



HOW TO AVOID THE BROAD NATURE OF EXPORT CONTROL VIOLATIONS

BY MARGARET JONES HOPSON

Many U.S. companies are unaware of the broad reach of U.S. export controls and are operating under the somewhat understandable, but very hazardous, belief that they can readily disregard these laws unless they deal with advanced, delicate, or military-related goods and technology. It is a common misconception that only companies dealing internationally in these sorts of goods and technology have export compliance exposure. U.S. export controls not only affect a wide range of international transactions, but also extend to a host of activities that are wholly domestic and/or unlikely to be readily recognized as international in scope.

The following scenarios illustrate what companies may face:

- A company engaging in no international activity may have to restrict foreign national employees' exposure to certain technical data;
- A company engaging in *domestic* sales of articles intended for export must comply with basic diligence, including running its purchaser through certain government lists and including a destination control statement in commercial documents; or
- A company engaged in exporting a wholly foreign manufactured item, even if shipped from one foreign country to another, will have export compliance responsibilities relating to the export of that item if it contains a *de minimis* amount of U.S. content, whether materials or technology, including development and design.

The maze of U.S. export controls presents quite a challenge. First, there are several different export control regimes administered and enforced by agencies located within various federal governmental departments. Furthermore, not all export control requirements are codified, and those that are are often counter-intuitive. However, exporters can and must understand and comply with the obligations that apply to their activities, and in most instances, the cost of compliance is modest.

The full reach of export controls is beyond the scope of this article. Rather, this article is intended to provide a basic understanding of the Export Administration Regulations (EAR) and the many ways in which an unwary exporter may violate the EAR.

VARIOUS EXPORT CONTROL REGIMES

U.S. export controls are handled by several agencies administering and enforcing various regulations, as follows:

1. The Bureau of Industry and Security (BIS)

Located within the U.S. Department of Commerce, the Bureau of Industry and Security regulates the export of dual use items, those items with an ordinary commercial use, which may also be put to some sinister use against the United States. The regulations applying to these items are the EAR.¹ The regulations are the focus of this article.

2. The Directorate of Defense Trade Controls (DDTC)

Located within the U.S. Department of State, the DDTC regulates exports of defense articles and defense services, pursuant to the International Traffic in Arms Regulations (ITAR),² which include the U.S. Munitions List. While a detailed discussion of the ITAR is beyond the scope of this article, it is noteworthy that even if a manufacturer of military items has no intention of exporting such items and, in fact, does not do so, the manufacturer must register with the Department of State.

3. The Office of Foreign Assets Control (OFAC)³

Located within the U.S. Treasury Department, the OFAC administers embargoes and economic sanctions with a significant number of countries, including Cuba, Iran, and Syria.

These restrictions are often quite broad, affecting more than just exports to these countries.

ENFORCEMENT OF THE EAR

BIS enforces the EAR in order to protect U.S. national security, foreign policy, and economic interests by interdicting illegal exports, investigating violations, and prosecuting violators of export control laws. BIS has federal law enforcement authority and works closely with U.S. Department of Commerce lawyers in the Office of Chief Counsel for Industry and Security and Department of Justice in U.S. Attorneys' offices. The regulations place responsibility on parties involved in transactions subject to the EAR, whether by virtue of their information regarding these transactions, authority to carry out these transactions, or actual involvement in these transactions. More than just exporters, this may include freight forwarders, carriers, consignees, and other participants in an export transaction. The regulations not only apply to parties in the United States, but also to persons in foreign countries who are involved in transactions subject to the EAR.

An important notion in understanding enforcement of the regulations is that of the U.S. Principal Party in Interest (USPPI). Even if the terms of sale are such that title changes hands in the United States, and the American seller or manufacturer is not actually "exporting," if the buyer/exporter is not American, the U.S. party remains the USPPI with compliance responsibilities.

CONSEQUENCES OF VIOLATING THE EAR

Consequences for violating the EAR 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; the regulations are strict liability. In October 2007, enhanced consequences became effective, whereby civil penalties are the greater of \$250,000 or twice the value of the transaction. Criminal violators may be fined up to \$1million and/or up to 20 years in prison. For both civil and criminal violations, a denial of export privileges may result.

MAJOR ENFORCEMENT AREAS

There are a myriad of ways in which the EAR may be violated. Many are less commonly known and are a trap for the unwary.

Commerce Control List (CCL)-based controls are what most often come to mind when we think of a violation of the EAR. If an item has a specific export control classification number (ECCN), it must be determined if a license is required to export that item to the country of destination based on reasons for control. These sort of violations often include chemicals and metal and machines and parts, including semiconductors and integrated circuits, diaphragm pumps, and butterfly and check valves. In regard to CCL-based control violations, it is important to remember that parties to an export transaction cannot bypass the EAR by shipping items through a third country.



Failure to observe license conditions is an area of enforcement that often goes unobserved. In order to minimize the potential diversion or misuse of licensed exports, BIS adds conditions to nearly all export licenses. Your job is not done when you receive the export license! You must comply with conditions of that license, which conditions may restrict the way an item is used after export or may require certain reports to be made by the exporter. The conditions are created through an interagency process that includes BIS and the U.S. Departments of State and Defense, among others, and will be clearly stated on your export license.

The deemed export rule provides that the release of technology or source code subject to the EAR to a foreign national in the United States is “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. If a license would be needed to export the technology to the person’s home country, you must obtain a license to release the technology to the foreign national in the United States.

The United States 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 to other countries, may require authorization from the BIS or OFAC. The most common example of a state sponsor of terrorism is Cuba. Most American exporters are familiar with the U.S. economic sanctions against Cuba. However, 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: www.treas.gov/offices/enforcement/ofac
- BIS: www.bis.doc.gov/PoliciesAndRegulations/regionalconsiderations.htm.

Freight forwarders also face enforcement issues. Primary responsibility for compliance with the EAR generally falls on the USPP, often the U.S. seller. However, freight forwarders or other agents for PPIs 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.

False statements or misrepresentations of fact are yet another way to violate the EAR. 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 Automated Export System (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, nonetheless constitute violations of the EAR.

Antiboycott violations are likewise contemplated in the EAR. The antiboycott provisions of the EAR prohibit U.S. persons from complying with unsanctioned foreign boycotts and require 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 United States and their foreign affiliates, when their activities relate to the sale, purchase, or transfer of goods or services (including information) within the United States or between the United States and a foreign country including U.S. exports, forwarding and shipping, and financing.

Successor liability is a concern for those looking to acquire a business that may have violated the EAR. 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; and
- the target company’s export policies, procedures, and compliance manuals.

PRINCIPLES OF AN EFFECTIVE COMPLIANCE PROGRAM

Not only can an effective compliance program help an exporter to avoid violating the EAR, such a compliance program is afforded great weight in the mitigation of a violation of the EAR. BIS employs nine guiding principles to assess effectiveness of an export compliance program:

1. performance of meaningful risk analysis, including types of goods exported and the destination of those goods;
2. existence of a written compliance program that is communicated to others;

3. responsibility and supervision of the program by appropriate senior company officials;
4. adequate training provided to employees;
5. adequate screening of customers and transactions;
6. compliance with recordkeeping requirements;
7. existence of an internal system for reporting export violations, including making Voluntary Self-Disclosures;
8. existence of internal/external reviews or audits; and
9. whether remedial activity has been taken in response to export violations.

WHAT TO DO IF YOU HAVE A POTENTIAL VIOLATION

Aggravating and mitigating factors are taken into account when BIS determines the appropriate administrative penalty. General factors are the destination of the export, degree of willfulness involved in violation(s), number of violations, and whether criminal charges are in order. Some factors are given “great weight” and are treated as considerably more significant than factors that are not designated as such.

Mitigating factors include:

- Voluntary Self-Disclosure (VSD) of violations (great weight);
- effective export compliance program (great weight);
- cooperation with BIS investigation;
- assistance to other BIS investigations; and
- no previous record of violations.

Aggravating factors include:

- 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; and
- high quantity or value of export.

Voluntary Self Disclosures (VSD) are encouraged by BIS when a party believes it has 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. More than 95 percent are resolved with either a finding that no violation occurred or a warning letter.

Nonetheless, caution should be exercised in deciding whether to submit a VSD. Not only the facts you are disclosing, but also your whole operation, will be subject to scrutiny. If you discover violations, you should consult with counsel before making the final decision to file a VSD. Make sure you are clear as to whether an inadvertent mistake was made or the violations were willful and knowing. Other factors to consider in determining whether to file a VSD are whether you have adequate internal controls such that your standard operating procedures are sufficient; how you discovered the violation; what you did

once you discovered the violations, including any remedial action that would prevent the same lapse from occurring; and what was been done to the personnel who caused the violation.

CONCLUSION

The far-reaching nature of the export control laws in the United States generally, and the many ways in which an unwary exporter can violate the EAR, specifically, can be overwhelming. However, by understanding the many ways in which the EAR may be violated and establishing an effective export compliance program, an exporter can operate within the confines of the regulations. Finally, if an exporter discovers that a violation may have occurred, it should fully investigate the circumstances, not only of that violation, but also of the company’s overall export activity, in deciding whether to file a VSD.

NOTES

1. 15 C.F.R. §§730–774.
2. 22 C.F.R. §§120–130.
3. 31 C.F.R. §§500 *et. seq.*

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