

CLIENT ALERT

Managing Hand Carry Export/Import Pitfalls

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Business travelers carrying confidential and proprietary company information across international borders were recently reminded of the importance of protecting that information. The recent decisions in *U.S. v. Arnold*, 523 F.3d 941 (9th Cir. 2008) and *In re Boucher*, 2007 WL 4246473 (D. Vt. 2007) reaffirmed that U.S. Customs and Border Protection (CBP) has considerable discretion in searching laptops or other commonly carried electronic devices (like PDAs), and the owner or carrier's right of privacy may be construed narrowly. Although CBP has indicated that it has special procedures to handle attorney-client privileged and other sensitive information derived from searches, there are no guarantees, and CBP's broad discretion in this area creates significant risks of involuntary waiver and/or disclosure of such information. To minimize these risks, companies should keep their employees informed of their responsibilities related to hand-carried items as they travel abroad. Taking preventative measures in advance may reduce the likelihood of an inadvertent or unwanted disclosure.

U.S. export control laws permit employees to take "tools of the trade" (including laptops, PDAs, cell phones and digital storage devices) out of the country for up to one year. Routine uses of commercial encryption products are included in this authorization. But just because employees can carry these items doesn't mean that they should. On the import side, proper documentation and an understanding of the process can reduce administrative headaches. Following is a list of best practices to provide guidance to companies to assist employees as they leave and re-enter the United States:

- Prior to departure, review any existing company policies and U.S. regulations on the items and information that may be exported. There are restrictions to the type of equipment and information that can be taken to Cuba, Iran, North Korea, Syria and Sudan absent a specific exception.
- Record what company equipment will be taken out of the country.
- Delete sensitive information contained on the laptop or electronic device or travel with "blank" laptops whose hard drives have been cleared (access to proprietary or privileged information may still be available via remote access).
- When it is not possible to delete sensitive information, encrypt sensitive materials contained on the laptop or electronic device and isolate privileged and/or confidential information from other information on the laptop by labeling as such.
- If an employee will be taking sensitive technology, review export and reexport restrictions related to the technology, including issues of access and security precautions (such as using secured connections, passwords and personal firewalls).
- If the laptop contains ITAR controlled information, exemption 125.4(b)(9) may not apply and a license may be required.
- When an employee is stopped and questioned by a CBP officer concerning their laptop or other electronic device, the employee should fully cooperate with the officer. An employee should be prepared to answer questions concerning the information contained on the device and whether the hand carried items require a license for import/export.

In line with concerns regarding the inspection of employee laptops, there are also issues concerning duties assessed on hand carried items. The following best practices provide guidance to companies concerned about paying duties on laptops hand carried by their employees into the United States from abroad:

- To protect against duty assessment upon entering the United States, employees should carry proof of purchase documents as foreign-made items taken abroad are dutiable every time they enter the United States. In the alternative, an employee may register their laptop with their local CBP office prior to departure by completing and submitting Customs Form CF4457. *Note:* This may only be necessary for laptops or other electronic devices purchased within six months of the date of travel.
- When an employee opts not to hand carry their laptop or other electronic device into the United States from abroad, but rather ships the items, they must complete Customs Form 3299 - Declaration for Free Entry of Unaccompanied Articles. This form allows unaccompanied personal effects to be cleared through Customs. For items to clear Customs, the employee must be in the United States unless a "U.S. Power of Attorney Form" is completed and is accompanied by the U.S. Customs Form 3299.
- Companies may consider the use of ATA carnets - a simplified customs procedure for temporary admission of goods for entry and exiting a foreign country. The ATA carnet system covers laptops used for business purposes only. Carnets are valid in over 75 countries and expire after 12 months.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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