

# DEALING WITH VIOLATIONS IN EXPORT AND IMPORT TRANSACTIONS

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## Dealing with Violations in Export and Import Transactions

[Thomas B. McVey](#)<sup>1</sup>

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*You are the general counsel or CEO of your company. Your compliance manager comes into your office and tells you that he/she may have discovered an export violation within the company. Or perhaps you have received a directed disclosure from the State Department requesting information, an administrative subpoena from BIS, or an informed compliance letter from Customs. You are aware that export and import violations can result in significant civil and criminal penalties, so a lot is at stake. The following are a number of issues that you might present to your company in responding to this hypothetical situation under the Export Administration Regulations, International Traffic In Arms Regulations, U.S. sanctions laws and U.S. import laws. The details of your response, of course, will vary depending upon the company and violations involved. A lot will have to happen quickly so it is important for you to be prepared in advance for this situation.*

1. Stop the Unlawful Activity. The first step in responding to a possible export or import violation is to stop the potentially wrongful actions. If there are a series of transactions underway or other ongoing activities that create a risk of violation, you should advise the employees involved to cease them. If a company has committed a violation in the past and you are dealing with a single prior incident, this can usually be resolved. However if a violation is ongoing this creates a much more complex problem - the situation gets worse each day and the participants may be acting with knowledge of possible wrongdoing. If you are not sure if an activity constitutes a violation, the safest course always is to stop the activity until you can determine the proper legal course of action.

2. Collect the Relevant Information. To properly evaluate a potential violation, you must understand the facts in question. To accomplish this you should identify the persons involved and relevant documents (including electronic documents). You should then meet with the key employees, review the documents and properly protect the results of your review. The following are a number of issues to consider in conducting this review:

- *Preserve Attorney-Client and Other Privileges*. If the review is conducted by or at the direction of the company's legal counsel certain work may be protected under the attorney-client privilege and/or the attorney work-product doctrine. Use care not to waive these privileges through actions such as improper disclosure of the privileged information. Also in certain instances if in-house counsel conducting the review are also performing managerial functions within the company there is risk that the attorney-client privilege may not apply and the company should consider getting its outside counsel involved.

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- *Preservation of Relevant Documents.* You should advise persons involved not to destroy documents or delete e-mails that may be relevant to the suspected violation.<sup>2</sup> Also destruction of relevant documents could result in additional violations such as obstruction of justice or destruction/alteration of records.<sup>3</sup>
- *Upjohn.* Consider if it is appropriate to provide Upjohn warnings in discussions with employees.<sup>4</sup> In addition, in some instances it may be advisable to have a third person present in employee interviews in the event you need a witness in the future for statements made.
- *Foreign Legal Requirements.* If personnel or documents are located in foreign countries, consider if privacy or other laws in such countries place restrictions on collecting certain information from individuals (including their computer records) and/or removing such information/records from the country.
- *Thoroughness Versus Speed.* You must balance the need to conduct a thorough review against the requirement to complete the review in a timely manner. A shoddy review can result in a flawed assessment; and any unnecessary delay can result in more serious violations and unnecessary harm to the company.

### 3. Analyze Possible Violations; Identify Criminal Violations Early In the Process.

*Types of Trade Violations.* Many attorneys often think of trade violations as overt actions such as exporting without a license or underpaying import duties. However trade violations can also encompass many less obvious activities that can result in significant penalties, such as attempts to commit a violation, aiding and abetting a violation, and acting with knowledge that a violation is about to occur. You should be alert for these other activities as well. 15 CFR §764.2 provides an example of the breadth of actions that constitute violations under the Export Administration Regulations (“EAR”):

- Engaging in conduct that is prohibited by the EAR;
- Causing, aiding or abetting a violation;
- Conspiracy to engage in a violation;
- Solicitation and attempts to cause a violation;
- Acting with knowledge of a violation;
- Possession with intent to illegally export;
- Misrepresentation and concealment of facts;
- Evasion;
- Acting contrary to the terms of a denial order;
- Failure to comply with reporting and recordkeeping requirements.

Of course, destroying evidence, obstructing an investigation or providing false information in a government investigation can have significant consequences, often more severe than the underlying trade violation. For example, the maximum criminal penalty for import violations under 18 U.S.C. §541<sup>5</sup> is a fine and imprisonment of up to two years, but the



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maximum penalty for obstruction of the related investigation is twenty years imprisonment.<sup>6</sup> If both violations are proven, both penalties can be imposed.

Violations can also occur in certain instances if your company sells products to a foreign customer and the customer resells the products to a prohibited country, prohibited party or for a prohibited end use.<sup>7</sup>

*Enforcement Authorities.* To aid in your review, a number of the principal U.S. legal authorities and enforcement agencies related to export violations under the EAR, the International Traffic In Arms Regulations (“ITAR”), U.S. sanctions laws administered by the Office of Foreign Assets Control (“OFAC”) and import laws administered by U.S. Customs and Border Protection (“Customs”) are set forth in the table in Exhibit A below.

*Criminal Versus Civil Violations.* One of the most important questions in any export or import violation is whether the violation is civil or criminal. Under the two principal export statutes,<sup>8</sup> criminal liability typically arises if an action is “willful.” For example, under both §1705(c) of the International Emergency Economic Powers Act and §2778(c) of the Arms Export Control Act the statutes specify that criminal sanctions are based upon “willful” violations.<sup>9</sup> The standard of what is considered “willful” is different for different federal crimes and in different federal circuits. In United States v. Bishop<sup>10</sup> the Fourth Circuit held that the standard of willfulness in ITAR cases is relatively low – the defendant needs only to have a “general knowledge” that an action is illegal and not specific knowledge that the item is listed on the U.S. Munitions List and subject to licensing requirements.<sup>11</sup> In making this determination, the court relied on the Supreme Court’s decision in Bryan v. United States,<sup>12</sup> and cited other cases, both within and outside the Fourth Circuit.<sup>13</sup> The National Security Division of the Justice Department has also stated that in export control and sanctions cases, its attorneys rely on the standard of willfulness set forth in Bryan v. United States.<sup>14</sup>

The standard for criminal violations of import laws is similar. Under the criminal import statutes at 18 U.S.C. §§541 and 545,<sup>15</sup> the criminal standards are specified in the statutes as “knowing” or “willful,” and under 18 USC §542 violations are based upon fraudulent actions, false statements, similar wrongful acts and in certain instances on willful acts.<sup>16</sup> In addition, under other statutory provisions available to prosecutors for import-related crimes such as 18 U.S.C. §1001 (false statements), 18 USC §1519 (destruction, alteration or falsification of records) and 18 USC §§1956 and 1957 (money laundering), the standards stated in the statutes are typically “knowing” and/or “willful” as well. There has been a recent increase in criminal prosecutions of Customs violations in light of increasing concerns regarding duty evasion, particularly under antidumping and countervailing duty orders, and increased enforcement pressures under the Trade Facilitation and Trade Enforcement Act of 2015, so you should be alert for these issues in your review.<sup>17</sup>

For civil export violations under the EAR, ITAR and U.S. sanctions laws, there is typically no willful intent required to prove a violation.<sup>18</sup> For civil violations of Customs laws under 19 USC §1592, parties can be found liable for actions based upon fraud, gross negligence and negligence.<sup>19</sup>

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If a violation meets the willful standard, parties can often be charged with both civil and criminal penalties for the same wrongful action.

The assessment of potential criminal liability in the early part of your internal review has recently become more important. As discussed further below, the Justice Department (“Justice”) recently announced a new program where companies are permitted to file voluntary self-disclosures directly with Justice for criminal violations of export control laws. Under the traditional practice, companies frequently filed initial voluntary disclosures with the Directorate of Defense Trade Controls (“DDTC”), the Bureau of Industry and Security (“BIS”) or OFAC immediately upon discovery of a violation and filed final disclosures sixty days later, and the agencies had the discretion to refer criminal matters to Justice. With the announcement of the new Justice voluntary self-disclosure program, companies must now consider early in the process if they should also file a disclosure with Justice simultaneously with filing the initial voluntary disclosures with the civil agencies. (See discussion of voluntary self-disclosures in Section 4 below.)

*Calculations of Civil Monetary Penalties.* Both OFAC and BIS have adopted administrative enforcement guidelines that provide a transparent methodology for calculating monetary penalties for civil violations of the U.S. sanctions laws and the EAR. For example, under the OFAC Economic Sanctions Enforcement Guidelines<sup>20</sup> (the “OFAC Guidelines”), for sanctions violations OFAC will review the facts and circumstances of the case in question and apply the “General Factors” in determining the appropriate administrative action in response to an apparent violation and the amount of any civil monetary penalty.<sup>21</sup> On June 22, 1016 BIS adopted its version of the administrative guidelines<sup>22</sup> for violations under the EAR (the “BIS Guidelines”) which are modeled on and similar to the OFAC Guidelines.<sup>23</sup> The methodology for calculating penalties for Customs violations under 19 USC §1592 is set forth at 19 USC §1592(c).

*Successor Liability.* One often overlooked source of export violations is through the merger/acquisition process. If a company acquires a target company in an acquisition and the target company had an export violation prior to the acquisition, the acquiring company can be found liable for the preexisting violation in certain instances. This includes even if the target company was acquired through the purchase of assets (as compared to the purchase of stock or a merger). (See [Acquirer Can Be Liable For Export Control Violations of Acquired Company](#))<sup>24</sup> Acquirers should conduct thorough due diligence reviews for export violations prior to the acquisition of another company – if problems are discovered these can often be resolved through voluntary disclosures filed prior to the closing. If problems are not discovered until after the closing, this creates more complex issues and the acquirer will want to move quickly to attempt to reduce the potential impact on the combined businesses.<sup>25</sup>

*Compliance Programs.* A major factor considered by each of the export agencies and Justice in assessing liability and the amount of penalties is the existence and adequacy of an export compliance program.

4. Considering A Voluntary Self-Disclosure. If you determine that a violation has occurred, you may consider submitting a voluntary self-disclosure. Each of DDTC, BIS, OFAC

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and Customs has procedures for voluntary self-disclosures and, as discussed below, Justice recently announced a program for parties to submit voluntary self-disclosures for criminal violations of export laws.

The decision regarding whether to submit a voluntary self-disclosure is a complex legal question. Export control officials have frequently stated publicly that if a company submits a voluntary disclosure, this can reduce the likelihood of a criminal referral to Justice and often results in reduced or no penalties. As such, a voluntary self-disclosure can be helpful in minimizing the impact of a violation. However a review of the major enforcement cases reveals that many of the major cases initiated by DDTC, BIS and OFAC originated through voluntary disclosures. In addition, companies surrender valuable legal rights in this process. Consequently a company must use care in assessing whether to use a voluntary self-disclosure for a particular situation.

The advantages of voluntary self-disclosures include:

- The company could receive a favorable resolution of the violation, including reduced penalties (such as provided under the OFAC and BIS Penalty Guidelines) and in some cases no penalties at all.
- It reduces the likelihood of the agency referring the matter to Justice for criminal prosecution.
- It provides the opportunity for your company to tell its side of the story and introduce favorable information such as mitigating factors and corrective steps that the company has taken since the violation.

The disadvantages include:

- The company likely waives the attorney-client privilege that might otherwise protect a communication for any such communications that are shared with the government and waives work product protection for work product that is shared;
- The company loses confidentiality of sensitive information;
- In most cases the company is admitting that it committed a violation with no assurance that the government will respond favorably;
- While the company may become entitled to favorable treatment in penalty calculations such as under the OFAC and BIS Enforcement Guidelines, the agency can still proceed with a civil enforcement action and/or impose penalties, especially in egregious cases;
- The agency can still refer the matter to Justice for criminal prosecution, especially in egregious cases.

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In most cases, to receive the benefits of the disclosure it must be submitted before the U.S. government learns about the violation. If you submit the disclosure and the government already knows about the violation in question, you have the double problem of possibly losing the protection of the disclosure while having just informed the government about the wrongful actions of your company.

*Mandatory Disclosures.* In certain instances disclosure of a violation is a mandatory requirement, such as for transactions subject to ITAR: engaging in transactions, submitting marketing proposals or engaging in brokering activity with a “proscribed country” listed in ITAR §126.1, or failing to return ITAR-controlled items to the U.S. that were temporarily exported pursuant to 22 CFR §123.17 (c), (f), or (i).<sup>26</sup>

*Department of Justice Program For Voluntary Self-Disclosures For Criminal Export Violations.* As referenced above, on October 2, 2016 the Justice National Security Division issued guidance that companies would be permitted to submit voluntary self-disclosures directly to Justice for criminal violations of the export control laws (the “DOJ Guidance”). If a filing company met the requirements under the DOJ Guidance, it may become eligible for “significantly” reduced penalties including “the possibility of a non-prosecution agreement (NPA), a reduced period of supervised compliance, a reduced fine and forfeiture and no requirement for a monitor.”<sup>27</sup> This creates the significant benefit of potentially reducing criminal penalties for a violation, but makes the assessment of filing voluntary self-disclosures more complex. As referenced above, under the traditional practice companies often submitted initial voluntary disclosures to the civil agencies followed up by final disclosures sixty days later, and the agencies have the discretion to refer criminal matters to Justice during this period. With the announcement of the new program, companies must now consider early in the process if they will also file a voluntary self-disclosure with Justice concurrently with filing the initial voluntary disclosures with the civil agencies.

5. Responding To Requests For Information. In many trade cases, the activity begins when an agency issues a request for information to your company. This can range from a routine administrative inquiry to a more formal subpoena or other request as part of an investigative process. The agencies have various methods of requesting information in connection with export and import activities. For example, DDTC often issues “directed disclosures” requesting the company to answer questions or submit documents. OFAC may issue an administrative subpoena, often in letter form, and BIS may issue a request for production of records under 15 CFR §762.7. Customs can issue an informed compliance letter, Request For Information (CBP Form 28), Notice of Action (CBP Form 29) and other types of documents. The U.S. Attorney can issue a Subpoena To Testify Before A Grand Jury.

Regardless of the form, however, a request from the government is a significant event and must be dealt with properly. The following are a number of points to consider in responding:

- Responding to such requests is usually mandatory (subject to the rights of respondents to object to disclosures for permitted reasons discussed below) and responses must be submitted within the time periods specified in the request.

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Failure to respond can result in additional violations, waiver of rights and additional penalties.<sup>28</sup>

- Responses must be accurate, truthful and complete. Submission of information that is not truthful can lead to other violations, often more significant than the underlying request, and in certain cases result in criminal penalties.
- Some requests may appear to be routine administrative inquiries, but the company should bear in mind that any information submitted can be used by the agency to prove wrongdoing by the company or lead to a more serious investigation. The company should use great care in reviewing information before submitting it to the government and take advantage of rights to object to disclosure of information for which there is a legal basis to do so.
- It may be possible to request a narrowing of the scope of the request, for example to cover a shorter time period or more limited categories of documents, especially if you can show that the materials requested are irrelevant to the investigation, that production creates unnecessary hardship to the respondent and/or will require unnecessary use of the government's resources to review. However granting such requests is subject to the discretion of the requesting agency. Any agreement to narrow or otherwise amend the scope of the request should be confirmed in writing with the agency.
- Parties typically have the right to object to producing documents that are protected by privileges such as the attorney-client privilege and the attorney work product doctrine. Companies should work with their counsel to review information requested to identify materials that may be subject to privileges. Of course, disclosure of such materials in most cases will constitute a waiver of the applicable privilege. (See Section 2 above regarding instances in which the attorney-client privilege might not be available for in-house corporate counsel.)
- If the request requires review of a large amount of electronic documents, the requesting agency may agree to an automated search of documents using electronic search techniques and search terms agreed to between the parties.
- Parties should use care not to destroy evidence. For example, EAR §762.6 provides that the required period of retention of records is 5 years from triggering events, however EAR §762.6(b) provides that if a party receives a BIS request for the production of documents, the recipient is prohibited from destroying or disposing of records even for a period of time that exceeds the five-year retention period.
- You can ask the agency if your company is a target of the investigation or if the agency is merely collecting evidence in its investigation of another party. In some instances the agency may inform you if your company is a target of the investigation. However if you are told that your company is not a target, you



should recognize that information submitted can nonetheless be used to prove a violation by your company or lead to your company eventually becoming a target of the investigation.

- There are mandatory recordkeeping requirements by DDTC, BIS, OFAC and Customs<sup>29</sup> and the company must have these records available to produce to the agencies if requested. If the company takes too long to collect and produce its records in response to a request for information, this could result in additional violations for failure to comply with the export or import recordkeeping requirements.

6. Other Issues In Export and Import Enforcement Actions. Enforcement actions for export violations are different than those of many other federal agencies due to the special rights of the government based on national security and limited judicial review. Customs cases also present specialized issues involving import administration, port security, border security and appeals to a specialized court. Consequently the defense of these cases raises a number of unique and challenging issues.

In the export area, each of the three export agencies has its own procedures for adjudicating civil enforcement cases.<sup>30</sup> For ITAR violations, the Office of Defense Trade Controls Compliance within DDTC has a highly specialized enforcement staff that conducts investigations and resolves many of its major civil enforcement cases through a negotiated settlement process. BIS' Office of Export Enforcement, on the other hand, maintains a broad enforcement operation including agents in eight field offices across the U.S. with authority to bear firearms, make arrests, execute search warrants, serve subpoenas, detain and seize goods and investigate both civil and criminal violations. OFAC also has a highly specialized enforcement division engaged in investigations and administrative settlements.<sup>31</sup> The agencies rely on multiple investigative agencies and intelligence services for support, including the Federal Bureau of Investigation, Customs and Border Protection, Immigration and Customs Enforcement, Defense Criminal Investigative Service, Defense Security Service and various intelligence agencies.

If criminal export matters are referred to the Justice Department, such cases are typically handled by Justice's National Security Division, Counterintelligence and Export Control Section. In addition, individual U.S. Attorneys' Offices often pursue criminal export control and sanctions prosecutions – some of these are in conjunction with agency enforcement actions while others are initiated independently by Justice or individual U.S. Attorneys' offices.<sup>32</sup>

The agencies also often consult with the Defense Technology Security Administration (“DTSA”) within the Defense Department to assess the potential injury to national security that has occurred as a result of an export violation. The issue of injury to national security is one of the most important factors considered by the agencies in assessing the seriousness of an export violation. In addition, the Export Enforcement Coordination Center, an interagency office directed by the Department of Homeland Security (“DHS”), coordinates the investigation and prosecution of export violations among intelligence and law enforcement agencies on a government-wide basis.<sup>33</sup>

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Customs has a more traditional adjudicative process for civil enforcement actions. Customs serves multiple roles including enforcing U.S. import laws (such as merchandise classification, valuation, duty collection) as well as enforcing the regulations of over one hundred other federal agencies in import transactions.<sup>34</sup> Civil actions initiated by Customs are frequently brought under 19 USC§1592 (so-called “592 actions”) for entry of merchandise through fraud, gross negligence or negligence. Such cases are initially adjudicated through an administrative process with appeal to the U.S. Court of International Trade and eventually to the U.S. Court of Appeals for the Federal Circuit. If Customs is enforcing the laws of other agencies in the context of an import transaction (for example regulations administered by the Consumer Protection Safety Commission), such other agencies may bring enforcement actions directly or refer matters to the Department of Justice.<sup>35</sup>

In some cases, one wrongful action or series of actions can result in violations of multiple sets of regulations. This can result in a number of agencies conducting separate concurrent investigations of the same activity.<sup>36</sup> Also, if a company incurs a significant penalty for a compliance violation, this can be followed by a civil shareholder derivative suit against the company’s officers and directors for failure to properly supervise the company. Investigations by multiple agencies and private parties can complicate the defense of an enforcement action - the company must deal with multiple agencies, sets of regulations and legal standards at the same time. In attempting to resolve such cases counsel will often need to make complex decisions of whether to settle with one agency while other investigations continue, or wait to obtain a “global” resolution that includes all of the agencies involved.

*Tolling of Statutes of Limitations.* As part of an investigation, the agency may ask if the company will enter a tolling agreement to extend the statute of limitations for violations that are the subject of the investigation. This is a complex legal decision. Statutes of limitations, of course, provide valuable rights to the company, especially if activities being reviewed in the investigation occurred prior to the time limit under the relevant statute. However, in certain instances there may be benefits to the company for cooperating with the agency, including obtaining credit as a mitigating factor to reduce penalties. Assessing the risks and benefits of tolling a statute of limitations is similar to assessing a voluntary disclosure – every case is different and the company should review the issue carefully with its counsel based upon the specific facts of its case.

*Protection of Sensitive Information.* The agencies address protection of sensitive information in different ways. For administrative proceedings under ITAR, 22 CFR §128.14 provides that proceedings under 22 CFR Part 128 are confidential except for items referenced in §128.14.<sup>37</sup> For proceedings under the EAR, 15 CFR §766.11(a) provides that the administrative law judge may limit discovery or introduction of evidence or issue protective orders to prevent undue disclosure of the sensitive information. BIS is also permitted to withhold information from the respondent that is classified or sensitive.<sup>38</sup> If a case is adjudicated in a court (such as a criminal prosecution or a judicial appeal of an agency action) or an arbitration where there is a risk that sensitive information such as export-controlled technical data will be released to the public, courts can issue protective orders. In addition, if there is a risk of disclosing export-controlled information to foreign nationals who are parties, witnesses or experts, the parties can

apply to DDTC or BIS for a license or other authorization for such disclosure and the agencies will consider such request based upon the merits of the request.

*Appeals and Judicial Review.* Each of the three export agencies has appeals procedures for reconsideration of lower agency determinations. For example, under ITAR §128.13 parties have the right to appeal a determination by DDTC to the Under Secretary of State for Arms Control and International Security. Similarly, under the EAR §§766.21 and 766.22 parties have the right to appeal agency actions by BIS to the Under Secretary of Commerce for Export Administration. (Appeals of OFAC determinations are discussed separately below.) Many observers believe that a right of appeal to an Under Secretary of the agency bringing the enforcement action does not provide the same level of objectivity and independent review as an appeal to a more independent reviewer, and litigants should recognize this as they embark on this process.

The issue of judicial review of agency determinations in export cases is more complex in light of the national security, foreign affairs and emergency powers issues involved. Under most areas of federal administrative law, parties are afforded significant rights of procedural protections and judicial review under the Administrative Procedure Act (“APA”).<sup>39</sup> However DDTC and BIS have attempted to shield themselves from the provisions of the APA - ITAR §128.1 provides that administration of the AECA is expressly exempt from various provisions of the APA, and EAR §766.1 has similar restrictive language.<sup>40</sup> Notwithstanding the absence of these protections, however, some litigants have found the opportunity to challenge the validity of DDTC and BIS actions in judicial fora, including challenges based upon the constitutionality of agency actions under the first, second and fifth amendments.<sup>41</sup>

Appeals and judicial review of OFAC civil enforcement actions are addressed in multiple places throughout the OFAC sanctions regulations, including in regulations for a number of the individual sanctions programs. See, eg, 31 CFR. §560.704 under the Iran Transactions and Sanctions Regulations. While IEEPA, the enabling legislation for most of the sanctions programs, is silent on the issue of judicial review except for determinations based upon classified information, many of the OFAC regulations for IEEPA-authorized programs provide that the issuance by OFAC of a penalty notice constitutes a final agency action and respondents are entitled to judicial review of agency actions “in the federal district courts,”<sup>42</sup> and lawsuits have been brought against OFAC in such courts.<sup>43</sup> (Appeals under the Cuban Assets Control Regulations under the Trading With the Enemy Act are subject to a different procedure set forth in 31 CFR §501.741 – see generally 31 CFR Part 501, Subpart D.) It should be noted, however, that in judicial review of OFAC actions, courts have afforded great deference to the agency in light of the national security and foreign policy issues involved.<sup>44</sup>

Appeals and judicial review of Customs civil enforcement cases for import violations are also resolved through a specialized process. In such cases, parties are typically entitled to judicial review of agency determinations in the U.S. Court of International Trade (“CIT”), a specialized federal court that sits in New York, with appeals from the CIT to the U.S. Court of Appeals for the Federal Circuit.

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7. Personal Liability For Export and Import Violations. Individuals have long been subject to personal civil and criminal liability for violations of export laws. See, for example, cases involving Timothy Gormley,<sup>45</sup> Peter Gromacki,<sup>46</sup> LeAnne Lemeister,<sup>47</sup> John Reese Roth,<sup>48</sup> Mozaffar Khazaei,<sup>49</sup> Guerman Goutorov and Eric Carlson, to name just a few. In some instances the individuals were acting in their capacities as employees (Gormley) or officers (Goutorov and Carlson) of exporting companies, and in others they were acting alone (Gromacki). In one instance the employee was a senior export compliance officer and empowered official of a major U.S. defense contractor (Lemeister). Many of the cases against individuals are criminal prosecutions with significant financial penalties and prison sentences (Timothy Gormley was sentenced to 42 months imprisonment). (See [Corporate Officers Charged Personally For Export Violations](#)).

Individuals are also subject to personal liability for import violations in certain instances. In one recent noteworthy case, United States v. Trek Leather, Inc. et al., the U.S. Court of Appeals for the Federal Circuit held that a company's president can be personally liable for civil Customs violations under 19 USC §1592.<sup>50</sup> Similarly, many of the recent criminal prosecutions for Customs violations cited above have targeted individual officers and directors of importers. See, e.g., United States v. Wolff et al., (cited above).

In 2015, Deputy Attorney General Sally Yates issued the now famous "Yates Memorandum" directing federal prosecutors to focus on individuals personally involved in corporate wrongdoing in federal enforcement cases. In the recent Volkswagen auto emissions case, involving the largest Customs penalty to date, six Volkswagen executives were also personally indicted and one arrested for their roles in the case, signaling that the Yates mandate to prosecute business executives personally would continue.<sup>51</sup> While at the time of this writing it is unclear if the Yates mandate will continue in the new Trump administration, regardless of the Yates policy it is expected that individuals will continue to be subject to personal liability for export and import violations as was the case prior to the Yates memorandum. Consequently individuals should continue to use great care in their export/import compliance activities to protect both their organizations and themselves.

The above are just a number of the issues to consider in an enforcement situation and there may be additional issues depending on the facts of your case.

**Note: This article contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not intended and should not be construed as legal advice.**

## EXHIBIT A

### ENFORCEMENT LEGAL AUTHORITIES FOR EXPORT AND IMPORT VIOLATIONS

The following are some of the principal enforcement legal authorities under U.S. export and import laws.



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<b>International Traffic In Arms Regulations</b>	
Enforcement Agency	<ul style="list-style-type: none"> <li>Compliance, Registration and Enforcement Division, Office of Defense Trade Controls Compliance, Directorate of Defense Trade Controls, Department of State</li> </ul>
Enforcement Legal Authority	<ul style="list-style-type: none"> <li><b>Criminal:</b> <ul style="list-style-type: none"> <li>§2778(c) of the Arms Export Control Act (“AECA”) (22 USC § 2778(c))</li> <li>22 CFR §127.3</li> </ul> </li> <li><b>Civil:</b> <ul style="list-style-type: none"> <li>§2778(e) of AECA (22 USC §2778(e))</li> <li>22 CFR §127.10</li> </ul> </li> </ul>
Penalties	<ul style="list-style-type: none"> <li><b>Criminal:</b> Fines of up to \$1 million and imprisonment of up to 20 years, or both, per violation</li> <li><b>Civil:</b> Civil monetary penalties of up to \$500,000 per violation (as adjusted under Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 to \$1,094,010 per violation)</li> </ul>
Other Available Sanctions	<ul style="list-style-type: none"> <li>Statutory and administrative debarment, seizure, forfeiture and disposition of defense articles, vessel, vehicles and aircraft involved, under 22 USC §401</li> </ul>
Investigative Agencies	<ul style="list-style-type: none"> <li>In addition to DTCC, multiple investigative agencies and intelligence services including Customs and Border Protection, Immigration and Customs Enforcement, Federal Bureau of Investigation, Defense Criminal Investigative Service, Defense Security Service and various intelligence agencies; the Defense Technology Security Administration (“DTSA”) also may be involved in assessing injury to national security</li> </ul>
<b>Export Administration Regulations</b>	
Enforcement Agency	<ul style="list-style-type: none"> <li>Office of Export Enforcement (“OEE”), Office of Enforcement Analysis (“OEA”) and Office of Antiboycott Compliance (“OAC”), Bureau of Industry and Security, Department of Commerce</li> </ul>
Enforcement Legal Authority	<ul style="list-style-type: none"> <li><b>Criminal:</b> <ul style="list-style-type: none"> <li>§206(c) of the International Emergency Economic Powers Act (22 USC §1705(c)), as amended by §2(a) of the International Emergency Economic Powers Enhancement Act</li> <li><b>Note:</b> The EAR was previously authorized by the Export Administration Act (“EAA”) but the EAA has expired and the EAR is currently authorized under IEEPA</li> <li>15 CFR §764.3(b)</li> </ul> </li> <li><b>Civil:</b> <ul style="list-style-type: none"> <li>§206(b) of IEEPA (22 USC §1705(b))</li> <li>15 CFR §764.3(a)</li> <li>See Also BIS Guidance On Charging and Penalty Determinations In Settlement of Administrative Enforcement Cases, 15 CFR Part 766 Supplement No. 1, and Guidance On Charging and Penalty Determinations In Settlement of Administrative Enforcement Cases Involving Antiboycott Matters, 15 CFR Part 766 Supplement No. 2</li> </ul> </li> </ul>
Penalties	<ul style="list-style-type: none"> <li><b>Criminal:</b> Fines of up to \$1 million and 20 years imprisonment, or both, per violation</li> <li><b>Civil:</b> Civil monetary penalties of the greater of \$250,000 (as adjusted under Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 to \$284,582 per violation) or an amount that is twice the amount of the transaction that is the basis of the violation with respect to the penalty imposed, per violation</li> </ul>

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Other Sanctions Available	<ul style="list-style-type: none"> <li>• Denial of export privileges, seizure and forfeiture, exclusion from practice, cross-debarment and statutorily-mandated sanctions related to weapons proliferation. See 15 CFR §764.3</li> <li>• Protective Administrative Measures under 15 CFR §764.6 including: license exemption limitations, revocation or suspension of licenses, issuances of temporary denial orders and issuance of orders of denial for conviction of an offense specified in EAR §11(h)</li> <li>• Conduct that constitutes a violation of the EAR may also be prosecuted under 18 U.S.C. 371 (conspiracy), 18 U.S.C. 1001 (false statements), 18 U.S.C. 1341, 1343, and 1346 (mail and wire fraud), and 18 U.S.C. 1956 and 1957 (money laundering)</li> </ul>
Investigative Agencies	<ul style="list-style-type: none"> <li>• OEE has both civil and criminal investigative authority; in addition Immigration and Customs Enforcement, Federal Bureau of Investigation, Defense Criminal Investigative Service, Defense Security Service and various intelligence agencies; DTSA also may be involved in assessing injury to national security</li> </ul>
<b>Office of Foreign Assets Control</b>	
Enforcement Agency	<ul style="list-style-type: none"> <li>• Assistant Director For Enforcement, Office of Foreign Assets Control (“OFAC”), U.S. Department of the Treasury</li> </ul>
Enforcement Legal Authority	<ul style="list-style-type: none"> <li>• <u>Criminal:</u> <ul style="list-style-type: none"> <li>○ Various statutory authorities – OFAC’s principal enforcement authority is under IEEPA and the Trading With the Enemy Act (see below)</li> <li>○ §206(c) of the International Emergency Economic Powers Act (22 USC §1705(c)), as amended by §2(a) of the International Emergency Economic Powers Enhancement Act</li> <li>○ §16 of the Trading With the Enemy Act (“TWEA”)</li> <li>○ 31 CFR Part 501 generally and regulations governing various individual OFAC sanctions programs</li> </ul> </li> <li>• <u>Civil:</u> <ul style="list-style-type: none"> <li>○ §1705(b) of IEEPA (22 USC §1705(b)), as amended by the International Emergency Economic Powers Enhancement Act</li> <li>○ 31 CFR Part 501 generally</li> <li>○ Regulations governing various individual sanctions programs</li> <li>○ Appendix A to 31 CFR Part 501 – Economic Sanctions Enforcement Guidelines</li> </ul> </li> </ul>
Penalties	<ul style="list-style-type: none"> <li>• <u>Criminal:</u> <ul style="list-style-type: none"> <li>○ Under IEEPA, fines of up to \$1 million and 20 years imprisonment, or both, per violation</li> <li>○ Under TWEA, fines of up to \$1 million and 20 years imprisonment, or both, per violation</li> </ul> </li> <li>• <u>Civil:</u> <ul style="list-style-type: none"> <li>○ Under IEEPA and most sanctions programs, greater of \$250,000 (as adjusted under Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 to \$289,238) or an amount that is twice the amount of the transaction that is the basis of the violation with respect to the penalty imposed, per violation</li> <li>○ Under TWEA \$50,000 (as adjusted under Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 to \$85,236 per violation)</li> </ul> </li> </ul>
Other Sanctions Available	<ul style="list-style-type: none"> <li>• Denial, suspension, modification or revocation of licenses or other authorizations</li> <li>• Cease and desist orders</li> <li>• Other administrative powers</li> </ul>

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Investigative Agencies	<ul style="list-style-type: none"> <li>In addition to the Assistant Director of Enforcement, Federal Bureau of Investigation, Defense Criminal Investigative Service, Defense Security Service and various intelligence agencies</li> </ul>
<b>U.S. Customs and Border Protection</b>	
Enforcement Agency	<ul style="list-style-type: none"> <li>Customs and Border Protection; also Immigration and Customs Enforcement</li> </ul>
Enforcement Legal Authority	<ul style="list-style-type: none"> <li>Customs enforces multiple U.S. statutes and regulations in the context of import transactions, border security and other areas; the principal enforcement legal authority for import transactions is as follows:               <ul style="list-style-type: none"> <li><u>Criminal:</u> <ul style="list-style-type: none"> <li>18 USC §541 (false classification, underpayment of duty), §542 (entry by means of false statements), §544 (relanding of goods), §545 (smuggling), §550 (false claims for refunds of duty), §551 (concealing or destroying invoices or papers); see generally 18 USC Chapter 5</li> <li>Other available provisions: 18 U.S.C. §1001 (false statements), 18 USC §1519 (destruction, alteration or falsification of records) and 18 USC §§1956 and 1957 (money laundering),</li> </ul> </li> <li><u>Civil:</u> <ul style="list-style-type: none"> <li>The principal civil enforcement authority for Customs import violations is 19 USC §1592 for fraud, gross negligence and negligence</li> </ul> </li> </ul> </li> </ul>
Penalties	<ul style="list-style-type: none"> <li><u>Criminal:</u> <ul style="list-style-type: none"> <li>18 USC §541 (false classification, underpayment of duty) – fines or imprisonment of up to 2 years or both</li> <li>18 USC §542 (entry by means of false statements) – fines or imprisonment of up to 2 years or both</li> <li>18 USC §544 (relanding of goods) – fines or imprisonment of up to 2 years or both</li> <li>18 USC §545 (smuggling) – fines or imprisonment of up to 20 years or both, forfeiture of merchandise</li> <li>18 USC §550 (false claim for refund of duty) - fines or imprisonment of up to 2 years or both; forfeiture of merchandise</li> <li>18 USC §551 (concealing invoices) – fines or imprisonment of up to 2 years or both</li> </ul> </li> <li><u>Civil:</u> <ul style="list-style-type: none"> <li>19 USC §1592(c)(1) (Fraud) - an amount not to exceed the domestic value of the merchandise</li> <li>19 USC §1592(c)(2) (Gross Negligence) - (A) the lesser of: (i) the domestic value of the merchandise, or (ii) four times the lawful duties, taxes, and fees of which the United States is or may be deprived, or (B) if the violation did not affect the assessment of duties, 40 percent of the dutiable value of the merchandise.</li> <li>19 USC §1592(c)(3) (Negligence) - (A) the lesser of: (i) the domestic value of the merchandise, or (ii) two times the lawful duties, taxes, and fees of which the United States is or may be deprived, or (B) if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise.</li> </ul> </li> </ul>
Other Sanctions Available	<ul style="list-style-type: none"> <li>Seizure and forfeiture of merchandise involved in violations</li> </ul>
Investigative Agencies	<ul style="list-style-type: none"> <li>Multiple investigative agencies and intelligence services including Customs and Border Protection, Immigration and Customs Enforcement, Federal Bureau of Investigation, and various intelligence agencies</li> </ul>
<b>Department of Justice</b>	

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Enforcement Agency	<ul style="list-style-type: none"><li>• Counterintelligence and Export Control Section, National Security Division, Department of Justice (for export control and sanctions cases)</li><li>• Individual U.S. Attorneys' Offices</li></ul>
Penalties	<ul style="list-style-type: none"><li>• See "Criminal" penalties for each agency above</li></ul>

**Note: This article contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not intended and should not be construed as legal advice.**

To be placed on our list to receive additional articles on export and import law please contact [Thomas McVey](mailto:tmcvey@williamsmullen.com) at: [tmcvey@williamsmullen.com](mailto:tmcvey@williamsmullen.com) or 202.293.8118. Additional articles on ITAR, EAR and US sanctions programs are available at: "[Export Articles.](#)"

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<sup>1</sup> Thomas B. McVey is the Chair of the [International Practice Group](#) of Williams Mullen, where he practices in the areas of international trade law and the federal regulation of international business. Additional articles on ITAR, EAR and US sanctions programs are available at: "[Export Articles.](#)"

<sup>2</sup> You should consider putting this advice to employees in writing. This is frequently referred to as a "litigation hold notice," "preservation letter" or "stop destruction request."

<sup>3</sup> See 18 USC §1519.

<sup>4</sup> See [Upjohn Co. v. United States](#), 449 U.S. 383 (1981).

<sup>5</sup> This covers false classifications of quality or value, entry of goods by paying less than the amount of duty legally due, and similar violations.

<sup>6</sup> See 18 USC §1519. See also 18 U.S.C. §371 (conspiracy), 18 U.S.C. §1001 (false statements), 18 U.S.C. §§1341, 1343, and 1346 (mail and wire fraud) and 18 U.S.C. §§1956 and 1957 (money laundering).

<sup>7</sup> See, e.g., [Epsilon Electronics, Inc. v. U.S. Department of the Treasury, Office of Foreign Assets Control, et al.](#), 168 F.Supp.3d 131 (D.C. 2016).

<sup>8</sup> These are the Arms Export Control Act (22 USC Chapter 39 (§§2751-2799aa-2)), the statutory authority for the International Traffic In Arms Regulations, and the International Emergency Economic Powers Act (50 USC §§ 1701-1707), the statutory authority for the Export Administration Regulations and many of the U.S. Sanctions Programs.

<sup>9</sup> §1705(c) of IEEPA provides that "a person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of, an unlawful act described in subsection (a) of this section shall, upon conviction, be fined not more than \$1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both." This section was amended in October 2007 under the International Emergency Economic Powers Enhancement Act to increase the applicable penalties under this section.

§2778(c) of the AECA provides: "Any person who willfully violates any provision of this section, section 2779 of this title, a treaty referred to in subsection (j)(1)(C)(i), or any rule or regulation issued under this section or section 2779 of this title, including any rule or regulation issued to implement or enforce a treaty referred to in subsection (j)(1)(C)(i) or an implementing arrangement pursuant to such treaty, or who willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required



to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined for each violation not more than \$1,000,000 or imprisoned not more than 20 years, or both.”

<sup>10</sup> United States v. Bishop, 740 F.3d 927 (4<sup>th</sup> Cir. 2014).

<sup>11</sup> The court stated: “Under the standard of willfulness described above, [the defendant’s] true belief as to the illegality of transporting the [article subject to control] is sufficient to establish culpability under the AECA even if unaccompanied by knowledge of the contents of the USML.” Id. p. 935.

<sup>12</sup> Bryan v. United States, 524 U.S. 184 (1998).

<sup>13</sup> See for example United States v. Hsu, 364 F.3d 192, 198 n.2 (4<sup>th</sup> Cir. 2004); United States v. Roth, 628 F.3d 827 (6<sup>th</sup> Cir., 2011) (“[S]ection 2778(c) does not require a defendant to know that the items being exported are on the Munitions List. Rather, it only requires knowledge that the underlying action is unlawful.”); United States v. Tsai, 954 F.2d 155, 162 (3<sup>d</sup> Cir. 1992) (“If the defendant knew that the export was in violation of the law, we are hard pressed to say that it matters what the basis of that knowledge was.”); and United States v. Murphy, 852 F.2d 1, 7 (1<sup>st</sup> Cir. 1998) (upholding a jury instruction that “made clear that conviction [under the AECA] would not require evidence that defendants knew of the licensing requirement or were aware of the munitions list.”). But see United States v. Gregg, 829 F.2d 1430, 1437 n. 14 (8<sup>th</sup> Cir. 1987) in which the court interprets willfully to require that a defendant knew that the underlying exported items were on the Munitions List.

<sup>14</sup> See Department of Justice Guidance Regarding Voluntary Self-Disclosures, October 2, 2016 (the “DOJ Guidance”) p. 4, note 5. The DOJ Guidance provides: “Under *Bryan*, an act is willful if done with the knowledge that it is illegal. The government, however, is not required to show the defendant was aware of the specific law, rule, or regulation that its conduct may have violated.”

<sup>15</sup> Which deal with violations including false classifications, making false statements in import transactions and duty evasion.

<sup>16</sup> Some courts have held, however, that statements that are merely “recklessly” made meet the standard for violations of §542. See eg. United States v. Bagnall et al., 907 F.2d 432 (3<sup>rd</sup> 1990).

<sup>17</sup> For example, in United States v. Wolff et al., No. 08-CR-00417, *indictment filed* (N.D. Ill Aug. 31, 2010), a food company and ten individual executives were indicted for import violations in the evasion of payment of approximately \$80 million of antidumping duties on Chinese-origin honey. See also United States v. Chen (N.D. Ga 2012) and United States v. Chavez, et al. (SD Cal. 2012). In a related development, in 2016 Congress enacted the Trade Facilitation and Trade Enforcement Act of 2015 which expanded enforcement authority for Customs in import violations. Separately, the Department of Justice has recently been bringing civil actions for import violations under the False Claims Act., which can result in higher penalties than traditional the Customs enforcement mechanism and a lower standard of proof than criminal cases.

<sup>18</sup> Under the BIS and OFAC Enforcement Guidelines, “Awareness of Conduct at Issue” is a factor to be considered by the agency in assessing penalties, *ie*, if a respondent had knowledge or reason to know that the conduct constituted a violation, this would justify a higher penalty amount. However it generally is not a mandatory element to prove knowledge or reason to know in order for a violation to exist. The BIS Enforcement Guidelines provide: “Generally, the greater a Respondent’s actual knowledge of, or reason to know about, the conduct constituting an apparent violation, the stronger the OEE enforcement response will be. In the case of a corporation, awareness will focus on supervisory or managerial level staff in the business unit at issue, as well as other senior officers and managers.” Among the factors OEE may consider in evaluating the Respondent’s awareness of the conduct at issue are actual knowledge, reason to know, and management involvement. See Guidance On Charging and Penalty Determinations In Settlement of Administrative Enforcement Cases, 15 CFR Part 766 Supplement No. 1, Sec. III.

<sup>19</sup> See 19 USC §1592(a).

<sup>20</sup> See 31 CFR Part 501 Appendix A.

<sup>21</sup> To calculate the penalty, OFAC will first determine if the case is “egregious” or “non-egregious,” and then calculate a base penalty amount based upon the transaction value and whether the respondent submitted a voluntary self-disclosure. The base penalty amount will then be adjusted to reflect the applicable General Factors to produce OFAC’s final proposed civil penalty. See OFAC Guidelines, 31 CFR Part 501 Appendix A.

<sup>22</sup> See BIS Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, 15 CFR Part 766 Supplement No. 1.

<sup>23</sup> The BIS process includes determining a base penalty amount, adjusting this amount by aggravating and mitigating factors, assessing whether the violation is egregious, determining the presence and adequacy of an export compliance program and whether the respondent submitted a voluntary self-disclosure. The BIS Guidelines do not apply to cases involving violations of Part 760 of the EAR – Restrictive Trade Practices or Boycotts, but rather Part 766 Supplement No. 2 of the EAR apply to such cases.

<sup>24</sup> See In the Matter of Sigma-Aldrich Business Holdings, Inc.

<sup>25</sup> The BIS Publication “Don’t Let This Happen To You” provides the following regarding export liability from acquisition transactions:

Businesses can be held liable for violations of the EAR committed by companies that they acquire.

Businesses should be aware that the principles of successor liability may apply to them and should perform “due diligence” in scrutinizing the export control practices of any companies that they plan to acquire.

A properly structured due diligence review can determine whether an acquired company has violated any export laws. This review should examine the company’s export history and compliance practices, including commodity classifications, technology exchanges, export licenses and authorizations, end-users, end-uses, international contracts, the status of certain foreign employees who have access to controlled technologies, and the company’s export policies, procedures, and compliance manuals. Voluntary self-disclosures should be submitted outlining any violations that this review uncovers, if not by the company responsible, then by the company seeking to acquire it. Failure to scrutinize properly an acquired company’s export practices can lead to liability being imposed on the acquiring company. The case of C.A. Litzler Co., Inc. (page 51) demonstrates the importance of conducting due diligence reviews during the acquisition of a company, or in this particular case, the acquisition of a substantial portion of a company’s assets. See p. 19.

<sup>26</sup> See 22 CFR §§ 126.1(e)(2) and 123.17(j).

<sup>27</sup> Under the DOJ Guidance, to receive the benefits of a voluntary self-disclosure, the submission must be made on a timely basis, must disclose all of the relevant facts and must be submitted “prior to an imminent threat of disclosure or government investigation.” (citing U.S.S.G. §8C2.5(g)(1)). In addition, the Guidance provides that the submitting party must provide proactive cooperation to Justice in its investigation of the matter and timely and appropriate remediation. If a company meets these criteria, the company can may become eligible for “a significantly reduced penalty, to include the possibility of a non-prosecution agreement (NPA), a reduced period of supervises compliance, a reduced fine and forfeiture and no requirement for a monitor.” DOJ Guidance p. 8. The DOJ Guidance does not set forth specific levels of relief that will be afforded as in the OFAC and BIS Enforcement Guidelines, but rather states that the ultimate resolution will be determined based upon on an evaluation of the totality of the circumstances in a particular case. If more aggravating circumstances are present, a more stringent resolution will be required. The DOJ Guidance states: “Nevertheless, the company would still find itself in a better position than if it had not submitted a VDS, cooperated, and remediated.” Guidance, p. 9.

<sup>28</sup> It may be possible to obtain an extension of time in which to respond to the request, however there is no assurance that the agency will agree to this so you should submit your extension request early and be prepared in case the request is denied. In addition, while a short extension may be granted, longer extensions are more difficult to obtain.

<sup>29</sup> These typically require exporters and importers to maintain records of export and/or import transactions for a five year period and longer in certain instances.

<sup>30</sup> For ITAR, see 22 CFR Part 128; for EAR see 15 CFR Part 766, for OFAC Sanctions Programs see 31 CFR Part 501 and provisions in regulations for each of the individual sanctions programs, and for Customs see 19 USC §1592(b).

<sup>31</sup> The OFAC Sanctions Compliance and Evaluations Division handles enforcement for financial institutions and the Enforcement Division handles other enforcement matters.

<sup>32</sup> The National Security Division attorneys in Washington also often provide specialized expertise to individual U.S. Attorney offices in handling these cases.

<sup>33</sup> The office is administered by DHS, with a team that includes officials from DHS, the Federal Bureau of Investigation, the Departments of Commerce, State, Justice, Defense, Treasury, Energy, Office of the Director of National Intelligence and the Postal Inspection Service.

<sup>34</sup> This includes regulations administered by the Food and Drug Administration, Consumer Product Safety Commission, Federal Trade Commission, International Trade Commission and the enforcement of federal intellectual property laws.

<sup>35</sup> See United States of America v. LM Import-Export, Inc., et al., Case No. 1:11-cv-20765 (S.D. Fl.) and United States of America v. Hung Lam, et al., Case No. 12-20048-CR (S.D. Fla.).

<sup>36</sup> For example, in a recent case involving National Oilwell Varco, Inc. (“Varco”) for violations involving Cuba, Iran and Sudan, Varco was subject to investigations by OFAC, BIS and the U.S. Attorney in the Southern District of Texas. See: [https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20161114\\_varco.pdf](https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20161114_varco.pdf)

<sup>37</sup> See 22 CFR §§ 128.14 and 128.17.

<sup>38</sup> However where the administrative law judge determines that documents containing the sensitive matter need to be made available to a respondent to avoid prejudice, the judge may direct BIS to provide an unclassified summary of the documents to the respondent. The judge may provide the parties opportunity to make arrangements that permit a party or a representative to have access to such matter without compromising sensitive information. Such

arrangements may include obtaining security clearances, or giving counsel for a party access to sensitive information and documents subject to assurances against further disclosure, including a protective order, if necessary. See 15 CFR 766.11.

<sup>39</sup> Administrative Procedure Act, 5 USC §§551 to 559.

<sup>40</sup> ITAR Section 128.1 provides that administration of the AECA is expressly exempt from various provisions of the APA. This section provides:

“The administration of the Arms Export Control Act is a foreign affairs function encompassed within the meaning of the military and foreign affairs exclusion of the Administrative Procedure Act and is thereby expressly exempt from various provisions of that Act. Because the exercising of the foreign affairs function, including the decisions required to implement the Arms Export Control Act, is highly discretionary, it is excluded from review under the Administrative Procedure Act.”

Similarly, EAR Sec. 766.1 provides:

“This part does not confer any procedural rights or impose any requirements based on the Administrative Procedure Act for proceedings charging violations under the EAA, except as expressly provided for in this part.”

<sup>41</sup> See for example, Bernstein v. United States Department of State, 945 F. Supp. 1279 (N.D. Cal. 1996), 974 F. Supp. 1288 (N.D. Cal. 1997); Bernstein v. United States Department of Justice, 176 F.3d 1132 (9<sup>th</sup> Cir. 1999); Bernstein v. Department of Commerce, No. 95-0582 (N.D. Cal. 2003); Junger v. Daley, et al., 209 F.3d 481 (6<sup>th</sup> Cir. 2000); U.S. v. Zhen Zhou Wu, Nos. 11-1115, 11-1141 (1st Cir. 2013); Defense Distributed and Second Amendment Foundation, Inc. v. U.S. Department of State, et al., No. 1:15-CV-372-RP (W.D. Tex.), and Micei International v. Department of Commerce, No. 09-1155 (DC Cir. 2010). Under §13(c)(3) of the Export Administration Act parties are entitled to judicial review of BIS determinations directly to the U.S. Court of Appeals for the District of Columbia, however the EAA has expired. IEEPA, the current statutory authority for the EAR, is silent on issues involving judicial review except in connection with determinations based upon classified information. The EAR previously provided for judicial review pursuant to 15 CFR §766.22(e) which directed the parties to pursue an appeal as set forth in the EAA’s judicial review provision under §13(c)(3), however this provision (§766.22(e)) was deleted from the EAR in technical amendments in 2010.

<sup>42</sup> See eg., 31 CFR § 560.704 (Iran), 31 CFR §742.703 (Syria), 31 CFR §538.704 (Sudan) and 31 CFR §547.703 (Dem. Republic of the Congo).

<sup>43</sup> In light of the important constitutional issues involved in unilateral presidential authority in national emergencies, IEEPA has been the subject of numerous court challenges. See, eg., Dames & Moore v. Regan, 453 U.S. 654 (1981); Kindhearts For Charitable Humanitarian Development, Inc. v. Timothy Geithner, et al., 647 F.Supp.2d 857 (N.D. Ohio 2009) and U.S. v. Ali Amirnazmi, No. 10-1198, (3d Cir. 2011). More recently, parties have been able to obtain judicial review of OFAC sanctions programs under the provisions of the APA. See for example Epsilon Electronics, Inc. v. United States Department of the Treasury, Office of Foreign Assets Control, et al., 168 F.Supp.3d 131 (D.C. 2016).

<sup>44</sup> For example, in Epsilon Electronics (see footnote above) Epsilon appealed OFAC’s determination that the company engaged in unauthorized exports to Iran in the U.S. District Court for the District of Columbia. The appeal was based upon violations of the APA and constitutional protections. The court upheld OFAC’s determination and its \$4,073,000 civil penalty assessment. Of significance, the court stated that in reviewing OFAC actions courts are required to be “extremely differential” to the agency in reviewing agency actions in light of OFAC’s national security and foreign affairs functions: The court stated:

When reviewing agency decisions in the area of foreign relations, courts must be mindful that “[m]atters related to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or inference.” Regan, 468 U.S. at 242 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)). Thus, “[a]s a general principal, . . . [a reviewing court] should avoid impairment of decisions made by the Congress or the President in matters involving foreign affairs or national security.” Glob. Relief Found. v. O’Neill, 207 F. Supp. 2d 779, 788 (N.D. Ill. 2002) (citing Haig v. Agee, 453 U.S. 280, 292 (1981)). Accordingly, a review of a decision made by OFAC is “extremely deferential” because OFAC operates “in an area at the intersection of national security, foreign policy, and administrative law.” Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 734 (D.C. Cir. 2007). Epsilon, p.8-9.

<sup>45</sup> See <http://www.justice.gov/usao-edpa/pr/north-wales-man-sentenced-illegally-exporting-goods>.

<sup>46</sup> See <https://www.fbi.gov/newyork/press-releases/2012/four-individuals-charged-in-the-southern-district-of-new-york-with-exporting-various-goods-from-the-united-states-to-iran-and-china>.

<sup>47</sup> See <http://www.state.gov/t/pm/rls/othr/misc/218216.htm>.

<sup>48</sup> United States v. Roth, 628 F.3d 827 (6<sup>th</sup> Cir., 2011).

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<sup>49</sup> See also actions involving Mozaffar Khazaei in the US District Court for the District of Connecticut on October 23, 2015 - <http://www.justice.gov/opa/pr/former-connecticut-resident-sentenced-over-eight-years-prison-attempting-send-us-military>, and Alexander Posobilov, Shavkat Abdullaev and Anastasia Diatlova in the Eastern District of New York on October 26, 2015 - <http://www.justice.gov/opa/pr/three-defendants-convicted-conspiring-illegally-export-controlled-technology-russian-military>.

<sup>50</sup> See *United States v. Trek Leather, Inc. et al.*, No. 11-1527 (Fed. Cir. 2014).

<sup>51</sup> In January 2017 Justice and CBP announced that Volkswagen had agreed to pay \$4.3 billion in combined criminal and civil penalties in connection with the case. The \$1.45 billion civil penalty component of this payable to CBP to resolve Customs civil fraud charges was described by CBP as the largest civil penalty collected by CBP. See <https://www.cbp.gov/newsroom/spotlights/cbp-joins-doj-fbi-and-epa-announcing-settlement-against-volkswagen-result-their> and <https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six>