

INTERNATIONAL TRADE ALERT

EXPORT COMPLIANCE PROGRAMS ON THE HORIZON FOR U.S. GOVERNMENT CONTRACTORS



New legislation and recent amendments to the Federal Acquisition Regulation (FAR), when considered in combination, indicate that U.S. government contractors could soon face more formal requirements and standards to maintain an export compliance program. Section 890 of the National Defense Authorization Act for Fiscal Year 2008 (Defense Authorization Bill) leans very heavily in the direction of requiring that companies maintain a formal export control compliance program addressing both International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR) requirements to qualify for U.S. government contracts. The bill was signed into law by President Bush on January 28, 2008. In a parallel development, under recent amendments to the FAR, government contractors are now required more generally to formalize their internal controls, compliance plans and training of employees. These developments have substantial implications for standards and benchmarks of corporate export compliance.

RELEVANT PROVISIONS OF SECTION 890 OF THE DEFENSE AUTHORIZATION BILL

The Defense Authorization Bill contains provisions that require the Department of Defense (DOD) to file a report with the House and Senate Armed Services Committee within six months on the agency's views regarding the "utility" of imposing formal export compliance safeguards requirements on defense contractors to prevent violations of ITAR and EAR export control restrictions. Specifically, the bill calls for DOD comments regarding requiring companies to –

- formally designate a corporate liaison with primary responsibility for export compliance oversight who would be "available for U.S. Government training"
- maintain a corporate plan to provide training and disseminate information regarding application of U.S. export controls
- be subject to mandatory periodic audits of export compliance safeguards
- report on a periodic basis on measures taken to ensure compliance with the U.S. export control laws.

FAR AMENDMENTS

Under the new provisions of the FAR that became effective on December 24, 2007, contractors that receive a federal contract (other than a contract for a commercial item under FAR Part 12)

exceeding \$5 million and that will take 120 days or more to perform are required to take a number of steps to formalize their compliance programs at a more general level. These include –

- implementing a written code of ethics and business conduct within 30 days of a contract award
- establishing an employee ethics and compliance training program within 90 days of the contract award
- implementing an internal control system that –
 - facilitates timely discovery and disclosure of improper conduct in connection with government contracts
 - ensures corrective measures are promptly instituted and carried out.

The new provisions further require that the internal control system should provide for –

- periodic reviews of company business practices, procedures, and policies focusing on the special requirements of government contracting
- an internal reporting mechanism
- internal and external audits
- disciplinary action for improper conduct.

All of these requirements are to apply and flow down to subcontractors when the subcontract is for other than a commercial item, exceeds \$5 million and will take more than 120 days to perform. Failure to comply with the new requirements will subject companies to possible withholding of contract payments.

CONCLUSIONS

Until now there has never been any formal requirement or set of standards requiring implementation or maintenance of an export compliance program under the ITAR, the EAR or the FAR. Consequently, these developments have significant implications for the way in which officials at other U.S. agencies with an interest in U.S. export controls, besides DOD, approach these issues. This includes officials at the Commerce Department’s Bureau of Industry and Security, the State Department’s Directorate of Defense Trade Controls, the Securities and Exchange Commission, and the Office of the National Coordinator for Export Enforcement within the National Security Division of the Department of Justice. These developments underscore the need for U.S. exporters and government contractors alike to maintain an effective export control compliance program at the corporate and division level, across company operations, consistent with best practices benchmarks that are recognized and understood by U.S. regulators.

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