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A Broader Perspective

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New Dual/Third Country National Rule Continues to Present Challenges

On August 15, 2011, a new rule took effect which amended the International Traffic in Arms Regulations ("ITAR") to include a new license exemption for the transfer of defense articles to dual/third country national ("DTCN") employees of approved non-U.S. licensees under ITAR agreements. 76 Fed. Reg. 28174. The new exemption was intended to resolve concerns about the requirement for non-U.S. licensees to ITAR agreements to gather country of birth, citizenship and permanent residency information from employees, which caused human rights and privacy concerns in some countries. At the same time, the exemption sought to alleviate some of the burden faced by U.S. parties to ITAR agreements by allowing the identification and tracking of DTCN employees to shift to the non-U.S. licensees. However, approximately one month after the rule became final, it has done little to reduce the administrative burden on exporters, created confusion in the agreement preparation process, and had a limited practical effect.

First, if utilized, the new rule increases the administrative burdens on non-U.S. licensees, which must now screen employees working under ITAR agreements. DDTC guidance about the level of required screening is subject to interpretation and provides discretion to non-U.S. licensees about the design and implementation of a screening process; further, many non-U.S. licensees have yet to develop formal screening procedures. This requires continued diligence on the part of U.S. parties to ensure that non-U.S. licensees institute adequate procedures to meet the screening requirements of the new rule and avoid compliance concerns. Second, U.S. parties must ensure that non-U.S. licensees understand that the new rule does not alleviate the need for U.S. parties to conduct agreement due diligence, which should include seeking information about non-U.S. licensee technology control plans and screening procedures. Third, foreign signatories must also understand that while they may institute their own screening procedures, DTCN issues must still be addressed for sublicensees. Fourth, should non-U.S. licensees screen, DDTC requires records to be maintained, which could include personal information collected from employees, which may run afoul of privacy and human rights laws. Finally, confusion has resulted as a result of the numerous technical changes required by the rule. To utilize the new exemption, new clauses relating to §§124.8(5) and 124.16 must be incorporated into the agreement. U.S. parties must take time to explain each of these clauses to the non-U.S. licensees as part of the agreement preparation process.

Because of these issues, many companies continue to utilize the traditional DTCN approval process, which relies on DDTC to vet DTCN employees of non-U.S. licensees to ITAR agreements and explicitly considers country of birth/national origin as a factor. Please visit our website at http://www.bryancave.com/DDTC-Updates-its-Guidelines-for-Preparing-Electronic-Agreements-to-Implement-New-DualThird-Country-National-Rule-Supplement-to-IRB-No-488-09-28-2011 for additional information about each of the options under the new rule and a discussion of technical guidance from DDTC's Guidelines for Preparing Agreements.

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