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US State Department Proposes to Limit Definition of Defense Services; Eliminates TAA Requirement in Certain Circumstances

In April, the US Department of State, Directorate of Defense Trade Controls (DDTC) published a proposed rule that has the effect of limiting the scope of activities that are considered a defense service and establishes new definitions of ''Organizational-Level Maintenance,'' ''Intermediate-Level Maintenance'' and ''Depot-Level Maintenance.'' The change would allow certain activities to proceed without any DDTC approval, when Technical Assistance Agreement (TAA) approval is now required. DDTC will accept comments on this proposed rule until June 13, 2011.

The discussion below reviews each paragraph of the proposed new definition of defense services and relates our comments on the impact of the change and the impact of the new definitions of O-, I- and depot-level maintenance.

> § 120.9 Defense service.
>
> (a) Defense service means:
>
> (1) The furnishing of assistance (including training) using other than public domain data to foreign persons (see § 120.16 of this subchapter), whether in the United States or abroad, in the design, development, engineering, manufacture, production, assembly, testing, intermediate or depot level repair or maintenance (see § 120.38 of this subchapter), modification, demilitarization, destruction, or processing of defense articles (see § 120.6 of this subchapter)…

The addition of "using other than public domain data" will allow substantially greater flexibility for collaborative R&D and fundamental research, but the change falls short by not excluding other information which is not ITAR-controlled technical data. Under the heading "Supplemental Information" in the Federal Register notice of the proposed rule, DDTC states that "[t]he proposed change removes the requirement in § 124.1(a) to seek the Directorate of Defense Trade Controls' approval if the defense service that is being rendered uses public domain data *or data otherwise exempt from ITAR licensing requirements*" (emphasis added). We agree that providing assistance related to a defense article which does not involve the use of ITAR-controlled technical data should not be deemed a defense service. However, this concept is not reflected in this paragraph.

Assistance related to a defense article should not be deemed a defense service if the assistance:

- Uses only public domain information (as stated in the proposed rule);
- Uses only general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities;
- Uses only basic marketing information on function or purpose or general system descriptions of defense articles; or
- Uses only technology subject to the Export Administration Regulations.

However, only the first bullet above is excluded in the proposed definition. We recommend that DDTC change the proposed rule by adding the clause "using technical data (see § 120.10 of this subchapter) rather than the clause "using other than public domain data," as currently proposed.

Limiting repair and maintenance to Intermediate and Depot Level eliminates the need for a TAA for basic or organizational repair and maintenance assistance. This change is discussed further on the following pages.

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> (2) The furnishing of assistance to foreign persons, whether in the United States or abroad, for the integration of any item controlled on the U.S. Munitions List (USML) (see § 121.1 of this subchapter) or the Commerce Control List (see 15 CFR part 774) into an end item (see § 121.8(a) of this subchapter) or component (see § 121.8(b) of this subchapter) that is controlled as a defense article on the USML, regardless of the origin…

This new provision is a clarification of existing practice. Assistance in integrating a defense article is a defense service even if the assistance is limited to the integration of dual-use items. For example, a contractor could be involved in integration of IT and communication equipment into a military command center for a foreign military. The IT and communication equipment may comprise dual-use, off-the-shelf hardware and software. While the equipment is dual-use the total solution is a defense article – a military command center. The assistance in designing and integrating the command center is a defense service. The Supplemental Information section of the Federal Register notice provides a useful definition of ''integration.'' DDTC states in the notice that integration means the systems engineering design process of uniting two or more things in order to form, coordinate or blend into a functioning or unified whole including introduction of software to enable proper operation of the device. This includes determining where to install something (e.g., integration of a civil engine into a destroyer which requires changes or modifications to the destroyer in order for the civil engine to operate properly; not simply plug and play).

Integration should be distinguished from installation, which DDTC indicates means the act of putting something in its pre-determined place and does not require changes or modifications to the item in which it is being installed (e.g., installing a dashboard radio into a military vehicle where no changes or modifications to the vehicle are required; connecting wires and fastening the radio inside of the preexisting opening is the only assistance that is necessary). Consequently, if the contractor merely installed a dual-use antenna system at the military command center, without making modification to the antenna, the service would not be a defense service.

> (3) Training or providing advice to foreign units and forces, regular and irregular, regardless of whether technical data is transferred to a foreign person, including formal or informal instruction of foreign persons in the United States or abroad by any means including classroom or correspondence instruction, conduct or evaluation of training and training exercises, in the employment of defense articles; or
>
> (4) Conducting direct combat operations for or providing intelligence services to a foreign person directly related to a defense article.

Serving as an advisor to a foreign military concerning the use of defense articles is a defense service. Engaging in combat operations using defense articles also constitutes a defense service. The proposed rule provides better clarity and limits the scope of activities that will be deemed defense services. Under the proposed rule, military training and assistance combat operations will only be deemed a defense service when related to the use of defense articles.

> (b) The following is not a defense service:
>
> (1) Training in the basic operation (functional level) or basic maintenance (see § 120.38) of a defense article…

As stated in the proposed Section 120.9(a)(1) above, training or assistance in basic or O-level repair and maintenance is not a defense service. The proposed new Section 120.38 defines O-level repair and maintenance. Organizational-level maintenance (or basic-level maintenance) is defined as "the first level of maintenance performed by an end-user unit or organization 'on-equipment' (directly on the defense article or support equipment) assigned to the inventory of the end-user unit or organization . . . [consisting of] repair, inspecting, servicing, or calibration,

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testing, lubricating and adjusting equipment, as well as replacing minor parts, components, assemblies and line-replaceable spares or units."

> (2) Mere employment of a U.S. citizen by a foreign person…

This provision of the proposed new rule is intended to "prevent the anomalous situation where foreign companies are reluctant to hire US citizens for fear that such employment alone constitutes a defense service, even where no technical data would be transferred to the employer," according to DDTC. Thus, it appears that DDTC intends that a US citizen is deemed not to be furnishing defense services to the employer provided the US citizen is not employed in a capacity involving performing tasks that would cause the employee to release ITAR-controlled technical data in the course of employment. In practice, this may mean that the employee may not be engaged in a technical capacity involving defense articles without prior DDTC approval, but employment with other responsibilities would not be defense services. Clarifying language could be added to this provision by DDTC such as "where the employment does not involve the release of technical data by the US citizen."

> (3) Testing, repair, or maintenance of an item ''subject to the Export Administration Regulations'' (see 15 CFR 734.2) administered by the Department of Commerce, Bureau of Industry and Security, that has been incorporated or installed into a defense article…

This proposed exclusion follows the logic of the new provision at proposed Section 120.9(a)(2). Repair of a dual-use item incorporated into a defense article is not a defense service because the assistance relates only to the dual-use item and not to the defense article into which the dual-use item is installed. However, by contrast, troubleshooting the problems related to the operation of the dual-use item as integrated into the defense article would be defense service if it involved assisting to correct problems with the integrated solution.

> (4) Providing law enforcement, physical security or personal protective training, advice, or services to or for a foreign person (see § 120.16 of this subchapter), using only public domain data…

This proposed provision serves as an exception to proposed Sections 120.9(a)(3 and 4) when the services are limited to physical security or personal protective training, advice, or services using only public domain information. This training or assistance apparently is not deemed a defense service even if it does involve training in the use of defense articles.

> (5) Providing assistance (including training) in medical, logistical (other than maintenance), or other administrative support services to or for a foreign person.

This proposed provision also serves as an exception to proposed Sections 120.9(a)(3 and 4) when the services are limited to medical, logistical (other than maintenance) or other administrative support services.

The proposed definition of defense services and related proposed definitions and changes will clarify and limit the activities which DDTC will deem to be defense services and will eliminate the need to obtain TAAs in such circumstances.

The Impact of EU and US Iranian Sanctions on Multinational Businesses

In the second half of 2010, both the European Union and the United States imposed far-reaching sanctions against Iran. The measures on both sides of the Atlantic are considerably broader than the United Nations Security Council Resolution 1929 (2010), on which they are based and have had significant impact on all business activities with Iran.

Strict controls and enforcement actions have brought about a real need for caution on the part of businesses as EU and US authorities have made clear that they do not tolerate violation of the rules. In the UK, for instance, two

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instances of infringement were firmly sanctioned last October. In one case, a Lancashire businessman was jailed for eight months and ordered to pay £30,000 costs for knowingly exporting controlled goods and in particular the supply of radiation detection equipment to Iran without an export license. The other cases involved a former British Royal Marine who was sentenced to two-and-a-half-years imprisonment for knowingly exporting controlled goods after attempting to supply high-tech sniper scopes to Iran. In November last year, the Belgium Ministry of Energy announced the investigation of two firms over allegations of illegally exporting weapon grade nuclear material to Iran. In the United States, recent enforcement actions include charges by the Office of Foreign Assets Control (OFAC) against Barclays Bank PLC pertaining to prohibited banking transactions provided to proscribed parties in Iran (among other countries). Barclays ultimately agreed to settle charges and pay the US government US$176 million and adopt various compliance measures. In another case, OFAC imposed a civil fine of US$36,000 against a subsidiary of Aon Energy for facilitating payments of premiums on certain insurance services associated with a petroleum project on Kharg Island in Iran.

While compliance with the EU and US rules alone already imposes a significant burden on businesses, the simultaneous application of both sets of rules to one and the same business activity can become an insurmountable challenge and create understandable confusion.

This article therefore attempts to provide some clarity by summarizing the main provisions of both sanction regimes and outlining relevant parallels and differences in a comparison table.

The EU system

The current EU sanctions against Iran are set out in Council Decision 2010/413/CFSP[1] and Council Regulation 961/2010[2].

The restrictions include an arms embargo[3] as well as the prohibition to sell, supply, transfer or export, directly or indirectly, to Iran the dual-use goods and technology listed in Annex I to Regulation 961/2010 (reflecting Annex I to the EU dual-use Regulation[4] 428/2009, except for certain Category 5 goods), Annex II (items related to Iran's nuclear program) and Annex III (internal repression). It is also prohibited to purchase, import or transport these items from Iran or provide related brokering services or technical and financial assistance.

Prior authorization is required for the sale, supply, transfer or export of additional items related to Iran's nuclear program, listed in Annex IV, and for brokering services or technical and financial assistance related to these items.

Regulation 961/2010 also prohibits the sale, supply or transfer of equipment and technology listed in Annex VI to Iran's oil and gas industry as well as the provision of related brokering services or technical and financial assistance.[5]

Furthermore, there are restrictions on establishing financial and corporate links with certain entities in Iran. Making available any funds or economic resources[6] to or for the benefit of designated persons and entities listed in Annexes VII and VIII is prohibited. Imports from and exports to Iran are subject to pre-arrival and pre-departure information

[1] 2010/413/CFSP: Council Decision of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP, OJ 2010 L195/39 as amended.
[2] Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007, OJ 2010 L281/1 as amended.
[3] Due to the distribution of competences within the EU, arms embargos need to be implemented at the national level by the authorities of each EU Member State.
[4] Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ 2009 L134/1.
[5] Note that the embargo regulation provides for "grandfathering" exceptions for contracts relating to investments made before 26 July 2010 subject to certain conditions.
[6] Economic resources are broadly defined as basically meaning any assets.

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requirements. Financial transactions require prior authorization if more than €40,000 and prior notification if between €10,000 and €40,000.[7]

Member States are obliged to establish a penalty system for violations of the embargo rules. In addition to the specific sanction rules the general export controls for military and dual-use goods apply.

The US System

The current US sanctions against Iran are set out in the Iranian Transactions Regulations (ITR) and Iranian Financial Sanctions Regulations, which are administered by OFAC, and the Iran and Libya Sanctions Act of 1996, as amended by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA) signed into law on July 1, 2010.[8]

The ITR establish a comprehensive trade and investment embargo against Iran. The ITR apply broadly to US persons, which is defined to include US citizens, permanent resident aliens, entities organized under the laws of the United States (including foreign branches) and persons physically located within the United States. The ITR broadly prohibit virtually all transactions with Iran by US persons and facilitation by US persons of transactions between non-US persons and Iran. In addition, in limited circumstances, an OFAC license is required for re-exports even by non-US persons of US-origin goods, technology or services to Iran or the government of Iran.

US sanctions under the Iran and Libya Sanctions Act and CISADA apply broadly to US and non-US persons, including financial institutions, insurers, underwriters, guarantors and any other business organizations; any foreign subsidiary, parent or affiliate of such business organizations; and any other nongovernmental entity, organization or group. Among other things, these sanctions prohibit non-US persons (individuals and entities) from making certain investments in Iran's petroleum resources sectors or providing goods or services that assist Iran to import or produce refined petroleum products.

The legislation requires that the President impose on persons found to engage in sanctionable conduct three or more sanctions selected from a menu of nine sanctions, which includes denial of Export-Import Bank loans, credits or credit guarantees for US exports to the sanctioned entity; denial of US bank loans exceeding US$10 million in one year; and a prohibition on any arm of the US government making any procurement from the entity. In addition, CISADA extended the penalty provisions of the International Emergency Economic Powers Act (IEEPA) to apply to violations of the ITR's import and export provisions. These include civil penalties of up to US$250,000 per transaction or twice the amount of the transaction, whichever is greater, as well as criminal penalties (for willful violations) including a fine of up to US$1 million and/or imprisonment of up to 20 years.

In addition to the foregoing economic sanctions, the United States has imposed an extensive arms embargo on Iran. The US has a policy of denial for requests for licenses and other authorizations for the export or import of defense articles or defense services destined for or originating in Iran. Even if a license is granted, articles for export may not be shipped on a vessel, aircraft or other means of conveyance that is owned or operated by, or leased to or from, Iran.

Exports or re-exports of most dual-use items (including technology and software) on the Commerce Control List (CCL) to Iran require a license from Bureau of Industry and Security (BIS) (or OFAC). The United States maintains however a general policy of denial for most license applications other than for humanitarian transactions or for transactions related to the safety of civil aviation and safe operation of US-origin aircraft, and there are no license exceptions available. Also, re-exports to Iran of foreign-made commodities, software or technology incorporating

[7] Except payments for foodstuff, health care, medical equipment or humanitarian purposes.
[8] Pub. L. No. 111-195, 124 Stat. 1312.

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controlled US content valued at more than 10 percent of their total value are subject to a licensing requirement under the Export Administration Regulations (EAR).

Further information on the EU and US sanctions is set out in the comparison table below:

Type of Sanctions	United States	European Union
Military sanctions	Policy of denial for requests for licenses and other requests for authorizing the export or import of defense articles or defense services destined for or originating in Iran. Defense articles licensed for export may not be shipped on a vessel, aircraft or other means of conveyance that is owned or operated by, or leased to or from, Iran. US persons are prohibited from engaging in transactions covered by the UN Security Council arms embargo of Iran.	Decision 2010/431: arms embargo, implemented on a national level. Regulation 961/2010: prohibition to provide technical assistance related to military goods.
Dual-use sanctions	Unless licensed by OFAC, export or re-export of most items on the CCL to Iran requires a BIS license (including the release of software and technology to an Iranian national). General policy of denial for most applications other than applications for humanitarian transactions or for transactions related to the safety of civil aviation and safe operation of US-origin aircraft. No license exceptions available. Re-exports to Iran of foreign-made commodities, software or technology incorporating controlled US content valued at more than 10 percent of their total value are subject to the EAR.	Regulation 961/2010: Prohibition to sell, supply, transfer or export items listed in Annex I (Annex I of Regulation 428/2009 except certain Category 5 goods), Annex II (items related to Iran's nuclear program) and Annex III (internal repression). Prohibition to provide brokering services or technical and financial assistance related to items listed in Annexes I, II and III. Prohibition to purchase, import or transport from Iran the items listed in Annexes I, II and III. Authorization required for sale, supply, transfer or export of items listed in Annex IV (additional items related to Iran's nuclear program). Authorization required for brokering services or technical and financial assistance related to items listed in Annex IV. Prohibition to sell, supply, transfer or export items listed in Annex VI (equipment and technology for the key sectors of the oil and natural gas industry). Prohibition to provide brokering services or technical and financial assistance related to items listed in Annexes VI ("grandfathering" exceptions for contracts relating to investments made before July 26, 2010 subject to certain conditions). Additionally the general dual-use controls as established by Regulation 428/2009 apply.

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Type of Sanctions	United States	European Union
Other Economic Sanctions	OFAC administers a comprehensive trade and investment embargo against Iran; includes prohibitions on most export and re-export transactions with certain exceptions; OFAC license is required for re-exports by non-US persons of sensitive US-origin goods, technology or services to Iran or the government of Iran. New US Iran sanctions legislation prohibits non-US persons (individuals and entities) from making certain investments in Iran's petroleum resources sectors or providing goods or services that assist Iran to import or produce refined petroleum products.	Regulation 961/2010: restriction on establishing financial and corporate links with certain "Iranian entities;" prohibition to make available any funds or economic resources (any assets) to or for the benefit of designated persons and entities listed in Annexes VII and VIII; pre-arrival or pre-departure information requirement on all goods brought into or leaving the customs territory of the EU from or to Iran prior; authorization for money transfers to and from Iran above €40,000; and prior notification of money transfers between €10,000 and €40,000 (except for foodstuff, health care, medical equipment or humanitarian purposes).

The US "Blocking" Measures Against Libya Cover More Than SDNs

On February 25, 2011, one day before the UN Security Council endorsed economic sanctions against Libya, President Obama issued Executive Order 13566 imposing broad US sanctions against the country. The Executive Order consists solely of "blocking" measures against the Government of Libya, Muammar Gadhafi, and his close allies and family members. Although not a comprehensive embargo like the US sanctions programs against Iran or Cuba, the US Libya sanctions are surprisingly broad. Indeed, they are considerably more expansive than UNSCR 1970 or the country sanction programs implementing the UN resolution, including in the EU and EU Members States.

Executive Order 13566 consists of various blocking measures that apply to property and interests in property held by Muammar Gadhafi, his regime and five members of the Gadhafi family. These blocking measures apply to virtually any property of blocked persons, tangible or intangible, and any direct or indirect interest therein, including present, future or contingent interests. Property subject to the sanctions includes property or property interests that are in the United States or that come within the United States, or that are in the possession or control of a US person, including US-based companies and overseas branch offices (but not independent foreign subsidiaries).

US persons in possession or control of blocked property subject to the US Libya sanctions are prohibited from transferring, paying, exporting, withdrawing or otherwise dealing in the property. In addition, US persons must notify OFAC by written report within 10 days of receipt of blocked property.

The scope of the US sanctions against Libya is distinguishable from that of other countries implementing UNSCR 1970 in the sanction's application to Libya's government. Executive Order 13566 applies expressly to "the Government of Libya, its agencies, instrumentalities and controlled entities, and the Central Bank of Libya." The Executive Order does not define the term "control," but Treasury Department guidance indicates that it considers 50 percent or greater ownership to be one indicator of control (among others).

In light of the prevalence of state-owned enterprises in Libya, US sanctions potentially affect a significant volume of transactions. These include, for example, transactions by US companies with the Central Bank of Libya, Libya's National Oil Corporation, Libyan Airlines and numerous other government "instrumentalities and controlled entities." In fact, OFAC recently published a list of 14 oil and exploration companies owned or controlled by Libya's National Oil Corporation, which OFAC considers to be subject to the blocking measures. US sanctions also apply to transactions involving banks that are owned or controlled by the government of Libya; however, OFAC has issued a general license permitting transactions with such banks that are organized under the laws of a country other than

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Libya, provided the transactions do not otherwise involve Libya's government or any person whose property and interests in property is blocked.

Any activities by US persons in furtherance of the performance of contracts with these or other Libyan government-owned entities would appear to violate the Executive Order, as would transactions by US persons that have the purpose or effect of evading or avoiding the prohibitions of the Executive Order. Further, there is no exemption in the Executive Order for contracts entered into prior to the effective date of the Order.

In subjecting Libya's government entities to blocking measures, Executive Order 13566 goes beyond the Security Council Resolution and other countries' measures to implement the resolution. In the EU, for example, Council Decision 2011/137 (February 28, 201) and Regulation 204/2011 (March 2, 2011) establish an arms embargo against Libya, as well as a visa ban and asset freeze against Muammar Gadhafi, his family members and certain government officials in Libya. The EU regulations do not, however, block transactions with the Libya's government generally, or with its owned or controlled instrumentalities or entities.

In light of the breadth of Executive Order 13566, US companies should scrutinize carefully all transactions involving Libya. This is particularly important in sectors traditionally occupied by state-owned enterprises, such as the energy, utilities, transportation and infrastructure sectors. Where doubt exists as to whether or not a Libya-based company is government-owned, US companies are advised to request a specific license from OFAC.

Comparison of the Foreign Corrupt Practices Act Antibribery Provisions With the Proposed UK Bribery Act and Regulations on Official Bribery

Comparison of the FCPA Antibribery Provisions With the Proposed UK Bribery Act and Regulations on Official Bribery	FCPA Antibribery Provisions	England, Northern Ireland, Scotland and Wales Antibribery Laws and Regulations
Source	15 U.S.C. §§ 78dd-1, et seq.	The law is contained in a number of Acts, the main provisions are found in the following acts: • The Public Bodies Corrupt Practices Act 1889 • The Prevention of Corruption Act 1906 • The Prevention of Corruption Act 1916 • Anti-Terrorism, Crime and Security Act 2001 On 8 April 2010 the Bribery Act 2010 (the Bribery Act) was passed which will replace the above laws. The Bribery Act is due to come into effect in 2011. This note deals with the law under the proposed Bribery Act as of April 2011.
Who can be punished?	• Offerors of forbidden payments who are: – Issuers of securities that are required to register or file reports pursuant to the Securities Exchange Act, or any officer,	• Offerors and acceptors of bribes. – This includes individuals and senior officers of a corporate entity if the offense was committed with their

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Comparison of the FCPA Antibribery Provisions With the Proposed UK Bribery Act and Regulations on Official Bribery	FCPA Antibribery Provisions	England, Northern Ireland, Scotland and Wales Antibribery Laws and Regulations
	director, employee, or agent of an issuer or any stockholder acting on behalf of an issuer. – Domestic concerns (i.e., citizens, nationals or residents of the United States or any legal entity with its principal place of business in the United States or organized under US laws) or any officer, director, employee, agent or stockholder acting on behalf of a US-based concern. – Anyone acting within the territory of the United States.	consent or connivance. – The offense can be committed in the UK or by a person with a close connection to the UK. A close connection can include a British citizen, British resident, entities incorporated in any part of the UK and Scottish partnerships. • The **offeror** of a bribe to a Foreign Public Official. • A **commercial organization,** if a person associated with it bribes another person and the organization did not have adequate procedures in place to prevent such conduct. This applies to all partnerships or companies incorporated in any part of the UK and to any foreign partnership or company that carries on a business, or a part of a business in the UK.
What constitutes the subject of the prohibited transfer?	• "Anything of value" (examples may include but are not limited to cash or cash equivalents, real or personal property, offers of employment, etc.). • There is no *de minimus* amount. • May include payment to a relative. • Authorization of illicit payment to be made by someone else (e.g., sales agent).	• Any financial or other advantage. • The person to whom the advantage is offered, promised or given does not have to be the same person as the person who has, will or may perform the function or activity concerned. • It does not matter whether the advantage is offered, promised or given directly or through a third party.
What is prohibited and involving whom?	• Offers, promises (the payment does not have to be in fact made) or payments of: – Anything of value. – To a *foreign official* (i.e., any officer or employee of any foreign government, department or agency of a foreign government, or any instrumentality of a foreign government, or of a public international organization, or any person acting in an official capacity for or on behalf of any such person or entity), foreign political party, party official, any candidate for foreign political office, or any other person while knowing (i.e., actual knowledge, substantial certainty or a firm belief) that all or part of the payment, promise or offer to pay will be passed onto one of the above.	• **Offering** bribes to another person: – This occurs where a person offers, promises or gives a financial or other advantage to a recipient in exchange for the recipient's improper performance of a public or business activity. – This applies in the public and the private sector. • **Accepting/receiving** a bribe: – This occurs where a person requests, agrees or accepts a financial or other advantage in exchange for the recipient to perform a public or business activity improperly. – This applies in the public and the private sector.

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Comparison of the FCPA Antibribery Provisions With the Proposed UK Bribery Act and Regulations on Official Bribery	FCPA Antibribery Provisions	England, Northern Ireland, Scotland and Wales Antibribery Laws and Regulations
	– Third party payments are also prohibited (e.g., foreign sales representative, marketing consultant, distributor, joint venture partner, foreign subsidiary or contractor). – With corrupt intent. – For the purpose of influencing an official act or decision of the person, inducing that person to do or omit to do any act in violation of a lawful duty, inducing that person to use their influence with a foreign government to affect or influence any government act or decision or secure any improper purpose. – To assist in obtaining or retaining business for or with, or directing business to any person. – Applies to existing and future business (e.g., obtaining or renewal of contracts, as well as corrupt payments relating to performance of existing contracts or carrying out existing business).	• Bribing a **"Foreign Public Official":** – This occurs where a person attempts to influence a foreign public official (including an official of a public international organization) in an official capacity to obtain business (which includes a business advantage). – This offense is not dependent on improper performance by the foreign public official. – The key elements of the offense are: (i) an intention to influence a foreign official in his official capacity; (ii) an intention to obtain or retain business, or to secure an advantage in the conduct of business; and (iii) the relevant act or omission is neither permitted nor required by local written law (or the rules of a public international organization). • Failure of a company to prevent bribery: – This occurs when a person "associated" with the company or partnership (including employees, agents and third party associates) bribes another person to get business (or obtain a business advantage). – No direct contractual link is required between the "associated person" and the organization. – The only available defense to this charge is if the company or partnership can prove that it had in place "adequate procedures" designed to prevent bribery. – Guidelines are to be published by the Secretary of State about the adequate procedures that should be put in place by a company to ensure prevention.
Penalties	• Maximum penalties:* – Corporations: Criminal – US US$2 million**; Civil – US US$10,000 (DOJ); US US$500,000 (SEC)***. – Individuals: Criminal – US US$100,000, five years imprisonment or both**; Civil – US	• Individual – 10 years and/or unlimited fine. • Any other person – unlimited fine.

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Comparison of the FCPA Antibribery Provisions With the Proposed UK Bribery Act and Regulations on Official Bribery	FCPA Antibribery Provisions	England, Northern Ireland, Scotland and Wales Antibribery Laws and Regulations
	US$10,000 (DOJ); US US$100,000 (SEC)***. *Whenever a fine is imposed on any corporate officer, director, employee, agent or stockholder, the corporate entity may not pay, directly or indirectly, the individual's fine. **DOJ criminal antibribery violations are subject to 18 U.S.C. § 3571, which provides an individual may be fined a maximum of US$250,000, or, alternatively, any defendant may be fined twice the gain someone derived or lost from the offense. ***In an SEC civil enforcement action, the court may impose a fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation or (ii) a specified dollar limitation.	
Exceptions / affirmative defenses	• Exception: – "Grease payments": payments to a foreign official, political party or party official to speed up or secure performance of routine governmental action. • Affirmative defenses: – Conduct is lawful under the written laws of the country of the foreign official, political party, party official or candidate; or – The payment, gift, offer or promise of anything of value that was made was a reasonable and bona fide expense incurred by or on behalf of a foreign official party, party official, or candidate and was directly related to (i) the promotion, demonstration or explanation of products or services or (ii) the execution or performance of a contract with a foreign government or agency thereof.	• General rule – no exceptions or defenses. • A commercial organization is not guilty of an offense if a person associated with it bribes another person and the organization had adequate procedures in place to prevent such conduct.

Recent Enforcement Actions

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

Washington Man Pleads Guilty to Conspiracy to Unlawfully Export Radiation-Hardened Semiconductor Devices to China. Lian Yang of Woodinville, Washington, pleaded guilty to conspiring to unlawfully export defense articles under the US Munitions List (USML) in violation of the Arms Export Control Act. According to the criminal complaint, Mr. Yang attempted to purchase and export from the United States to China 300 radiation-hardened, programmable semiconductor devices, which require export authorization from the Department of

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State. The devices are said to have no purpose outside military or aerospace use. According to news reports, US military sources have said that the devices are most likely for the guidance systems of China's newest missiles, spy satellites and its next-generation space program. Mr. Yang allegedly planned to set up a shell company and create false purchase orders stating that unrestricted items were being exported, rather than the ITAR-controlled semiconductors. Allegedly, he agreed to pay US$620,000 for the 300 devices and arranged a wire-transfer of US$60,000 to undercover agents as partial payment for a sample of five devices.

Former NASA Employee Pleads Guilty for Unlawful Exports of Infrared Military Technology to South Korea. Kue Sang Chun, formally an electrical engineer at the NASA Glenn Research Center in Ohio, pleaded guilty in the Northern District of Ohio with one count of violating the Arms Export Control Act and one count of filing false tax returns. According to the two-count information filed by the government, Mr. Chun knowingly and willfully exported defense articles under the USML to South Korea without an export license or authorization from the Department of State. Specifically, Mr. Chun unlawfully exported several infrared focal plane array detectors and infrared camera engines to South Korea for use in Korean government projects. He also entered into an agreement with a Korea-based company to design, build and test electronics to support the unauthorized exports.

Two Chinese Nationals Sentenced for Illegally Exporting Military and Dual Use Electronics to China. Zhen Zhou Wu and Yufeing Wei were sentenced to prison terms of 97 months and 36 months, respectively, for conspiring to violate US export control laws, illegally exporting controlled electronic equipment from the United States to China, and filing false shipping documents with the Department of Commerce. Mr. Wu and Ms. Wei used Chitron Electronics, Inc., a Waltham, Massachusetts company founded and controlled by Mr. Wu and managed by Ms. Wei, to procure defense articles and EAR-controlled equipment from US suppliers and then export these items to China through Hong Kong. Military factories and research institutes in China were among those to whom these controlled-items were shipped. The illegally exported defense articles are primarily used in military phased array radar, electronic warfare, military guidance systems and military satellite communications. The EAR-controlled items that were unlawfully exported can be used in electronic warfare, military radar, satellite communications and space applications. Chitron Electronics, Inc. was also fined US$15.5 million in connection with this unlawful conduct.

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

Metal Distributor Reaches US$575,000 Settlement With BIS for Unlicensed Exports to China and Israel. TW Metals, Inc. has agreed to pay a US$575,000 civil penalty to settle charges of 48 unauthorized exports of titanium alloy to China and one unauthorized export of aluminum bar to Israel. TW Metals transshipped these items, which are classified under ECCN 1C202 and controlled for nuclear nonproliferation reasons, through Canada. TW Metals filed a voluntary self-disclosure with BIS regarding these unauthorized exports.

Supplier of Drivetrain Systems and Components Settles With BIS for EAR Violations. ArvinMeritor, Inc. which recently changed its name to Meritor, Inc., has agreed to pay a US$100,000 civil penalty to settle allegations of 15 EAR violations. BIS charged ArvinMeritor for violating the EAR by exporting without the required license or license exception the following items or technology that are controlled for national security reasons: (i) various axles from the United States to China; (ii) technical drawings of carrier castings to fit the axle of certain military vehicles from the United States to Brazil; (iii) technical drawings of axle assemblies for a tractor-trailer and heavy-duty truck to an Indian national; (iv) technical drawings of rear housing casts for certain military vehicles from the United States to China, India, Mexico and South Korea; and (v) seal assemblies for certain military vehicles from the United States to France. BIS also charged ArvinMeritor with causing, aiding and abetting the unlicensed export from the United States to Italy by providing technical drawings of a gear drive

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controlled for national security reasons to the US sales office of an Italy-based company, which then forwarded the drawings to its offices in Italy. ArvinMeritor voluntary notified BIS of these unlicensed exports.

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

US Distributor Agrees to Pay US$20,000 to Settle Allegations of Iran Sanctions Violations. Aegis Electronic Group, Inc., a US-based distributor of industrial imaging products including cameras, monitors and related control units, entered into a US$20,000 settlement with OFAC for alleged violations of the Iran Transactions Regulations. Between August 2008 and January 2009, Aegis exported two camera control units for US$2,685 to Austria with knowledge that these items were intended for reexport to Iran. Aegis did not voluntary disclose these unlawful shipments to OFAC. In augmenting the penalty from the US$10,000 base amount for these violations, OFAC considered the allegedly knowing and willful conduct by an Aegis employee and that Aegis lacked a serious compliance program. OFAC did, however, consider the company's later implementation of a compliance program and training, as well as, no evidence that any of its senior management participated in the apparent violations as mitigating factors.

US Insurance Brokerage Firm Pays US$122,408 to Settle Violations of Iran Transactions Regulations. McGriff, Seibels & Williams of Texas, Inc. settled allegations of violations of the Iran Transactions Regulations with OFAC for US$122,408. McGriff allegedly designed, revised and placed with foreign insurers six commercial multiple peril insurance polices that insured the risks of a submersible oil rig in Iran's waters during the period from May 1, 2004 to April 31, 2005. The foreign insurers received US$453,364 in combined premiums for these insurance policies. McGriff voluntary disclosed the alleged violations to OFAC. In determining the settlement amount OFAC took into account: the specialized nature of the insurance policies, which involved Iran's petroleum industry, undermined the objectives of the sanctions program; a senior employee engaged in the conduct outside the knowledge of the company's senior management; McGriff had no prior record of violating OFAC sanctions programs; and McGriff cooperated with OFAC throughout the investigation.

Barclays Reaches US$176 Million Settlement with OFAC as Part of Global Settlement With the Department of Justice and New York County District Attorney's Office. Barclays Bank PLC has agreed to settle allegations of violations of the Burmese Sanctions Regulations, Cuban Assets Control Regulations, Iranian Transactions Regulations and Sudanese Sanctions Regulations with OFAC for US$176 million. Barclays has also entered into deferred prosecution agreements with the Department of Justice (DOJ) and New York County District Attorney's Office (NYCDA) in connection with these alleged violations, whereby it has agreed to a forfeiture of US$298 million and implementation of stringent compliance measures. Barclay's monetary settlement with OFAC will be deemed satisfied upon payment of the US$298 million to the DOJ and NYCDA. Allegedly, Barclays knowingly and willingly processed more than US$100 million through US banks on behalf of banks and persons in Cuba, Iran, Libya, Sudan and Burma and implemented practices designed to circumvent filters at US banks designed to detect transactions in violation of US sanctions programs. These practices apparently included the use of cover payments to avoid referencing sanctioned parties as well as amending and reformatting US dollar payment messages to remove information identifying sanctioned entities. Barclays voluntary disclosed this conduct to OFAC. OFAC mitigated the penalty from a US$219 million base amount due to Barclay's substantial cooperation, remediation and lack of a prior recent history of OFAC violations. The fact that a number of the transactions in Sudan involved the export of agricultural products also influenced the mitigation of the penalty amount.

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Federal Corrupt Practices Act (FCPA) – US Department of Justice and US Securities and Exchange Commission

Japan-based Engineering and Construction Company to Pay US$218.8 Million to Resolve an FCPA Investigation. JGC Corporation has agreed to pay a US$218.8 million criminal penalty as part of a deferred prosecution agreement (DPA) to settle violations of the FCPA for its participation in a scheme to bribe government officials in Nigeria to obtain engineering, procurement and construction (EPC) contracts to build liquefied natural gas (LNG) facilities on Bonny Island, Nigeria. The scheme involved a four-company joint venture, which included JGC, Kellogg Brown & Root Inc. (KBR), Technip S.A., and Snamprogetti Netherlands B.V., that was awarded four EPC contracts between 1995 and 2004 to build the LNG facilities. The DOJ alleged that JGC authorized the joint venture to hire two agents, Jeffery Tesler and a Japan-based trading company, to pay bribes to high-level and lower-level officials in Nigeria, respectively. The joint venture paid approximately US$132 million to a Gibraltar corporation controlled by Tesler and more than US$50 million to the Japan-based trading company to further the scheme. The DOJ alleged that JGC intended these payments, in part, to be used to bribe government officials in Nigeria. The other members of the joint venture and several individuals involved in the scheme have pleaded guilty, entered into DPAs or settled civil enforcement actions with the US government. In total, the US government has obtained US$1.5 billion in penalties for the FCPA violations arising from this bribery scheme.

Johnson & Johnson Reaches a US$70 Million Settlement With the DOJ and SEC for Violations of the FCPA. Johnson & Johnson and its subsidiaries resolved corruption related investigations with the DOJ and SEC. Johnson & Johnson agreed to pay a US$21.4 million fine to settle criminal charges brought by the DOJ and US$48.6 million in disgorgement and prejudgment interest to resolve the SEC enforcement action. In the DPA, Johnson & Johnson admitted that its subsidiaries, employees and agents paid bribes to publicly-employed health care providers in Greece, Poland and Romania to influence the purchase of Johnson & Johnson and its subsidiaries' products. Johnson & Johnson also admitted that wholly-owned subsidiaries based in Belgium and the UK secured 18 UN Oil for Food Program pharmaceutical sales contracts through the payment of kickbacks to Iraq. The payments described above were euphemistically referred to as "cash incentives," "sales promotional costs," "local support payments," "civil contracts" or "commissions" and were recorded as such in the corporate books and records of the subsidiaries. These inaccurate books and records were then incorporated into Johnson & Johnson's books and records for the purposes of preparing financial statements filed with the SEC.

The DPA has a term of three years and contains numerous conditions common in recent DPAs in the FCPA context. However, the DPA contains several additional and onerous conditions not found in recent FCPA-related DPAs. For example, the DPA requires Johnson & Johnson to implement a system of annual certifications by senior managers in each of the company's corporate-level functions, divisions and business units in each foreign country wherein they confirm their local standard operating procedures adequately implement the company's anticorruption policies and procedures, including training requirements, and that they are not aware of any FCPA or other corruption issues that have not already been reported to corporate compliance. This condition and several other onerous and expensive conditions have not appeared in recent prosecutorial agreements and may indicate the DOJ has raised the standard in FCPA compliance.

On the same day the DOJ and SEC resolved their enforcement actions, the UK's Serious Fraud Office (SFO) resolved its prosecution of DePuy International Limited, a UK-based Johnson & Johnson subsidiary, which the DOJ had referred to the SFO. The conduct of certain DePuy International personnel figured prominently in the US enforcement actions. To resolve the UK matter, the SFO sought and obtained a civil recovery order in the amount of £4.829 million, plus prosecution costs. In addition to the US and UK enforcement actions, authorities in Greece have reportedly frozen at least €5.785 in assets belonging to another Johnson & Johnson subsidiary.

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