



PRACTICING LAW INSTITUTE ADVANCED CORPORATE COMPLIANCE PROGRAM

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COMPLIANCE IN THE EXPORT ARENA REVISITED:
UNIQUE APPLICATIONS

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EXPORT COMPLIANCE IN TODAY'S ENVIRONMENT

- ◆ Greater focus on corporate behavior
- ◆ Greater accountability for officers, directors and board members
- ◆ U.S. Government insight into more corporate activities
- ◆ “Whistleblowers”
- ◆ Heightened awareness of national security and potential United States’ vulnerabilities
- ◆ Congressional interest

STATUTES AND REGULATIONS



- ◆ Over 90% of technology related exports or transfers are controlled by two laws and regulations in the United States
 1. The Export Administration Regulations, 15 C.F.R. Part 730 *et seq.*, continued through the International Emergency Economic Powers Act and Executive Order
 2. The International Traffic in Arms Regulations, 22 C.F.R. Part 120, *et seq.*, implementing the Arms Export Control Act
- ◆ The transfers are controlled through a licensing regime
- ◆ Recordkeeping is mandatory

UNIQUE ISSUES

- ◆ Export licensing in a litigation, arbitration or mediation context
- ◆ Export due diligence in the merger, acquisition, divestiture, and consolidation context

KEY DEFINITIONS THAT EXTEND EXPORT CONTROL LICENSING JURISDICTION TO UNIQUE CONTEXTS



◆ Export:

1. Physical transfer of product, technology or data outside the United States
2. Release of software source code to a foreign person, whether in the United States or abroad
3. Visual release of product or technology
4. Oral exchanges involving technical data or technology

◆ Licensing

1. Regulations do not explicitly or implicitly limit licensing to a commercial context
2. Requirements apply to U.S. persons, wherever located

EXPORT LICENSING IN THE LITIGATION, ARBITRATION OR MEDIATION CONTEXT



- ✦ Not a commercial transaction circumstance
- ✦ Deals with articles or technology that may be controlled under either the ITAR, EAR, or other export regulation
- ✦ Requires export licensing, where appropriate, for a number of activities

EXPORT LICENSING IN THE LITIGATION, ARBITRATION OR MEDIATION CONTEXT

◆ Why does export licensing apply?

1. Foreign person is involved – e.g., party, witness, counsel, expert
2. Technical data or technology is involved
3. Commodities or articles are controlled to foreign destination
4. Transfers of technology or product need to occur

EXPORT LICENSING IN THE LITIGATION, ARBITRATION OR MEDIATION CONTEXT



◆ Issues:

1. Researching, preparing and drafting complaint
2. Witness preparation
3. Expert theory development
4. Document collection and review
5. Depositions
6. Testimony
7. Supporting motions such as evidentiary or summary judgment submissions
8. “Open” courtroom

EXPORT LICENSING IN THE LITIGATION, ARBITRATION OR MEDIATION CONTEXT



◆ Where do issues arise?

1. Party who sues or seeks arbitration or mediation is a foreign person under the regulations
2. Party who is sued or is subject to arbitration or mediation is a foreign person under the regulations
3. Expert witnesses are foreign persons
4. Attorneys working on a matter are foreign persons
5. U.S. attorneys represent foreign persons
6. Discovery must occur in a foreign destination

EXPORT LICENSING IN THE LITIGATION, ARBITRATION OR MEDIATION CONTEXT

◆ Where do issues arise?

1. Fact witnesses are foreign persons
2. Technical data needs to be reviewed and analyzed
3. Technical data needs to be discussed
4. The judge, mediator or arbitrator is a foreign person under the regulations
5. Classified information needs to be discussed or reviewed as part of the case

EXPORT LICENSING IN THE LITIGATION, ARBITRATION OR MEDIATION CONTEXT



◆ Licensing

1. Obtain authorizations from appropriate agencies – State, Commerce, or Treasury
2. Incorporate ITAR or EAR requirements into protective orders
3. Obtain appropriate expert opinions on scope of national security issues from the Department of Defense
4. Address Department of Defense licensing provisos directly with DTSA and State

EXPORT LICENSING IN THE LITIGATION, ARBITRATION OR MEDIATION CONTEXT



Most complicated issue

1. The export license contains provisos or limitations which restrict the activity you need to pursue under the litigation, arbitration or mediation
 - Raises practical issues/limitations
 - Raises constitutional questions and conflicts

EXPORT LICENSING IN THE LITIGATION, ARBITRATION OR MEDIATION CONTEXT

◆ Likely limitations involve:

1. An inability to release technical data, specifications, and related technical information, including Government or privately generated documentation during the litigation, arbitration or mediation
2. Restrictions on the scope of testimony, cross-examination and deposition questions that can be asked
3. Monitoring of proceedings by the Department of Defense
4. Coordinating and obtaining clearance from Defense Department personnel prior to release of technical information subject to the litigation, arbitration or mediation



EXPORT LICENSING IN THE MERGER, ACQUISITION, DIVESTITURE AND CONSOLIDATION CONTEXT

- ◆ The last 10 years have seen a wave of mergers, acquisitions, divestitures and consolidations, primarily at the prime contractor level
- ◆ The last 5 years have seen the beginning of a similar situation in the 1st and 2nd tier subcontractor level
- ◆ Merger, acquisition, divestiture and consolidation activity is global in nature and likely to continue as U.S. industry expands its reach and foreign industry invests in the United States



EXPORT LICENSING IN THE MERGER, ACQUISITION, DIVESTITURE AND CONSOLIDATION CONTEXT

- ✦ The current compliance environment, as in the adversarial contexts noted above, has also affected this commercial activity
- ✦ Although due diligence in the financial arena and certain high risk areas, such as environmental, tax, intellectual property and labor compliance, has occurred consistently, the more focused diligence in specialized fields lags behind

EXPORT LICENSING IN THE MERGER, ACQUISITION, DIVESTITURE AND CONSOLIDATION CONTEXT

- ◆ Type of activity subject to the export laws:
 1. A U.S. party merges with a U.S. party
 2. A U.S. party merges with a foreign party
 3. A U.S. party divests assets to a U.S. party
 4. A U.S. party divests assets to a foreign party
 5. A foreign party merges with a U.S. party
 6. A foreign party merges with a foreign party with U.S. assets or facilities
 7. A foreign party divests assets to a U.S. party



EXPORT LICENSING IN THE MERGER, ACQUISITION, DIVESTITURE AND CONSOLIDATION CONTEXT

- ◆ Type of activity subject to the export laws:
 1. A foreign party divests assets to a foreign party
 2. A U.S. party acquires a U.S. party or its assets
 3. A U.S. party acquires a foreign party or its assets
 4. A foreign party acquires a U.S. party or its assets
 5. A foreign party acquires a foreign party or its assets
 6. Consolidations occur in U.S. operations
 7. Consolidations occur in foreign operations
 8. Consolidations meld U.S. and foreign operations



EXPORT LICENSING IN THE MERGER, ACQUISITION, DIVESTITURE AND CONSOLIDATION CONTEXT

- ◆ In each context noted above, some of the key factors that require review include:
 1. The value of international revenues
 2. All export authorizations received, maintained and to be transferred to the acquiring, divesting or successor entity
 3. All voluntary disclosures related to the assets to be transferred
 4. Registration with appropriate U.S. Government agencies
 5. Any foreign export authorizations obtained



EXPORT LICENSING IN THE MERGER, ACQUISITION, DIVESTITURE AND CONSOLIDATION CONTEXT

- ◆ In each context noted above, some of the key factors that require review include:
 1. Entity compliance status before relevant U.S. Government agencies
 2. Classifications of all products and technology
 3. Thorough understanding of the employee base
 4. Thorough understanding of the customer base

EXPORT LICENSING IN THE MERGER, ACQUISITION, DIVESTITURE AND CONSOLIDATION CONTEXT



◆ Risks

1. Successor liability theory – *EDO Corporation*, Department of State (2003); *MultiGen-Paradigm/Computer Associates*, Department of State (2003); *Boeing/Hughes Settlement*, Department of State (2003); *Sigma Aldrich*, Department of Commerce, Office of Export Enforcement (Part 766 proceeding 2002)
2. Export violations, both inherited and perpetuated
3. Void licenses
4. Failure to meet regulatory obligations resulting in export authorization suspension

EXPORT LICENSING IN THE MERGER, ACQUISITION, DIVESTITURE AND CONSOLIDATION CONTEXT



◆ Strategies:

1. Contractual requirement to settle any violations *prior* to closure of transaction
2. Indemnification clause to cover fines, penalties, fees and related expenses
3. Escrow provision (at \$500,000 per suspected or disclosed violation)
4. Schedule of disclosures, classifications, general correspondences, and licenses
5. Price offset for any fines, penalties or other intangible effects of inherited export violations
6. Appendix and copies of export authorizations for conduct of due diligence



EXPORT LICENSING IN THE MERGER, ACQUISITION, DIVESTITURE AND CONSOLIDATION CONTEXT

- ◆ Critical need: Obtain all export authorizations to conduct the actual due diligence:
 1. For attorneys
 2. For the due diligence room
 3. For the parties to be acquired
 4. For document transfers
 5. For negotiations
 6. For site visits to assets to be acquired
 7. For document preparation and deal finalization

QUESTIONS?

