

U.S. Export Controls and Economic Sanctions Primer¹

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I. Overview

The United States imposes a number of export controls and economic sanctions that restrict whether a good, technology or service can be exported from the United States or reexported from another country without a government license. These restrictions also affect whether companies can get paid for their exports even if the export or reexport does not require a license. “Export controls” generally refer to restrictions on exports due to the nature of the item, end-use or end-user involved while “economic sanctions” generally refer to restrictions based on the country involved. This primer addresses the core U.S. requirements in both areas that affect exporters and reexporters.

The reasons for requiring a license before certain transactions may proceed typically arise from national security or foreign policy concerns. Also, the requirements affect diverse industries, such as the automotive, chemical, electronics, marine, medical device, oil and gas and telecommunications industries, as well as many others.

Several U.S. government agencies are involved in the implementation of export controls and economic sanctions, most notably the Departments of Commerce, State and Treasury. The Department of Energy and the Nuclear Regulatory Commission can also be involved. In addition, several countries other than the United States have imposed their own export control and economic sanctions regimes.

The range of export and reexport-related activities at issue is also quite broad. Examples include exports to customers, reexports by affiliates or distributors outside the United States, exports of non-U.S. made items containing U.S.-origin components, moving production equipment to an affiliate and hiring foreign nationals.

This area of law is challenging for companies because it is very complex and is constantly evolving. Substantial reform efforts underway now may ease some of the burden involved. The steep potential penalties, however, require that companies take the time to understand their obligations and implement appropriate compliance procedures.

For most U.S. export control and economic sanctions laws, civil penalties can include fines of \$250,000 or more per violation and a ban on exports. Enforcement cases regularly settle for hundreds of thousands of dollars.

II. Commerce Department’s Export Administration Regulations

Most exporters are subject to the Commerce Department’s Export Administration Regulations (“EAR”).³ The Commerce Department’s Bureau of Industry and Security (“BIS”) implements and enforces these regulations.⁴

The EAR apply to exports from the United States of goods, software and technology and reexports of those items. These regulations also apply to exports and reexports from other countries of items made outside the United States that contain more than *de minimis* U.S. content.⁵ Several types of items are expressly exempt from the EAR's coverage, including items that are subject to the jurisdiction of the State Department, Department of Energy or Nuclear Regulatory Commission.⁶ Information that is publicly available is also exempt.⁷

The *de minimis* rules provide that an item made outside the United States that contains more than 10% or 25% restricted content (depending on the destination) becomes subject to the EAR.⁸ This means that a U.S. license could be required to export many foreign-made items. The U.S. content at issue in a *de minimis* calculation qualifies as restricted content if a license would have to be required to export the U.S. input itself due to its classification according to the Commerce Control List ("CCL") or the Commerce Department's rules on embargoed countries, both of which are addressed below.⁹

Another important concept under the EAR is the "Deemed Export Rule." That rule generally provides that sharing technology with a non-U.S. national who is not a Green Card holder is deemed to be an export to the individual's home country.¹⁰ Providing such nationals access to controlled technology requires a license. This rule poses significant issues for employers, even if they do not actually export.

There are three general reasons why the EAR would require an exporter or reexporter to obtain a license. They are: (1) the applicable CCL classification or Commerce embargo rule indicates the item involved is controlled for the respective destination, (2) the end-user is on one of the U.S. government's prohibited lists or (3) the end-use is prohibited.¹¹

Commerce Control List

The CCL appears in the EAR and is divided into ten categories that describe various items. The categories are as follows¹²:

- Category 0 – Nuclear materials, facilities and equipment
- Category 1 – Special materials and related equipment, chemicals, "microorganisms" and "toxins"
- Category 2 – Systems, equipment and components
- Category 3 – Electronics
- Category 4 – Computers
- Category 5 – Part 1 – Telecommunications
Part 2 – Information security
- Category 6 – Sensors and lasers
- Category 7 – Navigation and avionics
- Category 8 – Marine
- Category 9 – Aerospace and propulsion

Each of these categories is divided further into descriptions of items that are identified by Export Control Classification Numbers ("ECCN"). Each ECCN identifies technical criteria for a particular item as well as controls that apply to that ECCN. For example, an ECCN for one of the entries in

Category 1 describes chemicals and has a heading that reads: “1C350 Chemicals that may be used as precursors for toxic chemicals.” The ECCN here is the alphanumeric code 1C350, and the remainder of the heading generally describes the items that ECCN covers. The items actually covered by this ECCN appear in the ECCN’s entry under the subheading “List of Items Controlled.” ECCN 1C350 also includes several notes that provide exclusions from the ECCN’s coverage and guidance on how to interpret the ECCN. This is common. If an ECCN describes the item at issue, the notations in the “Reason for Control” subheading must then be studied.¹³

For ECCN 1C350, the first reason for control notes, “CB applies to entire entry [-] CB Column 2.” The code CB is defined in the EAR as meaning the “[p]roliferation of chemical and biological weapons.”¹⁴ To determine whether a stated reason for control means a license is required, one must then consult the Commerce Country Chart, unless the ECCN instructs otherwise.¹⁵

The Commerce Country Chart is a matrix that identifies the countries of the world and reasons for which exports to each respective country might require a license.¹⁶ If a reason for control noted in a given ECCN entry also applies to the intended destination, then that export cannot proceed without a license.¹⁷ Even if a particular reason for control noted in an ECCN does not apply to the destination, a license would be required if any other reason for control noted in the ECCN would apply to the given destination.¹⁸

If an item is subject to the EAR but is not listed on the CCL, that item is referred to by the code “EAR99.”¹⁹ EAR99 items can be exported and reexported under the EAR to any destination provided the destination is not embargoed and the end-user and end-use prohibitions noted below do not apply.²⁰

Part 746 of the EAR identifies the scope of the embargoes the United States implements through the EAR, as opposed to through the Treasury Department’s regulations, and both are described below.

Companies subject to the EAR typically maintain a matrix listing their products and technologies and the corresponding CCL classifications. This matrix should be integrated into business development activities and sales order reviews, and related activities should not be permitted to proceed until a licensing determination has been made. An engineer familiar with an item’s technical details and someone familiar with the EAR typically work together to determine the applicable ECCNs.

End-User Restrictions

Items that are subject to the EAR generally may not be exported or reexported without a license to an entity or individual on one of the Commerce Department’s prohibited lists.²¹ The most relevant Commerce Lists are the Denied Persons List and Entity List.²² The Denied Persons List identifies entities and individuals who have lost their export privileges. The Entity List reflects entities and individuals BIS says have engaged in some activity that threatens U.S. national security or foreign policy. BIS also maintains an Unverified List, which BIS says identifies entities and individuals of concern who should not be involved in a transaction unless the exporter or reexporter can satisfy itself that the transaction will not violate the EAR.

Exporters and reexporters typically incorporate some form of denied party screening into their compliance procedures.

End-Use Restrictions

The EAR identify a number of end-uses for which exports and reexports cannot be made without a license.²³ Examples include activities relating to nuclear proliferation²⁴ and the development of chemical or biological weapons.²⁵ Other examples are exports and reexports for unmanned aerial vehicles and activities involving certain rockets.²⁶ Another end-use prohibition covers exports or reexports of designated items to China for military use.²⁷

The end-use license requirements typically arise only when the exporter or reexporter has knowledge of an intended prohibited end-use. Companies often deal with these requirements, in part, by obtaining end-use certifications from customers. Regardless of a company's approach, however, it is critical that indications of possible prohibited end-uses are not ignored because the EAR permit BIS to infer knowledge from deliberate ignorance and other conduct.²⁸

License Exceptions

Even if it appears a license is required, several license exceptions in the EAR might override that requirement.²⁹ Each license exception has detailed eligibility requirements, however, and needs to be studied carefully. Examples of exceptions include exports for the repair or replacement of previously exported items³⁰, exports for government programs³¹ and exports of certain trade tools.³² A fairly new exception called "Strategic Trade Authorization" (or "STA") permits many otherwise restricted exports and reexports to allied countries provided the recipients agree to certain use restrictions.³³

License Applications

If a transaction cannot proceed without a license, a license application must be submitted to BIS using its online system called SNAP-R.³⁴ SNAP-R requires a free registration and certification for both the company making the application and the individual who will be administering the company's SNAP-R account.³⁵

License applications can cover multiple items being sent to a given recipient and typically require identification of the end-user, end-use, ECCN, quantity and fair market value.³⁶ Many license applications also require additional information specific to the type of application, such as for the export of machine tools, chemicals and telecommunication devices.³⁷ Additional support documents, such as end-user statements or import certifications, might be required depending upon the reason why a license is required and the intended destination.³⁸

Classification Requests and Advisory Opinion Requests

Companies that are uncertain as to whether or how an item is described on the CCL can request that BIS provide an official classification of that item.³⁹ This entails providing BIS detailed information about the item at issue. It is often in the requesting company's best interest to have done its own classification analysis and suggest to BIS what the outcome should be and to identify any interpretation issues that might be involved and how they should be resolved. BIS does not make its

classifications public, but many companies choose to do so. BIS has started a listing online of such companies.⁴⁰

BIS will also issue formal advisory opinions on legal interpretations of the EAR.⁴¹ Requests for advisory opinions are made by letter and should present the legal issue and the requesting company's analysis for what it believes is the correct outcome. BIS makes redacted versions of certain advisory opinions available on its website.⁴²

Other Requirements

The EAR impose requirements on the export-related documents a company must keep.⁴³ They also impose a number of administrative requirements for covered shipments. The most universally relevant of these is a requirement to file an Automated Export System entry with Customs for exports requiring a license⁴⁴ and to include a destination control statement on invoices for shipments of non-EAR99 items.⁴⁵

Penalties

The possible penalties for violating the EAR are very steep. For civil violations, the monetary penalties can be \$250,000 or twice the value of the transaction for each violation.⁴⁶ In addition, a company can lose its export privileges and be subject to outside audits.⁴⁷

For criminal violations the penalty can be \$1 million or twice the benefit received from the transaction for each violation plus possible jail time of twenty years.⁴⁸

Companies that discover a violation has occurred often face difficult choices. Depending upon the situation and their own appetite for risk (not only of the violation being detected but also of the possible penalties resulting from the disclosure), companies often use the EAR's voluntary self-disclosure process.⁴⁹ A voluntary self-disclosure should provide a complete account of the facts involved, an explanation why the violation occurred, evidence of relevant corrective actions and mitigating factors.⁵⁰ The disclosure can be made in two phases: an initial notice followed by a completed disclosure shortly thereafter.⁵¹ A principal benefit of voluntary self-disclosures is that BIS has stated its policy is to begin settlement negotiations at half the total possible monetary penalty if a voluntary self-disclosure is submitted.⁵²

It is very common for BIS to respond to a voluntary self-disclosure by arranging for a BIS agent to interview relevant personnel and by asking additional questions. A draft charging letter often follows that lays out the charges BIS intends to pursue and notifies the company that BIS intends to litigate the charges. In practice, almost all companies reach a settlement with BIS before litigation. The draft charging letter and settlement agreement, however, become public.⁵³

III. State Department's International Traffic in Arms Regulations

A decent rule of thumb is that all U.S. companies that specifically design or modify an item for a military or space application are subject to the State Department's International Traffic in Arms Regulations ("ITAR").⁵⁴ The Directorate of Defense Trade Controls ("DDTC") administers and

enforces the ITAR from within the State Department.⁵⁵ It is important to note that the scope of the ITAR is not limited to items one might intuitively consider to be arms. The restrictions under the ITAR are very broad and can apply to any company working with a customer whose business relates even tangentially to a military or space application. Products that are subject to the ITAR that commonly surprise manufacturers include electronic devices designed for civil applications that are slightly modified for a military application, automotive parts designed for commercial sales that have dimensions modified for a military and certain space-rated equipment.

While less complex overall than the EAR's restrictions, there is a much greater likelihood under the ITAR that an item cannot be exported or reexported without a license. It is also important to note that the ITAR impose many more restrictions on the export and sharing of information and the provision of services than is the case under the EAR.

Defense Articles

The key issue under the ITAR is whether the hardware at issue in a transaction is a "defense article." A defense article is any item listed on the ITAR's U.S. Munitions List ("USML").⁵⁶ The USML consists of twenty-one categories of diverse items, including typical military equipment such as tanks and bombs, as well as many other items such as electronic components, filtration devices and satellites.⁵⁷ As noted above, one can apply a rule of thumb to get a sense of whether a hardware item will be listed on the USML, but exporters are responsible for being certain where an item is described on that list. In addition, the USML has a catchall category, Category XXI, that covers any item that was specifically designed or modified for a military purpose and has substantial military applicability.

Technical data directly related to a hardware item that is subject to the ITAR are also considered defense articles.⁵⁸ The deemed export rule referred to above with respect to the EAR generally applies with respect to the ITAR as well, because exports are defined to include disclosing technical data to a foreign person.⁵⁹

A license is required to export or reexport a defense article to any country, unless an exemption applies.⁶⁰ Temporary exports and imports also require a license.⁶¹ Permanent imports might require a license but are subject to the jurisdiction of the Bureau of Alcohol, Tobacco and Firearms.⁶²

Unlike with the EAR, there is no *de minimis* provision for foreign made items incorporating ITAR-controlled items. Such foreign made items become subject to the ITAR.

As noted in the explanation of the EAR, items subject to the ITAR are expressly excluded from the scope of the EAR. This means that the ITAR's jurisdiction trumps the EAR.

Defense Services

A license is required for a U.S. company to provide essentially any type of assistance to a non-U.S. company with respect to a defense article.⁶³ For example, even where a U.S. company is selling hardware that does not require an export license under the ITAR or EAR, the U.S. company can still perform a restricted defense service by providing many types of assistance with respect to the integration of that hardware into a defense article.

Registration

Unlike the EAR, U.S. companies that manufacture or export defense articles or provide defense services must register with DDTC and pay a registration fee.⁶⁴ Brokers of ITAR items, addressed below, must also register with DDTC.⁶⁵

Licensing

The ITAR licensing system is more complex than under the EAR, in part because there are more types of licenses under the ITAR. The most common ITAR licenses for exporting hardware or technical data are referred to as a DSP-5 (permanent export), DSP-61 (temporary import) and DSP-73 (temporary export).⁶⁶ The basic information requirements for these license applications include invoices or similar documents memorializing the actual transaction and the item's intended end-use.⁶⁷ The information requirements are not particularly complicated, but the actual license applications can be quite cumbersome, requiring attention to whether the appropriate information is included in the correct block on the given form.

Defense Services require one of three types of licenses. A Technical Assistance Agreement ("TAA") authorizes a U.S. company to provide almost any type of assistance (such as design support, troubleshooting, marketing discussions etc.) other than services relating to the manufacture or distribution of defense articles.⁶⁸ A Manufacturing License Agreement ("MLA") is required to provide a non-U.S. company the right or know-how to manufacture a defense article.⁶⁹ A Warehouse Distribution Agreement ("WDA") is required for a non-U.S. company to store and distribute a U.S. company's defense articles.⁷⁰

Each of the three types of agreements authorizing a defense service resemble standard commercial agreements in many respects, but they must exist separately from any other agreements. DDTC provides standard templates applicants should follow, and they include several verbatim provisions required under the ITAR.⁷¹ These agreements can be somewhat difficult to draft well due to requirements such as need to identify and disclose the nationalities of overseas personnel and other companies, such as subcontractors, who will be involved and to submit a detailed statement of work the applicant would like to have authorized.

ITAR license applications must be submitted through DTrade, which is DDTC's online filing system.⁷²

In preparing license applications, it is also important to note that DDTC's licensing policy generally calls for denial should the application involve countries specified in 22 C.F.R. § 126.1.

Commodity Jurisdiction Determinations

The wording of the ITAR is often extremely vague and broad, and, as a result, many companies are not certain whether they are subject to the ITAR. A solution for these companies is often to obtain a Commodity Jurisdiction Determination, which is an official DDTC ruling as to whether an item is subject to the ITAR.⁷³ These determinations have historically been confidential, but DDTC has started making a summary of the determinations available online.⁷⁴

License Exemptions

There are a few exemptions for defense article exports and the provision of defense services. Among the most common are the “Canadian Exemption” and the exemption for temporary imports for repair.

The Canadian Exemption generally permits defense article exports to Canada without a license provided the end-user is the Canadian government or a company registered under a particular Canadian law and the defense article to be exported is not one of several sensitive types identified in the ITAR.⁷⁵ Defense Services can be provided under the Canadian Exemption without a license, but the scope of information that can be shared is limited and certain written certifications are required.⁷⁶

The ITAR provide a license exemption for a few types of temporary imports, most commonly for repair purposes.⁷⁷ The main requirements for this exemption are that the export must have been permissible in the first instance, the Customs import documentation must indicate that the exemption is being invoked and that the functionality of the item being repaired cannot be enhanced as compared to its original condition.

Brokering

Foreign companies that broker the provision of defense articles or defense services as agents of U.S. companies must register with DDTC.⁷⁸ In certain instances, their acts of brokering cannot proceed without a U.S. government license.⁷⁹

Commissions and Political Donations

License applications above certain dollar thresholds must also include a statement as to whether the applicant has paid any commissions or made any political donations above specified amounts in connection with the provision of the defense article or defense service.⁸⁰

These particular requirements are also noteworthy because of their potential to expose issues under the Foreign Corrupt Practices Act or other countries’ anticorruption laws.

Penalties

The civil penalties for violating the ITAR are \$500,000 per violation, audit requirements and loss of export privileges.⁸¹ The criminal penalties are \$1 million or twice the gain or loss from the violation and a suspension of export privileges, plus, for individuals, twenty years in jail.⁸²

The ITAR also provide that exporters of covered items are responsible for the acts of the recipients with respect to those items.⁸³

Voluntary Disclosures

As with the EAR, should a violation occur, the ITAR provide for a voluntary disclosure process that frequently offers companies the opportunity to receive more favorable treatment than would be the

case if DDTC learned of the violation on its own.⁸⁴ The requirements as to the information that needs to be submitted are fairly similar to those under the EAR. It should also be noted, however, that, if a violation involves one of the Section 126.1 countries for which there is a general policy of denial, a disclosure might be mandatory.⁸⁵

A main difference between the ITAR and EAR voluntary programs is that if an ITAR initial notification of voluntary disclosure is submitted pending a thorough review of the matters covered, the completed disclosure must be provided within sixty calendar days unless an extension is granted.⁸⁶

Another significant difference between EAR and ITAR disclosures is that DDTC tends to penalize only the most serious cases.⁸⁷ This means that, although the ITAR affect many unsuspecting companies, those companies can often resolve the matter through a voluntary disclosure without receiving any penalty. Such voluntary disclosures, however, must be thorough and reflect that adequate corrective actions were put in place. Repeat voluntary disclosures, as one might expect, do not generate the same goodwill and can result in greater government scrutiny of a company's activities.

Other Requirements

There are a number of other requirements under the ITAR that pertain to record keeping⁸⁸ and shipments of ITAR items. Among the more common shipment requirements are the requirement to include a destination control statement on the bill of lading and invoice,⁸⁹ file an export record in the Automated Export System⁹⁰, mark technical data and keep a record of when exemptions are used.⁹¹

IV. U.S. Economic Sanctions Regulations

The U.S. Treasury Department's Office of Foreign Assets Control ("OFAC")⁹² and the U.S. Commerce Department's BIS administer a variety of economic sanctions against countries, entities and individuals for foreign policy reasons. These reasons vary and include concerns such as a country's involvement in developing weapons of mass destruction and an entity's or individual's involvement in the same activities or activities related to drug trafficking or undermining democracy. The consequence of these sanctions is typically that U.S. companies cannot do business with a specified country, entity or individual. There are many nuances to the laws in these areas, however, particularly with respect to the activities of a U.S. company's foreign affiliates that are not prohibited.

Even if foreign affiliate activities in sanctioned countries are permissible under U.S. law, public companies also need to consider the reputational risks associated with the Securities and Exchange Commission ("SEC") requiring publication of their affiliates' business in sanctioned countries. The SEC's Office of Global Security Risk monitors overseas activities of public company affiliates with an eye towards whether they become material and should be noted in required SEC reports.⁹³

The following summaries identify the main features of the various U.S. economic sanctions programs.

Iran & Sudan

OFAC administers broad economic sanctions against Iran⁹⁴ and Sudan⁹⁵ that are fairly similar in nature and among the most restrictive of all U.S. economic sanctions programs. The main prohibitions under

these programs are that (1) U.S. companies cannot export goods, services or technology directly to Iran or Sudan or to a third country with the intention that the exports are bound for Iran or Sudan⁹⁶ and (2) U.S. companies cannot export goods or technology for incorporation into a foreign-made product knowing that that product is provided predominantly to Iran or Sudan.⁹⁷ The Iran sanctions also prohibit exports for inventory if the predominant portion of the inventory is provided to Iran.⁹⁸

The Iran and Sudan sanctions regulations typically permit foreign affiliates of U.S. companies to engage in trade with Iran and Sudan that involves U.S.-origin products, provided the products are classified as EAR99 according to the Commerce Control List and are not ordered specifically for Iran or Sudan.⁹⁹ A significant limitation to this authorization, however, is that U.S. companies cannot facilitate a foreign affiliate's business with Iran or Sudan.¹⁰⁰ This facilitation prohibition also applies to a foreign affiliate's business that does not involve U.S.-origin products.

There are some significant exceptions and licenses available under the Iran and Sudan programs. Perhaps most notable is the licensing system for medicines, medical devices and agricultural products.¹⁰¹ OFAC publishes a quarterly report on its licensing activities in these areas.¹⁰² Examples of license exceptions available include exports of informational materials¹⁰³ and exports for international organizations.¹⁰⁴

There have also been substantial changes in these sanctions programs recently. With respect to Iran, the Iran Sanctions Act was amended to expand the possible penalties for engaging in activities relating to Iran's oil and gas industry.¹⁰⁵ Those amendments also impose new prohibitions on the activities of banks with respect to Iranian business.¹⁰⁶ For Sudan, a significant recent development was the recognition of Southern Sudan as an independent state. The U.S. sanctions against Sudan do not apply to Southern Sudan, but U.S. prohibitions on conduct that benefits Sudan pose compliance risks due to the interwoven economies of those countries.¹⁰⁷

Penalties for violations of the U.S. economic sanctions against Iran or Sudan are typically the same as those for violating the EAR noted above because most penalties are authorized by the same statute. Penalties for violating the prohibitions on activities involving the Iranian oil and gas sector can include the U.S. government refusing to offer certain types of assistance such as export financing and the loss of export privileges for exports requiring a license.¹⁰⁸

Cuba

OFAC administers sanctions against Cuba that are somewhat less complex than those against Iran and Sudan but can be more restrictive in some respects.¹⁰⁹ The main prohibition is against U.S. companies and their foreign subsidiaries engaging in any dealing in which Cuba or a Cuban national has an interest.¹¹⁰ For these purposes, "interest" is a defined term, but its definition does not establish how closely involved Cuba or a Cuban national needs to be in a transaction for it to be banned.¹¹¹ Consequently, companies must proceed carefully with respect to any business with Cuba.

The Cuba sanctions have similar exceptions and licensing options as the Iran and Sudan sanctions. A unique twist in the Cuba program is that the Department of Commerce's BIS, rather than the Department of Treasury's OFAC, administers the medicines, medical device and agriculture licensing programs.¹¹²

Civil penalties for violating the U.S. sanctions against Cuba are \$65,000 per violation and forfeiture of any item that is the “subject of the violation.”¹¹³ The criminal penalty is the greater of \$1 million or twice the gain or loss from the violation and forfeiture of any item that is the “subject of the violation,” and for individuals it is the greater of \$250,000 or twice the gain or loss from the violation plus ten years in jail and forfeiture of any item that is the “subject of the violation.”¹¹⁴

North Korea and Syria

The U.S. Commerce Department’s BIS administers the main U.S. sanctions against North Korea¹¹⁵ and Syria¹¹⁶. OFAC also administers limited sanctions against North Korea¹¹⁷ and Syria¹¹⁸ as well.

Overall, the U.S. sanctions against North Korea and Syria are very restrictive, but they are not as broad as those noted so far. The general prohibition is against anyone exporting or reexporting to North Korea¹¹⁹ or Syria¹²⁰ any item that is subject to the EAR. Practically speaking, this means that no company, regardless of location in the world, can export or reexport to North Korea or Syria any item that was made in the United States, that was exported from the United States or that was made outside the United States and contains U.S.-origin content that accounts for more than 10% of the finished item’s value.

The U.S. sanctions against Syria were also just expanded to prohibit U.S. companies from providing services to Syria and from facilitating efforts by non-U.S. companies to provide services to Syria.¹²¹

While the Syria sanctions include license exceptions for exports of EAR99 food and medicine¹²², there are very few exceptions under the North Korea sanctions that would have broad application.¹²³

The penalties for violating the U.S. sanctions against North Korea and Syria are typically the same as for violating the EAR, because the main sanctions are set out in the EAR.

Burma

OFAC administers economic sanctions against Burma that are more narrow than those above and are structured differently. The main sanctions are against U.S. companies providing financial services to Burma and making new investments in Burmese projects involving the exploitation of Burma’s natural resources.¹²⁴

The U.S. sanctions against Burma provide many of the license exceptions noted for other sanctions programs.

The penalties for violating the sanctions against Burma are typically the same as those noted above for sanctions other than those against Cuba.

Asset freezes

In addition to the broad restrictions on trading with particular countries, OFAC administers a variety of asset freezes that limit business with certain entities and individuals. The affected entities and individuals appear on what OFAC calls its “Specially Designated Nationals List” (“SDN List”).¹²⁵

Economic sanctions overall are primarily a tool to discourage actors, whether they be governments or private, from engaging in certain conduct. Interestingly, the U.S. trend in economic sanctions is to pursue foreign policy objectives through new asset freezes rather than broad economic sanctions against a given country.

A typical asset freeze prohibits anyone in the world from engaging in most business with respect to assets in the United States or in the possession or control of a U.S. company if a targeted entity or individual has an interest in those assets. Recent examples of the U.S. government’s approach in this regard were the freezing of covered assets of the Libyan¹²⁶ and Syrian¹²⁷ government and entities and individuals the U.S. government believes have contributed to political repression in those countries. Other reasons for being designated on OFAC’s SDN List include affiliation with the government of a sanctioned country, involvement in terrorism or drug trafficking activities and efforts to undermine local democracies.¹²⁸

Penalties for violating asset freezes are typically the same as penalties for violating the EAR because they have a common authorizing statute.

Companies typically try to comply with asset freezes by screening overseas transactions for anyone involved that might be on one of the U.S. government’s prohibited lists. It is important, however, to review why an entity or individual is on a list because the relevant prohibition might not restrict all related business.

As with all aspects of U.S. export controls and economic sanctions, restrictions due to asset freezes may be complicated and significant, and penalties could be severe. It is, therefore, important to understand the nuances of the relevant export controls and economic sanctions so that companies can implement appropriate compliance measures that are designed to avoid violations while also not turning away business unnecessarily.

¹ This primer is intended to be informational in nature and does not amount to legal advice. The regulations in the areas covered here are complex and change frequently. Legal advice should be sought for any particular issues an entity or individual might face.

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Corey has substantial experience with the U.S. Commerce Department's Export Administration Regulations, the State Department's International Traffic in Arms Regulations, the Office of Foreign Assets Control's economic sanctions regulations, Customs and Border Protection's regulations and the Foreign Corrupt Practices Act. His experience also includes compliance with export controls and economic sanctions imposed by the European Union, its Member States and various other countries.

More information about him is available at <http://www.khlaw.com/Corey-Norton> You can also follow the latest export and import legal developments on Twitter through [@cnortonexport](#) and [@cnortonimport](#).

³ 15 C.F.R. Parts 730-774.

⁴ <http://www.bis.doc.gov>

⁵ 15 C.F.R. § 734.3 (a).

⁶ Id. § 734.3 (b)(1).

⁷ Id. § 734.3 (b)(3).

⁸ Id. § 734.4.

⁹ Id. Part 734, Supp. 2.

¹⁰ Id. § 734.2 (b).

¹¹ Id. § 736.2 (a).

¹² Id. § 738.2.

¹³ Id. § 738.4 (a).

¹⁴ Id. § 742.2. The other reasons for control are described in Part 742 as well.

¹⁵ Id. § 738.4 (a).

¹⁶ Id. § 738.3.

¹⁷ Id. § 738.4 (a).

¹⁸ Id. § 738.4 (a).

¹⁹ Id. § 732.3 (b)(3).

²⁰ Id. § 736.2 (b).

²¹ The lists and a description of each are available at <http://www.bis.doc.gov/complianceandenforcement/liststocheck.htm>

²² 15 C.F.R. Part 744 provides the bases for adding an entity or individual to one of the Commerce Department's prohibited party lists.

²³ 15 C.F.R. Part 744.

²⁴ Id. § 744.2.

²⁵ Id. § 744.4.

²⁶ Id. § 744.3.

²⁷ Id. § 744.21.

²⁸ Id. § 772.1 (Def. of "Knowledge").

²⁹ Id. Part 740.

³⁰ Id. § 740.10.

³¹ Id. § 740.11.

³² Id. § 740.9 (a)(2)(i).

³³ Id. § 740.20.

³⁴ Id. § 748.7 (b).

³⁵ Id. § 748.7 (b).

³⁶ Id. Part 748, Supp. 1.

³⁷ Id. Part 748, Supp. 2.

³⁸ Id. §§ 748.9, 748.10, 748.11.

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- ³⁹ Id. § 748.3 (b).
- ⁴⁰ <http://www.bis.doc.gov/commodityclassificationpage.htm>
- ⁴¹ 15 C.F.R. § 748.3 (c).
- ⁴² <http://www.bis.doc.gov/policiesandregulations/advisoryopinions.htm>
- ⁴³ 15 C.F.R. Part 762.
- ⁴⁴ Id. § 758.1.
- ⁴⁵ Id. § 758.6.
- ⁴⁶ 50 U.S.C.A. § 1705 (b); 15 C.F.R. § 764.3 (a)(1).
- ⁴⁷ 15 C.F.R. § 764.3 (a)(2).
- ⁴⁸ 18 U.S.C.A. § 3571; 50 U.S.C.A. § 1705 (c); 15 C.F.R. § 764.3 (b).
- ⁴⁹ 15 C.F.R. § 764.5.
- ⁵⁰ Id. § 764.5 (c)(3).
- ⁵¹ Id. §§ 764.5 (c)(1).
- ⁵² <http://www.bis.doc.gov/complianceandenforcement/factsheet11012007.pdf>
- ⁵³ <http://efoia.bis.doc.gov/exportcontrolviolations/toexportviolations.htm>
- ⁵⁴ 22 C.F.R. Parts 120 to 130.
- ⁵⁵ <http://www.pmddtc.state.gov>
- ⁵⁶ 22 C.F.R. § 120.6.
- ⁵⁷ Id. § 121.1.
- ⁵⁸ Id. §§ 120.6, 120.10.
- ⁵⁹ Id. § 120.17 (a)(4).
- ⁶⁰ Id. § 123.1.
- ⁶¹ Id. §§ 123.4, 123.5.
- ⁶² Id. § 123.2.
- ⁶³ Id. §§ 120.9, 124.1.
- ⁶⁴ Id. Part 122.
- ⁶⁵ Id. § 129.3.
- ⁶⁶ <http://www.pmddtc.state.gov/licensing/forms.html>
- ⁶⁷ See, e.g., http://www.pmddtc.state.gov/DTRADE/documents/DTrade_DSP_5_Instructions.pdf (Guidelines for completing the DSP-5)
- ⁶⁸ Id. § 120.22.
- ⁶⁹ Id. § 120.21.
- ⁷⁰ Id. § 120.23.
- ⁷¹ <http://www.pmddtc.state.gov/licensing/agreement.html>
- ⁷² <http://www.pmddtc.state.gov/DTRADE/index.html>
- ⁷³ 22 C.F.R. §§ 120.3, 120.4; http://www.pmddtc.state.gov/commodity_jurisdiction/index.html

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- ⁷⁴ http://www.pmdtc.state.gov/commodity_jurisdiction/determination.html
- ⁷⁵ 22 C.F.R. § 126.5 (b).
- ⁷⁶ Id. § 126.5 (c).
- ⁷⁷ Id. § 123.4.
- ⁷⁸ Id. § 129.3.
- ⁷⁹ Id. §§ 129.6, 129.7, 129.8.
- ⁸⁰ Id. Part 130.
- ⁸¹ 22 U.S.C.A. §§ 2778, 2779a, 2780; 22 C.F.R. §§ 127.7, 127.10.
- ⁸² 18 U.S.C.A. § 3571; 22 U.S.C.A. § 2778 (c); 22 C.F.R. §§ 127.3, 127.7.
- ⁸³ 22 C.F.R. § 127.1 (b).
- ⁸⁴ Id. § 127.12.
- ⁸⁵ Id. § 126.1 (e).
- ⁸⁶ Id. § 127.12 (c)(1)(i).
- ⁸⁷ See, e.g., http://www.pmdtc.state.gov/compliance/consent_agreements.html
- ⁸⁸ 22 C.F.R. § 122.5.
- ⁸⁹ Id. § 123.9 (b).
- ⁹⁰ Id. § 123.22 (a).
- ⁹¹ Id. §§ 123.26, 125.6.
- ⁹² <http://www.treasury.gov/ofac>
- ⁹³ <http://www.sec.gov/divisions/corpfin/globalsecrisk.htm>
- ⁹⁴ 31 C.F.R. Part 560.
- ⁹⁵ Id. Part 538.
- ⁹⁶ Id. §§ 538.205, 560.204.
- ⁹⁷ Id. §§ 538.411, 560.204 (b).
- ⁹⁸ Id. § 560.204 (b).
- ⁹⁹ Id. §§ 538.507 (b), 560.205 (a).
- ¹⁰⁰ Id. §§ 538.206, 560.208.
- ¹⁰¹ Id. §§ 538.523, 560.530.
- ¹⁰² See, e.g., http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20110921_22.aspx
- ¹⁰³ 31 C.F.R. §§ 538.212 (c), 560.210 (c).
- ¹⁰⁴ Id. §§ 538.531, 560.539.
- ¹⁰⁵ Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (“CISADA”), Pub. Law No. 111-195, Sec. 102.
- ¹⁰⁶ CISADA, Sec. 104.
- ¹⁰⁷ http://www.treasury.gov/resource-center/sanctions/Programs/Documents/sudan_secede_guide.pdf
- ¹⁰⁸ CISADA, Sec. 102.

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- ¹⁰⁹ 31 C.F.R. Part 515.
- ¹¹⁰ *Id.* § 515.201 (b).
- ¹¹¹ *Id.* § 515.312.
- ¹¹² 15 C.F.R. § 746.2 (b); 31 C.F.R. § 515.533.
- ¹¹³ 31 C.F.R. §§ 501.701 (a)(3), (a)(4), 515.701.
- ¹¹⁴ 18 U.S.C.A. § 3571; 31 C.F.R. §§ 501.701 (a)(1), (a)(2), 515.701.
- ¹¹⁵ 15 C.F.R. § 746.4.
- ¹¹⁶ *Id.* Part 736, Supp. 1, General Order No. 2.
- ¹¹⁷ 31 C.F.R. Parts 500, 510.
- ¹¹⁸ Exec. Order 13582 (Aug. 17, 2011).
- ¹¹⁹ 15 C.F.R. Part § 746.4 (a).
- ¹²⁰ *Id.* Part 736, Supp. 1, General Order No. 2 (a).
- ¹²¹ Exec. Order 13582 (Aug. 17, 2011).
- ¹²² 15 C.F.R. Part 736, Supp. 1, General Order No. 2 (a).
- ¹²³ *See, e.g.*, 15 C.F.R. § 746.4 (c).
- ¹²⁴ 31 C.F.R. Part 537.
- ¹²⁵ <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>
- ¹²⁶ Exec. Order 13566 (Feb. 25, 2011).
- ¹²⁷ Exec. Order 13573 (May 18, 2011).
- ¹²⁸ <http://www.treasury.gov/resource-center/sanctions/Pages/default.aspx>