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Austin Trade Compliance Roundtable March 26, 2012

The Many Faces Of Export Control Enforcement Knowing and Avoiding The Broad Nature of Violations

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Introduction

Export Control Enforcement

- BIS Enforcement protects U.S. national security, foreign policy, and economic interests by interdicting illegal exports, investigating violations, and prosecuting violators of export control laws.
- Export Enforcement has federal law enforcement authority, and works closely with Commerce lawyers in the Office of Chief Counsel for Industry and Security and Department of Justice lawyers in U.S. Attorneys' Offices.



Introduction

Export Control Law

A number of executive branch agencies have responsibilities for regulating exports from the United States.

1. Dep't of Commerce (BIS) controls the widest range of goods and technology, known as dual use, through the EAR;
2. State Department (DDTC) arms exports controlled through the ITAR;
3. Energy Department, which controls exports and re-exports of technology related to special nuclear materials; and
4. Treasury, which administers economic sanctions.



Introduction

Responsible Parties

- EAR put responsibility on persons who have information, authority or functions relevant to carrying out transactions subject to the EAR.
- May include exporters, freight forwarders, carriers, consignees, and other participants in an export transaction.
- The EAR apply not only to parties in the U.S. but also to persons in foreign countries who are involved in transactions subject to the EAR.



Introduction

Responsible Parties

- **U. S. Principal Party in Interest (“USPPI”)** – even if the terms of sale are such that title changes hands in the US, and the American seller or manufacturer is not actually “exporting”, if the buyer/exporter is non-US, the US party remains the USPPI with compliance responsibilities.



Introduction

Consequences of Violating the EAR

- Consequences include criminal and administrative penalties.
- For willful violations, both criminal fines and administrative penalties may apply.
- For most administrative violations, there is no intent requirement – strict liability.
- Enhanced consequences were passed 10/16/2007:
 - civil penalty is the greater of \$250,000 or 2 Xs the value of the transaction
 - criminal violators may be fined up to \$1MM and/or up to 20 years prison
- Denial of export privileges.



Major Enforcement Areas

- There is a myriad of ways in which the EAR may be violated. The major areas of enforcement follow.
 - **CCL Based Controls**
 - **Transshipment and Re-exports**
 - **Failure to Observe License Conditions**
 - **Deemed Exports**
 - **State Sponsors of Terrorism**
 - **Freight Forwarder Issues**
 - **False Statement/Misrepresentation of Fact**
 - **Antiboycott Violations**
 - **Successor Liability**



Major Enforcement Areas

CCL Based Controls

- What most often comes to mind when we think of a violation of the EAR.
- Item is classified, and, if it has a specific ECCN, you must determine if a license is required to export that item to the country of destination based on reasons for control.
- Violations often involve:
 - chemicals and metals including nickel powder, hafnium, zirconium, and bismuth.
 - machines and parts including semiconductors and integrated circuits; diaphragm pumps, butterfly and check valves.



Major Enforcement Areas

Transshipment and Re-exports

- Parties to an export transaction cannot bypass the EAR by shipping items through a third country.
- An exporter cannot bypass the U.S. embargo against Iran by shipping an item to a distributor in the United Kingdom and asking that distributor to transship the item to a customer in Iran. Under U.S. law, this would be considered an export to Iran and both the U.S. exporter and the United Kingdom distributor could be liable for violating U.S. law.



Major Enforcement Areas

Failure to Observe License Conditions

- To minimize the potential diversion or misuse of licensed exports, BIS adds conditions to nearly all export licenses.
- Conditions may restrict the way an item is used after export, or it may require certain reports to be made by the exporter.
- The conditions are created through an interagency process that includes BIS and the Departments of State and Defense, among others.



Major Enforcement Areas

Failure to Observe License Conditions

Example

- **The Violation:** Houston based Western Geophysical Co. of America, of Houston, violated license conditions for underwater geophysical mapping equipment exported to the People's Republic of China.
- The license conditions required the equipment, which was controlled for national security reasons, to be monitored on a weekly basis while stored in the PRC.
- **The Penalty:** On 9/1/2006, WesternGeco agreed to pay a civil penalty of \$925,000, and related company, Western Geophysical Co. agreed to pay administrative penalties totaling \$1,965,600.



Major Enforcement Areas

Deemed Exports

- The release of technology or source code subject to the EAR to a foreign national in the US “deemed” to be an export to the home country of the foreign national and may require a license.
- Technology can be released through visual inspection, oral exchanges of information, or the application to situations abroad of personal knowledge or technical experience acquired in the United States.



Major Enforcement Areas

Deemed Exports

Example

- **The Violation:** Between January 2004 and May 2006, through the Tennessee-based company Atmospheric Glow Technologies, Inc., J. Reece Roth, a Professor Emeritus at University of Tenn., engaged in a conspiracy to transmit export controlled technical data for a military unmanned aerial vehicle to foreign nationals from the People's Republic of China and Iran.
- **The Penalty:** On 9/3/2008, Roth was convicted on 18 counts of Conspiracy and Arms Export Control Act violations, for which he was sentenced to 48 months in prison and two years of supervised release.



Major Enforcement Areas

State Sponsors of Terrorism

- The US maintains broad export controls against countries that have been designated by the Secretary of State to be state sponsors of terrorism.
- These countries are sometimes subject to partial or complete embargoes; so many exports to these countries, even of ordinary commercial items not typically controlled when exported to other countries, may require authorization from the BIS or (OFAC)



Major Enforcement Areas

State Sponsors of Terrorism

- **Regional Considerations:** It is important to familiarize yourself with the restrictions that apply to the ultimate destination of your export. U.S. law in this area frequently changes in accordance with an evolving foreign policy.
- **The following websites are good resources:**
 - OFAC's website:
 - <http://www.treas.gov/offices/enforcement/ofac/>
 - BIS's website:
 - <http://www.bis.doc.gov/PoliciesAndRegulations/regionalconsiderations.htm>



Major Enforcement Areas

State Sponsors of Terrorism

Example

- **The Violation:** From 2002 to 2006, 5 foreign subsidiaries of San Marcos, Texas-based Thermon Manufacturing Company committed a total of 33 violations by reexporting or causing the export to Iran, Syria, Libya and listed entities in India of EAR99 heat tracing equipment manufactured in the United States by Thermon Manufacturing, without the required BIS license.
- **The Penalty:** On September 11, 2009, the five foreign subsidiaries of Thermon Manufacturing Company agreed to pay a total of \$176,000 in combined civil penalties.
- **Mitigating Circumstances:** Thermon Manufacturing Company voluntarily disclosed the violations and cooperated fully in the investigation.



Major Enforcement Areas

Freight Forwarder Issues

- Primary responsibility for compliance with the EAR generally falls on the USPPI, the U.S. seller. However, freight forwarders or other agents for PPI's are responsible for their actions, including the representations they make by signing an export declaration or other export control document.
- To help avoid liability in an export transaction, agents and exporters must decide whether any aspect of the transaction raises red flags, inquire about those red flags, and ensure that suspicious circumstances are not ignored.
- Both the agent and the principal party are responsible for the accuracy of each entry made on an export document.
- Good faith reliance on information provided by the exporter may excuse an agent's actions in some cases, but the careless use of pre-printed "NLR" forms or unsupported entries can get an agent into trouble.



Major Enforcement Areas

Freight Forwarder Issues

Example

- **The Violation:** DHL unlawfully aided and abetted unlicensed exports to Syria, Iran and Sudan and failed in connection with numerous exports to these countries to comply with recordkeeping requirements of the EAR and OFAC regulations, including failure to retain air waybills and other export control documents required to be retained by the regs.
- **The Penalty:** In August 2009, DHL agreed to pay a civil penalty of \$9,444,744 and conduct external audits covering exports to Iran, Syria and Sudan for a 5 year period.



Major Enforcement Areas

False Statement/Misrepresentation of Fact

- A party to an export transaction may be subject to criminal and/or administrative sanctions for making false statements to the U.S. Government in connection with an activity subject to the EAR.
- Common types of false statements seen by BIS are statements on an AES filing that an export does not require a license or statements that an export was shipped under a particular license number when in fact that license was for a different item.
- False statements that are made indirectly through another person, such as a freight forwarder, constitute violations of the EAR.



Major Enforcement Areas

False Statement/Misrepresentation of Fact

- **The Violation:** In 2003 and 2004, MTS Systems, Corp. (MTS), of Eden Prairie, Minnesota, submitted export license applications containing misleading representations of material facts for export of seismic testing equipment to India. MTS had knowledge that they could be used for testing of Indian nuclear facilities.
- **The Penalty:** MTS was sentenced to two years' probation and a \$400,000 criminal fine, as well as a a \$400,000 civil penalty.



Major Enforcement Areas

Antiboycott Violations

- The antiboycott provisions of the EAR, prohibit U.S. persons from complying with unsanctioned foreign boycotts, and requires that U.S. persons report their receipt of certain boycott requests to BIS.
- **The Arab League boycott of Israel** is the principal foreign economic boycott that U.S. persons must be concerned with today. The antiboycott laws, however, apply to all boycotts of countries that are friendly to the United States imposed by foreign countries.
- The antiboycott provisions apply to all "U.S. persons" – individuals and companies located in the U.S. and their foreign affiliates, when their activities relate to the sale, purchase, or transfer of goods or services (including information) within the U.S. or between the U.S. and a foreign country including: U.S. exports; forwarding and shipping, and financing.



Major Enforcement Areas

Antiboycott Violations

Example

- **The Violation:** On thirty-six occasions during the years 2002 and 2003, Rohde & Liesenfeld, Inc., a freight forwarder located in Houston, furnished prohibited information about its or another company's business relationships with or in a boycotted country, in connection with the shipment of goods from the U.S. to Syria.
- **The Penalty:** Rohde & Liesenfeld, Inc. agreed to pay a \$108,000 civil penalty.



Major Enforcement Areas

Successor Liability

- Recent administrative cases have made clear that businesses can be held liable for violations of the EAR committed by companies that they acquire.
- A properly structured due diligence review can determine whether an acquired company has violated any export laws, and should examine the company's export history and compliance practices, including:
 - commodity classifications
 - technology exchanges
 - export licenses
 - end-users / end-uses
 - international contracts
 - foreign employees with access to controlled technologies
 - the target company's export policies, procedures and compliance manuals.



Major Enforcement Areas

Successor Liability

Example

- **The Violation:** In 2000 - 2002, Northrop Grumman Corporation, both in its own capacity and as successor to Litton Industries, Inc., which Northrop acquired in 2001, exported navigation equipment and module manufacturing data to destinations in the Philippines, Singapore, Malaysia, Italy and the United Kingdom without the required licenses.
- **The Penalty:** Northrop agreed to pay a \$400,000 civil penalty.
- **Mitigating Circumstance:** Northrop voluntarily self-disclosed the violations and cooperated fully with the investigation.



How to Avoid These Violations

Principles for an Effective Compliance Program

- An effective compliance program is entitled to great weight mitigation of a violation.
- **BIS employs 9 guiding principles to assess effectiveness of an export compliance program:**
 - Performance of meaningful risk analysis, including types of goods exported and the destination of those goods;
 - Existence of a written compliance program, that is communicated to others;
 - Responsibility and supervision of program by appropriate senior company officials;
 - Adequate training is provided to employees;
 - Adequate screening of customers and transactions;
 - Compliance with recordkeeping requirements;
 - Existence of an internal system for reporting export violations, including making Voluntary Self-Disclosures;
 - Existence of internal/external reviews or audits;
 - Whether remedial activity has been taken in response to export violations.



What to do if You Have a Potential Violation

Aggravating/Mitigating Factors

- Several factors are taken into account when determining the appropriate administrative penalty.
- **General factors:**
 - Destination of the export
 - Degree of willfulness involved in violations
 - Number of violations
 - Criminal charges



What to do if You Have a Potential Violation

Mitigating Factors

- Some factors are given “great weight” and are treated as considerably more significant than factors that are not so designated.
- **Mitigating factors:**
 - Voluntary Self-Disclosure of violations (great weight)
 - Effective export compliance program (great weight)
 - Cooperation with BIS investigation
 - Assistance to other BIS investigations
 - No previous record of violations



What to do if You Have a Potential Violation Aggravating Factors

- **Aggravating factors:**
 - Deliberate effort to hide or conceal violations (great weight)
 - Serious disregard for export compliance responsibilities (great weight)
 - Item is significant due to its sensitivity or reason for control (great weight)
 - History of violations
 - High quantity or value of export



What to do if You Have a Potential Violation

Voluntary Self Disclosure

- BIS encourages the submission of Voluntary Self Disclosures (VSDs) by parties who believe they may have violated the EAR.
- BIS considers VSD an excellent indicator of a party's intent to comply with U.S. export control requirements and may provide BIS important information on other ongoing violations.
- Most VSDs result in no penalty. Over 95% are resolved with either a finding that no violation occurred or a warning letter.
- **Caution should be exercised in deciding whether to submit a VSD. Not only the facts you are disclosing, but your whole operation will be subject to scrutiny.**



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