

SHADES OF GREY: PERSONAL LIABILITY UNDER U.S. EXPORT LAWS



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February 21, 2007

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GENERAL THEORIES

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



GENERAL THEORIES

- * Liability applies
 - ◆ Personally
 - ◆ In a corporate context
 - ◆ In a representative context



GENERAL THEORIES

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



EXPORT LIABILITY: PARTIES AFFECTED

- * Exporter
- * Applicant
- * Employee
- * Representative
- * Recipient



EXPORT LIABILITY

* Applies under the ITAR and the EAR



EXPORT LIABILITY

- * Liability is not mutually exclusive. Multiple parties may be held responsible for one activity or action.



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”



IMPACT

- * Courts have upheld standards less stringent than criminal
- * In a civil context, courts have presumed some level of knowledge and have imputed that knowledge to individuals and entities



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)



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



REGULATORY IMPLEMENTATION

* ITAR

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



REGULATORY IMPLEMENTATION

* Additional ITAR areas

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



REGULATORY IMPLEMENTATION

- * ITAR Enforcement

- ◆ *Example: L-3/Goodrich*



EMPOWERED OFFICIAL

- * § 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

- * § 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

* 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

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



EMPOWERED OFFICIAL

* 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 SIGNATURE

* 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 RISKS

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



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
 - ✦ “the support” – who advised you? about what? with what recommendations?



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)



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



ASSOCIATED RISKS

- * Inaccurate information
 - ◆ See, e.g., L-3/Goodrich CJ action
- * 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?



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?



SOLUTIONS

- * 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



SOLUTIONS

- * Insurance policies
 - ◆ Determine risks to be covered
 - ◆ Patterned after “D & O” policies
- * Indemnification for actions taken in the course of employment *as interpreted* by the empowered official



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))



CRIMINAL LIABILITY

* Courts have upheld convictions:

- ✦ On the basis of “facts and circumstances surrounding the case” (*Morrisette 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)



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



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



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



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?