

Enforcement Trends in U.S. Export Controls

CONNECT

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Enforcement Trends



Key US Export Control Regimes

- > **International Traffic in Arms Regulations (ITAR)**
 - Department of State, Directorate of Defense Trade Controls (DDTC)
 - “Defense” articles, technical data, software, services
- > **Export Administration Regulations (EAR)**
 - Department of Commerce, Bureau of Industry and Security (BIS)
 - Commercial/dual-use articles, technical data, software
 - Antiboycott regulations
- > **Office of Foreign Assets Control (OFAC)**
 - Department of the Treasury
 - Embargoed destinations/parties
- > **Foreign Trade Statistics Regulations (FTSR)**
 - Department of Commerce, Census Bureau
 - Export Reporting of Statistical Information
- > **Committee on Foreign Investment in the United States**
 - Inter-agency committee, led by the Department of the Treasury
 - Reviews acquisitions of U.S. companies by foreign parties for national security concerns
- > **Foreign Corrupt Practices Act**
 - Anti-bribery/Books and records

Enforcement Trends

Examples:

- > Enforcement Initiatives
 - Department of Justice “National Counter-Proliferation Initiative”
 - >30% increase in enforcement actions
- > Increasing Penalty Provisions
 - International Emergency Economic Powers Act (IEEPA)
 - civil fines increased: \$50,000 to the greater of \$250,000 or twice the amount of the transaction; criminal penalties increased: \$50,000 to up to \$1,000,000 per violation
 - Foreign Trade Regulations
 - Increased from \$1,000 to \$10,000 per violation

Enforcement Trends

Examples:

- > More aggressive enforcement
 - Agencies are taking a harder line on enforcement, refusing to accept disclosure as voluntary, doing more “directed” disclosures, issuing more subpoenas,...
- > Agencies seeking higher penalties
 - Draft charging letters are citing the highest possible penalties as the starting point for negotiations

What does this mean?

- > The chances of getting caught have gone up
- > The level of penalties applicable have gone up

If your compliance program is based on an analysis of your company's compliance risk of 5 or 10 years ago, it is time to revisit the numbers

Identifying (and Managing) Your Risk Areas

- > No “one size fits all” compliance plan
- > Risks depend on your business
 - What you export
 - How you export (physically or intangibly)
 - Where you do business
 - With whom you do business
- > How you manage those risks should be tailored to fit your company and your business

Identifying (and Managing) Your Risk Areas

- > Common Assumptions that result in violations:
 - “I don’t export anything”
 - “The [fill in the blank] that I export are not subject/controlled”
 - “Someone else is responsible”
 - “I already have adequate policies and procedures in place”

Before you assume you don't export anything

- > Do you know...
- > Where all of your company's technical resides on computer systems?
 - Who has access to those computer systems (including who maintains and supports your system)?
- > Every non-U.S. location where you conduct research, development, production?
 - Do you outsource any R&D to universities or service providers?
 - Production of goods designed in U.S.?
- > Everything that leaves your facility?
 - What gets emailed?
 - What your salespeople hand carry with them when they travel internationally?
 - What gets shipped through the mailroom?
- > What foreign persons – employees, visitors, contractors - are in your facility?

Before you assume nothing you do is subject/controlled

- > Do you know...
- > Classification of all company articles, technical data, software?
 - Items still under development?
 - Have you reviewed all of the CCL?
- > Whether your company modifies for a defense use?
 - Does customer tell you whether they are using your custom components/data for a defense use?
 - Could be for a customer in the U.S. or overseas
- > What your foreign affiliates are doing?
 - Where are they sourcing/selling?
 - Using your U.S.-based servers?
- > The end-use/end-user of all of your transactions?

Before you assume someone else is responsible...

- > Who is responsible for determining if a license is required?
 - Normally, party who “controls” the export shipment
 - Hires the freight forwarder or arranges for transportation with the carrier
 - But - in an “ex-works” transaction, the seller is still responsible:
 - unless foreign party agrees in writing to be responsible
 - Selling ex-works does not absolve you of your export obligations!!!

- > Who is responsible for filing data via AES?
 - Normally, the USPPPI/seller
 - But, in an ex-works transaction, may be the Foreign Principal

Before you Assume you Have Controls, Does Your Compliance Program Include:

- Management commitment letter or policy
 - Create a “Compliance Culture”
- Responsible party(ies)
 - Create Clear Roles and Responsibilities For Offices, Functions and Individuals
- Recordkeeping policy
 - Take into account a broad scope of records – more than just shipping documents!
- Audits, Internal Reviews, and a Mechanism for identifying and raising potential violations
 - Voluntary self-disclosure may result in significant mitigation
- Training and Education
 - Ranging from awareness education to task specific training

Does Your Compliance Program Include:

- Product classification
 - All other controls flow from classification
 - You cannot comply unless you have completed this step
- Screening
 - Denied persons
 - Diversion
 - Prohibited end-uses
 - Sanctioned/embargoed destinations
 - Antiboycott compliance
- License Determination
 - Requests and Compliance

Wrap Up

- > Enforcement is UP;
- > Penalties are UP;
- > Agencies are taking a harder look at, and line on, self disclosures.
- > These increased risks need to be included in your cost/benefit analysis when reviewing your export compliance program.

Wrap Up

- > The rules often do not make sense – do not make common sense assumptions.
- > Planning ahead will minimize the negative impact of export regulations on your business .
- > Report any suspicious activity immediately and through the appropriate channels.
- > Always act in a manner that you would be able to justify in the face of a government audit and maintain records.
- > No single transaction is worth jeopardizing your export privileges, your company's reputation, and certainly not jail time.



THANK YOU

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