



David Glynn

Of Counsel
303.295.8071
Denver
dglynn@hollandhart.com

Is Your ITAR Empowered Official Qualified? Better Check!

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As demonstrated by a recent Department of State, Directorate of Defense Trade Controls (DDTC) enforcement action, some staffing decisions can have costly export control compliance ramifications. DDTC recently published on its website a settlement agreement with Darling Industries, Inc., the parent of R.E. Darling Co., Inc., a manufacturer and exporter of specialty rubber and composite products. R.E. Darling products include defense articles subject to control under the International Traffic in Arms Regulations (ITAR). Among other ITAR violations, DDTC determined that R.E. Darling failed to appoint a qualified Empowered Official (EO).

U.S. manufacturers and exporters of defense articles are required to register with DDTC and renew the registration annually. A DDTC registrant must appoint one or more EOs to oversee the company's ITAR-related activities. The ITAR specifies qualifications for the EO position, stating that each EO must be a U.S. person who:

1. Is directly employed by the applicant or a subsidiary in a position having authority for policy or management within the applicant organization; and
2. Is legally empowered in writing by the applicant to sign license applications or other requests for approval on behalf of the applicant; and
3. Understands the provisions and requirements of the various export control statutes and regulations, and the criminal liability, civil liability and administrative penalties for violating the Arms Export Control Act and the [ITAR]; and
4. has the independent authority to:
 - a. Inquire into any aspect of a proposed export, temporary import, or brokering activity by the applicant;
 - b. Verify the legality of the transaction and the accuracy of the information to be submitted; and
 - c. Refuse to sign any license application or other request for approval without prejudice or other adverse recourse.

22 C.F.R. § 120.25(a).

In the Darling Industries settlement, DDTC found that R.E. Darling failed to appoint a qualified EO. Specifically, DDTC asserted in the Charging Letter that R.E. Darling's EO "was not in a position of having authority for policy or management within R.E. Darling's organization . . . [and] did not understand the provisions and requirements of the various export statutes

and regulations.” Additionally, the EO “prepared, signed, and submitted license applications that reflected a deficient understanding of the licensing process and the regulations.” DDTC found that as a result of these shortcomings R.E. Darling “consistently failed to comply with the terms and conditions of authorizations and the ITAR”.

DDTC charged Darling Industries with a total of six violations of the ITAR, including a single violation of 22 C.F.R. § 127.1(b)(1) for appointing an EO who did not meet the ITAR’s requirements. Under the Consent Agreement, the company settled for a fine of \$400,000 along with other remedial steps, including a mandatory external compliance audit.

Although DDTC does not prescribe a specific training program, curriculum, or certification process for the EO position, companies must take the appointment of an EO seriously. An employee must meet each of the qualifications listed above before functioning as the company’s EO. Appointing an EO with the requisite independent authority is particularly important. Low-level operational personnel, for example, generally lack such authority. Some companies appoint as EO an employee in the logistics or shipping function, creating not only doubt as to the EO’s authority and independence, but also a potential conflict between the EO’s compliance role and the logistics or shipping department’s mission of expedient product shipment and delivery.

Ongoing training of the EO is also an important factor in establishing and maintaining an employee’s qualifications for the position. Export control statutes and regulations are complicated and ever changing – the EO must be willing and able to remain knowledgeable about these requirements, and the company must be committed to investing in training.

Holland & Hart has an experienced team of international trade compliance counsel who are well prepared to assist your company’s efforts to address ITAR and other export control requirements, including providing ongoing compliance training to EOs and other personnel.

Questions? Please contact Dave Glynn (303.295-8071) / djglynn@hollandhart.com or Ivan Koves (303.295-8223) / ipkoves@hollandhart.com).

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