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## Export Controls and Economic Sanctions

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## Export Controls and Economic Sanctions

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# Export Controls and Economic Sanctions

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## I. Introduction

This Article summarizes important developments in 2016 in export controls and economic sanctions, including developments surrounding United States economic sanctions regulations and trade embargoes, international traffic in arms regulations, and export administration regulations. The article also discusses voluntary United States self-disclosure program for willful violations and changes to Canadian sanctions programs.

## II. Developments Involving the Economic Sanctions Regulations and Trade Embargoes Administered by the United States Treasury Department's Office of Foreign Assets Control

### A. CUBA SANCTIONS

In 2016, the United States Treasury Department's Office of Foreign Assets Control (OFAC) issued three rules to amend its Cuban Assets Control Regulations (CACR). First, on January 27, 2016, OFAC published a final rule that: removed financial restrictions for non-agricultural exports; expanded air carrier services; expanded travel authorizations to Cuba pertaining to professional meetings, public performances, clinics, workshops, exhibitions, and athletic and other competitions; and expanded the list of authorized humanitarian projects to include disaster preparedness and response.<sup>1</sup>

Second, on March 16, 2016, OFAC promulgated a final rule that: further eased restrictions on certain economic activity with Cuba (*e.g.*, authorization for U.S. financial institutions to open and maintain bank accounts in the United States for Cuban nationals in Cuba to receive payments in the United States for authorized transactions and to process "U-Turn"

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1. Cuban Assets Control Regulations, 81 Fed. Reg. 4,583 (Jan. 27, 2016) (to be codified at 31 C.F.R. pt. 515).

transactions in which Cuba or a Cuban national has an interest); established new opportunities for persons subject to U.S. jurisdiction to establish a physical and/or business presence in Cuba for certain kinds of activities (e.g., physical presence authorization for humanitarian projects and non-commercial activities intended to provide support for the Cuban people, and business presence authorization for exporters of goods that are authorized for export or re-export to Cuba and certain other kinds of entities that facilitate authorized transactions); and expanded the authorization to travel to Cuba for certain kinds of educational purposes.<sup>2</sup>

Finally, on October 17, 2016, OFAC issued a final rule that served to expand opportunities for scientific collaboration by authorizing certain transactions related to Cuban-origin pharmaceuticals and joint medical research; improve living conditions for Cubans by expanding existing authorizations for grants and humanitarian-related services; increase people-to-people contact in Cuba by facilitating authorized travel and commerce; facilitate safe travel between the United States and Cuba by authorizing civil aviation safety-related services; and bolster trade and commercial opportunities by expanding and streamlining authorizations relating to trade and commerce.<sup>3</sup>

## B. IRAN SANCTIONS

On January 16, 2016, the United States and the European Union lifted certain nuclear-related sanctions on Iran in connection with the so-called “Iran deal,” *otherwise known as* the Joint Comprehensive Plan of Action (JCPOA) between Iran and the “E3/EU+3” (the European Union, France, Germany, the United Kingdom, China, Russia, and the United States), to ensure Iran’s nuclear program would be used only for peaceful purposes.<sup>4</sup> Sanctions were lifted on the same day that the International Atomic Energy Association (IAEA) reported it had verified Iran’s compliance with certain nuclear-related measures outlined in the JCPOA (a day known as Implementation Day under the agreement).<sup>5</sup>

The JCPOA was negotiated pursuant to the framework set out in a November 24, 2013 interim agreement entitled the Joint Plan of Action (JPOA), which allowed for limited sanctions relief in exchange for a short-

2. CACR, 81 Fed. Reg. 13,989 – 13,994 (Mar. 16, 2016) (to be codified at 31 C.F.R. pt. 515).

3. CACR, 81 Fed. Reg. 71,372 (Oct. 17, 2016) (to be codified at 31 C.F.R. pt. 515).

4. Joint Statement, EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif (Jan. 01, 2016), [https://eeas.europa.eu/headquarters/headquarters-homepage/2991/joint-statement-by-eu-high-representative-federica-mogherini-and-iranian-foreign-minister-javad-zarif\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/2991/joint-statement-by-eu-high-representative-federica-mogherini-and-iranian-foreign-minister-javad-zarif_en).

5. Director General of the International Atomic Energy Agency, *Verification and Monitoring in the Islamic Republic of Iran in light of United Nations Security Council Resolution 2231 (2015)*, U.N. doc S/2016/57, annex and enclosure (Jan. 19, 2016); Press Statement, John F. Kerry, Sec’y of State, Confirmation of Verification of Iranian Actions Pursuant to the Joint Comprehensive Plan of Action (Jan. 16, 2016), <https://www.state.gov/documents/organization/251545.pdf>.

term suspension of certain parts of Iran's nuclear program.<sup>6</sup> The parties subsequently agreed to the broad parameters of the JCPOA on July 14, 2015, including the types of sanctions-related commitments to be undertaken by the United States and the European Union on Implementation Day.<sup>7</sup>

In particular, the U.S. government announced the following limited Iran sanctions relief measures on Implementation Day:

1. Relaxation of Nuclear-Related Secondary Sanctions: The U.S. government relaxed its nuclear-related "secondary sanctions" on Iran, which previously allowed the U.S. government to impose certain penalties on non-U.S. persons operating outside of U.S. jurisdiction in specific, targeted Iranian sectors. The relaxations were implemented through two mechanisms: (i) the President's issuance of Executive Order 13716, which revoked Executive Orders 13574, 13590, 13622, and 13645 with respect to Iran and also re-authorized sanctions authorities for certain non-nuclear sanctions;<sup>8</sup> and (ii) the State Department's exercise of its waiver authorities under certain statutory sanctions on Iran.<sup>9</sup> As a result, non-U.S. persons generally would no longer be subject to secondary sanctions for engaging in activities outside of U.S. jurisdiction involving the following:

- a) Iran's financial and banking sectors;
- b) the provision of certain insurance, reinsurance, and underwriting services;
- c) Iran's energy, petroleum, and petrochemical sectors;
- d) Iran's shipping and shipbuilding sectors and port operators;
- e) trade with Iran in gold and other precious metals;
- f) trade with Iran in certain "materials" (including graphite, raw or semi-finished metals such as aluminum and steel, coal, and certain software), except that the transfer of certain materials to Iran must be approved by the Procurement Channel established by the JCPOA, and any materials may not be used in connection with Iran's military or ballistic missile programs; or
- g) Iran's automotive sector.

Secondary sanctions continue to apply to (a) the above activities to the extent any sanctioned persons known as Specially Designated Nationals

6. P5+1, EU, and Iran, Joint Plan of Action, (Nov. 24, 2013), [http://eeas.europa.eu/archives/docs/statements/docs/2013/131124\\_03\\_en.pdf](http://eeas.europa.eu/archives/docs/statements/docs/2013/131124_03_en.pdf); Resource Center, Joint Plan of Action (JPOA) Archive and Joint Comprehensive Plan of Action (JCPOA) Archive (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Pages/jpoa\\_archive.aspx](https://www.treasury.gov/resource-center/sanctions/Programs/Pages/jpoa_archive.aspx).

7. Joint Comprehensive Plan of Action, July 14, 2016, <https://www.state.gov/documents/organization/245317.pdf>.

8. Exec. Order No. 13716, 81 Fed. Reg. 3693 (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa\\_eo.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_eo.pdf).

9. U.S. Dep't. of State, JCPOA Contingent Waivers (Oct. 18, 2015), <https://www.state.gov/e/eb/rls/othr/2015/248320.htm>; see *supra*, note 5, Confirmation of Verification of Iranian Actions Pursuant to the Joint Comprehensive Plan of Action.

(SDNs) are involved; (b) certain activities contributing to WMD proliferation, terrorism, human rights abuses, corruption, censorship, and unrest in Syria or Yemen, which are subject to separate secondary sanctions that were not lifted or waived; and (c) in any context where a party provides “significant financial, material technological, or other support to, or goods or services in support of any activity or transaction on behalf of or for the benefit of” any Iranian person on OFAC’s List of Specially Designated Nationals and Blocked Persons (SDN List).<sup>10</sup>

2. *Removal of Parties from Sanctions Lists*: In addition, OFAC removed several hundred Iranian parties from the SDN List, Foreign Sanctions Evaders List (FSE List), and Non-SDN Iran Sanctions Act List.<sup>11</sup> OFAC transferred some of the former Iranian SDNs to a separate sanctions list known as the List of Persons Identified as Blocked Solely Pursuant to Executive Order 13599 (E.O. 13599 List). The E.O. 13599 List includes Iranian SDNs designated solely pursuant to the Iranian Transactions and Sanctions Regulations, 31 C.F.R. part 560 (ITSR), under the authority of E.O. 13599, based on their status as an Iranian financial institution or a Government of Iran party. United States persons continue to be broadly prohibited from engaging in transactions with any party in Iran and must block any E.O. 13599 List party’s property or interest in property that comes within the United States or the possession/control of a U.S. person. As a result, the primary effect of delisting these parties from the SDN List was to remove the risk that non-U.S. persons operating outside U.S. jurisdiction could be “collaterally” designated as SDNs for materially supporting such listed SDNs or that foreign financial institutions could suffer sanctions for processing transactions for such SDNs.<sup>12</sup> In addition, the de-listings carry potential implications for the SEC reporting requirements pursuant to Section 219 of the Iranian Threat Reduction and Syrian Human Rights Act of 2012 (ITRA),<sup>13</sup> in relation to transactions or dealings with listed SDN parties.

3. *General License H for United States-Owned or -Controlled Entities*: OFAC also issued General License H, which authorized non-U.S. entities owned or controlled by U.S. persons to engage in Iran-

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10. Exec. Order No. 13716, *supra* note 8, at § (a)(i); U.S. Dep’t. of Treasury and U.S. Dep’t. of State, *Guidance Relating To The Lifting of Certain U.S. Sanctions Pursuant To The Joint Comprehensive Plan of Action on Implementation Day* (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/Implement\\_guide\\_jcpoa.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/Implement_guide_jcpoa.pdf).

11. Office of Foreign Assets Control, JCPOA-related Designation Removals, JCPOA Designation Updates, Foreign Sanction Evaders Removals, NS-ISA List Removals; 13599 List Changes (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/updated\\_names.aspx](https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/updated_names.aspx).

12. See *Guidance Relating to the Lifting of Certain U.S. Sanctions Pursuant to the Joint Comprehensive Plan of Action on Implementation Day* *supra* note 10, at 26-28.

13. Securities Exchange Act of 1934 § (r), 15 U.S.C. 78(m) (2017).

related transactions, subject to certain conditions.<sup>14</sup> These conditions include the restrictions on involvement of any of the following:

- a) U.S. persons (except in limited circumstances involving the alteration or establishment of corporate policies and the provision of “automated” and “globally integrated” business support systems);
- b) funds transfers to, from, or through any U.S. financial institution (including most transactions settled or processed in U.S. dollars);
- c) parties on the SDN List or FSE List;
- d) military, paramilitary, intelligence, or law enforcement entities of the Government of Iran or any agents or affiliates thereof;
- e) exports from the United States, or re-exports from third countries, of goods, services, or technology that are subject to export restrictions under the ITSR or the Export Administration Regulations (EAR) (including certain transactions involving parties on the Commerce Department’s Bureau of Industry and Security (BIS) Denied Persons’ List or Entity List); and
- f) activities subject to other sanctions targeting Iran, including those relating to WMD proliferation, ballistic missiles, and terrorism.

Non-U.S. entities owned or controlled by U.S. persons first became subject to the ITSR’s prohibitions in October 2012, pursuant to section 218 of the ITRA.<sup>15</sup> Thus, General License H represents a partial return to the scope of sanctions applicable to such non-U.S. entities before October 2012.

4. General Licenses for Iranian Carpet and Foodstuffs: OFAC reinstated certain general licenses in the ITSR relating to Iranian-origin carpets and foodstuffs.<sup>16</sup>

5. Commercial Aviation Licensing Policy: OFAC also issued a Statement of Licensing Policy for Activities Related to the Export/Reexport to Iran of Commercial Passenger Aircraft and Related Parts and Services (Aviation SLP), which expanded on the available favorable licensing policy issued under the JPOA for safe operation of Iranian commercial passenger aircraft.<sup>17</sup> The Aviation SLP allows U.S. persons and, where there is a nexus to U.S. jurisdiction, non-U.S. persons to apply for specific licenses from OFAC to export, re-export, sell, lease, or transfer to Iran commercial passenger aircraft for exclusively civil aviation or spare parts/components for commercial passenger aircraft, as well as to provide associated services (*e.g.*, warranty, maintenance,

14. Office of Foreign Assets Control, Iranian Transactions and Sanctions Regulations, General License H, Authorizing Certain Transactions Relating to Foreign Entities Owned or Controlled by a United States Person, 31 C.F.R. pt. 560.

15. Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 218, 126 Stat. 1214, 1234-35 (2012).

16. Iranian Transactions and Sanctions Regulations, 81 Fed. Reg. 3330-33 (to be codified at 31 C.F.R. pt. 560 and Appendix A to Chapter V) (Jan. 21, 2016).

17. Office of Foreign Assets Control, Iranian Transactions and Sanctions Regulations, 31 C.F.R. pt. 560, Statement of Licensing Policy For Activities Related to the Export or Re-export to Iran of Commercial Passenger Aircraft and Related Parts and Services (Jan. 16, 2016).

and repair services and safety-related inspections). Separate authorizations from BIS may also be required.

Importantly, while the U.S. government lifted certain “secondary sanctions” targeting non-U.S. persons (and also authorized most Iran-related transactions by non-U.S. entities owned or controlled by U.S. persons), U.S. persons remain prohibited from engaging in virtually any Iran-related transactions, under the “primary sanctions” on Iran implemented pursuant to the ITSR. In addition, certain financial sanctions continue to be applicable under the Iranian Financial Sanctions Regulations (IFSR), 31 C.F.R. part 561, for foreign financial institutions that process targeted transactions for Iranian SDNs and certain other sanctioned activities.

Since implementation of the JCPOA, OFAC issued two additional general licenses in the context of civil aviation:

- a. General License I (issued March 24, 2016) authorizes U.S. persons to negotiate and enter into contracts for activities eligible for the Aviation SLP, provided performance under the contract is made contingent on authorization under a specific license issued by OFAC.<sup>18</sup>
- b. General License J (issued July 29, 2016) authorizes the re-export by non-U.S. persons of certain aircraft to Iran on temporary sojourn of no more than 72 hours, subject to certain conditions.<sup>19</sup> The aircraft must be a fixed-wing civil aircraft that is of U.S. origin or contains more than 10% controlled U.S. content and that is registered outside the United States in a non-sanctioned country (i.e., a country that is not in Country Group E:1 of Supplement No. 1 to Part 740 of the EAR). The non-U.S. person re-export must also maintain the rights to hire/fire the cockpit crew, dispatch the aircraft, and determine the flight route, among other conditions. The regulatory authorization for temporary sojourns of aircraft in Iran is now similar to that available for other sanctioned countries under License Exception AVS under Section 740.15 of the EAR.

### C. LIFTING OF BURMA SANCTIONS

On September 15, 2016, during State Counsellor Aung San Suu Kyi’s visit to Washington D.C., President Obama announced plans to lift U.S. sanctions on Burma in recognition of the country’s progress toward

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18. Office of Foreign Assets Control, Iranian Transactions and Sanctions Regulation, 31 C.F.R. pt. 560, Authorizing Certain Transactions Related to the Negotiation of, and Entry into, Contingent Contracts for Activities Eligible for Authorization Under the Statement of Licensing Policy for Activities Related to the Export or Re-export to Iran of Commercial Passenger Aircraft and Related Parts and Services (Mar. 24, 2016).

19. Iranian Transactions and Sanctions Regulation, 31 C.F.R. pt. 560, General License J, Authorizing the Reexportation of Certain Civil Aircraft to Iran on Temporary Sojourn and Related Transactions (July 29, 2016).

democratic governance.<sup>20</sup> On October 7, 2016, U.S. sanctions against Burma were formally terminated when President Obama issued Executive Order 13742, which: (1) terminated the national emergency with respect to Burma that had been declared in Executive Order 13047 of May 20, 1997; (2) revoked Executive Orders 13310, 13448, 13464, 13619, and 13651; (3) waived the sanctions under Section 5(b) of the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008;<sup>21</sup> and (4) terminated the visa bans implemented under Presidential Proclamation 8693 of July 24, 2011.<sup>22</sup> As a result, the U.S. sanctions on Burma are no longer in effect. OFAC has announced that the Burmese Sanctions Regulations (BSR), 31 C.F.R. part 537, will be removed from the Code of Federal Regulations and that all parties designated as SDNs solely pursuant to the BSR have been removed from the SDN List. In addition, the State Department's Responsible Investment Reporting Requirements now apply on a voluntary basis only. Although Burma continues to be designated by the Financial Crimes Enforcement Network (FinCEN) as "jurisdiction of primary money laundering concern" under Section 311 of the USA PATRIOT Act, FinCEN has issued an administrative exception, which allows corresponding accounts for Burmese banks, subject to certain due diligence requirements.<sup>23</sup>

Before the termination of the U.S. sanctions against Burma, the U.S. government had taken significant steps toward liberalizing the sanctions. For example, on May 18, 2016, OFAC issued or expanded general licenses authorizing transactions relating to U.S. persons residing in Burma, exports to and from Burma, and movement within Burma; as well as most transactions involving blocked Burmese banks.<sup>24</sup>

#### D. EXPANSION OF NORTH KOREA SANCTIONS

Following an additional nuclear test by North Korea on January 6, 2016, and a rocket launch using ballistic missile technology on February 7, 2016, the U.S. government expanded its existing sanctions on North Korea to impose a comprehensive embargo on the country. On March 15, 2016, President Obama issued Executive Order 13722,<sup>25</sup> which: (1) blocks the property of the Government of North Korea and the Workers' Party of Korea; (2) prohibits exports or re-exports from the United States or by U.S. persons of goods, services (including financial services), and technology to

20. Grace Aranow, *President Obama and Aung San Suu Kyi Celebrate Progress in Burma* (Sept. 15, 2016), <https://obamawhitehouse.archives.gov/blog/2016/09/15/president-obama-and-daw-aung-san-suu-kyi-celebrate-burmese-progress>.

21. Tom Lantos Block Burmese Jade (Junta's Anti-Democratic Efforts) Act of 2008, Pub. L. 110-286, 122 Stat. 2631-48.

22. Exec. Order 13472, 81 Fed. Reg. 70953 (Oct. 7, 2016).

23. Imposition of Special Measures Against Burma, 69 Fed. Reg. 19093 (Apr. 12, 2004) (to be codified at 31 C.F.R. pt. 103).

24. Burmese Sanctions Regulation, 81 Fed. Reg. 31169 (May 18, 2016) (to be codified at 31 C.F.R. pt. 537).

25. Exec. Order 13722, 81 Fed. Reg. 14943 (Mar. 18, 2016).

North Korea; (3) prohibits new investment in North Korea by U.S. persons; and (4) expands the criteria under which parties may be designated as SDNs for engaging in North Korea-related activities. Executive Order 13722 implements provisions of the North Korea Sanctions and Policy Enhancement Act of 2016<sup>26</sup> and U.N. Security Council Resolution 2270 (2016).<sup>27</sup> As a result, U.S. persons are prohibited from engaging in virtually all transactions involving North Korea.

#### E. OTHER OFAC DEVELOPMENTS

In 2016, OFAC issued regulations to implement sanctions on Burundi-related SDNs (the Burundi Sanctions Regulations, 31 C.F.R. part 554), under Executive Order 13712 of November 22, 2015 (“Blocking the Property of Certain Persons Contributing to the Situation in Burundi”).<sup>28</sup> In addition, OFAC issued regulations to implement the Hizballah International Financing Prevention Act of 2015 (Hizballah Financial Sanctions Regulations, 31 C.F.R. part 566), which authorize financial sanctions on foreign financial institutions that knowingly facilitate certain significant transactions or engage in money-laundering for Hizballah or affiliated SDNs.<sup>29</sup>

Finally, the OFAC sanctions against Cote d’Ivoire-related SDNs were lifted under Executive Order 13739,<sup>30</sup> terminating the national emergency with respect to the situation in Cote d’Ivoire.

#### F. OFAC ENFORCEMENT ACTIONS

OFAC took several notable enforcement actions in 2016, which continued to focus on the parties’ lack of reasonable due diligence or their general level of wrongdoing. In the former category, Barclays Bank PLC agreed to a civil liability settlement of approximately USD 2.49 million, for alleged violations arising from transactions processed to or through the United States for Barclays Bank of Zimbabwe corporate customers that were 50 percent-or-more owned by SDNs (and are therefore deemed blocked by operation of law).<sup>31</sup> The bank did not identify the ultimate beneficial ownership by SDNs because of its failure to collect this information or to upload it from paper files to an electronic system, which was screened outside Zimbabwe

26. North Korea Sanctions and Policy Enhancements Act of 2016, Pub. L. No. 114-122, 130 Stat. 93.

27. S.C. Res. 2270 (Mar. 2, 2016).

28. Burundi Sanctions Regulations, 81 Fed. Reg. 19878 (Apr. 6, 2016) (to be codified at 31 C.F.R. pt. 554).

29. Hizballah International Financing Prevention Act of 2015, Pub. L. 114-102, 129 Stat. 2205.

30. Exec. Order 13739, 81 Fed. Reg. 63673 (Sept. 14, 2016).

31. OFAC Enforcement Information: Barclays Bank Plc Settles Potential Civil Liability For Apparent Violations of the Zimbabwe Sanctions Regulations (Feb. 8, 2016), [https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160208\\_barclays.pdf](https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160208_barclays.pdf).

due to local regulations prohibiting compliance with U.S. sanctions and in-country screening. The case was determined to be “non-egregious,” even though Barclays processed additional transactions for the blocked persons after U.S. financial institutions blocked transactions for those persons and the bank had confirmed the blocked status of its customers.

OFAC also took several enforcement actions against agricultural and medical companies that did not comply with available OFAC licensing provisions. Of particular note, the PanAmerican Seed Company agreed to a civil liability settlement of USD 4.32 million for alleged violations arising from indirect exports of seeds (primarily flower seeds) to two Iranian distributors, via Europe and the Middle East.<sup>32</sup> The penalty far exceeded the total value of the exports, which was valued over \$770,000 in “economic benefit to Iran.” The case was not voluntarily self-disclosed and was deemed “egregious,” due to the awareness by several mid-level managers of the misconduct and the systematic concealment of the involvement of Iran.

## II. Developments Involving the International Traffic in Arms Regulations

### A. REGULATORY DEVELOPMENTS

In furtherance of the Export Control Reform (ECR) Initiative’s goals of providing clarity and harmonizing key concepts among export agencies, the State Department’s Directorate of Defense Trade Controls (DDTC) published an interim final rule on June 3, 2016, changing and adding definitions of key terms used in the International Traffic in Arms Regulations (ITAR).<sup>33</sup> The existing definitions of “export” and “reexport” were revised, while “release” and “retransfer” received their own definitions (new sections 120.50 and 120.51), in order to better describe and distinguish between the various types of transactions subject to the ITAR, both in the United States and abroad.<sup>34</sup> In a final rule issued three months later, DDTC made several additional clarifications and corrections responsive to comments submitted following the interim final rule.<sup>35</sup> In what appears to be a shift from its previous approach regarding mere “access” to technical data being an ITAR-controlled event, DDTC has now “confirm[ed] that theoretical or potential access to technical data is not a release”<sup>36</sup> for purposes of the ITAR’s approach to “deemed exports.” Several other ITAR

32. OFAC Enforcement Information: PanAmerican Seed Company Settles Potential Civil Liability for Alleged Violations of the Iranian Transactions and Sanctions Regulations (Sept. 13, 2016), [https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160913\\_panam.pdf](https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160913_panam.pdf).

33. International Traffic in Arms: Revisions to Definition of Export and Related Definition, 81 Fed. Reg. 35611 (June 3, 2016) (to be codified at 22 C.F.R. 120, 123, 124, 125, and 126).

34. *Id.* at 35,612-14.

35. International Traffic in Arms: Revisions to Definition of Export and Related Definitions, 81 Fed. Reg. 62004 (Sept. 8, 2016) (to be codified at 22 C.F.R. pts. 120, 125, 126, and 130).

36. *Id.* at 62,005.

terms for which revised or new definitions have been proposed, such as “defense service,” “technical data,” “public domain,” and “fundamental research,”<sup>37</sup> are still under U.S. government review and will be the subject of separate rulemakings.

DDTC also made several ECR-related changes to the U.S. Munitions List (USML) in 2016. First, a final rule promulgated on July 28, 2016, amended and clarified USML Categories XIV (Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment) and XVIII (Directed Energy Weapons).<sup>38</sup> Among other changes, this rule reflected the migration of riot control agents and certain detection, remediation, and protective equipment from the USML to the EAR’s Commerce Control List (CCL). Second, DDTC revised USML Category XII (Fire Control, Laser, Imaging, and Guidance Equipment) on October 12, 2016.<sup>39</sup> The amended Category XII excludes certain items having potential civilian uses (largely now on the CCL), and includes a number of specific defense articles that DDTC chose to move from Categories VIII (Aircraft and Associated Equipment), XIII (Auxiliary Military Equipment), and XV (Spacecraft Systems and Associated Equipment). Finally, a November 21, 2016 rulemaking amended USML Categories VIII (Aircraft and Related Articles) and XIX (Gas Turbine Engines and Associated Equipment).<sup>40</sup> The latest changes, which related chiefly to specific military aircraft components and subsystems, were intended to provide clarity, account for technological developments, and ensure that controls are calibrated to protect national security while accommodating legitimate civil uses and goals.

A rulemaking published on August 17, 2016, clarified how exports of items subject to the EAR may be exported under an ITAR license or exemption in certain cases, revised the destination control statement in the ITAR to reflect the corresponding statement in the EAR, and made several administrative and conforming changes, as part of ECR.<sup>41</sup>

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37. International Traffic in Arms: Revisions to Definitions of Defense Services, Technical Data, and Public Domain; Definition of Product of Fundamental Research; Electronic Transmission and Storage of Technical Data; and Related Definitions, 80 Fed. Reg. 31,525 (June 3, 2015) (to be codified at 22 C.F.R. pts. 120, 123, 125, and 127).

38. Amendments to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Categories XIV and XVIII, 81 Fed. Reg. 49,531 (July 28, 2016) (to be codified at 22 C.F.R. pt. 121).

39. Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XII, 81 Fed. Reg. 70,340 (Oct. 12, 2016) (to be codified at 22 C.F.R. pt. 121).

40. Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Categories VIII and XIX, 81 Fed. Reg. 83126 (Nov. 11, 2016) (to be codified at 22 C.F.R. pt. 121).

41. Amendment to the International Traffic in Arms Regulations: Procedures for Obtaining State Department Authorization To Export Items Subject to the Export Administration Regulations; Revision to the Destination Control Statement; and Other Changes, 81 Fed. Reg. 54732 (Aug. 17, 2016) (to be codified at 22 C.F.R. pts. 120, 123, 124, 125, and 126).

On September 29, DDTC issued an amendment designating Tunisia as a “major non-NATO ally” for purposes of the ITAR; adjusting the denial policy set forth in section 126.1 of the ITAR to reflect exemptions in U.N. arms embargoes against Eritrea, Somalia, and the Democratic Republic of the Congo; and terminating the applicability of section 126.1 to Liberia, Côte d’Ivoire, Sri Lanka, and Vietnam.<sup>42</sup>

## B. DEFENSE DISTRIBUTED LITIGATION

In a 2-1 decision filed on September 20, 2016, the United States Court of Appeals for the Fifth Circuit ruled that the U.S. District Court for the Western District of Texas did not err in declining to grant a motion for a preliminary injunction against DDTC in the *Defense Distributed v. U.S. Dep’t of State* litigation.<sup>43</sup> Plaintiffs-Appellants Defense Distributed and Second Amendment Foundation Inc. had sought to enjoin DDTC from applying the ITAR in a manner that prevents the online distribution of certain unclassified, non-governmental technical information about 3D-printable firearms and components. Circuit Judges Davis and Graves found that the Government’s interest in national security outweighed the Plaintiffs-Appellants’ interest in their First and Second Amendment rights for purposes of the preliminary injunction analysis.<sup>44</sup> In a lengthy dissent, Circuit Judge Jones took issue with the majority’s reasoning: “By refusing to address the plaintiffs’ likelihood of success on the merits and relying solely on the Government’s vague invocation of national security interests, the majority leave in place a preliminary injunction that degrades First Amendment protection and implicitly sanctions the State Department’s tenuous and aggressive invasion of citizens’ rights.”<sup>45</sup>

## C. REGISTRATON GUIDANCE FOR FIREARMS MANUFACTURERS AND GUNSMITHS

Largely in response to public debate sparked by the *Defense Distributed* litigation and aspects of the ECR Initiative, DDTC issued guidance in July intended to clarify the distinction between firearms “gunsmithing” and firearms “manufacturing” for purposes of ITAR registration.<sup>46</sup> Broadly speaking, tasks such as firearms maintenance and repair, occasional kit assembly, cosmetic changes, and after-market modifications that do not significantly improve capabilities would not constitute “manufacturing”

42. Amendment to the International Traffic in Arms Regulations: Tunisia, Eritrea, Somalia, the Democratic Republic of the Congo, Liberia, Côte d’Ivoire, Siri Lanka, Vietnam, and Other Changes, 81 Fed. Reg. 66804 (Sept. 29, 2016) (to be codified at 22 C.F.R. pts. 120 and 126).

43. *Defense Distributed v. U.S. Dep’t of State*, 838 F.3d 451 (5th Cir. 2016).

44. *Id.* at 460.

45. *Id.* at 476.

46. Bureau of Political-Military Affairs, Applicability of the ITAR Registration Requirement to Firearms Manufacturers and Gunsmiths (July 22, 2016), <https://www.pmdtc.state.gov/compliance/documents/ITARRegReqFirearmsManufacturers.pdf>.

activities that trigger the section 122 registration requirement. In contrast, the systematized production of parts or ammunition, or the use of specialized equipment or tooling to improve a firearm's performance beyond its original specifications, would be registerable "manufacturing" per the ITAR.

#### D. SIGNIFICANT ITAR ENFORCEMENT DEVELOPMENTS

On May 9, 2016, DDTC announced a partial relaxation of the statutory debarment imposed on Rocky Mountain Instrument Company (RMI) in 2010,<sup>47</sup> when it pleaded guilty to violating the Arms Export Control Act.<sup>48</sup> Under the modified debarment scheme, exporters other than RMI may now apply for and utilize DDTC authorizations to export RMI-origin defense articles and defense services without first having to request separate transaction exceptions to the debarment order.<sup>49</sup>

Microwave Engineering Corporation (MEC) agreed to pay a fine of USD 100,000 as part of a civil consent agreement with DDTC concluded on June 20, 2016.<sup>50</sup> MEC had voluntarily disclosed that "deficiencies in its ITAR compliance program" led to the release of controlled technical data concerning communications equipment to a scientist from China employed on an H-1B visa, on several occasions from December 2009 to June 2010.<sup>51</sup>

On October 5, 2016, Marc Turi and Turi Defense Group, Inc. (collectively, "Turi") agreed to a suspended \$200,000 fine, and to refrain from engaging in ITAR-controlled activities for four years, to settle charges of certain unauthorized activities subject to the ITAR.<sup>52</sup> Specifically, DDTC alleged that in 2011, Turi unlawfully proposed and brokered the sale of Eastern European weapons and ammunition to persons in Libya without authorization (although no actual deliveries were made).<sup>53</sup> The civil settlement coincided with a Department of Justice decision to request

47. Bureau of Political-Military Affairs; Modification of Statutory Debarment Imposed Pursuant to Section 127.7(c) of the International Traffic in Arms Regulations – Rocky Mountain Instrument Company, 81 Fed. Reg. 28113 (May 9, 2016).

48. Notice of Debarment Pursuant to Section 127.7(c) of the International Traffic in Arms Regulations, 75 Fed. Reg. 54692 (Sept. 8, 2010).

49. Bureau of Political-Military Affairs, *supra* note 47.

50. Microwave Engineering Corporation (U.S. Dep't of State, Bureau of Political-Military Affairs, June 20, 2016) (consent agreement), [https://www.pmddtc.state.gov/compliance/consent\\_agreements/pdf/MEC\\_CA.pdf](https://www.pmddtc.state.gov/compliance/consent_agreements/pdf/MEC_CA.pdf).

51. Letter from Sue Gainor, Office of Def. Trade Controls Compliance, to Suzanne Wright, Chair of Board/President, Microwave Engineering Corp., [https://www.pmddtc.state.gov/compliance/consent\\_agreements/pdf/MEC\\_CA.pdf](https://www.pmddtc.state.gov/compliance/consent_agreements/pdf/MEC_CA.pdf).

52. Consent Agreement, Marc Turi and Turi Defense Group, Inc., (U.S. Dep't of State, Bureau of Political Military Affairs, Oct. 5, 2016), [https://www.pmddtc.state.gov/compliance/consent\\_agreements/pdf/Turi\\_CA.pdf](https://www.pmddtc.state.gov/compliance/consent_agreements/pdf/Turi_CA.pdf).

53. Letter from Arthur Shulman, Office of Def. Trade Controls Compliance, to Marc Turi, President, Turi Defense Group, Inc., *available at* [https://www.pmddtc.state.gov/compliance/consent\\_agreements/pdf/Turi\\_PCL.pdf](https://www.pmddtc.state.gov/compliance/consent_agreements/pdf/Turi_PCL.pdf).

dismissal of a criminal case it had commenced against Turi in connection with alleged efforts to arm anti-Qadhafi rebels in Libya.<sup>54</sup>

### III. Developments Involving the Export Administration Regulations

#### A. REGULATORY DEVELOPMENTS

In 2016, the BIS issued three final rules that were intended to liberalize certain export controls that had been imposed against Cuban entities. On January 27, 2016, the BIS promulgated a final rule that established a general policy of approval for five types of transactions (*i.e.*, transactions relating to certain telecommunications items; certain commodities and software for non-governmental entities that seek to strengthen civil society in Cuba and to U.S. news bureaus in Cuba; certain agricultural items; and certain items that are necessary to ensure the safety of civil aviation) and that stated that proposed exports and re-exports of certain items to meet the needs of the Cuban people to Cuban state-owned organizations or governmental entities would be reviewed on a case-by-case basis.<sup>55</sup> Next, on March 16, 2016, the BIS published a final rule that: (1) amended the EAR to allow cargo on a vessel that is on temporary sojourn to Cuba to transit Cuba on that vessel under a license exception; (2) created the ability for EAR99 items and items controlled for antiterrorism reasons only to be shipped pursuant to license exception to persons authorized by the Office of Foreign Assets Control to establish and maintain a physical or business presence in Cuba; and (3) adopted a policy of case-by-case review for items that would enable or facilitate exports from Cuba of items produced by the private sector.<sup>56</sup> Subsequently, on October 17, 2016, BIS issued a final rule that authorized the use of License Exception SCP for items sold directly to individuals in Cuba for personal use and License Exception AVS for cargo that is transiting Cuba on aircraft that are on temporary sojourn in Cuba, and that reduced the number of Cuban Government and Cuban Communist Party Officials who are ineligible recipients under License Exceptions GFT, CCD, and SCP.<sup>57</sup>

On March 8, 2016, the BIS added Zhongxing Telecommunications Equipment (ZTE) Corporation and certain related entities to the Entity

54. Kenneth P. Vogel and Josh Gerstein, *Obama DOJ Drops Charges Against Alleged Broker of Libyan Weapons*, POLITICO (Oct. 5, 2016) <http://www.politico.com/story/2016/10/marc-turi-libyan-rebels-hillary-clinton-229115>.

55. Cuban Licensing Policy Revisions, 81 Fed. Reg. 4580 (Jan. 27, 2016) (to be codified at 15 C.F.R. pt. 746).

56. Cuba: Revisions to License Exceptions and Licensing Policy 81 Fed. Reg. 13972 (Mar. 16, 2016) (to be codified at 15 C.F.R. pts. 736, 740).

57. Cuba: Revisions to License Exceptions and Licensing Policy, 81 Fed. Reg. 13972 (Mar. 16, 2016) (to be codified at 15 C.F.R. pts. 736, 740, 746).

List.<sup>58</sup> Subsequently, on March 24, 2016, the BIS issued an amendment to the EAR by adding Supplement No. 7 to EAR Part 744 to create a temporary general license to specify that exports, re-exports, and transfers of “NLR” items were allowed from March 24, 2016, through June 30, 2016.<sup>59</sup> The BIS extended the temporary general license in June, August, and November 2016.<sup>60</sup>

The Commerce Department’s Office of Export Enforcement (OEE) revised its guidance regarding administrative enforcement cases based on violations of the EAR.<sup>61</sup> In large part, the OEE guidance is consistent with OFAC’s long-standing guidance on similar cases based on violations of the laws and regulations it enforces. The guidance went into effect on July 22, 2016.<sup>62</sup>

In May, the Commerce Department amended the EAR to remove the short supply license requirements that had applied to exports of crude oil from the United States.<sup>63</sup> In July 2016, the CCL was amended to add items that no longer warranted control under USML Categories XIV (Toxicological Agents) or XVIII (Directed Energy Weapons).<sup>64</sup> The Commerce Department issued a final rule to describe how articles that no longer warranted control under USML Category XII (Fire Control, Laser, Imaging, and Guidance Equipment) were to be controlled under the EAR.<sup>65</sup>

## B. SIGNIFICANT EAR ENFORCEMENT CASES

Fokker Services B.V. (Fokker), a Netherlands company, consented to a \$10 million fine in a settlement published on June 2, 2016.<sup>66</sup> The BIS

58. Additions to the Entity List, 81 Fed. Reg. 12004 (Mar. 8, 2016) (to be codified at 15 C.F.R. pt. 744).

59. Temporary General License, 81 Fed. Reg. 15633 (Mar. 24, 2016) (to be codified at 15 C.F.R. pt. 744).

60. Temporary General License: Extension of Validity, 81 Fed. Reg. 41799 (June 28, 2016); Temporary General License: Extension of Validity, 81 Fed. Reg. 55372 (Aug. 19, 2016); Temporary General License: Extension of Validity, 81 Fed. Reg. 81663 (Nov. 18, 2016).

61. Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, 81 Fed. Reg. 40499 (June 22, 2016) (to be codified at 15 C.F.R. pt. 766).

62. *Id.*

63. Removal of Short Supply License Requirements on Exports of Crude Oil, 81 Fed. Reg. 29483 (May 12, 2016) (to be codified at 15 C.F.R. pts 730, 740, 743, 744, 746, 754, 762, 772, and 774).

64. Commerce Control List: Addition of Items Determined To No Longer Warrant Control Under United States Munitions List Category XIV (Toxicological Agents) or Category XVIII (Directed Energy Weapons), 81 Fed. Reg. 49517 (July 28, 2016) (to be codified at 15 C.F.R. pts 704 and 774).

65. Revisions to the Export Administration Regulations (EAR); Control of Fire Control, Laser, Imaging, and Guidance Equipment the President Determines No Longer Warrants Control Under the United States Munitions List (USML), 81 Fed. Reg. 70320 (Oct. 12, 2016) (to be codified at 15 C.F.R. pts 734, 742, 744, 772, and 774).

66. Fokker Services B.V. (U.S. Dep’t of Commerce, Bureau of Indus. and Sec., June 2, 2016) (final order), <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2015/1060-e2458/file>.

alleged that Fokker took steps to evade the EAR while committing 253 violations by unlawfully exporting various United States-origin aircraft parts and components to Sudan and Iran (including Iranian military end-users) from 2005 to 2010.

On June 3, 2016, BIS announced that it was fining Weiss Envirotronics, Inc. a civil penalty of \$575,000 for the unauthorized export of controlled environmental test chambers to China on twenty occasions between March 2010 and September 2013.<sup>67</sup>

Alcon Pharmaceuticals Ltd. (a Swiss company) and Alcon Laboratories, Inc. (based in Texas) reached an agreement with BIS on June 29, 2016, to pay an \$8.1 million civil penalty in connection with approximately 200 unlawful shipments of United States-origin medical devices to Iran and Syria.<sup>68</sup> BIS alleged that personnel within the Alcon group of companies were aware of the restrictions on such exports and routed the shipments through third countries in an effort to circumvent U.S. requirements.

On July 22, 2016, BIS imposed a \$500,000 fine and a five-year debarment on R&A International Trading Inc. (and its owner and president, Rukhsana Kadri) for allegedly submitting false shipper information to the U.S. government via the Automated Export System in an effort to conceal a customer's identity on multiple occasions, and for making and soliciting false statements during the BIS investigation of the inaccurate filings.<sup>69</sup>

On September 28, 2016, Technoline SAL of Beirut, Lebanon, agreed to pay a \$450,000 fine to settle charges that it unlawfully exported United States-origin spectrometers, chromatographs, and related items to Syria (a sanctioned country) on seven occasions between August 2009 and October 2010.<sup>70</sup> In addition, the company was debarred from engaging in activities subject to the EAR for a period of two years.

As part of a civil settlement announced on November 8, 2016, National Oilwell Varco (based in Texas) and Dreco Energy Services Ltd. (based in Alberta) agreed to pay \$2.5 million in connection with unauthorized shipments of United States-origin oil, gas, and manufacturing equipment to Iran and Oman in 2006, 2007, and 2012.<sup>71</sup>

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67. Weiss Envirotronics, Inc. (U.S. Dep't of Commerce, Bureau of Indus. and Sec., June 3, 2016) (final order), <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2015/1061-e2459/file>.

68. Alcon Pharmaceuticals Ltd. (U.S. Dep't of Commerce, Bureau of Indus. and Sec., June 30, 2016) (final order), <https://efoia.bis.doc.gov/index.php/documents/export-violations/1068-e2466/file>.

69. R&A International Trading Inc. (U.S. Dep't of Commerce, Bureau of Indus. and Sec., July 22, 2016) (final order), <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2015/1072-e2470/file>.

70. *In re* Technoline SAL (U.S. Dep't of Commerce, Bureau of Indus. and Sec., Sep. 29, 2016), available at <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2015/1080-e2474/file>.

71. National Oilwell Varco and Dreco Energy Services Ltd (U.S. Dep't of Commerce, Bureau of Indus. and Sec., Nov. 8, 2016) (final order), <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2015/1085-e2477/file>.

#### IV. Department of Justice Establishes Voluntary Self-Disclosure Program for Willful Violations

In October, the Department of Justice took a highly noticeable step into export controls and economic sanctions compliance by issuing public guidance for a voluntary self-disclosure (VSD) program involving potentially willful (and hence criminal) violations.<sup>72</sup> “This Guidance memorializes the policy of [the National Security Division] to encourage business organizations to voluntarily self-disclose criminal violations of the statutes implementing the U.S. government’s primary export control and sanctions regimes” under the Arms Export Control Act (AECA) and the International Emergency Economic Powers Act (IEEPA), which includes the EAR that are currently under the authority of IEEPA.<sup>73</sup> By providing a voluntary self-disclosure, such disclosing entities may receive a “significantly reduced penalty, to include the possibility of a non-prosecution agreement (NPA), a reduced period of supervised compliance, a reduced fine and forfeiture, and no requirement for a monitor.”<sup>74</sup> The Guidance further advises that failure “to voluntarily disclose its export control and sanctions violations will rarely qualify for an NPA.”<sup>75</sup>

The government further notes that this recent development is because it has “made it a priority to pursue willful export control and sanctions violations by corporate entities and their employees” and because “business organizations and their employees are at the forefront of our enforcement efforts.”<sup>76</sup> In the Guidance, the Department of Justice notes that it presumes harm to national security when these laws are violated.<sup>77</sup> The Guidance also notes some areas where harm to national security is especially aggravated, such as where the violation involves nuclear nonproliferation, missile technology, terrorist organizations, or systemic compliance failures.<sup>78</sup> The Guidance emphasizes that is it not “intended to suggest that the government can require business organizations to voluntarily self-disclose, cooperate, or remediate. Companies remain free to reject these options.”<sup>79</sup>

Previously, the only known VSD that private parties were encouraged to provide were directly to the regulatory agencies themselves. For instance, an actual or potential violation could be voluntarily reported to DDTC where the actions involve the AECA. DDTC would then determine if consultation with the Department of Justice was warranted given the circumstances. This

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72. Guidance Regarding Voluntary Self-Disclosures, Cooperation, And Remediation In Export Control And Sanctions Investigations Involving Business Organizations, Nat'l Sec. Div., Dep't of Justice (Oct. 2, 2016), <https://www.justice.gov/nsd/file/902491/download>.

73. *Id.* at 2.

74. *Id.* at 8.

75. *Id.* at 9.

76. *Id.* at 1-2.

77. Guidance Regarding Voluntary Self-Disclosures, *supra* note 72, at 3.

78. *Id.* at 8.

79. *Id.* at 4.

development, however, now encourages private parties to disclose violations to the regulatory agencies and, if there are potentially willful violations, then also to the Department of Justice. As such, this Guidance purports to not affect the existing VSD processes with the Departments of State, Commerce, and Treasury.<sup>80</sup>

This new recommended VSD process, the Department of Justice notes, concerns only those violations that are willful. In its Guidance, the Department of Justice notes that

[i]n export control and sanctions cases, [the government] uses the definition of willfulness set forth in *Bryan v. United States*, 524 U.S. 184 (1998). Under *Bryan*, an act is willful if done with the knowledge that it is illegal. The U.S. government, however, is not required to show the defendant was aware of the specific law, rule, or regulation that its conduct may have violated.<sup>81</sup>

Although the U.S. government argues and stresses the *Bryan* willfulness standard applies to every situation, there is a federal circuit split on this issue.<sup>82</sup> Therefore, counsel should review the standard in the applicable jurisdiction.

As a practical matter, willfulness for private companies under the *Bryan* standard is a minimal threshold for the U.S. government to prove because businesses are virtually presumed to be knowledgeable of the regulations impacting their activities.<sup>83</sup> As a consequence, the impact of the *Bryan* standard on a private company could ensnare many otherwise civil violations into potentially criminal violations, and thus cause debate whether to submit a VSD to the Department of Justice. Additionally, this Guidance is also broader because the Department of Justice assumes that national security is harmed when these laws are violated: “Almost all criminal violations of U.S. export controls and sanctions harm the national security or have the potential to cause such harm.”<sup>84</sup> By contrast, experience with the Departments of State and Commerce have shown that they stress harm to national security in more limited contexts.<sup>85</sup>

The Guidance, however, is limited on what types of reduced liability a disclosing entity might receive. “In determining what credit to give an organization that voluntarily self-discloses illegal export control or sanctions

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80. *Id.* at 3.

81. *Id.* at 4 fn. 5.

82. *United States v. Roth*, 642 F. Supp. 2d 796 (E.D. Tenn. 2009) (describing differing standards for willfulness).

83. *See United States v. Zhen Zhou Wu*, 711 F.3d 1, 15 (1st Cir. 2013); *see also United States v. Bishop*, 740 F.3d 927 (4th Cir. 2014) (individual may have willfulness where he or she possesses ability to understand a license may be required prior to export).

84. Guidance Regarding Voluntary Self-Disclosures, *supra* note 72, at 3.

85. For instance, the ITAR distinguishes items based on whether they are designated as Significant Military Equipment. *See* 22 C.F.R. 120.7. Also, the EAR specifically identifies whether an item is controlled for national security reasons. *See* 15 C.F.R. 774.

conduct, fully cooperates, and remediates flaws in its controls and compliance program, federal prosecutors must balance the goal of encouraging such disclosures and cooperation with the goal of deterring these very serious offenses.”<sup>86</sup> In submitting a voluntary self-disclosure, the following elements must be met:

- The company discloses the conduct “prior to an imminent threat of disclosure or government investigation,” U.S.S.G. § 8C2.5(g)(1);
- The company discloses the conduct to CES and the appropriate regulatory agency “within a reasonably prompt time after becoming aware of the offense,” U.S.S.G. § 8C2.5(g)(1), with the burden on the company to demonstrate timeliness; and
- The company discloses all relevant facts known to it, including all relevant facts about the individuals involved in any export control or sanctions violation.<sup>87</sup>

Additionally, once a VSD is made, the Department of Justice will consider a number of factors to determine whether any leniency towards the disclosing entity is appropriate.<sup>88</sup> The essence of these factors is whether the disclosing entity has provided full cooperation by participating proactively, provided all the material facts, and provided access to key employees and documents.<sup>89</sup> Furthermore, disclosing entities are also expected to implement an effective compliance program, discipline employees that caused the violations, and take further necessary steps as appropriate.<sup>90</sup> Disclosing entities that provide less than full cooperation may nevertheless receive some leniency.<sup>91</sup> The Guidance notes that “eligibility for cooperation credit is not predicated upon the waiver of the attorney-client privilege or work product protection.”<sup>92</sup>

One additional point about this Guidance is its relation to the new guidelines that were published in September 2015 (referred to as the “Yates Memo”) that altered the Department of Justice’s policy towards prosecuting employees of corporations for violations of federal laws, and providing cooperation credit for corporations.<sup>93</sup> The Guidance specifically states that its purpose is to also implement the Yates Memo by “promoting greater accountability for individual corporate defendants.”<sup>94</sup> Thus, a voluntary self-disclosure addressing potential criminal liability by the entity may result in a focus by the Department of Justice (under the Yates Memo) on the actual employees of the entity who were specifically involved in the violations.

86. Guidance Regarding Voluntary Self-Disclosures, *supra* note 72, at 3.

87. *Id.* at 5.

88. *Id.* at 5-6.

89. *Id.*

90. *Id.* at 7-8.

91. Guidance Regarding Voluntary Self-Disclosures, *supra* note 72, at 6-7.

92. *Id.* at 6.

93. Memorandum from Sally Yates, Deputy Attorney General on Individual Accountability for Corporate Wrongdoing (Sep. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download>.

94. *Id.* at 2.

## VI. Changes to Canadian Sanctions against Iran, Russia, Ukraine, Belarus, and Egypt

The year 2016 was an active year in Canadian economic sanctions and export controls legislation and included updates in Canada's United Nations and autonomous sanctions against the Islamic Republic of Iran, autonomous sanctions against Russian and Ukraine, and the expiration of sanctions against certain Egyptian nationals. Canada also took a major step in relaxing certain export controls by beginning the process of removing Belarus from the *Area Control List*, which should significantly ease the burden for Canadian persons and entities seeking to do business in Belarus.

Canadian developments are critical for U.S. companies that have either Canadian affiliates or Canadian personnel. Given that Canadian sanctions law can found jurisdiction through nationality, actions by a foreign company using a Canadian national risks exposing personnel to personal criminal liability. Such actions can also risk tainting the Canadian affiliate either directly or via Canada's criminal corporate liability provisions.

### A. IRAN

On February 5, 2016, Canada's Minister of Foreign Affairs, Stéphane Dion, announced that Canada had revised its economic sanctions against Iran in the *Regulations Amending the Special Economic Measures (Iran) Regulations* (the "Iran Regulations")<sup>95</sup> and *Regulations Amending the Regulations Implementing the United Nations Resolutions on Iran* ("Canada's UN Regulations"),<sup>96</sup> enacted pursuant to the Special Economic Measures Act (SEMA)<sup>97</sup> and the United Nations Act, respectively.

In the Iran Regulations, Canada has made significant amendments to the list of designated persons, now referred to as "listed persons," who are subject to a general asset freeze and transaction ban. The number of listed individuals has been halved, from 83 to 41. The number of listed entities has been reduced from 530 to only 161.

The trade embargo has been significantly relaxed. The prohibitions against making investments in Iran, restricting port services to Iranian vessels, or providing flagging or classification services to Iranian oil tankers or cargo vessels have all been completely lifted. Canada also removed the restrictions against importing or purchasing any goods from Iran and the blanket financial services ban.

95. Global Affairs Canada, *Regulations Amending the Special Economic Measures (Iran) Regulations* (Feb. 4, 2016), [http://www.international.gc.ca/sanctions/countries-pays/iran\\_sema\\_regulations-iran\\_lmes\\_reglement.aspx?lang=eng](http://www.international.gc.ca/sanctions/countries-pays/iran_sema_regulations-iran_lmes_reglement.aspx?lang=eng) (amending S.C. 1992, c. 17 (Can.)).

96. Global Affairs Canada, *Regulations Amending the Regulations Implementing the United Nations Resolutions on Iran* (July 20, 2015), [http://www.international.gc.ca/sanctions/countries-pays/iran\\_un\\_regulations-iran\\_onu\\_reglement.aspx?lang=eng](http://www.international.gc.ca/sanctions/countries-pays/iran_un_regulations-iran_onu_reglement.aspx?lang=eng).

97. Special Economic Measures Act, S.C. 1992, c.17 (Can.), <http://laws-lois.justice.gc.ca/eng/acts/S-14.5/FullText.html>.

Under the Iran Regulations, Canada has lifted the broad supply ban by repealing that section and replacing it with a prohibition on supplying goods and technology, which lists 41 categories of items commonly used in nuclear, biological, and chemical weapons programs, including certain centrifuges, autoclaves, fibrous or filamentary materials, gamma-ray spectrometers, and specialty metals.

Canadian businesses, and American businesses with Canadian personnel or affiliates, also need to review the remaining restrictions in place under Canada's UN Regulations. These relate to activities involving nuclear proliferation, military and conventional arms programs, and ballistic missile development.

Canadian corporations are still required to obtain appropriate export permits under the *Export and Import Permits Act* (EIPA)<sup>98</sup> for any goods or technology listed on Canada's Export Control List (ECL). While Canada has now allowed trade with Iran, the Canada Border Services Agency will likely continue to scrutinize exports to Iran to ensure compliance with economic sanctions and export controls. Also, although the notice is silent in regards to items originated in the United States, all goods or technology of U.S. origin, regardless of sensitivity, should be exported or transferred to Iran with an appropriate permit from the Export Controls Division.

## B. RUSSIA AND UKRAINE

On March 18, 2016, marking the second anniversary of the Russian occupation of the Crimean region of Ukraine, the Canadian government expanded its sanctions against Russia and Ukraine by adding 19 entities and individuals to its lists of designated blacklisted persons. The amendments also provide a new basis for which entities may be blacklisted under the Russia sanctions.

Under Schedule 1 of the *Special Economic Measures (Russia) Regulations* (the "Russia Regulations")<sup>99</sup> and the *Special Economic Measures (Ukraine) Regulations* (the "Ukraine Regulations"),<sup>100</sup> both implemented pursuant to the SEMA, Canada imposes broad prohibitions against engaging in activities involving 279 entities and individuals listed as designated persons, including these present additions.

The amendments also provide a new basis for listing persons or entities for purposes of the broad prohibitions described above. Previously, the listing of entities owned and controlled by, or acting on behalf of, a designated person did not include persons listed solely because they were an associate or family member of a designated person. This distinction has

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98. Export and Import Permits Act, R.S.C. 1985, c. E-19, <http://laws-lois.justice.gc.ca/eng/acts/E-19/>.

99. Special Economic Measures (Russia) Regulations, SOR/2014-58 (Can.), <http://laws.justice.gc.ca/eng/regulations/SOR-2014-58/FullText.html>.

100. Special Economic Measures (Ukraine) Regulations, SOR/2014-60 (Can.), <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2014-60/FullText.html>.

been eliminated, and now entities owned or controlled by, or acting on behalf of, an associate or family member of a designated person may be listed in Schedule 1.

Under its Ukraine sanctions, Canada also imposes a broad trade embargo against the Crimea region of Ukraine, including investment, supply, sourcing, services, and technical data prohibitions. Lastly, the Russia Regulations contain prohibitions on the export or diversion of certain listed items, used heavily in the oil and gas industry, to Russia or any person in Russia for use in offshore, arctic, or shale oil exploration and production. Services associated with such goods are also prohibited.

### C. BELARUS

On May 7, 2016, Canada's Minister of Foreign Affairs announced that Canada initiated a process to remove Belarus from the Area Control List ("ACL")—a regulation to the EIPA.<sup>101</sup> This decision was made due to Canada's recognition that the Belarusian government has made some progress in key areas, including releasing numerous political prisoners, conducting a presidential election, and participating in mediation efforts regarding Ukraine and the Crimean Region.

### D. EGYPT

On March 10, 2016, Canada enacted the Regulations Amending the Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations<sup>102</sup> that repealed provisions concerning Egypt in the Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations ("Tunisia and Egypt Regulations").<sup>103</sup>

Overall, Canada introduced a number of important amendments in 2016 that had a significant impact on the way Canadian companies approach their business dealings on the market in Iran, Russia, Ukraine, Belarus, and Egypt. Given the tight economic and political bond between Canada and the United States, Canada might be expecting further significant amendments in sanctions against these and other countries after January 2017.

Of particular importance will be the impact on U.S. corporations with foreign affiliates if the executive orders made to implement the JCPOA are repealed or if key components of the Cuban economic embargo are re-implemented. These actions may create issues for companies that have begun transactions with either Iran or Cuba through Canadian subsidiaries

101. Global Affairs Canada, *Notice to Exporters: Exports of items listed on the Export Control List to Belarus* (May 13, 2016), <http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/197.aspx?lang=eng>.

102. Regulations Amending the Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations, SOR/2016-41 (Can.) (Mar. 11, 2016), <http://www.gazette.gc.ca/rp-pr/p2/2016/2016-03-23/html/sor-dors41-eng.php>.

103. *Id.* (repealing selected provisions from Freezing Assets of Corrupt Foreign Officials (Tunisia) Regulations, SOR/2011-78 (Can.)).

or affiliates. The latter case is particularly troubling because the Canadian blocking order prohibiting compliance with the embargo remains active.