

# The Export Practitioner

Timely News and Analysis of Export Regulations

SEPTEMBER  
2008

Volume 22  
Number 9



## INSIDE

Jackson Calls for  
Modernization of  
BIS Enforcement

## ALSO INSIDE

Lockheed Martin  
Settles ITAR Charges

AMD Self-Discloses  
Deemed Export  
Violations

Misuse of License  
Exceptions Gets  
BIS Attention

Mark Menefee on  
Beijing Olympics

Entity List Rules  
Expanded

Mandatory SNAP  
Deadline Set

BIS to Study Night  
Vision Cameras  
in China

DDTC Issues Final  
Rule on 17(c)

ITAR Fees Draw  
Early Comments



# CONGRESS SHOULD MODERNIZE BIS ENFORCEMENT AUTHORITIES

By Darryl W. Jackson\*

In a global economy, it is increasingly important for our law enforcement agents to have all the tools they need to combat the proliferation of weapons of mass destruction to rogue states and terrorists. For this reason, one legislative matter that reasonable minds easily should agree upon is the need for Congress to strengthen our dual-use export control system by making permanent the law enforcement authorities of the special agents in the Bureau of Industry and Security (BIS) and modernizing their investigative powers. Congress should do so to protect our national security and prosperity against current threats.

Ensuring that dual-use items do not fall into the hands of those who would do us harm is the sole mission of special agents at BIS. These dedicated men and women protect our national security by concentrating their investigative efforts on three priorities: countering the proliferation of weapons of mass destruction (WMD), stopping terrorism and terrorism-support, and preventing the diversion of dual-use goods to unauthorized military end uses. Accordingly, they describe their mission as "Keeping the most sensitive U.S. dual-use goods and technology out of the most dangerous hands."

## Importance of Investigative Powers

BIS investigations often lead to federal criminal prosecutions of export violators and have resulted in jail time and criminal fines. The Department of Commerce also pursues administrative cases against violators, with a range of sanctions, including monetary penalties and denials of export privileges.

BIS cases have involved exports of devices commonly used in hospitals that also can be used as nuclear detonators; exports to terrorist groups such as Hezbollah and Hamas; as well as exports to state-sponsors of terror, such as Iran and Syria. In addition, BIS has issued a General Order that restricts exports to a variety of companies and individuals that were obtaining the types of components used in improvised explosive devices (IEDs) against Coalition Forces in Iraq and Afghanistan.

BIS special agents are directly charged with meeting the threats in today's post-9/11 world. Yet, their law enforcement authorities, as well as their investigative tools, lag far behind the times.

The agency's law enforcement authorities, which allow our special agents to perform such critical and basic

tasks as making arrests and searching for evidence of export violations, resided in the Export Administration Act (EAA), which lapsed years ago. Dual-use export enforcement does not sunset when the EAA lapses, however; it continues by presidential executive order under the Export Administration Regulations (EAR) and the International Emergency Economic Powers Act (IEEPA) which must be renewed on an annual basis.

## Lack of Authority Causes Problems

This dynamic causes three significant problems that hamper the BIS Office of Export Enforcement's (OEE) important mission.

The first problem is that BIS special agents must continually work to keep their law enforcement authorities in effect by other means. This entails having to be repeatedly deputized over the years by the United States Marshals Service. The time and effort that BIS must repeatedly expend to accomplish the administrative tasks required to keep its law enforcement authorities intact are wasteful and would be far better spent in pursuit of its national security mission.

The second problem is caused by the absence of a permanent statute containing BIS law enforcement authority. Without the EAA, it is very difficult for Congress to update regularly the agency's investigative tools.

Doing so is important, because violators constantly adopt new methods of operation that law enforcement must counter. Congress periodically updates the investigative powers of other federal law enforcement agencies by amending the statutes that provide their underlying legal authority. BIS needs a renewed EAA so Congress can do the same for it going forward.

The third problem flows from those above. BIS investigative authorities are now in serious need of modernization. Our special agents need up-to-date investigative powers that will enable them to pursue export violators effectively in these national security cases.

## Investigations Becoming More Complex

The complexity of export enforcement investigations, as well as BIS' national security mission, dictate that the agency have the kinds of investigative tools that are now routinely used by other federal, state and local

law enforcement agencies. Law enforcement commonly must use a broad array of investigative tools – often in tandem – because conspirators take great pains to maintain secrecy and evade detection.

For example, our investigations commonly involve overseas activity by the parties in question. BIS special agents should have explicit authority to conduct overseas investigations, so they can follow the trail of evidence wherever it leads around the globe. This will help ensure that violators beyond our shores do not escape justice.

Moreover, export investigations that involve WMD proliferation, terrorism and illicit military acquisitions of sensitive U.S.-origin items require that our special agents penetrate conspiracies. To penetrate the higher echelons of these conspiracies, OEE also needs expanded undercover authority that is consistent with that of other law enforcement agencies that have similar missions.

Having authority for wiretaps for EAA and IEEPA violations will also strengthen our special agents' ability to penetrate the upper levels of such conspiracies. In addition, it will allow BIS to present to juries critical evidence of the conspirators' intent. Asset forfeiture will also help remove the profit motive from export violators.

Many other federal, state and local law enforcement agencies have these investigative powers, including those that investigate far more routine matters. It is incongruous that BIS special agents, who are charged with investigating the most significant national security threats facing our country, do not. The Congress should swiftly remedy this situation.

The permanent footing upon which BIS' law enforcement authorities should reside, as well as the modern investigative tools our special agents require, are reflected in the Export Enforcement Act of 2007 (S. 2000), an administration-backed bill that was introduced in 2007 by Senate Banking Committee Chairman Christopher Dodd (D-Conn.).

The remaining time on the legislative calendar is rapidly waning. Accordingly, it is urgent that this Congress swiftly pass legislation that will give the dedicated men and women of BIS the long-needed law enforcement authorities and investigative tools to carry out their mission and effectively protect our national security and prosperity.

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Reprinted from *The Export Practitioner* September 2008

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