

Outbound Trade Compliance

Washington, D.C.

BAKER & MCKENZIE

東京青山・青木・狛法律事務所

Client Alert

February 28, 2011

For More Information

Washington, DC Trade Group

Edward E. Dyson, Partner
+1 202 452 7004
edward.dyson@bakermckenzie.com

Nicholas F. Coward, Partner
+1 202 452 7021
nicholas.coward@bakermckenzie.com

Janet K. Kim, Partner
+1 202 835 1653
janet.k.kim@bakermckenzie.com

Sylwia A. Lis, Partner
+1 202 835 6147
sylwia.lis@bakermckenzie.com

Mark D. Menefee, Of Counsel
+1 202 835 4254
mark.menefee@bakermckenzie.com

Alison Stafford Powell, Attorney*
alison.stafford.powell@bakermckenzie.com

Steven F. Hill, Associate
+1 202 835 6121
steven.hill@bakermckenzie.com

Kerry B. Contini, Associate
+1 202 835 6100
kerry.contini@bakermckenzie.com

Lise S. Test, Associate
+1 202 835 6131
lise.test@bakermckenzie.com

Alexandre Lamy, Associate
+1 202 835 1862
alexandre.lamy@bakermckenzie.com

Sunny Mann, Partner
+ 44 20 7919 1397
sunny.mann@bakermckenzie.com

Tristan Grimmer, Associate
+ 44 20 7919 1476
tristan.grimmer@bakermckenzie.com

James Robinson, Associate
+ 44 20 7919 1631
james.robinson@bakermckenzie.com

New Libya Sanctions

This Client Alert reviews recent developments involving the imposition of trade and financial sanctions against Libya. We set out below a summary of measures taken by the United States, the United Nations, the European Union, the United Kingdom, Switzerland, and Canada.

I. United States

On February 25, 2011, in response to ongoing violence against civilians in Libya, President Obama issued an [Executive Order](#) blocking all property interests that are or come into the United States or the possession or control of U.S. Persons of the following Restricted Persons: the Government of Libya (including its agencies, instrumentalities, and controlled entities); the Central Bank of Libya; and Colonel Muammar Qadhafi ("Qadhafi") and his children (the "U.S. Order"). These sanctions took effect at 8 pm Eastern standard time on February 25.

- In addition to imposing an asset freeze, the U.S. Order effectively prohibits all U.S. Persons from engaging in any transactions, whether directly or indirectly, with or for the benefit of Restricted Persons, including Libyan state-owned/controlled commercial enterprises.
- The term "U.S. Person" includes: companies incorporated in the United States and their non-U.S. branches; any entity or individual in the United States; and U.S. citizens and permanent residents (i.e., "green card" holders), wherever located or employed. The term "U.S. Person" does not include non-U.S. subsidiaries of U.S. companies that are separately organized under the laws of another country.
- As drafted, the U.S. Order does not grandfather any pre-existing transactions. Accordingly, companies are encouraged to identify any potential transactions involving the Restricted Persons described in this Client Alert and to suspend any performance or activities under those transactions, pending further clarification from the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC"). Given that pre-existing contracts with Restricted Persons are now blocked, U.S. Persons should refrain from amending or terminating such contracts, pending further guidance from OFAC. In addition, it is not yet clear whether the typical 10-day reporting deadline for holders of blocked property will apply to parties affected by the U.S. Order.

Blocking the Property of the Government of Libya

The U.S. Order blocks all property and interests in property of the Government of Libya, including its agencies, instrumentalities, controlled entities, and the Central Bank of Libya, that come within the United States or within the possession or control of U.S. Persons. With a limited exception for certain third-country financial institutions (described below), these sanctions

Zurich Trade Group

Philippe Reich, Partner
+ 41 44 384 1382
philippe.reich@bakermckenzie.com

Serge Pannatier, Associate
+ 1 416 22 707 98 31
serge.pannatier@bakermckenzie.com

Toronto Trade Group

Paul Burns, Partner
+ 1 416 865 6912
paul.burns@bakermckenzie.com

Lisa Douglas, Associate
+ 1 416 865 6972
lisa.douglas@bakermckenzie.com

Brian Cacic, Associate
+ 1 416 865 2327
brian.cacic@bakermckenzie.com

Amsterdam Trade Group

Jasper Helder, Partner
+ 31 20 551 7579
jasper.helder@bakermckenzie.com

Chiara Klaui, Associate
+ 31 20 551 7812
chiara.kloui@bakermckenzie.com

Hong Kong Trade Group

Eugene Lim, Partner
+ 852 2846 2413
eugene.lim@bakermckenzie.com

apply to commercial entities that are owned or controlled by the Government of Libya, even if located outside of Libya.

Based on other U.S. sanctions programs administered by OFAC that involve blocking orders, we assume that OFAC will interpret the prohibition on dealings in property in which Restricted Persons have an interest to encompass facilitation by U.S. Persons of transactions that U.S. Persons may not undertake directly. If so, this means that U.S. Persons may not approve or in any way support the activities of non-U.S. persons, such as non-U.S. subsidiaries of U.S. companies, involving the Government of Libya or other Restricted Persons.

Notwithstanding the above, on February 25, 2011, OFAC issued [General License No. 1](#), which authorizes transactions by U.S. Persons with financial institutions owned or controlled by the Government of Libya that are organized under the laws of a country other than Libya.

Blocking the Property of Qadhafi and Other Persons and Travel Ban

The U.S. Order also blocks all property and interests in property of Qadhafi and four other individuals who are either senior officials of the Government of Libya or Qadhafi's children. On February 25, 2011, OFAC [announced](#) that these individuals' names have been added to the Specially Designated Nationals and Blocked Persons List ("[SDN List](#)"). Pursuant to 2008 [guidance](#) issued by OFAC in connection with sanctions programs involving blocking orders and persons on the SDN List, any entity in which these listed persons own, directly or indirectly, a 50% or greater interest would also be considered a Restricted Person, even if not specifically identified on the SDN List.

The U.S. Order also gives OFAC broad authority to designate additional parties, including (i) senior officials of the Government of Libya; (ii) a child of Qadhafi; (iii) persons involved in committing human rights abuses related to political repression in Libya; (iv) persons that have materially assisted or supported such human rights abuses or blocked persons designated under the U.S. Order; (v) persons owned or controlled by, or acting on behalf of, a blocked person; and (vi) a spouse or dependent child of a blocked person. As OFAC could in the future designate additional parties pursuant to the U.S. Order, it is important to screen all parties to transactions involving Libya against the current version of the SDN List.

Further, on February 26, 2011, Secretary of State Clinton [announced](#) that she had signed an order directing the State Department to revoke U.S. visas held by senior officials of the Qadhafi regime, others responsible for human rights violations in Libya, and their immediate family members, with new visa applications denied as a matter of policy. Additional details about these travel restrictions have not been made public.

Guidance for U.S. Financial Institutions

On February 24, 2011, the Treasury Department's Financial Crimes Enforcement Network ("[FinCEN](#)") issued [guidance](#) to U.S. financial institutions regarding events in Libya. FinCEN's guidance advises U.S. financial institutions to apply enhanced scrutiny for private banking accounts held by or on behalf of Libyan "senior foreign political figures" and to monitor transactions that could potentially represent misappropriated or diverted state assets, proceeds of bribery or other illegal payments, or other public corruption proceeds involving Libya. U.S. financial institutions that know, suspect, or have reason to know such activities are occurring are directed to file a Suspicious Activity Report with FinCEN.

Suspension of DDTC Licenses for Libya

On February 26, 2011, the U.S. State Department's Directorate of Defense Trade Controls ("DDTC") [announced](#) that it was suspending all licenses for the export of defense articles or services to Libya, until further notice. No exports to Libya may be made under previously issued DDTC licenses, and no exemptions from licensing requirements in the International Traffic in Arms Regulations, 22 C.F.R. Part 120 *et seq.*, may be used to export defense articles or services to Libya. The announcement states that DDTC will provide further guidance at a later date in a notice to be published in the *Federal Register*.

Dual-Use Export Controls

At this time, the U.S. Commerce Department's Bureau of Industry and Security has not announced any changes to export controls applicable to Libya under the Export Administration Regulations ("EAR"), 15 C.F.R. Part 730 *et seq.* Accordingly, exports and reexports to Libya of goods, technology, or software subject to the EAR remain subject to the EAR provisions in effect prior to the U.S. Order, provided that to the extent U.S. Persons are involved, the export or reexport is not to or for the benefit of the Government of Libya or any other Restricted Person. Nonetheless, given the breadth of the new U.S. sanctions administered by OFAC and the potential for the continued strengthening of the Libya sanctions, we recommend that all transactions subject to the EAR and involving Libya be subjected to careful compliance review.

II. United Nations

On February 26, 2011, the United Nations Security Council unanimously adopted [Resolution 1970](#) to impose sanctions against Libya. Among other things, Resolution 1970 authorizes an arms embargo on Libya as well as an asset freeze and travel ban applicable to officials of the Government of Libya.

III. European Union

The European Union has already moved to implement Resolution 1970 through the adoption of a Council Decision on February 28, 2011. The text of the Council Decision has not yet been published, but according to a [press release](#) from the Council of the European Union, the measures extend to freezing the funds and economic resources of Qadhafi and certain family members. Going beyond the minimum requirements of Resolution 1970, the EU is also unilaterally targeting a further twenty individuals. The full text of the applicable EU legislation will be published in the coming days.

IV. United Kingdom

The United Kingdom has already implemented Resolution 1970 through the [Libya \(Financial Sanctions\) Order 2011](#) ("UK Order"), which came into force at 5:15 pm London time on February 27, 2011. It is not uncommon for the UK to implement UN resolutions ahead of any EU implementation, in order to avoid any delay that might allow assets to be moved out of the jurisdiction. The UK will also clearly follow the full text of additional EU measures.

Under the UK Order, as it currently stands, all funds and assets belonging to Qadhafi and those individuals designated by Resolution 1970, or belonging to any individuals or entities acting on behalf of, owned or controlled by such persons, are frozen. The UK Order further prohibits the making available of any funds or economic resources, directly or indirectly, to or for the benefit of these designated persons. All financial institutions, and other bodies and persons in the UK, must inform HM Treasury if they hold any funds, financial

assets, or economic resources that are subject to the freezing requirement. The UK Order (and, indeed, the EU legislation) will impact not only dealings with Qadhafi and his family, but also those entities that they own or control. As noted by HM Treasury, this is likely, in practice, to extend to dealings with many Libyan state enterprises.

The UK Department for Business, Innovation and Skills ("UK BIS") is also introducing heightened export controls in order to implement the arms embargo contained in Resolution 1970 and to restrict the supply of other sensitive items. The full details of measures taken by UK BIS are yet to be published.

V. Switzerland

On February 24, 2011, the Swiss Federal Council decided to block with immediate effect all assets, funds, and resources of Qadhafi, his relatives, and his entourage held in Switzerland, and to prohibit the sale or disposal of any goods—in particular real estate—belonging to these persons. Any violations of these sanctions are subject to fines up to 10 times the value of the funds or resources in question. Persons aware of such funds or resources are under a duty to notify the authorities thereof. The Swiss Government thus intends to take all reasonably necessary steps to avoid any diversion of Libyan state assets that may still be held in Switzerland. The [Ordinance](#) (in French) is valid for three years, and the list of persons can be changed by the Federal Department of Foreign Affairs at any time.

VI. Canada

Canada has implemented Resolution 1970 pursuant to the United Nations Act (Canada). In addition to implementing Resolution 1970 into Canadian law, Canada will also implement further economic sanctions against Libya as regulations made under the [Special Economic Measures Act](#) ("SEMA"). Sanctions are imposed under SEMA in situations where the Government of Canada has determined that a "grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis." While the official text of the SEMA sanctions against Libya have yet to be published, the Government of Canada has indicated that the sanctions will contain additional measures to impose an asset freeze and prohibit financial transactions with the Government of Libya, its institutions, and agencies, and the Central Bank of Libya.

* * *

Because additional sanctions are possible in the near future, Baker & McKenzie is monitoring this situation closely. In this context, all potential transactions and activities involving Libya should be carefully reviewed for compliance with the Libya sanctions in each relevant jurisdiction.

The foregoing is intended only to provide a general overview of the new Libya sanctions. Please do not hesitate to contact us if you have any questions about how these changes might affect your company or if you require advice on any specific transactions or plans.

©2011 Baker & McKenzie. All rights reserved. Baker & McKenzie GJB Tokyo Aoyama Aoki Koma Law Office (Gaikokuho Joint Enterprise) is a member firm of Baker & McKenzie International, a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

This Publication has been prepared for clients and professional associates of Baker & McKenzie. Whilst every effort has been made to ensure accuracy, this Publication is not an exhaustive treatment of the area of law discussed and no responsibility for any loss occasioned to any person acting or refraining from action as a result of material in this Publication is accepted by Baker & McKenzie.

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.