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Companies Face New Process in Disclosures of Potential Export Violations

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Companies opting to file voluntary disclosures of potential export violations with the State Department's Directorate of Defense Trade Controls (DDTC) will soon be required to utilize a new process for submitting their disclosures: filing new Forms DS-7787 and supporting documentation in the online Defense Export Control Compliance System (DECCS). **This new process will be a sharp departure from the way in which companies have historically approached disclosures**, in which they filed detailed, narrative submissions in hardcopy with the DDTC.

On November 28th, the Department of State published a Federal Register notice soliciting comments from the public regarding the proposed rollout of the new Form DS-7787 for the submission of voluntary disclosures of violations of the Arms Export Control Act and International Traffic in Arms Regulations. **Public comments may be submitted on or before December 28, 2016.** See 81 Federal Register 85668 (November 28, 2016).

The State Department's Directorate of Defense Trade Controls (DDTC) is responsible for administering and enforcing the Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR) which apply to exports, reexports, temporary imports and brokering activities involving defense articles (including technical data) and the provision of defense services. Like other U.S. federal government agencies that regulate imports into and exports from the United States, the DDTC encourages companies to voluntarily disclose potential AECA and ITAR violations. Voluntary disclosures assist the DDTC in determining what, if any, administration action should be taken in cases of AECA and ITAR violations, and may be considered mitigating factors in ITAR enforcement actions. Despite the use of the term voluntary in connection with disclosures, there is an affirmative duty



imposed on companies to notify the DDTC of potential AECA and ITAR violations involving:

- The failure to return certain firearms, ammunition, parts, components, accessories and attachments for firearms, body armor and chemical agent protective gear to the United States as required by the temporary export license exemptions in Section 123.17 of the ITAR; and,
- Unauthorized exports, reexports, temporary imports into the United States, proposals or presentations to sell, transfers or retransfers of defense articles (or the provision of services) involving proscribed countries identified in Section 126.1 of the ITAR.

The DDTC may also direct an ITAR registered company or another party to disclose details about a particular transaction based on information the DDTC may have received from partner federal agencies. Further, the failure to report a violation of the AECA or ITAR that harmed U.S. national security and foreign policy objectives may be treated as an aggravating or adverse factor in enforcement actions. Regardless of whether a voluntary disclosure is filed, the DDTC has the authority to refer cases to the Department of Justice for criminal prosecution if warranted. The DDTC will notify the Department of Justice that a voluntary disclosure has been submitted; however, the Department of Justice is not required to give that disclosure any weight. Nonetheless, the DDTC reports that, in Fiscal Year 2015, approximately 1,200 voluntary disclosures were submitted, and the vast majority of those cases were closed without the imposition of any civil penalties.

Section 127.12 of the ITAR describes the information that should be submitted in support of a voluntary disclosure. A complete disclosure package typically consists of: (a) a detailed narrative letter (printed on the company's letterhead and signed by the Empowered Official) that describes the violation that occurred, the underlying circumstances, the parties to the violations, the transactions

and commodities involved, and the remedial action already taken or planned by the company; (b) copies of the commercial and shipping records relating to the transactions or activities; and, (c) other documentation that relates to the violation that occurred. Companies currently submit their voluntary disclosures in hardcopy form to the DDTC.

However, as part of its ongoing IT modernization project, the DDTC has proposed to require the use of new Form DS-7787 for the submission of voluntary disclosures of potential AECA and ITAR violations. The DDTC states that the use of a streamlined form such as the DS-7787 will result in easier tracking and analysis of submissions. The DDTC first proposed the use of the DS-7787 in June 2016. See 81 Federal Register 39994 (June 20, 2016). Nine public comments were received in connection with the June announcement. In response to those comments, the DDTC stated that:

- The unlimited character text boxes provided for each data field of the DS-7787 should allow ample room for disclosers to insert their narrative explanations, and companies may provide ancillary information in the Additional Relevant Information text box as well as upload supporting documentation to the form; however, the DDTC intends for the DS-7787 to be the primary vehicle for disclosing violations.
- The burden associated with the form is estimated to be an average of ten hours per submission, and the vast majority of disclosures submitted annually generally take far less than 10 hours per response;
- The form's instructions have been reworked to: (a)





define which fields are mandatory; (b) explain how to determine the number of violations; (c) clarify what information is required for related disclosures, discovery dates, and relevant DDTC licenses or authorizations; (d) describe the disclosure method for companies and individuals under consent agreements or other reporting arrangements; and, (e) provide guidance on disclosing violations involving proscribed countries per Section 126.1 of the ITAR;

- Classified information should never be included in the DS-7787;
- Disclosures may not be submitted by third parties such as outside counsel; however, outside counsel may be listed as a point of contact for the submission;
- Sub-licensees and subcontractors should be included as involved parties on the DS-7787;
- If the violation of the sub-licensee or subcontractor relates to one of the discloser's ITAR authorizations, the discloser may share responsibility for the violation and should report the violation as such;
- If the discloser is reporting a violation of a subcontractor or sub-licensee that is *not* related to any of its authorizations, the discloser should select the Third Party Disclosure option on the form;
- Non-US entities that wish to submit disclosures will be required to create unique usernames and passwords to access the case management system and file the Forms DS-7787;
- Mitigating and aggravating factor information may be inserted into the Additional Relevant Information field of the DS-7787;
- The case management system will meet all current government standards for data security and privacy,

and individual users will be required to create unique usernames and passwords to access the system and submit information over an encrypted connection; and,

- The information submitted as part of the disclosure will be protected from public disclosure to the extent permitted by law, and disclosers should clearly mark proprietary information as such in their submissions.

Companies considering the filing of a voluntary disclosure, or that foresee the possibility of filing one in the near future, are urged to stay abreast of the proposed Form DS-7787 procedure and when it may officially go into effect. In addition, the Top 5 tips for successful voluntary disclosures that should be considered include:

(1) Commence a thorough internal review of the potential violation that occurred, other shipments or activities that may be impacted (either previous shipments made or those about to depart from the United States), root causes of the errors that occurred, parties and personnel involved, and other transactions going back five years in time—the statute of limitations for export violations is five years, so it is important to engage in a deep dive;

(2) Engage outside export counsel early on to assist in the internal review and preparation of the voluntary disclosure, and ensure that all materials generated during the review are subject to the attorney-client privilege;

(3) Maintain copies of all documents, communications, inquiries and responses to government requests as part of the export record retention process;





(4) As soon as the root cause or causes have been identified, immediately begin designing a corrective action plan and implementing preventative measures, such as conducting additional internal training for personnel, revamping and enhancing documented policies and procedures, address performance issues with service providers (e.g., brokers, forwarder, couriers) who may have been a contributing factor in the violations, consider increasing the frequency and scope of post-shipment reviews and internal audits to ensure that the errors are not reoccurring;

(5) Consider increasing the frequency and scope of post-shipment reviews and internal audits to ensure that the errors are not reoccurring and that all remedial measures promised as part of the overall corrective action plan have been fully executed. ■



For More Information

If you have any questions about voluntary disclosures, the ITAR or other international trade issues, please feel free to contact a member of Polsinelli's International Attorneys, including Melissa Proctor at mproctor@polsinelli.com.



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