

Informed exporting

U.S. firms look to BIS to provide more detailed compliance information.

BY CHRIS GILLIS

When it comes to information related to U.S. export control regulations, simpler isn't necessarily better.

Corporate compliance officers involved in exports say they need as much detailed information as possible to comply, and believe the Commerce Department's Bureau of Industry and Security could do more to improve the presentation and accessibility of this type of information.

"I like the direction they have started going," said Brian Amero, corporate trade compliance manager for Teradyne. "However, I don't want to see a lot of slides and graphics. I'd like to see more content."

The BIS Web site offers online compliance training tools and information to assist exporters, and more delivery is underway. For instance, in January, BIS said it plans to develop a Web page where sources of publicly available information on export



Amero

commodity classifications can be found. "We are taking this action to enhance procedural transparency in the licensing process and to help exporters comply with U.S. export and re-export control laws," the agency said in a statement.

While BIS is also praised for making its staff available to speak before companies and trade associations about export control regulations and initiatives, there are concerns about the depth and clarity of the information put forth in these presentations.

"It's one of those cases when you have three different people talking about the requirements and you may get three different sets of answers," Amero said.

The Homeland Security Department's Customs and Border Protection is increasingly measured by corporate compliance officers, who also have import activities within their function, as an example of what BIS can do to provide compliance information through its Web site.

"CBP tends to be more transparent and puts its positions in writing on a searchable Web site," Amero said. "BIS is moving in the right direction to help exporters do a better job at compliance, but they have a long way to go."

In what has been called a step forward by exporters, BIS in late February announced the updated Export Management and Compliance Program (EMCP), formerly known as the Export Management Systems Review Module (EMS). The program, which was posted on the BIS Web site, was last revised by the agency in May 2000.

Prior to the update, exporters, compliance lawyers and consultants complained that the previous EMCP module contained many outdated requirements and references, including maintaining a paper copy of the Denied Persons List and no mention of the Automated Export System.

"It seems to me that if BIS wants to tout the EMS audit module as the touchstone of export compliance, it might want to update it a little more often than every decade," commented R. Clifton Burns,

attorney with law firm Bryan Cave LLP, in his Feb. 23 *Export Law Blog*.

Burns called the new audit module “a pretty thorough top-to-bottom revision.”

“The requirements described in the Export Administration Regulations (EAR) may seem overwhelming without a system to capture analysis, decisions, accountability and implementing procedures,” BIS said. “An EMCP takes individual decisions and pieces of information and builds them into an organized, integrated system. It is a program which can be established to manage export-related decisions and transactions to ensure compliance with the EAR and license conditions.”

Many exporters welcomed the EMCP’s release and use it as a template for their internal export compliance programs.

“If you have a bulk of the guidelines in place, your compliance program will be viewed favorably by BIS,” said Dennis Farrell, global export compliance officer for Analog Devices.

“I did review it and believe I’m on the right course,” Teradyne’s Amero added.

While the EMCP is seen as a valuable

resource, companies are cautioned that it’s merely the basic framework of what a U.S. export compliance program should entail.

Paul DiVecchio, president of DiVecchio & Associates, an export compliance consulting firm, warns against exporters taking the guidelines and “just filling in the blanks” to build their internal compliance programs. “It’s a value-added tool, but not an end-all for compliance,” he said.

He also recommends if BIS is serious about getting the message out to the export community to prevent violations that it should allow the BIS Export Management and Compliance Division to conduct exporter compliance audits one year after settlements of enforcement cases. In addition, DiVecchio said the Export Management and Compliance Division should have the authority to conduct spot audits based on the likelihood of non-compliance as a result of pending investigations or



DiVecchio



Wall

contradictory export data filed in AES.

Under the direction of Christopher Wall, former Commerce Department assistant secretary for export administration, BIS spent the last months of the Bush presidency attempting to improve its interface with the export industry. Some of these actions were subsequently launched shortly after President Obama took office.

In November 2008, BIS released a question-and-answer section on its Web site pertaining to the proposed rule establishing a license exception for intra-company transfers. The license exception would allow an approved parent company and the approved owned or “controlled-in-fact” entities to export, re-export or transfer (in-country) many items on the Commerce Control List among themselves for internal company use.

On Jan. 5, BIS requested public comment on whether U.S. export controls influenced manufacturers’ decisions to use U.S.-origin parts and components in commercial products. BIS enforces the country’s “dual-use” export regulations, which require U.S. companies to obtain Commerce Department licenses for exports with both commercial and military applications.

The agency said it would use the information to help determine the effectiveness of export controls, the strength of the defense industrial base, U.S. employment, the financial strength of U.S. industry, and the ability of U.S. industry to compete in the market.

In March, BIS asked for the industry’s help to determine the reasons why so many export licenses it issues to companies appear to be unused or used for less than the authorized quantity or value limits. Most licenses are valid for two years.

The agency said in a *Federal Register* notice that it’s “particularly interested in whether characteristics of the export license application review process induce applicants to apply for greater authorizations than they need and, if such is the case, any costs associated with such applicants.”

“BIS is starting to get at the core issues we’re all talking about,” Farrell said. “I hope the new administration will continue to do that.”

Farrell said the big problem for U.S. exporters today is dealing with Cold War-era export controls that are still largely in place.

“We have an export regime that’s outdated,” he said. “Our export controls are very restrictive and actually hurt the U.S. economy. We can’t do what other companies in Europe and Asia can do.” ■

U.S. export compliance — what it takes

In addition to the Bureau of Industry and Security’s Export Management and Compliance Program (www.bis.gov/complianceand enforcement/emcp.htm), the keys to ensuring that a company’s U.S. export compliance program is effective include:

- **Ensure the compliance program applies to the company’s business practice.** When conducting a compliance assessment, review the business practice globally to position the compliance checks and balances with all international export scenarios that may occur.

- **Interview personnel to determine the strengths and weaknesses of the current export regulatory compliance climate.** Be sure to portray the exercise as an “assessment” and not an “audit.” An audit may convey negativity — looking to find fault — which results in lack of honest and open dialogue.

- **Think outside the box.** Don’t just look at the criteria outlined in the EMCP assessment module. Look at the company’s business profile from an “enforcement risk analysis perspective.” For example, is the sponsor letter in support of a visa for a foreign national visiting the United States comprehensive enough? Is there the likelihood of con-

trolled tech data transfers occurring? Is there accountability by the company to ensure that terms of the sponsor letter are complied with?

- **Implement a practical program.** Ensure what you say is what you do in your compliance program. If the elements of the compliance program cannot be implemented, then do not state as such. If you are investigated by BIS, this will come back to haunt you.

- **Keep assessments a regular activity.** The regulations and business practices are in constant flux. Therefore, the compliance program should be evolving. Assessing the effectiveness of the compliance program should also be conducted on a continuous basis, not just annually.

- **Hire qualified outside help.** If the company uses an outside resource to conduct the compliance review, ensure that the individuals are qualified with years of experience working in the export community, have a strong knowledge to properly interpret the regulations, and understand the enforcement agencies’ view toward investigations. Too many companies are engaging large accounting firms and law firms that do not have personnel with the necessary savoir faire to conduct proper compliance assessments.