Export Control Laws Advance U.S. Security

by Lauren M. Camilli

Export control laws help protect our country by keeping goods and technologies from terrorists who would misuse them. The U.S. Department of Commerce's Bureau of Industry and Security (BIS) is responsible for administering most U.S. export control laws on dual-use items. Export control classification numbers are used by the BIS to describe controlled substances and the characteristics that make them controlled. The BIS administers and enforces U.S. export control laws to advance U.S. national security, foreign policy and economic interests.

The bureau has an enforcement arm, the Office of Export Enforcement (OEE)—an elite law enforcement organization recognized for its expertise and integrity. Export enforcement activities focus on the most significant threats facing our nation. The top priorities are to prevent and pursue illegal exports intended to facilitate the proliferation of weapons of mass destruction and missile delivery systems, or intended to support terrorist entities and state sponsors of terrorism. Many of these items are dual-use commodities that have a commercial application and could be used as weapons of mass destruction, conventional arms or terrorist weapons.

In fiscal year 2004, the OEE conducted more than 1,200 export enforcement investigations that resulted in forty-nine arrests, forty-two criminal convictions and criminal fines totaling $9.8 million. The BIS imposed more than $8.8 million in administrative penalties, thirty-one export denial orders, and other administrative sanctions. Sensitive dual-use items are on a Commerce Control List, which tracks U.S. commitments under multilateral export control regimes. The BIS works with numerous agencies, including the departments of State, Defense, Energy, Homeland Security and Justice, to promote and defend national security interests.

Most exporters are subject to export control laws. It is important that your clients understand U.S. export laws before proceeding with export transactions. Many items include not only sophisticated hardware and software, but also much more common items. Most of the dual-use export control system is set forth in the Export Administration Regulations (EAR).

Potential Penalties

The regulations cover all parties to export transactions, including exporters, carriers and consignees. There are both criminal and civil fines for violators of U.S. export control laws. Penalties include fines, imprisonment or denial of export privileges. The regulations apply to parties in the United States and foreign countries that are involved in transactions subject to the regulations.

Violations of the regulations are subject to criminal and administrative penalties. Fines for export violations can reach up to $1 million per violation in criminal cases, $11,000 per violation in most administrative cases and $120,000 per violation in certain administrative cases involving national security issues. Some criminal violators may be sentenced to prison and administrative penalties, which may deny export privileges. These denials may be temporary—depending on the severity of the violation. The names of persons who have had their export privileges denied are published in the *Federal Register*.[1] Violations of temporary denial orders may carry criminal penalties. Voluntary self-disclosures of violations by companies and individuals may increase the potential to negotiate a settlement with the BIS before any formal hearings are conducted. Voluntary self-disclosures are given great weight and can potentially save a company from public admonishment and severe penalties. Many settlement agreements with the BIS involve neither an admission nor denial of the charges and are therefore may be an attractive alternative.

License Requirements

License requirements for a particular transaction or item are based on a number of factors. These include the technical characteristics of the item to be exported, its destination, the end use and the end user. The following examples are ways in which exporters can run into trouble by violating U.S. laws: A professor illegally exported potentially deadly plague bacteria, which is a controlled substance. The professor was convicted of forty-seven counts and sentenced to two years in prison for those violations. In a less obvious case, a sports and recreation company exported night vision devices to Japan and fourteen other countries without an export license. In this criminal case, the company's executive was sentenced to five years of probation and fined $650,000. In contrast, an exporter of hydrogen fluoride to Mexico without the required licenses voluntarily disclosed its violations and fully cooperated with the investigation. The company paid a $36,000 administrative penalty—the extent of its liability.

Exports that require licenses—such as potentially dangerous bacteria, night vision devices or thermal imaging cameras—are products the U.S. government obviously should be concerned about for security reasons. Other products that are subject to penalties include firearm scopes, aluminum alloy rods, petroleum and various chemical compounds. In all of these cases, self-disclosure and full cooperation were looked upon as mitigating circumstances that decreased potential criminal and civil violations.

A large area of concern and potential violation for companies is computer technologies. A well-known computer company in 2000 was found to have violated the EAR by exporting and reexporting computers and computer equipment without having the required export licenses. Exports of these commodities were destined for South Korea. Reexports of the U.S.-originated goods were transferred from Hong Kong to the Peoples Republic of China and from Singapore to India. Because of voluntary self-disclosure, the company agreed to pay $39,000 as an administrative penalty.

When an item does require a license, the exporter's responsibilities may not end there. License conditions may include restrictions in the way in which an item is used or may require subsequent reports to be filed. These additional requirements may also include the imposition dollar limit to a transaction from the BIS. Failing to file copies of certain documents with the BIS after the export transaction is completed may also impose subsequent liability and penalties.

Deemed Exports

A hot topic in today's export compliance framework is "deemed exports." This category of exports includes the release of technology or source code to a foreign national, even if the foreign national is in the United States. These exports are "deemed" to be an export to the home country or countries of the foreign national and may require a license. These types of technologies can be transferred through visual inspection, oral information exchanges or application to situations abroad of personal knowledge or technical experience accrued in the U.S. Many potential problems can develop when a U.S. company employs foreign nationals.

In one example, a communications company employed foreign nationals from China and the Ukraine to conduct research on the development and manufacturing of commercial digital fiber optic transmission of broadband switching equipment, software and technology. This research required a license under the export regulations. In a similar case, a semiconductor corporation also released technical data to Chinese nationals without a required license. In these two common examples of deemed exports, the companies faced fines of $125,000 and $560,000 respectively.

Prohibited Destinations

Many exports to countries that sponsor terrorism are prohibited. Laws in this area frequently change in accordance with foreign policy, so it is important to keep updated on the countries currently on the enforcement list. If a company ships goods to one country that does not require a license, but has knowledge that its ultimate destination is a prohibited country requiring preauthorization, the company may be subject to strict penalties. Currently, state sponsors of terrorism are Cuba, Iran, Libya, North Korea, Sudan and Syria.

Exporters cannot, therefore, attempt to go around the EAR requirements by shipping items through a third country to circumvent the prohibited destination controls. Even though an export does not go directly to a country, asking another party to reship the item could open the exporter to liability. The BIS has issued a description of how it determines appropriate penalties for violations. Each case is considered independently and the circumstances and the BIS's objectives.[2]

Factors include the destination of the export, the degree of willfulness involved, and the number of violations and criminal charges. Mitigating factors include voluntary self disclosure, an export compliance program in effect, cooperation with officials, and the absence of previous records of violations. Other factors, such as efforts to conceal violations or complete disregard for compliance responsibilities, can seriously adversely affect an exporter's case. Additionally, if an item is significant due to its sensitive nature or reason for control, that factor is given great weight during the investigation.

Responsibility of Agents

Although the primary responsibility for compliance is with the seller and the buyer in any transaction, other agents acting on behalf of the principals are responsible for their actions, including agents that sign export control documentation. Agents to a transaction must look for "red flags" and suspicious circumstances involved in any export transaction. Freight forwarding companies or customs agents have been held criminally liable for forwarding shipments despite being warned by agents of the BIS that such shipments would be in violation of export controls to prevent nuclear proliferation. Filing false shipping documents or shipping on behalf of a company that is denied export privileges has also resulted in liability for freight forwarders and customs brokers.

"Intended Use" or "End Use"

Another important consideration when examining export transactions is the issue of "intended use" or "end use" of the product. If the exporter knows or has reason to know that any of the items will be used in a way that should concern the U.S. gov-

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ernment, these items may require a license, although they might not ordinarily fall under any of the requirements. For guidance, the BIS has published a "Know Your Customer" guidance document in Supplement No. 3 to Part 732 of the EAR. An cntity list is published in the *Federal Register* so that an exporter can check to see if exports to certain end users present an "unacceptable risk" of being diverted to an end user that may cause concern.

Antiboycott Provisions

Under the EAR, there are antiboycott provisions, which prohibit exporters from complying with requirements of unsanctioned foreign boycotts. For example, a foreign country's requirement that exporters refuse to do business with persons on a boycott list would be prohibited. Exporters must report receipt of boycott requests to the BIS. During the mid-1970s, the U.S. adopted two laws to counteract the participation of us citizens in other nations' economic boycotts of countries friendly to the U.S. These "antiboycott" laws were the 1977 amendment to the Export Administration Act (EAA) (as carried over into the Export Administration Act of 1979) and the Ribicoff Amendment to the 1976 Tax Reform Act (TRA). These laws were put in place to require U.S. persons to refuse to participate in foreign boycotts that the U.S. did not sanction.

Successor Liability

If a business is about to acquire another company, it may be held responsible for export violations of that company. Successor liability is an important factor to consider if a business is doing "due diligence" on companies they plan to acquire. A thorough review should include a look at the company's export history, compliance practices in place, and any international contracts in effect.

Recent Cases

Within the last few months, a California biotech company agreed to pay $904,500 in civil penalties to settle charges that it exported biological toxins to Canada in violation of the EAR. Under the settlement agreement, the company's export privileges were denied for a period of two years. However, provided that the company commits no violations during the two year suspension, its privileges will be reinstated. The company allegedly exported biological toxins sixty-seven times without having obtained the required export licenses. Export controls of biological toxins are part of the U.S. obligations as a member of the Australia Group, a multilateral regime whose members are committed to the nonproliferation of chemical and biological weapons.

In April 2005, a Virginia company agreed to pay $10,000 in civil penalties to settle charges that it illegally exported optical sighting devices from the U.S. to Canada in violation of the EAR. On ten occasions, it was charged that the Virginia firm exported ten rifle scopes to Canada. Also in 2005, an Illinois company and its president were sentenced in connection with criminal violations of the act for illegally exporting polygraph machines to China. The company's president was sentenced to two and one half years probation, including six months of electronically monitored home confinement, and community service. The president knowingly exported the equipment without the required licenses.

Recent Changes and Developments in BIS Regulations

In 2004, the BIS updated its controls to reflect geopolitical developments. For example, the BIS published rules that transferred licensing responsibility for export to Iraq and Libya to the Department of Commerce, reduced the level of controls on commercial exports to Iraq, ended license requirements for the export of low-level items to Libya and updated controls for Cuba. That same year the BIS process had an increased number of exports license applications with shorter average times. The BIS completed the review of 15,534 license applications in fiscal year 2004, an increase of nearly 25 percent from the previous year. The average processing time was reduced from forty-four days in 2003 to thirty-six days in 2004. On April 14, 2005, the BIS published a regulation that substantially increased the number of countries requiring a license for certain chemical biological controlled exports. The new rule requires a license to export these items to all countries worldwide except the Australia Group countries.[3] The U.S. government is considering tightening rules on deemed exports which require U.S. companies to get licenses for foreign nationals they hire to work with controlled technologies. The BIS could expand the list of foreign nationals subject to controls by making U.S. companies obtain license for hiring foreign nationals who are permanent residents of the U.S., a category that is currently exempted for licensing requirements. In the future, if the aim is to prevent China from gaining access to technologies, the U.S. could opt to impose tighter controls on foreign nationals from Taiwan, Europe or Southeast Asia because of their cooperation with projects in China. As another possible option, the Commerce Department could also tighten existing rules or increase the goods controlled on the commercial control lists.

Red Flags and Important Questions for Clients To Ask

When determining whether a license is required for a particular transaction, you should ask the following questions: What is being exported? Where is the item being exported? Who will receive the item? How will it be used? Once you have answered these questions, you can take preventative measures such as checking end users, checking end uses, and reviewing all shipping documentations and export declarations. For assistance in determining license requirements, you can also contact an export counselor at the BIS.[4]

Because of the changing requirements under the regulations, an exporter should frequently check the regulations for changes in prohibited destinations and products requiring a license. You should not assume that new regulations do not change your current obligations. Exporters should also always be aware of "red flags" and practice due diligence when working with a new buyer or acquiring a new busi-

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ness. Exporters should review their current export compliance programs to have good guidelines in place to avoid potential civil and criminal penalties.

Finally, when faced with a potential violation, an exporter should know that voluntary self-disclosures and cooperation with investigators are given great weight by the BIS when determining the appropriate level of penalties.

Endnotes:

1 This list can be found at **http://www.bis.doc.gov/**.

2 The penalty guidance is available online at: **http://www.access.gpo.gov/bis/ear/pdf/766.pdf**.

3 The Australia Group consist of Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, South Korea, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Switzerland, Sweden, Turkey, the United Kingdom and the U.S.

4 Check the BIS Web site at **http://www.bis.goc.gov**.