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Authors:



Ross H. Garber
(860) 251-5901
rgarber@goodwin.com



T. Scott Cowperthwait
(860) 251-5134
scowperthwait@goodwin.com



Chasity V. Roberts
(860) 251-5069
croberts@goodwin.com

www.shipmangoodwin.com

Enforcement Likely to Rise Following Implementation of Export Reform

Although the President's Export Control Reform (ECR) initiative was designed to facilitate exports, it will likely lead to more vigorous, stricter enforcement of export control laws and regulations, with elevated administrative and civil penalties and even criminal consequences for violations. This change in the enforcement climate is the probable result of the transfer of regulatory jurisdiction from the U.S. Department of State Directorate of Defense Trade Controls (DDTC) to the U.S. Department of Commerce Bureau of Industry and Security (BIS). As explained below, BIS has a muscular investigations operation, which has historically viewed itself more like a traditional enforcement agency than its counterpart at the State Department. In fact, its Office of Export Enforcement (OEE) regularly investigates export control violations involving commercial and dual-use items and cooperates with the Department of Justice in criminal matters. And now BIS appears to be gearing up; the President's Fiscal Year 2014 budget requests \$8.291 million "for additional resources to augment BIS enforcement capabilities."

BIS Is A Robust And Aggressive Enforcement Agency

In contrast to DDTC, BIS maintains a singularly robust investigative operation. It touts the fact that its agents are equipped with the authority to make arrests, execute search warrants, serve subpoenas, and detain and seize any goods suspected of illegal exportation. At a recent congressional hearing held by the U.S. House of Representatives' Committee on Foreign Affairs, Assistant Secretary of Commerce Kevin Wolf stated:

Commerce enforcement officials bring unique capabilities and authorities to investigate and monitor export activities. Our Export Enforcement Special Agents conduct criminal investigations and the Bureau of Industry and Security can bring to bear unique administrative authorities - such as civil penalties, temporary and long-term denial orders, and Entity List and Unverified List designations - that can be more powerful than criminal sanctions by taking away a company's ability to export or a foreign company's ability to obtain U.S. -origin items. We have seen time after time that our Entity List drives front companies out of business and legitimate businesses to change their behavior to become responsible stewards of international trade.

While U.S. trade enforcement officials have uniformly stated that ECR aims to build “higher walls around fewer items,” BIS appears to be relishing its expanding jurisdiction by creating “higher walls” around “more” items and ensuring that the walls are not scaled.

BIS Enforcement Surge Has Already Begun

Anticipating BIS’s increased enforcement needs, the Commerce Department hired 22 additional licensing and compliance officers last year. These additional personnel were dedicated to addressing exports that fall within the scope of the “600 series” regulations, which apply to relatively sensitive dual-use items that previously fell within the jurisdiction of the State Department.

BIS has adjusted its operations and is working with other agencies to enhance its regulatory and enforcement efforts. For example, OEE is part of the Export Enforcement Coordination Center (known as “E2C2”), which is comprised of officials from various federal agencies, including the FBI, the Department of Homeland Security’s Immigration and Customs Enforcement Homeland Security Investigations (HSI) directorate, the U.S. Department of Treasury’s Office of Foreign Assets Control (OFAC) and DDTTC. E2C2 is the primary forum for interagency cooperation on export control enforcement. BIS also formed an interagency Information Triage Unit to coordinate the collection and dissemination of information and intelligence concerning export transactions subject to licensing authority.

The effectiveness of interagency collaboration has had dire consequences for some companies in aerospace and defense industry. As recently as June 5, 2014, Fokker Services B.V., a Netherlands-based aerospace services provider, agreed to a global settlement with BIS, OFAC and the U.S. Attorney’s Office for the District of Columbia. BIS charged Fokker with 253 separate export control violations. As part of the settlement, Fokker agreed to pay a civil penalty of \$10.5 million and forfeit an additional \$10.5 million. It also entered into a deferred prosecution agreement with the Justice Department. Secretary of Commerce Eric L. Hirschhorn stated, “The scope of [the] global settlement with Fokker Services highlights the egregious nature of the violations and points to the commitment of OEE to pursue and prosecute those responsible no matter where they are located. OEE and our partner law enforcement colleagues will continue to use all means available to ensure that U.S. technology does not fall into the wrong hands.”

Also notable is that BIS is working with the U.S. Census Bureau to beef up enforcement by tracking exports through the Automated Export System (“AES”) requirements, the system used by U.S. exporters to electronically declare their international exports.



More BIS-Generated Criminal Cases

The boost in number of enforcement officers and accessibility of shared information has amplified BIS investigations. In Fiscal Year 2013, BIS investigations led to 52 criminal convictions, an increase of nearly 100% from the previous year. BIS investigations also resulted in 71 administrative export actions against individuals and businesses last year, compared to 42 in Fiscal Year 2012.

Not only is BIS investigating more, it is obtaining greater penalties. Notably, on November 26, 2013, BIS announced its largest penalty to date, which it obtained from Weatherford International Ltd and certain of its subsidiaries. The company agreed to pay \$100 million to settle criminal and administrative charges. (See our previous bulletin: <http://www.shipmangoodwin.com/weatherford-international-agrees-to-pay-253-million-to-settle-alleged-violations-of-export-controls-regulations>)

Conclusion

BIS has made clear that export control reform does not mean less enforcement. To the contrary, all signs are that BIS has broadened and strengthened its enforcement mission. Companies should, therefore, not rely on past practice with the State Department to guide their reactions to possible violations of export regulations that are now within the jurisdiction of BIS. There is a new sheriff in town.

Questions or Assistance?

If you have any questions regarding this alert, please contact Ross Garber at (202) 469-7750, (860) 251-5901 or rgarber@goodwin.com, or Scott Cowperthwait at (860) 251-5134 or scowperthwait@goodwin.com.

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One Constitution Plaza
Hartford, CT 06103-1919
860-251-5000

300 Atlantic Street
Stamford, CT 06901-3522
203-324-8100

1875 K St., NW - Suite 600
Washington, DC 20006-1251
202-469-7750

289 Greenwich Avenue
Greenwich, CT 06830-6595
203-869-5600

12 Porter Street
Lakeville, CT 06039-1809
860-435-2539

www.shipmangoodwin.com



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