



South Florida EAR & ITAR Export Controls Seminar

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Voluntary Self-Disclosure

- Turning yourself in: Bureau of Industry and Security
- Outline: Violations, The Process, Sanctions, & Disclosure v. Non-Disclosure



Voluntary Self-Disclosure

- Export Administration Act (EAA)
- Export Administration Regulations (EAR)
- Bureau of Industry and Security (BIS)



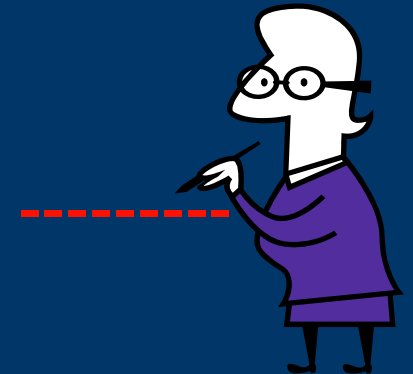
Voluntary Self-Disclosure: What is a Violation?

- (a) *Engaging in prohibited conduct*
- (b) *Causing, aiding, or abetting a violation*
- (c) *Solicitation*
- (d) *Conspiracy*
- (e) *Acting with knowledge of a violation*
- (f) *Possession with intent to export illegally*
- (g) *Misrepresentation and concealment of facts*
- (h) *Evasion*
- (j) *License alteration*
- (k) *Acting contrary to the terms of a denial order*



VSD: The Process

- ALL Voluntary Self-Disclosures should be made to the BIS Office of Export Enforcement
- OEE: Procedures
- VSD: Only a Mitigating Factor
- Other Mitigating and Aggravating Factors



VSD: Procedural Requirements

Initial Disclosure:

Initial notification

After the initial notification:

Narrative account

- The kind of violation involved
- Explanation of violation
- Identities
- Description of Items involved
- Supporting documents, shipping documents & mitigating circumstances

VSD: Sanctions

- Civil Penalty
- Denial of Export Privileges
- Exclusion from Practice
- Criminal Sanctions



Transfers of Licenses

Under the Export Administration Regulations (EAR), BIS issues individual export licenses to parties. In some instances, ownership of the party/licensee changes due to mergers and acquisitions. This may result in a change to the license if the party to whom the license was issued no longer exists, or is no longer engaged in exporting.

The EAR contain a procedure under Section 750.10 that provides for the transfer of export licenses.

The transfer of an export license must be requested by the licensee, therefore any request for a transfer of a license that is the result of a corporate transaction in which the licensee will cease to exist as a legal entity must be made prior to the licensee ceasing to exist.

15 CFR §772.1 Definition of terms as used in the Export Administration Regulations (EAR)

Knowledge. When referring to an actor in a transaction that is subject to the EAR, knowledge (the term may appear in the EAR as a variant, such as “know,” “reason to know,” or “reason to believe”) of a fact or circumstance relating to the transaction includes not only positive knowledge that the fact or circumstance exists or is substantially certain to occur, but also an awareness that the existence or future occurrence of the fact or circumstance in question is more likely than not. Such awareness is inferred, *inter alia*, from evidence of the conscious disregard of facts and is also inferred from a person’s willful avoidance of facts. This usage of “knowledge” incorporates an objective, “reasonable person” standard. Under that standard, a party would have knowledge of a fact or circumstance if a reasonable person in that party’s situation would conclude, upon consideration of the facts and circumstances, that the existence or future occurrence of the fact or circumstance in question is more likely than not.

Case Analysis

Gusmer Europe, S.L.:

Violator: A Spanish company (affiliated with a U.S. company)
Violation: Shipment of spraying equipment to Cuba without a license.
Filed VSD
Penalty: \$250,000 mitigated to \$40,000

Select Engineering, Inc.:

Violation: Shipped sensors and connectors (EAR99) to Iran, via United Arab Emirates.
Previously applied for and received BIS Export License to Iran.
Penalty: \$250,000 mitigated to \$52,800

David Rainville:

Violator: Individual, VP of Administration and Sales and Marketing Manager, Select Engineering, Inc.
Violation: False or misleading statement to BIS Agent inquiring about unlicensed export of medical equipment by employer to Iran, via the United Arab Emirates.
Penalty: \$250,000 mitigated to \$34,200

Case Analysis

P.R.A. World Wide Trading Co., Inc.:

Violation: False statements on value of items identified on the SED.

Penalty: \$250,000, with \$160,000 payable within 30 days and \$90,000 suspended for one year if no further violations.

Cargoland Air and Ocean Cargo, Inc.:

Violator: Doral, Florida, freight forwarder

Violation: One shipment of riot helmets to Venezuela without a license

Penalty: \$50,000 mitigated to \$36,000 payable in equal installments over 12 months.

VSD: Recent Case Analysis

- EPMedSystems Scenario:

Heart Monitor Equipment Shipped to Iran

Export Violations Purely Technical

BIS Attacks the VSD

EPMedSystems Case: Lessons to Learn

- If a VSD is filed:
 - Make sure it is completely accurate
- An effective voluntary disclosure requires more than simple disclosure
- Properly educate overseas staff

Principles of Effective Compliance Programs for Great Weight Mitigation in BIS's Administrative Cases

1. Whether the company has performed a meaningful risk analysis
2. The existence of a formal written compliance program
3. Whether appropriate senior organizational officials are responsible for overseeing the export compliance program
4. Whether adequate training is provided to employees
5. Whether the company adequately screens its customers and transactions
6. Whether the company meets recordkeeping requirements
7. The existence and operation of an internal system for reporting export violations
8. The existence and result of internal/external review or audits
9. Whether remedial activity has been taken in response to export violations

An Effective Compliance Program is a Mitigating Factor in an Administrative Case (Supp 1 to Part 766)

- **Great Weight (GW) Mitigation up to 25%**
 - Was it in *Effect* Prior to Violation?
 - Did it Lead to Discovery of Violations?
 - Preventing further Violations
 - Was it Improved to Address Violations?

What Export Enforcement Looks For:

Design: There is no “One-Size-Fits-All”

- Use EMS Guidelines

Cited in 15 CFR Part 766 Supp. 1

Described in detail on the BIS Web Site

- Use ICP Guidelines (15 CFR §752.11)
- Industry Best Practices

What ACRB Looks For:

Was *Effective* Program in Place Prior to violation?

- Establishing program after the fact to correct action not enough for GW

Was Program Subsequently Upgraded?

How is the Program Implemented?

Is There Verifiable Evidence of implementation?

Evidence of Effective Compliance

Documentation

- Training Records
- Disciplinary Records for Violation of Company Policy
- Due Diligence/Screening Checklists
- Evidence of Record Retention
- Provide Results of Compliance Audits
- Clear and Written Designation of Responsible Officials

Design & Implementation Template (DIT)

Complete the DIT and submit to OCC Attorney
– Provide supporting documentation

ACRB uses this information for determining effectiveness of Compliance Program

Remember: The Design is Up to You but Implementation Has to be Measurable

BIS Administrative Case Effective Compliance Program Design & Implementation Template (DIT)

Criteria		Relevant Evidence for Compliance Program Mitigation
1. Whether the Company has performed a meaningful risk analysis	Design	
	Implementation	
2. The existence of a formal written compliance program	Design	
	Implementation	
3. Whether appropriate senior organizational officials are responsible for overseeing the export compliance program	Design	
	Implementation	
4. What adequate training is provided to employees	Design	
	Implementation	
5. Whether the company adequately screens its customers and transactions	Design	
	Implementation	

BIS Administrative Case Effective Compliance Program Design & Implementation Template (DIT)

Criteria		Relevant Evidence for Compliance Program Mitigation
6. Whether the company meets record keeping requirements	Design	
	Implementation	
7. The existence and operation of an internal system for reporting export violations	Design	
	Implementation	
8. The existence and results of internal/external review or audits	Design	
	Implementation	
9. Whether remedial activity has been taken in response to export violations	Design	
	Implementation	

Why CBP?

- DHS (CBP and ICE) have border search authority to enforce export control regulations
- CBP is physically located at the borders
- CBP is granted authority to inspect, search, detain and seize goods being exported without the proper authorizations (licenses, license exemptions, ITNs, AES exemption, or AES post-departure statement)

What is the Role of CBP for Exports?

- To enforce other U.S. Government agency laws and regulations
- Inspect and examine cargo, passengers and export documentation
- Detain questionable shipments
- Seize shipments in violation of export control laws and any other U.S. laws
- Interdict unreported currency, stolen vehicles, and other illegal exports

What is the Role of CBP for Exports?

- Preventing terrorist groups, rogue nations and other criminal organizations from obtaining U.S. Munitions List (USML), Commerce Control List (CCL) commodities
- Enforce sanctions and embargoes against individuals, groups, organizations, and countries
- Increase export compliance

Code of Federal Regulations

- Regulations CBP is responsible for enforcing include:
 - 19 CFR 192 (Customs & Border Protection)
 - 15 CFR Parts 1 – 799 (Department of Commerce)
 - 15 CFR Part 30 (U.S. Census Bureau)
 - 21 CFR Parts 1300-1399 (Drug Enforcement Administration)
 - 22 CFR Parts 120-130 (Department of State)
 - 27 CFR Parts 447-555 (Alcohol, Tobacco & Firearms)
 - 31 CFR Parts 200-end (Office of Foreign Asset Control)

19 CFR 192.14

- Shipper Requirements
 - File via the Automated Export System (AES)
 - Receive System Acceptance in the form of the Internal Transaction Number (ITN)
 - Provide the ITN, AES post-departure filing statement or AES exemption statement to the carrier when the cargo is delivered to the carrier
- Carrier Requirements
 - Do not load any cargo without the ITN, the AES post-departure statement or the AES exemption statement

How Does CBP Conduct Enforcement?

Risk-Based Assessment

- Automated Export System
- Automated Targeting System filters the AES data to look for suspect shipment characteristics
- Cargo manifests (Bills of lading, Invoices, Packing Lists, Hazmat Certifications, Other shipping documentation)
- Company History or the lack of history
- Other paperwork

Examination of Cargo

CBP is looking to determine if the actual commodity matches the description on the AES transmission, the manifest and other paperwork, and whether any licenses or license exemptions are required for export



Best Practices

- AES Transmission and export documentation should match - AES transmission, commodity description (s), invoice (s) and packing slip (s) should match. Obvious discrepancies will at a minimum delay the export
- Respond quickly to FP&F notices of seizure, delayed responses can be costly
- Correct problems as quickly as possible
- Use the Correct Port Code - If the commodity reaches the dock and the AES transmission cannot be located for that port the shipment can be seized

Best Practices

- Voluntary Disclosure of items to be exported that were not properly exported or were imported improperly
- Census Regulations violations sometimes are technical issues; exporters or their agents should ensure that documentation and AES filings are completed correctly

Revisions to Title 15, Part 30

- Mandatory filing of export information through the Automated Export System (AES) or through *AESDirect*
- Shipper's Export Declarations (SEDs) are no longer accepted. Until February 1, 2009, Census and CBP used informed compliance with exporters that continued to submit SEDs
- Effective date of the new FTR was July 2;
Implementation date was September 30, 2008;
Enforcement date was February 1, 2009

Revisions to Title 15, Part 30 (continued)

- The timelines provided for in the Trade Act of 2002 apply to the advance filing of electronic export information (EEI) filed in the AES or *AESDirect*
- Depending on the mode of transportation, data needs to be provided in advance to the carrier within specific timeframes

Revisions to Title 15, Part 30 (continued)

- CBP is delegated authority to enforce new penalty provisions for violations of the FTR
- Penalties up to \$10,000 per violation may be issued to any party to the export transaction, as appropriate
- Penalties may be imposed for a failure to file export information in AES, filing late in AES, or for other violations

Revisions to Title 15, Part 30 (continued)

- Penalty Mitigation Guidelines published on January 2, 2009; effective on February 1, 2009 for violations occurring on or after that date
- Penalties are discretionary and can be issued against any culpable party with respect to the export transaction
- Separate penalties for other violations may still be issued

Failure to File EEI in AES

- No record in AES for an export transaction by the required date and the government discovers it before the violation is corrected; or any record filed later than 10 days after the due date
- Depending on the number of prior offenses and aggravating and mitigating factors, penalties can range from \$750 to \$10,000

Late Filing of EEI in AES

- Occurs when the AES record is filed beyond the due date for such filing
- Depending on the number of prior offenses and aggravating and mitigating factors, penalties can range from \$250 per day to \$1,100 per day up to a maximum of \$10,000

Other FTR Violations

- Includes filing of incorrect or incomplete information, failure to correct AES information after its is known, failure to provide carrier with proof of filing citation or exemption within time limits, etc
- Depending on the number of prior offenses and aggravating and mitigating factors, penalties can range from \$500 to \$10,000

Carrier Penalties

- Includes failure to adhere to 15 CFR 30.45, failure to report filing citations or exemption legends on the manifest, failure to provide the USPPI or agent with changes to the date or place of export, etc.
- Depending on the number of prior offenses and aggravating and mitigating factors, penalties can range from \$500 to \$10,000 (Late filing of manifest is \$1,100 per day late, up to a maximum of \$10,000 per violation)

Aggravating Factors Include:

- Several violations in the same export transaction
- Circumstances suggest an intentional violation
- High number of violations in past three years
- Evidence of criminal conviction for a related violation
- Party exhibits disregard for its responsibilities under U.S. law and regulations
- Party is a regular exporter but lacks a systematic export compliance effort

Mitigating Factors Include:

- First – time USPPPI, authorized agent, FPPI carrier, etc.
- Voluntary self-disclosure of the violation
- Clearly documented evidence of remedial measures to prevent future violations
- Exceptional cooperation with government
- Violation was an isolated occurrence
- Party has assisted in another investigation
- Party has a systematic export compliance effort



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