

EXPORT COMPLIANCE UPDATE

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December 2006 Export Compliance Update



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ITAR QUIZ

Q I have a need to send my ITAR controlled system to my foreign government customer. Can I send it to their Embassy in Washington, D.C.?
The Embassy has indicated that they will get a license to export the equipment to the home country.

REMINDER: Annual Calendar Year Sales Reports for Manufacturing Licenses Agreements and Distribution Agreement were due by December 31, 2006.

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Hand Carrying Export Controlled Equipment Out of the USA

Travelers should consider the requirements of the US export regulations before taking any export controlled equipment or technical data outside the United States via "hand-carry" (carrying the goods either on their persons, or carry-on baggage). This method of export is subject to the same documentary requirements as items that are passed to a freight forwarder for shipment or to an international courier service such as FedEx. For licensed equipment, the traveler should have in his/her possession a completed AES (Automated Export System) record that shows the "ITN" number identifying that the Bureau of Customs and Border Protection (CBP) has authorized the shipment, as well as a "Commercial Invoice" (or a "Customs Invoice") that identifies the license number, quantity, value, and description of the equipment and all of the parties to the transaction, and includes the required statement concerning diversion of the goods (see EAR Part 758.6 or ITAR 123.9(b), as applicable).

If the equipment is being temporarily exported and is subject to the ITAR, the traveler will be required to present the original license and related export documents to the (CBP) prior to boarding the plane. If the equipment is under an ATA Carnet, this too must be presented to CBP at time of export. The Commercial Invoice for temporary exports should show the traveler as the ultimate consignee in the country or countries of sojourn, and clearly indicate that the goods are being returned to the United States.

For many international travelers carrying a laptop is a must to stay connected while on travel. While there are generally no licensing requirements for the laptop itself or the related operating and application software (i.e. MS Office), the placement of export controlled software or technical data on the laptop, makes the laptop export controlled, with the ensuing requirement for licenses and presentation of documentation to CBP prior to export. Without proper care and consideration of the laws pertaining to export control, including the laws of the country of

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ITAR Seminar February 21-22, 2007

FD Associates will be hosting a comprehensive two-day ITAR export licensing and compliance seminar on February 21 & 22, 2007.

Mark your calendars today! Please visit our website www.fdassociates.net or contact Kate at 703-847-5301 for a brochure.



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Compliance Corner— Importing Destructive Devices

As many of you know, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATFE) administers the regulations pertaining to the permanent import of defense articles contained in the U.S. Munitions Import List (USMIL). The USMIL is similar to the U.S. Munitions List (USML) found in the International Traffic in Arms Regulations (ITAR), except that it does not contain USML Categories V, VIII(b) through XIII and Categories XVII through XIX. The USMIL is found at Part 27 of the Code of Federal Regulations (CFR) § 447.21.

Unless specifically exempted by § 447.53, companies that permanently import any article on the USMIL must obtain an approved import permit (ATF Form 6) from ATF prior to importing these articles. Companies that permanently import articles listed in Categories I through III or any "destructive devices" on the USMIL must also comply with the Gun Control Act of 1968 (GCA) and the National Firearms Act (NFA). Compliance with the GCA and NFA, requires companies wishing to import firearms, ammunition, or destructive devices to have a federal firearms license (FFL). Companies may also be required to pay the Special Occupational Tax (SOT) required by the NFA. Importers must also comply with ATFE record-keeping and marking requirements.

The definitions of "firearms" and "ammunition" are self-explanatory, but what, exactly, is a "destructive device"? Destructive devices include bombs, grenades, rockets with a propellant charge over four ounces, missiles with an explosive or incendiary charge greater than one quarter ounce, mines, and any firearm greater than .50 caliber (12.7mm) (excluding sporting shotguns). Destructive devices, regardless of USML or USMIL Category, are "firearms" governed by the GCA and the NFA.

The ATFE classifies all destructive devices, components for destructive devices, and ammunition for destructive devices as "non-sporting" firearms and ammunition. The GCA generally prohibits the importation of non-sporting firearms and ammunition. There are certain exemptions, however, for non-sporting firearms and ammunition to meet specific government contract requirements, (federal, state or local). Additionally, you may import non-sporting firearms and ammunition for "scientific or research purposes", such as a private or government-sponsored research and development program.

If you have additional questions regarding importing destructive devices, please give us a call.

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.

How Good are Your License Applications?

A recent web-announcement by the State Department's, Directorate of Defense Trade Controls (DDTC), Managing Director, Robert ("Turk") Maggi reminds us of the importance of submitting quality license applications. The announcement identifies that the DDTC has recently seen a significant decrease in the quality of license applications, and that DDTC will no longer "correct" these applications. According to Mr. Maggi, the current "Return Without Action" (RWA) rate is about 20% and the low-quality applications cross the full spectrum of DDTC licensing authorizations (Agreements, Amendments, Commodity Jurisdictions and License Applications). Apparently low-quality applications come from companies of all sizes and all sectors of the defense industry. The stated reasons for the low-quality applications also cross the full spectrum of mistakes and omissions.

How can an applicant avoid an RWA? Obviously each type of license application is different, and sometimes the RWA can be due to the licensing officer not fully understanding the intended transaction, but here are some of our thoughts:

- Make sure that you meet all of the ITAR requirements: Omitting a certification statement or not completing all of the necessary blocks on your application will be a guaranteed RWA.
- Ask Questions: If it doesn't make sense to you, it won't make sense to the licensing officer.
- Ensure that your support documents are consistent with the application: Information on the license must be substantiated by support documents – purchase orders, end-use statements, etc. These must support each other and the application.
- Provide a transmittal letter: If there are valid reasons for discrepancies between any of the information supporting the application and the license, or the license is not self-explanatory, provide a succinct, well written letter that helps clarify the transaction.
- Always include a good technical description of the product or data to be exported.
- Have a third party not familiar with the application read it before submission: This is particularly important for agreements and other complex licenses where the author is often so close to the subject they may not see omissions and inconsistencies.

Mr. Maggi identifies that errors and omissions in license applications, demonstrate a lack of basic understanding of export control requirements and a potentially inadequate compliance program. Companies should also be aware that low-quality applications with the resulting RWA by DDTC represent a significant cost to the company in terms of shipping and program delays and potentially lost business, as customers look elsewhere for suppliers. *As always, the devil is in the detail!*

ITAR ANSWER

A NO. Shipment of any ITAR controlled equipment to a foreign Embassy in the U.S. is an "export" as defined at Section 120.17 of the ITAR, and would require a license

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ultimate destination or the country or countries of sojourn, there is potential for the items to be confiscated or seized by either the Customs agents of the importing country or the US CBP with the resulting delays and penalties (fines). Seizure of US export controlled equipment by foreign Customs agents may be a violation of US export control laws which would necessitate a voluntary disclosure to the respective export control agency (Commerce or State).

Many firms have established policies and procedures for international travel that include the completion of an "international travel form" that is cleared by export compliance personnel prior to travel. If you plan to take export controlled equipment or technical data with you on your international travel, make sure that you are fully compliant with US and foreign export/import requirements before you leave.

Sudan

Most US importers and exporters are aware of the comprehensive sanctions against Sudan. But, many are not aware of additional measures being taken by Congress to support the Peacekeeping efforts in Sudan. Recently Congress passed and sent to President Bush, the Darfur Peacekeeping and Accountability Act. One of many sanctions included in the act, freezes the assets of Sudanese Government officials that have been found to have involvement in the genocide in Sudan. Additionally, lawmakers have recommended that that international companies doing business in Sudan be denied US contracts.

US companies involved in supporting the peacekeeping missions in Sudan should ensure that exports of all equipment (including commercial equipment such as laptops and related software) be licensed through the appropriate export control agency (Commerce for commercial items and technology and State for defense articles or services).

Companies need also consult the Department of Treasury, Office of Foreign Assets Control regulations. Transactions with Sudan are fully embargoed by OFAC, and a license will also be required from this agency.

REGULATORY UPDATES

U.S. Congress

Sep. 30, 2006— The President signed H.R. 6198, the Iran Freedom Support Act, which requires the President to impose sanctions on any company or individual that provides anything to

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Iran with the knowledge that it would contribute materially to Iran's efforts to develop weapons of mass destruction. The President has a choice of six sanctions, including denial of export licenses.

Department of Commerce

July 19, 2006: The Bureau of Industry and Security (BIS) in an advisory opinion clarified Para. 740.10(b)(2)(iii) of the Export Administration Regulations (EAR), clarifying that the ECCNs listed in EAR Sec. 740.2(a)(5) are eligible for export under License Exemption RPL to the PRC, but not to North Korea.

Oct. 18, 2006 – 71 Fed. Reg. 61435: BIS withdrew the proposed rule it had published in 2004 (69 Fed. Reg. 60829) that would have revised the EAR definition of "knowledge" and updated the list of "red flags" that indicate a likely violation of the "catch-all" controls (controls based on end use or end user). The proposed rule had attracted broad criticism from industry.

Nov. 20, 2006 – 71 Fed. Reg. 67034: BIS amended the EAR to tighten controls on surreptitious listening devices (SLDs) by creating ECCNs 5D980 and 5E980 to cover software and technology for SLDs classified under ECCN 5A980 and imposing a new "SL" foreign policy control on all three ECCNs. The control policy for the SL control is set forth in an amendment to EAR Sec. 742.13.

Nov. 24, 2006 – 71 Fed. Reg. 67786: BIS amended the EAR to implement the conclusions of the June 2006 plenary meeting of the Australia Group (AG) by adding certain fungi and toxins, correcting errors in two ECCNs, and adding the Central African Republic and Comoros to the list of States Parties to the Chemical Weapons Convention (CWC). Provisions affected are EAR Sec. 742.2 and ECCNs 1C351, 1C353, 1C355, 1C360, 1C991, and 2B350.

Nov. 27, 2006 – 71 Fed. Reg. 68438: BIS amended the Commerce Country Chart (EAR Part 738, Supp. No. 1),

Country Group (EAR Part 740, Supp. No. 1), and EAR Sec. 740.7(d)(1) to reflect the split of Serbia and Montenegro into separate countries.

Department of State

Oct. 4, 2006 – 71 Fed. Reg. 58496: The Directorate of Defense Trade Controls (DDTC) deleted Haiti from the list of embargoed countries in Sec. 126.1(a) of the International Traffic in Arms Regulations (ITAR) and added paragraph 126.1(j) describing its new licensing policy allowing exports of defense articles to Haiti under limited circumstances.

Dec. 15, 2006 – 71 Fed. Reg. 75609: The DDTC suspended all licenses and exemptions covering exports of defense articles and defense services to Lebanon, except exports authorized by the Government of Lebanon (GOL) or the United Nations Interim Force in Lebanon (UNIFIL). DDTC also announced a policy of denial for applications to export ITAR-controlled items to Lebanon (except those authorized by the GOL or UNIFIL).

Department of the Treasury

Oct. 3, 2006 – 71 Fed. Reg. 58470: The Treasury Department published the current list of countries participating in the boycott of Israel: Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, UAE, and Republic of Yemen. Iraq is not on this list, but its status for future lists remains under review by Treasury.

Sanctions & Denial Orders

Department of Commerce

Nov. 30, 2006 – 71 Fed. Reg. 69220: BIS announced the termination of non-proliferation measures it had imposed in July 2006 on the Russian entity Sukhoy.

Department of the Treasury

Oct. 5, 2006 – 71 Fed. Reg. 58742: The Office of Foreign Assets Control (OFAC) revised the Global Terrorism Sanctions Regulations to authorize in-kind donations of medical devices and medical services by U.S. nongovern-

mental organizations to the Palestinian Authority Ministry of Health, provided that the donations are strictly for distribution in the West Bank or Gaza and not intended for resale. Previously, only donations of medicine were authorized

Department of State

Nov. 20, 2006 – 71 Fed. Reg. 67191: The Bureau of Political Military Affairs (PMA) announced the 3-year debarments from export of articles or services controlled under the International Traffic in Arms Regulations (ITAR) of 20 persons because they had been convicted of violations of the Arms Export Control Act (AECA). More information can be found on www.gpo.gov.

Fines & Penalties

Oct. 18, 2006: L-3 Communications Corporation of New York, NY agreed to pay a civil penalty of \$1.5 million to settle charges by DDTC that its subsidiary, Titan Corporation, had violated the ITAR by failing to report commissions paid to third parties in its applications for export licenses and by falsely stating in those applications that there were no reportable commissions. The charges by DDTC followed Titan's guilty plea to charges of violating the Foreign Corrupt Practices Act, for which it was sentenced to pay a criminal fine of \$13 million.

Dec. 14, 2006: Xiaodong Sheldon Meng of Cupertino, CA was indicted in the federal court in San Jose, CA for stealing ITAR-controlled military combat and commercial simulation software and other products from his former employer with the intent that they would be used to benefit the governments of China, Thailand, and Malaysia. Notably, the 36-count indictment included not only charges of AECA violations, but also charges for conspiracy, economic espionage, attempted economic espionage, theft of trade secrets and attempted theft of trade secrets, foreign and interstate transportation of stolen property, and making false statements.