

EXPORT CONTROLS IN THE WAKE OF SEPTEMBER 11

By Stephen H. LaCount

The tragedy of September 11 and the specter of terrorist attacks has deeply penetrated the national consciousness, and inspired the creation of the new Department of Homeland Security. Primary responsibility for controlling “dual use” high-technology products, such as computer and telecommunications equipment, may well be transferred from the Commerce Department to Homeland Security. In today’s world, industry and security coexist in uneasy tension. We strongly recommend that clients review their export control compliance programs and licensing procedures with the assistance of expert counsel. Corporations and their officers who have violated U.S. export laws have faced unprecedented civil and criminal penalties and fines, including loss of export privileges for one or more years.

Industry Responsibility and Government Export Control Policy

In an address to the exporting community, Under Secretary Kenneth Juster, head of Commerce’s Bureau of Industry and Security (formerly known as the Bureau of Export Administration), made the following observations: “You [industry] are on the front lines in evaluating new customers and monitoring exports of your goods and services.... The Bureau is not simply a lobbyist for industry. We have an independent obligation to protect the national security of the United States.”

A recent report from the Armed Services Committee stated: “When the world witnessed the destructive potential of terrorism on September 11, we were reminded of the need to remain steadfast in recognizing emerging threats to our security, and to think one step ahead of those who wish to do us harm.... To ensure that terrorist groups and their state sponsors are never able to gain access to chemical, biological, or nuclear weapons, or the means to deliver them via missile, the United States is employing a variety of methods to combat the spread of weapons of mass destruction, including multilateral agreements, diplomacy, arms control, threat reduction assistance, export control and other means where necessary. Export control forms a key component in our efforts to stem proliferation and terrorism.”

Agencies That Regulate U.S. Exports and Scope of Regulation

The Departments of Commerce, State, Treasury, Energy and other federal agencies administer a wide range of export control regulations, including rules governing re-exports of U.S. - origin commodities, technical data and software from third countries to other foreign destinations. In recent years these regulations have been frequently revised, generally broadly reducing controls on exports to the former Soviet Bloc countries, while increasing controls on items potentially used in the production or deployment of missile technologies and chemical, biological and nuclear weapons. U.S. companies – including their foreign subsidiaries – are subject to U.S. export control laws. Foreign domiciled companies that integrate U.S. technology into their products can also be subject to U.S. export control laws in certain instances. A number of prominent companies – recently subjected to harsh penalties and fines by the Office of Export Enforcement – have learned the hard way that U.S. export control laws cast a wide net.

Countries and Persons Subject to Economic Sanctions or National Security Controls – U.S. Intelligence Assessments

It is extremely difficult, if not impossible, for U.S. companies, or foreign companies exporting or re-exporting U.S. origin products or technology, to get license approval to export to members of the so-called “axis of evil” or other countries or individuals designated below by asterisks.

*Iran is reportedly one of the most egregious state sponsors of terror, and known to be seeking dual-use materials, technology and expertise from Russia, China and Western Europe for its offensive biological and chemical weapons programs. It is also seeking to upgrade its large ballistic missile force with the help of Russian, North Korean and Chinese firms. Iran is also developing a nuclear weapons capability. For all these reasons, it is closely scrutinized for dual-use imports.

*North Korea is the world’s number one exporter of missile technology and equipment. These sales generate hard currency, which in turn finances further missile development and production. As the CIA publicly reports: “North Korea has assumed the role as the missile and manufacturing technology source for many programs.”

*Libya continues to pursue an indigenous chemical warfare production capability, relying heavily on foreign suppliers for precursor chemicals, technical expertise and other key chemical warfare-related equipment. It continues to seek ballistic missile-related equipment, materials, technology and expertise from foreign sources.

*Other Countries Restricted by Office of Foreign Assets Control: Balkans, Cuba, Liberia, Sierra Leone, Sudan, Yugoslavia.

*Specially Designated Nationals. The “SDN” list is about 30 pages long and includes thousands of individuals and entities that are primarily located outside of the blocked countries.

Note on Iraq: Iraq formerly maintained an aggressive program to rebuild its nuclear, chemical, biological and missile capabilities and was an embargoed destination. However, in the aftermath of the fall of the Saddam Hussein regime, it is now possible for U.S. exporters to obtain export licenses to supply dual-use materials and technologies critical to the country’s rebuilding efforts.

Note on China: China is still a sensitive destination because of “Chinese proliferation” concerns and U.S. failure to conclude a protocol covering end-use visits.

New Export Control Attachés

The Department of Commerce has implemented a comprehensive new agent training program, and assigned export control attachés in Abu Dhabi, United Arab Emirates and Cairo, Egypt. These attachés will no doubt monitor the disposition of U.S.-origin products in the Middle East more effectively than in the past.