

Export/Import Enforcement: What to Do When Investigators “Knock”

How to React to Visits, Subpoenas, and Search Warrants

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DISCLOSURES

BREAK-OUT

Voluntary Disclosures

Will You Make Mistakes?

"Every exporter makes mistakes. A company that is not disclosing violations is either covering them up or is too stupid to know it has violations."

- David Trimble, former Director, DDTC Compliance



Why Voluntarily Disclose?



- Earns a “halo effect” with regulators.
- Reduces likelihood of repeated violations.
- Give attention to corrective actions.
- May result in increased funding.
- To avoid subpoenas and searches.
- To avoid a directed disclosure.
- To reduce the likelihood of fines, prison, debarment, and other penalties.



Risks of Disclosure

- Waives attorney-client privilege.
- May trigger prosecution or sanctions that may otherwise not have occurred.
- May become public (consent agreements).
- May assist civil litigation (related suits by employees, shareholders, or business entities.)
- May chill employee cooperation in future investigations.
- May result in delay of other applications for licenses and agreements pending VD resolution.
 - *But don't apply for approval without disclosing errors.*

Use the proper VD terminology.

- **State Dept, DDTC, ITAR = “Voluntary Disclosure” (“VD”)** (22 CFR § 127.12)
 - Homeland Security Investigations (HSI) Investigates.
- **Commerce Dept, BIS, EAR = “Voluntary Self-Disclosure” (“VSD”)** (15 CFR § 764.5(c)(3))
 - Office of Export Enforcement (OEE) Investigates.
- **Commerce Dept, Census Bureau, Foreign Trade Regulations (FTR) = “Voluntary Self-Disclosure” (“VSD”)** (15 CFR § 30.74)
 - U.S. Customs or OEE Investigate.

Proper Terminology (Continued)

- **Justice Dept = “Voluntary Self-Disclosure” (“VSD”)** (VSD Guidance, 26 Oct 2016)
 - FBI and HSI investigate.
- **Treasury Dept, OFAC = “Voluntary Self-Disclosure” (“VSD”)** (31 CFR Part 500)
 - FBI, HSI, and Secret Service investigate.
- **Customs & Border Protection = “Prior Disclosure” (“PD”)** (19 C.F.R. § 162.74)
 - CBP & HSI investigate.

Quiz!

You discover that someone in your company violated export or import regulations.

- Question: Are you required to file a disclosure?
- **Answer: Depends on the violation. Voluntary disclosures are of course voluntary.**
- **But sometimes ...**

Disclosures are
sometimes required.

Mandatory Disclosures:

- **ITAR § 123.17 Exports of Firearms, Ammunition, and Personal Protective Gear**
 - (j). If the articles temporarily exported are not returned, **a report must be submitted** to DDTC.
- **ITAR § 126.1 Prohibited Exports, Imports, and Sales to or From Certain Countries**
 - (e)(2). **Any person who knows** of a proposed, final, or actual sale, export, transfer, reexport, or retransfer of articles, services, or data as described in paragraph (e)(1) of this section **must immediately inform** DDTC.

Mandatory Disclosures:

- **ITAR § 130.9: Political contributions or fees**
 - **“must inform”** DDTC if exporter or vendors paid political contributions of \$5,000 or more, or fees of \$100,000 or more.
- **EAR § 764.2(g)(2):**
 - Every person ... **must notify** BIS in writing, of any change of any material fact previously stated, **immediately upon discovery** that a change has occurred or may occur in the future.
 - No person may fail to comply with any reporting requirement.

Disclosures are also required by:

- Agency Directed Disclosures and Consent Agreements
- License or agreement provisos
- Contract clauses
 - Foreign Military Sales
 - FAR/DFARS clauses
 - DFARS 252.204-7012(b): within 72 hours
 - Primes often require subs or vendors to report suspected violations to primes.
- Merger/Acquisition agreements

Do Voluntary Disclosures Really Matter?

BIS: “Voluntary self-disclosures will be afforded “great weight.”

OFAC: A voluntary self-disclosure will result in a base penalty amount at least 50 percent less than in cases not involving a VSD.

DOJ: “Significantly reduced penalty, possibility of a non-prosecution agreement (NPA), reduced fine and forfeiture, and no requirement for a monitor.”

Administrative Penalties in EAR Violations

- Supp. No. 2 to 15 CFR Part 766—Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases Involving Antiboycott Matters

Base Penalty Matrix

Voluntary Self-Disclosure?	Egregious Case?	
	NO	YES
YES	(1) One-Half of the Transaction Value (capped at \$125,000 per violation)	(3) Up to One-Half of the Applicable Statutory Maximum.
NO	(2) Applicable Schedule Amount (capped at \$250,000 per violation)	(4) Up to the Applicable Statutory Maximum.

When?

Timing

- ITAR, EAR, Customs regs state that initial disclosure should be made *when discovered*.
- Followed by completed report within ...
 - ITAR: 60 days; EAR: 180 days
 - US Customs:
 - **Protection from Customs penalties** if you disclose before government discovers violation.
 - Verbal disclosure followed by written w/i 10 days.
- *Advice: “Disclose early and often.”*

How to Write a Disclosure

Required Information

- Describe the mistake:
 - Who made the mistake? (NOT: “*Mistakes were made.*”)
 - When and where did it occur?
 - Why was it was not prevented, and
 - What corrective actions have been or will be taken?
- Report other violations within past 5 years.
- “*Be brief. Omit needless words.*”
 - Strunk & White’s *Elements of Style*

Required Elements in EAR and FTR

EAR §764.5 (FTR §30.74). Voluntary self-disclosure

- Notification of a violation must be **in writing** and include the following:
 - Description of why, when, where, and how the violation occurred.
 - Product description, quantity, classifications.
 - Identities of persons involved.
 - Authorizations (license, exceptions).
 - Corrective actions taken or planned.
 - Certified by senior official.
- Follow within 180 days with complete disclosure.

Required Elements in an ITAR VD

- Everything in a “voluntary” disclosure is *voluntary*, but ...
 - If you fail to tell DDTC all they want to know, you may not receive the benefits of a VD.
 - DDTC is likely to reply and ask more questions.
- See the list of required information at ITAR § 127.12(c), (d), and (e).

Proposed DDTC Form DS-7787

Summarize the incident in table format

Form DS-7787, Disclosure of Violations of the Arms Export Control Act (ITAR § 127.12)¹	
Block 1: Identifying Information	
a. Case Number	<i>(Assigned by DDTC after receiving initial VD submission.)</i>
b. Registration Code	M-_____
c. Person/Entity	<i>Entity</i>
d. DBA Name	<i>(Optional)</i>
e. Address	
Block 2: Submission Information	
a. Submission Type	<i>(Disclosure) or (Notification of 3rd party violation) or (Response to DDTC)</i>
b. Disclosure Type	<i>(Initial) or (Extension Request) or (Full) or (Supplemental)</i>
c. Supplemental	<i>(Description -- Only if b. "Supplemental")</i>
d. Related Disclosures	
e. SME?	<i>No / Yes (describe)</i>
f. Classified?	<i>No / Yes (describe) [Disclosure to DSS is also required by NISPOM 10-510.]</i>
Block 3: Violation Information	
a. Number of Violations	<i>(Separate by type.)</i>
b. Violation Dates	<i>(Specific, Date Range, or Ongoing.)</i>
c. Discovery Date	
d. Related Authorizations	
e. Program/Contract	<i>(Optional)</i>
f. Subsidiary Identity	<i>(Optional)</i>
g. Violation Type	<i>"Provide your assessment of the categories under which the violation best fits."</i>
h. Violation Description	

Writing the Disclosure

If this is a repeated violation, own up to it, explain why your corrective actions from the last time didn't work, and come up with a better solution to the problem.

Don't cut-and-paste explanations and remediation from prior disclosures.

Make it look good! Like a contract proposal.

Aggravating Circumstances? Explain.

- Risks to national security.
- Extended period of wrongdoing.
- Delay in reporting.
- Management condoned or ignored wrongdoing.
- Repeated offenses without corrective actions.
- Untrue statements in VD.
- Concealing or hiding conduct.
- Willful, knowing, or (Dr. Roth's) "Who cares?" attitude.

Include Mitigating Circumstances

DoJ Sentencing policy: Mitigating if company has:

- Strong culture of compliance.
- Robust IT system.
- Employees with good qualifications and compensation.
- Compliance function independent of sales/marketing.
- Mandatory training of employees.
- Regular audits of the compliance program.
- Reporting structure of compliance function that brings compliance problems directly to senior company officials.

Mitigating Circumstances – List them.

Agencies may give you a break . . .

- If the transactions would have been authorized if you had asked.
- If your company fully cooperates with government. (Including waiver of statute of limitations.)
- If you have already taken or will take corrective actions, such a training and new directives.
- If you bring in an independent auditor or law firm to ensure you have disclosed everything.
- If you have a good internal compliance program to reduce risk of future violations.

Clean up.

Follow up.

Clean up, follow up.

- **Take corrective actions before being forced by the Government.**
 - Have a mature CA plan.
 - Sign-in sheet with date, name, employee number
 - Don't say you corrected the problem unless you're sure it was done.
 - Audit to ensure problem is not recurring.
- **Training: Always keep . . .**
 - Copies of training materials.
 - Identity of trained employees and bios of trainers.
 - Results of post-training quiz if taken.

Parting Advice...

When dealing with the Government: Always have an attitude of cooperation.

- It's all about attitude.
 - Remember Cool Hand Luke?
 - **Warden:** *“What we’ve got here is ... failure to communicate!”*
- **Boss:** *“You got your mind right, Luke?”*
 - **Luke:** *“Yeah, I got it right ... ah, ah, I got it right boss!”*
- You and the Government have the same goal: 100% compliance.
... So get your mind right for success!



THE END.

Thanks for your attention.

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THE DAILY BUGLE

Friday, 25 August 2017

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EX/IM ITEMS FROM FEDERAL REGISTER

[\[No items of interest noted today.\]](#)

OTHER GOVERNMENT SOURCES

1. [Ex/Im Items Scheduled for Publication in Future Federal Register Editions](#)
2. [Commerce/BIS: \(No new postings.\)](#)
3. [DHS/CBP Announces ACE PRODUCTION Outage on 26-27 Aug](#)
4. [State/DDTC: \(No new postings.\)](#)
5. [Treasury/OFAC Issues Venezuela-related General Licenses](#)
6. [EU Amends and Releases Corrigendum Concerning Restrictive Measures Against ISIL \(Da'esh\) and Al-Qaida](#)

NEWS

7. [Reuters: "Russia Sanctions Disrupt Italian Bank's 5 Billion Euro Loan Deal"](#)
8. [Reuters: "Trump Imposes New Sanctions on Venezuela 'Dictatorship,' PDVSA Debt"](#)
9. [ST&R Trade Report: "Dates and Deadlines: China Investigation, CBP Forms, AGOA Review, Classification"](#)

COMMENTARY

10. [L. Scheetz: "BIS Publishes Rule Implementing 2016 Wassenaar Plenary Meeting Changes"](#)

New Export/Import Jobs?

Every Monday in the Bugle: (Over 100 jobs listed.)

EX/IM MOVERS & SHAKERS

15. Monday List of Ex/Im Job Openings

(Source: Editor)

Published every Monday or first business day of the week. Please send openings in the following format to jobs@fullcirclecompliance.eu.

* COMPANY; LOCATION; POSITION TITLE (WEBLINK); CONTACT INFORMATION; REQUISITION ID

"#" New or amended listing this week.

- * Acteon Group Ltd.; Norwich, Suffolk, or London, UK; [Head of Compliance](#); or email [Mike Pay](#)
- * Advanced Micro Devices (AMD); Austin TX; [Import/Export Compliance Manager](#); Requisition ID: 24061
- * AgustaWestland Philadelphia Corporation; [Associate General Counsel, Corporate & Compliance](#); careers.us.aw@leonardocompany.com
- * Amazon; Mexico City, Mexico; [Mexico Trade Compliance Program Manager](#); Requisition ID: 520481
- * Amazon; Seattle WA; [NA Compliance Analyst](#); Requisition ID: 256357
- * Ansell; Iselin NJ; [Senior Specialist NA Trade Compliance](#); Requisition ID: IRC6513
- # Autodesk; San Rafael CA; [Export Compliance Manager](#); Requisition ID: 17WD24183
- # Baylor University; Waco, TX; [Manager/Director of Export Compliance](#); Vacancy ID S030428
- * Berry Plastics Corporation; Evansville IN; [International Trade Compliance Administrator](#); Requisition ID: 4054
- # Carpenter Technology Corporation; Reading, PA; [Senior Specialist, International Trade Compliance](#)
- * DRS Technologies; Dayton OH; [Senior Trade Compliance Manager](#)
- * Eaton; Titchfield, United Kingdom; [Global Trade Manager \(Trade Compliance\)](#); Requisition ID: 020681

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