

Export Declaration Regulations: New Penalty Guidelines

Ensuring Compliance to Mitigate Penalties in Export Transactions

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:

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Tuesday, April 7, 2009

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

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Mitigating Factors – FTR Violations for Improper/Missing AES Filings

Ronald I. Meltzer

April 7, 2009



Importance of Mitigation

- Violation of FTR due to missing/improper AES filing can lead to civil penalty of up to \$10,000/violation
- Penalties vary based on number of FTR violations in the past and presence of mitigating & aggravating factors



Importance of Mitigation (cont'd)

- Presence of mitigating factor(s) may lead to a lower penalty within a specified range
- Aggravating factor(s) may lead to a higher penalty within the same range
- Factors may offset each other



Benefits of Mitigation - Example

- First offense – failure to file AES → max. \$2,500 penalty
- Mitigation can lower penalty to as low as \$750
- Max. \$2,500 penalty typically reserved for situations with aggravating factors



Examples of Mitigating Factors

- 1st time USPPPI, authorized agent, carrier, etc.
- Voluntary self-disclosure: “Extraordinary” weight
- Clear documentation of remedial measures
- Exceptional cooperation with CBP, Census or BIS
- Isolated occurrence
- Substantial assistance in investigation of 3rd party
- Systematic export compliance efforts



Examples of Aggravating Factors

- Multiple violations in same export transaction (e.g., incorrect value, missing data, violations of other agency regs, etc.)
- Intentional violation
- High number of violations in 3-year period
- Criminal conviction for related violation (e.g. BIS)
- Pattern of disregard for U.S. export law responsibilities
- No systematic export compliance program



Comparison with OFAC Factors

- Detailed list of “General Factors” to take into account (not mitigating/aggravating)
 - Voluntary disclosure (one of two key factors)
 - Willfulness or recklessness of violation (“egregious” case is another key factor)
 - Awareness of conduct
 - Harm to objectives of sanctions programs
 - Similar: voluntary disclosure, experience of violator, existence of compliance programs or remedial measures



Comparison with EAR Factors

- Some factors explicitly given “great weight”
- Voluntary disclosure
- Effective compliance program
- Deliberate concealment
- Sensitivity of item
- Other factors
 - Harm to objectives of EAR provisions
 - Deliberate concealment



Comparison with EAR Factors (Cont'd)

- Sensitivity of items or destination involved
- Quantity/value of items
- Time period for EAR violations at five years
- Similar: voluntary disclosures, compliance programs, cooperation, inexperience



Comparison with ITAR Factors

- Voluntary disclosure
- Whether license would have been authorized if requested
- Why violation occurred
- Knowledge/involvement of senior management
- Intentional violation
- Familiarity with ITAR
- Prior violations
- Knowledge/involvement of senior management
- Similar: voluntary disclosure, degree of cooperation, compliance program, but no weighting of factors



Comparison with CBP Factors: §1592 Violations

- Quite different
 - Contributory CBP error & CBP knowledge
 - “Immediate” remedial actions
 - Inability to pay
 - Cooperation with investigation
 - Obstruction of investigation (withhold evidence, misleading info)
 - Failure to comply w/ lawful demand of CBP officer
 - Similar: inexperience, prior record, but prior disclosure treated differently



The Foreign Trade Regulations and CBP's New Penalty Mitigation Guidelines

April 7, 2009

Part III: Best Practices to Ensure Compliance
with the FTR and Prior Disclosures

Lars-Erik Hjelm, Partner
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Agenda

I. Compliance Programs

- A. Penalty Risks
- B. Objectives
- C. Principles
- D. Elements

II. Prior Disclosures

- A. FTR Provisions
- B. Implementation



I. Compliance Programs

A. Penalty Risks

- ◆ FTR civil penalties are not exclusive – criminal and other penalties may apply
- ◆ Forfeitures – both civil and criminal
- ◆ Criminal penalties – filing false or misleading EEI could result in \$10,000 per violation and five years imprisonment



I. Compliance Programs

A. Penalty Risks (cont.)

- ◆ EAR Violations – Filing inaccurate EEI could also result in liability under the EAR
 - For example, if the commodity is subject to a BIS export license and the USPPPI fails to provide the agent with the license or other BIS authorization number, the USPPPI remains liable under the EAR
 - Sanctions for violating the EAR include fines of up to \$5,000 or five times the value of the export (whichever is greater), denial of export privileges and five years imprisonment
- ◆ Other criminal statutes – False Statements Act and CBP Export Smuggling Statute



I. Compliance Programs

B. Objectives (for USPPIs, FPPIs, Carriers and Agents)

- ◆ Promote compliance with FTR by addressing and reflecting the requirements of the regulations and ensuring that the export information filed is complete, accurate and timely
- ◆ Identify any filing errors in order to take remedial action and institute changes that would minimize risk of further violations
- ◆ Demonstrate systematic compliance effort and corporate responsibility



I. Compliance Programs

C. Principles

- ◆ Identify issues and risks involved
- ◆ Craft program for your company and area of business
- ◆ Institute a flexible program that can evolve
- ◆ Ensure the program is manageable for your company
- ◆ Garner upper management support



I. Compliance Programs

D. Elements

- ◆ Corporate compliance policy and statement of management commitment
- ◆ Compliance organizational structure with delegation of oversight authority



I. Compliance Programs

D. Elements (cont.)

- ◆ Formal written program, including compliance procedures covering topics such as:
 - FTR terminology
 - General EEI requirements and procedures
 - AES / AESDirect Process
 - Special provisions and types of transactions
 - Addressing response messages
 - Correcting export information
 - Classifying commodities
 - Kimberley Process
 - Using U.S. authorized or forwarding agent



I. Compliance Programs

D. Elements (cont.)

- ◆ Recordkeeping policies and procedures
 - All parties shall retain supporting documents for at least five years from the date of export. If the export is subject to Department of State or other agency recordkeeping requirements that exceed five years, those requirements prevail
 - AES filers shall also retain a copy of the electronic certification notice from the Census Bureau showing the filer's approved operational status for as long as the filer submits EEI through AES. AESDirect filers shall retain a copy of the electronic certification notice during the AESDirect certification for as long as the filer submits EEI through AESDirect



I. Compliance Programs

D. Elements (cont.)

- ◆ Audit plan
 - Reviewing Compliance Reports
 - Reviewing Fatal Error Reports
 - Periodic Audits of Process
- ◆ Internal reporting/notification mechanism
- ◆ Education and training



II. Prior Disclosures

A. Foreign Trade Regulation Provisions

◆ Limitations:

- The VSD must be provided to Census Bureau
- The disclosure must be received prior to Census or any other U.S. Government agency has learned of potential violation and commenced an investigation
- While the VSD is a mitigating factor, it will be evaluated together with all other factors of case. Weight given is in discretion of Census and mitigating effect may be outweighed by aggravating factors
- The person providing VSD must do so with full knowledge and authorization of senior management



II. Prior Disclosures

A. FTR Provisions (cont.)

- ◆ Information:
 - Initial notification: (1) must be in writing, (2) sent to the Chief of the Foreign Trade Division of Census, (3) must include the name of person making the disclosure, (4) must provide a brief description of suspected violations, including general nature, circumstances and extent of the violations
 - If the potential violations involve exports of items controlled, licensed or otherwise subject to the jurisdiction of another agency (BIS, CBP), a disclosure should also be made to that agency
 - Final disclosure:
 - ▶ Companies should conduct a “thorough review”
 - ▶ Review should go back five years from date of initial notification
 - ▶ Narrative account should “sufficiently describ[e] the suspected violations so that their nature and gravity can be assessed”
 - ▶ The account should also discuss the nature of the review and the measures taken to minimize the likelihood of future violations



II. Prior Disclosures

A. FTR Provisions (cont.)

- ◆ Information (cont.):
 - Final disclosure narrative account should include:
 - ▶ The kind of violation involved
 - ▶ The required data that was not reported or reported incorrectly
 - ▶ An explanation of when and how the violations occurred
 - ▶ The identities and addresses of the individuals and organizations involved
 - ▶ A description of any mitigating circumstances
 - EEI: All FTR required data that was not reported must be reported. All unreported data or corrections shall be made through AES



II. Prior Disclosures

A. FTR Provisions (cont.)

- ◆ Information (cont.):
 - Census Bureau Response:
 - ▶ Census will notify CBP, ICE and BIS of the disclosure, acknowledge the submission and provide contact information to the disclosing entity
 - ▶ Census may further: inform the person or entity of the action to be taken, issue a warning letter or letter setting forth corrective measures required or refer the matter to OEE for the appropriate action



II. Prior Disclosures

B. Implementation

- ◆ Census is encouraging the submission of VSDs
 - It also seems to be pursuing informed compliance as its first response to problems
- ◆ BIS has indicated it will review VSDs and follow up on potential EAR violations
 - However, it seems to be focused on the most “egregious” violations, for example, those which indicate a pattern of disregard for the FTR or which appear to be intentional violations
 - Inadvertent or singular violations may not be a high priority for BIS, which remains focused on issues relating to its core mission, including stopping WMD, terrorism and unauthorized military end-uses



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Export Declaration Regulations: New Penalty Guidelines

Ensuring Compliance to Mitigate Penalties in Export Transactions
(Part I)

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Background Information

- The Commerce Department's Bureau of the Census is responsible for collecting, compiling, and publishing export trade statistics for the United States, pursuant to the Foreign Trade Regulations ("FTR").
- Export trade data required to be collected under the FTR is referred to as Electronic Export Information ("EEI").
- EEI replaced the paper Shipper's Export Declarations ("SEDs").
- EEI is filed through the Automated Export System ("AES") or through AESDirect.

Background Information (cont'd)

- The 2002 Foreign Relations Authorization Act mandated electronic filing (Public Law 107-228) and authorized the Secretary of Commerce, with the concurrence of the Secretary of Homeland Security, to publish regulations mandating electronic filing.
- AES allows the government to improve the quality, timeliness and coverage of export statistics.
- EEI is also used, under the Export Administration Regulations ("EAR"), to detect and prevent the export of certain items by unauthorized parties or to unauthorized destinations or end user.

Census Final Rule

- The Census Bureau published its final rule in the Federal Register on June 2, 2008 (73 Federal Register 31,548; 15 CFR 30).
- Census' final rule amended the FTR to require filing of EEI through AES or AESDirect for all shipments where a SED is required.
- Census' new FTR became effective on July 2, 2008.

Responsibility for Enforcement and Investigations

- The new FTR included provisions for the issuance of civil penalties for violations.
- In 2005 the Commerce Secretary delegated to the DHS Secretary the authority to enforce the FTR.
- The DHS Secretary delegated administration of penalty provisions to the Commissioner of U.S. Customs and Border Protection ("CBP").
- Consequently, the administration of the penalties will be under CBP and its procedures.
- Enforcement, however, was postponed until 2008, when proposed amendments to the FTR were finalized.

CBP's Penalty Guidelines

- On January 2, 2009, CBP issued mitigation guidelines for violations of the FTR.
- Guidelines became effective on February 1, 2009.
- Both U.S. Immigration and Customs Enforcement ("ICE") and CBP officials in DHS may conduct investigations.
- The Commerce Department's Bureau of Industry and Security may also conduct investigations and perform enforcement under their own authority.

CBP's Penalty Process

- CBP's usual **import** penalties proceed in two stages.
- Importers have the opportunity to respond to a pre-penalty notice regarding whether any violation occurred.
- If Customs finds a violation occurred, the importer may petition for mitigation of the penalty amount.
- Penalty proceedings usually conducted by the local Fines, Penalties and Forfeitures Office, with input from CBP Headquarters for substantial cases.

Penalties under the FTR may be issued to:

- U.S. Principal Parties in Interest (USPPIs);
- Foreign Principal Parties in Interest (FPPIs);
- Freight Forwarders;
- Authorized Agents (including brokers and other parties to the export transaction); and
- Carriers.

Assessment of Penalties (up to \$10,000)

- Penalties may be assessed against any culpable party with respect to an export transaction.
- Penalties may be assessed against more than one culpable party.
- Penalties should be assessed against a culpable party or parties per each AES transmission in violation of the FTR, rather than per each violation of the FTR with respect to the AES transmission.

Civil penalties of up to \$10,000 per violation may be imposed for:

- Failure to file export information in AES;
- Late filing of export information in AES;
- Failure to file all of the necessary information in AES, the filing of incorrect information, or the failure to comply with another FTR requirement;
- Failure by an exporting carrier to provide certain documents or information to FTR.

Failure to File and Late Filing

- Failure to file export information in AES occurs when:
 - The government finds no record in AES for an export transaction by the date that the record is required, and that discovery is made and communicated to the USPPPI, authorized agents, or other party before the violation is corrected; or
 - An AES record filed more than 10 days after the due date, regardless of whether the government discovered the violation, is considered a failure to file.
- Late filing occurs when an AES record is filed beyond the due date for filing (15 CFR 30.4)

Other FTR Violations (non-exhaustive list):

- Incorrect value for shipment and other incorrect information in AES record (*i.e.*, incorrect USPPI, consignee, end-user, commodity description, or port of export);
- Failure to cite license code or license number;
- Failure to obtain Power of Attorney for AES transmission;
- Failure to identify transaction as routed transaction;

Other FTR Violations (cont'd):

- Failure to correct information in AES as changes become known to filer;
- Failure to provide carrier with appropriate proof of filing citation or exemption legend by the time periods set forth in FTR;
- Failure to retain all records relating to export shipment for a 5 year period from date of export.

Penalties May be Issued Against Carriers for:

- Failure to follow filing requirements under 15 CFR 30.45;
- Failure to provide the USPPI or authorized agent with changes to the date of export or the port of export;
- Failure to report the proof of filing citation or exemption legend on the required manifest;

Penalties May be Issued Against Carriers for:

- Late filing of manifest information when filing an incomplete manifest under bond;
- Failure to provide the list of proof of filing citations or exemption legends prior to departure from port of exit when filing incomplete manifest under bond;
- For carriers exempted from filing a manifest, the failure to file, upon request, the proof of filing citations or exemption legends.

Questions?

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