

EXPORT COMPLIANCE UPDATE

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What To Do When ICE Comes To Visit

While we hope that this doesn't happen to you, we are aware that the inspectors from the Department of Homeland Security, Immigration and Customs Enforcement (ICE) are increasing their visits to companies concerning potential or actual export violations. ICE is charged with both investigating and enforcing immigration and customs (export/import) violations under various statutes including the Arms Export Control Act and the Export Administration Act. The reasons for an unannounced visit by ICE are many and may include information received from a disgruntled employee, a competitor, or from their own sources. Visits from ICE involve serious allegations of company violations of any of the US export/import statutes and companies should have in place a procedure to handle an unannounced visit by ICE or any government enforcement investigator.

Procedures should be written and be provided to key people including the front desk receptionist, legal counsel, export compliance officer, facility security officer, and senior management. The procedure should clearly identify the persons to be contacted in the event of a visit by ICE. As the receptionist is likely to be the first contact, he or she should be briefed on the procedure, particularly who in the company to contact.

All visits by ICE will be accomplished via a subpoena or warrant. You should always ask to see a copy. Make sure that the address of the premises to be searched is correct. It is possible that the subpoena does not apply to your company. Write down the

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NEW SERIES OF EXPORT SEMINARS

Commencing in 2006, we will be offering a new series of export seminars. These programs will be one or two-day intensive seminars for those persons charged with the day-to-day support of their company's export licensing and compliance function.

The initial program will be held on **February 2, 2006**, and will be a one day, top-down look at individual and company responsibilities under the ITAR. The program will include commodity jurisdiction, registration (brokers and exporters), part 130 requirements, licensing, shipping, record keeping and reporting requirements.

The workshops will be held in our offices in McLean VA and will accommodate no more than twelve people- space is really limited!

We will be emailing brochures shortly, but if you are not on our mailing list, or would like to know more, please contact Josh at (703) 847-5801.

Compliance Corner: Customs Seizures

Increasingly companies are receiving notices from U.S. Customs and Border Protection ("CBP") identifying that their goods have been detained or seized. Detentions or seizures occur due to a variety of reasons: incorrect or incomplete information on an AES record, failure to present a license, failure to obtain a license, or when CBP has questions regarding the export jurisdiction of the commodity. When CBP detains the goods, the detention may be temporary while CBP investigates the proposed export or import. However, CBP may elect to seize the goods thereby placing them under their control.

There are two ways that CBP can seize the equipment: the physical holding of the equipment in a bonded warehouse, or a constructive seizure. When CBP makes a constructive seizure the goods may remain in the custody of the exporter or freight forwarder but are not able to be moved. In rare cases, constructive seizures can occur in a foreign country before the equipment has cleared customs of that country.

What are your options if your goods have been seized by CBP? Often companies first learn of the seizure via a letter from the Fines Penalties and Forfeitures arm of CBP. The notice of seizure will include an "Election of Proceedings Form AF", which will require the exporter to make a choice as to whether to forfeit the goods, seek remedy through the courts, or enter an administrative settlement. In most instances, companies will elect an administrative settlement, which will allow the goods to be released to them after settlement and payment of a fine.

No matter how the goods are seized, the process for release is the same. In addition to filing the Election of Proceedings Form AF, you have the right to request "Early Release". Early Release is typically granted for lower level violations where no license is required. CBP will also look at prior violations to determine if Early Release is applicable. The Early Release procedure is an informal process and must be requested at the time the company completes the Election of Proceedings Form AF. Early Release will require the company to file a statement identifying the mitigating factors and paying the full amount of the fine. The company will also be required to execute a Hold Harmless Agreement and pay all of the accrued storage charges before the seized goods will be turned over the exporter/importer for shipment.

Proposed DFARS Changes

In our August, 2005 issue of "Export Compliance Update", we identified proposed changes to the Defense Federal Acquisition Regulation (DFARS). The intent of these changes is to flow-down export compliance responsibilities to companies granted contracts with DOD, in order to help prevent the unauthorized disclosure of export-controlled information, services, software and hardware, provided or developed under DOD contracts. The proposed changes would among other things require industry to maintain more stringent procedures regarding foreign employee access to controlled information.

Industry feedback of the proposed rule has not, in general, been supportive. Concern was expressed that the rule is extremely burdensome and may conflict with existing export regulations (i.e. EAR and ITAR), and that the changes would require DOD contracting officers to make decisions outside of their area of expertise. University commenters expressed concern that the proposed changes would make it more difficult to exchange information with foreign-national experts in their respective fields. Commenters also expressed concern that the proposed rule violates the Presidential Directive NSDD-189, on the Transfer of Scientific, Technical and Engineering Information which states: "No restrictions may be placed upon the conduct . . . of federally-funded fundamental research that has not received national security classification."

ICE, Continued From Page 1

name, phone number, agency, badge number and any other relevant information of the person presenting the subpoena. Immediately contact your legal counsel or other nominated personnel and ask the officers to wait until they arrive before starting the search.

You should not delay the search too long, however, as this may be considered an impediment to execution of the search warrant. Instead, you should monitor the search by having an employee accompany each officer. The employee monitor should make a record of the files that were searched, their location, and particularly any documents that are removed. If access to classified documents is required, you should verify that the officer is properly cleared to receive such documents. At the end of the search, request a record of any inventory or documents seized. If the search appears to exceed the terms of the search warrant, you should make an oral objection and make a record of such objection. It is also important that you do not destroy any documents during the investigation.

Finally, if the government investigator wants to interview you, contact your corporate legal or outside legal counsel. You have a right to have counsel present. In conducting the interview, it is important that all individuals dealing with ICE be cooperative, helpful and truthful.

These are but a few of the things to consider when facing an unexpected visit from ICE. Like all things dealing with export compliance, companies should anticipate such an event and have procedures in place to respond appropriately.

ITAR ANSWER

A

The State Department has identified that any party that receives U.S. origin technical data via a signatory to an agreement (licensee) is considered to be the same as a sublicensee and is therefore required to sign an NDA.

⇒ Your TAA should be amended accordingly.

AGREEMENT EXTENSIONS

FD Associates has learned that companies that have applied for extensions to agreements less than 60 days prior to December 31, but before December 1, will be authorized by DDTC to continue activities under the agreement for 90 days, pending amendment issuance.

As this is a compliance matter, companies that have not filed extensions or amendments prior to Nov 1 (the 60-day filing date) may be required to provide DDTC with a letter explaining the reason for delay in submission.

DDTC will be posting a notice on its website concerning this matter.

REGULATORY UPDATES

Department of Commerce

Oct. 31, 2005 – *70 Fed. Reg. 62295*: BIS added 5 entities to the Unverified List of entities where BIS has been unable to conduct pre-license checks or post-shipment verifications. The listing of an entity on the Unverified List is a "red flag" that gives exporters an affirmative duty to substantiate that the transaction complies with the EAR and does not involve a prohibited proliferation activity. The 5 newly added entities are T.Z.H. International Co. Ltd. (Hong Kong); Design Engineering Center (Islamabad, Pakistan); Kantry (Moscow, Russia); Elaton Company (Moscow, Russia); and Pskovenergo Service (Pskov, Russia).

Nov. 7, 2005 -- *70 Fed. Reg. 67346*: BIS amended several provisions of the EAR to bring the treatment of Bulgaria, Czech Republic, Estonia, Hungary, Iceland, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia into conformity with the treatment of other NATO member states with respect to transit shipments. The amendments appear in Sec. 732.2 (General Prohibition 8); Supplement No. 1 to Part 738 (country chart); Sec. 740.2; Sec. 740.15; Supplement No. 1 to Part 740 (country groups); Sec. 742.4; Sec. 744.7; and Sec. 772.1 (definition of "controlled country").

Department of State

Oct. 14, 2005 – *70 Fed. Reg. 60127*: The Secretary of State exercised her authority to waive a statutory ban on the sale or lease of U.S. defense articles or defense services to any country that questions U.S. firms about their compliance with the Arab boycott of Israel. The waiver applies to Iraq, Bahrain,

REGULATORY UPDATES

Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, the United Arab Emirates, and Yemen.

Fines & Penalties

Oct. 12, 2005: Imbsen & Associates of Sacramento, CA agreed to pay a civil penalty of \$2,400 to settle charges by the Treasury Department Office of Foreign Assets Control (OFAC) that it had violated the Libyan embargo program by contracting with a Maltese entity to sell Imbsen software to a Libyan consignee. Imbsen, which did not voluntarily disclose the violation, also agreed to enhance its OFAC compliance program.

Oct. 12, 2005: IndeCorp Corporation of Chicago, IL agreed to pay a civil penalty of \$14,520 to settle OFAC charges that it exported services including sales, reservations, and marketing support to a Libyan entity that was a Specially Designated National (SDN). IndeCorp has taken remedial measures and upgraded its OFAC compliance program, but did not voluntarily disclose the violation.

Oct. 12, 2005: Archer Daniels Midland Company of Decatur, IL agreed to pay a civil penalty of \$13,750 to settle charges by OFAC that it had violated the Cuban embargo when its wholly owned subsidiary, Finora Canada Ltd., entered into a contract with an entity in which the Cuban government has an interest and made multiple exports under the contract. In stating the penalty, OFAC noted that ADM had not voluntarily disclosed the violations.

Oct. 12, 2005: Stolt-Nielsen Transportation Group of Greenwich, CT agreed to pay \$16,500 to settle OFAC charges that it violated the Iran embargo program by paying a foreign affiliate's port expenses in Iran by wire transfer. S-N reported an upgrade of its OFAC compliance program, but did not voluntarily disclose the violation.

Oct. 17, 2005: Clark Material Handling Company of Lexington, KY agreed to pay a \$200,000 civil penalty to BIS for 19 violations of the EAR including con-

spiracy to violate the EAR; exporting lift truck parts to Iran without the required export licenses; false statements on SEDs; and false statements to a special agent of the Office of Export Enforcement in the course of an investigation.

Oct. 17, 2005: DHL Holdings (USA), Inc. of Plantation, FL agreed to pay BIS an \$18,000 civil penalty to settle charges that it had accepted, transferred, and forwarded items subject to the EAR to Saudi Arabia on behalf of a corporation and an individual who at the time were subject to a Temporary Denial Order (TDO).

Oct. 18, 2005: George Charles Budenz II, a retired Navy commander, pleaded guilty in federal court in San Diego, CA to three counts of exports of engine parts for F-5 fighters, T-38 military trainers and Chinook helicopters to Malaysia and Belgium without the required State Department license. Budenz admitted to making the shipments at the direction of Arif Ali Durrani, who had earlier pleaded guilty to charges of conspiracy to illegally export military aircraft engine parts to the United Arab Emirates, Malaysia, and Belgium.

Oct. 24, 2005: Overton's, Inc., of Greenville, NC agreed to pay BIS a civil penalty of \$6,600 to settle 22 charges of illegal exports of optical sighting devices to Canada without the required licenses.

Oct. 24, 2005: Epstein, Edell, Shapiro, Finman & Lytle, a Maryland law firm, agreed to pay BIS a \$17,000 civil penalty for 8 alleged antiboycott violations involving furnishing Syria with information about other persons' business relationships with or in a boycotted country, and also for failing to report this boycott request in a timely manner.

Oct. 26, 2005: Cymer, Inc. of San Diego, CA agreed to pay BIS a civil penalty of \$19,250 to settle two charges of illegal deemed exports to citizens of Russia and China; two charges of unlicensed exports of ultraviolet lighting equipment to Taiwan, and one charge of false statements in a Shipper's Export Declaration by stating that the equipment was eligible for shipment without an export license.

Oct. 26, 2005: Noshir S. Gowadia of Maui, Hawaii was indicted in federal court in Washington, DC, on charges that he violated the Arms Export Control Act and other federal laws by allegedly selling secret information about the B-2 stealth bomber to three unnamed foreign countries. Gowadia was an engineer for Northrop Corp. from 1968 to 1986 and helped develop an infrared suppression system for the B-2's propulsion system.

Nov. 15, 2005: Maine Biological Laboratories, Inc. of Waterville, ME agreed to a \$100,000 civil penalty and a 5-year denial of export privileges for 12 violations of the EAR involving exports of flu vaccines to Syria, false statements, and failure to file correct SEDs.

Nov. 15, 2005: Medical Equipment Specialists, Inc. of Worcester, MA agreed to a \$37,500 civil penalty and 5-year denial of export privileges for 3 violations of the EAR involving attempted unlicensed exports of X-ray equipment to Cuba.

Nov. 15, 2005: Salinas International Freight Company, Inc., of Dallas, TX agreed to pay a civil penalty of \$11,600 to settle charges that it had exported computer equipment to Saudi Arabia on behalf of a denied person and had misrepresented licensing authority on a SED.

Sanctions & Denial Orders

Department of Commerce

Nov 15, 2005 – 70 Fed. Reg 69311 and 69314: BIS imposed 5-year Denied Person status and a \$44,000 civil penalty on Suburban Guns (Pty) Ltd. of Cape Town, South Africa, for four violations of a 1998 denial order by ordering guns from U.S. companies. BIS also imposed a 5-year denial of export privileges and \$55,000 fine on an individual, Phaedon Nicholas Criton Constan-Tatos of Cape Town, South Africa, for facilitating the illegal acquisition of guns from U.S. companies by Suburban Guns and for making false statements to a BIS official investigating the case.

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ITAR QUIZ

Q My TAA authorizes sublicensing to specified subcontractors and requires them to get a Non Disclosure Agreement (NDA). It also identifies that the equipment and related technical data will be retransferred to other parties who are involved in the program. These parties are not identified as sublicensees.

Are there any steps that my customer should take before retransferring the equipment and related technical data to these other named parties?

Compliance/Reporting Reminders:

- Annual brokering reports
- Annual sales reports in furtherance of MLA's and WDA's
- Semi-annual reports for use of Canadian exemption 22 CFR 126.5 (c) services