

**DRAFT**  
**SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY AND CONSISTENCY**  
**MARCH 1, 2004**

**U.S. B Australia Free Trade Agreement**

**Annex I**  
**Services/Investment Non-Conforming Measures**

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**ANNEX I**

1. The Schedule of a Party to this Annex sets out, pursuant to Articles 11.13 (Investment Non-Conforming Measures) and 10.6 (Services Non-Conforming Measures), a Party's existing measures that are not subject to some or all of the obligations imposed by:
  - (a) Article 11.3 or 10.2 (Investment and Services National Treatment);
  - (b) Article 11.4 or 10.3 (Investment and Services Most-Favored-Nation Treatment);
  - (c) Article 10.5 (Services Local Presence);
  - (d) Article 11.9 (Investment Performance Requirements);
  - (e) Article 11.10 (Investment Senior Management and Boards of Directors); or
  - (f) Article 10.4 (Services Market Access).
2. Each Schedule entry sets out the following elements:
  - (a) **Sector** refers to the sector for which the entry is made;
  - (b) **Obligations Concerned** specifies the obligation(s) referred to in paragraph 1 that, pursuant to Articles 11.13.1(a) (Investment Non-Conforming Measures) and 10.6.1(a) (Services Non-Conforming Measures), do not apply to the listed measure(s);
  - (c) **Level of Government** indicates the level of government maintaining the listed measure(s);
  - (d) For the United States, **Measures** identifies the laws, regulations, or other measures for which the entry is made. For Australia, **Source of Measure** means the laws, regulations, or other measures that are the source of the non-conforming measure for which the entry is made. A measure cited in the **Measures** or **Source of Measure** element:
    - (i) means the measure as amended, continued, or renewed as of the date of entry into force of this Agreement, and
    - (ii) includes any subordinate measure adopted or maintained under the authority of and consistent with the measure;

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- (e) **Description**, for Australia, sets out the non-conforming measure for which the entry is made; and **Description**, for the United States, provides a general, nonbinding, description of the **Measures**.

3. In accordance with Article 11.13.1(a) (Investment Non-Conforming Measures) and 10.6.1(a) (Services Non-Conforming Measures), the articles of this Agreement specified in the **Obligations Concerned** element of an entry do not apply to the non-conforming measure identified in the **Description** (for Australia) or **Measures** (for the United States) element of that entry.

4. Where a Party maintains a measure that requires that a service provider be a citizen, permanent resident, or resident of its territory as a condition to the supply of a service in its territory, a Schedule entry for that measure taken with respect to Article 10.2 (Services National Treatment), 10.3 (Services Most-Favored-Nation Treatment), or 10.5 (Services Local Presence) shall operate as a Schedule entry with respect to Article 11.3 (Investment National Treatment), 11.4 (Investment Most-Favored-Nation Treatment), or 11.9 (Investment Performance Requirements) to the extent of that measure.

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**ANNEX I**

**Annex I**  
**Schedule of the United States**

**Sector:** Atomic Energy

**Obligations Concerned:** National Treatment (Article )

**Level of Government:** Central

**Measures:** *Atomic Energy Act of 1954*, 42 U.S.C. §§ 2011 et seq.

**Description:** Investment

A license issued by the United States Nuclear Regulatory Commission is required for any person in the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, use, import, or export any nuclear “utilization or production facilities” for commercial or industrial purposes. Such a license may not be issued to any entity known or believed to be owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government (42 U.S.C. § 2133(d)). A license issued by the United States Nuclear Regulatory Commission is also required for nuclear “utilization and production facilities,” for use in medical therapy, or for research and development activities. The issuance of such a license to any entity known or believed to be owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government is also prohibited (42 U.S.C. § 2134(d)).

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**Sector:** Business Services

**Obligations Concerned:** National Treatment (Article )  
Local Presence (Article )

**Level of Government:** Central

**Measures:** *Export Trading Company Act of 1982*, 15 U.S.C. §§ 4011-4021  
15 C.F.R. Part 325

**Description:** Cross-Border Services

Title III of the *Export Trading Company Act of 1982* authorizes the Secretary of Commerce to issue “certificates of review” with respect to export conduct. The Act provides for the issuance of a certificate of review where the Secretary determines, and the Attorney General concurs, that the export conduct specified in an application will not have the anticompetitive effects proscribed by the Act. A certificate of review limits the liability under federal and state antitrust laws in engaging in the export conduct certified.

Only a “person” as defined by the Act can apply for a certificate of review. “Person” means “an individual who is a resident of the United States; a partnership that is created under and exists pursuant to the laws of any State or of the United States; a State or local government entity; a corporation, whether organized as a profit or nonprofit corporation, that is created under and exists pursuant to the laws of any State or of the United States; or any association or combination, by contract or other arrangement, between such persons.”

A foreign national or enterprise may receive the protection provided by a certificate of review by becoming a “member” of a qualified applicant. The regulations define “member” to mean “an entity (U.S. or foreign) that is seeking protection under the certificate with the applicant. A member may be a partner in a partnership or a joint venture; a shareholder of a corporation; or a participant in an association, cooperative, or other form of profit or

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nonprofit organization or relationship, by contract or other arrangement.”

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**Sector:** Business Services

**Obligations Concerned:** National Treatment (Article )  
Local Presence (Article )

**Level of Government:** Central

**Measures:** *Export Administration Act of 1979, as amended, 50 U.S.C. app. 2401-2420.*

*International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706.*

*Export Administration Regulations, 15 C.F.R. Parts 730 through 774.*

**Description:** Cross-Border Services

With some limited exceptions, exports and reexports of commodities, software, and technology subject to the Export Administration Regulations require a license from the Bureau of Industry and Security, U.S. Department of Commerce (BIS). Certain activities of U.S. persons, wherever located, also require a license from BIS. An application for a license must be made by a person in the United States.

In addition, release of controlled technology to a foreign national in the United States is deemed to be an export to the home country of the foreign national and requires the same written authorization from BIS as an export from the territory of the United States.

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**Sector:** Mining

**Obligations Concerned:** National Treatment (Article )  
Most-Favored-Nation Treatment (Article )

**Level of Government:** Central

**Measures:** *Mineral Lands Leasing Act of 1920*, 30 U.S.C. Chapter 3A  
  
10 U.S.C. § 7435

**Description:** Investment

Under the Mineral Lands Leasing Act of 1920, aliens and foreign corporations may not acquire rights-of-way for oil or gas pipelines, or pipelines carrying products refined from oil and gas, across on-shore federal lands or acquire leases or interests in certain minerals on on-shore federal lands, such as coal or oil. Non-U.S. citizens may own a 100 percent interest in a domestic corporation that acquires a right-of-way for oil or gas pipelines across on-shore federal lands, or that acquires a lease to develop mineral resources on on-shore federal lands, unless the foreign investor's home country denies similar or like privileges for the mineral or access in question to U.S. citizens or corporations, as compared with the privileges it accords to its own citizens or corporations or to the citizens or corporations of other countries (30 U.S.C. §§ 181, 185(a)).

Nationalization is not considered to be denial of similar or like privileges.

Foreign citizens, or corporations controlled by them, are restricted from obtaining access to federal leases on Naval Petroleum Reserves if the laws, customs, or regulations of their country deny the privilege of leasing public lands to citizens or corporations of the United States (10 U.S.C. § 7435).



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**Sector:** All Sectors

**Obligations Concerned:** National Treatment (Article )  
Most-Favored-Nation Treatment (Article )

**Level of Government:** Central

**Measures:** 22 U.S.C. §§ 2194 and 2198(c)

**Description:** Investment

The Overseas Private Investment Corporation insurance and loan guarantees are not available to certain aliens, foreign enterprises, or foreign-controlled domestic enterprises.

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- Sector:** Air Transportation
- Obligations Concerned:** National Treatment (Article )  
Most-Favored-Nation Treatment (Article )  
Senior Management and Boards of Directors (Article )
- Level of Government:** Central
- Measures:** 49 U.S.C. Subtitle VII, *Aviation Programs*  
14 C.F. R. Part 297 (foreign freight forwarders); 14 C.F.R. Part 380, Subpart E (registration of foreign (passenger) charter operators)
- Description:** Investment
- Only air carriers that are “citizens of the United States” may operate aircraft in domestic air service (cabotage) and may provide international scheduled and non-scheduled air service as U.S. air carriers.
- U.S. citizens also have blanket authority to engage in indirect air transportation activities (air freight forwarding and passenger charter activities other than as actual operators of the aircraft). In order to conduct such activities, non-U.S. citizens must obtain authority from the Department of Transportation. Applications for such authority may be rejected for reasons relating to the failure of effective reciprocity, or if the Department of Transportation finds that it is in the public interest to do so.
- Under 49 U.S.C. § 40102(15), a “citizen of the United States” means:
- (a) an individual who is a U.S. citizen;
  - (b) a partnership in which each member is a U.S. citizen; or
  - (c) a U.S. corporation of which the president and at least two-thirds of the board of directors and other managing officers are U.S. citizens, and at least 75 percent of the voting

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interest in the corporation is owned or controlled by U.S. citizens.

In addition, this statutory requirement has historically been interpreted by the Department of Transportation (and the Civil Aeronautics Board before it) to require that an air carrier in fact be under the actual control of U.S. citizens. The Department of Transportation makes this determination on a case-by-case basis, and has provided guidance as to certain lines of demarcation. For example, total foreign equity investment of up to 49 percent (with a maximum of 25 percent being voting stock), by itself, is not construed as indicative of foreign control. See Department of Transportation Order 91-1-41, January 23, 1991.

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**Sector:** Air Transportation

**Obligations Concerned:** National Treatment (Articles )  
Most-Favored-Nation Treatment (Articles )  
Local Presence (Article )  
Senior Management and Boards of Directors (Article )

**Level of Government:** Central

**Measures:** 49 U.S.C., Subtitle VII, Aviation Programs  
49 U.S.C. § 41703

14 C.F.R. Part 375

As qualified by paragraph 2 of the **Description** element

**Description:** Cross-Border Services

1. Authorization from the Department of Transportation is required for the provision of specialty air services in the territory of the United States.\*

Investment

2. “Foreign civil aircraft” require authority from the Department of Transportation to conduct specialty air services in the territory of the United States. “Foreign civil aircraft” are aircraft of foreign registry or aircraft of U.S. registry that are owned, controlled, or operated by persons who are not citizens or permanent residents of the United States (14 C.F.R. § 375.1). Under 49 U.S.C. § 40102(15), a “citizen of the United States” means:

- (a) an individual who is a U.S. citizen;
- (b) a partnership in which each member is a U.S. citizen; or
- (c) a U.S. corporation of which the president and at least two-thirds of the board of directors and other managing officers

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are U.S. citizens, and at least seventy-five percent of the voting interest in the corporation is owned or controlled by U.S. citizens.

In addition, this statutory requirement has historically been interpreted by the Department of Transportation (and the Civil Aeronautics Board before it) to require that an air carrier in fact be under the actual control of U.S. citizens. The Department of Transportation makes this determination on a case-by-case basis, and has provided guidance as to certain lines of demarcation. For example, total foreign equity investment of up to 49 percent (with a maximum of 25 percent being voting stock), by itself, is not construed as indicative of foreign control. See Department of Transportation Order 91-1-41, January 23, 1991.

\*A person of Australia will be able to obtain such an authorization given Australia's acceptance of the U.S. definition of specialty air for the Cross-Border Services Chapter.

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**Sector:** Transportation Services - Customs Brokers

**Obligations Concerned:** National Treatment (Articles )  
Local Presence (Article )

**Level of Government:** Central

**Measures:** 19 U.S.C. § 1641(b)

**Description:** Cross-Border Services and Investment

A customs broker's license is required to conduct customs business on behalf of another person. Only U.S. citizens may obtain such a license. A corporation, association, or partnership established under the law of any state may receive a customs broker's license if at least one officer of the corporation or association, or one member of the partnership, holds a valid customs broker's license.

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**Sector:** All Sectors

**Obligations Concerned:** National Treatment (Article )  
Most-Favored-Nation Treatment (Article )

**Level of Government:** Central

**Measures:** *Securities Act of 1933*, 15 U.S.C. §§ 77C(b), 77f, 77g, 77h, 77j,  
and 77s(a)

17 C.F.R. §§ 230.251 and 230.405

*Securities Exchange Act of 1934*, 15 U.S.C. §§ 78l, 78m, 78o(d),  
and 78w(a)

17 C.F.R. § 240.12b-2

**Description:** Investment

Foreign firms, except for certain Canadian issuers, may not use the small business registration forms under the Securities Act of 1933 to register public offerings of securities or the small business registration forms under the Securities Exchange Act of 1934 to register a class of securities or file annual reports.

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**Sector:** Communications – Radiocommunications

**Obligations Concerned:** National Treatment (Article )

**Level of Government:** Central

**Measures:** 47 U.S.C. § 310  
Foreign Participation Order 12 FCC Red 23841 (1997)

**Description:** Investment

The United States reserves the right to restrict ownership of radio licenses in accordance with the above statutory and regulatory provisions. Radiocommunications consists of all communications by radio, including broadcasting.



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**Sector:** Professional Services - Patent Attorneys, Patent Agents, and Other Practice before the Patent and Trademark Office

**Obligations Concerned:** National Treatment (Article )  
Most-Favored-Nation Treatment (Article )  
Local Presence (Article )

**Level of Government:** Central

**Measures:** 35 U.S.C. Chapter 3 (practice before the U.S. Patent and Trademark Office)

37 C.F.R. Part 10 (representation of others before the U.S. Patent and Trademark Office)

**Description:** Cross-Border Services

As a condition to be registered to practice for others before the U.S. Patent and Trademark Office (USPTO):

- (a) a patent attorney must be a U.S. citizen or an alien lawfully residing in the United States (37 C.F.R. § 10.6(a));
- (b) a patent agent must be a U.S. citizen, an alien lawfully residing in the United States, or a non-resident who is registered to practice in a country that permits patent agents registered to practice before the USPTO to practice in that country; the latter is permitted to practice for the limited purpose of presenting and prosecuting patent applications of applicants located in the country in which he or she resides (37 C.F.R. §10.6(c)); and
- (c) a practitioner in trademark and non-patent cases must be an attorney licensed in the United States, a “grandfathered” agent, an attorney licensed to practice in a country that accords equivalent treatment to attorneys licensed in the United States, or an agent registered to practice in such a country; the latter two are permitted to practice for the limited purpose of representing parties located in the country in which he or she resides (37 C.F.R. § 10.14(a)-

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**Sector:** All Sectors

**Obligations Concerned:** National Treatment (Articles )  
Most-Favored-Nation Treatment (Articles )  
Local Presence (Article )  
Performance Requirements (Article )  
Senior Management and Boards of Directors (Article )

**Level of Government:** Regional

**Measures:** All existing non-conforming measures of all states of the United States, the District of Columbia, and Puerto Rico

**Description:** Cross-Border Services and Investment