

CLIENT ALERTS

Export Administration

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The current situation in the region of Syria and Iraq involving the Islamic State (ISIS) seems to worsen daily. The danger for America is very real, and extends beyond potential military hostilities or even terrorism. American businesses that export or are willing to export may be at heightened legal risk. Export Control regulations and related enforcement places a significant responsibility and associated risks on American individuals and companies. The penalties for export violations, both civil and criminal, can be (and often are) draconian; and “I didn’t know” has no weight as a defense or mitigating factor where penalties for exports or technology transfer violations are involved.

According to news reports from the region, the Islamic State has seized or captured approximately \$500 Million in U.S.-made military equipment, parts, and related technical information that the U.S. Government previously had given to the new Iraqi government following removal of Saddam Hussein. In addition, reports indicate that the tempo of operations set by the Islamic State has been and continues to be fairly high, stressing the captured equipment significantly. Although we currently have no Open Source Intelligence to estimate reliably the extent of spare parts and technical information that was seized along with the equipment, it is fair to assume that spare parts (and some degree of technical information and assistance) for that American equipment likely will be required within the near or medium term. Therefore, ISIS will turn to American companies and individuals for its requirements. It knows that the quantities of spares, and level of technical information or assistance that it will require is unlikely to be available through unrestricted sources. Thus, it will use a number of artifices to avoid U.S. Export Controls.

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Money is no concern to ISIS, but circumvention of U.S. Export Controls in order to purchase spares will prove more challenging. ISIS therefore most probably will attempt to use a variety of means to attempt to buy what it needs, such as third parties, straw purchasers, and transshipment points. These are old, proven techniques with which U.S. law enforcement officials and prosecutors are familiar, and thus present a risk to the unwary vendor or dealer in such things. Moreover, the illegal purchaser often relies on the allure of large, favorably priced, quick-turn-around orders to overcome any initial hesitancy an American company may have. Such orders are particularly attractive to companies that have fixed overhead to absorb, and excess capacity to fill, as well as to sales organizations seeking “good sales numbers.”

In the current economic climate then, a conveniently filled order worth several million dollars certainly is a major temptation to most suppliers of spare parts, especially those which already have the tools, available capacity and facilities necessary to go into production relatively rapidly. The agencies that enforce export controls are also aware of this, and thus are vigilant – witheringly vigilant. Given that high degree of watchfulness, it is unlikely that any illegal parts will ever leave a U.S. port. Nevertheless, the monetary incentives may be so great that some will be tempted to ignore the intricacies of export regulation, or simply to “ask no questions” -- and very likely come to grief in a U.S. District Court. Fines for violations (even unwitting violations) often can be large, loss of export rights could be ruinous, and even incarceration is an option available to enforcement agencies and prosecutors.

At the same time, however, there are legitimate foreign purchasers of spare parts and technologies, considering that the U.S. (along with Russia) is a major vendor of arms internationally. The key to separating this “legal” wheat from the “illegal” chaff is in due diligence. And a company’s very existence (and possibly even the liberty of some of its officers and employees) may depend on the quality of a company’s export due diligence and licensing practices.

Even the most experienced exporters have enforcement issues, from time to time. Thus, attention to this important matter is all the more important for companies with more modest export-compliance requirements, and extends considerably beyond the simple expedient of obtaining an export license for hardware; it also includes licenses for technical information and assistance which may be related to marketing efforts before anything leaves the loading dock.

The Bureau of Industry and Security (BIS) publication (“Know Your Customer” Guidance and Red Flags) at 15 CFR Part 732, Supplement No. 3, is a very useful general introduction to the steps necessary to a prudent exercise of due diligence for each (or a given category of) export sale(s), regardless of the commodity involved. Each step in the process should be appropriately, thoroughly, and contemporaneously documented so that it can be completely verified later, should any question arise. No shortcuts are permissible, nor is willful blindness. In fact, shortcuts to any extent often have disastrous consequences, sooner or later. Note should be taken that although it is the stated policy of the government to have one agency administering exports, and although major steps have been taken in that direction, there still exists a separate regulatory function for purely military items at the Department of State in addition to that affecting dual-use items regulated by the Department of Commerce. Nevertheless, the due diligence required is essentially the same, with slight variation.

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Remember that most sales today, and especially export sales, occur electronically, and necessarily involve many electronic documents, and other electronically stored information. Consequently, it is very important to establish and maintain standardized methods documenting all activities surrounding such sales, and especially for preserving records surrounding export sales, including any degree of transfer of technical information and assistance, whether a sale is actually consummated, or not.

It is these sorts of things that Butzel Long's Washington Office, in conjunction with other lawyers in its other offices, specializes.