



Debarment of Several Major Freight Forwarders May Disrupt International Sales

02.28.2012

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The General Services Administration (GSA) added several freight forwarding companies to its Excluded Parties List System on February 16, 2012. BAX Global Inc., Kuhne and Nagel International AG, Panalpina Welttransport (Holding) AG, Panalpina, Inc., and Schenker AG were debarred from Federal contracting based on their recent plea agreements on charges that they engaged in conspiracies to fix fees in connection with international air cargo shipment services^[1] The companies were charged with carrying out various price-fixing conspiracies "by, among other things, agreeing during meetings and discussions to coordinate various charges and fees on customers purchasing international freight forwarding services for cargo freight destined for air shipment to the United States."^[2] As a result of the debarments, those companies are ineligible to receive contracts from Federal agencies and may also be ineligible to act as subcontractors to Government prime contractors, absent a compelling reason to allow the contract.

An additional consequence of the debarment is that those companies are also now "generally ineligible^[3] to receive licenses or other approvals for the export or temporary import of defense articles that may be required under the International Traffic in Arms Regulations (ITAR). The U.S. State Department's Directorate of Defense Trade Controls (DDTC) issued guidance on February 24, 2012 regarding "existing, pending and future authorizations" for companies affected by the debarment: (1) BAX Global Inc., Irvine, CA; (2) Kuhne and Nagel International AG, Schindellegi, Switzerland; (3) Panalpina Welttransport (Holding) AG, Basel, Switzerland; (4) Panalpina Inc., Morristown, NJ; and (5) Schenker AG, Nordrhein-Westfalen, Germany.^[4]

Existing export licenses or other authorizations that include any of those entities are not affected and may continue to be used. If you have an export license issued by the U.S. State Department that includes one of these entities as a freight forwarder, you can continue to use the license without need to amend or obtain other written authorization from DDTC.

However, any future export license application that includes one of those entities must include a "transaction exception request."^[5] The transaction exception requests must explain "why the applicant is unable to utilize a different freight forwarder" and "how the inclusion of the ineligible entity is in the interests of U.S. foreign policy or national security."^[6]

The State Department did not specifically provide guidance on the use of ITAR exemptions for transactions involving the affected companies. However the notice did state that

written authorization from DDTC is required before a person with knowledge that another person is then ineligible pursuant to ? 120.1(c) of the ITAR . . . orders, buys, receives, uses, sells, delivers, stores, disposes of, forwards, transports, finances, otherwise services or participates in any transaction which may involve any defense article or the furnishing of any defense service for which a license or approval is required by the ITAR for export where such ineligible person may obtain any benefit there from [sic] or have any direct or indirect interest therein.^[7]

This suggests that DDTC would take the position that exporters cannot make future shipments pursuant to ITAR exemptions using the services of the affected companies without written authorization from DDTC.

The affected companies include the largest freight forwarders in the world, and their debarment could have a significant impact on many companies. Government contractors and companies that are shipping ITAR-controlled goods internationally should carefully review the implications of these decisions on their international and domestic sales.

UPDATE: As of March 27, 2012, only two of the originally debarred freight forwarders, BAX Global, Inc. and Schenker AG, remain on the Excluded Parties List. The Air Force has reinstated Kuhne and Nagel International AG, Panalpina Welttransport (Holding) AG, and Panalpina, Inc., and those parties are no longer debarred or ineligible to receive licenses from DDTC. BAX Global Inc. and Schenker AG are reportedly also working with the Air Force to be reinstated. Some companies are questioning whether they should do business with any of the formerly debarred freight forwarders, while others note that the forwarders may now have a heightened awareness of compliance issues. As always, companies should perform due diligence to avoid working with freight forwarders or other companies that are not operating in compliance with law.

If you have any questions concerning this topic, please feel free to contact Jahna M. Hartwig, at 202.293.8145 or jhartwig@williamsmullen.com or any member of Williams Mullen's International Section.

[1] See U.S. Department of Justice, *Six International Freight Forwarding Companies Agree to Plead Guilty to Criminal Price-Fixing Charges* (Sept. 30, 2011) available at http://www.justice.gov/atr/public/press_releases/2010/262791.htm.

[2] *Id.*

[3] 22 C.F.R. ? 120.1(c) ("U.S. persons . . . who are ineligible to contract with . . . any agency of the U.S. Government are generally ineligible" for licenses or other ITAR approvals).

[4] DDTC, *Guidance for Existing, Pending, and Future Authorizations Involving Certain Freight Forwarders Debarred From Government Contracting by U.S. Air Force Action of February 16, 2012* (Feb. 24, 2012) ("*DDTC Guidance*") available at http://www.pmdtc.state.gov/documents/webnotice_FreightForwardersDebarred.pdf; DDTC, *Update to DDTC Web Notice of February 24, 2012* (Feb. 27, 2012) available at http://www.pmdtc.state.gov/documents/webnotice_FreightForwarders-Update.pdf. Although Ceva Logistics LLC, and EGL, Inc. were included in the original notice, the Air Force has reinstated those companies and confirmed that they are no longer in the Excluded Parties List System. Ceva and EGL therefore should not be affected by the guidance. The other freight forwarders may also challenge their debarment and attempt to be reinstated over the next several weeks or months, so DDTC has advised companies to "monitor the Excluded Parties List System for any changes to the status of the remaining entities."

[5] Export licenses between February 18-24, 2012, are required to be updated with a transaction exception request "within 72 hours from the date of [the] notice," or will be Returned Without Action. License applications pending before February 18, 2012 will be "reviewed in the normal course." See *id.*

[6] *Id.*

[7] *Id.*

Please note:

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