

Government Contracts Advisory

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Important New Changes to the ITAR

On December 13, 2007, the Directorate of Defense Trade Controls (DDTC), the office of the U.S. State Department tasked with enforcing export controls governing defense articles and technology, enacted several important changes to the section of the International Traffic in Arms Regulations (ITAR) governing voluntary self disclosures (VSDs). The most significant change amends ITAR § 127.12(c)(1)(i) to impose a 60-calendar day deadline after initial notification for submitting a final disclosure report pursuant to § 127.12(c)(2). The new final rule also provides additional guidance on the types of corrective actions that DDTC will find acceptable in connection with VSDs.

Previously, ITAR § 127.12 did not impose time constraints on the submission of VSDs, requiring only that they be made "promptly." In recent public remarks, DDTC expressed frustration at the amount of time VSD submitters take to submit final reports after making an initial notification. DDTC has attempted to accelerate submission of final reports in older pending VSD cases by sending written requests for final reports to submitters. In the case of recently submitted preliminary notifications, DDTC has been responding immediately with letters requesting submission of a final report within 60 days. As a practical matter, therefore, the new rule will not cause a change in the timing of VSD submissions from DDTC's current informal practices. Moreover, the new rule does not establish any timelines within which one must make an initial notification, thereby triggering the 60-day requirement.

The new rule, however, does give DDTC's existing policy the force of regulation. Moreover, it provides a "hammer" not previously available to DDTC: if a final report is not submitted within 60 days after the submission of an initial notification, DDTC will not deem the notification as a voluntary disclosure. As a consequence, DDTC may decline to consider the initial notification as a mitigating factor in determining the disposition of the violation. Further, companies that seek to avoid triggering the 60 day deadline by not submitting an initial notification (as well as companies that choose not to make any disclosure) will continue to face the prospect that the government will become aware of the potential violation and commence an investigation prior to the company's submission of a VSD report. In that event, the submitter will lose the opportunity to voluntarily disclose the potential problem.

The new rule permits DDTC to grant extensions to the 60 day deadline. In the past, DDTC has generally been reasonable in granting extensions, but there were no guidelines on the requirements for obtaining such extensions. The new rule sets out criteria for granting extensions: a senior officer or empowered official must explain what required information could not yet be obtained and why, and may be required to state a time period within which the final report will be submitted. The extent to which these newly articulated criteria will affect the ability of VSD submitters to obtain extensions is unclear.

In addition to imposing a 60 day deadline, the new rule for the first time articulates the types of corrective actions that must be taken in response to the violations giving rise to the disclosure. Specifically, the corrective actions must have been adopted in response to the disclosed violations and the voluntary disclosure must explain how the corrective actions are designed to deter future such violations from recurring. The previous rule required only that companies making a voluntary disclosure describe any corrective actions it had taken.

Prior to implementing this change in the rule, DDTC had already been placing increased emphasis on corrective measures in its evaluation of voluntary disclosures, and in recent disclosure cases DDTC has requested additional information from submitters on this subject. The new rule is a formal announcement

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by DDTC that it expects exporters to deal with violations quickly, decisively and effectively, and to provide compelling reassurance that violations will not recur. As a result of this change, companies choosing to make voluntary disclosures will need to focus on more than simply investigating and reporting violations. As soon as possible after violations are discovered, companies must begin to identify and implement suitable corrective measures so that they are in place by the time the final disclosure report is submitted.

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