

Client Alert

International Trade & Litigation Practice Group

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Five Major Freight Forwarding Companies Debarred by U.S. Government

Five freight forwarders who have performed significant work for the U.S. Government and Government contractors have been added to the Excluded Party List System (EPLS), meaning that they have been debarred from U.S. Government contracting. The debarred freight forwarders are:

- BAX Global Inc., 440 Exchange, Irvine, California 92602
- Kühne + Nagel International AG, Post Office Box 67, Schindellegi, Switzerland
- Panalpina Welttransport (Holding) AG, Postfach, Basel, Switzerland 4002
- Panalpina Inc., 1776 On the Green, 67 E Park Place Fl 3, Morristown, New Jersey 07960
- Schenker AG, Alfredstr. 81, Essen, Nordrhein-Westfalen, Deutschland 45130

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The debarment of these freight forwarders from U.S. Government contracts follows a September 30, 2010 guilty plea by certain of these companies to criminal price-fixing charges, antitrust violations, and an agreement by them to pay \$50.7 million in criminal fines to the United States Government. According to a September 30, 2010 press release by the U.S. Department of Justice, the entities that pleaded guilty include Kühne + Nagel International AG, Panalpina World Transport (Holding) Ltd., Schenker AG, and BAX Global Inc.

The debarment carries implications under the Federal Acquisitions Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS) for U.S. Government contractors who currently contract or may wish to contract with these forwarders. Moreover, because these forwarders often are used for shipments on defense contracts, the U.S. Department of State's Directorate of Defense Trade Controls, which is the agency that administers the International Traffic in Arms Regulations (ITAR), issued guidance on February 24, 2012 stating that the forwarders are ineligible to participate in transactions requiring authorization under the ITAR without DDTC's grant of a transaction exception. Transactions exceptions generally are granted only in cases where an exception is in the foreign policy or national security interests of the United States.

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With respect to the implications for prime or subcontractors who have agreements with these freight forwarders, or who may wish to contract with these freight forwarders in the future, FAR and DFARS impose restrictions on contracting with debarred entities, and great care should be exercised to ensure compliance with these restrictions. Generally, debarred entities are ineligible to contract with any agency of the U.S. Government, and debarment penalties extend to subcontracting with most U.S. Government prime contractors. Legal counsel should be consulted by entities currently contracting with, or wishing to contract with, any of the debarred entities.

With respect to existing authorizations by DDTC that include the debarred freight forwarders, DDTC has provided guidance that: (1) existing authorizations approved prior to February 16, 2012 are not affected, and no further authorization is required from DDTC; (2) authorization requests received by DDTC prior to February 18, 2012 will be reviewed by DDTC in the normal course, without the submission of a request for approval in accordance with § 127.1(c) of the ITAR (*i.e.*, a transaction exception request); and (3) authorization requests received by DDTC on or after February 18, 2012 will require a transaction exception request demonstrating why the applicant is unable to use any other freight forwarder and how the inclusion of the ineligible entity is in the interests of U.S. Foreign policy or national security, or the authorization request will be returned without action.

The impact of this debarment is significant, and creates implications for many U.S. Government contractors and subcontractors.

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