investment, exports and imports, the provision of financial services and technical data, the transiting of ships and aircraft, and dealings with designated persons.¹⁰⁸ Burma had also been listed on Canada’s Area Control List (ACL) since 1997. With these changes, Burma has now been removed from the ACL so that exports and transfers of goods or technology from Canada to Burma are no longer prohibited. These developments will raise new trade and investment opportunities for Canadian business. But firms should proceed with caution as certain restrictions remain in effect.

101. Regulations Amending the Special Economic Measures (Syria) Regulations, SOR/2012-35, ¶ 3.3(a)-(c) (Can.).

102. *Id.* ¶ 3.3(b).

103. *Id.* ¶ 3.3(c).

104. Regulations Amending the Special Economic Measures (Syria) Regulations, SOR/2012-107, ¶ 2.2 (Can.).

105. *Id.* ¶ 1.

106. Regulations Amending the Special Economic Measures (Syria) Regulations, SOR/2012-145, ¶ 7 (Can.).

107. Regulations Amending the Special Economic Measures (Burma) Regulations, SOR/2012-85, ¶ 4 (Can.) [hereinafter SOR/2012-85].

108. Special Economic Measures Act, SOR/2007-285, ¶¶ 3-13 (Can.).

Persons in Canada and Canadians outside of Canada are still prohibited from dealing with designated persons as listed in the Regulations. There is also a military trade embargo of Burma. Persons in Canada and Canadians outside of Canada are prohibited from supplying, transporting, or otherwise dealing in any arms or related material destined for Burma or any person in Burma. These prohibitions also apply to the transfer of technical data and provision of financial services related to military activities or dealings in arms and related materials.

D. SOME LIBERALIZATION OF ENCRYPTION EXPORT CONTROLS

Included in the above-noted changes to the ECL was a long-awaited implementation of the ancillary crypto decontrol note at Note 4 to ECL Group 1, Category 5 – Part 2, which decontrols items the primary function or set of functions of which is not any of the following: information security, a computer (including operating systems, parts, and components therefor), sending, receiving, or storing information or networking.¹⁰⁹ Further, their cryptographic functionality must be limited to supporting their primary function or set of functions, and when necessary, details of the items must be accessible and provided, upon request, to ascertain compliance with conditions of the decontrol note.

On July 31, 2012, General Export Permit No. 45 (Cryptography for the Development or Production of a Product) was issued.¹¹⁰ Provided certain conditions are satisfied, it allows for the export of controlled cryptographic items, subject to some exceptions, that are used for the development or production of a product without having to apply for an individual export permit. The transfer must be made to a non-government entity in one of twenty-nine designated countries or non-government entities in any country (other than sanctioned or ACL countries) if the entity is controlled by a Canadian resident or a non-government affiliated entity located in one of the twenty-nine designated countries. The exporter must notify ECD prior to the first transfer in each calendar year and then report on transfers made during the previous calendar year by January 31. ECD information requests must be responded to within fifteen days. In the case of physical exports, “GEP-45” must be specified on the export report filed with the Canada Border Services Agency.¹¹¹

ECD has also proposed another General Export Permit—GEP No. 46—which will allow for the transfer of finished products containing controlled cryptography to affiliates.¹¹² This would permit transfers to consignees that are an “affiliated company” of the exporting or transferring company and that have a parent whose head office is located in Canada, the United States, or one of twenty-nine designated countries. It would also have similar notification and reporting requirements as GEP No. 45. According to ECD, this is anticipated to come into force in early 2013.

109. *A Guide to Canada's Export Controls*, *supra* note 98, at 70-75.

110. General Export Permit No. 45 – Cryptography for the Development of Production of a Product, SOR/2012-160 (Can.).

111. *Notice to Exporters No. 182*, FOREIGN AFFS. & INT'L TRADE CAN., <http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/182.aspx?lang=eng&view=d> (last modified Jan. 22, 2013).

112. *Notice to Exporters No. 186*, FOREIGN AFFS. & INT'L TRADE CAN., <http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/186.aspx?lang=eng&view=d> (last modified Jan. 22, 2013).