

EXPORT BREAKFAST BRIEFING SERIES

INTERNATIONAL TRAFFIC IN ARMS REGULATIONS: EMPOWERED OFFICIAL “BASIC TRAINING”



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EMPOWERED OFFICIAL “BASIC TRAINING”

- * Congress establishes the ground rules for companies to export products, technology, technical data and services
- * Statutes and regulations allocate responsible Government agencies and timelines for implementing regulations
- * Generally predicated on achieving certain objectives: foreign policy, national security and other general political goals, such as protection of short supply



EMPOWERED OFFICIAL “BASIC TRAINING”

- * But the laws and regulations are also designed to assign responsibility for the completion of certain tasks and provide accountability for the results of those tasks
- * The export arena is no exception
- * Responsibility and accountability are both established through the Arms Export Control Act, 22 USCA § 2778 (as amended) (“AECA”) and the statute’s implementing regulations, the International Traffic in Arms Regulations, 22 CFR part 120-130 (as amended) (“ITAR”)



EMPOWERED OFFICIAL “BASIC TRAINING”

- * Exporting is a privilege not a right
- * AECA outlines the general requirements to be met to exercise that privilege
- * § 2778(b)(1)(A)(i): . . . As prescribed in regulations issued under this section, every person (other than an officer or employee of the United States Government acting in an official capacity) who engages in the business of manufacturing, exporting, or importing any defense articles or defense services designated by the President under subsection (a)(1) of this section shall register with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations . . .



EMPOWERED OFFICIAL “BASIC TRAINING”

* AECA requires:

- ◆ registration
- ◆ payment of registration fees
- ◆ licensing
- ◆ identification of items controlled on the United States Munitions List
- ◆ identification as either an exporter, manufacturer or broker of defense articles, defense services and/or technical data



EMPOWERED OFFICIAL “BASIC TRAINING”

- * AECA, however, does not specifically mention a requirement for particular individuals to carry out the licensing, compliance and related activities for companies that are subject to the AECA
- * So from where does the concept of an accountable individual derive for AECA purposes?



EMPOWERED OFFICIAL “BASIC TRAINING”

- * The concept of an “accountable individual” may be found in the AECA’s implementing regulations, the ITAR
- * “Accountable individual” is the “Empowered Official” as defined in ITAR § 120.25
- * The concept, therefore, is a creation of the Department of State as a discretionary exercise of its authority to draft and implement regulations for the AECA
- * Legally, therefore, the Empowered Official is not a creation of statute, but a creation of regulation!



EMPOWERED OFFICIAL “BASIC TRAINING”

- * Why is it relevant that the Empowered Official is a regulatory and not statutory fiction?
 - ◆ may be modified by the Department of State without Congressional amendment to the AECA
 - ◆ allows the Department of State, therefore, the greatest flexibility to add or remove responsibilities from the Empowered Official position without Congressional involvement
- * Permits the allocation of responsibilities that create liability on both a personal and representative level that rests within the discretion of an agency where judicial oversight is limited, absent constitutional considerations



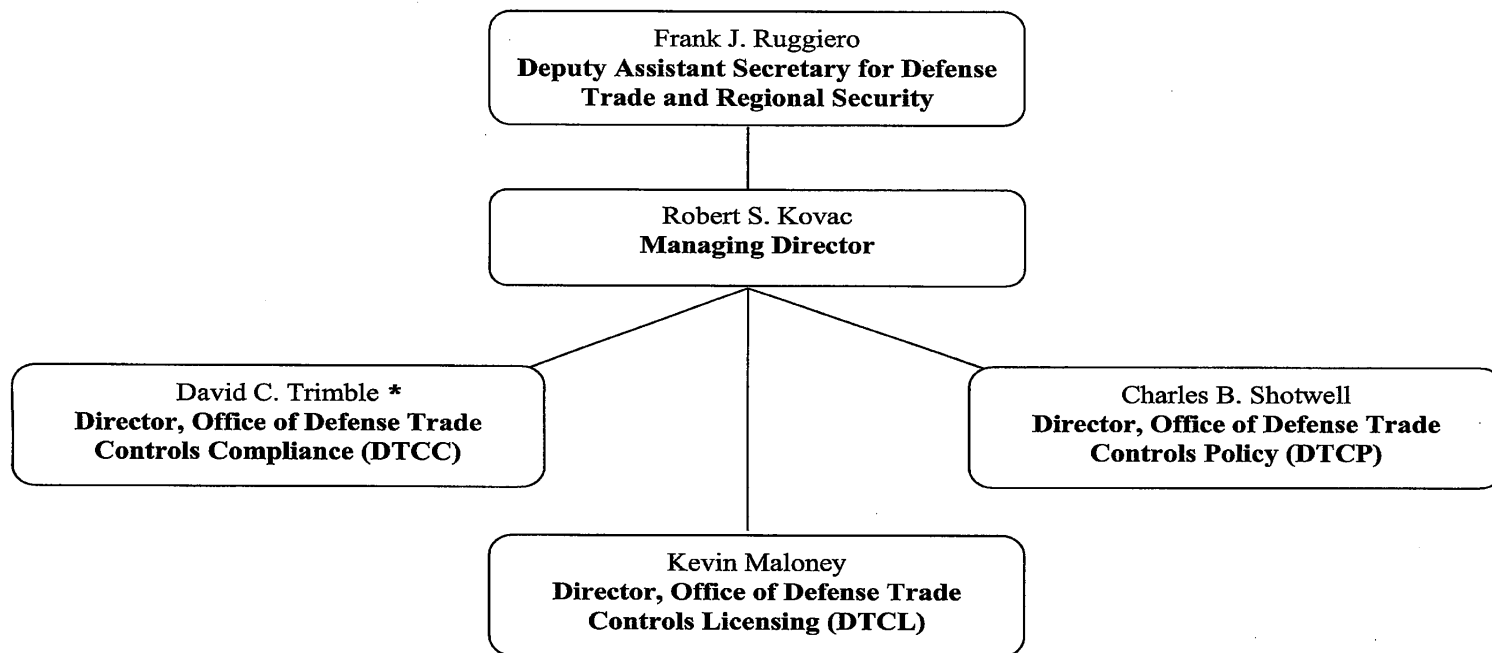
EMPOWERED OFFICIAL “BASIC TRAINING”

- * What agency within the Department of State exercises the authority of the AECA?
 - ◆ Directorate of Defense Trade Controls (“DDTC”)
 - ◆ DDTC Managing Director, Mr. Robert Kovac
 - ◆ Reports to and is overseen by the Assistant Secretary for Political-Military Affairs, Mr. Frank Ruggiero (Acting)



DDTC ORGANIZATIONAL CHART

Directorate of Defense Trade Controls (DDTC)



* Left DDTC on April 10, 2009; Daniel J. Buzby, Acting Director



EMPOWERED OFFICIAL “BASIC TRAINING”

* DDTC

- ◆ Managed by a non-political appointee
- ◆ Transcends administrations assuming that political appointees do not perceive issues with the Managing Director
- ◆ Staffed to perform licensing, policy and compliance functions in one area – unlike the Bureau of Industry and Security



EMPOWERED OFFICIAL “BASIC TRAINING”

* DDTC

- ◆ Conflicted in its objectives absent two Assistant Secretaries
- ◆ “Judge, Jury and Executioner”
- ◆ Limits the ability to effectively and assertively challenge DDTC positions
- ◆ Creates issues for Empowered Officials executing their duties



EMPOWERED OFFICIAL “BASIC TRAINING”

- * Empowered Official as a “creation of regulation”
- * ITAR § 120.25 outlines the mandatory requirements for all Empowered Officials



REGULATORY IMPLEMENTATION

* Additional ITAR areas

- ◆ Misrepresentation/omission of material fact (§ 127.2(a))
- ◆ Due diligence in export requests (§ 123.9(a))



EMPOWERED OFFICIAL “BASIC TRAINING” EMPOWERED OFFICIAL ITAR § 120.25 Elements

- * § 120.25 establishes the elements to be met:
 - ◆ “Directly employed” by applicant or subsidiary
 - ◆ Position “with authority for policy or management” within the applicant
 - ◆ Empowered “in writing”
 - ◆ “Understands” the laws, regulations and penalties for violations



EMPOWERED OFFICIAL “BASIC TRAINING” EMPOWERED OFFICIAL ITAR § 120.25 ELEMENTS

- * § 120.25 establishes the elements to be met:
 - ◆ Has “independent authority” to:
 - * “inquire” into a proposed transaction
 - * verify the “legality” of the transaction
 - * verify the “accuracy of the information to be submitted”
 - * “refuse” to sign an application without retribution



EMPOWERED OFFICIAL “BASIC TRAINING”

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ITAR § 120.25 Elements

* Areas of concern

- ◆ “Policy” and “management”
- ◆ “Independent authority”
- ◆ “Verify the legality of the transaction”
- ◆ “Verify” the “accuracy of the information”
- ◆ “Refuse” to sign an application



EMPOWERED OFFICIAL “BASIC TRAINING”

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ITAR § 120.25 ELEMENTS

* Requirements versus Practicality

- ◆ Clash of potentially competing interests
- ◆ Should the interests compete?
- ◆ Justifications for actions taken may not have precedent for support



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ITAR § 120.25 ELEMENTS

* Requirements versus Practicality

- ◆ Inconsistent U.S. Government positions taken depending upon:
 - * parties
 - * type of activity
 - * licensing officer or compliance specialist
 - * other U.S. Government interests



EMPOWERED OFFICIAL “BASIC TRAINING”

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ITAR § 120.25 ELEMENTS

* What does it mean?

- ◆ Satisfaction of § 120.25 elements
- ◆ Approval of activities and information submitted
- ◆ Responsibility for accuracy and legality of information and transaction



EMPOWERED OFFICIAL “BASIC TRAINING”

- * Based on these elements, what policy objective is met through the requirement to have an Empowered Official?

- * Objectives:
 - ◆ One person with which DDTC may interface to obtain answers
 - ◆ Creates an individual who acts as the “eyes and ears” of DDTC within the Company or entity
 - ◆ “Self-policing”



EMPOWERED OFFICIAL “BASIC TRAINING” CHOOSING AN EMPOWERED OFFICIAL

- * Criteria applied – ITAR § 120.25 alone?
- * Where to look – internally or externally?
- * Characteristics and personality
- * Management issues to address
- * Personal Liability
- * Vicarious liability



EMPOWERED OFFICIAL “BASIC TRAINING”

CHOOSING AN EMPOWERED OFFICIAL:

A Sampling of Essential Questions to Ask and Answer Prior to any EO Delegation

- * Who within Management or the corporate structure should choose the Empowered Official?
- * Who should delegate the Empowered Official?
- * From where should the Empowered Official’s authority derive?
- * From which job function should the Empowered Official be drawn?
- * How many other “hats” should the Empowered Official wear, if any?



EMPOWERED OFFICIAL “BASIC TRAINING”

CHOOSING AN EMPOWERED OFFICIAL:

A Sampling of Essential Questions to Ask and Answer Prior to any EO Delegation

- * How many Empowered Officials should a company have?
- * To whom should the Empowered Official report?
- * Should the Empowered Official have the independent authority to hire outside counsel?
- * Should the Empowered Official be allocated a budget from which to draw to hire additional resources at the Empowered Official’s discretion?
- * Should the Empowered Official be an attorney?



EMPOWERED OFFICIAL “BASIC TRAINING”

CHOOSING AN EMPOWERED OFFICIAL:

A Sampling of Essential Questions to Ask and Answer Prior to any EO Delegation

- * Who may challenge or override an Empowered Official’s decision?
- * May the Empowered Official’s duties be changed absent a regulatory amendment?
- * If so, who may change the Empowered Official’s duties?
- * Should the Empowered Official job be rotated among corporate functional areas – *i.e.*, Human Resources, Security, Legal, Contracts, others?



EMPOWERED OFFICIAL “BASIC TRAINING”

BEING AN EMPOWERED OFFICIAL:

A Sampling of Essential Questions That Must be Answered Prior to Accepting the Post

- * To whom do I report?
- * From where are my authorities drawn? Legal? Contracts? the President? the Board of Directors? the Audit Committee?
- * Is my autonomy clearly established?
- * Is my autonomy understood by management?
- * Is my autonomy understood by the employees, whether above or below the Empowered Official?



EMPOWERED OFFICIAL “BASIC TRAINING”

BEING AN EMPOWERED OFFICIAL:

A Sampling of Essential Questions That Must be Answered Prior to Accepting the Post

- * Is my delegation in writing and drawn from the proper ITAR authorities?
- * Has my delegation been notified to DDTC in writing?
- * Have my qualifications been vetted against ITAR § 120.25 and will they withstand scrutiny if questioned?
- * Will the Legal Department or the General Counsel’s office support my efforts and my decisions?
- * Who may challenge my decisions?



EMPOWERED OFFICIAL “BASIC TRAINING”

BEING AN EMPOWERED OFFICIAL:

A Sampling of Essential Questions That Must be Answered Prior to Accepting the Post

- * Who may override my decisions?
- * May I take my decisions to the Board or to the President or CEO if challenged?
- * May I be discharged or terminated for the exercise of my Empowered Official duties?
- * When and how may I report inaction on the part of the Company to DDTC?



EMPOWERED OFFICIAL “BASIC TRAINING” LICENSING ISSUES ASSOCIATED WITH EMPOWERED OFFICIALS

- * ITAR § 120.25 directs that licenses be signed by Empowered Officials
- * Subject to certification
- * Covered by the False Statements Act, 18 USC § 1001
- * Signature of the Empowered Official on a license represents that the Empowered Official has fulfilled his/her duties and therefore confirms all of the information in the license



EMPOWERED OFFICIAL “BASIC TRAINING” LICENSING ISSUES ASSOCIATED WITH EMPOWERED OFFICIALS

* What happens if:

- ◆ the wrong USML category appears on a license?
- ◆ the wrong “classification” appears on a license repeatedly?
- ◆ the dollar values do not match the supporting commercial or government documents?
- ◆ marketing provides you the wrong names of people to whom business development presentations will be made and those names are included in the license?



EMPOWERED OFFICIAL “BASIC TRAINING” LICENSING ISSUES ASSOCIATED WITH EMPOWERED OFFICIALS

* What happens if:

- ◆ you fail to note that a voluntary disclosure is pending on the same product or the same activity for which you are submitting a license?
- ◆ you failed to screen or the screening did not catch a problem and that entity is included on the license?



EMPOWERED OFFICIAL “BASIC TRAINING”

COMPLIANCE ISSUES ASSOCIATED WITH EMPOWERED OFFICIALS

- * How much verification of the facts provided to an Empowered Official is enough?
- * How much independent due diligence is needed?
- * Do the red flags vary from transaction to transaction and does that mean my “verification” obligations may also vary?
- * How do I present information to DDTC when asked questions?



EMPOWERED OFFICIAL “BASIC TRAINING”

COMPLIANCE ISSUES ASSOCIATED WITH EMPOWERED OFFICIALS

- * What constitutes “accurate, open and honest” answers when responding to questions from DDTC/Licensing or Compliance?
- * Do Empowered Official obligations extend beyond licenses – e.g., are there due diligence obligations associated with submitting commodity jurisdiction requests to DDTC?
- * May Empowered Officials rely on other than U.S. Government sources for information to question the viability or veracity of a foreign or U.S. party?



EMPOWERED OFFICIAL “BASIC TRAINING” EMPOWERED OFFICIALS RESOURCES

- * Should Empowered Officials use checklists?
- * If so, which ones?
- * How much backup documentation should be required if checklists are used?
- * How often should checklists be updated?



EMPOWERED OFFICIAL “BASIC TRAINING” EMPOWERED OFFICIALS RESOURCES

- * Export Transaction Questionnaire (Tab 14) – review
- * Templates – good or bad?
- * How much “reinvention” should occur?



EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY GENERAL THEORIES

- * Liability for actions taken exists
 - ◆ By the nature of the action, activity or task
 - ◆ By law
 - ◆ By representations



EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY GENERAL THEORIES

- * Liability applies
 - ◆ Within a personal context
 - ◆ In a corporate context
 - ◆ In a representative context



EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY GENERAL THEORIES

- * Types of liability
 - ◆ Civil/administrative
 - ◆ Criminal
 - ◆ Vicarious



EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY

CIVIL AND ADMINISTRATIVE LIABILITY

- * Standard for liability varies from criminal
- * Does not require *mens rea* (intent)
- * Some situations result in strict liability – *i.e.*, “you needed a license; you didn’t have one; it’s a violation”
- * Theory of “vicarious” liability applies



EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY IMPACT

- * Judicial approach: The court “cannot say that the AECA or its implementing regulations are unconstitutionally vague and applied in fact, as applied to the defendants in this case, the statute is rather specific as to what conduct is prohibited: the export and/or the attempted export, without a license, of items on the Munitions List.” *United States v. Sun*, 278 F.3d 302, 309 (4th Cir. 2002)



EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY IMPACT

* What standard applies?

- ◆ “As such, a person of ordinary intelligence, especially business people as knowledgeable as [defendants], would understand what conduct is illegal.” *Sun*, 278 F.3d at 309



EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY REGULATORY IMPLEMENTATION

* ITAR

- ◆ Empowered Official (§ 120.25)
- ◆ Violations – responsibility (§ 127.1(b))



EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY REGULATORY IMPLEMENTATION

* Additional ITAR areas

- ◆ Misrepresentation/omission of material fact (§ 127.2(a))
- ◆ Due diligence in export requests (§ 123.9(a))



EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY EMPOWERED OFFICIAL

- * § 120.25 establishes the elements to be met:
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EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY EMPOWERED OFFICIAL RISKS

- * Each decision creates individual and corporate liability
- * Judged by “reasonableness” standards



EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY EMPOWERED OFFICIAL RISKS

- * “Reasonableness” varies depending upon:
 - ◆ “the judge” – who is reviewing your actions for reasonableness?
 - ◆ “the timing” – *i.e.*, Hughes Network Systems’ disclosure regarding unlicensed exports to PRC
 - ◆ ITT Consent Agreement and Boeing 2008 Consent Agreement
 - ◆ Analytical Methods Consent Agreement
 - ◆ “the support” – who advised you? about what? with what recommendations?



EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY VIOLATIONS

- * § 127.1(b) holds “any person who is granted a license” **responsible** “for the acts of **employees, agents, and all authorized persons** to whom possession of the licensed defense article or technical data has been entrusted” (Emphasis added)



EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY IMPACT

- * Broad and potentially four-tiered liability:
 - ◆ Applicant to whom license issued
 - ◆ Individual providing the information
 - ◆ Empowered official signing and submitting documentation
 - ◆ Recipient handling the licensed materials or items



EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY ASSOCIATED RISKS

- * Inaccurate information
 - ◆ See, e.g., L-3/Goodrich CJ action and Boeing Agreements Management

- * Failure to verify “legality” of transaction
 - ◆ steps taken
 - ◆ ability to “reasonably rely” on assessments
 - ◆ understanding “legality” of transaction – e.g.:
 - * what laws apply?
 - * what elements must be met to satisfy legal requirements?
 - * supporting precedent for interpretations?



EMPOWERED OFFICIAL “BASIC TRAINING” LIABILITY ASSOCIATED RISKS

- * Exercise of independent authority – e.g.:
 - ◆ what does it mean?
 - ◆ how do you memorialize the exercise of that authority?
 - ◆ who judges the “independent” nature of that authority?



EMPOWERED OFFICIAL “BASIC TRAINING” CORPORATE AND PERSONAL PROTECTIONS FOR EMPOWERED OFFICIAL’S ACTIONS

- * Procedures which establish the powers of the empowered official
 - ◆ Cross-referenced to other export procedures
 - ◆ “Trained” to all business segments
 - ◆ Communicated, in writing, by General Counsel to ***all*** business unit management and personnel



EMPOWERED OFFICIAL “BASIC TRAINING” CRIMINAL LIABILITY

- * Criminal liability applies to actions taken by Empowered Officials
- * Is not mutually exclusive from corporate liability
- * § 2778(c) Criminal violations; punishment: . . . Any person who willfully violates any provision of this section or section 2779 of this title, or any rule or regulation issued under either section, or who willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined for each violation not more than \$1,000,000 or imprisoned not more than ten years, or both



EMPOWERED OFFICIAL “BASIC TRAINING” CRIMINAL LIABILITY

- * Requires *mens rea* (intent or “willfulness”) for prosecution
- * Requires “knowledge of the law” that forbids actions (*Bryan v. United States*, 524 U.S. 184, 193-95 (1998) (unlicensed firearms violations); *United States v. Tsai*, 954 F.2d 155, 162 (3d Cir.), *cert. denied*, 506 U.S. 830 (1992) (AECA case))



EMPOWERED OFFICIAL “BASIC TRAINING” CRIMINAL LIABILITY

- * Courts have upheld convictions:
 - ◆ On the basis of “facts and circumstances surrounding the case” (*Morissette v. United States*, 342 U.S. 246, 251 (1952), *quoted in United States v. Tooker*, 957 F.2d 1209, 1214 (5th Cir. 1992))
 - ◆ On the basis of the individual “knowing” that an export is a violation of laws, but *not* the *specific regulation* that was violated (*Tsai*, 954 F.2d at 162; *Tooker*, 957 F.2d at 1214)



EMPOWERED OFFICIAL “BASIC TRAINING” CRIMINAL LIABILITY

- * Liability in a criminal context can arise in a number of circumstances:
 - ◆ Advising company personnel that certain activities require a license then failing to follow through on requiring the license be obtained



EMPOWERED OFFICIAL “BASIC TRAINING” CRIMINAL LIABILITY

* Issues of concern in a criminal context:

- ◆ “Willful” self-blinding
- ◆ “What’s everybody else doing?”
 - * distinction between “benchmarking” and “fact gathering to exercise independent judgment”
 - * “triage” – the U.S. Government is not enforcing these regulations



EMPOWERED OFFICIAL “BASIC TRAINING” ISSUES OF CONCERN

- * Relying on “conflicting” U.S. Government statements
 - ◆ What the law says
 - ◆ What the regulations say
 - ◆ What a U.S. Government employee says
 - ◆ “Forum shopping” within the U.S. Government for a person who will give you the answers you or the company seeks



EMPOWERED OFFICIAL “BASIC TRAINING” ADDRESSING ISSUES OF CONCERN IN A CRIMINAL CONTEXT

- * Know what you are doing and why

- * Understand the limits to your authority and be prepared to act accordingly:
 - ◆ too limited
 - ◆ too vague
 - ◆ unsupported
 - ◆ management chain



QUESTIONS