

EXPORT COMPLIANCE UPDATE

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Backlog In Processing At DDTC

The continuing delays in processing license applications by the Office of Defense Trade Controls Licensing ("ODTCL"), particularly Technical Assistance Agreements and Manufacturing License Agreements, is creating a significant problem for companies in meeting contractual deadlines, with resulting program delays and potential liquidated damages. The old averages of 8-10 weeks for license review and issuance are rare, with 12-16 weeks being more likely. For agreements (TAAs/MLAs), the situation is much worse and we are currently seeing processing times of five (5) months or more.

The reasons for the delays are standard: too many cases for processing, competing priorities, too few people reviewing. Nowhere is the lack of staffing more apparent than with the Agreements Team which is staffed by military personnel and is currently only manned to 65% of its maximum staffing levels.

The recent order by the Secretary of Defense to assign military officers to operational posts only, coupled with the ODTCL policy to fill Agreements Team vacancies with military officers only further compounds the situation. Although there are some interim assignments of non-military personnel to the Agreements Team, staffing levels are likely to remain unchanged for some time to come.

We are frequently asked to help companies "expedite" license review, particularly when the company is dealing with an angry customer that doesn't understand the reason

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Calendar of Export Seminars

FD Associates will be hosting export training seminars on the following dates in 2006: Mark your calendars today!

March 23rd (Registration Full)

May 4th

June 15th & 16th (2-day intensive workshop)

Sept. 14th

Oct. 26th

Please visit our website at www.fdassociates.net for additional information as it becomes available.

Compliance Corner - Retransfers

The ITAR §123.9 requires an exporter to ascertain specific end-use/end-user information, prior to submitting a license application to the Office of Defense Trade Controls Licensing (ODTCL) or using an ITAR exemption. Any changes to the approved end-use/end-user for any ITAR controlled technical data or equipment require the written approval of the ODTCL before the retransfer can occur.

The requirement for retransfer authorization applies to all ITAR-controlled items: the fact that it is a very small component in a large system makes no difference- if it is subject to the ITAR, full end-use must be identified at time of license application, or retransfer approval must be obtained.

How do US companies protect themselves from unauthorized retransfers, particularly when the customer is a foreign company, perhaps not well versed in US law and regulation or where the actual end-customer is not yet known? The ITAR § 123.9 requires that exporters mark their invoices and bills of lading with certain language that identifies the restrictions on retransfers. Commonly, this language is applied to shipments of hardware, but not data leaving the exporter liable for possible technical data retransfer violations.

Exporters should consider additional steps to ensure their customers are aware of the limitations on retransfer. Things to consider: marking all of your documents, emails, faxes, etc., containing ITAR controlled data with clear unambiguous language concerning reexport limitations; entering into an ITAR NDA with your customer that identifies the provisions of §123.9; and maintaining close contact on any program where the end-user on the license or exemption is a commercial entity or the end-use is a multinational program. These are only a few of the possible suggestions. The ITAR § 127.1 holds the exporter responsible for "all authorized persons to whom possession of the license defense article or technical data has been entrusted". It is your responsibility to ensure your customer knows the limitations on retransfers of any ITAR controlled product or technical data. Having a clear written policy and procedure to address this requirement will help protect your company against any diversions contrary to the ITAR.

Change In Policy Towards Indonesia

The January 2006 notice on the DDTC website waiving restrictions on the export of lethal defense articles and related defense services for end use by the Indonesian Armed Forces, to all extents and purposes ends restrictions on sales to that country. The announcement continues the process of military reengagement with Indonesia that started in December 18, 2001 with the lifting of restrictions on non-lethal defense articles to Indonesia. Other recent actions include the Secretary of State's November, 2005 decision to waive restrictions on Foreign Military Financing (FMF); the May, 2005 decision to resume non-lethal Foreign Military Sales (FMS) sales and the February, 2005 decision to allow the resumption of International Military Education and Training (IMET).

The Administration considers the relationship between the United States and Indonesia, the world's third largest democracy, to be of the utmost importance. As the world's most populous majority-Muslim nation, Indonesia is a voice of moderation in the Islamic world. It also plays a key role in guaranteeing security in the strategic sea lanes in Asia and is a leading member of the Association of Southeast Asian Nations. In resuming FMF, the Administration plans to provide assistance for military programs and units that will help modernize the Indonesian military, provide further incentives for reform of the Indonesian military, and support U.S. and Indonesian security objectives, including counterterrorism, maritime security and disaster relief.

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for the delay. While licensing officers are sympathetic to your business concerns, this is not their first priority and they have been directed to work on a FIFO (first-in-first out) basis only. The one exception to this policy is where the "expedite" request is related to US national security or foreign policy matter. Under these situations, a request in writing, from a US government agency, referencing the particular case number, and detailing the national security or foreign policy issue that requires the expedited treatment will be considered. Approval to move the application to the top of the queue can only come from the Deputy of Licensing or higher - not the licensing officer. License applications for Operation Enduring Freedom, Operation Iraqi Freedom or for end use in the UK or Australia, or for the Joint Strike Fighter will also be processed as an exemption to the FIFO policy.

As always, when it comes to licensing, we cannot stress the importance of planning well in advance.

ITAR ANSWER

A Either your company or the ABC Company will need to submit a written request for approval of the retransfer of the widget to Norway in accordance with 22 CFR 123.9(c). Even though this commodity will be reexported to a NATO country, i.e. Norway you are not eligible to use the ITAR exemption at 123.9(e) as the commodity is being reexported from a non-NATO country.

REGULATORY UPDATES

The President

Dec. 14, 2005: President Bush certified to Congress that the export of 36 accelerometers to Ministry of Railways of China would not measurably improve China's missile or space launch capabilities. Under legislation passed in 1999, such a certification is required in advance of any export of missile equipment or technology to China.

Department of Commerce

Dec. 1, 2005 – *70 Fed. Reg. 72073*: The Bureau of Industry and Security (BIS) announced that it will exempt a foreign government or agency of India, Bulgaria, the Czech Republic, Hungary, Poland, Romania and Slovakia from import certificate requirements.

Dec. 6, 2005: BIS published detailed guidance on the use of License Exception USPL (U.S. Persons in Libya), which had been created on Nov. 17, 2005. Consult this guidance at http://www.bis.doc.gov/PoliciesAndRegulations/LibyaGuidance11_16_05.htm.

Department of Defense

Nov.30, 2005 – *70 Fed. Reg. 71472*: The Defense Security Cooperation Agency (DSCA) notified Congress of a proposed \$100 million sale to Finland of Sidewinder missiles, AIM-9X Dummy Air Training Missiles, AIM-9X Captive Air Training Missiles, and related defense articles and defense services.

Department of State

Jan. 18, 2006 – DDTC posted a notice on its website (www.pmdtc.org) stating that it was waiving restrictions placed on the export of ITAR-controlled lethal defense articles and related defense services for end use by the Indonesian Armed Forces. Applications will now be considered on a case-by-case basis. The announcement implements a provision in the FY 2006 Foreign Operations, Export Financing, and Related Programs Appropriation Act. *See related article on this page.*

REGULATORY UPDATES

Jan. 24, 2006 – 71 Fed. Reg. 3762: DDTTC finalized an interim rule (69 Fed. Reg. 708888, Dec. 8, 2004) that had amended ITAR Parts 122 and 129 to increase registration fees for exporters and brokers to \$1,750 (1 year) or \$3,500 (2 years) and reduce the registration validity period to two years, and made other minor administrative changes.

Wassenaar Arrangement

December 19, 2006: The Wassenaar Arrangement published on its website (www.wassenaar.org) a 6-page summary of control list changes adopted at its December 2005 plenary.

Fines & Penalties

Dec. 7, 2005: Howard Hsy of Bellevue, WA pleaded guilty to conspiring to violate the Arms Export Control Act (AECA) by illegally exporting night-vision goggles and other military equipment to Taiwan with an ultimate destination in China. Donald Shull of Seattle, WA had pleaded guilty on Oct. 11, 2005, to violating the EAR in connection with exports to the same Taiwanese co-conspirator.

Dec. 7, 2005: A jury convicted Robert E. Quinn of Lexington, KY of one count of conspiracy and five counts of exports violating the U.S. embargo on Iran by shipping forklift and tow tractor parts to an Iranian forklift truck manufacturer via a broker in Dubai, UAE. Khalid Mahmood, the president of the UAE broker, had previously pleaded guilty to related charges and testified for the government at Quinn's trial. Under federal sentencing guidelines Quinn faces a likely sentence of 97 to 121 months in prison. Quinn's employer, Clark Material Handling Company of Lexington, KY agreed on Oct. 17, 2005 to pay a \$200,000 civil penalty to BIS in connection with the same exports.

Dec. 15, 2005: Fernando Sero of Yonkers, NY was sentenced in White Plains, NY federal court to 40 months in prison for violating the AECA by shipping defense articles including assault

rifles and other weapons and ammunition to Mindanao in the Philippines without the required export license. The defense articles were shipped in sealed containers under falsified shipping documents.

Dec. 20, 2005: Following a plea agreement, a federal court in Washington, D.C. sentenced LPPAI, Ltd. of Houston, TX to a criminal fine of \$50,000 and corporate probation for 3 years for exporting specialty alloy pipes intended for an end user in Iran after a shipping company had refused to process the shipment because it lacked the required export license. In a civil settlement with BIS for the same offense, LPPAI also agreed to pay an administrative penalty of \$50,000, forfeit seized commodities valued at over \$33,000, and be subject to a suspended 5-year denial of export privileges.

Dec. 27, 2005: Hailin Lin of Manitowoc, WI was sentenced to 42 months in federal prison, 2 years of supervised release, and a \$50,000 fine and agreed to forfeit her interest in her home and \$329,000 in cash for her role in a conspiracy that shipped Commerce-controlled electronic components to China without the required export licenses. On January 18, 2006, Lin's husband, Ning Wen, was sentenced to 5 years in federal prison, forfeiture of his interest in his home and \$329,000 cash, and a fine of \$50,000 for conspiracy, money laundering, and making false statements to FBI agents for his role in the export scheme. Jian Guo Zu and his wife, Ruo Ling Wang, the owners of the Beijing company to which the parts were shipped, had earlier pleaded guilty. Qu was sentenced in July 2005 to 48 months in prison and a \$2,000 fine, and Wang received 7 months (time served) in prison and a \$1,500 fine.

Jan. 4, 2006: CIT Group, Inc. of Livingston, NJ agreed to pay BIS \$74,800 to settle charges of 17 alleged violations by two of its subsidiaries involving unauthorized exports of oscilloscopes to Israel and the Philippines.

CIT voluntarily disclosed the violations.

Jan. 4, 2006: Becton, Dickinson & Co. of Franklin Lakes, NJ agreed to pay \$123,000 to settle charges by BIS of alleged violations related to unauthorized exports of biomedical products from a Singapore subsidiary to India. Becton, Dickinson voluntarily disclosed the violations.

Jan. 11, 2006: GasTech Engineering Corp. of Tulsa, OK, a designer and fabricator of oil and gas processing plants and systems, pleaded guilty in U.S. District Court in Tulsa to conspiring to violate the Iranian Transaction Regulations by providing engineering and procurement services to the National Iranian Gas Company. Under the plea agreement, GasTech agreed to institute a corporate compliance program to be monitored by the Commerce Department and to a fine that will include the proceeds traceable to its role in the conspiracy. GasTech's president, Parvis Khosrowyar, was also charged in the conspiracy but remains a fugitive.

Sanctions & Denial Orders

Jan. 25, 2006: Hazim Elashi was sentenced in Dallas, TX federal court to 66 months imprisonment followed by deportation, and his brother, Ihsan "Sammy" Elashi was sentenced to 72 months imprisonment. The brothers and their company, Infocom Corporation, had been convicted of conspiracy to violate the EAR and the Libyan Sanctions Regulations, and the brothers had also been convicted of conspiracy to file false Shipper's Export Declarations. The sentences were part of a wide-ranging case involving unauthorized exports to Syria and Libya, conspiracy to launder money, and conspiracy to deal in the property of a Specially Designated Terrorist. Three other Elashi brothers who were also convicted in the conspiracy are in federal custody for immigration violations and await sentencing for the export control convictions.

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ITAR QUIZ

Q You obtained a DSP-5 export license to permanently export a widget to Sweden for end use by ABC Company in Sweden. You have already made the export against the license and have just learned that ABC Company in Sweden wants to export the widget to Norway. What requirements do you and ABC Company have?