

EXPORT COMPLIANCE UPDATE

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May 2006 Export Compliance Update

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ITAR QUIZ

Q I have just received my approved TAA from State Department. One of provisos identifies that I need to have a DSP-83 "Non-transfer and Use" form signed by all of the parties provided to the State Department with the signed agreement. Can I start work on the TAA, once the agreement has been signed?

FD Associates 2006 Export Seminars

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Exports to Venezuela

Readers will be aware that relations with Venezuela and the US have become more strained in recent months. The US is concerned about Venezuela's increasing ties with Iran and Cuba, which are designated as countries sponsoring terrorism, as well as its alleged relations with several guerilla groups in Colombia, which have been designated as terrorist organizations by the State Department. According to media reports, Venezuela has been considering the sale of its fleet of F-16 military aircraft to Iran and Cuba.

Therefore, the May 15, Department of State ("DOS") notice to Congress that Venezuela is not fully cooperating with the antiterrorism efforts of the US will come as no surprise. With the presentation of this report to Congress, effective 1 October 2006, the Office of Defense Trade Control Licensing ("ODTCL") will no longer be granting approval for exports of items on the US Munitions List to Venezuela. Additionally, the ODTCL will not grant any requests for the retransfer or re-export of any previously exported defense articles from a third country to Venezuela. Until October 1, the ODTCL will continue to consider applications for licenses to Venezuela on a case-by-case basis. Please note that it is unlikely that any export requests or retransfer requests that are not in support of US national security or foreign policy and security interests will be approved.

Until a Federal Register notice is published to the contrary, previously approved export authorizations will not be rescinded and exports under exemptions will still be allowed. As of this writing, a Federal Register notice related to these recent actions taken by the State Department has not been published. Thus, there is a high probability that when such a notice is posted, additional changes and/or restrictions may be announced.

Any individual or company currently doing business with Venezuela, or planning on doing so in the future, should take note of the ways in which these restrictions could affect their business. For example, companies that currently have approved licenses for export to Venezuela should take extra care to ensure that there is a well-developed compliance mechanism in place to monitor and control any technology transfers. In addition to being a good practice, such a mechanism will allow for the company to be prepared for the increased scrutiny that is likely to be placed on exports or transactions involving Venezuela.

Finally, companies who currently employ Venezuelan nationals, or individuals holding dual citizenship (Venezuela and another non-US country), should be aware that the renewal of any export licenses and/or technical assistance agreements involving these employees will not be permitted after 1 October.



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Compliance Corner - Complying with License Provisos

If your company has ever received an approved DSP license, agreement/amendment or retransfer authorization request from the Office of Defense Trade Controls Licensing ("ODTCL") chances are the activities authorized under the approval are restricted by provisos. As compliance with provisos is an integral part of any authorization granted by the ODTCL, it is essential that all members of the company involved with the program or product that is subject of the authorization be familiar with and able to comply with the provisos. One of the first steps a company should take after receiving an approved license or other authorization is review the approval with key personnel involved with the program. This requirement extends to program managers, manufacturing personnel, engineers, shipping clerks, as well as export compliance personnel. In addition to ensuring that personnel are aware of any provisos, it is a good practice to establish a sign-off process whereby personnel acknowledge that they have read and understand the limitations of the provisos on the subject sale or program.

License provisos can be confusing or contradictory or may even restrict the company from doing what was requested. If your company identifies any provisos of concern, you should assess whether the offending provisos have any bearing on the program or otherwise restrict the company from performing the activities requested under the license. Where the proviso has no relevance to the program or export, there is usually no requirement to do anything further. However, if the proviso does restrict or appears to restrict the company in the requested activities, the company has a responsibility to seek clarification or even deletion of the proviso from the State Department. This is done via a "General Correspondence" (GC) request. The proviso appeal should identify the proviso in question and include a clear identification of the company's concern with the proviso and suggested language to resolve that concern. In some instances, it may be necessary to request that the proviso be deleted. In addition, there may be situations when it is appropriate for the company to hold discussions with the State Department or Department of Defense prior to the submission of the proviso appeal.

Even when your approval has no provisos of concern, it is important that the company have a plan and process in place for monitoring activities under the authorization to ensure the company remains in compliance with the license and its provisos. Such a process will go a long way toward keeping your company ITAR compliant.

JOIN US FOR THE FD ASSOCIATES 2-DAY COMPREHENSIVE ITAR WORKSHOP ON JUNE 15th & 16th

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.

Changes in Controls on China?

The US government is considering expanding controls on the export of commercial items to China to address concerns within DOD and Congress that the Chinese government is using these items to expand its military capability. The Bush administration last year floated plans to expand export controls on a large number of items considered useful to China for military purposes; as well as conducting background checks on end-users and allowing for broader oversight of transactions with China in general. Responding to the concerns of industry associations and US companies that trade with China or have established operations in that country, we understand that the US government is considering scaling back its original proposal. The original list which had included hundreds of items that would be more closely regulated, including aircraft parts, computer chips and machine tools, has apparently been shortened to forty-six (46) items.

If implemented, the proposed regulations would still require exporters to apply for a license to sell items such as software, lasers, cameras and navigation equipment to China. Apparently, the proposed regulations would also require US companies to obtain a certificate from the Chinese government certifying that the items would not be used for military purposes. Proposed sales would be scrutinized to ensure that they aren't making a "material contribution" to China's military capabilities.

The 46 items that would be affected by the proposed regulations fall into nine categories: products containing chemicals, toxins or microorganisms; electronic design and development technology; computers; telecommunications equipment; information security; sensors and lasers; navigation equipment and other avionics; marine technology; propulsion and space vehicles; and materials processing equipment.

The proposed regulations are far from final and may be further revised before they enter into effect. In addition to industry concerns that the new regulations will put them at a competitive disadvantage to foreign companies that do not have the same restrictions, Congress is apparently divided on the proposed regulations. Representative Manzullo of Illinois, a Republican, is concerned that the regulations will impinge on manufacturing exports, while Republicans Hunter of California, chairman of the House Armed Services committee, and Henry Hyde of Illinois, chairman of the House International Relations Committee, have been pressing for tighter controls.

It is expected that the proposed regulations will be met with resistance by the Chinese government and Commerce Department Undersecretary, McCormick, who administers the U.S. Export Administration Regulations, is expected to travel to China this month to try to address Chinese concerns. *Stay tuned for more!*

ITAR ANSWER

A No. Even though the ITAR allows an exporter to commence the provision of services under the agreement once the agreement has been signed and provide a copy of the signed agreement to the State Department within 30 days from date of signing [22 CFR 124.4 (a)], the DSP-83 proviso overrides this. The standard language of the DSP-83 proviso identifies that the DSP-83 must be submitted prior to the implementation of the agreement. Therefore the exporter must submit the signed agreement and DSP-83 to the State Department immediately after both documents are signed by all of the parties and prior to the export of any technical data or defense services.

State Department Reorganizes

In an apparent effort to improve processing timelines for license approvals and agreements the State Department's Office of Defense Trade Controls Licensing (ODTCL) has undergone a major realignment. The agreements division has been dissolved and agreements officers and licensing officers now work on teams organized by USML categories.

There also have been changes in the assignment of USML categories. With the exception of Category III, USML categories are no longer split between licensing teams. In addition, points of contact for OEF/OIF licenses are also designated on each of the licensing teams, replacing the current single point of contact for such cases.

We certainly hope these changes will assist in overcoming the excessively long processing times and backlog at the ODTCL.

Defense Trade Policy: Libya

As reported in our Sanctions Section P3, on May 15, the Secretary of State announced her intent to rescind Libya's designation as a state sponsor of terrorism. Currently, Libya is a proscribed destination under Section 126.1 of the ITAR (22 CFR § 126.1) and has been previously designated as a state sponsor of terrorism

Exporters should be aware that the announcement by the Secretary of State is only a first step in removing Libya from the list of proscribed countries identified in Section 126.1 of the ITAR. A forty-five (45) day Congressional notification period is required.

In addition, until there is a Federal Register notice announcing a change in Libya's status as a proscribed destination, the State Department will continue to deny all export applications for defense articles and services to Libya.

REGULATORY UPDATES

Regulatory Updates

The President

10 May 2006—71 Fed. Reg. 27379: The President issued an order continuing for a year the national emergency that authorizes a prohibition on certain exports to Syria.

Department of State

23 May 2006—71 Fed. Reg. 29703: The Directorate of Defense Trade Controls amended the ITAR to include any airframe parts and components common to the C-130 (Models A through H) and L-100 aircraft that have no current use on any other commercial aircraft, on the US Munitions List. The change is scheduled to take effect 21 August 2006. In a related notice on the State Department website, the DDTC identified that exporters can complete existing transactions under existing authorizations, but should apply to DDTC for the proper export approval for new or subsequent shipments. *See related article in Export Compliance Update February/March.*

Department of Commerce

27 April 2006—71 Fed. Reg. 24918: The Bureau of Industry and Security (BIS) amended many sections of the Chemical Weapons Convention Regulations (15 CFR Parts 710-722). The new amendments were addressed in a proposed rule issued on 7 December 2004. They include a prohibition against exports of Schedule 2 chemicals to countries that are not Party to the CWC; however, this is already subject to an export license requirement under Section 742.18 of the EAR and a general policy of denial.

2 May 2006—71 Fed. Reg. 25746: BIS corrected four errors contained in the 24 April 2006 regulation that replaced Composite Theoretical Performance (CTP) with the Adjusted Peak Performance (APP) as a computer metric. The changes related to the discussion of changes to the Missile Technology Controls in the Preamble to the new rule (2 errors); the paragraph on License Exception TSR in ECCN 4E001; and paragraph b.2 of the List of Items Controlled section of ECCN 4E001.

Nuclear Regulatory Commission

20 April 2006 – 71 Fed. Reg. 20336: To implement provisions of the Energy Policy

ions on the import and export of nuclear equipment and material. The changes affect certain exports of highly-enriched uranium, by product material, and radium-226.

Sanctions & Denials

Department of Commerce

25 April 2006 – 71 Fed. Reg. 23896: Denial orders against Ruo Ling Wang and Beijing Rich Linscience Electronics Co., both of Beijing, China, were extended until May 2, 2015.

12 May 2006: BIS issued a 6-month Temporary Denial Order against Data Physics Corporation, Data Physics China, et al. for selling, and later shipping, controlled spherical couplings to a concern on the Entity List. Data Physics had attempted to conceal the identity of the end-user by using a false customer name.

17 May 2006 – 71 Fed. Reg. 28657: BIS added Jian Gou Qu of Beijing, China, incarcerated at Metropolitan Correctional Center, Chicago, IL to the Denial Order against Ruo Ling Wang and Beijing Rich Linscience Electronics Co. as a related person.

Department of State

15 May 2006: The Secretary of State announced that effective June 29 2006, the U.S. will rescind Libya's designation as a "State Sponsor of Terrorism." This will open the way for an expected BIS regulation modifying the EAR to remove Libya from the list of countries affected by "AT" (antiterrorism) controls. *See related article P2.*

18 May 2006 – 71 Fed. Reg. 28897: The Secretary of State determined and certified to Congress that Cuba, Iran, North Korea, Syria, and Venezuela are not cooperating fully with U.S. antiterrorism efforts. *See related article P1.*

Department of the Treasury

27 April 2006: The Office of Foreign Assets Control (OFAC) added Gabriel Abdul Kareem Badri, Gaffar Mohamed El Hassan, Nusa Hilal, and Adam Yacub Shant, all Sudanese individuals, to the SDN list and updated the entry on Lashkar E-Tayyiba.

10 May 2006 – 71 Fed. Reg. 27199: OFAC amended its regulations to reflect sanctions that had been imposed on the Palestinian Authority in April 2006, following a determination that Hamas, a terrorist entity, had a property interest in the transactions of the Palestinian Authority. These sanctions affect only transactions involving the Palestinian Authority. They do not bar all transactions involving individuals and entities in the Palestinian territory.

Fines & Penalties

20 April 2006: Toxin Technology of Sarasota, Florida, agreed to pay \$255,750 to settle 93 charges relating to unauthorized exports of toxins to various countries, including Japan, France, and the United Kingdom.

1 May 2006: Four people who operated Manten Electronics of Mount Laurel NJ -- Xu Weibo, Xiu Lig Chen, Hao Li Chen and Kwan Chun Chan -- were sentenced to jail terms of 44 months, 18 months, and 30 months, and house arrest for 6 months, respectively, for their guilty pleas to one count each of conspiracy to violate the Export Administration Regulations and the Arms Export Control Act. Xu Weibo also pleaded guilty to one count each of violating the EAR and the AECA. They admitted to illegally exporting controlled items used in a wide variety of defense weapons systems to at least two subdivisions of China's Ministry of Information Industry. In addition to their sentences, the defendants also agreed to forfeit \$391,337 representing the revenue from the illegal sales.

10 May 2006: Plains All American Pipeline L.P. of Houston, TX agreed to pay an \$82,500 penalty to settle charges of 30 violations of the EAR for exports of crude oil to Canada in excess of the amounts authorized on the licenses. PAAP had voluntarily disclosed the violations.

12 May 2006: Extreme Networks, Inc. of Santa Clara, CA agreed to pay a civil penalty of \$35,000 to settle charges of unauthorized exports of controlled items to an organization on the Department of Commerce's Entity List. BIS claimed that Extreme Networks knew the export was prohibited, because it had previously applied for an export license to export comparable items to the same entity, and the license application had been denied.