

EXPORT COMPLIANCE UPDATE

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January/April 2007 Export Compliance Update

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COMPLIANCE QUIZ

Q What countries are currently determined to be supporting an unsanctioned foreign boycott and what are the restrictions and required actions are placed on US persons concerning the countries involved with the boycott?

REMINDER

FD Associates is sponsoring a 2-Day Export Compliance Workshop titled "US EXPORT CONTROLS: A FOREIGN PERSPECTIVE" Space is filling fast! See our website www.fdassociates.net for registration information or contact Mel at (703)847-5801 for information.

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Permanent Import Exemptions

Companies seeking to import items listed on the United States Munitions Import List, 27 CFR § 447.21 (USMIL), must either obtain an approved import permit (Form 6) from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) prior to importing these items or use one of the exemptions found in 27 CFR § 447.53. The USMIL includes many of the same articles as the US Munitions List, 22 CFR § 121.1, but excludes certain categories, such as explosives, Category V, technical data, and Categories VIII(b) – VIII(j), IX – XIII, XVII – XIX. The exemptions in 27 CFR § 447.53 permit imports of USMIL items without an approved Form 6 in the circumstances described below.

- > By or for any United States agency: The U.S. government does not need an approved Form 6 to import defense articles.
- > Components for items being manufactured under contract for the Department of Defense: If your company purchases components for a system that your company manufactures under a Department of Defense contract and for the Department of Defense's use, you may import these components without obtaining an approved Form 6 first. For example, if your company manufactures M1A2 tanks under contract for the US Army and you purchase the ball bearings for the tracks from a company in Turkey, you may import those ball bearings without an approved Form 6. This exemption does not apply to firearms as defined by the Gun Control Act of 1968, 18 USC § 921(a)(3).
- > Importation of articles manufactured in foreign countries for persons in the United States pursuant to Department of State approval: You may import items manufactured overseas for your company's use under the authority of a Manufacturing License Agreement (MLA) or offshore procurement DSP-5

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Export Seminar

May 31-June 1, 2007- "US Export Controls: A Foreign Perspective"

We are hosting a seminar on US Export controls from a foreign perspective. The program will focus on aspects of the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR) pertinent to foreign companies. Topics include licensing requirements, TAAs, support documentation, retransfers, and other aspects of the ITAR and EAR critical to foreign firms doing business in the United States.

Please visit our website www.fdassociates.net for registration information or contact Mel at 703-847-5801

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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Third County National/ Dual National Employees

In our December 2006 edition of "Export Compliance Update", we identified the requirement to identify the nationality of any third country/dual national employee of foreign licensees that would receive ITAR controlled technical data under an approved agreement (Technical Assistance or Manufacturing License) or technical data license. As a condition of being granted access to ITAR controlled technical data, the third country/dual national must sign a Non-Disclosure Agreement (NDA) that meets the criteria of the ITAR § 124.7 and § 124.8 and certify they will not retransfer the data to any foreign person, without US State Department authorization.

The identification of the nationality of its employees is a matter of concern for many governments, as it may conflict with labor laws or other laws of these countries. Increasingly, these governments are expressing their concern at the highest levels within the U.S. State Department and are requesting relief from the ITAR for identification of dual national employees. In October 2006, the State Department and the Australian government reached an agreement that would allow Australian dual national employees of the Australian Department of Defence and Australian defense companies to receive ITAR controlled technical data under an approved agreement or license without identification of the nationality of those employees. Restrictions still exist for employees who are dual nationals of any proscribed country identified in § 126.1 of the ITAR. Eligible dual nationals must have a security clearance and a need-to-know. Additionally, only agreements or licenses involving cooperative projects with the U.S. (e.g. the JSF) or where the ultimate end-user is the Australian DOD are eligible. In most instances, the latter requirement can be met, if the Australian DOD is made a party to the license or agreement.

According to a recent article in Canada's "The Globe and Mail" newspaper, the U.S. and Canada have also reached an agreement on dual nationals involved in military projects in Canada that are subject to the ITAR. Apparently, under the agreement Canadian Department of National Defence employees will be granted relief from ITAR restrictions that currently prevent dual nationals from 17 countries from having access to data related to U.S. military technology. The exemption could eventually be extended to other federal agencies, and then, with the agreement of the U.S. government, to people in the private-sector industry.

You can expect other major allies to seek similar relief in the future.

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without first obtaining an approved Form 6 from ATF. For example, if the Department of State approved an MLA that allows a British company to manufacture components for a submarine dive plane, you may import these components without an approved Form 6. The exemptions from obtaining an ATF6 Import Permit do not apply to firearms, including destructive devices and components for destructive devices, as defined by the Gun Control Act of 1968, 18 USC § 921(a)(3).

In order to import USMIL articles, either using an approved Form 6 or using one of the 27 CFR § 447.53 exemptions, your company must be registered with ATF. Additionally, in claiming an exemption you must submit a statement to the Bureau of Customs and Border Protection (CBP) identifying the exemption. This is done at time of import. You must also include supporting documentation with your statement, such as a letter from the Department of State or the Department of Defense, confirming that your shipments meet the conditions of the exemption you claim. In some instances, CPB may accept a copy of your DOD contract or even indication of your contract number, as sufficient confirmation.

State and Commerce Licensing Update

State Department-D-Trade Update

Use of Registered Name: Effective February 12, 2007, all applicants must use their DDTC registered name which corresponds to their DDTC registration record before submitting any license application or amendment with the State Department. A new security feature in D-Trade checks the registrant's approved name against the application being submitted. If a match is not found, the D-Trade system will automatically reject the application. Therefore, applicants that are a subsidiary, business unit, or companies that are "doing business as" ("dba") must use their parent company registered name. When applying for any license, the D-Trade form has a feature that will permit a secondary entry to allow for the name of the subsidiary, division or dba, as applicable.

D-Trade Forms Mandatory: DDTC announced that as of April 30, 2007, it will not accept a carbon copy or MS Word downloadable DSP-5, DSP-61, and DSP-73 license applications. Applicants must ensure that all license applications (DSP-5, DSP-61, and DSP-73) are submitted via the acceptable D-Trade Pure Edge downloadable forms. Note that while the notice cites April 30, as the final date, it is our experience that this practice has been in effect for some time.

Amendments to Form License: DDTC is working on enhancing the D-Trade system to incorporate DSP-6, DSP-62, and DSP-74 forms to amend DSP-5, DSP-61, and DSP-73 license applications. These forms will be posted on the DDTC's website and will eventually replace the Ellie Net DSP-119 application.

State Department-Registration Update

DDTC has completed a review of registration requests and renewals received over the past 6 months and has identified significant deficiencies. According to the DDTC website, nearly 50% of registration requests did not meet the minimum standard for acceptance, let alone subsequent analysis and final action by the Compliance & Registration Division. Citing a drain on resources with resulting delays in final action on issuance of registration requests, DDTC has adopted a policy of rejecting registration submissions that do not meet basic criteria for acceptance. Those requests (and the check payment) will be returned via certified mail with the reason(s) for rejection. To help companies in preparing and submitting registration requests, DDTC has updated and expanded upon its "Helpful Hints" registration guide. DDTC has also established a standard letter that identifies the reason for the rejection.

Commerce Department-SNAP-R Licensing:

The Bureau of Industry and Security (BIS) has a similar electronic licensing system to the State Department's D-Trade system called Simplified Network Application Process (SNAP). The SNAP system has recently undergone a redesign and is now known as "SNAP-R". SNAP-R has many of the key features of the State Department's D-Trade System, including the ability to electronically attach supporting documents. Unlike DDTC, use of SNAP-R is not mandatory. Companies can still submit their application via the hard copy BIS748P multiform application. We understand however, BIS is considering making use of the SNAP-R system mandatory. Rather than waiting for this to happen, we strongly encourage companies with BIS licensing requirements to become registered to use SNAP-R. In addition to ease of use, we have noticed quicker turnaround time of license applications submitted through SNAP-R.

COMPLIANCE QUIZ ANSWER

A Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, the United Arab Emirates and Yemen have been determined to support the Arab League boycott of Israel. This boycott is not sanctioned by the United States.

The Export Administration Regulations (EAR), Part 760, prohibits any U.S. person or company from complying with an unsanctioned foreign boycott request. Part 760 also requires any U.S. person or company that has received a boycott request to report such request to BIS within the same quarter the report was received.

REGULATORY UPDATES

The President

March 30, 2007 – 72 Fed. Reg. 15009: President Bush determined that the Republic of Serbia and the Republic of Montenegro are eligible to receive U.S. defense articles and defense services.

Department of State

Dec. 19, 2006 – The State Department announced that as a result of the recent coup by Fiji's military, it will impose sanctions on Fiji including the suspension of all deliveries and sales of lethal military equipment to Fiji.

Jan. 18, 2007 – 72 Fed. Reg. 2326: The Secretary of State issued a determination authorizing the provision of non-lethal military assistance in support of military reform in Southern Sudan.

Feb. 7, 2007 – 72 Fed. Reg. 5614: The Directorate of Defense Trade Controls (DDTC) amended ITAR Section 126.1 (covering embargoed countries) regarding Libya and Venezuela. Libya was deleted from subsections 126.1(a) and 126.1(d), and a new subsection 126.1(k) was added specifying that while exports to Libya remain under a general policy of denial, exports may be approved on a case-by-case basis for "non-lethal defense articles and defense services" and "non-lethal safety-of-use defense articles as spare parts for lethal end-items." Venezuela was added to the list of embargoed countries in subsection 126.1(a).

April 3, 2007-72 Fed.Reg.15830: The DDTC further amended ITAR Section 126.1 regarding Vietnam, to make it a policy to consider on a case-by-case basis licenses, other approvals, exports or imports of non-lethal defense articles and defense services destined for or originating in Vietnam. Under this policy, exports of lethal-end items, components of lethal-end items (unless those components are non-lethal, safety-of-use spare parts for lethal-end items), non-lethal crowd control defense articles and defense services, and night vision devices to end-users with a role in ground security will not be approved.

Department of Commerce

Jan. 9, 2007 – 72 Fed. Reg. 900: The Secretary of Commerce increased the maximum civil monetary penalty per

violation of the Export Administration Regulations (EAR) to \$50,000. The penalty had previously been limited to \$11,000.

Feb. 26, 2007 – 72 Fed. Reg. 8315: BIS proposed to establish a new Country Group C to Part 740 of the EAR for countries that are "Destinations of Diversion Concern." Criteria for inclusion in Country Group C would include transit/transshipment volume, inadequate export/re-export controls, failure to control diversion activities, and unwillingness to cooperate with the U.S. in interdiction efforts. Consequences of inclusion in Country Group C might include more stringent licensing policies, more conditions on licenses, and reduced eligibility for license exceptions.

March 6, 2007 – 72 Fed. Reg. 9847: BIS amended provisions in the EAR regarding items controlled for crime control reasons to extend the use of License Exception GOV to such items (while expressly noting that it will not extend to government contractors); expressly prohibit the use of any license exception for specially designed implements of torture and related items that are subject to the requirements of EAR Sec. 742.11; and to move thumbcuffs to Export Control Commodity Number (ECCN) 0A983, for which there is a general policy of denial.

March 19, 2007 – 72 Fed. Reg. 12729: BIS listed Serbia and Montenegro as separate countries on the list of States Parties to the Chemical Weapons Convention (CWC). This change had been made elsewhere in the EAR on November 27, 2006 (71 Fed. Reg. 68438).

Fines & Penalties

March 20, 2007 – 72 Fed. Reg. 13082, 13083, and 13085: BIS imposed 10-year denial orders on Fiber Materials, Inc. of Biddeford, ME, Materials International, Inc. of Acton MA, Walter L. Lachman of Concord, MA, and Maurice Subilia of Kennebunkport, ME following their criminal convictions in 2005 for knowingly exporting controlled items to India without the required export license and conspiring to violate the Export Administra-

tion Act (EAA). The two individuals had also been convicted of aiding and abetting a violation. The controlled items were parts of an isostatic press. The defendants had argued that the items shipped were not "specially designed" for a controlled item and that the term "specially designed" was unconstitutionally vague; however, the First Circuit Court of Appeals rejected those arguments and upheld the conviction.

Feb. 20, 2007 – 72 Fed. Reg. 7811: Henry ("Hank") L. Lavery III and Security Assistance International, Inc. received a one-year administrative debarment from participation in activities regulated under the ITAR pursuant to a Consent Agreement signed in December 2006. Reinstatement after the one-year period will be contingent on full compliance with the terms of the Consent Agreement and evidence that the underlying problems that gave rise to the violations have been corrected.

March 19, 2007: BIS announced that ITT Corporation, Engineered Valves Group, of Lancaster, PA had paid \$26,400 to settle charges of exporting controlled valves to China, Saudi Arabia, and Taiwan without the required authorization; misrepresentation or concealment of facts; and failure to comply with EAR reporting and recordkeeping requirements. ITT had voluntarily disclosed the violations.

March 27, 2007: ITT Corporation agreed to plead guilty in federal court in Roanoke, VA to exporting ITAR-controlled technical data to the United Kingdom, Singapore, and the PRC without a license and omitting statements of material facts in arms exports reports, and to pay a total monetary penalty of \$100 million. The plea agreement followed a 5-year government investigation into ITT's exports of night vision systems and night vision technology. \$50 million of the penalty will be suspended for 5 years and can be reduced on a dollar-for-dollar basis if ITT invests in further development of night-vision technology. The U.S. Government will retain the right to share any newly developed technology with other manufacturers. ITT is the first major defense contractor convicted of a criminal violation of the Arms Export Control Act.