

# EXPORT COMPLIANCE UPDATE

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## EMPOWERED OFFICIAL IN NAME ONLY?

### EXPORTING DUAL-USE ITEMS TO CANADA

Companies are cautioned that simply because a product is commercial and it is being exported to Canada does not automatically mean that no licenses are required. Exporters must review all products and exports against the current version Export Administration Regulations (EAR) to ensure that there are no restrictions against the export.

As evidenced by a recent export fine against EMD Biosciences, the regulations do change and exporters must know the control requirements on their products before they ship. In May 2005, the Department of Commerce imposed a \$904,500 civil penalty on the San Diego firm for exporting biological toxins (classified as ECCN 1C351) to Canada without licenses. EMD claimed it was unaware that the EAR had been amended on May 31, 2003 to require export licenses to export human pathogens and toxins classified under ECCN 1C351 to all destinations, including Canada.

The Department of Commerce is also taking additional steps to control the export of other dual use items to Canada. After a three year initial comment period, the Commerce Department's Bureau of Industry and Security (BIS) has issued a proposed rule that would amend section 742.5 of the Export Administration Regulations (EAR) by imposing a license requirement for exports and reexports of items controlled for missile technology (MT) reasons to Canada. Currently, the Commerce regulations require licenses for MT-controlled items to all destinations except Canada.

### LESSENING OF ARMS EMBARGO ON INDONESIA

Over recent years, the State Department has maintained a partial arms embargo upon Indonesia due to human-rights concerns. The Indonesian government has recently agreed to increase its prosecution of those convicted of gross human rights atrocities. The embargo has been eased several times and the government has recently eased the restrictions. In May 2005, the State Department lifted the ban on the government sale of non-lethal defense equipment and services to Indonesia via Foreign Military Sales (FMS) programs.

Direct commercial sales from U.S. industry of non-lethal defense articles and services to Indonesia were allowed in January. Indonesia is hoping to acquire military hardware and training assistance from the United States to revitalize its poorly equipped armed forces.

The International Traffic in Arms Regulations (ITAR) requires that U.S. companies designate an Empowered Official (EO) to sign licenses, agreements and other export authorizations on behalf of their company. An EO must meet certain criteria as specified in the ITAR, Section 120.25. Does your company EO meet the ITAR criteria for EO status?

According to ITAR §120.25, an EO must be a U.S. person (*Note: A U.S. person is a: 1) U.S. citizen; 2) permanent resident, or 3) protected person*) who is directly employed by the applicant or a subsidiary in a position having authority for policy or management within the applicant organization. A company cannot designate a foreign person, a consultant, a freight forwarder, a temporary employee or other third party to be their EO.

An EO must be a senior employee, legally empowered by the company to sign license applications or other requests for approval. A written statement designating an EO must be on file and should be included with the company's export compliance program. The Office of Defense Trade Controls Compliance (ODTCC) also requires that companies provide them with a current list of their EOs.

An EO needs to understand the provisions and requirements of the various export control statutes and regulations, as well as the criminal liability, civil liability and administrative penalties that may be imposed upon the company for violating the export regulations.

The ITAR also identifies that an EO must have the independent authority to:

- Inquire into any aspect of a proposed export or temporary import by the applicant, and
- Verify the legality of the transaction and the accuracy of the information to be submitted; and
- Refuse to sign any license application or other request for approval without prejudice or other adverse recourse.

The State Department expects that the company EO meet all the criteria as stated in the ITAR. Does your EO meet the standards laid out in the ITAR, or was your EO designated simply to fulfill a requirement on paper?

## RECENT US ACQUISITIONS

The ITAR requires companies to amend their licenses, agreements and other authorizations anytime there is a change in information contained in the authorizations. In some instances, new authorizations will be required. The requirement to amend or renew extends to changes in company names due to acquisitions, mergers, and divestments.

Listed below are several recent U.S. and foreign acquisitions that may require amendments for State Department licenses and agreements.

### **Daewoo Heavy Industries and Machinery Ltd. – Korea**

On April 29, 2005 Doosan Heavy Industries & Machinery Ltd. acquired Daewoo Heavy Industries & Machinery Ltd. in Seoul, Korea. Both the foreign company and the U.S. offices have changed their names to Doosan Heavy Industries & Machinery Ltd, and Doosan Infracore America Corporation.

### **BAE Systems Avionics - United Kingdom**

Also occurring on April 29, 2005, BAE Systems Avionics Ltd (UK) was acquired by Finmeccanica SpA (Italy) and renamed - SELEX Airborne Systems Ltd. See the State Department web site [www.pmdtc.org](http://www.pmdtc.org) for further details.

### **Wilson Logistics Holding AB - Sweden**

Wilson Logistics Group was acquired by TPG N.V., now known as TNT N.V., in late 2004. On June 30, 2005, Wilson Logistics Holding AB will change its name to TNT Freight Management Holding AB. The change only concerns the Holding company (Wilson Logistics Holding AB) and not the Swedish company Wilson Logistics Sweden AB.

### **The Titan Corporation - United States**

On June 3, 2005, U.S. L-3 Communications announced that it has signed a definitive agreement to acquire San Diego-based Titan Corporation. At press time there was no additional information available on the new name of the former Titan Corporation businesses.

### **Esterline Technologies and Palomar Products - United States**

Also occurring on June 3, 2005 was the acquisition by Esterline Technologies of Palomar Products. There is no specific information available at this time regarding a name change for either of these companies as a result of this acquisition.

## ITAR ANSWER

**A** Changes to the foreign consignee or party to a license or agreement are considered to be substantial and generally will require new licenses for the unshipped balances (DSP-5, DSP-85) or renewals (DSP-73, DSP-61). Manufacturing License and Technical Assistance Agreements must be amended and signed by all parties including the old and new owners.

Therefore Company A must submit new licenses and amendments for any active license and agreement involving Company V.

## REGULATORY UPDATES

### **Department of Commerce**

April 29, 2005 – *70 Fed. Reg. 22247*: The Bureau of Industry and Security (BIS) amended the Export Administration Regulations (EAR) to change several items of contact information including the fax number for the Office of Exporter Services (now 202-482-2927) and the delivery address for encryption review requests and reports. The rule also provides that voluntary disclosures must be made to Office of Export Enforcement (OEE) headquarters and may no longer be made at OEE field offices and makes several minor administrative changes.

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May 24, 2005 – *70 Fed. Reg. 29660*: BIS issued a proposed rule amending the EAR to impose a license requirement for exports and reexports of items controlled for missile technology (MT) reasons to Canada. A similar proposed rule and request for comments was published December 20, 2001, following a report issued by the General Accounting Office (GAO - now Government Accountability Office) that called for such action. Comments are due June 23, 2005. *See related article on Page 1.*

### **Nuclear Regulatory Commission**

May 25, 2005 – *70 Fed. Reg. 29934*: The Nuclear Regulatory Commission (NRC) amended its regulations to shift Syria from the list of restricted destinations (10 CFR 110.29) to the list of embargoed destinations (10 CFR 110.28). The effect of this move will be to prohibit the export of any nuclear material or components to Syria under general license.

## REGULATORY UPDATES

### Fines & Penalties

April 27, 2005: Wilden Pump and Engineering Co. of Grand Terrace, CA agreed with BIS on a \$700,000 penalty plus a suspended three-year denial of export privileges to settle charges of 71 violations concerning exports of diaphragm pumps to China, Israel, Iran, Syria, and the United Arab Emirates without the required authorization. The charges included exporting without the required authorization, false statements on shipper's export declarations, and unlicensed transfers of controlled items knowing that a violation of the EAR was to occur.

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April 28, 2005: Robert E Quinn and Michael H. Holland, both of Lexington, Kentucky, and Mohammed A. Sharbat of Esfahan, Iran were indicted by a federal grand jury in Washington, DC, on one count of conspiracy and five counts of exports and attempted exports of fork lift designs and components to Iran without obtaining the required authorization from the Treasury Department Office of Foreign Assets Control (OFAC). The alleged illegal transactions were routed to Iran through Dubai, United Arab Emirates.

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May 6, 2005: In federal court in Milwaukee, WI, Jian Guo Qu of the People's Republic of China (PRC) pled guilty to one count of conspiracy to export dual-use semiconductors and other electronic components to China without proper authorization. Ruo Ling Wang, also of the PRC, pled guilty to one count of falsifying and undervaluing a shipment of illegally exported electronics. Qu awaits sentencing and faces up to four years in prison; Wang was sentenced to time served (six and a half months) and a \$1500 fine. Ning Wen and his wife Hailin Lin, both U.S. citizens residing in Manitowoc, WI, will be tried on charges of participating in the same scheme in September 2005 in Green Bay, WI.

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May 10, 2005: A federal court in San Jose, CA, acquitted Qing Chang Jiang of Cupertino, CA of charges that he ille-

gally exported microwave technology to China, holding that there was reasonable doubt that he knew his actions violated U.S. law – a prerequisite for a criminal conviction. However, Jiang faces up to five years in prison after being found guilty of making false statements to customs investigators concerning the exports. Prior to his trial, Jiang spent two months in jail followed by twenty months during which he was required to wear an electronic monitoring device and prohibited from conducting export business.

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May 11, 2005: EMD Biosciences, Inc. of San Diego, CA agreed to pay a \$904,500 civil penalty to settle charges that it made 67 exports of biological toxins to Canada without the proper authorization. EMD also accepted a two-year denial of export privileges, suspended provided that EMD commits no violations during the suspension period. Under its prior name, CN Biosciences, Inc., EMD had previously paid a civil penalty of \$708,000 to settle charges of 171 unlicensed exports to various destinations. *See related article on Page 1.*

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May 26, 2005: Laurel Industrial, Inc., of San Jose, CA agreed to a \$44,000 civil penalty to settle charges by BIS that it had made unauthorized exports of underwater acoustic detection equipment to the PRC. Laurel also agreed to complete an internal export compliance audit and submit the results to BIS. The charges involved unauthorized exports of three DS7000 acoustic deck units. Laurel was also charged with making false or misleading statements on export documents related to the shipments.

### Sanctions & Denial Orders

#### Office of the President

May 10, 2005 – *70 Fed. Reg. 24697*: The President ordered the continuation of the national emergency against Syria, thereby renewing current prohibitions on

exports and reexports to Syria.

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May 19, 2005 – *70 Fed. Reg. 28979*: The President certified to Congress that Cuba, Iran, Libya, North Korea, and Syria are not fully cooperating with U.S. antiterrorism efforts. The President noted that Libya was currently under study and that when the study is completed, he will further consult with Congress on this issue. No defense article or defense service can be licensed to any of these five countries without a special waiver.

#### Department of Commerce

May 6, 2005 – *70 Fed. Reg. 23983*: BIS imposed a three-year denial order on Petrochemical Commercial Co. Ltd. of London, England for aiding in the solicitation of an attempted unauthorized export to Iran by forwarding a bid by a Dutch company for EAR99 gas compression spare parts that were to be exported from the U.S. to Iran.

#### Department of State

May 6, 2005: The Directorate of Defense Trade Controls (DDTC) suspended existing licenses for the export of ITAR-controlled defense articles and services to the Democratic Republic of the Congo (DRC) and announced a general policy of denial on future applications, with case-by-case consideration of exports for certain peace-keeping, humanitarian, or protective uses. The embargo implements United Nations Security Council Resolution 1596, expanding the existing embargo on exports of defense articles and services to the DRC.

#### Department of the Treasury

May 4, 11, 12, and 25, 2005: The Office of Foreign Assets Control added the Palestinian entity ElEhssan (with many aliases), 30 Colombian individuals, 31 Colombian entities, 3 Indonesian individuals, and the Islamic Jihad Group to its list of Specially Designated Nationals (SDNs) and changed the SDN entries for 3 Colombian individuals and 1 Indonesian individual.

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## ITAR QUIZ

**Q** U.S. “Company A” has a number of licenses and agreements with a German company, “Company V”, for end-use by the German government. Company V has recently been purchased by another German company, “Company W.” The new company will be called “Company VW.”

What licensing actions must be undertaken by Company A?