

U.S. Trade Controls on Libya

In September 2004, the United States lifted its longstanding economic sanctions program against Libya. A number of recent regulatory developments have made it easier for U.S. companies and individuals, as well as non-U.S. companies and individuals selling U.S.-origin products, to conduct business with and in Libya. This *International Trade Update* summarizes those developments, while highlighting some of the key restrictions that remain.¹

Regulatory Developments

1. U.S. Commerce Department Export Controls. The U.S. Commerce Department, Bureau of Industry and Security (BIS), pursuant to the U.S. Export Administration Regulations (Export Regulations),² is responsible for controlling exports and re-exports to Libya of U.S.-origin “dual use” items. Dual use items include goods, software, and technology that have not been specifically designed or modified for military use, and which are not otherwise subject to the export licensing jurisdiction of the U.S. State Department.

During 2005, BIS has taken a number of steps to ease restrictions on transactions with Libya involving dual use goods, software, and technology, as follows:

*License Exception USPL.*³ On November 16, 2005, BIS issued an interim rule creating a License Exception for exports and re-exports to U.S. Persons in Libya (USPL) of certain U.S.-origin goods, software, and technology controlled under the Export Regulations for antiterrorism purposes.⁴

License Exception USPL applies only to use of subject items in Libya by U.S. persons for business or professional activities. A non-U.S. person in Libya may use items exported or re-exported under the Exception so long as that person is (i) employed by the U.S. person who received the item, and (ii) using the item within the scope of his or her employment.⁵ The transfer of such items to non-U.S. persons in Libya is prohibited without additional authorization. If items exported or re-exported to Libya under the License Exception are not consumed or destroyed while in Libya, in accordance with the Export Regulations, the items must be returned to the United States or re-exported to a permissible third country.

Specific items identified by the interim rule that may benefit from the new License Exception include portable generator sets, encryption hardware, certain information security software, and diesel engines. However, not all items controlled for antiterrorism purposes are eligible for the License Exception, because the Exception covers those items that are controlled for export and re-export to Libya for antiterrorism reasons only (as opposed to those items controlled for both antiterrorism and national security reasons). Thus, for instance, exports to Libya of encryption software controlled under Export

Control Classification Number 5D002 continue to require a license because 5D002 software is controlled for both antiterrorism and national security reasons.

Installed Base Items. On March 22, 2005, BIS published a Final Rule regulating certain items subject to the Export Regulations that may have been illegally exported or re-exported to Libya before the lifting of the U.S. embargo on Libya. The Final Rule legalizes certain transactions relating to such items, called “installed base” items, that previously were prohibited.⁶

The Final Rule establishes a two-tier policy to regulate installed base items, as follows:

- ❖ Tier 1. Activities with installed base items categorized under Tier 1 generally are permitted if a report is filed with BIS within 90 days of the activity.⁷ These items include:
 - ◇ EAR99 items (those subject to the Export Regulations but not identified on the Commerce Control List (Control List) (15 C.F.R. part 774));
 - ◇ Control List items that currently would be authorized for export and re-export to Libya under a License Exception; and
 - ◇ Control List items controlled for export only for national security and antiterrorism reasons, or for antiterrorism reasons only, and which are not on the Wassenaar Arrangement’s Sensitive List or Very Sensitive List.⁸
- ❖ Tier 2. This designation applies to all installed base items listed on the Control List that are not covered by Tier 1. Parties may not conduct activity involving Tier 2 items until those activities and items are licensed by BIS. Items with anticipated civil end-uses are treated more favorably by BIS in this regard than those with military, police, intelligence, or other sensitive applications.

Other Licensing Amendments from March 22, 2005 Final Rule. In addition to establishing BIS policy with respect to installed base items, the March 22 Final Rule announced the easing of restrictions on certain other exports controlled under the Export Regulations, including:

- ❖ Exports of commercial charges (also known as oil well perforators). Based on its recognition that such items “may be available from other countries and ... are important to ensure that oil development and production occurs in a safe manner,” BIS moved from a general policy of denial with respect to such charges to a policy of case-by-case review.
- ❖ Exports of certain aircraft and helicopters. BIS announced that it would begin reviewing applications for exports or re-exports to Libya of civil aircraft or helicopters on a case-by-case basis, rather than under its prior general policy of denial.
- ❖ Certain travel pursuant to License Exception AVS (for aircrafts and vessels). BIS amended its regulations to permit certain aircraft and vessels to travel to Libya pursuant to License Exception AVS. Previously, all aircraft and vessels subject to the Export Regulations bound for Libya required a license from BIS.

- ❖ Exports of certain software under License Exception TMP (for temporary export to Libya). The Final Rule clarified that certain software could be exported to Libya temporarily, e.g., on a laptop taken to Libya as baggage, in accordance with the conditions of License Exception TMP.

Remaining Restrictions on Dual Use Exports. Both through issuing licenses and the use of License Exceptions, BIS is authorizing an increasing number of dual use exports and re-exports to Libya. However, a number of important restrictions remain, as follows:

First, current BIS licensing policy toward Libya includes several categories of goods subject to a general policy of denial, including certain goods, software, and technology controlled for reasons of (i) chemical and biological weapons proliferation; (ii) encryption; (iii) missile proliferation; and (iv) national security.⁹

Second, the end-uses and end-users for exports to Libya, as established pursuant to the controls in 15 C.F.R. part 744, are restricted. Thus, BIS generally will not authorize exports requiring a license to Libyan military, police, intelligence or other sensitive end-uses.

Third, exports and re-exports to Libya of foreign-made dual use items incorporating more than 10 percent U.S.-origin content are subject to BIS licensing requirements. (With limited exceptions, foreign-made items containing 10 percent or less U.S.-origin content can be exported to Libya without a license from BIS, though the exporting country's laws may restrict such exports.) BIS will review applications for the re-export to Libya of foreign-made items containing between 10 and 20 percent U.S. content on a case-by-case basis.

2. U.S. State Department Export Controls. Notwithstanding the liberalization of U.S. trade policy towards Libya in certain areas, the United States continues to maintain an absolute embargo against Libya with respect to all military items. Pursuant to the Export Administration Act,¹⁰ the Arms Export Control Act,¹¹ and the Foreign Assistance Act,¹² the U.S. government periodically makes determinations of countries' support of international terrorism or their cooperation with U.S. efforts to combat international terrorism.¹³ As of December 13, 2005, the U.S. government continues to designate Libya as a state sponsor of terrorism.¹⁴ The U.S. arms embargo on Libya is maintained pursuant to this designation.

On September 28, 2005, the President announced a limited waiver to the U.S. arms embargo on Libya, specifically providing for limited exports to Libya of defense articles and services for purposes of:

- ❖ a transaction to assist in the disposition, including any required refurbishing, of Libyan-owned C-130H aircraft;¹⁵ or
- ❖ a transaction to assist in chemical weapon destruction in Libya.¹⁶

Under the waiver, the Secretary of State is required to "consult with and submit reports to the Congress for the proposed specific exports or transfers, 15 days prior to permitting them to proceed." In addition, there is no indication that defense technical data would be permitted for export under these determinations. Although this is a very limited waiver, in informal remarks recently, a State Department official indicated this is the first time he can recall the issuance of a waiver to any arms embargo.

Remaining Trade Restrictions on Libya

Over the past year, as detailed above, the United States has eased and lifted many restrictions on trade with Libya. However, a number of limitations and restrictions remain, and affect all U.S. nationals and companies, individuals and companies in the United States, and any person wherever located transacting in U.S.-origin goods.

1. State Sponsor of Terrorism. Libya is listed as a “state sponsor of terrorism” under Section 6(j) of the U.S. Export Administration Act, Section 40 of the U.S. Arms Export Control Act, and Section 620A of the U.S. Foreign Assistance Act. The following issues, among others, arise as a result:

Arms Embargo. Subject to the very limited waiver outlined above under U.S. State Department Arms Export Controls, the U.S. government maintains an absolute arms embargo on Libya, including a ban on military technical assistance and manufacturing licensing agreements with Libya.¹⁷ This covers all items regulated by the U.S. State Department under the International Traffic in Arms Regulations (ITAR), including ITAR-controlled items that have been exported to a third country pursuant to proper State Department authorization. In addition, exports and re-exports to Libya of any items that could make a “significant contribution to the military potential” of Libya are prohibited.¹⁸ This prohibition may be read to reach exports and re-exports to Libya of dual use items not specifically controlled for military purposes.

Terrorism List Government Sanctions.¹⁹ Under the Terrorism List Government Sanctions Regulations, U.S. persons are prohibited from (i) accepting a donation from the government of Libya; or (ii) entering into any transaction with the government of Libya that the U.S. person knows or has reason to know poses a threat of furthering a terrorist attack in the United States.²⁰ (Notably, “donation” is defined to include a transfer in the form of a gift; accordingly, a U.S. person that receives even a token gift from the government of Libya, including Libyan government departments and instrumentalities, may be in violation of these regulations.)

SEC Office of Global Security Risk.²¹ There are increasing reports that the U.S. Securities and Exchange Commission, Office of Global Security Risk (OGSR), has been sending letters to U.S. companies requesting that they provide information regarding dealings with countries designated as state sponsors of terrorism, including Libya. Subject to the OGSR’s specific mandate, these letters are part of the SEC’s effort to enforce anti-corruption laws and to convey information to shareholders about companies’ operations in terrorist-supporting countries.²² The OGSR specifically has targeted oil exploration and production and services companies based in the U.S., as well as several companies based in Europe.²³

2. Other Trade Controls Issues.

Sanctions on Libyan Individuals. Generally speaking, U.S. persons are prohibited from conducting or facilitating transactions with Libyan nationals or entities labeled as Specially Designated Global Terrorists and other Specially Designated Nationals (SDNs), wherever they are located.²⁴ Thus, all parties to any transaction in Libya or involving Libyan parties should be screened against the U.S. Treasury Department’s SDN List, as well as the other lists of prohibited parties maintained by the U.S. government.

Foreign Corrupt Practices Act. The Foreign Corrupt Practices Act (FCPA) prohibits U.S. companies, individuals, and all persons in the United States, as well as any third party acting on their behalf, from making, or promising or offering to make, directly or indirectly, a payment, donation, gift, or any thing of value to a foreign official (as broadly defined) in order to corruptly obtain or retain business, or obtain any unfair advantage.²⁵ Under the FCPA, the U.S. Justice Department has identified certain “red flags” that, when present in a transaction, a company should consider – and, to the extent possible and reasonable, investigate – for purposes of FCPA compliance before conducting the transaction.

One well-established red flag is the level of corruption in the country where the transaction will occur. In the case of Libya, at present, Libya is ranked 117 out of 158 countries included in Transparency International’s 2005 Corruption Perception Index.²⁶ This ranking puts Libya on a par with countries such as Afghanistan, Bolivia, Nepal, Russia, and Sierra Leone in terms of the country’s perceived level of corruption, and is a “red flag” for FCPA purposes. Due to this and other red flags pertaining to doing business in Libya, parties need to be aware of their obligations under the FCPA and with respect to sales consultants and other third parties acting on their behalf.

Antiboycott. The U.S. Department of Treasury has determined that Libya at least partly continues to cooperate with the Arab League’s economic boycott against Israel. (Boycott language most often appears in documents including shipping terms, powers of attorney forms, and the like.) When conducting business in or with Libya, it is important to be aware that, with limited exceptions, the U.S. Treasury Department and Commerce Department prohibit agreeing to comply with the Arab League boycott of Israel. Should any documents reference or request compliance with the Arab League boycott of Israel or request certain boycott-related information, there are certain steps that may need to be taken, including responding immediately to the request in the negative, reporting receipt of the request to the U.S. government, and other such steps.

General Business Issues. Libya’s poorly developed banking system, and the continuing lack of a reliable system of credit, mean that many transactions in Libya are conducted in cash. In most of the country, credit cards are not accepted, and individual credit generally is not available.²⁷

Travel to Libya. The U.S. diplomatic presence has been increasingly formalized since the U.S. government lifted its travel ban on Libya on February 26, 2004.²⁸ However, at present, only limited services are available for U.S. travelers to Libya. The U.S. State Department’s November 2005 travel advisory and other information pertaining to travel to Libya are available at the following URL: <http://www.state.gov/r/pa/ei/bgn/5425.htm>.

Outlook

Although restrictions on doing business with Libya remain, principally based on Libya’s designation by the U.S. government as a state sponsor of terrorism, there have been signals during 2005 that the U.S. government may be considering whether to remove this designation. According to press reports, a March 2005 Department of Homeland Security internal report described Libya as a “diminishing concern” with respect to its support of international terrorism.²⁹ In September 2005, U.S.

Secretary of State Condoleezza Rice “reaffirmed the U.S. commitment to broaden and deepen the relationship between Libya and the U.S.”³⁰ According to the report, Secretary Rice stated that “as Libya continued this course, it would regain a secure and respected place among the nations of the world.”³¹ Furthermore, as summarized above, the U.S. government recently has eased restrictions on trading with Libya through the creation of License Exception USPL and issuance of the limited waiver to the U.S. arms embargo on Libya. Nonetheless, early in 2005, some press reports and government officials were suggesting that restrictions on U.S. transactions with Libya would be substantially or entirely eliminated by the end of this year. Such a comprehensive rollback has not occurred.

Conclusion

While the U.S. government clearly is committed to strengthening its relationship with Libya, the liberalization of the relationship is proceeding slowly. There are many opportunities in Libya, but caution is warranted. Before conducting business in Libya, important compliance steps should be taken to avoid the many pitfalls that remain.

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Endnotes

¹ The United Nations lifted its sanctions on Libya in September 2003. Beginning in early 2004, the United States began easing its sanctions on Libya, culminating in the September 20, 2004 issuance of Executive Order No. 13357 (available at: <http://www.whitehouse.gov/news/releases/2004/09/20040920-5.html>), which lifted all remaining U.S. sanctions under the Libyan Sanctions Regulations, 31 C.F.R. part 550.

² 15 C.F.R. pts. 730-774. For general guidance on the EAR and copies of the regulations, *see*: http://www.access.gpo.gov/bis/ear/ear_data.html.

³ Establishment of New License Exception for the Export or Reexport to U.S. Persons in Libya of Certain Items Controlled for Anti-Terrorism Reasons Only On the Commerce Control List, 70 Fed. Reg. 69,432 (November 16, 2005), *at* <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-22674.pdf>.

⁴ In addition to License Exception USPL, a number of other License Exceptions may be available for exports and re-exports to Libya, including for: (i) certain temporary exports; (ii) certain exports to government end-users; (iii) certain gifts; (iv) certain items contained in baggage accompanying travelers; (v) certain exports of “technology under restriction;” (vi) certain replacements or exports for repair; and (vii) certain exports related to aircraft and vessels. *See, e.g.*, 15 C.F.R. part 740.

⁵ *See id.*

⁶ 70 Fed. Reg. 14,387 (Mar. 22, 2005) *available at*: <http://a257.g.akamaitech.net/7/257/2422/02jan20051800/edocket.access.gpo.gov/2005/pdf/05-5537.pdf>.

⁷ Reports must be submitted to the BIS Office of Export Enforcement, and should include all known material facts with respect to how the installed base item arrived in Libya. A report may address more than one activity and/or more than one installed base item. An additional report must be submitted if any new material information regarding the export or re-export to Libya of the installed base item is discovered. *See id.*

⁸ These Wassenaar Lists are available at the following URL: <http://www.wassenaar.org/controllists/index.html>

⁹ 15 C.F.R. § 742.20, *available at*: <http://www.access.gpo.gov/bis/ear/pdf/742.pdf>. Notwithstanding its general policy of denial with respect to certain exports and re-exports to Libya, BIS largely is authorizing most exports and re-exports to civil end users in Libya.

¹⁰ 50 U.S.C. § 2405(j). While the Export Administration Act technically lapsed in 1994, President Bush in Executive Order No. 13222 (Aug. 17, 2001) declared a national emergency and continued the Act. He most recently confirmed the continuation of this Executive Order on August 2, 2005. The notice of this continuation can be found at:

<http://www.whitehouse.gov/news/releases/2005/08/20050802-10.html>.

¹¹ 22 U.S.C. § 2780(d).

¹² Pub. L. No. 87-195, 75 Stat. 424 (Sept. 4, 1961), at § 620(A).

¹³ See 22 U.S.C. § 2781.

¹⁴ See, e.g., U.S. State Department, Notice: Determination and Certification Under Section 40A of the Arms Export Control Act, 70 Fed. Reg. 28,979 (May 19, 2005).

¹⁵ See Presidential Determination No. 2005-40, 70 Fed. Reg. 60,401 (Oct. 17, 2005), available at the following URL:

<http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-20855.htm>

¹⁶ See Presidential Determination No. 2005-39, 70 Fed. Reg. 60,399 (Oct. 17, 2005), available at the following URL:

<http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-20854.htm>

¹⁷ 22 C.F.R. § 126.1.

¹⁸ Export Administration Act, 50 U.S.C. § 2405(j)(1).

¹⁹ 31 C.F.R. part 596.

²⁰ Terrorism List Government Regulations, 31 C.F.R. part 596, available at:

http://www.access.gpo.gov/nara/cfr/waisidx_04/31cfr596_04.html.

²¹ In July 2003, Rep. Frank R. Wolf (R.-VA), Chairman of the Subcommittee on Commerce, Justice, State, and the Judiciary, House Committee on Appropriations, inserted language in the Committee Report accompanying the 2004 Appropriations Bill (Rep. 108-221 accompanying H.R. 2799) directing the SEC to establish a new office of Global Security Risk in the Division of Corporation Finance.

²² Benoit Faucon, *SEC Asks Companies to Report on Business With Terror States*, PITTSBURGH POST-GAZETTE, June 14, 2005, at E2.

²³ *Id.*

²⁴ 31 C.F.R. part 594. The regularly updated SDN List, which includes the list of SDGTs, is available at:

<http://www.treas.gov/offices/enforcement/ofac/sdn/>.

²⁵ 15 U.S.C. 78dd-1 et seq.

²⁶ The 2005 CPI is available at: http://www.transparency.org/policy_and_research/surveys_indices/cpi/2005.

²⁷ According to the U.S. liaison in Tripoli, Libya, notwithstanding efforts by the Libyan government to improve the Libyan credit system, credit cards are not accepted in Libya.

²⁸ U.S. Department of the Treasury, *U.S. Lifts Travel Ban on Libya*, Feb. 26, 2004, available at:

<http://www.treas.gov/press/releases/js1197.htm>.

²⁹ Eric Lipton, *Homeland Report Says Threat From Terror-List Nations Is Declining*, N.Y. TIMES, Mar. 31, 2005, at A9.

³⁰ Kim Gamel, *Rice: U.S. Committed to Ties With Libya*, WASH. POST, Sept. 18, 2005, at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/17/AR2005091701645.html?sub=new>.

³¹ *Id.*



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