

Department of Defense Amends Regulations to Require Export Compliance for Companies Performing Defense Contracts

Eric McClafferty

April 20, 2010

In a [Federal Register](#) notice, published on April 8, 2010, the Department of Defense amended the Defense Federal Acquisition Regulation Supplement (DFARS) to emphasize that companies performing DOD contracts must comply with U.S. export controls laws and regulations.

The DFARS rule underscores contractors' responsibility to comply with the applicable laws and regulations contained in both the Export Administration Regulations (EAR) and International Traffic in Arms Regulations (ITAR), including those for technology. The reference to technology compliance is important because many companies have good compliance systems related to product exports but do not have sufficient systems for dealing with export-controlled technology, particularly technology stored in company electronic systems. The rule does not address export controls requirements imposed by the Department of Energy, the Nuclear Regulatory Commission, or the Department of the Treasury.

The rule also mandates a new contract clause that must be included in all DOD contracts. The clause must 1) define "export-controlled items" as tangible and intangible items controlled by the EAR and ITAR; 2) state that the contractor will comply with all applicable laws and regulations regarding export-controlled items; 3) provide a reminder that this responsibility for compliance stems from applicable U.S. export laws and regulations, not from the DFARS clause; and 4) require that the contract include the substance of the DFARS clause in all subcontracts.

The rule also mandates that contractors consult with the Bureau of Industry and Security (BIS) and the Directorate of Defense Trade Controls (DDTC) about compliance questions. Because doing so can lead to potential criminal charges or civil penalties, contractors should first ensure their compliance systems are adequate and, depending on the question to be asked, consult with an export controls attorney.

Contractors that do not comply with the export controls laws can be subject to significant criminal and administrative penalties, including substantial fines and/or imprisonment, and the potential loss of export privileges and/or the ability to do business with the U.S. Government.

Contractors that implement effective export controls compliance programs will be in the best position to identify potential issues, consult with BIS and DDTC as required by the rule, avoid enforcement actions, and be prepared to assure the government and others in the industry that they

are ready to do business immediately in compliance with the new regulation. The government will also reduce the penalties levied against contractors that have effective compliance programs.

Please let us know if you have any questions regarding this rule, or if we can help you implement or update a compliance system or answer a specific compliance question. For more information, please contact:

[Eric McClafferty](#)

(202) 342-8841

emcclafferty@kelleydrye.com