



Trade and Customs Services

Preventing Liability for Third-Party Violations of Export Controls

TAX

AUDIT ▪ TAX ▪ ADVISORY

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Agenda

- ◆ What is a violation?
- ◆ What is knowledge?
- ◆ The “Three Questions”
- ◆ Steps to assist in preventing third-party violations
 - Training/Awareness
 - Destination Control Statements
 - End-Use/End-User Checks
 - Terms and Conditions
 - Contracts and Agreements
 - Routed Export Transactions
 - Work with Your Competitors/Colleagues
- ◆ Q & A





What is a violation?

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- ◆ **Black's Law Dictionary (8th edition) defines violation as:**
 - An infraction or breach of the law; a transgression;
 - The act of breaking or dishonoring the law; the contravention of a right or duty
- ◆ **The Export Administration Regulations (EAR) describes a violation as conduct prohibited by, contrary to or refraining from engaging in any conduct required by the Export Administration Act (EAA), EAR, or any order, license or authorization issued thereunder.**

What is a violation? (continued)

- ◆ **Remember that violations can occur in a number of ways:**
 - Overtly
 - Inadvertently
 - Omissions
 - Mistake of fact
- ◆ **Constant in all of these issues is that the exporter/United States Principal Party in Interest (USPPI) is generally responsible for any of the above; other parties may also be jointly or separately responsible**



What is “knowledge”?

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◆ As defined (Part 772) in the EAR :

- Knowledge of a circumstance (the term may be a variant, such as “know,” “reason to know,” or “reason to believe”) includes not only positive knowledge that the circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of facts.

What is “knowledge”? (continued)

◆ Why is “knowledge” critical to your export control program?

- Enforcement authorities may use your knowledge, tacit or implied, against you in penalty proceedings
- Remember that knowledge can exist in multiple areas within your company, and it is important that your company have an internal communication plan to share this knowledge



The Three Questions

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- ◆ **What did you know?**
- ◆ **When did you know it?**
- ◆ **What did you do about it?**

What did you know?

- ◆ Is there something in the transaction that an enforcement authority could deem as “knowledge”
- ◆ Is there something in the transaction that indicates you should have “known” something

When did you know it?

- ◆ **Did you know about the “potential” for a violation:**
 - Before the transaction was exported;
 - Post-export;
 - During an audit after the export
- ◆ **A voluntary self disclosure may be a mitigating factor**

What did you do about it?

- ◆ **Your actions once a violation has been discovered may be a mitigating factor in any penalty situation**
- ◆ **Disclosure prior to discovery of an inadvertence by an enforcement authority is key**



Steps to assist in preventing third-party violations

Training/Awareness

- ◆ **Continuous training/awareness for your company to update them on the regulations that affect their daily operations**
- ◆ **Targeted training for specific groups to aid them in identification and communication of suspected issues relating to export compliance (examples)**
 - Sales – Red Flags/Antiboycott/Sanctions-Embargoes/RPL Screening/End-Use Concerns
 - Engineering – Technology Transfers
 - Purchasing/Procurement – Technology Transfers
 - Shipping – Sanctions/Embargoes

Training/Awareness (continued)

- ◆ **Require your customers/suppliers to attend periodic export training**
 - Basic Awareness/Export Primer
 - Refresh periodically and document attendance
 - Establish certification standards
- ◆ **Attend compliance training periodically to update yourself on the latest regulations**
- ◆ **Participate in local/national groups for compliance updates**
- ◆ **Sign-up for trade newsletters**

Destination Control Statements

- ◆ Language is available in both the EAR and the International Traffic in Arms Regulations (ITAR)
- ◆ When is this language required?
- ◆ When should you use it?
- ◆ Better practice?

End-Use/End-User Checks

- ◆ **Know who are dealing with**
- ◆ **Do your homework – research, research, research**
 - Know that the government will be before they come knocking on your door!
- ◆ **Look for inconsistencies in the order information**
- ◆ **Develop/implement a standard new customer export set-up form or leverage your company's existing form**
 - Know your industry
 - Know the types of areas to consider for risk
 - Certain businesses
 - Certain locations

End-Use/End-User Checks (continued)

- ◆ **Develop/Implement an Export Compliance End-Use Certification**
 - Document signatures on the form
 - Refresh on a periodic basis (annually – 18 months)
- ◆ **Research the Web – key word search on:**
 - Export Control End-User Certifications or some combination thereof for examples of forms
 - Remember to customize these to your specific undertaking and circumstances

Terms and Conditions

- ◆ **Review your company's current Terms and Conditions for international trade clauses**
- ◆ **Typically, these terms and conditions will lack specificity in terms of both import and export language**
- ◆ **Develop several clauses for various scenarios**
 - Items subject to the ITAR
 - Distributors/Resellers
- ◆ **Revisit these clauses periodically (annually) to ascertain their continued viability or updating based on regulatory changes**

Contracts and Agreements

- ◆ **Review your company's boiler plate contract and agreement language**
 - Sales
 - Purchase
 - Distribution/Reseller/Agency
- ◆ **Consider requiring distributors/resellers to provide monthly/quarterly reports of sales of your products**
- ◆ **Conduct audits of distributors/resellers/agents**
 - Both transactional and process audits

Routed Export Transactions

- ◆ **Establish process with sales/order entry to identify routed export transactions early in the order process**
- ◆ **Develop a form letter to send to the purchaser/buyer and their designated agent informing them of their role/responsibility in the transaction**
 - Document signatures on the form and retain for recordkeeping purposes
- ◆ **Require copies of the AES submission be provided upon export ensuring the appropriate party has been named on the export transmission**

Work with Your Competitors/Colleagues

- ◆ **Establish a framework/understanding with your counterparts with your competitor's compliance team**
 - Share information on what you are seeing with respect to orders from specific regions/customer types/product lines
 - Request your legal group do the same
- ◆ **Participate in industry associations**
 - Which you are already doing with International Compliance Professionals Association (ICPA)
- ◆ **Participate/Sponsor benchmarking programs**



Q & A



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