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Foreign Subsidiaries of US Firms Subject to Plenary Extraterritorial US Jurisdiction Under Proposed EAA Replacement HR 2400

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On May 26, 2011, Representative Howard Berman introduced into the US House of Representatives, a bill [H.R. 2400] to replace the lapsed Export Administration Act of 1979 [EAA].

The definition of "United States Person" contained in Sec. 2(13)(C) of H.R. 2400 is noteworthy. The definition extends the jurisdiction of H.R. 2400 to foreign subsidiaries, foreign affiliates or foreign joint ventures "controlled in fact" by any companies or any entities operating in the US, or organized under the laws of, the US.

HR 2400 Section 2(13) provides:

"(13) The term 'United States person' means - (A) any individual who is a United States citizen or an alien lawfully admitted for permanent residence to the United

States; (B) any business or other entity operating in the United States or organized under the laws of the United States; and (C) ANY BUSINESS OR OTHER ENTITY THAT IS ORGANIZED UNDER THE LAWS OF A FOREIGN COUNTRY BUT IS CONTROLLED IN FACT BY A BUSINESS OR ENTITY DESCRIBED IN SUBPARAGRAPH (B), AS DETERMINED UNDER REGULATIONS OF THE PRESIDENT." [Emphasis added.]

The authority granted by HR 2400 to the President with respect to "United States persons" is broad and sweeping.

HR 2400 Section 103(a)(1) provides "the President shall control the transfer of items by United States persons, wherever located, and by foreign persons who are subject to the jurisdiction of the United States."

HR 2400 Section 104(a)(5) provides that in carrying out HR 2400 the President shall "require licenses for transfers of controlled items, including imposing conditions or restrictions on United States persons and foreign persons with respect to such licenses."

HR 2400's definition of "United States person" sharply enlarges the jurisdictional reach of HR 2400 from the current version of Section 5(a)(1) of the lapsed EAA and the definition of "US person" in Part 772 of the Export Administration Regulations [EAR, 15 CFR Part 772].

Section 5 (a)(1) of the lapsed EAA provides that "the President may in accordance with this section, prohibit or curtail the export of any goods or technology subject to the jurisdiction of the United States or export by any person subject to the jurisdiction of the United States." This statutory language has NOT been implemented to extend general plenary extraterritorial jurisdiction over foreign subsidiaries, foreign affiliates or foreign joint ventures for all EAA purposes.

The HR 2400 definition of "US person" mirrors the definition of "United States person" which is now uniquely confined to the EAR Antiboycott Regulations [15

CFR 760.1]. The statutory expansion of the definition of "United States person" to ALL authority of the President under HR 2400, and not merely to the Antiboycott Regulations, represents a significant policy shift from the status quo. Indeed, currently, only the OFAC Cuban Assets Control Regulations extend general plenary extraterritorial jurisdiction over foreign subsidiaries' transactions with respect to Cuba pursuant to 31 CFR 515.329(d).

If ultimately enacted into law, this Congressionally imposed expansion of the definition of "United States Person" for all HR 2400 export control authorities or purposes, strongly foreshadows a US export regime that will be forced to more highly oversee and constrain the activities of US companies' "controlled in fact" foreign subsidiaries, foreign affiliates and foreign joint ventures with respect to such foreign entities' worldwide activities.