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EXPORT CONTROLS UPDATE August 2008

This newsletter is a summary of changes to US export control regulations or other regulatory matters of interest for the month of August 2008.

REGULATORY UPDATES

The President

Aug. 28, 2008: President Bush certified to Congress that the export to China of one two-inch fluid energy mill to be used for the research and development of pharmaceutical powders and ten accelerometers for incorporation into railway geometry measurement systems would not be detrimental to the U.S. space industry and would not measurably improve China's missile or space launch capabilities. The Strom Thurmond National Defense Authorization Act for FY 1999 requires such a certification for any export of missile technology or equipment to China.

Department of Commerce

Aug. 21, 2008 – 73 Fed. Reg. 49311: The Bureau of Industry and Security (BIS) published a final rule amending Part 744 of the Export Administration Regulations (EAR) to expand the criteria for including a party on the Entity List. The rule also provides a procedure for a party listed on the Entity List to request that the listing be modified or removed. Parties listed on the Entity List are subject to increased export licensing requirements, as described in each individual listing. Under the new rule, an entity (or those acting on its behalf) can be included on the Entity List when “[t]here is reasonable cause to believe ...that the entity has been involved, is involved, or poses a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States.” The Entity List is to be reviewed at least annually by BIS’ End User Review Committee under procedures described in a new Supplement No. 5 to Part 744.

Aug. 21, 2008 – 73 Fed. Reg. 49323: BIS published a final rule requiring electronic submissions using the “SNAP-R” (Simplified Network Application Process Redesign) web-based system for the following submissions:

- Export license applications (except applications for Special Comprehensive Licenses and Special Iraq Reconstruction Licenses);
- Reexport licensed applications;
- Classification requests;
- Encryption review requests;
- License Exception AGR notifications; and
- All documents submitted in support of or related to the above submissions.

Paper submissions for these purposes will be permitted only with the express authorization of BIS.

This newsletter is provided as a service to our clients and is not intended to replace the ITAR or EAR as a reference source. If you have questions concerning the correct interpretation of the regulations please call us at (703) 847-5801.

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Aug. 22, 2008 – 73 Fed. Reg. 49645: BIS extended until Sep. 22, 2008 the comment period on two recommendations of the Deemed Export Advisory Committee. One recommendation concerns the possible narrowing of the scope of technologies on the Commerce Control List (CCL) that are subject to deemed export licensing requirements. The other concerns the criteria that should be used to assess country affiliation for foreign nationals with respect to deemed exports.

Department of Defense

Aug. 1, 2008: The Defense Security Cooperation Agency (DSCA) notified Congress of the following possible foreign military sales:

- missiles, avionics, radio systems, and associated articles and services, estimated total value \$1.5 billion, to Australia;
- unmanned aerial vehicles, mobile ground control stations, and associated articles and services, estimated total value \$205 million, to Germany; and
- unmanned aerial vehicles, mobile ground control stations, and associated articles and services, estimated total value \$330 million, to Italy.

Department of Justice

Aug. 28, 2008 – The Department of Justice issued new corporate charging guidelines that will be applicable to the criminal prosecution of business organizations for export control and other violations. The guidelines deal with the circumstances under which prosecutors give a defendant credit for cooperation with the prosecution. Among other changes, a defendant's refusal to waive the attorney-client privilege will no longer be a factor in determining whether the defendant has cooperated with the prosecution. Also, prosecutors will not evaluate a corporation's cooperation based on whether the company disciplined or terminated employees. See the new guidelines at <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>.

Department of State

Aug. 7, 2008: The Directorate of Defense Trade Controls (DDTC) posted detailed guidelines for license support documentation on its website at www.pmdtc.state.gov/license_support.htm. Among other things, DDTC stated that in addition to requiring a purchase order, letter of intent, or other documentation, it may require submission of a signed contract with an application for permanent export. DDTC also posted Frequently Asked Questions (FAQs) on license support documentation at www.pmdtc.state.gov/docs/FAQs_licenseSupport.doc. Applications that fail to comply with the documentation requirements will be returned without action.

Aug. 14, 2008 – 73 Fed. Reg. 47523: DDTC published a final rule amending U.S. Munitions List (USML) Category VIII to specify how criteria provided in Section 17(c) of the Export Administration Act (EAA) should be applied to determine whether the EAR or the ITAR will control certain basic parts and components that have a long history of use on both civil and military aircraft. Amended USML subcategories VIII(b) and (h), and an important note to Category VIII(h), provide that any part or component that (a) is standard equipment, (b) is covered by a civil aircraft type certificate (including amended and supplemental type certificates) issued by the Federal Aviation Administration for civil, non-military aircraft, and (c) is an integral part of such civil aircraft is subject to the EAR rather than the ITAR. This final regulation also includes other important provisions concerning Commerce vs. State Department jurisdiction over aircraft components.. Contact us for details.

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Aug. 14, 2008: DDTC posted FAQs about issues involving dual/third-country nationals in technical assistance agreements and manufacturing license agreements. The FAQs pertain mostly to dual/third-country nationals who are citizens of countries favored under International Traffic in Arms Regulations (ITAR) Sec. 124.16 – NATO members, the European Union, Australia, Japan, New Zealand, and Switzerland. These FAQs are at http://www.pmdrtc.state.gov/docs/FAQs_Section3_ag.doc.

FINES & PENALTIES

July 31, 2008: Donald Wayne Hatch of Washougal, WA, owner of Rigel Optics Inc. of Washougal, pleaded guilty in the Des Moines, Iowa to a charge of causing false statements to be made in a matter under the jurisdiction of the U.S. Department of Commerce. At the same time, Rigel Optics pleaded guilty to violating the Arms Export Control Act (AECA) by exporting “generation 2” night-vision goggles and rifle scopes without a the required license from the State Department. Hatch faces up to 5 years of imprisonment and a \$250,000 fine for the false statement charge, and Rigel Optics faces a maximum fine of up to \$1 million for the illegal exports.

Aug. 6, 2008: DDTC announced that Lockheed Martin Corporation had agreed to pay a fine of \$4 million for violating the AECA and the ITAR by making an unauthorized proposal to sell significant military equipment – Hellfire missiles – to the United Arab Emirates; and in connection with that proposal, transferring technical data to the UAE without a license, failing to comply with requirements for safeguarding classified information, and failure to obtain a Non-Transfer and Use Certificate; and, in a separate transaction, by making an unauthorized export of classified information on the Joint Air-to-Surface Stand-off Missile. Although Lockheed voluntarily disclosed these violations and cooperated in DDTC’s investigation – mitigating factors in determining a penalty – DDTC took action against Lockheed because the violations involved classified information and potential harm to U.S. national security and foreign policy interests.

Under Lockheed’s Consent Agreement with DDTC, Lockheed will appoint an Internal Special Compliance Official for a minimum of 2 years, implement specified compliance measures, conduct internal reviews of AECA and ITAR compliance for ITAR-related business units, establish necessary actions to ensure that sufficient resources are dedicated to compliance, provide semi-annual compliance status reports to DDTC, and have its corrective actions and their effectiveness audited by an outside consultant. One million dollars of the \$4 million penalty will be suspended on the condition that it be spent for remedial measures to comply with the Consent Agreement.

Aug. 8, 2008: Tai Shen Kuo of New Orleans, LA was sentenced in federal court for the Eastern District of Virginia to 188 months in prison and forfeiture of \$40,000 for conspiracy to deliver national defense information to a foreign government. Kuo had cultivated a friendship with Gregg W. Bergersen, a weapons systems policy analyst at DSCA, and had received classified defense information from Bergersen. Bergersen, who did not know that Kuo was passing the information to China, was sentenced on July 11, 2008 to 57 months in prison followed by 3 years supervised release. (See July 2008 Update.) Yu Xin Kang, a co-conspirator in the case, was sentenced to 18 months in prison on August 1, 2008, for aiding and abetting an unregistered agent of a foreign government.

Aug. 11, 2008: Ingersoll Machine Tools of Rockford, IL agreed to pay a \$126,000 civil penalty to settle charges of committing eight unlicensed deemed exports to Italian and Indian foreign nationals. The

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exports involved production and development technology for vertical fiber placement machines and production technology for five-axis milling machines.

Aug. 11, 2008: Advanced Micro Devices of Austin, TX agreed to pay \$11,000 to settle charges of unauthorized exports of microprocessor technology to Ukraine and China.

Aug. 12, 2008: Reson A/S of Slangerup, Denmark agreed to pay a \$119,250 civil penalty to settle charges by BIS of 29 violations of the EAR. In addition, Reson subsidiaries in Goleta, CA, Aberdeen, UK, and Cape Town, South Africa settled for civil penalties of \$83,000, \$9,900, and \$29,700, respectively, for their roles in the violations. The violations involved unlicensed exports and reexports of underwater echosounders controlled under ECCN 6A001 to Denmark, the United Kingdom, South Africa, Singapore, the UAE, Mozambique, Taiwan, Russia, and India. Reson voluntarily disclosed the violations.

Aug. 15, 2008: Johnson Trading & Engineering Company, Ltd. of Taiwan agreed to pay a civil penalty of \$90,000 to settle charges by BIS that it knowingly caused the unlicensed export to China of controlled computer chips, and that it took action to evade the requirements of the EAR by falsely declaring to the U.S. exporter that the country of ultimate destination was Taiwan and then facilitating the shipment of the chips to China via Hong Kong. Johnson Trading also agreed to a suspended five-year denial of export privileges and an audit of the company's export compliance program. \$30,000 of the \$90,000 penalty will be suspended if Johnson complies with the other terms of the agreement.

Aug. 18, 2008: BAX Global Inc. of Oak Creek, WI agreed to pay \$20,000 to settle charges of 3 exports of HLA tissue typing trays to Syria without the required authorization. The exports required licenses under General Order No. 2 of Supp. No. 1 to EAR Part 736, which requires a license for export or reexport to Syria of all items subject to the EAR, except food and EAR 99 medicine.

Aug. 20, 2008: Cargoland Air and Ocean Cargo, Inc. of Doral, FL agreed to pay a civil penalty of \$36,000 to settle charges that it attempted to export 210 riot helmets classified under ECCN 0A979 to Venezuela without the required authorization. Items classified under ECCN 0A979 are controlled for reasons of crime control and detection and require licenses for export to countries (including Venezuela) that are identified under CC Column 1 of the Country Chart.

Aug. 20, 2008: In a further installment of a multi-faceted criminal prosecution, Atmospheric Glow Technologies Inc. of Knoxville, TN pleaded guilty to ten illegal exports to a Chinese national of ITAR-controlled technical data relating to unmanned aerial vehicles that had been developed under a U.S. Air Force contract. The Chinese national was a graduate student at the University of Tennessee. Earlier, Dr. J. Reece Roth, a founder of AGT, had been indicted and pleaded not guilty, and a former AGT employee, Daniel Sherman, had pleaded guilty to conspiring with Roth to export the controlled data. (See April and May 2008 Regulatory Updates.) On Sep. 3, 2008, a jury convicted Roth of conspiracy to violate the Arms Export Control Act and 15 illegal exports of military technical information relating to plasma

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technology designed to be deployed on the wings of drones operating as weapons or surveillance systems. AGT will be sentenced in December 2008, and Roth will be sentenced in January 2009.

Aug. 28, 2008: The Treasury Department Office of Foreign Assets Control (OFAC) reported the following export enforcement actions:

- 8e6 Technologies of Orange, CA paid \$3,300 to settle charges that it had violated the Iranian Transactions Regulations by exporting its Internet services to Iran without an OFAC license or outside the scope of its OFAC license
- HM Digital, Inc. of Culver City, CA was assessed a penalty of \$2,662 for violating the Iranian Transactions Regulations by attempting to export water testing equipment to Iran without the required license.