2004

Triggering Parent Company Liability Under United States Sanctions Regimes: The Troubling Implications of Prohibiting Approval and Facilitation

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Terence J. Lau*

[General Electric] 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

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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.” The company “employs more than 100,000 people in over 120 countries,” and in 2003, earned over $16 billion in revenues. 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. From 1995 to 2000, U.S. Vice President Dick Cheney served as Halliburton’s CEO, and in that role, “lobbied the Clinton administration to ease sanctions on Libya and Iran.”

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2Halliburton Company, About Halliburton, at http://www.halliburton.com/about/index.jsp. 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 and testing equipment. Dave Lesar, Halliburton Howard Weill Energy Conference New Orleans, LA March 30, 2004, at http://ir.thomsonfn.com/IRUploads/5282/File Upload/HWConf033004_Rev.pdf (last visited Nov. 13, 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 generally id.

3Halliburton Company, supra note 2.


5Halliburton Company, Form 8-K (Feb. 6, 2004), at 10 (available at http://edgar.sec.gov/Archives/edgar/data/45012/000095012904000580/h12515e8vk.htm [last visited Nov. 13, 2004]). 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%. Id.

6See 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”).

7See 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 U.S. Vice President, when he led the National Energy Review in concluding in 2001 that the United States should “level the playing field for US [sic]
Among major oil producers, Iran remains a heavyweight in oil production. While the United States maintains an economic embargo against Iran, 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 (HPSL). All of HPSL’s revenues (in 2003, those revenues neared $40 million) are generated through business in Iran, and the company is profitable. The total revenues

companies overseas” and recommended a review of the sanctions regimes with consideration for the American energy industry. See id. See also Blumenthal, infra note 14 (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).

8Indeed, “65% of the world’s proven oil reserves are concentrated in five countries (Saudi Arabia, Iraq, United Arab Emirates, Kuwait and Iran).” See Leonardo Maugeri, Time to Debunk Mythical Link Between Oil and Politics, 101 Oil & Gas J. 18 (Dec. 15, 2003). See also Enid Tsui, Sinopec in Talks With Iran Over LNG Oil and Gas, Fin. Times, Apr. 13, 2004, at 24 (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).


11Id. 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 that do business in Iran. For example, Halliburton Manufacturing & Services Limited, incorporated in the United Kingdom, derives about 1% of its revenues from sales to its 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.
generated from business in Iran through Halliburton’s subsidiaries repre-
sent 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, the New
York City Police and Fire Department Pension Funds.14 The funds are man-
aged by the 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 un-
der a policy of apartheid, the Comptroller has indicated his belief that Hall-
iburton’s business in Iran “helps to underwrite and support terrorism,”16
and has requested that 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


13See, e.g., Robert Cohen, New Questions Arise on Halliburton, Iran, H OUS. CHR ON., 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 , N.Y. 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).

14The funds collectively own approximately 318,540 shares of Halliburton. See Halliburton
Report, supra note 10. 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 in such companies.
See Brad Bumstead, PA Likely to Start Investment Screening, P ITTSBURGH TRIBUNE-REVIEW, May
23, 2003).

15The Comptroller is an independently elected official in New York City. See The New York
nyc.gov/what_comptr_does.asp (last visited Nov. 13, 2004). The Comptroller manages almost
$80 billion in pension funds. See id.

1660 Minutes: Doing Business With the Enemy (CBS television broadcast, Jan. 25, 2004), avail-
13, 2004) [hereinafter 60 Minutes].

17See generally Letters, infra note 19; see also Halliburton Under Scrutiny Over Iran Links, E NERGY
The Comptroller’s office expressed strong dissatisfaction with the report and its contents, claiming that Halliburton merely described its operations in Iran without conducting a review of reputational risk to the company. In 2001, Halliburton received an inquiry from the Office of Foreign Assets Control (OFAC), operated under the Treasury Department. OFAC is the administrative agency charged with issuing regulations under the various federal laws, which are discussed in Part II of this article. OFAC promulgates U.S. economic sanctions and embargoes.

**Notes:**


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 about 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) (on file with author) [hereinafter Grassley]. See also Dinmore, supra note 7, at 7 (noting that Brad Sherman, D-CA, “asked at one recent hearing why the [United States] 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 4, 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 prevent 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/enforcement/ofac/faq/index.html (last visited Nov. 13, 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. President Harry Truman created OFAC in 1950 when he declared a national emergency and “blocked all Chinese and North Korean assets subject to U.S. jurisdiction.” 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), available at http://banking.senate.gov/index.cfm?Fuseaction=Hearings.Detail&HearingID=110 (last visited Nov. 13,
the Securities and Exchange Commission (SEC), 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 SEC suggests that OFAC’s inquiries may extend beyond the company’s operations in Iran.\(^{25}\) Halliburton maintains 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 charged with conducting

\(^{23}\)See Annual Report, supra note 4, 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”).


\(^{27}\)Id.

\(^{28}\)See Doreen Hemlock, U.S. Fines Two Firms in S. Florida, Sun-Sentinel, Apr. 15, 2003, at 1D.

business with a sanctioned country include Exxon Mobil, ChevronTexaco, Cooper Cameron, Northrop Grumman, and ConocoPhillips. According to one consultant, over 40% of U.S.-based companies that conduct business with sanctioned countries are oil concerns or energy-related firms. Recently, the SEC created a new Office of Global Security Risk, with the primary objective of identifying companies whose activities raise concern about global security risks that are material to investors.

30See Blumenthal, supra note 14 (Exxon Mobil admitted 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. See id.

31See 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 twenty-sixth shipment to North Korea. The company denied the charges).

32See 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”).

33See id. (reporting that Northrop Grumman disclosed a subsidiary called IRAN-Northrop Grumman Programs Service Co. in its 2000 disclosures to the SEC. The company says it has not done any business in Iran since then).

34See id. (reporting ConocoPhillips disclosed multiple subsidiaries in Iran and Libya in its 2001 SEC 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 C. Thompson Jr., 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), http://www.comptroller.nyc.gov/press/2003_releases/print/pr03-04-032.shtm. 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, 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 violates 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 20. The Senators requested a reply from the company by March 26, 2004. Id. As of this writing, no such reply has been made public.


making these determinations, the SEC will look at whether a company has operations in a country where “political, economic or other risks exist that are material.”

As of this writing, the United States maintains a comprehensive economic embargo, with import and export prohibitions, against three countries—Cuba, Iran, and Sudan. Enforcement of violations of these embargoes is real and ongoing. Since 1995, OFAC has prosecuted sixty-eight criminal cases for violations. OFAC currently has over 2600 civil cases open for investigation and has collected over $8 million in fines for violations of the Cuban embargo alone. The issue of what U.S.-based companies must do to avoid OFAC’s scrutiny for actions of its offshore subsidiaries, then, is both relevant and timely.

This article examines three issues surrounding the liability of U.S.-based companies with foreign subsidiaries or affiliates incorporated in countries where trade with U.S.-sanctioned countries is permissible. First, the article examines the statutory bases for economic trade sanctions and the OFAC-issued implementing regulations, namely the Trading with the Enemy Act (TWEA) and the International Emergency Economic

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38See Testimony of R. Richard Newcomb, supra note 22.

39See id.


41This article does not address the efficacy or public policy behind the use of unilateral trade sanctions. For analysis of trade sanctions, see generally John B. Reynolds III et al., 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 & COM. L. 333 (2002). This article also does not address the sanctions regimes administered by OFAC for narcotics or terrorist funding. For an article covering this area of the law, which primarily affects the financial services industry, see Edward Rubinoff & Tamer Soliman, OFAC Asset Blocking Programs, 19(7) S&P’s REV. BANKING & FIN. SERVICE 1 (Sept. 2003). See generally Marc Martin & 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; Joan Lavell, OFAC: A Compliance Priority, Office of Foreign Assets Control, J. INVESTMENT COMPLIANCE 7 (Jan. 1, 2002).

Powers Act\textsuperscript{43} (IEEPA) and how these statutes grant extraterritorial authority to OFAC. Second, the article explores regulations promulgated by OFAC that prohibit parent company “approval” or “facilitation” of transactions by such affiliates or subsidiaries, and how such regulations indirectly extend the reach of U.S. sanctions to the conduct of foreign subsidiaries and affiliates.\textsuperscript{44} Third, the article suggests that OFAC’s broad and sweeping interpretations of the statutes implementing economic embargoes has resulted in the inability of U.S.-based companies to comply with the spirit of the embargo, and that changes should be implemented by OFAC, or Congress if necessary, to ensure compliance. Some of these changes, discussed in Part IV, include an increase in operational transparency, adoption of a clear standard on the level of independence required between parent and subsidiary companies, clear definitions of “approval” and “facilitation,” an expansion of the legal services exemption currently found in the regulations, and establishment of a safe harbor provision for companies that follow real and meaningful steps to comply with U.S. trade sanctions.

II. EXTRATERRITORIAL APPLICATION OF UNITED STATES SANCTIONS REGIMES

This article deals with the thorny issue of how OFAC, a U.S. governmental administrative agency, reaches into the conduct of companies apparently


\textsuperscript{44}The main vehicle through which U.S. regulations reach the conduct of foreign subsidiaries is through the use of the words “facilitate or approve” found in many IEEPA-based sanctions. See infra Part II.B. 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, 180 (2001) (cautioning that the prohibitions are “quite broad” and are especially pertinent in a merger or acquisition context); see also William McGlone & Michael Burton, Economic Sanctions and Export Controls, 34 Int’l L. & Econ. 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’’); Edward Rubinoff et al., Rigorous Security Checks for Cross-Border Deals, Mergers & Acquisitions J. (Aug. 1, 2004) (cautioning that agencies such as OFAC are adopting broad successor liability for export control violations); Robert Shapiro, Mergers, Acquisitions and Due Diligence in International Trade, Metropolitan Corp. Couns., May 2004, at 23 (explaining recent administrative law judge decision that successor liability for international trade law violations can attach in an acquisition of assets alone).
beyond OFAC’s jurisdiction. For example, OFAC’s assertion of jurisdiction over Wal-Mart’s Canadian subsidiary, a corporation organized under the laws of Mexico, would be akin to Canada’s government agency, Health Canada, exerting jurisdiction over Wal-Mart, the U.S. parent corporation, for the safety of food sold wholly in the United States.45 In order to understand the grounds on which OFAC asserts its extraterritorial authority, it is important to examine the two statutes that purportedly grant this authority—TWEA and IEEPA.46


46In addition to OFAC-administered sanctions regimes, non-U.S. companies should also be concerned about the extraterritorial 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. app. §§ 2401–2420 (2004), apply to 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. § 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), at http://www.bis.doc.gov/news/2002/swisscouplesettles.htm. Additionally, financial institutions that are parties to contracts with the Federal Reserve are under contractual obligations to avoid trade with sanctioned countries. The recent $100 million penalty paid by UBS, a Swiss bank, for such violations, serves as a strong reminder to non-U.S.-based companies to pay very careful attention to U.S. embargo law. See generally Improving Financial Oversight: A Private Sector View of Anti-Money Laundering Efforts: Hearing before the House Oversights and Investigations
A. Trading with the Enemy Act (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 TWEA. It is clear that TWEA-based sanctions regimes apply to foreign subsidiaries of U.S. parent companies. 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 hereinafore 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 hereinafore 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, OFAC promulgates the Cuban Asset Control Regulations (CACR), first issued in July 1963 by President Kennedy. The CACR provides generally for the prohibition of most exports and imports of goods and services with Cuba or Cuban entities around the world, and requires U.S. persons subject to its jurisdiction to “block” or “freeze” property interests in which Cuba or a Cuban national has an interest. Penalties are stiff, with imprisonment terms of up to ten years and corporate criminal fines of up to $1 million or civil fines of up to $50,000 per transaction.

While the CACR has not always applied to foreign subsidiaries of U.S. parent corporations, it has been applicable to such subsidiaries since the passage of the Cuban Democracy Act in 1992. Specifically, the relevant portion of the CACR provides:

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.

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, SEATTLE TIMES, Sept. 19, 2003, at A15.
52 See TWEA, 50 U.S.C. app. § 16.
53 “Until 1975, a general license was available to permit trade by non-banking entities [as long as] U.S. national[s] did not participate in the transaction.” Boscariol, supra note 45, at 446–47. “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 the subsidiary’s role in activities such as decision making, risk taking, negotiation, and financing. Id. In 1990, Congress proposed banning outright the issuance of licenses to foreign subsidiaries of U.S. firms. Id. These amendments were codified in the Cuban Democracy Act of 1992.
In practice, the CACR affects commerce worldwide and has had a disruptive effect on many commercial transactions. The definition of “person subject to U.S. jurisdiction” and “person within the United States” includes any person, real or juristic, located physically in the United States. Any foreign branch of a U.S. company, wherever it may be located, is also subject to the CACR because under corporate law, branches are indistinguishable 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 “owned or controlled.” Even if a U.S. company does not own a majority of the issued and outstanding shares in a company, it can be deemed to control a foreign company through a joint venture or management agreement. Thus, U.S.-incorporated companies seeking to establish foreign strategic alliances that may involve little equity, but which retain the right to name senior management or board members, need to be wary of triggering the “control” threshold of the CACR.

Foreign subsidiaries and affiliates of American companies are therefore prohibited from exporting or importing any goods or services to or from Cuba, or to or from Cuban entities, without an OFAC license. 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. Modern commerce, however, often deals in shades of gray that are not 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. OFAC has failed to provide sufficient interpretative guidance on

56In 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, wherever organized or doing business, which is owned or controlled by any person or persons specified in paragraph (a) (1), (2), or (3) of this section.” See 31 C.F.R. § 515.330 (2004).


the meaning of these critical terms. For example, OFAC takes the position that a CACR violation occurs when a U.S. citizen purchases a Cuban cigar in a foreign country, as that U.S. citizen would be dealing in property in which a Cuban national has an interest. 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. OFAC suggests 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. McDonald’s franchise agreement, for example, is well-known for the amount of control it wields over franchisees. As a U.S. corporation, McDonald’s is clearly subject to the CACR’s jurisdiction, as would be any wholly owned subsidiary in Europe. A 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 Cuban nationals. While the day when passport checks for Cuban nationality at McDonald’s and Opel


60See id.

61A 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).

62Opel 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 131. See also AAEI Conference Highlights: How Microsoft, Philips Meet New Post-9/11 Compliance Requirements, MANAGING EXPORTS, Aug. 2004, at 1 (quoting Phyllis Wigginton, manager of export controls at Philips Electronics NA, relating the story of how Philips inadvertently sold 2700 TV sets to a Panama company, assuming the Panama company was screening for transactions when in fact it was reselling the TV sets to a Cuban entity).
dealings has not yet arrived, such a scenario seems plausible, given OFAC’s interpretation of the blocking and freezing provisions of Section 515.201 of the CACR. 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 even tighter\(^{63}\) and repeal of the embargo unlikely.\(^{64}\)

The North Korean sanctions regime, in place since 1950, is also based on the TWEA.\(^{65}\) As such, the jurisdictional reach of the regime is identical to that of the Cuban sanctions regime, that is, all owned and controlled subsidiaries and affiliates are subject to the North Korean sanctions regime.\(^{66}\) The scope of the sanctions, however, differs 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.\(^{67}\)

\(^{63}\)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, at 13A (noting that OFAC has assigned five times as many agents to investigate CACR violations as it has to track terrorist funding); Bay Area Biotech Firm Chiron Fined for Trading with Cuba, MARIN INDEP. J., Jul. 9, 2004 (reporting that Chiron Corp. paid $168,500 in civil penalties to OFAC after voluntarily disclosing it shipped two infant vaccines to Cuba between 1999 and 2002).

\(^{64}\)See Challenges for 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 long travails with dictatorship,” nothing was more important than “staying the course” and avoiding “experiments with perhaps well-meaning, but fundamentally misguided new tactics in Cuba”), available at http://foreign.senate.gov/hearings/2003/hrg031002p.html (last visited Nov. 13, 2004). 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).


\(^{66}\)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”).

The response of countries around the world to the extraterritorial application of the TWEA, predictably, has not been positive. 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 Boscardioli, supra note 45. 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) (arguing that provisions of the Helms-Burton Act violate principles of customary international law).

Canada, for example, reinstituted an old “blocking” law, the Foreign Extraterritorial Measures Act. This law was originally passed to block the application of U.S. discovery laws as well as treble damage provisions allowed by private antitrust litigation in the United States. The law was subsequently utilized to prohibit Canadian companies from complying with the U.S. trade embargo against Cuba. 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. Finally, the European Union, which has always taken a different view on how to treat the Castro dictatorship in Cuba, passed a Council Regulation requiring all member states to pass blocking legislation to prevent companies from complying with the U.S. embargo against Cuba. This directive is now national law in

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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 Boscardioli, supra note 45. 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) (arguing that provisions of the Helms-Burton Act violate principles of customary international law).


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 L. 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); Allan Thompson, NAFTA Invoked in Cuba Dispute: Canada, Mexico Jointly Challenge U.S. Trade Bill, TORONTO STAR, Mar. 13, 1996, at A1.

72 See Hunt, supra note 35, 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 Extraterritorial 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 action 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
Germany, Ireland, Austria, United Kingdom, Italy, Finland, Denmark, Greece, Netherlands, Spain, and Sweden.

B. International Economic Emergency Powers Act (IEEPA)

The second, and more common, basis for OFAC sanctions regimes is the International Emergency Economic Powers Act (IEEPA). IEEPA managers to notify the European Commission, within thirty 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. The regulation also 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 analysis on CR 2271/96, see for example, Jurgen Huber, The Helms-Burton Blocking Statute of the European Union, 20 Fordham Int’l L. J. 699 (1997); Kevin Martin Comment, Legislative Developments: 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. Int’l L. J. 429 (1997); Stefaan Smis & Kim Van der Borght, Current Developments: The EU-U.S. Compromise on the Helms-Burton and D’Amato Acts, 93 AJIL 227 (1999).

74See § 5 Nr. 70 Aussenwirtschaftsgesetz (Foreign Trade and Payments Act).

75See European Communities Regulations 1997 S.I.


80See Act No. 312 (June 3, 1998).

81See Decree-Presidential No. 187 (June 25, 1998).


85This article discusses the promulgation of various sanctions regimes under IEEPA. Increasingly, IEEPA is also being used as a forfeiture statute, as blocking assets may have the same impact as 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).

forms the basis for sanctions against Burma, the Balkans, Sierra Leone, Iran, Iraq, Libya, Sudan, and Zimbabwe. The most


89The Sierra Leone sanctions regime is aimed at stopping illicit trade in diamonds from Sierra Leone and Liberia because such trade 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 (2004), implementing Exec. Order No. 13,312, 68 Fed. Reg. 45,151 (July 29, 2003). Additionally, importation of timber and round log products from Liberia is prohibited. See 69 Fed. Reg. 44,885 (July 27, 2004).

90The Iranian sanctions regime consists of comprehensive blocking provisions. See 31 C.F.R. § 535 (2004). It also contains an import/export embargo. See 31 C.F.R. § 560 (2004). The sanctions were initiated by President Reagan in 1997, and started with an import embargo. See Exec. Order No. 12,613, 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. 12,959, 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. 13,059, 62 Fed. Reg. 44,531 (Aug. 19, 1997). In March 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
recent sanctions regime, against Syria,\textsuperscript{95} is also promulgated under IEEPA. Of this list, only Iran and Sudan are subject to comprehensive trade


\textsuperscript{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 (2004). Blocking provisions remain, however, and goods of U.S. origin remain subject to export controls. See Exec. Order No. 13,315, 68 Fed. Reg. 52,315 (Aug. 28, 2003).


\textsuperscript{93}The sanctions regime against Sudan includes an import/export trade embargo. See generally 31 C.F.R. § 538 (2004).

\textsuperscript{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. 13,288, 68 Fed. Reg. 11,457 (Mar. 6, 2003).

embargoes, including an export and import ban, while the other regimes provide for “softer” sanctions that target only specific industries, such as the rough diamond trade in the Sierra Leone sanctions regime. 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

96See 31 C.F.R. § 537.203 (2004), stating:

[E]xcept 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.

97See 31 C.F.R. § 588.204 (2004), which provides:

(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.

98See 31 C.F.R. § 592.202 (2004), which provides:

(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.


100See 31 C.F.R. § 575.211 (2004), which provides:

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.
Iranian,\textsuperscript{101} Libyan,\textsuperscript{102} and Sudanese\textsuperscript{103} regulations all prohibit evasions, attempts, and/or conspiracies by U.S. persons to violate the respective sanctions regimes.

While TWEA- and IEEPA-based sanctions regimes have some similarities, such as providing the President the statutory authority to freeze assets and cease economic trade,\textsuperscript{104} there is one significant 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, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.”\textsuperscript{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.

\textsuperscript{101}See 31. C.F.R. § 535.208(a) (2004), which provides, “[a]ny 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”; 31 C.F.R. § 560.203 (2004), which provides, “[a]ny 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.”

\textsuperscript{102}Unlike the other sanctions regimes, the Libyan regime prohibits only evasion, not attempts or conspiracies. See 31 C.F.R. § 550.208 (2004), which provides, “[a]ny 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.”

\textsuperscript{103}See 31 C.F.R. § 538.210 (2004), which provides:

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.


In certain sanctions regimes, however, OFAC has gone one step beyond simply prohibiting inchoate crimes. In these regimes (the Burmese, Iranian, Sudanese, and to a lesser extent, the now-defunct Serbian), OFAC has introduced the concept that a U.S. company may not “approve” or “facilitate” conduct that would be prohibited to the U.S. company itself. In other words, in addition to attempt and conspiracy, as those crimes are understood in modern criminal law, \(^{106}\) 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 in by a U.S. person or within the United States. \(^{107}\) The same prohibition is found in the import ban provisions of the sanctions regime. \(^{108}\) An interpretive section of OFAC’s regulations explains that “approval or other facilitation” includes “assisting” or “supporting” a foreign person’s activity \(^{109}\) and further explains that a U.S. person is prohibited from brokering, financing, guaranteeing, or approving the activities of a foreign affiliate. \(^{110}\) The U.S. person also cannot “approve,

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106 See generally, Joshua Dressler, Understanding Criminal Law (2d ed. 1995).

107 See 31 C.F.R. § 537.202 (2004), which provides:

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 in by a United States person or within the United States is hereby prohibited.

108 See Exec. Order No. 13310, 68 Fed. Reg. 44,853 at § 2(b) (July 28, 2003) (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”).

109 See 31 C.F.R. § 537.409(a), which provides:

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.

110 See 31 C.F.R. § 537.409(b), which provides:
supervise, or otherwise be involved” in a foreign subsidiary’s negotiations with Burma for new investment.111

The Iranian Transactions Regulations112 contain similar, but not identical, language. U.S. persons may not “approve, finance, facilitate, or guarantee” any transaction by a foreign person.113 According to OFAC, the term “foreign person,” includes a “foreign subsidiary” as well as “unaffiliated foreign persons.”114 An interpretive section to the Iranian regulations, however, provides restrictions that go beyond those in the Burmese regulations. This interpretive section indicates that OFAC will find prohibited facilitation or approval to occur 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.”115 OFAC will also find

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.

111 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, July 29, 2003, at 3, available at http://www.treas.gov/offices/enforcement/ofac/sanctions/t11burma.pdf (last visited Nov. 13, 2004). 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.


113 See 31. C.F.R. § 560.208 (2004), which provides:

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.


prohibited approval or facilitation when a U.S. person refers business opportunities involving Iran to any foreign person if the U.S. person could not have responded directly to such a referral.116 Finally, illegal approval or facilitation occurs when a U.S. person “[c]hanges the operating policies or procedures of a particular affiliate with the specific purpose of facilitating transactions that would [otherwise] be prohibited . . . if performed by a United States person or from the United States.”117

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.118 Like the Iranian regulations, the Sudanese regulations also contain an interpretive section. OFAC decrees that facilitation occurs when a U.S. person “assists” or “supports” trading activity with Sudan by any person.119 In the Sudanese regulations, OFAC, for the first time, indicates activities which do not constitute approval or facilitation, such as facilitating trade or a financial transaction that could be entered into directly by the U.S. person,120 or “[a]ctivity of a purely clerical or reporting nature that does not further trade or financial transactions with Sudan.”121 For example, merely reporting on the results of a subsidiary’s trade with Sudan is not prohibited facilitation.122 Financing or insuring that trade or warranting the quality of goods sold by a subsidiary to Sudan, however, does constitute prohibited facilitation.123 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.” Actions that require such independence include, but are not limited to, “business and legal planning; decision making; designing, ordering or transporting goods; [transactions involving] financial, insurance, and other

116See 31 C.F.R. § 560.417(b).
11731 C.F.R. § 560.417(c).
11831 C.F.R. § 538.206.
119See 31 C.F.R. § 538.407(a).
120Id.
121Id.
122Id.
123Id.
risks.” As with 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.

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) by a U.S. person to enter into a transaction that could not be entered into directly by a U.S. person. 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, 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 for other sanctions regimes.

Finally, language from the Serbia and Montenegro sanctions regimes (which are no longer in effect) provided that prohibited approval or facilitation occurs when a “U.S. national or permanent resident alien employed by a foreign company . . . participate[s] in any decision-making role in an activity by the foreign company that includes investment . . . in Serbia.”

C. Summary—TWEA and IEEPA Enforcement Against Foreign Subsidiaries

As discussed in Part II.A. above, TWEA-based sanctions programs reach the conduct of foreign-incorporated companies as long as they are owned

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124 31 C.F.R. § 538.407(b) (2004).
125 31 C.F.R. § 538.407(d).
127 31 C.F.R. § 538.407(c).
129 See 31 C.F.R. § 560.417(c).
130 See 31 C.F.R. § 586.409.
or controlled by U.S. persons. IEEPA-based sanctions do not apply to foreign-incorporated companies, but prohibitions on a U.S. person’s “approval” or “facilitation” of conduct by a foreign subsidiary may have the same effect. For a U.S.-based company, 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 must 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 regard to foreign subsidiaries that do trade with sanctioned countries, so as not to run afoul of any applicable “approval” or “facilitation” prohibitions. Table 1 summarizes the bases through which U.S. sanctions law can assert jurisdiction over the conduct of foreign-incorporated companies.

III. TRIGGERING LIABILITY: FACILITATION, APPROVAL, AND EVASION

As controversial as they may be, the CACR are at least clear in their application to foreign entities owned and controlled by U.S. parent entities. U.S. companies face a far more difficult task determining which conduct 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 based on OFAC enforcement, cases and rulings, while Part B explores the practical application of these rules to corporate governance of foreign subsidiaries and affiliates.

A. Enforcement: Cases and Rulings

In 2003, under pressure from various corporate governance groups,131 OFAC reluctantly began publishing the names of companies that had been

<table>
<thead>
<tr>
<th>Target Country</th>
<th>Source</th>
<th>Actions Prohibited (emphases added)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cuba/N. Korea</td>
<td>31 C.F.R. § 515.329</td>
<td>Provisions apply to corporations wherever organized or doing business owned or controlled by U.S. persons</td>
</tr>
<tr>
<td>Burma</td>
<td>31 C.F.R. § 537.202</td>
<td>Any approval or other facilitation . . .</td>
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<td>31 C.F.R. § 537.409(a)</td>
<td>Any action by a U.S. person that assists or supports a foreign person’s activity . . .</td>
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<tr>
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<td>31 C.F.R. § 537.409(b)</td>
<td>A U.S. corporation is prohibited from brokering, financing, guaranteeing, or approving the entry by any foreign person, including a foreign affiliate . . .</td>
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<tr>
<td>OFAC</td>
<td>The U.S. parent cannot approve, supervise or otherwise be involved in the foreign subsidiary’s negotiations . . .</td>
<td></td>
</tr>
<tr>
<td>Iran</td>
<td>31 C.F.R. § 560.208</td>
<td>No United States person, wherever located, may approve, finance, facilitate, or guarantee any transaction . . .</td>
</tr>
<tr>
<td>OFAC</td>
<td>. . . by a foreign subsidiary . . . or unaffiliated foreign persons</td>
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<td></td>
<td>31 C.F.R. § 560.417(a)</td>
<td>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</td>
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<td>31 C.F.R. § 560.417(b)</td>
<td>Changing the operating policies of a foreign affiliate with the specific purpose of facilitating transactions otherwise prohibited if performed by a U.S. person</td>
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<td></td>
<td>31 C.F.R. § 560.417(c)</td>
<td>Referring business opportunities in Iran to any foreign person</td>
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<tr>
<td>Sudan</td>
<td>31 C.F.R. § 538.206</td>
<td>Facilitation, including but not limited to brokering activities</td>
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<tr>
<td></td>
<td>31 C.F.R. § 538.407(a)</td>
<td>Assisting or supporting trading activity by any person</td>
</tr>
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<td>31 C.F.R. § 538.407(a)</td>
<td>Activities of a purely clerical nature (such as reporting on results of subsidiary’s trade with Sudan) are not prohibited facilitation</td>
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<td>31 C.F.R. § 538.407(b)</td>
<td>Warranting quality of goods sold by subsidiary to Sudan</td>
</tr>
<tr>
<td></td>
<td>31 C.F.R. § 538.407(b)</td>
<td>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</td>
</tr>
<tr>
<td></td>
<td>31 C.F.R. § 538.407(d)</td>
<td>Referring business opportunities in Sudan to any foreign person</td>
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Table 1: Continued

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<th>Source</th>
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<td>Cuba/N. Korea</td>
<td>31 C.F.R. § 515.329</td>
<td>Provisions apply to corporations wherever organized or doing business owned or controlled by U.S. persons</td>
</tr>
<tr>
<td>Burma</td>
<td>31 C.F.R. § 537.202</td>
<td>Any approval or other facilitation . . .</td>
</tr>
<tr>
<td></td>
<td>31 C.F.R. § 537.409(a)</td>
<td>Any action by a U.S. person that assists or supports a foreign person's activity . . .</td>
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<tr>
<td></td>
<td>31 C.F.R. § 537.409(b)</td>
<td>A U.S. corporation is prohibited from brokering, financing, guaranteeing, or approving the entry by any foreign person, including a foreign affiliate . . .</td>
</tr>
<tr>
<td>OFAC</td>
<td></td>
<td>The U.S. parent cannot approve, supervise or otherwise be involved in the foreign subsidiary's negotiations . . .</td>
</tr>
<tr>
<td>Iran</td>
<td>31 C.F.R. § 560.208</td>
<td>No United States person, wherever located, may approve, finance, facilitate, or guarantee any transaction . . .</td>
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<td></td>
<td>OFAC</td>
<td>. . . by a foreign subsidiary . . . or unaffiliated foreign persons</td>
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<tr>
<td></td>
<td>31 C.F.R. § 560.417(a)</td>
<td>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</td>
</tr>
<tr>
<td></td>
<td>31 C.F.R. § 560.417(c)</td>
<td>Changing the operating policies of a foreign affiliate with the specific purpose of facilitating transactions otherwise prohibited if performed by a U.S. person</td>
</tr>
<tr>
<td></td>
<td>31 C.F.R. § 560.417(b)</td>
<td>Referring business opportunities in Iran to any foreign person</td>
</tr>
<tr>
<td>Sudan</td>
<td>31 C.F.R. § 538.206</td>
<td>Facilitation, including but not limited to brokering activities</td>
</tr>
<tr>
<td></td>
<td>31 C.F.R. § 538.407(a)</td>
<td>Assisting or supporting trading activity by any person</td>
</tr>
<tr>
<td></td>
<td>31 C.F.R. § 538.407(a)</td>
<td>Activities of a purely clerical nature (such as reporting on results of subsidiary's trade with Sudan) are not prohibited facilitation</td>
</tr>
<tr>
<td></td>
<td>31 C.F.R. § 538.407(a)</td>
<td>Warranting quality of goods sold by subsidiary to Sudan</td>
</tr>
<tr>
<td></td>
<td>31 C.F.R. § 538.407(b)</td>
<td>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</td>
</tr>
<tr>
<td></td>
<td>31 C.F.R. § 538.407(d)</td>
<td>Referring business opportunities in Sudan to any foreign person</td>
</tr>
</tbody>
</table>
sanctioned under the various sanctions regimes, the relevant country involved, and the amount of the fine. OFAC has not provided descriptions of what specific behavior the company engaged in to warrant a penalty. Perhaps, OFAC believes a lack of specificity regarding the behavior in question will lead to conservative corporate governance of subsidiaries. A concern about setting precedent for future cases, which are 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.” What it has actually provided is very little guidance.

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, the common

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133 See BBC News, supra note 131 (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 131. For that violation, the company was fined $9,000. Online retailer Amazon.com was fined after twenty unaffiliated individuals offered Cuban cigars for sale on its Web site. Id. Caterpillar was fined $18,000 when marine parts from a European factory were diverted to Cuba without the company’s knowledge. Id.

134 See Nutting, supra note 45.

135 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, the defendant 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 that decision, 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 those 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 the 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.
theme that runs throughout the federal cases involving OFAC and its sanctions programs is one of extreme deference by the courts to the agency, perhaps due to the courts’ reluctance to interfere with foreign affairs, an area traditionally reserved for the executive branch.\footnote{See Stanley J. Marcuss, Grist for the Litigation Mill in U.S. Economic Sanctions Programs, 30 Law & Pol’y Int’l Bus. 501 (1999) (analyzing economic trade sanctions and how they may be attacked through litigation). See generally Lehrer, supra note 41 (reviewing how the courts have treated OFAC sanctions programs).}

Another potential area of guidance comes from OFAC’s interpretive rulings.\footnote{See Interpretative Rulings, supra note 57.} In a series of letters issued in response to real-world inquiries, OFAC has published, with the names of parties redacted, letters that attempt to provide guidance in interpreting the limits of liability.\footnote{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 who 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 Interpretive Rulings, supra note 57; 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.” See 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, 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 Interpreative Rulings, supra note 57; 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); 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 Web site). 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
parties, such as those engaged in academic and scholarly pursuits who needed clarification on the status of the peer review and publication process with respect to authors located in sanctioned countries, the rulings have been very helpful.\textsuperscript{139} None of these rulings, however, provide meaningful 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 Interpretative Rulings, \emph{supra} note 57; 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 noncommercial 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: Iranian Monster.com Users Claim Discrimination (National Public Radio broadcast, Apr. 28, 2003), available at http://www.npr.org/templates/story/story.php?storyId=1246331 (last visited Nov. 13, 2004). The company relented after a storm of protest, particularly from Iranian Americans, and now allows candidates to list the countries where they were educated. \textit{Id.}

\textsuperscript{139} The Institute of Electrical and Electronics Engineers, Inc. (IEEE) has 360,000 members in 150 countries. See Kevin Coughlin, \textit{Embargo Ruling Leaves Engineer Club in a Tizzy—Reports from Iran Branch Now Problematic}, \textit{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. \textit{Id.} IEEE was contacted by OFAC when a bank reported a transaction related to a scientific conference in Iran. \textit{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 Web site, and barred them from paying dues electronically. \textit{Id.} In an interpretative 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 Interpretive Rulings, \emph{supra} note 57; 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.” \textit{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 is, therefore, prohibited. \textit{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 value 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 30th 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,
guidance on what constitutes approval and facilitation.\textsuperscript{140} 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.\textsuperscript{141} Unfortunately, the time OFAC takes before issuing a ruling is often too long to be of much help. In one instance, an inquiry was made in February 2001, and the response came on April 30, 2003.\textsuperscript{142} Furthermore, OFAC’s 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 apply the ruling to their particular situation.

\textit{Publishers Grapple with Trade Embargoes, CHRON. 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, \textit{Sometimes, Editing Can Be a Crime; A Dispute Over Work from Iran and Elsewhere}, Nat’l L. J., Mar. 8, 2004, at 6. On April 2, 2004, OFAC relented and permitted IEEE to re-engage in peer review and copy editing. See Letter from R. Richard Newcomb, Director, Office of Foreign Assets Control, to Nelson Dong, Dorsey & Whitney LLP (Apr. 2, 2004) (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) (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”) (on file with author). OFAC cautioned, however, that “collaborative interaction” resulting in coauthorship remains prohibited. \textit{Id.} 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, \textit{A.A.P. Challenges U.S. on Restricted Nations Statute}, PUBLISHERS WEEKLY, Apr. 12, 2004, at 15.

\textsuperscript{140}In only one interpretive ruling does OFAC make direct reference to the facilitation prohibitions. \textit{See Interpretive Rulings, supra} note 57; 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.” \textit{Id.}

\textsuperscript{141}See OFAC Interp. Ruling 030331-FACRL-IA-02 (Mar. 31, 2003) (“OFAC operates under 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, but not export, classifications, although such a conclusion must surely be made at one’s peril.

\textsuperscript{142}See OFAC Interp. Ruling 030450-FACRL-IA-04 (Apr. 30, 2004).
The wait for a ruling is made more impractical because the interpretive rulings are not binding on OFAC and do not provide a “safe harbor” for companies that rely 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 a country under IEEPA-based sanctions.143 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 a charge of impermissible facilitation. The degree of independence exercised by the subsidiary is crucial to determining whether the U.S. company acts properly. The question most U.S. companies thus face 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 immunity to U.S. government disclosure demands. 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 Islands144 and conducts most of its business in Dubai.145 More than a quarter of the $23 billion in non-oil imports into Dubai are re-exported out of the emirate, with Iran receiving the largest share.146 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.”147 Halliburton also claims that “for the most part,” the

143 Prohibiting such ownership or control would undoubtedly raise a howl of protest with strong U.S. trading and military partners.

144 See 60 Minutes, supra note 16. Mail for the Halliburton subsidiary is rerouted to the Halliburton headquarters in Houston. Id. There are no employees on site. Id.

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

146 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.

activities of the different subsidiaries with operations in sanctioned countries are “quite” independent and there is “no coordinated direction” of the activity.\textsuperscript{148}

Such conduct seems to invite investigation.\textsuperscript{149} OFAC could make the argument that the mere creation of a legal entity in a foreign jurisdiction, without staff or 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,\textsuperscript{150} is prohibited under the inchoate criminal prohibitions in the sanctions regimes. The company’s refusal to directly rebut the claim that there is some level of coordination of the foreign entities’ work in sanctioned countries, suggests that some level of coordination does indeed exist. An agreement to work around the sanctions raises concerns about 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, invites inquiry under the inchoate criminal laws.\textsuperscript{151}

What options, then, exist for the vast majority of U.S. companies that have no desire to violate any of the sanctions regimes, but 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 not included in 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,\textsuperscript{152} I clarified several points with OFAC’s

\textsuperscript{148}Id.

\textsuperscript{149}See, e.g., Grassley, supra note 20 (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”).

\textsuperscript{150}See Halliburton Report, supra note 10 (admitting that 100% of HPSL’s revenues are derived from business in Iran).

\textsuperscript{151}Such action 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 supra Parts I and II.

\textsuperscript{152}The client has since abandoned such plans and has waived privilege.
Office of Chief Counsel.\textsuperscript{153} The results confirm a widely held perception that OFAC, deeply concerned about U.S. companies’ efforts to circumvent the spirit of the various trade embargoes, takes the most conservative interpretation possible of the statutory language.

One area which constantly raises questions is the similar, but not identical, structure and language of the various sanctions regimes.\textsuperscript{154} OFAC sometimes takes the view that the language is specific to each sanctions regime, and that the regimes should be read independently of each other.\textsuperscript{155} But OFAC has also taken the view that the analysis is the same no matter which sanctions regime is involved, even though the “facilitation or approval” language is found only in the Iranian and Sudanese transactions regulations. In an interpretive ruling involving Libya and Iraq,\textsuperscript{156} for example, OFAC cautioned an unnamed U.S. person against facilitation, despite the fact that no facilitation language is found in either Iraqi or Libyan sanctions regulations\textsuperscript{157}—only evasion is prohibited under those sanctions regimes.\textsuperscript{158} Similarly, the interpretive sections of the Sudanese transaction regulations, which incidentally only prohibit facilitation, and not approval,\textsuperscript{159} are meant to apply to all sanctions regimes.\textsuperscript{160} The implications of such interpretations 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 to all sanctions regimes, and that the interpretive guidance offered by OFAC is also equally applicable to 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

\begin{footnotes}
\footnote{\textsuperscript{153}Telephone Interview with Office of Chief Counsel, Office of Foreign Assets Control, U.S. Treasury Dept. (Apr. 20, 2004) [hereinafter Interview].}
\footnote{\textsuperscript{154}See supra Part II.B.}
\footnote{\textsuperscript{155}See Interpretive Rulings, supra note 57; OFAC Interp. Ruling 030606-FACRL-IA-07 (June 6, 2003) (limiting its ruling to the Iranian sanctions regime being discussed).}
\footnote{\textsuperscript{156}See OFAC Interp. Ruling 030428-FACRL-LI-01 (Apr. 28, 2003).}
\footnote{\textsuperscript{157}See discussion supra at Part II.B. Facilitation is mentioned only in the Libyan sanctions regulations in connection with the provision of legal services to Libyans on the requirements and compliance with U.S. laws, unless such legal services were provided to facilitate prohibited transactions. See 31 C.F.R. § 550.517 (2004).}
\footnote{\textsuperscript{158}See 31 C.F.R. § 550.208.}
\footnote{\textsuperscript{159}See 31 C.F.R. § 538.206.}
\footnote{\textsuperscript{160}Interview, supra note 153.}
\end{footnotes}
entities. The regulations themselves directly apply to U.S. persons “wherever located.” Consequently, U.S. expatriates may not take any part in a transaction between 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. OFAC insists that such conduct, which on its face violates the Iranian and Sudanese regulations on approval and facilitation, is prohibited.

The extent to which a U.S. company may change policies of its subsidiaries is also problematic. 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 over which it has managerial control from conducting transactions with an IEEPA-based sanctioned country, even though it is perfectly legal for that entity to engage in the transaction. Assume next that a subsidiary is offered a profitable business opportunity in the 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 to allow either transaction from 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 Dubai office, poses another set of problems. One of the incentives for mergers and acquisitions, after all, is greater efficiencies such as the use of a single legal, accounting, and human resources staff, along with one corporate economics and foreign exchange forecasting function, and so on. Even in the absence of a large complex international merger or acquisition, companies often share basic resources such as e-mail service across subsidiaries. Sometimes this level of interdependence


162 See Interview, supra note 153.

163 31 C.F.R. § 560.417(c); 31 C.F.R. § 538.407(c).
between affiliated companies is deep and inseparable. 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 op-
erations of overseas subsidiaries against risk as well. Along the same vein, a
company may have one Treasury function, and rely on only a few rela-
tionship banks for lines of credit that in turn finance operations across
multiple entities. In the inquiry of how much independence is required to
allow the U.S. parent to be shielded from liability on the basis of “approv-
al” and “facilitation,” OFAC views the function of shared office functions as
critically important. The official guidelines in this area are cursory. 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 con-
sidered facilitation. But, sharing back office functions is problematic if it
is specific to a transaction. In such a situation, companies appear to run
afoul of the facilitation provisions by providing support and assistance to-
ward 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, 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

16431 C.F.R. § 538.407(a).
165Interview, supra note 153.
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 addi-
tion, the regulations require the organization to take “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.
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.\(^1\) Even legal advice, which is permitted under various sanctions regimes,\(^2\) may not be provided if such advice could be construed as facilitation or approval.\(^3\)

### IV. Suggestions For Reform

Attention in Washington is starting to turn toward several aspects of OFAC’s operations. In 2001, Congress asked the Judicial Review Commission to conduct a review of OFAC.\(^4\) 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.\(^5\) To address that criticism, OFAC initiated several measures to increase transparency.\(^6\) First, it is using the OFAC Web site, which attracts 1.3 million “hits,” or visits, per month, to promulgate information.\(^7\)

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\(^1\) See 31 C.F.R § 537.409(a); 31 C.F.R. § 538.407(a) (both prohibiting U.S. companies from “assisting” or “supporting” foreign entities in their trade with sanctioned countries).

\(^2\) 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) (authorizing provision of legal services to Government of Iran or persons in Iran, provided such services do not facilitate otherwise prohibited transactions).

\(^3\) Such provisions recall the so-called “Granny’s Lawyer Goes to Jail Act,” part of the 1997 Balanced Budget Act, which made it criminal for attorneys to advise 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. Similar concerns appear to pertain to OFAC’s legal services regulations.

\(^4\) See Statement of R. Richard Newcomb, supra note 22.

\(^5\) Id.

\(^6\) Id.

\(^7\) Id.
Second, it regularly publishes speeches, reports, and Congressional testimony on its Web site.\textsuperscript{174} Third, it has started publishing redacted interpretive rulings.\textsuperscript{175} However, as discussed in Part II above, 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 those 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.\textsuperscript{176} Nonetheless, BIS operates with a level of transparency far beyond that of OFAC. Indeed, BIS recently published a final rule which details how it responds to violations, when it issues warning letters, when it pursues administrative enforcement, and when it refers for criminal enforcement. The rule also explains why it employs certain types of administrative sanctions, how it determines which sanctions are appropriate in a settlement, and how it determines mitigating and aggravating factors.\textsuperscript{177}

The secretive and furtive manner in which OFAC operates may very well be justified by the difficult tasks with which it is charged. 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 is not enough to constitute an effective trade embargo. By regulating through vague and unclear language, however, OFAC has tipped the scale too far toward law enforcement, leaving companies with little 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 regard to sanctioned

\textsuperscript{174}Id.
\textsuperscript{175}Id.
\textsuperscript{176}See Michael T. Burr, Understanding Immigration and Deemed Exports; The Unfortunate Ones, CORP. LEGAL TIMES, Nov. 2002, at 1.
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, 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 many jurisdictions in the United States, both federal and state. The Model Penal Code provides the following definition:

(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.179

What constitutes a “substantial step,” is further defined in the Model Penal Code, 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.181

178 All of the sanctions regimes contain prohibitions against evasions, attempts, and conspiracies. See discussion supra Part II.B.
179 MODEL PENAL CODE § 5.01(1) (1962).
180 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.
181 See MODEL PENAL CODE § 5.01 explanatory note on Subsection 2 (1962).
Likewise, the crime of conspiracy is well understood by most legal scholars and practitioners. The Model Penal Code provides:

(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.\(^{182}\)

The crime of conspiracy, which usually requires an overt act (that does not have to be criminal by itself) to carry out the objective of the conspiracy, is essentially a crime against criminal agreement.\(^{183}\)

Eliminating the “approval” and “facilitation” prohibitions would eliminate the tea-leaf reading that U.S. companies 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),\(^{184}\) 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 create offshore shell companies without real operations. Such conduct would surely be actionable under the inchoate prohibitions against attempt, conspiracy, and evasion.\(^{185}\)

The elimination of the “approval” and “facilitation” prohibitions would undoubtedly shift the policy balance toward recognition that offshore subsidiaries may trade freely with sanctioned countries under their national laws. Some conduct currently expressly prohibited, such as

\(^{182}\)Model Penal Code § 5.03 (1).

\(^{183}\)See Model Penal Code § 5.03 (5).

\(^{184}\)See, e.g., 31 C.F.R. § 560.417(c) (2004); 31 C.F.R. § 538.407(c) (2004).

\(^{185}\)OFAC may well learn a lesson or two from its sister agency, the Internal Revenue Service, which routinely prosecutes companies that use shell companies for tax evasion purposes. See, e.g., Karen J. Boucher & Shona Ponda, Current Corporate Income Tax Developments, Tax Adviser, Apr. 1, 2004, at 230.
referring business opportunities and changing corporate policies, would generally become permissible. Trade between subsidiaries and sanctioned countries may indeed increase. Nevertheless, because companies are highly sensitive to adverse publicity and market mechanisms, they are more likely to heed the lesson learned from Halliburton’s experience and the negative media attention precipitated by its trade with sanctioned countries through foreign subsidiaries. Given this experience, most companies are likely to forgo doing business with Iran, Cuba, Sudan, or Syria, as long as those countries are implicated in violations of international law.

In the alternative, if OFAC chooses not to eliminate the “approval” and “facilitation” prohibitions, it should provide specific guidelines and definitions in order to respond to the business community’s call for predictability. 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. The Commission maintains 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. 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, will go a long way toward 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 in order to steer clear of the “approval” and “facilitation” prohibitions. These guidelines should be clear on what percentage of a

187 See discussion supra Part I.
189 Id. at 144.
190 See Penalty Guidance, supra note 177.
191 This suggestion echoes the call by Senators Grassley and Baucus. See Grassley, supra note 20.
subsidiary’s business may be derived from business operations with a sanctioned country before mere ownership of that subsidiary is considered illegal “approval.”192 In drafting such per se standards, 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,193 U.S. companies may not have the ability to maintain the level of independence from subsidiaries upon which OFAC currently insists.194

Third, OFAC should adopt common “approval” and “facilitation” language across all sanctions regimes and apply a common interpretive definition of what it means to approve and facilitate. The appearance of similar, but not identical, “approval” and “facilitation” language in only the Sudanese, Iranian, and Burmese regulations leads to uncertainty among companies about the applicability of those provisions to other sanctions regimes.195

Fourth, OFAC should expand the legal services exemption in the regulations which currently permits only lawyers to advise on the status of U.S. law.196 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 that goods, capital, and services do not fall into terrorist hands. If a match with a specially designated national is found, when screening for terrorists, the parent company should be able to prevent the transaction from going forward. If a match is not found, the parent company should be able to permit the transaction to proceed without fear of civil or criminal liability.

192The export controls, for example, provide for a de minimis exception on U.S.-origin goods or products of U.S. technology and could provide guidance on when U.S. jurisdictional interests begin. 15 C.F.R. § 734 (Oct. 1, 2002).


194Much 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); Joseph F. Morrissey, Catching the Culprits: Is Sarbanes-Oxley Enough?, 2003 COLUM. BUS. L. REV. 801 (2003). See also MANAGING EXPORTS, supra note 62, at 1 (noting that noncompliance with U.S. export control regulations can lead to Sarbanes-Oxley issues to the extent that such noncompliance can impact a company’s financial statements); Rubinoff, supra note 44 (suggesting incorporating international trade law compliance in an acquisition due diligence questionnaire to avoid liability under Sarbanes Oxley).

195See discussion supra Part II.C.

196See discussion supra note 166.
Screening for potential terrorists, however, should not be the only basis on which U.S. parent companies may veto a potential transaction. OFAC should publish guidelines which permit U.S. companies to veto any proposed transaction by a foreign subsidiary on either legal or public relations grounds.  

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 if companies implement the actions specified in OFAC regulations to achieve compliance. The portions of the Sudanese regulations that specify conduct which is not prohibited facilitation are a good place to start, but OFAC should expand these regulations. 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, or at a minimum to act as a mitigating factor, in determining corporate culpability. OFAC should also clarify which types of actions are not considered facilitation.

V. CONCLUSION

Underlying all U.S. trade sanction policy is a desire to punish a wayward state. When multilateral sanctions are not approved by global bodies such as the United Nations, the United States 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 not to impose sanctions, and are instead pursuing a policy of economic engagement. When unilateral U.S. trade sanctions are not properly implemented, the

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197 The full panoply of legal considerations should be permitted, ranging from specially designated nationals to export controls to defense and trade controls.

198 A company may decide, for example, out of concern about media coverage, 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.

199 See Report, supra note 188, at 141.

200 See 31 C.F.R. § 538.407(b) (2004).

201 See supra note 72.
government’s objectives will almost certainly be undermined or frustrated.202 The prohibition on U.S. parent companies from “approving” or “facilitating” the conduct of foreign affiliates and subsidiaries has led to a paralysis among cautious investors on one hand, and on the other hand to an aggressive interpretation of the law that circumvents the policy intent of U.S. sanctions. Through adoption of the recommendations made in this article, OFAC can finally put to rest the demons of compliance that have vexed U.S. companies for decades, while allowing market mechanisms and greater legal compliance to achieve U.S. policy goals.

202 Peter L. Fitzgerald, Managing “Smart Sanctions” Against Terrorism Wisely, 36 NEW ENG. L. REV. 957, 960 (2002). 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.
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