

U.S. CUSTOMS AND BORDER PROTECTION ISSUE UPDATED RULES FOR ELECTRONIC DEVICE SEARCHES

FEBRUARY 6, 2018

Foreign visitors to the United States and U.S. residents, including citizens, returning from abroad, carrying electronic devices such as mobile phones, computers, tablets, cameras, music and media players, disks, drives and tapes will be subject to new guidelines with regard to searches of those devices. The same new rules also apply to those leaving this country. On January 8, 2018, U.S. Customs and Border Protection (CBP) issued a new directive allowing officers and agents to request that everyone unlock their devices for inspection. All files and applications are subject to scrutiny.

There are two categories of search, “basic” and advanced.” During an advanced search based upon a reasonable suspicion of illegal activity or a national security concern, a supervisor can approve connecting the cell phone or other device through a wired or wireless connection and analyze anything it contains. “Many factors” may trigger an advanced search such as inclusion on a governmental terrorist watch list.

While a search warrant is not required, border officers may still sift through photos, emails, documents and other stored information despite an absence of what one commentator has characterized as “individualized suspicion.” The search does not extend to data solely stored remotely, and officers may request the traveler to disable network connectivity (e.g., putting the device into “airplane mode”).

In 2017, under the old guidelines, the CBP search about .007 percent of incoming international travelers, amounting to 30,200 individual device searches. This Directive does not supersede Processing Foreign Diplomatic and Consular Officials, Directive 3340-032.

Whether you are a Chief Executive Officer, a computer engineer, an attorney or a tourist, these new CBP directives may affect you. In fact, the American Bar Association recently issued some advice to lawyers traveling to Vancouver, Canada for a meeting, which can be adapted for anyone travelling to and from the U.S. on business or pleasure.

- Eliminate or minimize the number of your electronic devices with information relating to trade secrets, confidential or privileged information.
- If an electronic device is necessary, minimize the amount of confidential information on the device. Deleting electronically stored information almost never fully removes all data.
- Consider obtaining a new, inexpensive electronic device containing only necessary information, and little or nothing confidential.
- Consider whether confidential information on the device should be encrypted, but remember that CBP may demand that you unencrypt or unlock information. If you are unable to do so, CBP may “detain” the device.
- Be aware of the type and location of confidential information on any electronic device you carry.
- Before approaching a border inspection area, place your electronic devices in “airplane” mode or having all Wi-Fi, Bluetooth and cellular connections terminated and disabled. Also consider powering down or locking electronic devices.

Both outside lawyers, and in-house lawyers working for companies or other entities, have some additional concerns.

- If your electronic device becomes the subject of an inspection, ask whether the officer is making a “request” or a “demand” for inspection. Consider whether the Rules of Professional Conduct to which you are subject, in the United States or another country, would permit you to consent to a “request” for inspection, or to agree to a “demand.”

- Also be ready to offer documentation identifying you as a lawyer and advise the officer that the electronic devices contain confidential and/or privileged information.
- Finally, consider the extent to which the Rules of Professional Conduct to which you are subject require you to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure.

While these recommendations may be of use, they should not be considered legal advice and may not be universally applicable. For further information please contact Cary Stewart Sklaren at [212-471-8468](tel:212-471-8468) or CSklaren@herzfeld-rubin.com.