

EXPORT COMPLIANCE UPDATE

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May/July 2007 Export Compliance Update

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COMPLIANCE QUIZ

Q (Pending from Mel/Kerstin)
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 boy-

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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Export Reform

Exporters will be interested to know there are currently initiatives which have the potential to reduce some of administrative delays in licensing . These reforms are:

US /UK Defense Trade Treaty: Various news sources have reported on the signing of a "Defense Trade Cooperation Treaty" by President Bush and British Prime Minister Tony Blair that would eliminate the need for most export licenses from the State Department for sales of defense equipment and services and related technical data to the United Kingdom. To qualify for an export authorization exemption under this treaty, "firms, facilities and entities" will have to be "vetted," by the U.S. Department of State. The treaty would not eliminate the requirement to notify Congress of major arms transfers. Export authorization from the State Department will still be required for retransfers of U.S. origin equipment, parts or defense technology or for sales destined to third countries.

One benefit of eliminating licensing requirements via treaty is that only Senate approval is needed for treaties: both houses must approve reform legislation.

Details of the treaty are still being worked out, and the State department must formally submit the package to the Senate for approval, which is hoped for by the end of 2007. With multiple bills dealing with Iraq, immigration reform legislation and budgets to pass, the Senate has a fairly full agenda. Add to the mix that next year is an election year, and according to one congressional aide, "I don't know how all this will play out".

The Senate is likely to give the treaty close examination before approving it, he said.

We are hopeful of an early Senate ratification of the treaty, and wonder if Australia will also be accorded the same treatment.

Congressional Export Legislation Reform Initiative: Congressmen Manzullo (R-IL), Crowley (D-NY) and Blumenauer (D-OR) have launched a bipartisan Congressional Export Control Working Group to address concerns that our export control policies are ineffective and do not take into account the technological revolution and global integration of the last quarter century. The purpose of the Export Control Working Group is to educate lawmakers and senior policy aides on the importance of a meaningful export control regime to U.S. national and economic security. The Congressional working group is intended to assist Congressional members and their staff in understanding the benefits a streamlined process will have on our economy and job growth. The Group has already sponsored two workshops to inform members and staff on the importance and intricacies of U.S. export control policies. One workshop featured presentations on the various export control programs at the U.S. Departments of Commerce, Defense and State. The second workshop fea-

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BIS Revised China Export Policy

We have previously reported that the Commerce Department's Bureau of Industry and Security (BIS) has proposed sweeping changes to its policy for exports to China of dual use items that could be used in military application. See Export Compliance Update XXX (insert date). Effective June 19, 2007, the BIS has implemented a final rule, which implements these changes. The final rule imposes new licensing requirements on a targeted list of items that could contribute to China's military modernization and removes licensing requirements for certain authorized customers in China.

Under the new rule there are higher levels of control on a focused list of items that could enhance China's military capability. Items subject to the new military end-use controls include aircraft and aircraft engines, avionics and inertial navigation systems, lasers, depleted uranium, underwater cameras and propulsion systems, certain composite materials, and some telecommunications equipment for space communications or air defense. Licenses will be required for any of the 31 ECCNs listed in Supplement No. 2 to Part 744 to the PRC, if, at the time of the export, the exporter knows, has reason to know or is informed by the BIS (via changes to the EAR) that the item is intended for a "military end-use".

Military end-use" is a now a defined term which is defined as incorporation into any item described on the U.S. Munitions List (USML), or the International Munitions List (IML) (as set out on the Wassenaar Arrangement), or any items listed on the CCL under ECCNs ending in "A018". The rule further defines military end-use as the "use", "development", "production", or "deployment" of the above military items. The term also includes deployment of any aircraft or gas-turbine engines classified under ECCN 9A991, or software or technology for use in the development production etc. of any items on ECCN 9A991 or 9B991.

The final rule also creates the Validated End-User (VEU) program to facilitate exports to China, without individual export licenses of certain items on the Commerce Control List (CCL). Items controlled on the CCL for Missile Technology or Crime Control reasons are not eligible for the VEU program and eligible items may be used for civil end-uses only. To qualify for the VEU program, a candidate must have a history of responsible use of U.S. origin commodities, cannot be involved in any military activities and must undergo an extensive review process by an interagency review committee chaired by the BIS which includes State, DOD and Energy. Intending VEU's must also be willing to undergo pre-and-post VEU authorization on-site reviews by the US government.

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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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Export Reform

tured the thoughts of U.S. industrial leaders and the challenges they face complying with current export control policies.

It seems to us that this fledgling initiative is a good opportunity for those in the export community frustrated with the delays in licensing, and the increasingly restrictive interpretations of the regulatory agencies, to help influence positive changes to our export control policies.

Commerce Proposes EAA Reauthorization: The Export Administration Regulations (EAR) have been designed primarily to implement the Export Administration Act of 1979, as amended, 50 U.S.C. app. 2401-2420 (EAA). The EAA however is not a permanent legislation, and when it has lapsed, as is currently the case, the President has exercised continuation of the EAR under the International Emergency Economic Powers Act (50 U.S.C. 1701-1706 (IEEPA)). In April this year, the Commerce Department proposed legislation that would reauthorize the EAA for 5 years. In addition to reauthorizing the EAA, the proposed legislation would also substantially increase penalties for violations of dual-use export controls, provide additional authority to Commerce Department enforcement officers, expand the list of criminal violations upon which a denial of export privileges would be based, and make a number of other changes. The proposed legalization has been published and shown to congressional committees, but has not yet been formally introduced in Congress.

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China Export Policy

Once approved, a US company or foreign reexporter may ship to the VEU with out any further licensing, subject of course to usual end-use due diligence. We understand that the BIS will publish a list of approved VEU's on its website.

As noted above, implementation of this rule is in effect as of June 19, 2007 and companies involved in transactions with China for dual-use technology should review the revisions to the EAR carefully to ensure there are no licensing requirements for their goods or technology to China. Please note that there are no changes to the ITAR, and China remains an embargoed country for all items on the US Munitions List.

COMPLIANCE QUIZ ANSWER

A (Pending details from Kerstin/Mel) 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

May 7, 2007 – 72 Fed. Reg. 25680: The Bureau of Industry and Security (BIS) amended items in the Commerce Control List to reflect changes agreed at the October 2006 plenary of the Missile Technology Control Regime (MTCR). The amendments clarify that the scope of the term “missile” as used in Export Control Classification Numbers (ECCNs) 1A102, 1C101, 1C107, 6A108, 6B108, 7A102, 7A103, 9A111, and 9B105 includes items when used in systems that are capable of a range of at least 300km, regardless of the payload capacity. Other substantive changes are made in ECCNs 7A002, 7A107 (adding certain 3-axis magnetic heading sensors), 9A101, and 9B117.

June 5, 2007 – 72 Fed. Reg. 31005: BIS issued a proposed amendment to the EAR that would expand the reasons for adding parties to the Entity List (EAR Part 744, Supp. No. 4). The new basis would be reasonable cause to believe that a party is or is likely to become “involved in activities that are contrary to the national security or foreign policy interests of the U.S. The announcement provides five examples of situations that would meet this criterion. Special license requirements apply to exports to end users that are on the Entity List. An end user named on the Entity List would be able to request that its listing be deleted or modified. The announcement notes that the purpose of the Entity List is to pinpoint controls on specific parties of concern.

June 7, 2007 – 72 Fed. Reg. 31450: BIS corrected the rule implementing the formula for calculating computer performance (Adjusted Peak Performance) in Weighted TeraFLOPs by broadening the availability of License Exception TSR, which had been unintentionally narrowed in a rule published on March 22, 2007 (72 Fed. Reg. 13440). The change applies to items classified under Export Control Classification Numbers (ECCNs) 4D001 and 4E001.

June 19, 2007 – 72 Fed. Reg. 33646: BIS published its much anticipated final rule introducing new provisions for exports to China. The rule created a presumption of denial for most items if they would make a “direct and significant contribution to the PRC’s military capabilities”, establishes a new control on exports and re-exports to the PRC of specified items on the Commerce Control List (CCL) that otherwise would not require an export license, if they are for a “military end-use;” and created a new “Validated End-User” (VEU) authorization that will allow eligible items to be exported without a license to Chinese end-users that have been pre-approved in a manner specified in the rule. *See related article PX*

Department of the Treasury

April 3, 2007 – 72 Fed. Reg. 15831: The Office of Foreign Assets Control (OFAC) amended the Iranian Transactions Regulations and the Sudanese Sanctions Regulations to permit exports and reexports to and for these countries via diplomatic pouch. The amended regulations note that indirect exports to these countries may still require authorization by the U.S. Department of Commerce.

April 3, 2007 – 72 Fed. Reg. 15934: The Treasury Department published its quarterly list of countries that require or may require participation in the international boycott against Israel: Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, United Arab Emirates, and Republic of Yemen. The status of Iraq with respect to this list remains under review by the Department.

REGULATORY UPDATES

June 20, 2007: OFAC issued General License #7 authorizing all transactions with the Palestinian Authority (PA) that had previously been prohibited by U.S. terrorism sanctions. The General License, which effectively normalizes trade with the PA, is predicated on the recent exclusion of Hamas from the PA.

Department of State

May 22, 2007 – 72 Fed. Reg. 28602: The DDTC amended Sec. 126.1 of the ITAR to make it U.S. policy to consider on a case-by-case basis authorizing exports to Somalia of defense articles and defense services that conform with the provisions of United Nations Security Council Resolution 1744. The amendment to the ITAR followed the May 9, 2007 Presidential Determination authorizing exports of defense articles and defense services to Sudan for the limited purpose of support of the Southern Sudan Security Sector Reform (SSR) Program.

June 7, 2007 – 72 Fed. Reg. 31452: DDTC amended the US Munitions List (USML), Category VIII(e), Note (1)(i) to exclude the QRS-11 inertial navigation chip and other quartz rate sensors from coverage under the ITAR, when they are integrated (or exported for integration) into the primary instrument system of a commercial aircraft. Previously, such chips had been excluded from the USML only if they were integrated into the standby navigational system of a commercial aircraft. Eligibility for this exclusion will not be automatic – it will be determined by DDTC on a case-by-case basis, using the Commodity Jurisdiction procedure.

Sanctions

Department of State

April 11, 2007 – 72 Fed. Reg. 18310: DDTC imposed a 3-year statutory debarment on ITT-Night Vision Division following ITT Corporation’s guilty plea to charges that it had willfully exported defense articles without a license. The debarment may be reconsidered after one year, and DDTC may grant “transaction exceptions” on a case-by-case basis. The debarment does not affect divisions of ITT Corporation other than Night Vision, because DDTC determined that ITT had taken appropriate mitigating actions.

April 23, 2007 – 72 Fed. Reg. 20158: The Bureau of International Security and Nonproliferation (ISN) imposed sanctions including a prohibition on exports of items controlled under the EAR or the ITAR on 14 foreign entities (including their successors, sub-units, or subsidiaries) that were found to have transferred multilaterally controlled items or other items having weapons of mass destruction (WMD) significance in violation of the Iran and Syria Nonproliferation Act. The sanctioned entities include: China National Precision Machinery Import/Export Corporation, (CPMIEC); Shanghai Non-Ferrous Metals Pudong Development Trade Co. Ltd and Zibo Chemet Equipment Company in China, Sokkia Singapore PTE Ltd Challenger Corporation (Malaysia); -Target Airfreight (Malaysia); Aerospace Logistics Services (Mexico); Arif Durrani (Pakistan); and various government agencies and entities in Syria.

June 20, 2007 – 72 Fed. Reg. 34059: DDTC imposed statutory debarment on the following persons who had been convicted of violating the Arms Export Control Act: Reinhard Rusli, Helmi Soedirdja, Ibrahim Amran, David Beecroft, Ignatius Soeharli, Hadiano Djuliarso, Ronald W Wiseman Phong Hoang, State Metals Industries, Inc., Romeo Dibattista, and Luciano Dibattista.

Department of Commerce

April 11, 2007 – 72 Fed. Reg. 18203: BIS imposed a 7-year denial of export privileges on Stephen Lincoln of Rugby, Warwickshire, England, in settlement of a charge involving the re-export of a system containing controlled software to Iran.

May 29, 2007 – 72 Fed. Reg. 29483: BIS imposed a limited 5-year denial order and a \$55,000 penalty on Data Physics Corporation of San Jose, CA in settlement of charges involving unauthorized exports to a listed entity in China. The denial order prohibits Data Physics from participating in exports to China or other activities involving China. The order also required Data Physics to perform an audit of its internal compliance program, and provide

the audit to the BIS Office of Export Enforcement.

June 12, 2007 – 72 Fed. Reg. 32279: BIS issued a Temporary Denial Order (TDO) against Cirrus Electronics LLC of Simpsonville, SC, related companies Cirrus Singapore and Cirrus India, and officers Parthasarathy Sudarshan, Mythili Gopal, Akn Prasad, and Sampath Sundar. The TDO was based on Cirrus’ knowingly exporting items to two end-users on the Entity List.

June 18, 2007 – 72 Fed. Reg. 33445: BIS issued a denial order against George Charles Budenz II and a related person, Richard Scott Tobey, effective until July 19, 2011, following Budenz’s guilty plea and conviction for exports of ITAR-controlled airplane parts to Malaysia and Belgium without a license. In the criminal case, Budenz was sentenced to 36 months imprisonment and a \$10,000 fine.

June 18, 2007 – 72 Fed. Reg. 33446: BIS issued a denial order against Arif Ali Durrani, effective until June 5, 2015, following Durrani’s conviction for exports of ITAR-controlled airplane parts to Malaysia and Belgium without a license.

Fines & Penalties

May 9, 2007: Chi Mak, a Chinese-born U.S. citizen working as an engineer at defense contractor Power Paragon of Anaheim, CA, was convicted in Santa Ana, CA federal court of conspiracy and attempt to violate export control laws, acting as an unregistered foreign agent, and making false statements to the FBI in connection with an alleged scheme involving exports to China. Other members of Mak’s family were scheduled to face trial in June for their involvement in the same illegal export scheme. Mak’s six-week trial raised difficult legal issues involving public-domain information and the right of a defendant to access classified evidence against him.

May 22, 2007: Sri Welaratna of San Jose, CA, President of Data Physics Corp., in his personal capacity agreed to pay a civil penalty of \$55,000 and accept a 5-year denial of export privileges to China having the same terms as the denial order imposed on Data Physics. These penalties related to the same unauthorized exports to Chinese organizations on the Entity List for which Data Physics was also penalized.