

U.S. Export Controls and Economic Sanctions

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I. Introduction

Foreign policy considerations strongly influenced export control and sanctions issues in 2006 with terrorism, national security, and nonproliferation at the forefront. While the respective agencies warned of additional enforcement, the numbers did not generally reflect such an increase. This article contains a summary of selected developments from 2006 in the areas of dual-use controls, arms export controls, and economic sanctions.¹

II. Dual-Use Export Controls

A. DEEMED EXPORT RULEMAKING

In its 2005 Advance Notice of Proposed Rulemaking (ANPR), the U.S. Department of Commerce Bureau of Industry and Security (BIS) sought comments in response to recommended changes to the deemed export rule contained in a March 2004 report by the U.S. Department of Commerce Office of the Inspector General (OIG).² Under one of the OIG proposals, the disclosure of controlled technology could have been deemed to be an export to the person's country of birth, regardless of the person's most recent citizenship or permanent residency. The OIG recommendations were widely opposed and drew numerous public comments.³ In response, BIS withdrew the ANPR⁴ but also established a

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1. Additional information on developments from 2006, including changes to the respective regulations, can be found at the American Bar Association (ABA) Section of Int'l Law Committee on Export Controls and Economic Sanctions website at <http://www.abanet.org/dch/committee.cfm?com=ic716000>.

2. Office of Inspector Gen., U.S. Dep't of Commerce, Final Inspection Report No. IPE-16176 (2004).

3. Public comments can be found at the BIS Electronic FOIA Reading Room website at <http://efoia.bis.doc.gov/>. See, e.g., Letter from Kenneth B. Reisenfeld, Chair, ABA Section of Int'l Law, to Bureau of Indus.

Deemed Export Advisory Committee (DEAC).⁵ The DEAC is comprised of twelve business and academic leaders and charged with addressing deemed export issues, specifically to “strike a balance between protecting national security and ensuring that the United States continues to build upon its position as a leading innovator of technology.”⁶

B. CHINA

On July 6, 2006, BIS proposed an amendment to the Export Administration Regulations (EAR) to revise controls on exports to the People’s Republic of China (PRC).⁷ The proposed rule is intended, in part, to “prevent exports that would make a material contribution to the military capability of the [PRC].”⁸ The rule would impose new licensing requirements on items exported to the PRC with knowledge of a military end-use.⁹ This licensing requirement would affect certain items within forty-seven specifically identified Export Control Classification Numbers (ECCNs) that currently do not require a license to the PRC. The proposed rule would also mandate that most transactions both requiring a license to the PRC for any reason and exceeding \$5000 per ECCN be supported by a PRC End-User Certificate.¹⁰ The PRC End-User Certificate must be obtained from the PRC Ministry of Commerce (MOFCOM).¹¹ Finally, the proposed rule would also provide for the establishment of a new authorization for validated end-users (VEUs).¹² The VEU certification would allow the export, reexport, or transfer of eligible items without a license to specified end-users in eligible destinations, currently limited to the PRC.¹³ The stated purpose of the proposed VEU program is to create efficiencies for U.S. exporters.¹⁴

& Sec., U.S. Dep’t of Commerce, *available at* http://www.abanet.org/intlaw/committees/business_regulation/export_controls/deemedexportcomments.pdf.

4. Revisions and Clarification of Deemed Export Related Regulatory Requirements, 71 Fed. Reg. 30,840 (proposed May 31, 2006) (to be codified at 15 C.F.R. pts. 734 & 772).

5. Establishment of Advisory Committee and Clarification of Deemed Export Related Regulatory Requirements, 71 Fed. Reg. 29,301 (May 22, 2006).

6. Press Release, U.S. Dep’t of Commerce, Commerce Secretary Announces Advisory Committee to Protect National Security and Increase American Competitiveness and Innovation (Sept. 12, 2006), *available at* http://www.bis.doc.gov/news/2006/AdvisorCommittee09_12_06.htm.

7. Revisions and Clarification of Export and Reexport Controls for the People’s Republic of China (PRC); New Authorization Validated End-User, 71 Fed. Reg. 38,313 (proposed July 6, 2006) (to be codified at 15 C.F.R. pts. 740, 742, 744, & 748) [hereinafter Proposed China Rule].

8. *Id.*

9. “Military end-use” is defined as:

... incorporation into, or use for the production, design, development, maintenance, operation, installation, or deployment, repair, overhaul, or refurbishing of items: (1) Described on the U.S. Munitions List . . . ; (2) Described on the International Munitions List . . . ; or (3) Listed under ECCNs ending in ‘A018’ on the Commerce Control List.

Proposed China Rule, *supra* note 7, at 38,318.

10. *Id.* at 38, 319-20.

11. *Id.* at 38, 320.

12. *Id.* at 38, 320-21.

13. *Id.*

14. Comments on this issue by the ABA Section of International Law may be found at <http://www.abanet.org/dch/committee.cfm?com=ic716000>.

C. LIBYA DEVELOPMENTS

On August 31, 2006, BIS issued a rule amending the EAR to implement the rescission of Libya's designation as a state sponsor of terrorism.¹⁵ BIS removed Libya from the list of terrorist-supporting countries identified under Country Group E:1 and added it to Country Group D:1.¹⁶ Libya otherwise remains in Country Groups D:2, D:3, and D:4.¹⁷ In addition, the de minimis rules affecting Libya have been changed consistent with its removal from the Country Group E:1 list: Reexports of goods to Libya from abroad are now subject to the EAR only when U.S. content exceeds 25 percent, a relaxation from the previous 10 percent level.¹⁸ Also under this rule, BIS has removed all Anti-Terrorism (AT) restrictions on exports to Libya, placed it in Computer Tier 3 for exports and reexports of high performance computers, and made available most other license exceptions and comprehensive special licenses to qualifying exports.¹⁹

D. KNOWLEDGE DEFINITION, RED FLAGS, AND SAFE HARBOR PROPOSAL WITHDRAWN

On October 18, 2006, BIS withdrew its proposed rule clarifying the EAR definition of knowledge, providing updated guidance on red flags for exporters, and creating a safe-harbor procedure.²⁰ The rule was originally published on October 13, 2004.²¹ The purpose of the proposed rule was to revise the definition of knowledge in the EAR, expand the current list of red flags from twelve to twenty-three, and to establish a safe-harbor mechanism for knowledge-based violations. Ultimately, BIS determined that "amending the EAR would neither clarify the public's responsibilities under the EAR nor make the regulations more effective."²²

E. ENFORCEMENT

The Office of Export Enforcement (OEE) remained active in 2006. OEE's efforts primarily targeted proliferation of Weapons of Mass Destruction (WMD) and missile deliv-

15. See *BIS Issues Rule Ending Libya's Status as Terrorist State*, WASH. TARIFF & TRADE LETTER, Sept. 4, 2006, at 2 [hereinafter *BIS Issues Libya Rule*]; see also Implementation in the Export Administration Regulations of the United States' Rescission of Libya's Description as a State Sponsor of Terrorism and Revisions Applicable to Iraq, 71 Fed. Reg. 51,714 (Aug. 31, 2006) (to be codified at 15 C.F.R. pts. 734, 738, 740, 742, 746, 748, 750, 752, 764, 772, & 774). This rescission was issued in response to the President's certification to Congress on May 15, 2006 that Libya had not provided support for international terrorists during the previous six months, and that Libya had provided assurances that it would not in the future support acts of international terrorism. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 51,715.

19. *Id.*; see also *BIS Issues Libya Rule*, *supra* note 15, at 3. For additional guidance and a comprehensive overview of the licensing requirements and policy of the new Libya rule, see BIS License Requirements, Licensing Policy, <http://www.bis.doc.gov/PoliciesAndRegulations/RegionalConsiderations/Libya083106Guidance.pdf>.

20. Revised "Knowledge" Definition, Revision of "Red Flags" Guidance and Safe Harbor, 71 Fed. Reg. 61,435 (proposed Oct. 18, 2006) (to be codified at C.F.R. pts. 732, 736, 740, 744, 752, 764, 772).

21. 69 Fed. Reg. 60,829 (proposed Oct. 13, 2004).

22. 71 Fed. Reg. 61,435-36.

ery systems, terrorism and state sponsors of terrorism, and diversions of dual-use goods to unauthorized military end-uses.²³ BIS reports that, during Fiscal Year 2006 (October 1, 2005, through September 30, 2006), it closed ninety-five administrative enforcement cases resulting in the imposition of \$13 million in administrative penalties, thirty-three export denial orders, and various other administrative sanctions.²⁴ These numbers are up from Fiscal Year 2005, during which BIS concluded seventy-four administrative cases resulting in \$6.8 million in administrative penalties.²⁵ In addition, BIS reports that during Fiscal Year 2006 OEE investigations resulted in thirty-four criminal convictions and \$3 million in criminal fines,²⁶ compared with thirty-one criminal convictions and \$7.7 million in criminal fines over the course of Fiscal Year 2005.²⁷

Finally, effective August 4, 2006, the EAR was amended to provide for the assessment of higher fines for EAR violations.²⁸ The EAR amendments are consistent with the recent amendments to the International Emergency Economic Powers Act made by the USA PATRIOT Improvement and Reauthorization Act of 2005.²⁹ Under this revision, BIS is now authorized to impose a maximum monetary civil penalty of \$50,000 per violation, an increase from the previously authorized amount of \$11,000 per violation.³⁰

F. PERSONNEL CHANGES

David H. McCormick left his post as Under Secretary of Commerce for Industry and Security to become Deputy National Security Advisor for International Economic Affairs. Mark Foulon has assumed the post of Acting Under Secretary. Christopher A. Padilla was confirmed by the U.S. Senate as Assistant Secretary of Commerce for Export Administration, replacing Peter Lichtenbaum, who returned to the private sector in February 2006. Also in 2006, John T. Masterson, Jr. was appointed Chief Counsel for Industry and Security and Catherine (Randy) Pratt was selected as Director for the Information Technology Controls Division.

III. Arms Export Controls

A. COMMODITY JURISDICTION ISSUES

1. *Directorate of Defense Trade Controls Activity: QRS-11*

As detailed further in Section III.C below, on March 28, 2006, the U.S. State Department, Directorate of Defense Trade Controls (DDTC), entered into a consent agreement

23. See Bureau of Indus. & Sec., Major Cases List, Oct. 2006, <http://www.bis.doc.gov/complianceandenforcement/Majorcaselist.pdf> [hereinafter October 2006 Major Cases List].

24. *Id.*

25. 2005 BIS ANN. REP. 10, available at http://www.bis.doc.gov/news/2006/annualReport/BIS_annualReportComplete05.pdf [hereinafter 2005 BIS ANNUAL REPORT].

26. See October 2006 Major Cases List, *supra* note 23, at 1.

27. See 2005 BIS ANNUAL REPORT, *supra* note 25, at 10.

28. Revision and Clarification of Civil Monetary Penalty Provisions of the Export Administration Regulations, 71 Fed. Reg. 44,189 (Aug. 4, 2006) (to be codified at 15 C.F.R. pt. 764) [hereinafter August 2006 Penalty Revision].

29. See H.R. 3199, 109th Cong. (2006) (enacted).

30. See August 2006 Penalty Revision, *supra* note 28.

with The Boeing Company to settle draft alleged violations of the International Traffic in Arms Regulations (ITAR).³¹ The draft alleged violations involved exports by Boeing of civilian aircrafts equipped with civilian inertial navigation devices that contained QRS-11 quartz rate sensors.³² DDTC had declared the QRS-11 sensor to be a defense article controlled under Category XII of the U.S. Munitions List (USML) and that the QRS-11 chip “did not cease to be controlled by the ITAR simply by virtue of its inclusion in a flight instrument.”³³ The settlement resolved the year’s most high-profile commodity jurisdiction issue to date. Among other things, the consent agreement states that Boeing “acknowledges that the Regulations, through the Commodity Jurisdiction (§ 120.4) process, is the only official mechanism by which questions regarding jurisdiction and categorization may be addressed.”³⁴ Thus, the settlement, in part, constitutes a statement by DDTC to the exporting community that an ITAR-controlled part or component remains ITAR-controlled even when incorporated into a civilian end-item unless DDTC declares otherwise through the formal commodity jurisdiction process.

2. *Initiative of the Committee on Export Controls and Economic Sanctions, ABA Section of International Law*

In 2006, the Committee held a series of meetings on commodity jurisdiction issues, including a dialogue with Ann Ganzer, Director of the Office of Defense Trade Controls Policy. In those meetings, Ms. Ganzer informally addressed various topics of commodity jurisdiction, including the following: (1) exporters may make self-determinations of commodity jurisdiction by reference to the factors set forth in 22 C.F.R. § 120.3, in conjunction with the USML; (2) DDTC can review, but may not endorse, any particular protocol for making such self-determinations; and (3) DDTC is conducting outreach efforts to industry and policy groups regarding commodity jurisdiction. These and other topics are under continuing discussion in the Committee.

B. EMBARGO ACTIVITIES³⁵

Eritrea. By Federal Register Notice dated March 6, 2006, and effective retroactively to September 12, 2005, DDTC announced a comprehensive arms embargo on Eritrea subject to very limited exceptions.³⁶

31. Specifically, the alleged violations were of 22 C.F.R. §§ 120-130 (2006). See Consent Agreement, In the Matter of The Boeing Company, Mar. 28, 2006, available at <http://www.pmdtc.state.gov/Consent%20Agreements/2006/The%20Boeing%20Company/Consent%20Agreement.pdf> [hereinafter Boeing Consent Agreement].

32. See DDTC Draft-Charging Letter, In the Matter of The Boeing Company, available at <http://www.pmdtc.state.gov/Consent%20Agreements/2006/The%20Boeing%20Company/Draft%20Charging%20Letter.pdf>.

33. *Id.* at 7.

34. See Boeing Consent Agreement, *supra* note 31, at 3.

35. Additional information about these arms embargoes, including the limited exceptions to such embargoes, is available from the Federal Register notices referred to in the endnotes in this section and from the DDTC website at www.pmdtc.state.gov.

36. See Notice of Suspense of Defense Export Licenses to Eritrea, 71 Fed. Reg. 11,281 (Mar. 6, 2006).

Haiti. Effective October 4, 2006, the ITAR was amended to remove Haiti from the list of countries subject to a U.S. arms embargo and to permit the transfer or export to Haiti of certain defense articles and services.³⁷

Indonesia. Effective March 29, 2006, DDTC ended its long-standing arms embargo on Indonesia.³⁸

Lebanon. On August 11, 2006, in accordance with United Nations Security Council Resolution (UNSCR) 1701, DDTC announced a general policy of denial on arms exports to Lebanon, save for those defense articles specifically authorized pursuant to UNSCR 1701.³⁹

Sudan. In September 2006, DDTC eased its embargo on Sudan by authorizing certain transfers of defense articles and services, funded by U.S. government assistance for the government of Southern Sudan.⁴⁰

Thailand. Despite the recent military takeover in Thailand, no arms embargo has been imposed on Thailand to date. However, at least one State Department official has indicated that licenses for arms exports to Thailand are being reviewed under a general policy of denial.

Venezuela. Effective August 17, 2006, subject to limited exception, DDTC imposed a comprehensive arms embargo on Venezuela.⁴¹

C. ENFORCEMENT

1. *L-3: Titan Consent Agreement*

L-3 Communications Corporation entered into a consent agreement with the U.S. government to settle alleged violations of the ITAR in connection with the failure of its subsidiary, Titan Corporation, to report commissions paid to third parties in its applications for exports of defense articles and Titan's false statements in those applications that there were no reportable commissions.⁴² Pursuant to the October 18, 2006, order that resulted from the consent agreement between L-3 and the government, based on Titan's actions, L-3 was fined civil penalties totaling \$3 million.⁴³

37. See Partial Lifting of Arms Embargo Against Haiti, 71 Fed. Reg. 58,496 (Oct. 4, 2006) (to be codified at 22 C.F.R. pt. 126).

38. See Notice of Export of Lethal Defense Articles/Defense Service to Indonesia, 71 Fed. Reg. 15,797 (Mar. 29, 2006).

39. See S.C. Res. 1701, U.N. Doc. S/RES/1701 (Aug. 11, 2006). Additional information about this SCR and the State Department's actions in response to the SCR are available on the DDTC website at http://www.pmdtc.state.gov/defense_trade_lebanon_arms_embargo.htm.

40. See Presidential Determination No. 2006-22, 71 Fed. Reg. 53,543 (Aug. 28, 2006).

41. See Notice of Revocation of Defense Export Licenses to Venezuela, 71 Fed. Reg. 47,554 (Aug. 17, 2006). There has also been anecdotal evidence that the U.S. Commerce Department Bureau of Industry and Security has adopted a general policy of denial with respect to licenses for dual-use exports to the Venezuelan military.

42. DDTC Consent Agreement, In the Matter of L-3 Communications, Oct. 18, 2006, available at http://www.pmdtc.state.gov/Consent%20Agreements/2006/L-3_communications_corporation/Consent_Agreement.pdf.

43. DDTC Order, In the Matter of L-3 Communications, Oct. 18, 2006, available at http://www.pmdtc.state.gov/Consent%20Agreements/2006/L-3_communications_corporation/Order.pdf.

2. *Boeing Consent Agreement*

As noted above in Section III.A, on March 28, 2006, Boeing entered into a consent agreement to settle draft alleged violations of the ITAR with respect to the export of civilian aircraft equipped with civilian inertial devices that contained QRS-11 quartz rate sensors. Formerly DDTC had declared to be ITAR-controlled because "certain features of the QRS-11, such as the capability to operate under severe environmental conditions, make it inherently military."⁴⁴ In the consent agreement, Boeing agreed, among other things, to (1) pay \$15 million to settle the draft charges, (2) appoint a Special Compliance Officer from outside the corporation to consult on and provide guidance to Boeing with respect to export compliance, and (3) allow on-site audits by the State Department.⁴⁵

3. *Goodrich Consent Agreement*

Goodrich and L-3 entered into a March 28, 2006, consent agreement with the government to settle alleged violations of the ITAR in connection with the omission of material facts in an export control document and exporting or causing the export of a defense article without authorization.⁴⁶ L-3 is cited in this settlement due to its acquisition of certain Goodrich business assets and for purposes of its ongoing responsibilities as successor. Among other things, under the consent agreement Goodrich and L-3 are required to pay aggregate civil penalties of \$7 million.⁴⁷

D. D-TRADE

Within the last year, several changes were made within D-Trade, the State Department's electronic license application filing system. First, in April 2006, the DSP-61 (for temporary imports) and DSP-73 (for temporary exports) forms first became available for use on D-Trade. Second, in September 2006, the most current version of the DSP-5, the form used for the permanent export of unclassified defense articles, became available. Third, in October 2006, additional changes were approved such that DDTC now only accepts DSP-5, DSP-61, and DSP-73 forms submitted through D-Trade (or by accessing electronic versions of those forms from the DDTC website).

In terms of use, D-Trade has also changed in the last year. According to DDTC, DSP-5 submissions through D-Trade have increased from approximately 5 percent of all such submissions in 2004 to approximately 40 percent as of October 12, 2006.⁴⁸

44. See *Boeing Consent Agreement*, *supra* note 31.

45. *Id.*

46. DDTC Consent Agreement, In the Matter of Goodrich Corporation, Mar. 28, 2006, available at <http://www.pmdtcc.state.gov/Consent%20Agreements/2006/Goodrich%20Corporation/Consent%20Agreement.pdf>.

47. DDTC Order, In the Matter of Goodrich Corporation, Mar. 28, 2006, available at <http://www.pmdtcc.state.gov/Consent%20Agreements/2006/Goodrich%20Corporation/Order.pdf>.

48. DDTC, D-Trade Update from the Managing Director, http://www.pmdtcc.state.gov/managing_director.htm (last updated Oct. 12, 2006).

E. PERSONNEL CHANGES

In 2006, Mike Dixon, Director, Office of Defense Trade Controls Management, departed from the State Department.

IV. Economic Sanctions

During 2006, the Office of Foreign Assets Control of the U.S. Department of the Treasury (OFAC) continued its recent trend of targeting specific individuals, activities, and companies when implementing new sanctions programs, rather than using broad-based sanctions models. Furthermore, OFAC undertook several initiatives⁴⁹ that appeared to reflect an increased focus on providing greater clarity and transparency for certain programs.

A. BELARUS, DEMOCRATIC REPUBLIC OF CONGO, AND CÔTE D'IVOIRE

President George W. Bush signed Executive Orders 13396, 13405, and 13413, respectively, to implement new economic sanctions programs for Côte d'Ivoire on February 7, 2006,⁵⁰ for Belarus on June 16, 2006,⁵¹ and for the Democratic Republic of Congo on October 27, 2006.⁵² With the general objectives of ending violence and corruption and promoting democratic development, these sanctions programs identify specific individuals and entities whose property and interests in property are subject to blocking requirements if they are within the United States or within the possession or control of a United States person.⁵³ In addition, these programs generally grant the Secretary of the Treasury, after consultation with the Secretary of State, discretion to add new persons and entities to the lists of parties that are subject to these blocking requirements.

49. For example, OFAC revised its enforcement procedures for the banking industry (discussed *infra*) and developed new internet resources. See OFAC, Recent OFAC Actions, Reorganization of the OFAC website (Jan. 5, 2006), <http://www.treas.gov/offices/enforcement/ofac/actions/20060105.shtml>.

50. Exec. Order No. 13,396, 71 Fed. Reg. 7,389 (Feb. 7, 2006) (implementing new economic sanctions against certain persons believed to have contributed to continued violations of a 2003 ceasefire agreement that resulted in the massacre of large numbers of civilians, widespread human rights abuses, significant political violence and unrest, and attacks against international peacekeeping forces leading to fatalities as well as supporting United Nations Security Council Resolution 1572 of November 14, 2004, which called on member states to take certain measures against those responsible for the continuation of hostilities in contravention of a May 3, 2003, ceasefire agreement).

51. Exec. Order No. 13,405, 71 Fed. Reg. 35, 485 (June 16, 2006) (implementing new economic sanctions against certain members of the Government of Belarus and other persons believed to have undermined Belarus's democratic processes or institutions, primarily during the country's March 2006 elections, as well as to have committed human rights abuses, and to have engaged in public corruption).

52. See Exec. Order No. 13,413, 71 Fed. Reg. 64,105 (Oct. 27, 2006) (implementing new economic sanctions against certain persons believed to have contributed to the widespread violence and atrocities in the Democratic Republic of Congo that continue to threaten regional stability, as well as supporting United Nations Security Council Resolutions 1596 of April 18, 2005, 1649 of December 21, 2005, and 1698 of July 31, 2006).

53. These blocking requirements mandate that United States persons cannot transfer, pay, export, withdraw, or engage in any other form dealing involving a property or interest in property held by an individual or entity identified by the sanctions program. This includes a prohibition on receiving or providing any contribution of funds, goods, or services to or for the benefit of any person listed or designated by the relevant executive order.

B. CUBA

In 2006, OFAC conducted a series of initiatives to simplify compliance with the Cuban Assets Control Regulations for personal activities that, in general, are not commercial in purpose.⁵⁴ Through a series of releases, OFAC updated and clarified its Cuban informational circular, which provides a consolidated, simplified explanation of the regulatory exemptions and licensing programs available for the provision of travel services, carrier services, and remittance forwarding services related to Cuba.⁵⁵ In addition, OFAC established an online license application system for family-related visits to Cuba called OFAC FastRequest.⁵⁶

C. IRAN

On July 17, 2006, OFAC created a favorable licensing regime under the Iranian Transactions Regulations⁵⁷ for those certain activities that either promote democratic reform in Iran or serve humanitarian objectives. Additionally, OFAC approved a new general license that authorizes United States persons to perform certain activities that would otherwise be prohibited by the Iranian Transaction Regulations, provided that these United States persons are both: (1) employees or contractors of the United Nations, the World Bank, the International Monetary Fund, the International Atomic Energy Agency, the International Labor Organization, or the World Health Organization; and (2) are performing these activities as part of the official business of those organizations.⁵⁸

While these new licensing regimes encourage constructive Iranian engagement by United States persons, OFAC continues to develop new methods to prohibit what it perceives as unconstructive relationships. Citing connections to Hezbollah, Hamas, the Popular Front for the Liberation of Palestine-General Command and the Palestinian Islamic Jihad, OFAC amended the Iranian Transaction Regulations on September 8, 2006, to exclude Bank Saderat from a previously issued general license allowing for “U-turn” pay-

54. OFAC Cuban Assets Control Regulations, 31 C.F.R. § 515 (2006).

55. OFAC, Circular 2006 Travel, Carrier and Remittance Forwarding Service Provider Program (Mar. 2006), <http://www.treas.gov/offices/enforcement/ofac/programs/cuba/circ2006.pdf>. The circular explains the basic policies and procedures applicable to all service providers, including appended guidelines regarding license applications, operational compliance, screening, enforcement, reporting, and recordkeeping. In March, April, June, August, and October of 2006, OFAC issued a series of releases that either updated the circular or clarified its interpretation. Among other effects, these releases expanded the list of authorized service providers for air, travel, and remittance-forwarding services to Cuba, as well as reemphasized OFAC’s pre-existing requirement that all remittances to Cuba be denominated in U.S. dollars, Canadian dollars, Swiss francs, British pounds, or Euros—not Cuban convertible pesos, also known as *chavitos*.

56. OFAC FastRequest, <https://fastrequest.ofac.treas.gov>.

57. OFAC, Iranian Transactions Regulations, Statement of Licensing Policy on Support of Democracy and Human Rights in Iran and Academic and Cultural Exchange Programs, 31 C.F.R. § 560 (2006), available at http://www.treas.gov/offices/enforcement/ofac/programs/iran/license_pol.pdf. While still requiring a case-by-case review, this policy encourages participation of United States persons in: conferences and training programs aimed at supporting Iranian democracy, human rights, and democratic institutions; educational, sports, and cultural exchanges with Iranians; and independent media and environmental programs deemed directly beneficial to the Iranian people.

58. Iranian Transactions Regulations, 71 Fed. Reg. 48,795 (Aug. 22, 2006) (to be codified at 31 C.F.R. § 560.539).

ments and transactions ordinarily incident to licensed or exempt transactions.⁵⁹ In so doing, OFAC effectively prohibited all transactions by persons within U.S. jurisdiction that directly or indirectly involve Bank Saderat.

D. NORTH KOREA

On May 8, 2006, OFAC amended the Foreign Assets Control Regulations⁶⁰ to prohibit United States persons from owning, leasing, operating, or insuring any vessel flagged by North Korea.

E. PALESTINIAN AUTHORITY

On April 12, 2006, OFAC determined that the Hamas party's leadership of the government of the Palestinian Authority, which followed elections held in January 2006, had given a property interest in the transactions of the Palestinian Authority to Hamas.⁶¹ As a result, this pronouncement clarified that the pre-existing blocking requirements that applied to Hamas' property and interests in property also applied to the property and interests in property of the Palestinian Authority.⁶² Contemporaneously with this pronouncement, OFAC also issued a series of general licenses that sought to mitigate the impact of these blocking requirements upon the Palestinian Authority.⁶³

These new general licenses authorize involvement by United States persons in connection with certain official governmental activities of the Palestinian Authority, such as paying taxes to the Palestinian Authority, engaging in transactions with certain governmental entities not controlled by Hamas, terminating existing activities involving the Palestinian Authority, as well as making in-kind donations of medicine, medical devices, and medical services.⁶⁴ Furthermore, on July 17, 2006, OFAC issued a set of guidelines for these general licenses that outlines OFAC's specific licensing policy for transactions with the Palestinian Authority.⁶⁵

59. Iranian Transactions Regulations, 71 Fed. Reg. 53,569 (Sept. 12, 2006) (to be codified at 31 C.F.R. pts. 560.516(a)-(b), 560.532(b), 560.405).

60. Foreign Assets Control Regulations, 71 Fed. Reg. 17,345 (Apr. 6, 2006) (to be codified at 31 C.F.R. pt. 500). Previously, United States persons had been authorized to engage in such transactions provided that the transactions occurred after June 19, 2000.

61. See OFAC, Recent OFAC Actions (Apr. 16, 2006), <http://www.treas.gov/offices/enforcement/ofac/actions/20060412.shtml>.

62. Global Terrorism Sanctions Regulations, 31 C.F.R. § 594 (2006); Terrorism Sanctions Regulations, 31 C.F.R. § 595 (2006); Foreign Terrorist Organizations Sanctions Regulations, 31 C.F.R. § 597 (2006).

63. Global Terrorism Sanctions Regulations, Terrorism Sanctions Regulations and Foreign Terrorist Organizations Sanctions Regulations, 71 Fed. Reg. 27,199 (May 10, 2006) (to be codified at 31 C.F.R. pts. 594, 595, 597).

64. Global Terrorism Sanctions Regulations, Terrorism Sanctions Regulations and Foreign Terrorist Organizations Sanctions Regulations, 71 Fed. Reg. 58,742 (Oct. 5, 2006) (to be codified at 31 C.F.R. pts. 594, 595, 597) (adding medical devices and medical services to the general licenses).

65. OFAC, Guidelines on Transactions with the Palestinian Authority (July 17, 2006), http://www.treas.gov/offices/enforcement/ofac/programs/terror/ns/pal_guide.pdf.

F. SUDAN

On October 13, 2006, the United States enacted the Darfur Peace and Accountability Act of 2006.⁶⁶ On that same day, President Bush signed an executive order⁶⁷ terminating certain pre-existing sanctions for the area and regional government of southern Sudan.⁶⁸ However, both the executive order and the Act presume that the national government of Sudan owns or controls all petroleum and petrochemical activity within all of its northern and southern territories. Therefore, throughout all regions of the country (including southern Sudan), the remaining sanctions still restrict activities related to the petroleum and petrochemical industries, including oilfield services and oil or gas pipelines, by requiring the blocking of related assets and prohibiting United States persons from engaging in certain related transactions. In addition, the states of California, Connecticut, Illinois, and Maine separately enacted statutes in 2006 that prohibit the investment of state funds in companies doing business with Sudan.⁶⁹

G. SYRIA

On April 25, 2006, President Bush signed Executive Order 13399.⁷⁰ While the executive order blocks the property of any person connected with terrorist acts in Lebanon, its primary objective is to support the investigations conducted by the United Nations⁷¹ and by the Government of Lebanon regarding the assassination of former Lebanese Prime Minister Rafiq Hariri in 2005. While no parties were immediately designated under the executive order, Syrian additions to the Specially Designated National List were issued on January 11, 2006, pursuant to a previously issued executive order,⁷² and, subsequently, on August 15, 2006.

66. Darfur Peace and Accountability Act of 2006, Pub. L. No. 109-344, 120 Stat. 1869 (to be codified at 50 U.S.C. § 1701).

67. Exec. Order No. 13,412, 71 Fed. Reg. 61,369 (Oct. 13, 2006).

68. The region of Sudan exempted from the pre-existing 1997 sanctions is "Southern Sudan, Southern Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur, or marginalized areas in and around Khartoum." Exec. Order No. 13,412, 71 Fed. Reg. 61,369 (Oct. 13, 2006). The definition of this area is left to the discretion of the Secretary of State to be defined in future regulations.

69. CAL. GOV'T CODE § 7513.6 (Supp. 2007) (effective Jan. 1, 2007); 2006 Conn. Legis. Serv. P.A. 06-51 (West) (effective May 8, 2006); 15 ILL. COMP. STAT. 520/22.5-22.6 (Supp. 2006) (effective Jan. 27, 2006); ME. REV. STAT. ANN. tit. 5, § 1956 (Supp. 2006) (approved Apr. 5, 2006) (to be repealed July 1, 2009). Arizona, Louisiana, New Jersey, and Oregon approved similar divestment plans in 2005. ARIZ. REV. STAT. ANN. § 38-716 (Supp. 2006); LA. REV. STAT. ANN. § 11:312 (Supp. 2007) (effective May 27, 2005); N.J. STAT. ANN. § 52:18A-89.9 (Supp. 2006) (effective Aug. 1, 2005); OR. REV. STAT. §§ 293.812-.817 (2005) (effective Aug. 23, 2005) (also applies to Iran). Furthermore, by the date of this article's publication, the legislatures of twenty-three additional states and the District of Columbia will have considered or will be considering legislation regarding Sudan divestment. See Sudan Divestment Task Force, <http://www.sudaninvestment.org> (last visited Jan. 29, 2007).

70. Exec. Order 13,399, 71 Fed. Reg. 25,059 (Apr. 25, 2006).

71. See S.C. Res. 1595, U.N. Doc. S/Res/1595 (Apr. 7, 2005).

72. Exec. Order No. 13,338, 69 Fed. Reg. 26, 751 (May 11, 2004).

H. OFAC ENFORCEMENT PROCEDURES FOR BANKING INSTITUTIONS

On January 12, 2006, OFAC issued an interim final rule instituting new procedures for all enforcement cases involving banking institutions.⁷³ These new enforcement procedures, which became effective thirty days after their issuance, represent a significant departure from the more formulaic approach of previous procedures.⁷⁴ They adopt a broader approach that considers a wide variety of facts and circumstances related to banking institutions and prescribe the application of penalties on a case-by-case basis.

Under the revised procedures, if a banking institution incurs an apparent violation, OFAC will evaluate the specific institution's overall OFAC compliance, including: (1) patterns or weaknesses in the institution's compliance program; (2) remedial measures taken to address those patterns or weaknesses; (3) the history of voluntary disclosure or of providing enforcement information to OFAC; (4) the number of improperly and properly handled transactions or accounts during the period under review; and (5) the level of cooperation provided by the banking institution with subpoena requests. These new procedures reflect several interagency initiatives through which OFAC has sought to increase cooperation with banking regulators⁷⁵ and provide for the sharing of information regarding apparent OFAC violations with other federal banking regulators. In addition, the new enforcement procedures include risk matrices, originally issued by other banking regulatory agencies,⁷⁶ that depository institutions may use as operational best practices guidelines.⁷⁷

I. ADMINISTRATIVE ACTIONS AND COURT CASES INVOLVING OFAC PROGRAMS

While no penalty in 2006 equaled the ABN AMRO Bank, N.V. penalty previously assessed in December 2005,⁷⁸ OFAC continued its practice of periodically posting important, final agency Penalty Notices and relevant case reports on its website to the extent

73. Economic Sanctions Enforcement Procedures for Banking Institutions, 71 Fed. Reg. 1,971 (Jan. 12, 2006) (to be codified at 31 C.F.R. pt. 501) [hereinafter *Banking Institutions*].

74. In tandem with the interim final rule, OFAC published a notice partially withdrawing the 2003 Economic Sanctions Enforcement Guidelines to the extent that these older guidelines applied to banking institutions. 71 Fed. Reg. 1,994 (proposed Jan. 12, 2006) (to be codified at 31 C.F.R. pt. 501).

75. Specifically, these interagency initiatives reference the members of the Federal Financial Institutions Examination Council, which includes the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision. An example of one such collaborative effort is the release of the Bank Secrecy Act Anti-Money Laundering Examination Manual that was issued in June 2005 and further revised and reissued in August 2006.

76. See Bank Secrecy Act Anti-Money Laundering Examination Manual, App. M ("Quantity of Risk Matrix—OFAC Procedures") 320 (2005), <http://www.occ.treas.gov/handbook/1-BSA-AMLwhole.pdf>.

77. *Banking Institutions*, *supra* note 73, at 1,972.

78. On December 19, 2005, OFAC, together with the Board of Governors of the Federal Reserve System, entered into a Cease and Desist Order against ABN AMRO Bank, N.V., and assessed a penalty in the amount of \$40 million against ABN AMRO Bank, N.V., which also satisfied a penalty concurrently assessed by the Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of the Treasury in the amount of \$30 million. The OFAC penalties were based upon violations of the Iranian and Libyan sanctions that occurred between December 2001 and April 2004. In addition, OFAC further demanded that a qualified independent third party review certain of ABN AMRO's transactions for evidence of additional violations. See OFAC Enforcement Information (Jan. 3, 2006), <http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/01032006.pdf>.

permitted under applicable law.⁷⁹ Many of these administrative cases as well as those resolved in the court system during 2006 involved penalties that were assessed for travel to sanctioned countries.⁸⁰

In addition to these travel-related penalties and several other prominent cases,⁸¹ two court cases that were active in 2006 particularly merit the attention of legal practitioners. First, in *United States v. Quinn*, a federal district court concluded that knowledge of OFAC licensing requirements did not satisfy the willfulness element of the alleged sanctions violations involved.⁸² Second, in *Del Monte v. United States*, the Del Monte organization filed documents seeking an injunction to compel OFAC to issue a license and a declaratory judgment that OFAC violated its mandatory legal duty to issue the license in a timely manner.⁸³

79. OFAC Civil Penalties and Enforcement Information, <http://www.treas.gov/offices/enforcement/ofac/civpen/index.shtml> (last visited Jan. 29, 2007). Of note, during the period from May to November 2006, OFAC identified fourteen companies with which it had agreed on settlement penalties for violations of the Cuban, Iranian, Libyan, and Sudanese sanctions programs. In addition to a description of the violations, these listings indicated whether or not the violations were voluntarily disclosed as well as whether or not the company had undertaken remedial compliance measures. Also, during that same period, OFAC reported several actions against ten individuals, whom OFAC did not name, for travel-related violations of the Cuban sanctions program or the purchase of Cuban cigars over the Internet.

80. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764 (9th Cir. 2006) (Plaintiff was penalized for travel to Iraq in violation of U.S. economic sanctions. The Court of Appeals affirmed the decision that OFAC was authorized to impose the travel ban and to prohibit the government from referring plaintiff's unpaid penalty to a private collection agency.); *Clancy v. Office of Foreign Assets Control*, No. 05-C-580, 2006 WL 2473346 (E.D. Wis. Aug. 24, 2006) (Clancy received a monetary penalty for traveling to Iraq to serve as a human shield in violation of Iraqi Sanctions Regulations, 31 C.F.R. § 575 (2006), and alleged that OFAC violated his First and Fifth Amendment rights and his right to travel to foreign countries pursuant to Article 12 of the International Covenant on Civil and Political Rights).

81. *Al-Haramain Islamic Found., Inc. v. Bush*, No. 06-274-KI, 2006 WL 2583425 (D. Or. Sept. 7, 2006) (Islamic foundation, monitored by the government, denied access to classified documents due to broader national security concerns); OFAC, Recent OFAC Actions—GasTech Settlement Agreement, <http://www.treas.gov/offices/enforcement/ofac/actions/20060707.shtml> (OFAC and GasTech Engineering Corp. settled Iranian Program Allegations as a condition of its plea agreement with the U.S. Attorney, Northern District of Oklahoma. In 2006, GasTech pled guilty to conspiracy to violate Iranian Transactions Regulations and was sentenced to probation and a \$50,000 criminal fine. OFAC alleged GasTech willfully exported its services to the National Iranian Gas Company to construct a plant in Iran. Conditions of the plea agreement include the remittance of \$33,000, in addition to the fine, and the implementation of a corporate compliance program by GasTech). In addition, several OFAC cases involved the transfer of funds to Specially Designated Global Terrorists, and, in each case, the court found such transfers to intentionally or knowingly provide material support to a foreign terrorist organization. See also *Strauss v. Credit Lyonnais*, No. CV-06-0702, 2006 WL 2862704 (E.D.N.Y. Oct. 5, 2006); *United States v. Elashi*, 440 F. Supp. 2d 536 (N.D. Tex. 2006); *United States v. Esfahani*, No. 05 CR 0255, 2006 WL 163025 (N.D. Ill. Jan. 17, 2006).

82. *United States v. Quinn*, 416 F. Supp. 2d 133 (D.D.C. 2006) (Defendant, convicted of violating Iran export restrictions, released on bond pending appeal resolution. Court concluded that knowledge of OFAC licensing requirement did not satisfy the willfulness element of the offenses.).

83. Complaint for Declaratory and Injunctive Relief, *Del Monte v. United States*, No. 1:06-01844-RJL (D.D.C. filed Oct. 27, 2006) (Plaintiff brings action to compel OFAC to issue overdue export license authorizing shipment of fruit to Iran. The complaint alleges that all U.S. government agencies have reviewed the license application and found it warranted, but OFAC has failed to issue the license, causing economic harm to Plaintiff. Plaintiff seeks an injunction to compel OFAC to issue the license and a declaratory judgment that OFAC violated a mandatory legal duty to issue the license. As of the date of this article's submission, this matter is still pending resolution.).

