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# International Trade and Technology Transfer Reporter IT$^3$

2012 – Issue 1

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# International Trade and Technology Transfer Reporter

## A Semiannual Publication of the Squire Sanders Global Import and Export Compliance Group

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*Download our free ITAR Handbook at www.squiresanders.com/international_trade. Available in full page and booklet forms. To receive a hard copy of our ITAR Handbook, please contact Jennifer Rivers (jennifer.rivers@squiresanders.com).*

### Upcoming Events

**ITAR Workshop – "How to Cure the Virus"**

Please join us July 3 through 5 for our annual workshop jointly organized by Squire Sanders, the Export Group for Aerospace and Defence of the UK and Strategic Shipping Company Limited of the UK. Principal presenters include George Grammas, partner in Squire Sanders' Washington DC office, and Allan Suchinsky of ITD Associates. The event will include video examples, panel sessions and exercises designed to give attendees a better understanding of the International Traffic in Arms Regulations (ITAR), access to leading experts in the field and opportunities to network with peers. A full agenda can be found at www.squiresanders.com/itar_workshop_how_to_cure_the_virus_2012/.

**American Conference Institute's 7th Advanced Forum on ITAR Compliance**

Join George Grammas, partner and Global Chair of Global Import and Export Compliance Squire Sanders (US) LLP (Washington DC), as he discusses managing complex ITAR licensing and compliance challenges affecting suppliers to non-US customers along with the practical impact of US-UK and US-Australia Treaties and other key considerations.

**Farnborough International Airshow**

If you would like to discuss the matters covered in this newsletter, Squire Sanders attorneys will be at the Farnborough International Airshow July 9 through 15. Please contact Simeon Ling (simeon.ling@squiresanders.com) to arrange a meeting.

### Global Import and Export Compliance Group

*The International Trade and Technology Transfer Reporter* is a semiannual publication of the Squire Sanders Global Import and Export Compliance group. With 37 offices in 18 countries, Squire Sanders is the first choice for one-stop global import and export compliance advice. See the back page of this newsletter for a listing of our key import/export compliance lawyers. Our Global Import and Export Compliance group focuses on:

- Export controls and trade sanctions
- Customs
- Anticorruption
- Global government contracting
- Cross-border transaction and investment compliance

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# US-UK Defense Trade Cooperation Treaty or License Exception STA – Which Holds More Promise for US-UK Defense Trade

Expectations were high when the US-UK Defense Trade Cooperation Treaty (Treaty Doc. 110–7) was signed by President Bush and Prime Minister Blair on June 21, 2007. At the time, no one would have predicted that we would need to wait five years to see the Treaty implemented. However, only this past April 13 did the US and the UK exchange diplomatic notes bringing the Treaty into force.

Much has changed over the past five years. Five years ago, the Treaty was presented as the future of US export controls with additional similar treaties to follow, but implementation of the Treaty appears to have been loaded with challenges and compromises. Today, many are questioning the practical value of the ultimate ITAR Treaty exemption in Section 126.17. Two years ago, Secretary Gates offered his now famous (at least within the export community) remarks on export controls reform, which has led to: (1) the proposed transfer of defense articles from the US Munitions List (USML) to the 600 Series on the Commerce Control List (CCL); and (2) the availability of License Exception STA for license free exports of 600 Series items to 36 countries, including the UK.

Should US and UK partners now invest in the Treaty exemption or simply wait for the transfer of defense articles off the USML to the 600 Series and then use License Exception STA? This is not a question to be considered lightly. Think back to the Defense Trade Security Initiative (DTSI); how many program or project licenses were ever approved and how many are used today? In the end, the consensus was that the tried and true Technical Assistance Agreement was the better choice, but a great deal of time and effort was expended by government and industry attempting to follow the DTSI. There probably is not a single answer for every company or situation, but some of the considerations are discussed below.

## The 600 Series and License Exception STA

A good place to start is with the proposed movement from the USML to the CCL 600 Series. The objective of export controls reform is to place higher fences around fewer items. One consequence of the policy is that certain items will be less controlled to allow the government to focus resources on more significant national security interests. While the ultimate plan is a single control list, the nearer term step is to transfer certain defense articles from the USML to the CCL.

The framework for this change is contained in the *Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML)* Federal Register Notice (76 Fed. Reg. 41,958, July 15, 2011). The Proposed Revisions introduce new Export Control Classification Numbers (ECCNs) dedicated to transitioned items called the “600 Series” (*e.g.,* xY6zz, where x is 0-9, Y is A-E, and zz tracks the Wassenaar Arrangement Munitions Lists [WAML]). The 600 Series is effectively creating a “Commerce Munitions List” because it will control items transferred from the USML and consolidate existing WAML items on the CCL.

Category by category, specific USML defense articles that are deemed to not warrant USML protections will move onto the 600 Series. Generic parts and components that were “specifically designated, modified, adapted or configured” for a defense article, regardless of military significance, will move to the EAR and its CCL. The USML will retain a “positive list” of higher controlled items. Determining whether a product will move to the new 600 Series or remain on the USML depends on an assessment of the particular product at issue.

The Proposed Revisions indicate that items in the 600 Series will generally be controlled for National Security (NS1) reasons. This means a license would be required to export or reexport items controlled under this series of ECCNs to all countries, except Canada, unless a license exception applies.

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License Exception Strategic Trade Authorization (STA) applies automatically to all 600 Series items that are supporting items, such as parts, components, accessories or attachments that are sent to any one of the US' 36 close allies, which include the UK.[1] For 600 Series items that are "end items," applicants must request application of the license exception STA through an interagency process. Applicants must submit a request to use the license exception STA along with an export license application, which will be reviewed by the Departments of Commerce, State and Defense to determine whether the export provides a critical military or intelligence advantage to the United States or is otherwise available in countries that are not allies or regime partners. The agencies have 39 days to determine whether the STA license exception applies. If the STA license exception applies, no license is required for exports destined for any one of the 36 countries, including the UK. If the license exception does not apply, then a general Commerce export license must be sought on a case-by-case basis.

Even if License Exception STA is not available and a license is required from Commerce, the two greatest problems that non-US customers have with the ITAR will be mitigated. **First**, to some extent the movement to the 600 Series should avoid the "ITAR contamination" problem for non-US customers, because the 600 Series items are eligible for a *de minimis* rule, which is not available in the ITAR. Under this rule, the EAR will not control non-US-made products containing US origin content from the 600 Series that is equal to or less than 10 percent. This rule is stricter than the normal 25-percent *de minimis* rule that applies to most destinations under the CCL, but more generous than the lack of a *de minimis* standard under the ITAR. **Second**, non-US customers will not need to collect ultimate end-use and end-user information, which can be a serious impediment to sales. If the licensing of the 600 series items follows the normal Commerce export licensing rules, the end-use and end-user information will not need to be taken to the ultimate government end-user, but only as far as the exporter's customer.

## US-UK Defense Trade Cooperation Treaty

For items that remain on the USML, the US-UK Defense Trade Cooperation Treaty may be a viable option in limited circumstances to export certain items to the UK without a license. On March 21, the final rules were published to implement the US-UK Treaty in the ITAR (77 Fed. Reg. 16,592). The final rules added Section 126.17 to the ITAR, creating the US-UK Treaty licensing exception. The Treaty license exemption eliminates the ITAR license requirements for certain qualifying exports that meet the following criteria:

- **Authorized exporters** are defined as US departments and agencies including employees with security clearance and US persons registered with DDTC.
- **Eligible end-users** are defined in terms of "Approved Communities" of government and private sector entities that may receive defense articles and services under the Treaty. Qualifying members of the "Approved Communities" must satisfy specific requirements, including approval by both the US and UK governments for private UK entities. The private entities are reviewed on the basis of several additional factors (*e.g.*, designation of UK "List X" site, foreign ownership, control or influence, and US export licensing history). Approved end-users also include certain US and UK "authorized intermediate consignees" that are eligible under the AECA and other US and UK laws to handle and receive a defense article or service without restriction. UK community members must be identified on DDTC's website at the time of the transaction.

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[1] Generally, license exception STA allows the export, reexport and transfer (in country) without a license of most CCL items to destinations that pose a relatively low risk of unauthorized use or diversion (*e.g.*, 36 close allies). STA destinations include: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Turkey and the UK. *See* 76 Fed. Reg. 35276 (June 16, 2011).

- **Acceptable end-uses** must be in support of the following specific end-uses: (i) US and UK combined military and counter-terrorism operations; (ii) US and UK cooperative security and defense research, development, production and support programs; (iii) mutually agreed security and defense projects where the end-user is the UK government; or (iv) US government end-uses. In addition, DDTC has a new process to identify and accept additional authorized end-uses that include the following: (a) operations, programs and projects that can be publicly identified on DDTC's website; (b) operations, programs and projects that cannot be publicly identified, but will be confirmed in written correspondence to DDTC; and (c) US government end-uses specifically identified in a US contract or solicitation.
- **Eligible defense articles** are those that are not *excluded* from the new Treaty exemption – not a short list.

A company considering whether to invest in using the Treaty exemption in the ITAR will need to consider (i) whether the transaction can fit within these limitations, and (ii) whether the items to be exported ultimately will be moved to the 600 Series. The question is what will remain on the USML that is not excluded from the Treaty exemption.

## EU Issues New General Export Authorizations

On December 8, 2011 the EU introduced five new Union General Export Authorisations (UGEAs) for the export of dual-use items listed in Annex I of the EU dual-use Regulation. The new licenses entered into force as of January 7, 2012. This article provides an overview of the EU licensing system for dual-use items and summarizes the scope of the now six UGEAs.

The new UGEAs might be good news to your company in terms of administrative burden if any of the products you export are listed dual-use items. Some stakeholders criticized in the forefront that the scope of the new UGEAs would be still too limited. However, given the political struggle and time it took to obtain the status quo, this is clearly an achievement for EU exporters.

### Licensing system for dual-use Items

The EU dual-use Regulation establishes four types of licenses:

- **UGEAs** are set out in Annexes II a to f to the EU dual-use Regulation and are structured in three parts. Parts 1 and 2 set out the items and destinations covered by the authorization. Part 3 establishes the conditions and (reporting and documentation) requirements that exporters must comply with when using the license. Generally every EU exporter fulfilling the conditions can use the authorizations. Member State authorities may, however, prohibit a specific exporter from using them if there is reasonable suspicion about its ability to comply with the authorization or other export control laws. MS may also impose additional conditions and requirements for the use of the UGEAs. In particular look out for pre-first use registration/reporting requirements
- **National general export authorizations** (NGAs) are – like the UGEAs – established by a general legal act. They are available to every exporter in the issuing Member State that fulfills the conditions and requirements set out therein. Not all Member States offer this form of authorization.
- **Global authorizations** are granted to an individual exporter for the export of one or more items to one or more countries/end-users. Generally before granting a global authorization, MS authorities will usually want to verify that the applying exporter has a history of compliance and proper record keeping system.
- **Individual authorizations** are the most common form of licenses. They are granted to an individual exporter for exports of one specific item to one end-user.

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UGEAs are created at the EU level. The other three types of authorizations are issued by Member States authorities, although not every Member State offers all authorizations. EU and national general authorizations can significantly facilitate everyday business life. Most importantly companies do not have to go through potentially burdensome and time consuming individual application processes. This significantly enhances business planning throughout all production and sales steps. On the other hand, the use of these authorizations requires diligent self-control and prudent and accurate record keeping. Member State authorities will periodically verify the correct application of the authorizations. In case of non-compliance or abuse they might impose penalties or (temporarily) withdraw export benefits. A proper compliance system is therefore key to the use of UGEAs and NGAs.

### Scope of the Six UGEAs

With the latest amendment the EU dual-use Regulation offers six UGEAs:

- EU001 – Export to Australia, Canada, Japan, New Zealand, Norway, Switzerland (including Liechtenstein) and the US.
- EU002 – Export of certain dual-use items to certain destination.
- EU003 – Export after repair/replacement.
- EU004 – Temporary export for exhibition and fair.
- EU005 – Telecommunications.
- EU006 – Chemicals.

## New Customs Numbers in Germany

As of March 10, 2012, economic operators reporting import or export transactions to Germany's customs authorities must use the EU Economic Operators Registration and Identification number (EORI number) replacing the previously used German customs numbers.

EORI is an EU-wide system for the registration and identification of economic operators, businesses or persons and was introduced in November 2009. The EORI number – assigned by a customs authority in a Member State – is valid throughout the EU and serves as a unique identification number in the completion of customs formalities.

In Germany, applications for the EORI number must be filed with the Information and Knowledge Management Department of the Federal Customs Administration (IWM Zoll) using the official form No 0870 (Party Master Data – Address Recording and Correction).

Going forward, customs declarations without a valid EORI number will not be accepted by the German customs authorities and the use of the newly introduced Release 8.4 of the IT-based ATLAS customs system now also requires an EORI number.

Moreover, new and pending application procedures before the Federal Office of Economics and Export Control (BAFA), such as an application for an export control license, cannot be completed without an EORI number.

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# Commenters Voice Objections to Proposed Revisions to ITAR Part 129 Brokering Regulations

On December 19, 2011, the US Department of State published notice of proposed revisions to Part 129 of the International Traffic in Arms Regulations (ITAR) governing the registration and licensing of brokers.[2] If adopted as proposed, the revised Part 129 would appear to extend the reach of the ITAR brokering regulations dramatically, potentially capturing a host of activities not defined as brokering under the existing regulations. The breadth of the potential expansion of the ITAR brokering regulations represented by the proposed rule changes has engendered widespread objections and expressions of concern, including those voiced in the formal comments submitted to the State Department in February in response to the notice. The persuasive arguments presented and near unanimity of the objections voiced by commenting parties would seem to make it difficult for the State Department not to consider tempering, or at least further clarifying, the reach of the proposed regulations. However, given that the revisions are in keeping with the State Department's historically broad interpretation of the brokering registration and licensing requirements under the existing Part 129 regulations, substantial changes to the proposed rules may be unlikely.

**A. Changed Definitions of the Terms "Broker" and "Brokering Activity"**

The expansive effect of the revised brokering regulations, if adopted as proposed, would flow primarily from changes to the definitions of "broker" and "brokering activities." First, revised Section 129.2(a) would define the term "broker" simply as "any person . . . who engages in brokering activities." This definition would eliminate two key elements of the definition of "broker" contained in the current version of Section 129.2(a), which defines broker to mean "any person who *acts as an agent for others* in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services *in return for a fee, commission, or other consideration*." Virtually every commenter urged that eliminating the concept of acting as an agent, intermediary or middleman for others, and to a lesser extent doing away with the concept of acting as such in return for a fee, commission or other consideration, would cast too wide a net and be inconsistent with the plain, commonly accepted and traditional understanding of what is meant by being a broker. Many pointed to the definitions of broker found in dictionaries and, in particular, in *Black's Law Dictionary* (9th ed. 2009), which defines a "broker" generally as:

> [a]n agent who acts as an intermediary or negotiator, esp. between prospective buyers and sellers; a person employed to make bargains and contracts between other persons in matters of trade, commerce or navigation.

The *Black's Law Dictionary* definition continues to provide that:

> [t]he most important determining factor of what constitutes a 'broker' is whether the party is dealing for itself or for another. A broker may, by contract, have title to property pass through it (though usually it does not), and it may, by contract, collect from the consumer, but a broker does not deal on its account. Two preliminary requirements must be met for a finding that an individual is acting as a broker: (1) the person is acting for compensation; and (2) the person is acting on behalf of someone else.

Second, revised Section 129.2(b) would define "brokering activities" to mean "*any action to facilitate* the manufacture, export, reexport, import, transfer, or retransfer of a defense article or defense service." The open-ended nature of the terms "any action" and "facilitate" would be limited under the revised regulations only by a brief list of activities, set forth under Section 129.2(e), excluded from the definition of "brokering activities," as follows:

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[2] *See* 76 FR 78578.

> (1) Activities by a U.S. person in the United States that are limited exclusively to U.S. domestic sales or transfers (e.g., not for export, which includes transfer in the United States to a foreign person);
>
> (2) Activities by employees of the U.S. Government acting in an official capacity; or,
>
> (3) Activities that do not extend beyond administrative services, such as providing or arranging office space and equipment, hospitality, advertising, or clerical, visa, or translation services, or activities by an attorney that do not extend beyond providing legal advice to a broker.

As one commenter noted:

> Taken together, the proposed definitional changes to "broker" and "brokering activities" will broadly expand the scope of persons and activities considered to be involved in brokering – such that lawyers, trade association representatives, those who provide assistance with local laws and regulations, and any company that subcontracts any aspect of a defense transaction (e.g., part procurements from suppliers) would be required to register as a "broker" and obtain a brokering license without regard to whether the Department of State had already approved the export or retransfer of the defense articles to the same end-user under an export license or other authorization.[3]

The ramifications of excluding the concept of an agent, intermediary or middleman from the definition of "broker" are exacerbated by the breadth of activities that could be covered under the definition of "brokering activities," potentially requiring any person assisting with a defense transaction or assisting a person who is assisting with such a transaction to register, and seemingly reaching activities such as exporting that are already controlled under the export licensing provisions of the ITAR. Indeed, it would seem that even suppliers of dual-use parts would be required to register as defense brokers under the revised regulations if they supply such parts as a subcontractor to a defense contractor, thereby engaging in an "action" that "facilitates" the defense contractor's manufacture of a defense article. Perhaps even the parts supplier's raw materials supplier could be considered engaged in brokering activity under the new definitions.

**B. Exemptions From Registering as a Broker**

The exemptions from the requirement to register as a broker, set forth in Section 129.3(b) of the proposed regulations, provide limited relief exempting only:

> (1) Employees of foreign governments or international organizations acting in an official capacity;
>
> (2) Persons exclusively in the business of financing, insuring, transportation or freight forwarding whose activities do not extend beyond those functions;
>
> (3) Under certain conditions, persons already registered under Part 122 of the ITAR, their U.S. person subsidiaries, joint ventures, and other affiliates listed and covered by their Statement of Registration, their bona fide and full-time regular employees and, finally, their foreign person brokers listed and identified as their exclusive brokers in their Statement of Registration; and,
>
> (4) Persons (including their bona fide regular employees) whose activities do not extend beyond acting as an end-user of a defense article or defense service exported pursuant to a license or approval under parts 123, 124, or 125 of the ITAR, or subsequently acting as a re-exporter or re-transferor of such article or service under an ITAR license or approval.

[3] Comments of Lockheed Martin.

### C. Exemptions From Prior Approval for Brokering Transactions

The exemptions from obtaining prior State Department approval (licensing) of brokering activities, set forth in Section 129.7 of the proposed regulations, are also limited. In summary form, these exemptions include:

> (1) Brokering activities undertaken for an agency of the U.S. Government pursuant to a contract between the broker and that agency, provided that the brokering activities (a) concern defense articles or defense services solely for the use of the agency or (b) are for carrying out a foreign assistance or sales program authorized by law and subject to control by the President by other means as demonstrated by either (i) the U.S. Government contract with the broker containing an explicit provision stating the contract supports a foreign assistance or sales program authorized by law, and the contracting agency has established control of the activity covered by the contract by other means equivalent to that established under the ITAR or (ii) DDTC providing written concurrence in advance that the condition has been met;
>
> (2) Brokering activities undertaken wholly within and that involve defense articles or defense services located within and destined exclusively for NATO, any member country of that organization, Australia, Japan, New Zealand, or the Republic of South Korea unless the activities involve certain defense articles or defense services (e.g., certain firearms, rockets and missiles, nuclear weapons delivery systems, night-vision related articles, chemical agents and precursors, spacecraft and other articles) enumerated in Section 129.7(d); and,
>
> (3) Brokering activities that involve U.S. defense articles or defense services that are not designated as significant military equipment (SME) and are for end-use by an international organization or foreign government unless the activities involve certain defense articles or defense services (e.g., certain firearms, rockets and missiles, nuclear weapons delivery systems, night-vision related articles, chemical agents and precursors, spacecraft and other articles) enumerated in Section 129.7(d).

It will be interesting to see whether the State Department ultimately determines that the proposed brokering rules require further revision to take account of the concerns expressed by industry as to their potentially broad application.

## Update on US and EU Economic Sanctions

The first few months of 2012 quickly revealed Iran and Syria as the primary countries of focus for US and EU economic sanctions. Picking up where 2011 left off, the measures adopted during this period escalate existing sanctions against these countries, while targeting activities that evade or undermine the effectiveness of the sanctions programs.

Following is an update on these efforts from both side of the Atlantic.

### US Sanctions

In the US, the recent strategy for economic sanctions against Iran and Syria has been to target non-US persons and entities whose activities undermine the US campaign to ratchet-up and sustain economic pressures on the governments of these countries. So far in 2012 the US government has implemented this strategy through three important enhancements to the sanctions programs. With respect to Iran, this has included measures to isolate the Central Bank of Iran and the Iranian

financial sector by imposing sanctions against non-US banks that deal with Iran. And with respect to both Iran and Syria, this has included measures against parties involved in using computer and network technology to support human rights abuses in Iran or Syria, and measures against parties who evade US sanctions programs.

### *1. Section 1245 of the NDAA of 2012.*

On December 31, 2012, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2012, Public Law 112-81, (NDAA) which includes at Section 1245 of the act, significant sanctions against Iran's financial sector. These sanctions seek to further isolate Iran from global markets and to reinforce existing sanctions against Iran's petroleum and petrochemical industries. The key provisions of NDAA Section 1245 direct the freezing of Iranian bank assets, the exclusion from the US banking sector of non-US banks conducting business with Iran, and the designation of Iran as a jurisdiction of primary money laundering concern:

- **Asset Freeze.** Executive Order 13599 of February 5, 2012 implements NDAA Section 1245(c) and blocks transactions involving property or interest in property of the government of Iran, the Central Bank of Iran, or an Iranian financial institution that is or that comes within the possession or control of the US or a US person. This expands US sanctions against Iran's financial sector in two important ways. First, for transactions involving the government of Iran or Iranian financial institutions that have not previously been designated and subject to blocking under other OFAC sanctions programs, it requires US banks and other individuals to block affected property, whereas they were previously required only to reject transactions involving these entities. Second, it greatly expands the scope of Iranian entities subject to blocking to all Iranian financial institutions and persons owned or controlled by, or acting or purporting to act for or on behalf of the government of Iran, the Central Bank of Iran or an Iranian financial institution. To implement the blocking provision, entities that meet the definition of the government of Iran or an Iranian financial institution are now identified on the SDN List with the tag "[IRAN]".
- **Sanctions Against Non-US Banks That Deal With Iran.** Under NDAA Section 1245(d), non-US financial institutions that are found to have "knowingly conducted or facilitated any significant financial transaction with the Central Bank of Iran or another Iranian financial institution" may be prohibited from opening or maintaining US correspondent or payable-through accounts, or be subjected to strict conditions on transactions using such accounts. While the NDAA does not define what qualifies as a "significant financial transaction," it expressly includes transactions for the purchase of petroleum or petroleum products. And, for such transactions, the NDAA extends sanctions to foreign central banks. The NDAA also authorizes the President to exclude from sanctions financial institutions within countries that the President determines to have significantly reduced their volume of crude oil purchases from Iran.
- **Designation of Iran as a Jurisdiction of Primary Money Laundering Concern.** NDAA Section 1245(b) designates the financial sector of Iran, including the Central Bank of Iran, as a Jurisdiction of Primary Money Laundering Concern under Section 311 of the USA PATRIOT Act, 31 U.S.C. Section 5318A. This effectively codifies the Treasury Department's November 25, 2011 designation of Iran as a jurisdiction of primary money laundering concern and reinforces proposed measures by the Secretary of the Treasury against Iran's banks.

Although NDAA Section 1245 targets only the Iranian financial sector, other pre-existing US sanctions programs apply to Syrian banks. Under these programs, the government of Syria and its agencies and instrumentalities, including the Central Bank of Syria, are subject to blocking provisions, and many major Syrian banks, including the Commercial Bank of Syria, are designated on OFAC's SDN List.

### 2. *Executive Order 13606 of April 22, 2012*

Following the financial sector sanctions implemented against Iran at the beginning of 2012, there has been a series of Executive Orders imposing sanctions that target specific activities inimical to US

policies in Iran and Syria. EO 13606, of April 22, 2012, exemplifies this approach.

EO 13606, entitled “Blocking the Property and Suspending Entry Into the United States of Certain Persons With Respect to Grave Human Rights Abuses by the Governments of Iran and Syria via Information Technology,” seeks to disrupt each country’s ability to use or acquire information and communications technology for computer and network disruption, monitoring or tracking that could be used to commit serious human rights abuses.

The Order identifies one individual and six entities for. It further authorizes the Secretary of the Treasury to designate additional persons that are found to have operated or directed the operation of technologies that facilitate computer or network disruption, monitoring or tracking for or on behalf of the governments of Iran or Syria, or to have provided to Iran or Syria related goods, services, or technology or other related assistance.

The Order pursues these objectives primarily through blocking provisions. It blocks (or freezes) all property or interests in property under US jurisdiction or that come within the possession of a US person, or all persons designated under the Order, thus effectively prohibiting virtually all transactions between US persons and persons designated under the Order. It also restricts entry into the United States by designated persons.

### 3. *Executive Order 13608 of May 1, 2012*

On May 1, 2012, just over one week after issuing EO 13606, President Obama issued another Executive Order imposing sanctions directed at Iran and Syria, this one against persons who evade US sanctions programs against these countries. EO 13608 aims to tighten existing sanctions programs against these countries by sanctioning non-US parties that assist the governments Iran or Syria or other persons to evade US sanctions.

More specifically, EO 13608 authorizes the Secretary of the Treasury to publicly identify and designate for sanctions a foreign national or entity that (i) has violated, attempted to violate, conspired to violate, or caused a violation of US sanctions against Iran or Syria; (ii) has facilitated deceptive transactions on behalf of a person subject to US sanctions concerning Iran or Syria; or (iii) is owned or controlled by, or acts on behalf of, a sanctions evader. These categories of Foreign Sanctions Evaders could potentially apply to many non-US companies doing business in Iran. They include, for example, non-US persons that cause a violation of US sanctions, even though they are not themselves subject to the violated sanctions provision.

EO 13608 operates by blocking Foreign Sanctions Evaders from US markets. It authorizes the Secretary of the Treasury to prohibit virtually all transactions by a Foreign Sanctions Evader that involve goods, technology or services in or intended for the US or that involve a US person, wherever located. And, like EO 13606, the Secretary may exclude Foreign Sanctions Evaders from the US.

## EU Sanctions

### Iran

In March 2012 the EU consolidated and reinforced its Iran sanctions by repealing Council Regulation 961/2010 and reintroducing extended measures via a new Council Regulation 267/2012. The Iran sanctions remain the most comprehensive ones among the EU sanctions.

The new restrictions supplement the pre-existing ones and relate most importantly to: (i) trade in dual-use goods and technology, (ii) key equipment and technology for use in the petrochemical industry, (iii) a ban on the import of Iranian crude oil, petroleum products and petrochemical products, and (iv) a prohibition of investment in the petrochemical industry. Moreover, trade in gold, precious metals and diamonds with the government of Iran, as well as the delivery of newly printed banknotes and coinage to or for the benefit of the Central Bank of Iran, is now prohibited. Furthermore, the new sanctions provide certain technical amendments to the existing measures, e.g. concerning the

definitions of terms and the scope of certain restrictions.

In addition to Regulation 267/2012 that established the Iran sanctions, Regulation 359/2011 introduced certain additional restrictions in view of the 2011 Arab Spring. The latter regulation was also amended in March by Council Regulation 264/2012. In addition to a freeze of and prohibition to provide funds and economic resources to listed legal and natural persons, it is now also prohibited to export equipment for the monitoring or interception of Internet and telephone communication to Iran and provide related services or assistance.

**Syria**

In January 2012 the EU implemented Council Regulation 36/2012, which repealed the previous sanction regime set out in Council Regulation 442/20111 and introduced extended measures against Syria. Regulation 36/2012 was successively further amended by Council Implementing Regulation 55/2012, Council Regulation 168/2012 and Council Implementing Regulation 266/2012.

The new regime extends the previous sanctions and introduces new restrictions including most importantly prohibitions on exports and related services of equipment for the monitoring or interception of Internet and telephone communication, and certain key equipment for the oil and gas industry.

The revised sanctions also prohibit the sale and purchase of gold, precious metals, and Syrian public(-guaranteed) bonds (in addition to the previously established ban on export of banknotes and coinage), as well as investments in the electric power plant sector and oil and gas industry. Furthermore, the sanctions include bans on certain banking and (re-)insurance services.

These additional restrictions make the Syrian sanctions one of the most comprehensive and restrictive among the EU sanctions, and given the current political situation it is likely that we will see further intensifications in the near future. Companies doing business with or in Syria should therefore be extra cautious.

*For further information about the sanctions programs against Iran or Syria, or any other sanctioned country, or to obtain a copy of the current Squire Sanders country-by-country sanctions summary report, please contact an attorney listed at the end of this publication.*

# RECENT ENFORCEMENT ACTIONS

## Directorate of Defense Trade Controls (DDTC) – US Department of State

**Aerospace Parts Supplier Fined US$50,000 in Settlement Agreement With DDTC for Alleged AECA and ITAR Violations.** Alpine Aerospace Corp. and TS Trade Tech Inc., both US persons with common ownership, are providers of spare parts for the aerospace industry in South Korea. Both respondents entered into a consent agreement with the DDTC to settle nine alleged violations of the Arms Export Control Act (AECA) and ITAR involving the unauthorized export of defense articles to the Republic of Korea Air Force between 2005 and 2007. Other violations included: (a) the failure to obtain a DSP-83 Non-Transfer and Use Certificate for the significant military equipment exports, as classified by USML, (b) misrepresenting on export control documents that the exports were covered by an export license in violation of ITAR Part 127.2(a), and (c) trading parts classified under USML Category VIII(h) without authorization. During this period, the companies were registered as exporters with the DDTC in accordance with AECA and ITAR. However, they did not obtain authorization for exporting the defense articles to South Korea. DDTC considered the companies' remedial compliance measures as mitigating factors in determining the charges. Each respondent appointed a new vice president for Compliance, underwent ITAR compliance training, and instituted new review and control procedures to prevent and detect any violations. Alpine Aerospace Corp. was fined US$30,000, and TS Trade Tech US$20,000. DDTC has permitted these amounts to be

used by the companies to defray the costs associated with the settlement's required remedial compliance measures.

## BIS – US Department of Commerce

### Four Companies Settle Antiboycott Charges Under the Export Administration Regulations (EAR)

**Perfume Retailer agrees to pay US$27,000 to settle BIS antiboycott charges.** Parfums de Coeur of Darien, Connecticut agreed to pay a US$27,000 fine to settle nine BIS charges of violating antiboycott regulations by furnishing information about business relationships with boycotted countries. The alleged violations arose from transactions with the United Arab Emirates from 2005 to 2006.

**Weiss-Röhlig USA LLC has agreed to pay a civil penalty of US$8,000 to settle BIS antiboycott charges.** Weiss-Röhlig, located in Cranford, NJ, faced two allegations that it violated the antiboycott provisions of the EAR during 2006 in connection with transactions involving the sale and/or transfer of goods or services (including information) from the US to Kuwait. Weiss-Röhlig, on one occasion, furnished prohibited information in a statement regarding the blacklist status of the carrying vessel, in violation of the antiboycott provisions of the EAR and, on another occasion, failed to report to the Department of Commerce the receipt of a request to engage in a restrictive trade practice or boycott, as required by the EAR.

**JAS Forwarding (USA) Inc. agrees to pay a civil penalty of US$19,200 to settle BIS antiboycott charges.** The Bureau of Industry and Security (BIS), through its Office of Antiboycott Compliance (OAC), alleged that on at least three occasions during the year 2006, in connection with transactions involving the sale and/or transfer of goods or services from the United States to Lebanon and Kuwait, JAS Forwarding furnished prohibited information in statements certifying that the goods were neither of Israeli origin nor contained Israeli materials and a statement regarding the blacklist status of the insurance company.

**Rexnord Industries LLC agrees to pay a civil penalty of US$8,000 to settle BIS antiboycott charges.** Rexnord Industries, located in Milwaukee, WI, settled allegations that it violated the antiboycott provisions of the EAR five times during the years 2007 through 2009, in connection with transactions involving the sale and/or transfer of goods or services from the US to Qatar, Pakistan and Bangladesh. BIS alleged that Rexnord Industries, on one occasion, furnished prohibited information in a statement certifying that the goods were neither of Israeli origin nor contained Israeli materials, and on four occasions failed to report to the Department of Commerce the receipt of a request to engage in a restrictive trade practice or boycott, as required by the EAR. Rexnord voluntarily disclosed the transactions to BIS.

### FedEx Settles Charges of Causing, Aiding and Abetting Unlicensed Exports for US$370,000

FedEx of Memphis, TN has agreed to pay a US$370,000 civil penalty to settle allegations that it committed six violations of the EAR relating to FedEx's provision of freight forwarding services to exporters. BIS alleged that on two occasions in 2006, FedEx caused, aided and abetted acts prohibited by the regulations when it facilitated the attempted unlicensed export of electronic components from the US to Mayrow General Trading and related entities in Dubai, United Arab Emirates. On June 5, 2006, BIS had issued a general order imposing a license requirement with a presumption of denial for the export or reexport of any item subject to the EAR to Mayrow General Trading and related entities. The general order was issued based on information that Mayrow and the related entities were acquiring electronic components and devices that were being used in improvised explosive devices deployed against Coalition forces in Iraq and Afghanistan. FedEx also settled allegations that in 2005 they aided and abetted acts prohibited by the regulations when it facilitated the unlicensed export of flight simulation software to Beijing University of Aeronautics and Astronautics, an organization listed on the US Department of Commerce's Entity List and located in

the People's Republic of China. Lastly, BIS alleged that on three occasions in 2004, FedEx caused, aided and abetted acts prohibited by the regulations when it facilitated the unlicensed export of printer components from the US to end-users in Syria.

## OFAC – US Department of the Treasury

### Cosmetics Company Settles Violations of the Iranian Transactions Regulations for US$450,000

Essie Cosmetics Ltd. and a former corporate officer have agreed to settle OFAC allegations involving unlicensed exports to Iran in violation of the Iranian Transactions Regulations (ITR) for US$450,000. The apparent violations relate to Essie and the officer's knowing sale and export of nail care products on three occasions valued at US$33,299 to an Iranian distributor pursuant to an Exclusive Distributorship Agreement in apparent violation of Section 560.204 of the ITR. Essie and the officer did not voluntarily self-disclose and OFAC considered the apparent violations an egregious case in light of their intentional efforts to evade sanctions. The base penalty was US$750,000.However, this amount was mitigated in part because Essie and the officer have no history of prior OFAC violations. However, Essie's apparent disregard for compliance measures and its uncooperative attitude, even after the company became aware of the violation, may have contributed to the large fine in comparison to the violation. This is evidenced by Essie's inclusion of Iran in their drop-down list of customer location, even after OFAC became aware of the violations.

### Technology Company Settles Violations of the Sudanese Sanctions Regulations

Teledyne Technologies Incorporated and its subsidiary, Teledyne RD Instruments, Inc., have agreed to pay US$30,385 to settle allegations of violations of the Sudanese Sanctions Regulations, 31 C.F.R. part 538, occurring in 2007. OFAC alleged that on two occasions, Teledyne indirectly exported Acoustic Doppler Current Profilers (ADCP) to Sudan valued at US$122,766. The base penalty amount for the alleged violations was US$61,383. OFAC determined that Teledyne voluntarily self-disclosed this matter to OFAC and the alleged violations constitute a non-egregious case. The settlement amount reflects OFAC's consideration of the following facts and circumstances, pursuant to the General Factors under OFAC's Economic Sanctions Enforcement Guidelines, 31 C.F.R. part 501, App. A: Teledyne has no history of prior OFAC violations; the exports of the ADCPs caused minimal harm to sanctions programs objectives; and Teledyne took appropriate remedial action upon learning of the potential OFAC violations.

### OFAC Fines Computer Supplier More Than US$1 Million for Exports to Iran

Online Micro LLC and one of its principal owners agreed to settle charges made by OFAC arising from apparent violations of the ITR, 31 C.F.R. part 560, related to unlicensed exports by Online Micro between 2009 and 2010 of computer-related goods indirectly from the US through Dubai, United Arab Emirates to Iran. The documents show that in May 2007, Online Micro purchased 1,000 computers from Dell Inc. for US$500,000, and later that year Dell began receiving service calls concerning the computers from persons in Iran. After conducting an internal investigation, Dell suspended Online Micro from placing further orders. Online Micro agreed to a settlement in the amount of US$1,054,388 with respect to apparent violations of the ITR by Online Micro and the owner. The settlement requires the forfeiture of a money judgment in the amount of US$1,899,964, and BIS Export Denial Orders which prohibit Online Micro and the owner from exporting any goods from the US for a 10-year period. The BIS Export Denial Orders were suspended provided Online Micro and the owner remain in compliance with the terms of their Settlement Agreements with BIS and with EAR. Online Micro and the owner did not voluntary disclose these matters to OFAC. OFAC considers the apparent violations to be egregious.

### Medical Equipment Manufacturer Settles Violation of Iranian Transactions Regulations

Sandhill Scientific, Inc., of Highlands Ranch, CO, a US manufacturer of medical equipment, has agreed to remit US$126,000 to settle allegations that it violated the ITR, 31 C.F.R. part 560, and

OFAC's Reporting, Procedures and Penalties Regulations, 31 C.F.R. part 501. On separate occasions in 2007 and 2008, OFAC alleged that Sandhill exported medical equipment valued at approximately US$6,700 to Dubai, United Arab Emirates, with knowledge or reason to know that the goods were intended for transshipment or supply to a company in Iran with which Sandhill had an exclusive distributor agreement. This matter was not voluntarily disclosed to OFAC. OFAC determined that the alleged violation was an egregious case because: Sandhill's unlicensed export appears to have resulted from willful and reckless conduct in which the company's management was directly involved; Sandhill appears to have deliberately concealed the fact that the goods were destined for Iran; and Sandhill did not fully cooperate with the investigation. These determinations resulted in a base penalty amount of US$250,000 for the alleged ITR violation. Also, because the medical equipment exported by Sandhill had a value of approximately US$6,700, the base penalty for the two alleged Reporting, Procedures and Penalties Regulation violations totaled US$40,000. Mitigating the penalty was the fact that the export may have been eligible for an OFAC license pursuant to Section 560.530 of the ITR and OFAC has no record of any prior sanctions enforcement actions involving Sandhill.

## Foreign Corrupt Practices Act (FCPA) – DOJ and SEC

### Trading Company Pays US$54.6 Million Fine to Settle FCPA Charges Linked to Bribery in Nigeria

Marubeni Corporation, a Japan-based trading company, agreed to pay US$54.6 million as part of a deferred prosecution agreement (DPA) stemming from a decade-long scheme to obtain engineering, procurement and construction contracts in Nigeria's liquefied natural gas industry. Marubeni worked with the TSKJ joint venture, comprised of Technip S.A., Snamprogetti Netherlands B.V., Kellogg Brown & Root Inc. and JGC Corporation, all of whom have previously reached settlements with the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) over their roles in Nigeria. As part of the DPA with the DOJ, Marubeni is to bring on a compliance expert to enhance its compliance program.

### Two Medical Device Manufacturers Settle FCPA Violations for More Than US$44 Million in Fines

Biomet Inc. settled FCPA charges brought by the DOJ and SEC over allegations that Biomet and its US, Argentine, Swedish and Chinese subsidiaries authorized more than US$1.5 million in illicit payments to publicly employed health care providers and hospital administrators in Argentina, Brazil, and China from 2000 to 2008 to win business. Employees at various levels within Biomet and its subsidiaries, including senior-level executives and at least six US citizens, were allegedly complicit in this bribery, as were certain distributors in Brazil and China. Under the scheme, Biomet agreed to pay HCPs illicit commissions between 15-20 percent and made improper payments in connection with clinical trials, hosted banquets, sponsored attendance at meetings and inappropriate leisure travel. To facilitate these illicit payments Biomet falsely recorded certain payments to conceal the true nature of the payments in the company's books and records. As part of these dispositions, Biomet agreed to pay a US$17.28 million criminal penalty, disgorge US$5.57 million in illicit profits and pre-judgment interest (for a total of US$22.85 million), and implement rigorous internal controls and monitorship. Biomet has joined a long line of companies from various industries to have provided inappropriate gifts, hospitality and entertainment in exchange for business in China.

Fellow medical device manufacturer Smith & Nephew (UK-based) and its US subsidiary resolved its own corruption charges with the DOJ and SEC by agreeing to pay more than US$22 million in fines and penalties in connection with allegations that Smith & Nephew's US and German subsidiaries bribed doctors in Greece for more than a decade to win business. According to allegations, Smith & Nephew employees, subsidiaries and affiliates agreed to sell Smith & Nephew products at full price to a Greek distributor while paying discounts and commissions (equal to a percentage of such sales) to offshore shell companies controlled by the distributor for "marketing" or "distribution" services that

were never in fact performed. Approximately US$9.4 million was paid to three offshore companies under this scheme from 1998 to 2008. The Greek distributor, in turn, is alleged to have used some or all of the funds to provide cash incentives and other things of value to publicly employed HCPs in Greece to induce the purchase of Smith & Nephew products. In settling with the DOJ and SEC, Smith & Nephew agreed to pay a US$16.8 million criminal penalty, disgorge US$5.4 million in ill-gotten gains and pre-judgment interest (for a total of US$22.2 million), implement an enhanced compliance program with rigorous internal controls, retain a compliance monitor for at least 18 months, and provide periodic reports to the agencies regarding the remediation and implementation of the enhanced compliance program. Similar to the enforcement actions brought against Biomet, senior personnel within Smith & Nephew also were aware of and failed to stop the company's improper payments to publicly employed HCPs. These enforcement actions represent the first of ongoing investigations that the DOJ and SEC are conducting against more than 20 companies in the health care industry.

**BizJet Resolves FCPA Charge and Lufthansa Technik Enters NPA With DOJ**

On March 14, 2012, the DOJ announced that BizJet International Sales and Support, Inc., a provider of aircraft maintenance, repair and overhaul services based in Tulsa, Oklahoma, paid a criminal penalty of US$11.8 million and entered into a three year Deferred Prosecution Agreement (DPA) to resolve an FCPA-related charge. In addition, the DOJ entered into a Non-Prosecution Agreement (NPA) with BizJet's German parent company, Lufthansa Technik AG, requiring it to cooperate in investigations, notify the DOJ of criminal conduct or other enforcement actions related to fraud or corruption, and adopt a compliance program meeting the DOJ's requirements as set out in the NPA's Appendix. Three BizJet executives and a BizJet sales manager allegedly paid bribes to foreign officials of the Mexican and Panamanian governments either directly or indirectly through a shell company owned and operated by the BizJet sales manager in order to obtain or retain contracts to perform services. BizJet discovered the violations during an internal audit at which point it initiated an internal investigation and voluntarily disclosed the violations to the DOJ. In calculating the penalty, the DOJ recognized BizJet's cooperation and remediation efforts, which included conducting an internal investigation, making employees available for interviews, collecting, analyzing and organizing voluminous evidence for the DOJ, terminating the employees responsible for the corrupt payments, and enhancing its compliance program. For these reasons, the DOJ issued a criminal penalty of US$11.8 million, which, according to the DOJ, was approximately 30 percent below the bottom of the fine range provided by the US Sentencing Guidelines (US$17.1 million to US$34.2 million in this case).

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