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INTERNATIONAL TRADE & TECHNOLOGY TRANSFER (IT^3) UPDATE

Squire, Sanders & Dempsey L.L.P.

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BAE Systems plc: Too Big to Suspend?

On March 1, 2010 UK-based defense contractor BAE Systems plc (BAES) pleaded guilty in the US District Court for the District of Columbia to conspiring to defraud the United States, making false statements about BAES' Foreign Corrupt Practices Act (FCPA) compliance program and violating the Arms Export Control Act (AECA) and International Traffic in Arms Regulations (ITAR). For its violation, BAES will pay a US$400 million criminal fine – one of the largest ever levied by the United States against a business for business-related violations. Despite the seriousness of the allegations against BAES and the magnitude of its criminal penalty, BAES has avoided the potentially more damaging effects of suspension or debarment from trade involving US defense articles or participation in US public procurement contracts. The US government's decision not to impose these measures raises questions about whether BAES is simply too big to penalize with suspension or debarment.

BAES' violations

BAES' violations stem from representations the company made to the US government between 2000 and 2002 that it would develop and implement policies and procedures to ensure compliance with the antibribery provisions of the FCPA and similar provisions of non-US laws established at the Organisation for Economic Co-operation and Development's (OECD) Anti-Bribery Convention. In brief, the FCPA prohibits certain businesses and individuals from making corrupt payments to foreign officials for the purpose of obtaining or retaining business. It further prohibits such payments to third parties when it is known that a portion of the payments will go to a foreign official for the purpose of obtaining or retaining business.

According to court documents, BAES knowingly and willfully failed to implement antibribery compliance measures and, in fact, reaped significant financial gains from prohibited activities which might have been detected and prevented had compliance measures been adopted as was represented. As part of its plea, BAES admitted to making a variety of payments prohibited by the FCPA, including a series of payments to offshore shell companies and third-party intermediaries. BAES did not screen these companies and intermediaries to the degree that BAES had represented to the US government that it would. In addition, the company made various payments to so-called "marketing advisors" that were retained by BAES to secure sales of defense items. In some cases, BAES encouraged these advisors to establish offshore shell companies to help hide their relationships with BAES, circumvent the laws of countries that prohibit such relationships and disguise prohibited payments.

BAES' violations of the AECA and ITAR derive from the same payments as those discussed above. In its plea, BAES admitted to making false, inaccurate and incomplete statements to the US government in its requests for authorization to export defense-related items by failing to disclose commissions paid to third parties to secure sales of those items. The company further admitted that it knowingly and willfully failed to disclose these payments in order to shield its relationships with outside advisors from public scrutiny.

Remedial measures against BAES

Under the terms of the plea agreement, BAES will pay a US$400 million criminal fine and maintain a comprehensive compliance program to detect and prevent future violations of the FCPA, non-US antibribery laws, the AECA and the ITAR. In addition, BAES must retain an independent compliance monitor for a period of three years who will periodically report to the US Department of Justice on the company's compliance performance.

Despite the magnitude of penalties levied against BAES, the company has not been suspended or debarred either from federal procurement contracts or from export activities controlled under the ITAR. Federal procurement regulations provide that a party that has violated the FCPA may face possible suspension or debarment from federal contracts.

These penalties were not imposed on BAES, however, as it was not specifically charged with (and did not admit to) violating or conspiring to violate the FCPA. Rather, BAES was charged with a single count of conspiring to defraud the United States and making false statements about its FCPA compliance program, charges presumably chosen specifically to avoid federal procurement suspension or debarment remedies.

UPCOMING EXPORT COMPLIANCE EVENTS

Export Controls and Government Contracts Compliance for NASA and other Government Contractors

8 June – Palo Alto, California

Squire Sanders will be sponsoring this half day program, led by Karen R. Harbaugh and David A. Saltzman who will be speaking on government contracting and export controls compliance issues for NASA and other government contractors. If interested in receiving details, contact J. Randolph Miller at jrmiller@ssd.com.

Defense Export Controls: New Rules and Regulations, Opportunities & Challenges

14 to 15 June – Washington DC

George N. Grammas will be speaking on avoiding unauthorized exports of technical data and defense services. Event details are available at http://www.ttcus.com/view-about.cfm?id=124.

AILA Annual Conference

30 June to 3 July – Washington DC

Squire Sanders lawyers Gregory W. Bates and Christopher H. Skinner will be speaking on FCPA and export controls compliance. Event details are available at http://www.aila.org/content/default.aspx?docid=25890.

ITAR Workshop: "How To Cure The Virus"

12 to 14 July – Stratford-upon-Avon, UK

A two and a half day workshop session, being jointly organized by the Export Group for Aerospace & Defence (EGAD), Squire Sanders and Strategic Shipping Company Ltd. George N. Grammas will speak on the application of ITAR to non-US persons and US enforcement actions against non-US persons; commodity jurisdiction and ITAR contamination of non-US products; and procurements from the US and sales to the US: effective use of ITAR agreements. Event details are at http://www.egad.org.uk.

Coping With Export Controls in Mixed Commercial and Military Business: "Turning the ITAR on Its EAR"

Fall 2010 – Northern California

If interested in receiving details, contact J. Randolph Miller at jrmiller@ssd.com.

For its violations of AECA and the ITAR, BAES continues to face possible suspension or debarment from export privileges. To date the Department of State has not issued a definitive statement about what, if any, action will be taken against BAES, leaving many US defense companies unsure about how to react. Immediately following the announcement of the BAES plea, the Department of State posted on its website a statement indicating that it would place a "temporary administrative hold" on all license applications where BAES "or any of its subsidiaries is an applicant, consignee, end user, manufacturer or source" (which was removed from the site less than 24 hours after it was posted). It was shortly thereafter replaced by similar statement, which was also taken down with 24 hours of its posting. On March 10, 2010 Department of State spokesman P.J. Crowley stated during a press conference that the Department of State was still "assessing the implication the [BAES] plea will have on the statutory debarment and resulting policy of denial."

He added that "applications for export will be delayed if those applications involve BAE Systems plc or any of its subsidiaries."

Application of the ITAR

The AECA prohibits issuance of licenses for defense-related exports to persons who have been convicted of violating the Act, unless or until such persons are granted relief. The Act further provides that relief from this "statutory debarment" can occur only after a thorough review of the circumstances surrounding conviction and a finding that appropriate measures have been adopted to mitigate any related law enforcement concerns. In implementing the enforcement provisions of the AECA, the ITAR explains that it is the policy of the Department of State to deny authorization for exports involving persons convicted of violating or conspiring to violate the AECA for a three-year period following conviction. Department of State policy permits debarred persons to request reinstatement of export privileges after one year of debarment; however, reinstatement is generally granted only after three years of debarment. To be reinstated, debarred persons must submit a request for reinstatement which is granted only after interagency consultations, upon a showing that export control concerns have been mitigated. In some cases, exceptions are granted for specific transactions involving debarred persons where consistent with foreign policy and national security concerns.

Having pleaded guilty to charges of conspiring to violate the AECA, BAES is subject to statutory debarment. The Department of State's current list of debarred persons includes scores of individuals and companies smaller than BAES that were convicted of smaller-scale violations in terms of sophistication and dollar value. The list includes, for example, Rigel Optics, Inc., which was debarred in 2009 and fined US$90,000 for certain prohibited exports, while its owner was fined US$5,000 for related false statements in licensing documents. Does BAES warrant special treatment due to its size and importance to the US government and US defense industry? Is the Department of State taking the position that the violations of the parent should not be attributed to the subsidiaries, or will it articulate some other justification for its position?

Conclusion

The US government's decision not to charge BAES for specific violations of the FCPA that could trigger suspension or debarment from federal contracts and the Department of State's reluctance to enforce its debarment policy strongly suggest that the US government views debarment remedies differently for different companies. Notably, BAES is one of the Department of Defense's largest arms suppliers. Debarment or suspension from federal contracts or defense-related exports would severely disrupt BAES' activities in the United States. For companies as large as BAES, these remedies could also severely disrupt government procurement activities and export licensing for countless US-based firms involved with BAES and BAES products. The government's reluctance to impose these remedies in this case could indicate an implied exception for circumstances where enforcement of suspension or debarment would be impractical or imprudent.

Managing Cross-Border Legal and Regulatory Risks in Aerospace and Defense

One lesson of the BAES plea is that the greatest legal and regulatory risk challenges facing the aerospace and defense industry are ITAR and FCPA compliance. US regulators have interpreted the ITAR to impose new compliance obligations on non-US companies and are bringing ITAR enforcement actions against non-US companies with increasing frequency. Further, as evidenced by the recent action against BAES the US Department of Justice (DOJ) alleging both ITAR and FCPA-related violations, US and non-US enforcement agencies are increasingly coordinating their investigations and pursuing companies based outside of the United States.

ITAR Compliance. The State Department's Directorate of Defense Trade Controls (DDTC) has significantly stepped up ITAR enforcement against non-US companies. DDTC's extra-territorial application of the ITAR requires non-US companies to obtain DDTC approval for re-exports and re-transfers abroad of US-origin defense articles, and extends to "ITAR contamination" of non-US products incorporating US-origin defense article components, requiring non-US companies to obtain DDTC approvals for the export of their products from one country to another country. The reach of DDTC's assertion of ITAR contamination jurisdiction is broad because DDTC does not recognize any *de minimis* standard for the US munitions content, asserting jurisdiction regardless of the comparative value of the US-origin defense article and the non-US-made product into which the US-origin defense article is incorporated.

Extraterritorial ITAR compliance obligations also are "pushed down" to non-US companies who are parties to DDTC-approved warehousing and distribution agreements, manufacturing and license agreements, and technical assistance agreements with US companies. ITAR obligations imposed under technical assistance agreements (TAAs) not only restrict the ability of non-US parties to the agreement to reexport or re-transfer technical data or defense services provided to them by the US party to the agreement, but also will dictate the nationalities of the non-US companies' employees who may have access to such data and services. Even companies based outside the United States who are not parties to TAAs may find themselves subject to ITAR controls to the extent they become sub-licensees under these agreements. Typically, sub-licensees are customers of non-US parties to the agreement who serve as prime contractors to foreign governments in defense programs. Sub-licensees must be pre-approved by DDTC and are required to enter into a nondisclosure agreement with their vendors who serve as licensees under the TAA.

Focus on Aerospace and Defense Industry

Squire Sanders offers a team of lawyers in the United States and around the world who focus on aerospace and defense industry issues. Through this integrated team, Squire Sanders brings the right mix of industry and cross-border business knowledge to support your organization everywhere it needs to be. We understand the challenges of operating in the global aerospace and defense market, including matters involving:

- Regulatory issues for aerospace and defense, including export controls and anticorruption maters
- M&A in the aerospace and defense sector
- Access to the PRC aerospace market
- Access to the US defense market
- International government contracting
- Critical policy issues, including spectrum allocation

This *Update* devotes special attention to our experience in each of these important areas. We welcome the opportunity to share our extensive credentials in aerospace and defense with you.

FCPA Compliance. 2009 witnessed an explosion of FCPA enforcement actions, with a record 40 cases brought by the DOJ and the US Securities and Exchange Commission (SEC). Presently, there are more than 140 FCPA matters pending investigation at DOJ. The jump in enforcement actions has been matched by increased monetary penalties with DOJ collecting almost US$1.5 billion in fines and penalties over the past two years. In addition to monetary penalties collected by the DOJ, publicly traded companies have recently announced the setting aside of reserves in anticipation of settling FCPA enforcement actions. These reserves, collectively, total more than US$1 billion. Another FCPA trend is the increased prosecution of individuals under FCPA, with 17 prosecutions and four individuals taken to trial and convicted in 2009, and 60 percent of all 2008 FCPA prosecutions being against individuals. More than 91 percent of the individuals prosecuted in the past 10 years either pleaded guilty or were convicted at trial. Industry-based targeting by the DOJ and SEC also continues to be a trend with the defense industry announced target for 2010.

Recent Enforcement Actions. ITAR and FCPA enforcement actions against non-US companies and individuals have been at the forefront of actions in 2010. The trend toward more vigorous FCPA enforcement, including prosecutions of individuals, was highlighted on January 19, 2010 when a sting operation resulted in the arrest of 21 executives and employees of military and law enforcement products manufacturers, including several foreign nationals, attending a trade show in Las Vegas. The DOJ announced that these arrests were part of "the largest single investigation and prosecution against individuals in the history of the DOJ's enforcement of the FCPA." The DOJ investigation in this case was also noteworthy for its use of investigative techniques that are typically applied in narcotics and organized crime cases.

In the first ITAR penalty action taken in 2010, DDTC announced on February 3 that it had entered into a consent agreement with a non-US company, Germany-based Interturbine Aviation Logistics Gmbh, and its Grand Prairie, Texas branch office, Interturbine Aviation Logistics GmbH, LLC, to resolve violations of the AECA and the ITAR, under which Interturbine agreed to pay a civil penalty of US$1 million.

As discussed above, on March 1, 2010, BAES, Europe's largest defense company, agreed to plead guilty to a charge of making false statements to the US government and will pay the DOJ a US$400 million fine. BAES also agreed to plead guilty to false accounting after another investigation by the Serious Fraud Office (SFO) in the UK, for which it will pay the SFO £30 million. The plea agreements stemmed from DOJ charges related to false representations made by BAES concerning payments to government officials in violation of the FCPA. In addition to the FCPA violations, BAES was charged with violating the ITAR for not disclosing these payments in applications submitted to DDTC to export US-sourced technology.

Growing Coordination of US and Non-US Investigations and Enforcement. During the same time the arrests were made by FBI agents in the Las Vegas sting operation in January, UK's City of London police were executing seven search warrants in connection with their own investigations into the companies involved, demonstrating the trend toward international coordination of investigation and enforcement agencies. Similarly, the BAES enforcement action noted above, which stemmed from parallel investigations by the DOJ and the British SFO, reflects the growing coordination of investigations and enforcement around the world.

In this regard, the DOJ is providing evidence, technical and forensic training, and FCPA-trained lawyers to assist non-US prosecutors with local bribery prosecutions. The International Organization of Securities Commissions has had a multilateral memorandum of understanding in place since 2003, which promotes sharing and exchanging investigative data, including bank and brokerage records, with securities regulators around the world. According to SEC Chairman Mary Schapiro, the SEC is "working vigorously across borders to detect and punish such illicit conduct." Most recently, on February 2, 2010 the United States signed a new Mutual Legal Assistance and Extradition Treaty Agreement with the EU which provides for investigative and enforcement assistance requests to be made by fax and email, thus significantly shortening the time frame within which the DOJ can secure information abroad. The agreement also provides that financial accounts and transactions are discoverable, and that bank secrecy is no defense to production. Furthermore, the agreement allows for the creation of joint investigative teams to operate in both the US and EU-member countries.

Participating in China's Aerospace Sector (part 1 of 2)

This article is the first installment of a two part series on participation in China's aerospace sector. This installment addresses the legal issues in China, the next installment will address the US regulatory issues.

As the aerospace sector has struggled in other regions during 2009, China sees sunny skies for its growing aerospace industry. The two principal players in the aerospace industry in China today are Aviation Industry Corporation of China

(AVIC) and Commercial Aircraft Corporation of China (COMAC). The AVIC, which is the largest aviation company in China, is principally engaged in the development and production of military and commercial aircraft and components. In 2008 the Government of China approved the formation of COMAC to design and produce commercial aircraft with the goal of reducing China's dependency on foreign-produced aircraft and to compete with Boeing and Airbus in the world's markets.

COMAC has begun production of its ARJ21, a regional aircraft with seating capacity of 70 that has been designed and built with foreign assistance and has already been certified by the Civil Aviation Authority of China for domestic commercial use. According to recent press reports, COMAC has already received more than 200 orders from domestic and international carriers for ARJ21s.

COMAC has also commenced the design of its C919, a jumbo jet with seating capacity of more than 300 people. Lacking experience in the production of large commercial aircraft, China has invited other companies to participate in the design and manufacture of components and systems. For some components (e.g., engines and landing gear), COMAC will contract directly with foreign suppliers. For others, a China-foreign joint venture is preferred (e.g., cockpit panel components and systems, and electrical power distribution components and systems) or required (e.g., hydraulic and fuel systems).

The establishment of a China-foreign joint venture in the aerospace industry in China, particularly one involving a state-owned enterprise, will likely present the following issues:

- **Government approvals –** Each non-PRC investment in the PRC including a joint venture, will be subject to government approval at some level.
- **Foreign ownership –** Typically the PRC partner will be expected to hold more than 50 percent of the equity of the joint venture entity, presenting challenges if the foreign investor wishes to have management control. This often results in intense negotiation regarding the management personnel to be appointed by each party and the scope and limits on the authority of each.
- **Non-compete –** The scope of a non-compete agreement typically becomes a difficult negotiation issue as the PRC partner wishes to enter the global market, conflicting with the common desire of the foreign investor to limit the China-based partner to China and far from its established markets in Europe and North America.
- **Transfer of equity interest –** PRC law requires the approval of the joint partner for any transfer of equity interest to a third party. Any such transfer is subject to the approval of Ministry of Commerce (MOFCOM) and registration with the Administration of Industry and Commerce (AIC). If the PRC joint venture partner wishes to transfer, it also is subject to approval by SASAC in addition to MOFCOM and AIC. Such requirements may present challenges for the foreign investor, who typically desires to include put and call options (and sometimes tag-along rights) in such a contract.
- **Antibribery –** Because the customer in China is typically a state-owned enterprise, it is essential to include FCPA and PRC antibribery compliance provisions in the contract.
- **Dispute Resolution –** In most contracts with PRC state-owned enterprises, the forum and rules for resolution of disputes is the subject of considerable negotiation. In our experience, the most common resolution is the Hong Kong International Arbitration Centre.

Structuring Due Diligence for Non-US Participation in the US Aerospace and Defense Sector

Cross-border aerospace and defense M&A transactions continue to provide one of the best ways to access new markets and supplement internal growth rates. Although these transactions offer attractive business opportunities, they also involve substantial legal and regulatory risks. Companies that do not identify and address these risks during due diligence may encounter post-closing enforcement actions and other challenges that can delay or even frustrate the company's ability to take advantage of the business opportunity that justified the transaction. Properly structuring the company's due diligence team and relationship with its outside legal advisors not only can facilitate the achievement of the acquisition's business objectives but also close transactions better, faster and cheaper.

Due diligence investigations in M&A transactions generally focus on answering three questions:

- Does the acquisition make sound business sense?
- What assets and liabilities will be acquired at closing?
- What are the risks and prospects of the business after closing?

In the absence of effective due diligence, companies are not able to make informed acquisition decisions. The key to effective due diligence is to integrate the company's legal counsel into a team representing all of the company's functional areas that will be involved not only in evaluating the acquisition, its risks and prospects but also, and more importantly, in integrating the acquired business into the company.

Cross-border aerospace and defense M&A transactions involve certain legal and regulatory risks that are not encountered in a typical M&A deal. Among such risks when the target is a US government contractor are those associated with criminal and civil false claims, defective pricing, export controls, foreign corrupt practices, foreign ownership, control and influence, government furnished property, organizational conflicts of interest, price reduction, and required wages and benefits.

Larger aerospace and defense companies performing US government prime contracts and subcontracts are required to implement codes of business ethics, compliance programs and internal controls in order to both promote organizational cultures that encourage ethical conduct and to show a commitment to comply with the law, and with the special requirements for government contracting. Larger contractors, therefore, have internal procedures designed to comply with US government procurement laws and regulations, along with staff responsible for those procedures and compliance.

When possible, a company should include on its due diligence team members of its staff already responsible for government contracting compliance, rather than rely on in-house or outside legal counsel to review the target's compliance with the special requirements of government contracting. Because a company's in-house compliance staff understands the special legal and regulatory requirements that govern government contracting, as well as the internal procedures and controls that the company has implemented to maintain compliance, they are particularly well-qualified to lead the due diligence investigation in their respective functional areas. Moreover, because they likely will be involved in integrating the acquired business after closing, the knowledge that they gain during due diligence will be very useful when facilitating the integration. Even if a company incurs the expense of having legal counsel prepare a detailed due diligence report, such reports are no substitute for the first-hand knowledge gained by the compliance staff while leading the due diligence effort.

Although the company's non-legal staff will be responsible for leading the due diligence investigation in an M&A transaction, the company's internal and external legal advisors also play very important roles. At the outset, legal counsel can help plan the scope of the due diligence investigation. As the non-legal staff identifies issues or potential problems

during due diligence, the staff must promptly notify the company's in-house legal counsel responsible for the acquisition. In-house counsel will assess the issues and determine whether additional investigation is warranted and, if so, specify the scope of further inquiry. Counsel will then stay engaged until the company fully understands the issue.

When due diligence raises a potentially troublesome issue, in-house counsel also need to determine whether the issue may warrant a pre- or post-closing voluntary disclosure or a special indemnification, closing condition or other condition in the acquisition agreement. It is at this point that in-house counsel normally will seek the assistance of the company's outside legal counsel.

Because many targets of aerospace and defense acquisitions are small to mid-size companies that often will not have the same extensive compliance programs required of larger aerospace and defense companies, the acquirer may encounter compliance issues during due diligence that the acquirer itself has eliminated as a result of its own compliance efforts. If in-house legal counsel has not had experience with the issue, or wants to make sure that the company considers all available options, in-house counsel will look to the company's outside legal counsel to suggest solutions. For example, if the issue encountered during due diligence involves an export violation, outside counsel can help the company determine whether pre- or post-closing voluntary disclosure is required and, if so, help to prepare the disclosure.

It is often cost-effective for the outside legal counsel to draft the acquisition agreement, support in-house counsel during negotiations and circulate revised drafts. When issues arise during due diligence, in-house and outside legal counsel will work together to ensure that the acquisition agreement appropriately allocates the risks associated with those issues and includes closing conditions and other provisions to protect the acquirer. In those cases where due diligence discloses a potential "show stopper" that cannot be adequately addressed in the acquisition agreement, outside and in-house legal counsel can work together to explain the issue to management so that management can make an informed acquisition decision. Effective due diligence is critical to any acquisition and especially when the target is in the highly regulated US aerospace and defense industry.

Implications of Spectrum Allocation on Aerospace and Defense Industry

The aerospace and defense sectors are heavily dependent on spectrum. Pressure from other users (e.g., commercial wireless operators) and regulators seeking to reallocate spectrum and impose other measures pose significant regulatory issues for these industries.

Spectrum management — an essential element for aerospace and defense

From aircraft operational safety to radar, and from weapons guidance systems to communications networks, the aviation and defense industries are heavily dependent on spectrum resources. Spectrum issues arise at the earliest stage of concept development, and extend to actual operations and frequency management in the air and on the battlefield. Accordingly, spectrum regulatory matters, including frequency allocation and development of technical standards, have a significant impact on spectrum-dependent aerospace and defense systems.

Relevant spectrum initiatives

There are a number of spectrum-related proceedings underway internationally that have significant implications for aerospace and defense. These include:

- **United Kingdom Ministry of Defence spectrum examination process, administrative incentive pricing (AIP), plans for release of spectrum to other users, and separate proceedings on applying AIP to**

- **aeronautical bands –** These and other Office of Communications (Ofcom) proceedings have potential impact on NATO and the EU, as well as Eastern Europe spectrum realignment/harmonization efforts.
- **US Spectrum Inventory Legislation –** Review of spectrum use between 225 MHz and 3.7 GHz or 10 GHz to identify spectrum for commercial wireless broadband services may increase pressure to reallocate spectrum from government to commercial use.
- **World Radiocommunication Conference 2012 (WRC-12) agenda items –** Agenda Item 1.3 – Spectrum for Unmanned Aerial Systems; Agenda Items 1.4, 1.7 and 1.24 – Spectrum for aeronautical radio navigation service (ARNS) and aeronautical mobile-satellite (route) service (AMS(R)S); Agenda Item 1.19 – Software defines radios; Agenda Item 1.22 – Protection from unlicensed short-range devices (SRDs); Agenda Item 1.25 – Spectrum for MSS in 4-16 GHz. These and related agenda items directly affect aerospace and defense spectrum allocations and technical standards.

Spectrum Access

In addition to the development of spectrum allocations and technical standards to support aerospace and defense operations, ensuring appropriate access to available spectrum is essential for mission success.

Commercial access to military/government spectrum. Separate licensing processes and potential policy concerns can undermine access to government spectrum by commercial operators seeking to satisfy military demand. Issues such as access to X-band spectrum and hosted satellite payloads in military bands can raise complex legal and policy issues.

Military/government access to commercial spectrum. Regulatory issues associated with broadband mobile satcom, including aeronautical, maritime and land mobile services, have been addressed in various international fora but significant uncertainties remain. Complex international licensing procedures and potential liability issues can undermine the provision of these and other communications services.

Spectrum Refarming. Close attention must be paid to spectrum refarming efforts. There is high demand for commercial spectrum for fixed and mobile broadband access, and regulators continue to examine spectrum dedicated to government/military use to help satisfy this demand.

Recent Enforcement Actions and Updates

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

Interturbine Aviation Logistics GmbH Settles Charges Related to Unauthorized Export of Significant Military Equipment. Interturbine Aviation Logistics GmbH, a corporation based in Germany, and its Texas branch office, Interturbine Aviation Logistics GmbH, LLC, collectively (IAL), have agreed to settle charges relating to seven alleged violations of the AECA and the ITAR. IAL distributes products for the commercial aviation and related industries. In 2004 IAL willfully exported a shipment of ITAR-controlled Dow Corning ablative material and sealant categorized as significant military equipment (SME), without DDTC authorization and despite previously having been notified by Dow Corning that the products were ITAR-controlled. According to DDTC's charging letter to IAL, the company had updated its automated ordering system to reflect that the products were ITAR-controlled. However, employees at IAL's office in Germany were able to circumvent company controls by falsely representing to its employees in the United States that proper export authorization had been obtained. In addition, employees at IAL's office in Germany had manipulated company records to conceal the shipment. At the time of its violations, IAL was not registered with DDTC as an exporter of defense articles.

To settle charges related to its unauthorized export of a defense article, IAL has entered a consent agreement with DDTC which includes an agreement to pay a civil penalty of US$1 million. Of this amount, US$400,000 will be suspended on the condition that IAL does not seek reinstatement of its registration with DDTC or enter any transaction involving ITAR-controlled hardware or technical data for the two-year duration of the consent agreement. Should IAL seek reinstatement, this amount would be applied toward remedial compliance measures prescribed by DDTC. IAL and DDTC further agreed to suspend US$500,000 of the civil penalty conditioned upon IAL implementing remedial compliance measures equivalent to this amount, including measures to prevent ordering or supplying any ITAR-controlled articles for the duration of the consent agreement. IAL further agreed to facilitate on-site reviews by DDTC officials with minimum advance notice, and to retain a DDTC-approved outside auditor to conduct an audit of its export control systems within the first 12 months of the agreement period. For its cooperation with DDTC and its agreement to pay the civil penalty and implementing significant additional remedial compliance actions, DDTC decided not to pursue administrative debarment.

Bureau of Industry and Security (BIS) – US Department of Commerce

Company Agrees to US$15 Million Settlement for Selling 747 Aircraft to Iran. On February 5, 2010 Balli Aviation Ltd., a subsidiary of the UK-based Balli Group PLC, pleaded guilty to criminal charges related to the illegal export of Boeing 747 aircraft from the United States to Iran. According to the two-count criminal information filed in federal District Court for the District of Columbia, Balli Aviation Ltd. conspired between 2005 and 2008 to export three Boeing 747 aircraft from the United States to Iran without US government authorization. More specifically, the company allegedly bought the aircraft using financing provided by an airline based in Iran, and then leased the aircraft to the airline for use in flights to and from Iran. The information further charges the company with violating a 2008 Temporary Denial Order against it, which prohibited it from engaging in any transactions involving items subject to the EAR.

To settle criminal charges, Balli Aviation agreed to pay a US$2 million criminal fine. In addition, the company settled related civil claims by agreeing to pay a US$15 million civil penalty, US$2 million of which will be suspended pending any further export violations. The company further agreed to a five-year period of denial of export privileges, which will be suspended barring further export violations, and to retain an independent auditor that will submit to BIS and OFAC annual reports about the company's export compliance.

North Carolina Company Settles Allegations of Aiding and Abetting Violations of BIS Export Denial Order. Sirchie Acquisitions Company, LLC (Sirchie) of Youngsville, North Carolina has settled allegations by BIS that the company aided and abetted actions taken to evade a September 2005 denial order issued by BIS. In 2005 Sirchie Fingerprint Laboratories, Inc. (SFPL) and its then president and CEO settled claims by BIS that they participated in a scheme to divert certain products controlled for crime control reasons for end-uses in China and Hong Kong. As part of its settlement SFPL paid an administrative penalty and agreed to a five-year suspended denial of export privileges; its president and CEO agreed to a five-year denial of export privileges. In 2008 following SFPL's acquisition by Sirchie, BIS investigators discovered 10 instances during the period of denial where the company evaded BIS's denial order by providing SFPL's former president and CEO with quotes for items for export, receiving pricing information for him and engaging in export transactions involving these items. For these actions in contravention of the denial order, Sirchie has agreed to pay US$2.5 million — the maximum applicable administrative penalty. In addition, Sirchie has agreed with the DOJ to a deferred prosecution agreement according to which it will pay US$10.1 million in criminal fines, including US$1.3 million to implement an export compliance plan.

Office of Foreign Assets Control (OFAC) – US Department of Treasury

Balli Group and Balli Aviation Agree to US$15 Million Penalty for Violation of Iran Sanctions. The Balli Group PLC and Balli Aviation, Ltd. (collectively Balli), Department of Treasury Office of Foreign Assets Control (OFAC), and Department of Commerce Bureau of Industry and Security (BIS) agreed to a US$15 million civil penalty to settle allegations of violations of the Iranian Transactions Regulations (ITR) and the Export Administration Regulations (EAR). (See our BIS enforcement update above.) OFAC alleged that Balli violated §§ 560.203 and 560.204 of the ITR when it exported three commercial airplanes and attempted to export three additional commercial airplanes from the United States to Mahan Airlines in Iran. In addition to the OFAC and BIS settlement, Balli agreed to pay a US$2 million criminal fine to the DOJ relating to the illegal exportation of commercial aircraft from the United States to Iran. US$2 million of the OFAC and BIS settlement will be waived provided Balli remains in compliance with the EAR. Balli agreed to retain a third-party consultant to audit Balli's compliance with export controls laws and sanctions regulations.

Balli agreed to observe a BIS order denying it and its representatives, agents, and employees of export privileges for five years. BIS has temporarily suspended, and will permanently suspend, the export order, provided Balli remains in compliance with the OFAC and BIS settlement and the EAR. While Balli did not voluntarily disclose the above conduct, it did cooperate with OFAC's investigation.

Industrial Maritime Carriers Worldwide Settles Violation of Sudanese Sanctions. Industrial Maritime Carriers Worldwide, L.L.C. (IMCW) and OFAC settled allegations of violations of the Sudanese Sanctions Regulations. OFAC alleged that IMCW transported transformers, locomotives, and spare parts to Sudan and contracted to receive unloading services in Sudan. Intermarine, L.L.C., an agent of IMCW, IMCW and the financial institution involved notified OFAC at the same time and cooperated with OFAC. IMCW did not voluntarily disclose the matter to OFAC. Intermarine remitted US$72,072 to resolve the allegations.

Individual Settles With OFAC for Selling Cuban Cigars. An individual and OFAC resolved allegations that the individual was dealing in Cuban cigars, in which Cuba or a Cuban national had an interest. OFAC alleged that the individual purchased Cuban-origin cigars and offered to sell them on the Internet. The individual did not voluntarily disclose the matter to OFAC and paid US$525 to resolve the allegations.

Aviation Services International Agrees to US$750,000 Settlement With OFAC for Selling Aircraft Parts to Iran. Aviation Services International, B.V., aka Delta Logistics, B.V. (ASI), a Netherlands-based aviation services company, settled administrative charges filed by OFAC and BIS arising out of ASI's alleged violation of the International Emergency Economic Powers Act (IEEPA) and ITR as a result of the unlicensed export of aircraft parts and other goods to Iran. OFAC alleged that ASI's export and attempted export of goods indirectly from the United States through a third country to Iran without a license in violation of §§ 560.203 and 560.204 of the ITR. ASI and OFAC agreed to a settlement amount of US$750,000 with respect to the ITR. Prior to the settlement, ASI's principal owners, Robert and Niels Kraaipoel, each pleaded guilty to one count of conspiring to violate the IEEPA. In addition, ASI also paid US$100,000 to resolve a criminal action arising out of the same conduct, and accepted a BIS export denial order which prohibited it from exporting any goods for seven years. OFAC deemed its US$750,000 settlement satisfied by ASI's acceptance of criminal responsibility, payment of the criminal fine, and by the sanctions imposed by BIS.

FCPA – US Department of Justice and US Securities and Exchange Commission

NATCO Settles FCPA Allegations for US$65,000. NATCO Group Inc. resolved allegations that it violated the FCPA's books and records and internal controls provisions as a result of improper payments made to Kazakhstan government officials. The civil complaint and administrative order stated that Test Automation & Controls, Inc. (TEST), a wholly-owned

subsidiary of NATCO, created false documentation to cover its payments of extorted immigration fines and accepted fraudulent consultant invoices to cover the fees being paid for visas in Kazakhstan. The SEC represented that in February and September 2007, Kazakhstan immigration prosecutors audited expatriate workers in TEST's office in Kazakhstan (TEST Kazakhstan). The prosecutors threatened to fine, jail or deport workers they claimed did not have proper documentation unless TEST Kazakhstan paid cash fines. TEST Kazakhstan employees used personal funds to pay prosecutors US$25,000 in February and US$20,000 in September. Subsequently, TEST reimbursed the employees. To disguise the February 2007 reimbursements to its employees, TEST inaccurately recorded the reimbursement payments in its books and records as "salary advances." To conceal the September 2007 payment, TEST recorded the reimbursements as "visa fines". The SEC also represented that one of the consultants TEST Kazakhstan used to obtain immigration documentation for its expatriate employees was not licensed to provide such services, and maintained close ties to an employee in the ministry responsible for issuing visas. On two occasions the consultant requested and received cash from TEST Kazakhstan in exchange for securing the visas. To conceal the cash requests, the consultant provided TEST Kazakhstan with fake invoices for "cable" from third-party entities that the consultant controlled. TEST Kazakhstan later submitted invoices totaling more than US$80,000, which it knew to be fraudulent, to TEST for reimbursement. TEST reimbursed these invoices despite knowing that the invoices mischaracterized the true purpose of the services rendered.

To resolve a civil action filed by the SEC, NATCO will pay a US$65,000 penalty. In an administrative proceeding, the SEC issued a cease-and-desist order prohibiting the company from committing or causing any further violations of the FCPA's books and records and internal controls provisions.

Forfeiture and Possible Prison Term. John W. Warwick pleaded guilty to a one-count indictment that charged him with conspiracy to violate the FCPA. More specifically, the indictment charged that Warwick and others conspired to make corrupt payments to government officials in Panama for the purpose of securing business for Ports Engineering Consultants Corporation (PECC), a former Panama-based company with an office in Richmond, Virginia, of which Warwick was president.

PECC was affiliated with Overman Associates, a Virginia Beach, Virginia-based engineering firm. Warwick admitted that PECC was created so that Overman Associates and others could corruptly obtain a maritime contract from Panama's government. Warwick further admitted that he participated in a conspiracy to bribe Panamanian officials to award PECC contracts to maintain lighthouses and buoys along Panama's waterways. In exchange for receiving a 20-year no-bid contract from Panama's government, Warwick and others authorized bribes totaling more than US$200,000 to the former administrator and deputy administrator of Panama's National Maritime Ports Authority and to a former high-ranking elected official of the Republic of Panama. Warwick faces five years in prison, a fine of US$250,000, or twice the gain or loss realized from the illegal conduct, and three years of probation. The indictment also contained a notice of forfeiture for US$798,909.44, the proceeds traceable to the conspiracy. As part of his plea agreement, Warwick agreed to forfeit US$331,000.

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INTERNATIONAL TRADE & TECHNOLOGY TRANSFER (IT^3) UPDATE

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