EVASIONS, APPROVALS AND FACILITATIONS OH MY! EXAMINING U.S. PARENT CORPORATIONS' LIABILITY FOR TRANSACTIONS BY FOREIGN SUBSIDIARIES WITH SANCTIONED COUNTRIES

by

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"GE conducts business in more than 100 countries around the world… An important challenge for all of us is to understand how [laws of different countries] apply to our operations. GE, the parent company, is a corporation organized in the United States. The laws of the United States frequently extend to the operations of GE and its affiliates throughout the world as well as to the business activities of GE employees wherever they live and work. Other countries may also apply their own laws outside of their borders to their own citizens and to corporations that are organized under their laws, such as GE subsidiaries or other controlled affiliates… In some instances, there may be a conflict between the applicable laws of two or more countries. When you encounter such a conflict, it is especially important to consult company legal counsel to understand how to resolve that conflict properly."[1]

I. INTRODUCTION

Halliburton Company ("Halliburton"), headquartered in Houston, Texas, was founded in 1919 and today is one of the world's largest providers of products and services to the oil and gas industries.[2] The company employs more than 100,000 people in over 120 countries,[3] and in 2003 earned over $16 billion in revenues.[4] Halliburton generally earns at least two-thirds of its revenues from operations outside the United States, and in the first nine months of 2003, earned more than 70% of its revenues from countries outside the United States.[5] From 1995-2000, Vice-President Dick Cheney served as Halliburton's CEO,[6] and in that role lobbied the Clinton administration to ease sanctions on Libya and Iran.[7]

Among major oil producers, Iran remains a heavyweight in oil production.[8] While the United States maintains an economic embargo against Iran,[9] generally speaking companies incorporated outside the United States face no such restriction. Perhaps it is no surprise, then, that Halliburton's foreign subsidiaries engage in a fair level of commerce with Iran. Specifically, Halliburton has a subsidiary incorporated in the Cayman Islands and headquartered in Dubai, United Arab Emirates, called Halliburton Products & Services Limited[10] ("HPSL"). All of HPSL's revenues (in 2003, those revenues were almost $40 million) are generated through business in Iran, and the company is profitable.[11] The total revenues generated from business in Iran through Halliburton's subsidiaries represent approximately one-half of one percent of the revenue of Halliburton.[12]

The conduct of Halliburton's non-U.S. incorporated subsidiaries and affiliates in countries such as Iran, Libya, and Syria has attracted the attention of the national media.[13] This attention has also been fed by a high-profile dispute between Halliburton and some prominent shareholders, namely the New York City Police and Fire Department Pensions Funds.[14] The funds are managed by Office of the Comptroller of New York City, William Thompson Jr.[15] In a public battle reminiscent of the movement to urge U.S. based companies to withdraw from South Africa while that country was ruled under a policy of apartheid, the Comptroller has indicated his belief that Halliburton's business in Iran "helps to underwrite and support terrorism,"[16] and has requested Halliburton issue a report to its Board of Directors on the company's operations in Iran, with a focus on any potential financial and reputational risk.[17] The company issued such a report in January 2004.[18] The Comptroller's office expressed strong dissatisfaction with the report, and continues to press Halliburton for an accounting of Halliburton's operations in Iran with a review of reputational risk to the company.[19]

The federal government has now joined the fray and has launched an investigation into Halliburton's activities.[20] In 2001, Halliburton received an inquiry from the Office of Foreign Assets Control ("OFAC"), operated under the Treasury Department.[21] OFAC is the administrative agency charged with issuing regulations under the various federal laws, discussed in Section II, *infra*, which promulgates U.S. economic sanctions and embargoes.[22] According to documents filed by Halliburton with the Securities and Exchange Commission ("S.E.C."), OFAC's inquiry requested information on Halliburton's compliance with the economic embargo against Iran.[23] In January, 2004, Halliburton received a follow-up letter from OFAC requesting additional information.[24] Halliburton's report to the S.E.C. suggests that OFAC's inquiries may be extending beyond its operations in Iran.[25] Halliburton continues to maintain that its business operations in Iran are "clearly permissible under applicable laws and regulations"[26] and that there is no connection between its products and services with either terrorism or nuclear research.[27]

Halliburton is by no means alone in facing increased scrutiny from lawmakers, shareholders and the media for its business in countries subject to U.S. trade sanctions. In 2003, OFAC began publishing a list of civil penalties and enforcement actions related to violations of its regulations.[28] General Electric is reported to have sold locomotives to Syria

and oil and gas equipment in Iran.[29] Other U.S. companies that have been accused of having some level of business with a sanctioned country include Exxon Mobil,[30] ChevronTexaco,[31] Cooper Cameron,[32] Northrop Grumman,[33] and ConocoPhillips.[34] Perhaps unsurprisingly, according to one consultant who conducts research for mutual and pension funds, over 40% of U.S. based companies that have business with sanctioned countries are oil concerns or energy-related firms.[35] Even the S.E.C. has taken notice. In 2004, the S.E.C. created a new Office of Global Security Risk, with the primary objective of identifying companies which activities raise concern about global security risks that are material to investors.[36] In making these determinations, the S.E.C. will look at whether a company has operations in a country where "political, economic or other risks exist that are material."[37]

As of this writing, the United States maintains a comprehensive economic embargo against three countries – Cuba, Iran, and Sudan. Enforcement of violations of these embargoes is real and ongoing. Since 1995, OFAC has prosecuted 68 criminal cases for violations (an average of 7.5 per year.[38] OFAC currently has over 2600 civil cases open for investigation,[39] and has collected over $8 million in fines for violations of the Cuban embargo itself.[40] The issue of what U.S-based companies must do to avoid OFAC's scrutiny for actions of its off-shore subsidiaries, then, is both relevant and timely.

This article examines three issues surrounding the liability for U.S. based companies with foreign subsidiaries or affiliates incorporated in countries where trade with U.S.-sanctioned countries is permissible.[41] First, the article examines the statutory bases for economic trade sanctions and the OFAC-issued implementing regulations, namely the Trading with the Enemy Act[42] ("TWEA") and the International Emergency Economic Powers Act[43] ("IEEPA"), and how they grant extra-territorial authority to OFAC. Second, the article explores the methods used by OFAC to extend the reach of U.S. sanctions promulgated under IEEPA to the conduct of foreign subsidiaries and affiliates.[44] Third, the article suggests that OFAC's broad and sweeping interpretations of the statutes implementing economic embargoes has unexpectedly resulted in U.S. based companies being unable to comply with the spirit of the embargo, and should therefore be changed to permit legal compliance.

II. THE LONG, LONG ARM OF U.S. LAW

This article deals with the thorny issue of how OFAC, a U.S. governmental administrative agency, reaches into the conduct of companies that, on its face, OFAC would have no jurisdiction over. After all, OFAC's assertion of jurisdiction over Wal-Mart's Canadian subsidiary, a corporation organized under the laws of Mexico, would be, at least on the surface, akin to Canada's Health Canada exerting jurisdiction over Wal-Mart, the parent U.S. corporation, for the safety of food sold wholly in the United States.[45] In order to understand the grounds on which OFAC asserts this jurisdictional authority, it is important first to examine the two primary statutes that purportedly grant this authority – TWEA and IEEPA.[46]

A. TWEA

OFAC does not use a "one size fits all" approach in enforcing trade sanctions. Rather, the agency promulgates a separate set of regulations for each sanctioned country, known generally as sanctions "regimes." Only two sanctions regimes, those relating to Cuba and North Korea, are based on the TWEA. There is no question as to whether TWEA-based sanctions regimes apply to foreign subsidiaries of U.S. parent companies – they do, by express terms.

TWEA provides, in relevant part:

> (b) (1) During the time of war, the President may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise--
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case

> in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.[47]

With this broad and expansive grant of Congressional authority to the President as its base, OFAC promulgates the Cuban Asset Control Regulations[48] ("CACR"), first issued in July 1963 by President Kennedy.[49] The CACR provide generally for the prohibition of most exports and imports of goods and services with Cuban or Cuban entities around the world,[50] and furthermore requires U.S. persons subject to its jurisdiction to "block" or "freeze" property interests in which Cuba or a Cuban national has an interest.[51] Penalties are stiff, with imprisonment terms of up to 10 years and corporate criminal fines of up to $1 million or civil fines of up to $55,000 per transaction.[52]

While the CACR has not always applied to foreign subsidiaries of U.S. parent corporations, [53] it has since the 1992 Cuban Democracy Act.[54] Specifically, the relevant portions of the CACR provide:

> The term *person subject to the jurisdiction of the United States* includes:
>
> (a) Any individual, wherever located, who is a citizen or resident of the United States;
> (b) Any person within the United States as defined in § 515.330;
> (c) Any corporation, partnership, association, or other organization organized under the laws of the United States or of any State, territory, possession, or district of the United States; and
> (d) Any corporation, partnership, association, or other organization, *wherever organized or doing business, that is owned or controlled* by persons specified in paragraphs (a) or (c) of this section.[55]

In practice, the CACR affects commerce worldwide and has had a disruptive effect on many commercial transactions. It is clear under the definition of "person subject to U.S. jurisdiction" and "person within the United States"[56] that any person, in the juristic sense of the word, located physically in the United States, is subject to the CACR. Any foreign branch of a U.S. company, wherever it may be located, is also subject to the CACR since under corporate law, branches are indistinguishable and not distinct separate entities from the parent corporation. Wholly-owned subsidiaries, wherever they may be incorporated, are also subject to the CACR.

The second threshold for jurisdiction is the notion of "control." Even if a U.S. company does not own a majority of the issued and outstanding shares in a company, for example, if it has control of the foreign company (i.e., through a joint venture or management agreement), then that foreign company is subject to the CACR. U.S.-incorporated companies seeking to establish strategic alliances with foreign companies that may involve little equity, but the right to name senior management or board members, thus need to be wary of triggering the "control" threshold of the CACR.

These subsidiaries and affiliates may thus not export or import any goods or services to or from Cuba, or to or from Cuban entities, without an OFAC license. That prohibition is generally easily understood and most U.S. based corporations should have little difficulty in implementing a corporate policy that prohibits trade with Cuba even by foreign subsidiaries and controlled affiliates.[57] Modern commerce, however, often deals in shades of gray that may not be contemplated by the regulators at OFAC. Under the broad prohibitions of the CACR, these subsidiaries may not "deal" with any "property" in which Cuba or a "Cuban national" has an interest.[58] Interpretative guidance from OFAC on the meaning of these critical terms in the CACR is slim. OFAC does take the position that a CACR violation occurs when a U.S. citizen purchases a Cuban cigar in Mexico.[59] It also takes the position that it would be illegal for a U.K. subsidiary of a U.S. based company to sign a contract with another U.K. company (in other words, a contract negotiated and executed wholly in the U.K. by two companies organized under the laws of the U.K.) if the contract contemplates "Cuba-related provisions" – even if those provisions are contingent upon the lifting of the embargo.[60] OFAC thus seems to suggest that a condition precedent in a contract that might allow a company to perform some legal act in the future for the benefit of a Cuban national creates a property interest, presumably a future expectancy interest.

Taken to its literal extreme, the CACR yields startling results. McDonalds' franchise agreement, for example, is well-known for the amount of control it yields over franchisees.[61] As a US corporation, McDonald's is clearly subject to the CACR's jurisdiction, as would any wholly-owned subsidiaries in Europe. Any European franchisee, however, would be independently owned and operated under a franchise agreement. An argument could be made that McDonald's exercises control over that franchisee, and could therefore be under an affirmative duty not to sell cheeseburgers and french fries to any Cuban nationals that walk through the front door. While the day when passport checks are conducted to check for Cuban nationality at McDonald's and Opel[62] dealerships has not yet arrived, under OFAC's interpretation of the blocking and freezing provisions of Section 515.201 of the CACR such a scenario seems colorable.

Speculating on the status of the U.S. embargo against Cuba is a favorite pastime of many policy analysts, but with each successive President, the embargo seems to grow ever tighter.[63] Repeal seems highly unlikely.[64]

The North Korean sanctions regime, in place since 1950, is likewise based on the TWEA.[65] As such, the jurisdictional reach of the regime is identical to that of the Cuban sanctions regime, i.e., all owned and controlled subsidiaries and affiliates are subject to the North Korean sanctions regime.[66] The scope of the sanctions, however, differ from the

CACR. Exports to North Korea are permitted with licenses from OFAC or the Department of Commerce, blocking and freezing restrictions are somewhat looser, and there is no travel ban.[67]

The response of countries around the world to the extra-territorial application of the TWEA, predictably, has not been positive.[68] Canada, for example, dusted off an old "blocking" law, the Foreign Extraterritorial Measures Act,[69] which was originally passed to block the application of discovery and treble damages brought by private antitrust litigation in the Untied States, to prohibit Canadian companies from complying with the U.S. trade embargo against Cuba.[70] Both Canada and Mexico have hinted that the North American Free Trade Agreement justifies their attempts to block the CACR from applying within their borders.[71] Finally, the European Union, which has always taken a different view on how to treat the Castro dictatorship in Cuba,[72] passed a Council Regulation requiring all member states to pass blocking legislation to prevent its companies from complying with the U.S. embargo against Cuba.[73] This directive is now national law in Germany,[74] Ireland,[75] Austria,[76] United Kingdom,[77] Italy,[78] Finland,[79] Denmark,[80] Greece,[81] Netherlands,[82] Spain,[83] and Sweden.[84]

B. IEEPA[85]

The second, and more common, basis for OFAC sanctions regimes is the International Emergency Economic Powers Act, or IEEPA.[86] IEEPA forms the basis for sanctions against Burma,[87] the Balkans,[88] Sierra Leone,[89] Iran,[90] Iraq,[91] Libya,[92] Sudan,[93] and Zimbabwe.[94] Sanctions against Syria, which are widely expected,[95] would be promulgated under IEEPA. Of this list, only Iran and Sudan are subject to comprehensive trade embargoes including an export and import ban, while the other regimes provide for "softer" sanctions.

In addition to the various direct prohibitions, the regulations generally contain prohibitions which echo ordinary concepts in criminal law of inchoate crimes. The Burmese, [96] Balkan, [97] Sierra Leone[98], Zimbabwe[99], Iraqi,[100], Iranian,[101], Libyan[102], and Sudanese[103] regulations all prohibit evasions, attempts, and/or conspiracies by U.S. persons.

While TWEA and IEEPA-based sanctions regimes have some similarities such as providing the statutory authority for the President to freeze assets and cease economic trade,[104] there is one most notable difference between the two statutes. Unlike TWEA-based sanctions regimes, IEEPA-based sanctions regimes generally define a U.S. person as "any United States citizen, permanent resident alien, juridical person organized under the laws of the United States (including foreign branches), or any person in the United States."[105] On its face, then, if a sanctions regime is promulgated under IEEPA, it will not apply to foreign-organized corporations, partnerships, or other juridical entities, including those owned or controlled by U.S. companies.

In certain sanctions regimes, however, OFAC has gone one step beyond simply prohibiting inchoate crimes. In these regimes (Burmese, Iranian, Sudanese, and to a lesser extent, the now-defunct Serbian), OFAC has introduced the concept of illegal "approval" and "facilitation" of conduct that a U.S. company would not otherwise be able to engage in by itself. In other words, beyond attempt and conspiracy, as those crimes are understood in modern criminal law, OFAC has made it a crime for a U.S. parent company to "approve" or "facilitate" prohibited transactions overseas.

The Burmese regulations, for example, bar "approval" or "other facilitation" by a U.S. person, wherever located, of a transaction by a foreign person where the transaction would constitute prohibited new investment in Burma if engaged by a United States person or within the United States.[106] The same prohibition is found in the import ban provisions of the sanctions regime.[107] An interpretive section to OFAC's regulations explains that "approval or other facilitation" includes "assisting" or "supporting" a foreign person's activity[108] and further explains that a U.S. person is prohibited from brokering, financing, guaranteeing, or approving the activities of a foreign affiliate.[109] The U.S. person is also cannot "approve, supervise, or otherwise be involved" in a foreign subsidiary's negotiations with Burma for new investment.[110]

The Iranian Transactions Regulations[111] contain similar, but not identical, language. U.S. persons may not "approve, finance, facilitate, or guarantee" any transaction by a foreign person.[112] By "foreign person," OFAC includes a "foreign subsidiary" as well as "unaffiliated foreign persons."[113] The Iranian regulations, however, expand beyond the Burmese regulations through an interpretive section. According to OFAC, a prohibited facilitation or approval occurs when a U.S. person "alters its operating policies or procedures, or those of a foreign affiliate, to permit a foreign affiliate to accept or perform a specific contract… without the approval of the United States person, where such transaction previously required approval by the United States person."[114] It also occurs when a U.S. person refers to any foreign person business opportunities involving Iran which the U.S. person could not directly respond to.[115] Finally, illegal approval or facilitation occurs when a U.S. person "changes the operating policies or procedures" of an affiliate with the "specific purpose" of facilitating transactions that would otherwise be prohibited if performed by a U.S. person or from the United States.[116]

The most expansive interpretation of the meaning of prohibited facilitation or approval comes from the Sudanese regulations. The Sudanese sanctions regulations specifically prohibit "facilitation" and "brokering" activities by U.S. persons.[117] Just like the Iranian regulations, the Sudanese regulations also contain an interpretive section. In it, OFAC decrees that facilitation occurs when a U.S. person "assists" or "supports" trading activity with Sudan by any person.[118] In the Sudanese regulations OFAC for the first time declares activities which are *not* approval or facilitation, such as facilitating trade or a financial transaction that could be entered into directly by the U.S. person,[119] or activity of a "purely clerical or reporting nature" that does not further trade or financial transactions with Sudan.[120] For example, merely reporting on the results of a subsidiary's trade with Sudan is not prohibited facilitation.[121] Financing or insuring that trade or warranting the

quality of goods sold by a subsidiary to Sudan, however, does constitute prohibited facilitation.[122] OFAC goes on to clarify that in order to avoid potential liability, a U.S. parent corporation must ensure that its foreign subsidiaries act independently of any U.S. person, including but not limited to business and legal planning, decision making, designing, ordering or transporting goods, and financial, insurance, and other risks.[123] As in the Iranian regulations, prohibited facilitation occurs when a U.S. person refers business opportunities involving Sudan which a U.S. person could not directly respond to as a result of the embargo.[124] Similar to the Iranian regulations, the Sudanese regulations also contain prohibitions against changing policies or operating procedures in order to allow a foreign entity owned or controlled (note the language, reminiscent of the TWEA-based Cuban regulations)[125] by a U.S. person to enter into a transaction that could not be entered into directly by a U.S. person.[126] It is critical to note, however, that whereas the counterpart regulation in the Iranian transactions regulations only makes changing policies illegal *where such transaction previously required the approval of a U.S. person* or *with the specific purpose* of facilitating transactions that would otherwise be prohibited by a U.S. person or from the United States, no such limitations are found in the Sudanese regulations. The Sudanese regulations predate the Iranian regulations,[127] but there is no basis in law to conclude that the Iranian regulations, which arguably provide for a scienter requirement before liability attaches, provide interpretive guidelines to other sanctions regimes.

Finally, language from the sanctions regime OFAC applied to Serbia & Montenegro, which are no longer in effect, give the example of a U.S. national or permanent resident alien employed by a foreign company as participating in a decision-making role in an activity by the foreign company that includes investment in Serbia as prohibited approval or facilitation.[128]

C. Summary – How TWEA and IEEPA Reach Foreign Subsidiaries

As discussed in Section IIA, *supra*, TWEA-based sanctions programs reach the conduct of foreign-incorporated companies as long as they are owned or controlled by U.S. persons. IEEPA-based sanctions cannot apply to foreign-incorporated companies, but prohibitions on a U.S. person's "approval" or "facilitation" of conduct by a foreign subsidiary may serve the same effect. For U.S. based companies, then, the extent to which its foreign subsidiaries and affiliates may trade with a sanctioned country depends, first, on whether the proposed trade is with a TWEA-based sanctioned country (Cuba or North Korea), or whether it is with an IEEPA-based sanctioned country. If it is an IEEPA-based sanctioned country, the U.S. parent needs to be aware of what the specific sanctions regime permits and does not permit in terms of exports, imports, freezing, and blocking. Finally, in addition to avoiding evasions, attempts, and conspiracies, the company must pay very careful attention to its conduct with regards to foreign subsidiaries that do trade with sanctioned countries, so as to not run afoul of any applicable "approval" or "facilitation" prohibitions. The following table summarizes the bases through which U.S. sanctions law can assert jurisdiction over the conduct of foreign-incorporated companies.

Target Country	**Source**	**Actions Prohibited** (emphases added)
Cuba/N. Korea	31 C.F.R. § 515.329	Provisions apply to corporations wherever organized or doing business ***owned or controlled*** by U.S. persons.
Burma	31 C.F.R. § 537.202	Any ***approval*** or ***other facilitation…***
	31 C.F.R. § 537.409(a)	Any action by a U.S. person that ***assists*** or ***supports*** a foreign person's activity…
	31 C.F.R. § 537.409(b)	A U.S. corporation is prohibited from ***brokering, financing, guaranteeing, or approving*** the entry by any foreign person, including a foreign affiliate…
	OFAC	The U.S. parent cannot ***approve, supervise or otherwise be involved*** in the foreign subsidiary's negotiations…
Iran	31 C.F.R. § 560.208	No United States person, wherever located, may ***approve, finance, facilitate, or guarantee*** any transaction…
	OFAC	… by a foreign subsidiary… or unaffiliated foreign persons.
	31 C.F.R. § 560.417(a)	***Altering*** a U.S. person's operating policies to allow a foreign affiliate to perform a specific transaction where such transaction previously required approval by the U.S. person
	31 C.F.R. § 560.417(c)	***Changing the operating policies*** of a foreign affiliate with the specific purpose of facilitating transactions otherwise

		prohibited if performed by a U.S. person
	31 C.F.R. § 560.417(b)	***Referring*** business opportunities in Iran to any foreign person
Sudan	31 C.F.R. § 538.206	***Facilitation,*** including but not limited to ***brokering activities***
	31 C.F.R. § 538.407(a)	***Assisting or supporting*** trading activity by any person
	31 C.F.R. § 538.407(a)	Activities of a ***purely clerical*** nature (such as reporting on results of subsidiary's trade with Sudan) are not prohibited facilitation
	31 C.F.R. § 538.407(a)	***Warranting*** quality of goods sold by subsidiary to Sudan
	31 C.F.R. § 538.407(b)	Foreign subsidiaries must act independently of any U.S. person, including but not limited to ***business and legal planning, decision making, designing, ordering or transporting goods, and financial, insurance, and other risks***
	31 C.F.R. § 538.407(d)	***Referring*** business opportunities in Sudan to any foreign person
	31 C.F.R. § 538.407(c)	***Changing*** policies or procedures in order to allow foreign entity owned or controlled by U.S. person to enter into transaction U.S. person cannot enter into directly, without regard to whether previously, approval was required or to any specific purpose of facilitating a transaction prohibited if performed by a U.S. person.
Serbia	31 C.F.R. § 586.409	U.S. national or resident alien hired by foreign-incorporated company may not participate in a ***decision-making role*** in an activity by the foreign company that includes prohibited investment in Serbia.

III. FACILITATION, APPROVAL AND EVASION: WHAT TRIGGERS LIABILITY?

As controversial as they may be, the CACR are clear in their application to foreign entities owned and controlled by U.S. parent entities. The far more difficult task for U.S. companies, such as Halliburton and General Electric, is determining conduct which leads to liability for trade by its foreign subsidiaries with IEEPA-based sanctioned countries on the basis of the "approval" and "facilitation" prohibitions. Part A of this section explores conduct that leads to liability from OFAC enforcement, cases and rulings, while Part B of this section explores the practical application of these rules to corporate governance of foreign subsidiaries and affiliates.

A. Guidance from Enforcement, Cases, and Rulings.

Some guidance can be gleaned from the statutes and regulations themselves, discussed in Section II, *supra*. A potentially fruitful area of guidance could come from studying past enforcements of violations. In 2003, under pressure from various corporate governance groups,[129] OFAC reluctantly began publishing the names of companies that had been sanctioned under the various sanctions regimes, the relevant country involved, and the amount of the fine.[130] OFAC has been tight-lipped, however on what specific behavior the company engaged in to warrant a sanction.[131] OFAC seems only too happy to permit the confusion to continue, perhaps under the belief that it is better for confusion to lead to conservative corporate governance of subsidiaries rather than allowing bright-line tests which would allow scheming lawyers to devise ways for the trade with sanctioned countries to continue. A concern about setting precedential value for future cases, which are after all inherently fact-specific, may also be driving OFAC's obscuration. OFAC claims that what it has provided is the

"maximum information [OFAC] can make available consistent with legal concerns."[132] This potential source of guidance therefore fizzles even before it can cast a shadow on what conduct leads to liability.

The case law on the meaning of "approval" and "facilitation" is scant as well. While there is some case law that deals with the direct export and re-export prohibitions found in most sanctions regimes,[133] the common theme that runs throughout the federal cases involving OFAC and its sanctions programs is one of extreme deference by the courts.[134]

Another potential area of assistance comes from OFAC's interpretive rulings.[135] In a series of letters issued in response to real-world inquiries, OFAC has published (with the names of parties redacted) letters that it says may provide guidance in interpreting the limits of liability.[136] The rulings have certainly aided those engaged in academic and scholarly pursuits to clarify the status of the peer review and publication process when it comes to authors located in sanctioned countries.[137] None of these rulings, however, provide meaningful guidance on where the line between the rocky shores of approval and facilitation and sandy beaches of non-approval and non -facilitation lies.[138] Indeed, in at least two of the rulings, OFAC has directly contradicted itself on the point of whether OFAC considers U.S. Customs rulings to be persuasive authority for its own determinations.[139] The interpretive rulings also demonstrate how long it can take OFAC to respond to a written inquiry by a private party for interpretive guidance. In one instance, the inquiry was made in February 2001, and the response came on April 30, 2003.[140] Furthermore, the rulings do not include the original request for a ruling, so the fact pattern which gave rise to the inquiry remains a mystery to those seeking to discern a similar set of facts and therefore, apply OFAC's logic to their facts. Worse, there is no legal authority to conclude that the interpretive rulings may be relied on by private parties, or that they provide a "safe harbor" for companies that rely, justifiably or reasonably, on the rulings.

B. Implications for Corporate Governance

As an initial matter, it is permissible and legal for a U.S. based company to own, and control, a foreign subsidiary that does business with an IEEPA-based sanctioned country.[141] Stated differently, the mere fact that a U.S. company fails to prevent a subsidiary from trading with a sanctioned country does not, in and of itself, give rise to impermissible facilitation. The answer, then, lies in large measure with the independence of the subsidiary from its U.S. parent. The real question is, how independent does the subsidiary have to be?

Companies seeking to answer this question may be tempted to be literal in their interpretation of the law. They may, for example, form an offshore subsidiary based in a jurisdiction with low costs of incorporation, restrictive secrecy laws and is fairly immune to U.S. governmental pressure to divulge too much information about its companies. Such is allegedly the case with Halliburton's HPSL, which, according to one media report, has nothing more than a post office box in the Cayman Islands[142]and carries most of its business in Dubai.[143] More than a quarter of the $23 billion in non-oil imports into Dubai are re-exported out of the emirate, and Iran gets the biggest share.[144] Halliburton defends itself by claiming that it has taken care to "isolate" its entities that continue to work in Iran from contact with U.S. citizens or managers of U.S. companies so that all work in Iran is undertaken "independently."[145] Halliburton also claims that "for the most part," the activities of the different subsidiaries with operations in sanctioned countries is "quite" independent of one another, and there is "no coordinated direction" of the activity.[146]

Such conduct seems to invite investigation.[147] It is hard to imagine any real or substantial difficulty posed to OFAC in making the argument that the mere creation of a legal entity in a foreign jurisdiction, unstaffed and without any real operations other than a post office box, which derives a majority or all of its revenues from operations in a sanctioned country such as Iran,[148] is prohibited under the inchoate criminal prohibitions in the sanctions regimes. The company's refusal to directly rebut the claim that some level of coordination of the foreign entities' work in sanctioned countries, if read to mean that some level of coordination does indeed exist, would implicitly suggest an agreement to work around the sanctions, thus yielding potential conspiracy liability. Similarly, in the acquisition context, a U.S. company that acquires an operating company that derives a large percentage of its revenues from trade with a sanctioned country is inviting inquiry under the inchoate criminal inquiry.[149]

What options, then, lie for the vast majority of U.S. companies which have no desire to violate any of the sanctions regimes, and yet own a portion of an affiliate or control a subsidiary that has a small amount of trade with an IEEPA-based sanctioned country? Speaking directly with OFAC yields, somewhat surprisingly, guidance otherwise missing from the text of the various sanctions regimes. While representing a client interested in a potential acquisition involving a company that had some level of commercial transactions with a sanctioned country,[150] the author clarified several points with OFAC's Office of Chief Counsel. The results confirm a perception widely held that OFAC is deeply concerned about U.S. companies' efforts to circumvent the spirit of the various trade embargoes, and therefore takes the most conservative interpretation of the statutory language possible.

One area which constantly raises questions surrounds the similar, but not identical, structure and language of the various sanctions regimes.[151] OFAC sometimes takes the view that the language is specific to each sanctions regime, and that they should be read independently of each other.[152] On the other hand, OFAC sometimes takes the view that while the "facilitation or approval" language are found only in the Iranian and Sudanese transactions regulations, the analysis is the same no matter which sanctions regime is at play. In an interpretive ruling involving Libya and Iraq,[153] for example, OFAC cautioned an unnamed U.S. person against facilitation, when no facilitation language is found in either Iraqi or Libyan

sanctions regulations[154] -- only evasion is prohibited under those sanctions regimes.[155] Similarly, the interpretive sections of the Sudanese transaction regulations, which incidentally only prohibit facilitation, and not approval,[156] are meant to apply to all sanctions regimes.[157] The implications are startling. In the absence of authority to the contrary, U.S. based companies have no choice other than to assume that the approval and facilitation prohibitions apply in *all* sanctions regimes, and that the interpretive guidance offered by OFAC is also equally applicable in *all* sanctions regimes.

Another area which raises frequent questions is the role of U.S. expatriates and executives sent on work assignment to these affected foreign entities. The regulations themselves directly apply to U.S. persons "wherever located,"[158] so U.S. expatriates may not take any part in the transaction by the subsidiary and the sanctioned country. What is unclear from the regulations, however, is whether it is permissible for the U.S. executive, either *sua sponte* or through direction from the U.S. parent, to excuse himself or herself from a particular transaction with a sanctioned country in order to enable the subsidiary to carry out an otherwise perfectly legal transaction. The answer from OFAC is an emphatic no,[159] and that such conduct, which on its face violates the Iranian and Sudanese regulations on approval and facilitation,[160] is prohibited.

Those same provisions give rise to another problematic area stemming from the regulations: the extent to which companies may change policies. Assume, for example, that a company has adopted a formal policy, passed with the proper and requisite corporate authority and duly memorialized, that prevents any entity it has management control of from transactions with an IEEPA-based sanctioned country, even though it is perfectly legal for that entity to engage in that transaction. Assume next that a subsidiary is offered a profitable business opportunity in that sanctioned country, or the U.S. company is contemplating an acquisition of a foreign company that has a small but profitable level of business with a sanctioned country. Under OFAC's broad application and interpretation of the "approval" and "facilitation" prohibition, the U.S. company would not be permitted to alter its policies in any manner whatsoever which would result in either scenario being carried out. Paradoxically, U.S. companies therefore have a *disincentive* from adopting a corporate policy that is broader than the letter of the U.S. sanctions laws.

The use of common "back office" functions, such as Halliburton's alleged use of common office space, phone and fax lines, and other office resources for HPSL's office Dubai, poses another particular set of problems. One of the drivers for mergers and acquisitions, after all, is greater efficiencies through the use of one legal staff, one accounting staff, one human resources staff, one corporate economics and foreign exchange forecasting function, etc., even across multiple brands or even across multiple legal entities worldwide. Even in the absence of a large complex international merger or acquisition, companies often share basic resources such as email service across subsidiaries. Sometimes this level of interdependence between affiliated companies runs deep. It is not unusual, for example, for large companies to be self-insured, and for those companies, through the use of intercompany insurance agreements, to insure the operations of overseas subsidiaries against risk as well. Along the same vein, a company may have one Treasury function, and rely on only a few relationship banks for lines of credit that in turn finance operations across multiple entities. In the inquiry of how much independence is enough to be shielded from approval on the basis of "approval" and facilitation," how OFAC views the function of shared office functions is critically important. The official guidelines in this area are scant. The Sudanese regulations say that activities of a "purely clerical" nature, such as reporting on the results of a subsidiary's trade with Sudan, are not considered facilitation.[161] On the other hand, sharing back office functions is problematic if it is specific to a transaction.[162] In such a situation, companies appear to run afoul of the facilitation provisions by providing support and assistance toward a transaction it would not otherwise be permitted to engage in, even if done innocently.

A related issue is the use of a common export control compliance division. Many U.S. based companies, as part of an export control internal compliance program, and in order to meet the U.S. Federal Sentencing Guidelines which recommend compliance programs to detect and report violations of law,[163] have in-house export compliance divisions staffed with experts on U.S. export controls and sanctions regimes. Many overseas affiliates, however, are either too thinly staffed or unable to obtain the expertise necessary to comply with the myriad of U.S. regulatory programs governing exports of goods and services. These affiliates may thus rely on the U.S. parent company to provide expert advice on screening against designated nationals, export control compliance, and sanctions compliance. Under OFAC's interpretation of "facilitation" and "approval," however, such assistance, rendered by a U.S. parent company to a subsidiary or affiliate that is trading with a sanctioned country, would be prohibited.[164] Even legal advice, which is permitted under various sanctions regimes,[165] may not be provided for the purposes of facilitation or approval.[166]

IV. SUGGESTIONS FOR REFORM

Attention in Washington is starting to turn towards several aspects of OFAC's operations. In 2001, Congress asked the Judicial Review Commission to conduct a review of OFAC.[167] While most of its work was specific to the Foreign Narcotics Kingpin Designation Act, a portion of the report pertained to the "transparency' of OFAC's operations and decision making standards.[168] To address that criticism, OFAC initiated several measures to increase transparency.[169] First, it is using the OFAC website, which attracts 1.3 million "hits," or visits, per month, to promulgate information.[170] Second, it regularly publishes speeches, reports and Congressional testimony on its website.[171] Third, it has started publishing redacted interpretive rulings[172]. However, as discussed in Section II, *supra*, none of these measures have directly addressed the

liability of a U.S. parent company under IEEPA-based sanctions programs for conduct of its owned and controlled foreign subsidiaries and affiliates.

A greater level of transparency does not appear to have hindered the work of the Commerce Department's Bureau of Industry and Security ("BIS"). Some of the enforcement actions taken by BIS have been just as controversial as the ones taken by OFAC, such as the criminal prosecution of a U.S. company and its officers for releasing controlled technology to Chinese nationals while on U.S. soil, a violation of the so-called "deemed export" rule.[173] Nonetheless, BIS operates with a level of transparency far beyond that which OFAC operates in. Indeed, BIS recently published a final rule whereby it details how it responds to violations, when it issues warning letters, when it pursues administrative enforcement, when it refers for criminal enforcement, the types of administrative sanctions it uses, how it determines what sanctions are appropriate in a settlement, and the mitigating and aggravating factors it considers.[174]

The secretive and furtive manner in which OFAC operates may very well be justified by the difficult tasks that it is charged with. Nonetheless, what clearly emerges out of the various IEEPA-based prohibitions against "approval" and "facilitation" is a policy concern that restricting the conduct of U.S. parent companies aren't enough to constitute an effective trade embargo. In legislating through vague and unclear language, however, OFAC has tipped the scale too far towards law enforcement, and companies are left with little in terms of guidance on how to actually follow the letter and spirit of U.S. law. If OFAC's attempts are driven by a hope that being unclear and vague will somehow "chill" corporate behavior with regards to sanctioned countries, it should examine the modern day reality that the only behavior chilled has been attempts by companies to follow the law.

Given this troubled landscape, OFAC should consider outright elimination of the "facilitation" and "approval" prohibitions across all IEEPA-based sanctions regimes, and rely solely on the inchoate criminal provisions to prevent U.S. parent complicity in subsidiary behavior. It is unclear why, given the wealth of jurisprudence on inchoate crimes,[175] OFAC felt it was necessary to include additional provisions prohibiting "approval" and "facilitation" of conduct U.S. companies would otherwise be prohibited from engaging in themselves. A closer examination of those inchoate prohibitions reveals conduct that would be illegal under established notions of jurisprudence.

The crime of "attempt," for example, is well understood and used in multitudes jurisdictions in the United States, both federal and subfederal. Attempt is defined by the Model Penal Code as:

> (1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
>
> (c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.[176]

What constitutes a "substantial step," is further defined in the Model Penal Code,[177] and many states have developed a rich body of case law to guide courts and juries in determining liability for attempted crimes. Ultimately, what is a "substantial step" is of course, an issue for a jury to decide.[178]

Likewise, the crime of conspiracy is well understood by most legal scholars and practitioners. The Model Penal Code defines conspiracy as:

> (1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.[179]

The crime of conspiracy, which usually requires an overt act (which does not have to be criminal by itself) to carry out the objective of the conspiracy,[180] is essentially a crime against criminal agreement.

Eliminating the "approval" and "facilitation" prohibitions would eliminate the tea-leaf reading that U.S. companies, clumsily trying to comply with U.S. law, are forced to engage in. It would also make it clear to corporate actors that legal compliance is the linchpin of sanctions programs, and not legal hair-splitting on the meaning of "approval" or "facilitation." The prohibition on changing operating policies, for example (which has the effect of discouraging companies from issuing blanket prohibitions against trade with sanctioned countries),[181] is a particularly egregious example of the regulations having the exact opposite effect of what they intended. OFAC should not be concerned that eliminating the "approval" and

"facilitation" prohibitions will allow companies to merely create offshore shell companies without real operations. Such conduct would surely be actionable under the inchoate prohibitions against attempt, conspiracy, and evasion.[182]

The elimination of the "approval" and "facilitation" prohibitions would undoubtedly shift the policy balance towards recognition that offshore subsidiaries may trade freely with sanctioned countries under their national laws. Some conduct currently expressly prohibited, such as referring business opportunities and changing corporate policies,[183] would generally become permissible. Trade by those subsidiaries may indeed increase. However, companies are highly sensitive to adverse publicity and market mechanisms. If the lessons being learned by Halliburton as it struggles with the New York City Comptroller's office and negative publicity on Sixty Minutes are anything to go by,[184] most companies will choose to forego business in Iran, Cuba, Sudan or Syria as long as those countries are tied to violations of international law.

In the alternative, if OFAC chooses not to eliminate the "approval" and "facilitation" prohibitions, it should take heed the business community's call for the need for predictability and careful planning. Specifically, OFAC should consider taking the following actions.

First, OFAC should take the Judicial Review Commission's recommendations seriously and increase its level of operational transparency.[185] The Commission believes that greater transparency will facilitate compliance and promote consistent application of standards for companies situated similarly, and that it can be done without harming vital government interests.[186] Information such as internal guidelines and policies on interpretation of statutes, investigative and enforcement actions, mitigating and aggravating factors, and procedural guideposts, much as BIS has made public,[187] will go a long away towards facilitating compliance by multinational companies.

Second, OFAC should publish guidelines on what level of independence U.S. companies are required to keep from foreign subsidiaries and affiliates[188] in order to steer clear of the "approval" and "facilitation" prohibitions. Part of these guidelines should be clear guidance on what percentage of a subsidiary's business may be derived from business operations with a sanctioned country before mere ownership of that subsidiary is considered illegal "approval."[189] In drafting these guidelines, OFAC must keep in mind that in an era of increased attention on corporate governance and new requirements under measures such as the Sarbanes-Oxley Act,[190] U.S. companies may not have the ability to maintain the level of independence from subsidiaries that OFAC currently insists on.[191]

Third, OFAC should adopt common "approval" and "facilitation" language across all sanctions regimes and apply a common interpretive definition on what it means to approve and facilitate, across all sanctions regimes. The appearance of similar, but not identical, "approval" and "facilitation" language in only the Sudanese, Iranian, and Burmese regulations[192] leads to a sea of uncertainty among companies about the applicability of those provisions to other sanctions regimes.

Fourth, OFAC should expand the legal services exemption in the regulations which currently only permits lawyers to advice on the status of U.S. law.[193] This exemption should be broadened to include export compliance services, both in-house and outside the company, that provide invaluable screening services to the foreign subsidiary to ensure goods, capital and services do not fall into terrorist hands. If a specially designated national "hit" is found, the parent company should be able to prevent the transaction from going forward. If a "hit" is not found, the parent company should be able to permit the transaction to proceed without fear of civil or criminal liability. Screening for potential terrorists should not be the only basis by which U.S. parent companies may veto a potential transaction, however. OFAC should publish guidelines which permit U.S. companies to veto any proposed transaction by a foreign subsidiary on either legal[194] or public relations grounds.[195]

Fifth, OFAC should follow the Judicial Review Commission's recommendation that it establish a safe harbor provision in the regulations that would shield companies from civil liability that make it clear that if companies implement the actions specified in OFAC regulations to achieve compliance, the business entity would not be subject to civil liability.[196] The portions of the Sudanese regulations that specify conduct which is not prohibited facilitation are a good place to start,[197] but need to be expanded. Criminal liability for inchoate crimes would of course remain. As part of this safe harbor provision, OFAC should introduce a scienter requirement, preferably as an absolute defense against liability, but at the least as a mitigating factor, in determining corporate culpability. OFAC should also take the opportunity to expand on what is not considered facilitation.

Underlying all U.S. trade sanction policy is a desire to punish a wayward state. When multilateral sanctions aren't approved by global bodies such as the United Nations, the U.S. has not hesitated to impose trade sanctions on its own and to continue lobbying the international community to follow suit. Unilateral trade sanctions must, however, recognize that other nations have exercised their sovereign right to *not* impose sanctions, and are instead pursuing a policy of economic engagement.[198] If unilateral U.S. trade sanctions are not properly implemented, the government's objectives will almost certainly be undermined or frustrated.[199] Through adoption of the recommendations made in this article, OFAC can finally put to rest the demons of compliance that have dogged U.S. companies for decades, while allowing market mechanisms and greater legal compliance to achieve U.S. policy goals.

FOOTNOTES

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Motor Company and former Director for ASEAN Governmental Affairs for Ford Operations Thailand. This article represents scholarship based on research and should not be construed as legal advice.

[1] General Electric, *Integrity – The Spirit & the Letter of Our Commitment* (Oct. 2000), at 5.

[2] Halliburton Company, *About Halliburton*, *at* http://www.halliburton.com/about/index.jsp (last visited March 28, 2004). The company's operations are generally divided into five operating groups: Drilling and Formation Evaluation, Fluids, Production Optimization, Landmark and Other Energy Services, and Kellogg Brown & Root, known internally as the Engineering and Construction Group. *Id.* The Production Optimization's product lines include completion products, production enhancement, and tools & testing equipment. Dave Lesar, *Halliburton Howard Weill Energy Conference New Orleans, LA March 30, 2004*, *available at* http://ir.thomsonfn.com/IRUploads/5282/FileUpload/HWConf033004_Rev.pdf (last visited Apr. 1, 2004). The Fluid Group's product lines include cementing and drilling fluids. *Id.* The Drilling and Formation Evaluation Group's products include directional drilling, drill bits, and wireline logging. *Id.* The Landmark Group's products and services include software technology, real-time reservoir solutions, and reservoir performance consulting. *Id.* The Kellogg Brown & Root unit engages in government services, including contingency support for U.S. military operations in Hungary, Croatia, Kosovo, Kuwait, Haiti, Afghanistan, and Iraq. *Id.* For a general discussion on Halliburton Company's most recent financial performance, *see id., passim.*

[3] Halliburton Company, *supra* note 3.

[4] HALLIBURTON COMPANY, 2003 ANNUAL REPORT 34 (2004).

[5] Halliburton Company, Form 8-K (Feb. 6, 2004), at 10. In 2000 the company earned 66% of its revenues from outside the United States. *Id.* In 2001, that figure was 62% and in 2002 it was 67%.

[6] *See* Terry Macalister, *Officials Woo Halliburton to Bid for NHS Contracts*, THE GUARDIAN (LONDON), April 5, 2004, at 23. *See also Halliburton Lands in the Dock Again*, ENERGY COMPASS, Feb. 12, 2004 (noting Nigeria's request to an economic crimes commission to investigate allegations that Halliburton's KBR division paid a $180 million kickback to influence the award of a Nigerian project in the 1990s when Cheney was in charge).

[7] *See* Guy Dinmore, *Economic Pressure: Traders With 'Rogue' States May Face Sanctions*, FINANCIAL TIMES (LONDON), Jul. 26, 2003, at 7. Mr. Cheney's advocacy role in easing those sanctions continued into his tenure as Vice President, where he led the National Energy Review in concluding in 2001 that the United States should "level the playing field for US [sic] companies overseas" and recommended a review of the sanctions regimes with consideration to the American energy industry. *See id. See also* Blumenthal, *infra* note 15 (noting that Cheney admitted during the 2000 Presidential campaign that Halliburton conducted business with Libya and Iran through foreign subsidiaries, and that Halliburton was fined $3.8 million in 1995 for exporting six pulse-neutron generators to Libya, which could be used as nuclear triggers).

[8] Indeed, 65% of the world's proven oil reserves are concentrated in five countries (in order, Saudi Arabia, Iraq, United Arab Emirates, Kuwait and Iran). *See* Leonardo Maugeri, *Time to Debunk Mythical Link Between Oil and Politics*, OIL & GAS JOURNAL, Dec. 15, 2003, at 18. *See also, Sinopec in Talks With Iran Over Oil, Gas Deal*, BUSINESS DAILY UPDATE (Apr. 15, 2004) (explaining new commercial transaction between China Petroleum and Chemical Corp (Sinopec) and Iran, which is the second largest provider of oil to China after Saudi Arabia).

[9] The economic trade embargo is a reflection of U.S. policy which condemns the government of Iran for multiple and serious human rights abuses. *See* U.S. Department of State, *2004 Country Reports on Human Rights Abuses – Iran*, Feb. 25, 2004, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27927.htm. The government also claims Iran supports international terrorism, is engaged in efforts to undermine the Middle East peace process, and has acquired weapons of mass destruction. *See generally U.S. Policy and Iran: Hearing Before the Senate Foreign Relations Committee*, 108th Cong. (Oct. 28, 2003) (Testimony of Richard Armitage, Deputy Secretary of State).

[10] Press Release, Halliburton Company, To: The Managers of the New York City Police Pension Fund and the New York City Fire Pension Fund (Jan. 25, 2004) (hereinafter "Halliburton Report") (on file with author).

[11] *Id.* According to Halliburton, HPSL's activities are parallel to and competitive with the activities of foreign affiliates of its competitors, U.S.-incorporated and otherwise. *Id.* There are other companies in the Halliburton enterprise which do business in Iran. For example, Halliburton Manufacturing & Services Limited, incorporated in the United Kingdom, derives about 1% of its revenues from sales to sister company HPSL. *See id.* M.W. Kellogg Limited, another British company, is a joint venture between Halliburton's KBR division and JGC Corporation, with KBR holding majority control. *See id.* M.W. Kellogg Limited derives about 3% of its income from operations in Iran, including providing engineering services and intellectual property licenses for two ammonia plants in Iran. *See id.*

[12] *Id*.

[13] *See, e.g.,* Robert Cohen, *New Questions Arise on Halliburton, Iran*, HOUS. CHRON., Feb. 11, 2004, at 3 (noting Senator Frank Lautenberg's interest in whether Halliburton improperly used a foreign subsidiary to evade the Iranian embargo). *See also* Bob Herbert, *Dancing With the Devil*, NEW YORK TIMES, May 22, 2003, at A33 (editorial critical of Halliburton's involvement with countries that support terrorism while White House officials condemned musical artists The Dixie Chicks for being unpatriotic).

[14] The funds collectively own approximately 318,540 shares of Halliburton. *See* Halliburton Report, *supra* note 11. New York is not the only state looking at its investments in companies that have business operations in sanctioned countries.

Pennsylvania, for example, is likely to be the first state that will specifically allow the state to screen investments against such companies. *See* Brad Bumstead, *PA Likely to Start Investment Screening,* PITTSBURGH TRIBUNE-REVIEW, May 17, 2003. *See also* Robin Blumenthal, *Under Scrutiny: Pension Funds Are Reconsidering Investments in Companies That do Business With Rogue Nations,* BARRON'S, Oct. 7, 2002, at 23 (reviewing steps taken by state pension agencies, including California's Calpers agency, to divest from such companies).

[15] The Comptroller is an independently elected official in New York City. *See* The New York City Office of the Comptroller, What the Comptroller Does, *available at* http://www.comptroller.nyc.gov/what_comptr_does.asp (last visited on April 18, 2004). The Comptroller manages close to $80 billion in pension funds. *See id.*

[16] *60 Minutes: Doing Business With the Enemy* (CBS television broadcast, Jan. 25, 2004), *available at* http://www.cbsnews.com/stories/2004/01/22/60minutes/printable595214.shtml (last visited Jan. 29, 2004) (hereinafter "60 Minutes").

[17] *See generally*, Letters, *infra* note 20. *See also Halliburton Under Scrutiny Over Iran Links*, ENERGY COMPASS, Mar. 27, 2003 and *Halliburton Plans Iran Review*, INT'L OIL DAILY, Mar. 24, 2003.

[18] *See* Halliburton Report, *supra* note 11.

[19] *See, e.g.*, Letter from William C. Thompson, Jr., Comptroller of the City of New York, to Margaret E. Carriere, Vice President, Corporate Secretary, and General Counsel, Halliburton Company (Dec. 5, 2003) (*available at* http://www.comptroller.nyc.gov/press/pdfs/halliburton-pr03-12-102/Dec5-03_Halliburton-letter.pdf) and Letter from William C. Thompson, Jr., Comptroller of the City of New York, to David J. Lesar, President, Chief Executive Officer and Chairman of the Board, Halliburton Company (Dec. 8, 2003) (*available at* http://www.comptroller.nyc.gov/press/pdfs/halliburton-pr03-12-102/Dec8-03_Halliburton-letter.pdf) (hereinafter "Letters").

[20] Several key legislators seem particularly interested and have written to the CEOs of ConocoPhillips, General Electric, and Halliburton, as well as OFAC, seeking clarification on the companies' business in countries subject to U.S. trade sanctions. *See* Press Release, Capitol Hill Press Releases, Grassley, Baucus Seek Answers on U.S. Companies' Dealings (Feb. 20, 2004) (hereinafter "Grassley") (on file with author). *See also* Dinmore, *supra* note 8, at 7 (noting that Brad Sherman, D-CA, asked a recent hearing why the US was prepared to go to war with Iraq but was not more active in applying economic tools to Iran).

[21] *See* Annual Report, *supra* note 5, at 54.

[22] OFAC is the modern successor to the Office of Foreign Funds Control ("OFFC"), which was established during the second world war when Norway was invaded by Germany, to prevent Nazi use of occupied countries' holdings of foreign exchange and to freeze the forced repatriation of funds belonging to nationals of those countries. *See* Office of Foreign Assets Control Frequently Asked Questions, *available at* http://www.treas.gov/offices/eotffc/ofac/faq/index.html (last visited April 15, 2004). After the United States entered the second world war, the OFFC became the primary weapon of economic warfare for the government, blocking enemy assets and prohibiting trade and transactions with the enemy. *Id.* OFAC itself was created in 1950 by President Harry Truman when he declared a national emergency and blocked all Chinese and North Korean assets subject to U.S. jurisdiction. *See id.* Today, OFAC sees its primary mission as administering and enforcing "economic sanctions against targeted foreign countries, and groups and individuals, including terrorists and terrorist organizations and narcotics traffickers, which pose a threat to the national security, foreign policy or economy of the United States." *See Terrorist Financing and Counter Terror Initiatives: Hearing Before the Senate Banking, Housing, and Urban Affairs Committee*, 108th Cong. (Apr. 29, 2004) (statement of R. Richard Newcomb, Director, Office of Foreign Assets Control). OFAC now has 144 employees and administers 27 different sanctions programs. *See id.* OFAC has ten divisions, with offices in Miami, Mexico City and Bogota. *Id.* OFAC's Licensing Division is the body responsible for granting exceptions to the sanctions programs, primarily for licenses to trade with Cuba and Iran. *See id.* The Compliance Division is set up mainly to help banks, brokers and others in the financial industries to screen for potential suspects such as drug traffickers and terrorists in their financial transactions. *See id.* The Civil Penalties Division determines OFAC final penalty action – in the last 10 years OFAC has collected nearly $30 million in civil penalties for sanctions violations, and has processed over 8000 matters. *See id.* The Enforcement Division conducts criminal and civil investigations, along with other government law enforcement agencies, into alleged violations of OFAC sanctions programs. *See id.*

[23] *See* Annual Report, *supra* note 5, at 54. Halliburton has also admitted to owning subsidiaries or stakes in joint ventures that export goods and/or services to Libya, another country subject to U.S. economic sanctions. *See id.*

[24] *See id.*

[25] *See id.* at 54 (noting that Halliburton may be required to respond to "other questions and inquiries about operations in countries with trade restrictions and economic embargoes").

[26] Press Release, Halliburton Company, Response to 60 Minutes Story, Jan. 25, 2004 (on file with author).

[27] *Id.*

[28] *See* Shane Kite, *Treasury's OFAC Publishes First Weekly Penalty List*, SECURITIES INDUSTRY NEWS, Apr. 14, 2003.

[29] *See NewsChannel 4: Investing in Terror? NewsChannel 4Investigates Pension Funds' Ties to Terrorism* (WNBC television broadcast, Jul. 11, 2002), *available at* http://www.wnbc.com/news/1539268/detail.html (last visited Jan. 29, 2004).

[30] *See* Blumenthal, *supra* note 15 (Exxon Mobil admitted having sales of fuel and chemicals to Syria and fuel and lubrication to Sudan). Somewhat unusually, Exxon Mobil also publicly opposes U.S. unilateral sanctions of countries. *Id.*
[31] *See id* (noting that news reports indicated ChevronTexaco's Korean joint venture, LG-Caltex, had won a contract to deliver 22,000 metric tons of heavy oil to North Korea, the company's third that year and its 26th shipment to North Korea. The company denied the charges).
[32] *See id* (reporting that Cooper Cameron admitted to doing business in every oil-producing region around the world and that some of its equipment might end up in Iran. The company insists its sales are within the law and "[t]o say we're doing business with terrorist-sponsoring countries is probably a misstatement").
[33] *See id* (reporting that Northrop Grumman disclosed a subsidiary called Iran-Northrop Grumman Programs Service Co. in its 2000 disclosures to the S.E.C. The company says it has not done any business in Iran since then).
[34] *See id* (reporting ConocoPhillips disclosed multiple subsidiaries in Iran and Libya in its 2001 S.E.C. filings. The company admitted that it has "operational activities in Syria" and "maintain[s] contacts" with Iran and Libya). ConocoPhillips was also targeted by New York City Comptroller William Thompson, who submitted a successful shareholder proposal to review the company's ties with sensitive countries in the Middle East. *See* Press Release, New York City Comptroller William C. Thompson Jr., ConocoPhillips Agrees with NYC Pension Funds' Proposal to Review Ties to "Sensitive Countries" in Middle East, Apr. 2, 2003, *available at* http://www.comptroller.nyc.gov/press/2003_releases/print/pr03-04-032.shtm (last visited Mar. 3, 2004). The company has agreed to sever ties with Iran and Syria. *Energy Brief – ConocoPhillips: Ties to Iran, Syria Will be Cut on Urging from Pension Funds*, WALL ST. J., Feb. 11, 2004, at C7. *See also* Roderick Boyd, *Conoco Says It Will End Iran Deals*, THE N.Y. SUN, Feb. 11, 2004, at 11 (reporting on Conoco's implementation of an internal policy that forbids trade with sensitive countries if doing so violated the spirit and letter of American law). That decision has not, however, stopped Congress from asking the company whether it intends to cease existing operations, or merely refrain from commencing any future operations in sanctioned countries. *See* Grassley, *supra* note 21. The Senators requested a reply from the company by March 26, 2004, *id.*, but as of this writing no such reply has been public.
[35] *See* Albert Hunt, *Corporate Accountability on Terrorism?*, WALL ST. J., Aug. 15, 2002, at A13.
[36] *See Fiscal 2005: Commerce: Hearing Before the Subcommittee on Commerce, Justice, State and the Judiciary Committee on House Appropriations*, 108th Cong. (Mar. 31, 2004) (Statement of William H. Donaldson, Chairman, U.S. Securities and Exchange Commission). *See also* Joel Chernoff, *Report's Aftermath: Public at Odds Over a 'Messy' Issue; Some Want to Investigate if Stocks They Own Have Any Ties to Terrorism*, PENSIONS AND INVESTMENTS, Apr. 5, 2004, at 3.
[37] *See* Statement of William H. Donaldson, *supra* note 38.
[38] *See* Testimony of R. Richard Newcomb, *supra* note 23.
[39] *See id.*
[40] *See* Max Baucus, Mike Enzi and Jeff Flake, *Terrorist Financing: Cuba Obsession Weakens U.S. Efforts*, ATLANTA JOURNAL-CONSTITUTION, May 20, 2004, at 15A.
[41] This article does not address the efficacy or public policy behind the use of unilateral trade sanctions. For analyses of trade sanctions, *see generally* John Reynolds, Michael Sherman, C. Ray Gold, John Papandrea, Jr., and James Prince, *Export Controls and Economic Sanctions*, 37 INT'L LAW. 263 (2003)**.** *See also* Rudolph Lehrer, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in Its Economic War on International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333 (2002). This article also does not address the sanctions regimes administered by OFAC for narcotics or terrorist funding. This area of the law, which primarily affects the financial services industry, is well covered in Edward Rubinoff and Tamer Soliman, *OFAC Asset Blocking Programs*, S&P'S THE REVIEW OF BANKING AND FINANCIAL SERVICE, Vol. 19, No. 7 (Sept. 2003), at 1. *See also* Marc Martin and Evan Wagner, *Quick: Who Knows What an SDN Is? Your Company Had Better Not Be Doing Business With a Specially Designated National*, LEGAL TIMES, Mar. 17, 2003, at 23, and Joan Lavell, *OFAC: A Compliance Priority; Office of Foreign Assets Control*, JOURNAL OF INVESTMENT COMPLIANCE, Jan. 1, 2002, at 17.
[42] Trading With The Enemy Act of 1917, 50 U.S.C. Appx. §§ 1 et seq. (2004) (hereinafter "TWEA").
[43] International Emergency Economic Powers Act, 50 U.S.C. §§ 1701—1706 (2004) (hereinafter "IEEPA").
[44] The main vehicle through which U.S. regulations reach the conduct of foreign subsidiaries is through the use of "facilitate or approve" found in many IEEPA-based sanctions. *See* Section IIB, *infra*. To date, little has been written on the use of this phraseology to extend the jurisdictional reach of U.S. law. *See, e.g.*, Lori Feathers, *Economic Sanctions and Their Effect on the Energy Industry*, 36 Tex. Int'l L.J. 175 (2001) (cautioning that the prohibitions are "quite broad", *id.* at 180, and are especially pertinent in a merger or acquisition context, *id.*). *See also*, William McGlone and Michael Burton, *Economic Sanctions and Export Controls*, 32 Int'l Law. 383 (2000) (concluding that "even in those cases where a foreign affiliate of a U.S. company may not be subject to the regulations, the U.S. parent company and all other U.S. persons are prohibited from acting in furtherance of any transaction between the foreign affiliate and Iran").
[45] Wal-Mart's Canadian subsidiary, Wal-Mart Canada Ltd., was placed in an unenviable position in 1997 when it inadvertently offered for sale pajamas made in Cuba, at a price of $9.50 each. *See* John Urquhart, *Wal-Mart Pulls Cuban Pajamas From Canada*, WALL ST. J., Mar. 6, 1997, at A3. Wal-Mart Canada was subject to OFAC rules prohibiting trade with Cuba, but also subject to Canadian law which prohibits Canadian companies from complying with the U.S. trade embargo against Cuba. *See id.* Wal-Mart's liability under U.S. law was $1 million in fines, while its liability under Canadian

law was similarly hefty. *See id.* Perhaps most uncomfortable was the public nature of the dilemma, with senior trade and law enforcement officials from both the U.S. and Canadian governments publicly pressuring Wal-Mart Canada to comply with its respective laws. *See id.* Wal-Mart Canada ultimately decided to place the pajamas back on sale two weeks later. John Urquhart, *Wal-Mart Puts Cuban Goods Back on Sale*, WALL ST. J., Mar. 14, 1997, at A3. U.S. trade officials expressed disappointment, and cautioned Wal-Mart that enforcement may follow. *See id.* In 2003, Wal-Mart (the U.S. parent) paid a $50,000 fine assessed by OFAC for the Cuban-origin pajamas sold in Canada. *See* Rex Nutting, *U.S. Companies Quietly Caught Trading With The Enemy*, CBS Marketwatch.com, Apr. 15, 2003. *See also* Laurie Ure, *Wal-Mart, NY Yankees, Others Settle Charges of Illegal Trading*, CNN.com, Apr. 14, 2003, *available at* http://www.cnn.com/2003/LAW/04/14/enemy.trading/, *last visited* April 15, 2004. For an expanded discussion on the Wal-Mart pajama case, *see* John Boscariol, *An Anatomy of a Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States*, 30 LAW & POL'Y INT'L BUS. 439 (1999). *See also* Peter Glossop, *Canada's Foreign Extraterritorial Measures Act and U.S. Restrictions on Trade with Cuba*, 32 INT'L LAW. 93 (1998).

[46] In addition to OFAC-administered sanctions regimes, non-U.S. companies should also be concerned about the extra-territorial application of U.S. export controls, administered by the Department of Commerce's Bureau of Industry and Security. The export controls, which are based on the Export Administration Act of 1979, 50 U.S.C. Appx. §§ 2401—2420 (2004), follow controlled goods and technologies if they are of U.S. origin and meet certain threshold content requirements. *See* Export Administration Regulations, 15 C.F.R. Part 734.2 (Oct 1, 2002). Many non-U.S. companies that re-export U.S.-origin goods to a sanctioned country such as Iran or Libya are thus liable under these export controls, and penalties can be severe. *See, e.g.*, Press Release, U.S. Department of Commerce Bureau of Industry and Security, Two Swiss Companies Settle Charges Relating to an Attempted Illegal Export to Iran, Nov. 12, 2002, *available at* http://www.bis.doc.gov/news/2002/swisscouplesettles.htm. Additionally, financial institutions parties to contracts with the Federal Reserve are under contractual obligations to avoid trade with sanctioned countries, and the recent $100 million penalty paid by UBS, a Swiss bank, for such violations serves as a strong reminder to non-US based companies to pay very careful attention to US embargo law. *See generally Anti-Money Laundering Efforts: Hearing Before the House Oversights and Investigations Subcommittee, House Financial Services Committee*, 108th Cong. (May 18, 2004) (statement of Steven Emerson, Executive Director, The Investigative Report).

[47] TWEA, *supra* note 41, at §5 (b).

[48] Cuban Asset Control Regulations, 31 C.F.R. § 515 (2004).

[49] 28 Fed Reg. 6974 (Jul. 9, 1963).

[50] *See* 31. C.F.R. § 515.201 (2004). For a fascinating description of how the Internet is starting to change international trade with Cuba, *see* Gail Epstein Nieves, *E-Commerce with Cuba Thrives via Canada*, THE SEATTLE TIMES, Sept. 19, 2003, at A15.

[51] *Id.*

[52] *See* TWEA, *supra* note 41, at § 16.

[53] Until 1975, a general license was available to permit trade by non-banking entities as long as U.S. nationals did not participate in the transaction. *See* Boscariol, *supra* note 44, at 446-7. In 1975, the general license was eliminated, and foreign subsidiaries were required to apply for specific licenses from OFAC in order to trade with Cuba. *Id* at 447. OFAC examined the independence of the foreign subsidiary from the U.S. parent, including its decision making, risk taking, negotiation, and financing. *Id.* In 1990, Congress proposed banning outright the issuances of licenses to foreign subsidiaries of U.S. firms. *Id*. These amendments were codified in the Cuban Democracy Act of 1992.

[54] Cuban Democracy Act, 22 U.S.C. §§ 6001 *et seq.* (2004).

[55] 31 C.F.R. § 515.329 (second emphasis added) (2004).

[56] In case the definition of "subject to the jurisdiction of the United States" was not clear enough, the CACR makes it clear that a "[p]erson within the United States" includes any partnership, association, corporation, or other organization, wheresoever organized, or doing business, which is owned or controlled by any person or persons specified in paragraph (a)(1), (2), or (3) of the section. *See* 31 C.F.R. § 515.330 (2004).

[57] Attempts to obtain OFAC licenses for transactions with Cuba almost always fail. *See, e.g.*, OFAC Interp. Ruling 020416-FACRL-CU-01 (Apr. 16, 2002) (denying permission for foreign subsidiary of U.S. company to book through non-U.S. websites transportation to and from Cuba and to book hotel and rental car reservations in Cuba for persons not subject to U.S. jurisdiction).

[58] 31 C.F.R. § 515.201 (2004).

[59] Office of Foreign Assets Control, *Cuba: What You Need to Know About the U.S. Embargo – An Overview of the Cuban Asset Control Regulations*, Mar. 24, 2003.

[60] *See id.*

[61] A myriad of law review articles deal generally with this topic and especially with termination rights under franchise agreements. *See, e.g.*, Robert Emerson, *Franchise Terminations: Legal Rights and Practical Effects When Franchisees Claim the Franchisor Discriminates*, 35 AM. BUS. L.J. 559 (1998).

[62] Opel AG being, of course, a wholly-owned German subsidiary of General Motors Corp. Indeed, ChevronTexaco was fined $9,000 for selling gasoline to the Cuban consulate in Belize through a local subsidiary. *See* BBC News, *infra* note 128.
[63] *See, e.g.*, Neil King Jr., *U.S. Squeezes Cuba Travelers – Castro Cited as Target, but Policy Seems Aimed at Florida Voters*, Wall St. J., Apr. 14, 2004, at A4 (noting that the Bush administration is putting the brakes on travel to Cuba). In spite of the increased enforcement of travel restrictions, there has been some growth in American-Cuban trade pursuant to food sales permitted since 2000, which are predicted to reach $1 million a day. *See id. See also Cuba Fund Inquiries Outrank Terror*, ST. PETERSBURG TIMES, Apr. 30, 2004 (noting that OFAC has assigned five times as many agents to investigate CACR violations as it has to track terrorist funding).
[64] *See U.S. Policy Toward Cuba: Hearing Before the Senate Foreign Relations Committee*, 108th Cong. (Oct. 2, 2003) (Testimony of Robert F. Noriega, Assistant Secretary of State for Western Hemisphere Affairs) (testifying that since the United States is in the "end game" of the Cuban people's travails with dictatorship, and nothing was more important than "staying the course" and avoiding "experiments with perhaps well-meaning but fundamentally misguided new tactics in Cuba"). *Cf.* Baucus, *supra* note 40 (editorial by Senators Max Baucus, Mike Enzi and Jeff Flake, criticizing the Bush administration's efforts to strengthen the embargo against Cuba, particularly the travel ban).
[65] *See* Office of Foreign Assets Control, *North Korea – What You Need to Know About Sactions – An Overview of the Foreign Assets Control Regulations as They Relate to North Korea*, Aug. 18, 2000.
[66] *See* 31 C.F.R. § 500.329 (2004) ("The term, *person subject to the jurisdiction of the United States*, includes any corporation, partnership, or association, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (a) or (c) of this section") (emphasis in original).
[67] *See id. generally*.
[68] The notion that American criminal law could reach into, and restrict the conduct of, an entirely Swedish company, for example, staffed entirely by non-U.S. nationals, purely by accident of American ownership or controlling ownership, seems a *prima facie* violation of the principles of national sovereignty. For an excellent bibliography of arguments and analyses of the CACR in light of norms of international law, *see* Boscariol, *supra* note 44, at note 35. *See also* S. Kern Alexander, *Trafficking in Confiscated Cuban Property: Lender Liability Under the Helms-Burton Act and Customary International Law*, 16 DICK. J. INT'L L. 523 (1998).
[69] Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1985), as amended by Bill C-54, proclaimed in force Jan. 1, 1997 (Can.).
[70] For a general discussion on the Canadian blocking legislation and its application to the trade embargo against Cuba, *see* Peter Glossop, *Canada's Foreign Extraterritorial Measures Act and U.S. Restrictions on Trade with Cuba*, 32 INT'L LAW. 93 (1998).
[71] *See* Anne Swardson, *Canada Vows Sanctions Against U.S. for Enforcement of Anti-Cuba Trade Law*, WASH. POST, June 18, 1996, at A7 (noting Canadian efforts to convene a NAFTA dispute resolution panel over the CACR) and Allan Thompson, *NAFTA Invoked in Cuba Dispute: Canada, Mexico Jointly Challenge U.S. Trade Bill*, THE TORONTO STAR, Mar. 13, 1996, at A1.
[72] *See* Hunt, *supra* note 36, at A13 (quoting Stu Eizenstat, former Ambassador to the European Union, as saying, "[t]he U.S. and Europeans have strongly different ways for dealing with rogue states. The European view is trade with them, invest in them and encourage them to be more tolerant or pro-western. Our view is more to isolate them and to sanction them").
[73] Council Regulation 2271/96 of 22 November 1996 Protecting Against the Effects of Extra-territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L 309) 1 ("CR 2271/96"). CR 2271/96 is not drafted to block any particular law or from any particular country; rather, it refers to its Annex 1 for a list of laws and originating countries that it seeks to block. *Id.*, at art. 1. CR 2271/96 requires directors and managers to notify the European Commission, within 30 days, when a European company's economic and/or financial interests have been affected by a law being blocked. *Id.*, at art 2. CR 2271/96 prohibits the recognition or enforcement of any judgment or decision of an administrative authority outside the European Community that gives effect to the laws being blocked (presumably, OFAC rulings would fall within this provision). *Id.*, at art. 4. CR 2271/96 prevents European companies and other legal organizations from complying with any of the laws being blocked, *id.*, at art. 5, and provides for recovery of costs, including legal fees, for damages caused by the application of laws being blocked, *id.*, at art. 6. CR 2271/96 directs member countries to implement the regulation into their local laws, and to set appropriate sanctions. *Id.*, at art. 8, 9. For more expansive analyses on CR 2271/96, *see, e.g.*, Stefaan Smis and Kim Van der Borght, *Current Developments: The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts*, 93 A.J.I.L. 227 (1999), Christopher Kirkham, *Legislative Development: Anti-Boycott Measures*, 3 COLUM. J. EUR. L. 320 (1997), Harvey Oyer, *The Extraterritorial Effects of U.S. Unilateral Trade Sanctions and Their Impact on U.S. Obligations Under NAFTA*, 11 FLA. J. INT'L L. 429 (1997), and Jurgen Huber, *The Helms-Burton Blocking Statute of the European Union*, 20 FORDHAM INT'L L. J. 699 (1997).
[74] *See* § 5 Nr. 70 Aussenwirtschaftsgesetz (Foreign Trade and Payments Act).
[75] *See* European Communities Regulations 1997 S.I.
[76] *See* Oct. 22, 1997 Bundesgezetz.

[77] *See* The Extraterritorial US Legislation (Sanctions Against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996, (1996) SI 1996/3171 (provides fines not exceeding GBP 5000).
[78] *See* Decree-Law 16 Aug 1998.
[79] *See* Act No. 265/1998 (Apr. 15, 1998).
[80] *See* Act No. 312 (June 3, 1998).
[81] *See* Decree-Presidential No. 187 (25 June 1998).
[82] *See* amendments of Dec. 24, 1998, to Dutch Act on Economic Offenses.
[83] *See* Act No. 27/1998 (Jul. 13, 1998).
[84] *See* Law of 13 Nov. 1997.
[85] The treatment of IEEPA in this article is to discuss its promulgation of various sanctions regimes. Increasingly, IEEPA is also being used as a forfeiture statute, as blocking assets has the equivalency of forfeiture. For a fascinating explanation on the broad and expansive use of IEEPA to seize property, see John D. Cline, *The President's Power to Seize Property in the Post-September 11 World: The International Emergency Economic Powers Act*, 27 CHAMPION 18 (2003).
[86] IEEPA, *supra* note 42.
[87] *See* 31 C.F.R. § 537 *et seq*. (2004). The Burmese sanctions regimes stems from two Executive Orders. The first, signed by President Clinton in 1997, declared a national emergency with respect to Burma. Exec. Order No. 13047, 62 Fed. Reg.28,301 (May 20, 1997). The 1997 Executive Order prohibited new investment in Burma, with a grandfather provision for contracts in place before the effective date. *Id*. The second Executive Order, issued by President Bush in 2003, tightened the sanctions by declaring an import ban on Burmese products. *See* Exec. Order No. 13310, 68 Fed. Reg. 44,853 (Jul. 28, 2003). It also imposes blocking provisions against the property and property interests of certain senior officials of the government of Burma. *See id.* For an analysis of the first round of sanctions against Burma involving the prohibition of new investment, *see* James Finch, David Schmahmann, and Patricia Bailey, *With a Broad Brush: The Federal Regulation of Sanctions Against Burma (Myanmar)*, 22 HAMLINE J. PUB. L. & POL'Y 323 (1999). For criticism of these sanctions, *see* Anna E. Johansson, *A Silent Emergency Persists: The Limited Efficacy of U.S. Investment Sanctions on Burma*, 9 Pac. Rim L. & Pol'y 317 (2000) (arguing that constructive engagement, international diplomacy, and establishment of a national human rights commission, or alternatively, multilateral sanctions, would be more effective in brining meaningful change to Burma). An interesting corollary discussion to the federal trade sanctions against Burma revolves around the attempts by certain states and cities to impose sanctions against Burma. For an excellent discussion of these non-federal sanctions, *see generally* Erika Moritsugu, *The Winding Course of the Massachusetts Burma Law: Subfederal Sanctions in a Historical Context*, 34 GEO. WASH. INT'L L. REV. 435 (2002).
[88] The Balkans sanctions regime is largely one of blocking property alone. In 2001 President Bush declared a national emergency with respect to violence in the former Yugoslav Republic of Macedonia, southern Serbia, the Federal Republic of Yugoslavia, and elsewhere in the Western Balkans region and imposed blocking provisions. *See* Exec. Order No. 13219, 66 Fed. Reg. 34,777 (June 29, 2001). The national emergency was lifted in a subsequent Executive Order, but a few blocking provisions remain. *See* Exec. Order No. 13304, 68 Fed. Reg. 32,315 (May 28, 2003).
[89] The Sierra Leone sanctions regime is aimed at stopping illicit trade in diamonds from Sierra Leone and Liberia that is fueling human rights violations in the region. The sanctions prohibit the importation into the United States of any rough diamond unless the rough diamond has been controlled through the Kimberley Process Certification Scheme. *See* 31 C.F.R. § 592.201 *et seq.* (2004), implementing Exec. Order No. 13312, 68 Fed. Reg. 45,151 (July 29, 2003).
[90] The Iranian sanctions regime consists of comprehensive blocking provisions, s*ee* 31 C.F.R. § 535 *et seq.* (2004), and an import/export embargo, *see* 31 C.F.R. § 560 *et seq.* (2004). The sanctions were initiated by President Reagan in 1997 and started with an import embargo. *See* Exec. Order No. 12613, 52 Fed. Reg. 41,940 (Oct. 29, 1987). In 1995 President Clinton tightened sanctions against Iran for its continuing support of international terrorism. *See* Exec. Order No. 12959, 60 Fed. Reg. 24,757 (May 6, 1995). In 1997 President Clinton declared that all trade and investment activities with Iran by U.S. persons were prohibited. *See* Exec. Order No. 13059, 62 Fed. Reg. 44,531 (Aug. 19, 1997). In March of 2000, the sanctions were eased somewhat to allow the importation of certain food items such as dried fruits, nuts, and caviar from Iran, as well as the importation of certain carpets. *See* 31 C.F.R. § 560.534 (2004). By and large, however, the trade embargo against Iran remains comprehensive.
[91] Ever since its invasion of Kuwait in 1990, Iraq has been subject to multilateral sanctions administered largely by the United Nations. That changed, of course, with the American military invasion of Iraq and subsequent rebuilding of the country. In May 2003, OFAC issued a general license which substantially lifted the economic embargo against Iraq. *See* 31 C.F.R. § 575 *et seq*. (2004). Blocking provisions remain, and exports of U.S.-origin goods remain subject to export controls. *See* Exec. Order No. 13315, 68 Fed. Reg. 52,315 (Aug. 28, 2003).
[92] The trade embargo against Libya lasted eighteen years. *See* 31 C.F.R. § 560 *et seq.* (2004). In April 2004, in a series of general licenses OFAC lifted the travel and trade embargo against Libya. *See* Glenn Kessler, *U.S. Opens Doors to Business With Libya; Bush Says Easing of Sanctions Rewards Cooperation on Banned Weapons*, WASH. POST, Apr. 24, 2004, at A14. Most blocking provisions remain, and exports are still subject to export controls. *See generally* Office of Foreign Assets Control, *Libya: What You Need to Know About the U.S. Embargo – An Overview of the Libyan Sanctions Regulations*, Apr.

29, 2004 and Press Release, Treasury Dept., Office of Foreign Assets Control, U.S. Announces Easing and Lifting of Sanctions Against Libya – Treasury to Issue General License Lifting Much of Economic Embargo (Apr. 23, 2004) *available at* http://www.treas.gov/press/releases/js1457.htm. The easing of sanctions became effective with the Commerce Department's publication of new rules governing exports to Libya. *See* Revision of Export and Reexport Restrictions on Libya, 69 Fed. Reg. 23,626 (Apr. 29, 2004) (to be codified at 15 C.F.R. pts. 732, 736, 740, 742, 744, 746, 762, and 772).

[93] The sanctions regime against Sudan includes an import/export trade embargo. *See generally* 31 C.F.R. § 538 *et seq.* (2004).

[94] The Zimbabwe sanctions regime is aimed at blocking the property and property interests of President Robert Mugabe and his senior staff. *See* Exec. Order No. 13288, 68 Fed. Reg. 11,457 (Mar. 6, 2003).

[95] *See, e.g., United States: Sanctions Sticks and Carrots*, ENERGY COMPASS, Mar. 11, 2004. *See also* Robin Wright and Glenn Kessler, *Some on Hill Seek to Punish Syria for Broken Promises on Iraq*, WASH. POST, Apr. 30, 2004, at A24 (noting Syrian Accountability Act, which gives President Bush a limited time frame before imposing sanctions).

[96] *See* 31 C.F.R. § 537.203 (2004) ("Except to the extent provided in regulations, orders, directives, or licenses that may be issued pursuant to this part, any transaction by a United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this part is prohibited").

[97] *See* 31 C.F.R. § 588.204 (2004) ("(a) Except as otherwise authorized, and notwithstanding any contract entered into or any license or permit granted prior to the effective date, any transaction by any U.S. person or within the United States on or after the effective date that evades or avoids, has the purpose of evading or avoiding, or attempts to violate any of the prohibitions set forth in this part is prohibited. (b) Except as otherwise authorized, and notwithstanding any contract entered into or any license or permit granted prior to the effective date, any conspiracy formed for the purpose of engaging in a transaction prohibited by this part is prohibited").

[98] *See* 31 C.F.R. § 592.202 (2004) ("(a) Notwithstanding the existence of any rights or obligations conferred or imposed by any contract entered into or any license or permit granted prior to July 30, 2003, any transaction by a United States person anywhere, or any transaction that occurs in whole or in part within the United States, on or after the effective date that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this part is prohibited. (b) Notwithstanding the existence of any rights or obligations conferred or imposed by any contract entered into or any license or permit granted prior to July 30, 2003, any conspiracy formed to violate any of the prohibitions of this part is prohibited").

[99] *See* Exec. Order No. 13288, 68 Fed. Reg. 11457 (Mar. 6, 2003).

[100] *See* 31 C.F.R. § 575.211 (2004) ("Any transaction for the purpose of, or which has the effect of, evading or avoiding, or which facilitates the evasion or avoidance of, any of the prohibitions set forth in this subpart, is hereby prohibited. Any attempt to violate the prohibitions set forth in this part is hereby prohibited. Any conspiracy formed for the purpose of engaging in a transaction prohibited by this part is hereby prohibited").

[101] *See* 31. C.F.R. § 535.208(a) (2004) ("Any transaction for the purpose of, or which has the effect of, evading or avoiding any of the prohibitions set forth in this subpart is hereby prohibited") and 31 C.F.R. § 560.203 (2004) ("Any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions contained in this part is hereby prohibited)".

[102] Unlike the other sanctions regimes, the Libyan regime only prohibits evasion, not attempts or conspiracies. *See* 31 C.F.R. § 550.208 (2004) ("Any transaction for the purpose of, or which has the effect of, evading or avoiding any of the prohibitions set forth in this subpart is hereby prohibited").

[103] *See* 31 C.F.R. § 538.210 (2004) ("Any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this part is prohibited. Any conspiracy formed for the purpose of engaging in a transaction prohibited by this part is prohibited").

[104] *See* Trading With the Enemy Act of 1917, *supra* note 41, at § 5b, and International Emergency Economic Powers Act, *supra* note 42**,** at § 1702.

[105] *See, e.g.*, 31 C.F.R. § 588.312 (2004) (defining U.S. person in the Balkan sanctions regime), 31 C.F.R. § 537.314 (2004) (defining U.S. person in the Burmese sanctions regime), 31 C.F.R. § 560.314 (2004) (defining U.S. person in the Iranian transactions regime), 31 C.F.R. § 535.321 (2004) (defining U.S. person in the Iraqi sanctions regime), 31 C.F.R. 592.312 (2004) (defining U.S. person in the Rough Diamonds-Sierra Leone sanctions regime), 31 C.F.R. § 550.308 (2004) (defining U.S. person in the Libyan sanctions regime), 31 C.F.R. § 538.315 (2004) (defining U.S. person in the Sudanese sanctions regime), and Exec. Order No. 13288, 68 Fed. Reg. 11,457 (Mar. 6, 2003) (defining U.S. person under the Zimbabwe sanctions regime).

[106] *See* 31 C.F.R. § 537.202 (2004) ("Except to the extent provided in regulations, orders, directives or licenses that may be issued pursuant to this part, any approval or other facilitation by a United States person, wherever located, of a transaction by a foreign person where the transaction would constitute prohibited new investment in Burma under this part if engaged by a United States person or within the United States is hereby prohibited").

[107] *See* Exec. Order No. 13310, *supra* note 86, at § 2(b) (prohibiting "any approval, financing, facilitation or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited by this order if performed by a United States person or within the United States").
[108] *See* 31 C.F.R. § 537.409(a) ("The prohibition contained in § 537.202 against approval or other facilitation of a foreign person's investment in Burma bars any action by a U.S. person that assists or supports a foreign person's activity that would constitute prohibited new investment under § 537.201 if engaged in by a U.S. person. This facilitation prohibition is subject to the exemption for trade in goods, services and technology set forth in § 537.204").
[109] *See* 31 C.F.R. § 537.409(b) ("Examples: (1) A U.S. corporation is prohibited from brokering, financing, guaranteeing, or approving the entry by any foreign person, including a foreign affiliate, into a contract for the development of, e.g., a natural gas field, a tourist hotel complex, or a rubber plantation in Burma, unless pursuant to the affiliate's exercise of rights under an agreement entered into prior to the effective date. An independent U.S. contractor, however, may perform brokerage, financing, or guarantee services if under a service contract meeting the conditions of § 537.204").
[110] *See* Office of Foreign Assets Control, *Burma: What You Need to Know About U.S. Sanctions Against Burma (Myanmar) – An Overview of the Burmese Sanctions Regulations*, Jul. 29, 2003, at 3. Interestingly, this language ("approve, supervise, or otherwise be involved with the foreign subsidiary's negotiations with regards to this project") does not appear in the implementing regulations. According to OFAC, the "What You Need to Know" series of documents are "explanatory only" and do not have the force of law. *Id.*
[111] 31 C.F.R. § 560 *et seq.* (2004).
[112] *See* 31. C.F.R. § 560.208 (2004) ("Except as otherwise authorized pursuant to this part, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, no United States person, wherever located, may approve, finance, facilitate, or guarantee any transaction by a foreign person where the transaction by that foreign person would be prohibited by this part if performed by a United States person or within the United States").
[113] *See* Office of Foreign Assets Control, *Iran: What You Need to Know About U.S. Economic Sanctions – An Overview of O.F.A.C. Regulations involving Sanctions against Iran*, Mar. 12, 2003, at 2.
[114] 31 C.F.R. § 560.417(a) (2004).
[115] *See* 31 C.F.R. § 560.417(b) (2004).
[116] 31 C.F.R. § 560.417(c) (2004).
[117] 31 C.F.R. § 538.206 (2004).
[118] *See* 31 C.F.R. § 538.407(a) (2004).
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] 31 C.F.R. 538.407(b) (2004).
[124] 31 C.F.R. 538.407(d) (2004).
[125] *See* 31 C.F.R. § 515.329 (2004) (making Cuban Asset Control Regulations applicable to all U.S. persons as well as foreign subsidiaries "owned or controlled" by U.S. persons. *See* discussion, *supra*, on Cuban Asset Control Regulations).
[126] 31 C.F.R. 538.407(c) (2004).
[127] *See* 63 Fed. Reg. 35,809 (1998), eventually codified as the Sudanese regulations at 31 C.F.R. § 538 *et seq.*).
[128] *See* 31 C.F.R. § 586.409 (2004).
[129] *See, e.g.*, BBC News, *US Fines Sanctions-Busting Firms*, Apr. 15, 2003, *available at* http://news.bbc.co.uk/2/hi/business/2948553.stm (last visited Apr. 19, 2004) (noting that legal newsletter Corporate Crime Reporter and advocacy group Public Citizen filed a Freedom of Information Act request for the release of information).
[130] *See* http://www.treas.gov/offices/eotffc/ofac/civpen/penalties/index.html.
[131] *See, e.g.*, Kite, *supra* note 29 (noting that OFAC "steadfastly refuses to go into specifics of what the firms did" to trigger sanctions). *See also* BBC News, *supra* note 128 (quoting Russell Mokhiber, editor of Corporate Crime Reporter: "From the beginning, OFAC's enforcement has been shrouded in secrecy," and Michael Tankersley, an attorney at Public Citizen: "Significantly, OFAC has resisted providing a meaningful description of the conduct that underlies these sanctions, the settlements proposed by the alleged offenders, and the reasoning behind OFAC's decision to impose a particular penalty, or settle for a given amount"). While OFAC does not disclose the reason a company is sanctioned, a company may preemptively seek to address the concerns of stakeholders by going public with details of the sanction. For example, ChevronTexaco voluntarily informed OFAC when an internal audit revealed a subsidiary in Belize had sold gasoline to the Cuban consulate in that country. *See* BBC News, *supra* note 128 For that violation, the company was fined $9000. Online retailer Amazon.com was fined after 20 unaffiliated individuals offered Cuban cigars for sale on its website. *Id.* Caterpillar was fined $18,000 when marine parts from a European factory was diverted to Cuba without the company's knowledge. *Id.*
[132] *See* Nutting, *supra* note 44.
[133] *See, e.g.*, United States v. Ehsan, 163 F.3d 855 (4th Cir. 1998). In *Ehsan*, the defendant attempted to purchase oil gas analysis systems and ship them to Iran via Dubai in the United Arab Emirates. *Id.* at 857. When he was arrested and charged

with violations of the Iranian sanctions regulations, he challenged his arrest on the basis that certain key terms in the transactions were not defined, and the District Court agreed. *Id.* The Fourth Circuit overturned, ruling that in the absence of grievous ambiguity, to apply the rule of lenity, as the District Court did, would be tantamount to taking an important foreign policy decision "out of the hands of the Executive and put it in the hands of the courts." *Id.* at 859. *See also* United States v. Arch Trading Co., 987 F.2d 1087 (4th Cir. 1993). In Arch Trading, the defendant appealed a conviction stemming from trading with Iraq. *Id.* The court rejected defendant's arguments that IEEPA impermissibly delegated legislative functions to the President and that the Iraqi Executive Orders were inconsistent, and therefore void for vagueness. *Id.* at 1093.

[134] For an analysis of economic trade sanctions and how they may be attacked through litigation, *see* Stanley Marcuss, *Grist for the Litigation Mill in U.S. Economic Sanctions Programs*, 30 LAW & POL'Y INT'L BUS. 501 (1999). For a review of how the courts have generally treated OFAC sanctions programs, *see* Rudolph Lehrer, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in its Economic War on International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333 (2002).

[135] *See* http://www.treas.gov/offices/eotffc/ofac/rulings/index.html for the interpretive rulings.

[136] Many of the interpretive rulings address the issues surrounding the informational materials exception to the embargo. OFAC has clarified, for example, that a U.S. person that provides an electronic database with a search function of publicly available journal articles in a variety of academic disciplines may make its database available to persons in Iran. *See* OFAC Interp. Ruling 030203-FACRL-IA-01 (Feb. 3, 2003). Similarly, a U.S. person may export films and movies to Iran, but may not make "substantive or artistic alterations or enhancements." *Id.* A U.S. person may not, however, conduct surveys and interviews with Iranian persons in Iran. *See* Interp. Ruling 030424-FACRL-IA-03 (Apr. 24, 2003). In another ruling, OFAC declared that no license was necessary where a U.S. company's foreign branch proposed to sell testing systems to a foreign company in a foreign country, which would use the testing system during the manufacturing of products that may be sold to Iran. *See* OFAC Interp. Ruling 030509-FACRL-IA-05 (May 9, 2003). Another letter informs a foreign company in a foreign country that it may not import U.S.-origin aircraft navigation and avionic equipment for re-export to Iran. *See* OFAC Interp. Ruling 030509-FACRL-IA-06 (May 9, 2003). Sometimes OFAC acts in the interests of national policy and after consulting with other governmental entities such as the State Department, as was the case when OFAC allowed case-by-case license applications to provide international Internet connectivity to Iranian persons. *See* OFAC Interp. Ruling 030606-FACRL-IA-07 (June 3, 2003). What is clear from these rulings is that in spite of the presence of the informational materials exception, "substantive enhancement" of information is not fair grounds for export. *See* OFAC Interp. Ruling 030807-FACRL-IA-08 (July 8, 2003). *See also* OFAC Interp. Ruling 030915-FACRL-IA-09 (Sept. 15, 2003) (holding that engagement of a publisher in Iran to perform translation, distribution and promotion services would constitute substantive or artistic alteration or enhancement of materials) and OFAC Interp. Ruling 031211-FACRL-IA-14 (Dec. 14, 2003) (holding that OFAC regulations do not prohibit U.S. persons from accepting previously existing, camera-ready brochures and pictures, fully created and in existence, from Iran for placement on its website. U.S. persons may not create new works at the behest of persons in Iran or to engage persons in Iran to create new works. *See* OFAC Interp. Ruling 031014-FACRL-IA-10 (Sept. 26, 2003). The creation of illustrations for a person in Iran is not permitted as it is considered a prohibition on the export of services. *Id.* The rulings clarify that the informational materials exemption includes publication by a U.S. person of schedules of flights between Europe and Iran, acceptance of reservations for travel between the United States and Iran, and issuance of travel airline tickets for the entire trip between the United States and Iran. *See* OFAC Interp. Ruling 031125-FACRL-IA-12 (Nov. 25, 2003). A U.S. person may pay a court judgment to an Iranian company. *See* OFAC Interp. Ruling 031211-FACRL-IA-13 (Dec. 11, 2003). Rulings may also be fact specific, as was the case when OFAC permitted U.S. banks to establish a presence in Iraq for purposes of facilitating non-commercial humanitarian funds transfers. *See* OFAC Interp. Ruling 030521-FACRL-IQ-01 (May 21, 2003). The informational materials exemption is so poorly worded it led online job-search services company Monster.com to delete any mention of a job candidate's educational training in Cuba, Syria, Iraq, Libya, Myanmar, North Korea, Sudan and Iran. *All Things Considered: Monster.com Limiting the Information that Job Seekers Can Mention Regarding Seven Nations US Businesses are Prohibited from Doing Business With on Their Resumes* (National Public Radio broadcast, Apr. 28, 2003), The company relented after a storm of protest, particularly from Iranian-Americans, and now allows candidates to list the countries where they were educated. *Id.*

[137] The Institute of Electrical and Electronics Engineers, Inc. ("IEEE") has 360,000 members in 150 countries. *See* Kevin Coughlin, *Embargo Ruling Leaves Engineer Club in a Tizzy – Reports from Iran Branch Now Problematic*, THE STAR-LEDGER, Dec. 21, 2003, at 1. About 2000 of its members are in Iran, Cuba, Libya and Sudan, with 1700 of those in Iran alone. *Id.* IEEE was contacted by OFAC when a bank reported a transaction related to a scientific conference in Iran. *Id.* While it explored its legal responsibilities, IEEE prevented chapters in those countries from using the IEEE name to host conferences, halted travel reimbursements, denied members access to job postings on the organization's website, and barred them from paying dues electronically. *Id.* In an interpretive ruling made public, OFAC held that no license was required for a U.S. entity (presumably the IEEE) to submit a manuscript from an Iranian author to member volunteers, for member volunteers to communicate with the author with any questions or comments regarding the manuscript, or for the U.S. entity to facilitate the communications between its member volunteers and the Iranian authors. *See* OFAC Interp. Ruling 031002-FACRL-IA-11 (Sept. 30, 2003). OFAC further held, however, that U.S. persons "may not provide the Iranian author substantive or artistic alterations or enhancements of the manuscript and the U.S. entity may not facilitate the provision of

such alterations or enhancements." *Id.* Specifically, OFAC cautioned that the editing of manuscripts including activities such as "reordering of paragraphs or sentences, correction of syntax, grammar, and replacement of inappropriate words by U.S. persons, prior to publication, may result in a substantively altered or enhanced product" and was therefore prohibited. *Id.* In another ruling, OFAC held that a U.S. organization may collect membership fees from persons in Iran if the fee charged exceeds the vale of the publications provided to the members, but that the provision of services such as professional certification, professional certification exams, credit card services and the formation in Iran of the U.S. entity's chapters would constitute a prohibited export of services. *See* OFAC Interp. Ruling 031103-FACRL-IA-15 (Nov. 3, 2003). OFAC's September 30 ruling had an immediate effect on many other scientific societies, some of which decided to ignore the ruling and continue accepting and editing manuscripts from authors in sanctioned countries. *See* Lila Guterman, *Publishers Grapple with Trade Embargoes*, CHRON. OF HIGHER ED., Mar. 5, 2004, at 15. The author of a 1988 law that amended the TWEA to provide the informational materials exemption, Howard Berman, complained to OFAC that it was promulgating regulations inconsistent with the spirit and letter of the law. *See* Leonard Post, Sometimes, Editing Can be a Crime; a Dispute Over Work from Iran and Elsewhere, National L. J., Mar. 8, 2004, at 6. On April 2, 2004, OFAC relented and permitted IEEE to re-engage in peer review and style and copy editing. *See* Letter from R. Richard Newcomb, Director, Office of Foreign Assets Control, to Nelson Dong, Dorsey & Whitney LLP (Apr. 2, 2004) (copy on file with author). *See also* Press Release, Office of Foreign Assets Control, OFAC Ruling Confirms Peer Review, Style and Copy Editing Consistent with the Berman Amendment (Apr. 5, 2004) (on file with author) (quoting OFAC Director Richard Newcomb, "scientific communities in sanctioned countries may publish their works in U.S. scholarly journals… this process is vital to promoting the free flow of information within the global community of scholarship"). OFAC cautioned, however, that "collaborative interaction" resulting in co-authorship remains prohibited. *Id*, at 3. As of this writing, the matter is still not resolved, as the Association of American Publishers is considering challenging OFAC's assertion of jurisdiction in this area. *See* Calvin Reid, *A.A.P. Challenges U.S. on Restricted Nations Statute*, PUBLISHERS WEEKLY, Apr. 12, 2004, at 15.

[138] In only one interpretive ruling does OFAC make direct reference to the facilitation prohibitions. *See* OFAC Interp. Ruling 030428-FACRL-LI-01 (Apr. 28, 2003). In the ruling, OFAC cautions a U.S. person (whose name is redacted from the ruling letter) that if Iraq or Libya were entitled to "specific production sharing or other benefits as part of the development of [third country] resources, a license would be required for you to direct, authorize, or otherwise facilitate any activity of [non-U.S. entity] in furtherance of such benefits to Iraq or Libya." *Id.*

[139] *See* OFAC Interp. Ruling 030331-FACRL-IA-02 (Mar. 31, 2003) ("OFAC operates uder different statutes from the Customs Service… and the meaning of 'incorporation' for Customs' purposes may differ from that applied to export or reexport transactions subject to OFAC jurisdiction"). *Cf.*, OFAC Interp. Ruling 031105-FACRL-BU-01 (Nov. 5, 2003) ("The US Customs Service is the primary authority that could ultimately determine whether or not a good is of Burmese origin and it would be most appropriate to contact them to determine if the finished teak products indeed satisfy the threshold ['substantially transformed'] standard"). One may be able to glean from these two rulings that OFAC will look to Customs for import, and not export, classifications, but such a conclusion must surely be made at one's own peril.

[140] *See* OFAC Interp. Ruling 030430-FACRL-IA-04 (Apr. 30, 2004).

[141] Such a prohibition, while undoubtedly the policy desire behind unilateral sanctions, would undoubtedly raise a howl of protest with strong U.S. trading and military partners

[142] *See* 60 Minutes, *supra* note 17. Mail for the Halliburton subsidiary is rerouted to the Halliburton headquarters in Houston. *Id.* There are no employees on site. *Id.*

[143] *Id.* The news program also reports that in Dubai, HPSL shares office space, phone and fax lines with a division of the U.S. based parent.

[144] *See* Matthew Swibel, *Trading With the Enemy – If You Want to Get Around Export Controls, Just Sell the Product to a Front Company in Dubai. The Middlemen Will Take it From There*, FORBES, Apr. 12, 2004, at 86.

[145] *See* Halliburton Report, *supra* note 11.

[146] *Id.*

[147] *See, e.g.*, Grassley *supra* note 21 (quoting Senator Chuck Grassley as asking "whether the Treasury Department is taking enforcement steps toward foreign subsidiaries that appear to be 'foreign' and 'subsidiary' in name only… We also want the department's viewpoints on whether current law is adequate to address subsidiaries that exist only on paper with nothing more than a p.o. box in the Caribbean. We also want to hear from the companies involved on how they believe their actions comply with both the spirit and letter of the law. If the law is inadequate, Congress will have to respond").

[148] *See* Halliburton report, *supra* note 11. (admitting that 100% of HPSL's revenues are derived from business in Iran).

[149] It also invites questions based on the blocking provisions of the sanctions regimes, which broadly require U.S. persons to freeze assets in which sanctioned countries have a "property interest." *See* discussion in Section I and II, *supra*.

[150] The client has since abandoned such plans and has waived privilege.

[151] *See* Section IIB, *supra*.

[152] *See* OFAC Interp. Ruling 030606-FACRL-IA-07 (June 6, 2003) (specifying its ruling was specific only to the Iranian sanctions regime being discussed, and not any other sanctions regime).

[153] *See* OFAC Interp. Ruling 030428-FACRL-LI-01 (Apr. 28, 2003).

[154] *See* discussion Section IIB, *supra*. Facilitation is only mentioned in the Libyan sanctions regulations in connection with the provision of legal services to Libyans on the requirements and compliance with United States laws, unless such legal services were provided to facilitate prohibited transactions. *See* 31 C.F.R. § 550.517 (2004).
[155] *See* 31 C.F.R. § 550.208 (2004).
[156] *See* 31 C.F.R. § 538.206 (2004).
[157] Telephone interview with Office of Chief Counsel, Office of Foreign Assets Control, U.S. Treasury Dept. (Apr. 20, 2004) (hereinafter "Interview").
[158] *See supra*, note 104.
[159] *See* Interview, *supra* note 156.
[160] 31 C.F.R. § 560.417(c) and 31 C.F.R. 538.407(c).
[161] 31 C.F.R. § 538.407(a) (2004).
[162] Interview, *supra* note 156.
[163] *See, e.g.*, 18 U.S.C. Appx. § 8A1.2 (2004). Under this provision of the federal sentencing guidelines, an effective program to detect and prevent violations of law is a mitigating factor which serves to reduce corporate criminal sentencing. *Id.* The regulations require that "the organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required." *Id*. In addition, the organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents, .and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution. *Id*.
[164] *See* 31 C.F.R § 537.409(a) and 31 C.F.R. § 538.407(a) (both prohibiting U.S. companies from "assisting" or "supporting" foreign entities in their trade with sanctioned countries).
[165] *See* 31 C.F.R. § 588.507(a)(1) (portion of Balkan regulations authorizing provision of legal advice and counseling on the requirements of and compliance with U.S. laws, but not for purposes of facilitating transactions in violation of the prohibitions). *See also* 31 C.F.R. § 560.525(a)(1).
[166] This invokes the so-called "Granny's Lawyer Goes to Jail Act," part of the 1997 Balanced Budget Act, which made it criminal for attorneys to advice clients on how to give away assets in order to be eligible for need-based Medicaid. *See* William Glaberson, *Lawyers Contend With State and Federal Efforts to Restrict Their Rising Power*, N.Y. TIMES, Aug. 5, 1999, at A16. The Act was never enforced by Attorney General Reno due to grave constitutional concerns. *See* Helen Huntley, *The Medicaid Maze*, ST. PETERSBURG TIMES, Aug. 6, 2000, at 1H. Such concerns appear equally valid when applied to OFAC's legal services regulations.
[167] *See* Testimony of R. Richard Newcomb, *supra* note 23.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *See* Michael Burr, *Understanding Immigration and Deemed Exports; The Unfortunate Ones*, CORPORATE LEGAL TIMES, Nov. 2002, at 1.
[174] Export Administration Regulations: Penalty Guidance in the Settlement of Administrative Enforcement, 69 Fed. Reg. 7,867 (Feb. 20, 2004) (hereinafter "Penalty Guidance") (to be codified at 15 C.F.R. pt. 764 and 766).
[175] As discussed in Section IIB, *supra*, all the sanctions regimes contain prohibitions against evasions, attempts, and conspiracies.
[176] MODEL PENAL CODE § 5.01(1) (1962).
[177] Generally, conduct is considered a "substantial step" if it is "strongly corroborative" of the actor's criminal purpose. *Id*. at § 5.01(2). The Code provides an illustrative list of conduct, including lying in wait, enticement, reconnoitering, unlawful entry, and possession of materials to be employed in the commission of the crime. *Id.*
[178] *See* MODEL PENAL CODE § 5.01 explanatory note on Subsection 2 (1962).
[179] MODEL PENAL CODE § 5.03(1) (1962).
[180] *See* MODEL PENAL CODE § 5.03(5) (1962).
[181] *See, e.g.*, 31 C.F.R. § 560.417(c) (2004) and 31 C.F.R. § 538.407(c) (2004).
[182] OFAC may well learn a lesson or two from its sister agency at the Internal Revenue Service, which routinely prosecutes companies that use shell companies for tax evasion purposes. *See, e.g.*, Karen Boucher and Shona Ponda, *Current Corporate Income Tax Developments*, THE TAX ADVISER, Apr. 1, 2004, at 230.
[183] *See* 31 C.F.R. § 560.417 *et seq.* (2004) and 31 C.F.R. § 538.407 *et seq.* (2004).
[184] *See* Discussion, Section I, *supra*.
[185] *See* Judicial Review Commission on Foreign Asset Control, Final Report to Congress, Jan. 23, 2001 (hereinafter "Report"), at 140.

[186] *Id.* at 144.
[187] *See* Penalty Guidance, *supra* note 173.
[188] This echoes the call by Senator Grassley and Baucus. *See* Grassley, *supra* note 21.
[189] The export controls, for example, provide for a *de minimis* exception on U.S.-origin goods or products of U.S. technology, 15 C.F.R. § 734 *et seq.* (Oct 1, 2002), that could provide guidance on when U.S. jurisdictional interests begin.
[190] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002)
[191] Much has been written, of course, on the governance requirements imposed by the Sarbanes-Oxley Act. *See, e.g.*, John Paul Lucci, *Enron – The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley*, 67 ALB. L. REV. 211 (2003) and Joseph Morrissey, *Catching the Culprits: Is Sarbanes-Oxley Enough?*, 2003 COLUM. BUS. L. REV. 801 (2003).
[192] *See* Section IIC, *supra.*
[193] *See* discussion, *supra*, at note 165.
[194] The full panoply of legal considerations should be permitted, ranging from specially designated nationals to export controls to defense and trade controls.
[195] A company may decide, for example, that due to concern on how it would look to the media, to veto a particular sale to a military academy in a sanctioned country that is otherwise permissible, but not veto a sale to a hospital or elementary school.
[196] *See* Report, *supra* note 184, at 141.
[197] *See* 31 C.F.R. § 538.407(b) (2004).
[198] *See supra* note 71.
[199] Peter Fitzgerald, *Responding to Rogue Regimes: From Smart Bombs to Smart Sanctions; Managing "Smart Sanctions" Against Terrorism Wisely*, 36 NEW ENG.L. REV. 957 (2002), at 960. Fitzgerald, formerly counsel to the IBM Export Regulation Office, offers a thoughtful critique on the use of sanctions to battle terrorist financing. Fitzgerald testified before the Judicial Review Commission on Foreign Assets Control, and has called for greater transparency in OFAC's operations to increase greater voluntary compliance. *See id.* at 983.