



## Dear U.S. Exporters: Beware

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The Federal agency primarily responsible for the administration and enforcement of the export control laws of the United States is the Bureau of Industry and Security within the U.S. Department of Commerce. Special Agents from the Office of Export Enforcement of the Bureau of Industry and Security (BIS) investigate suspected violations of the Export Administration Act (EAA) and the International Emergency Economic Powers Act (IEEPA). BIS investigations may result in a warning letter to an exporter, a monetary penalty against the exporter, and/or a criminal prosecution of the exporter. Without a doubt, exporters are under more scrutiny than ever before in their international business transactions, have more regulatory compliance requirements than ever before, and are investigated more than ever before. In 2008, I predict another record year of monetary penalties and even criminal prosecutions for various export violations. Prudent exporters will have an effective export compliance system in place, however, chances are that even the most careful and vigilant exporter will have an export violation. Preparing for, and dealing with, that eventuality is good business sense.

BIS Special Agents, often working with U.S. Customs and Border Protection (CBP) or U.S. Immigration and Customs Enforcement (ICE) officers, have the legal authority to demand records from an exporter or its agent, the freight forwarder, for any export transaction. This is done through an administrative subpoena issued by the BIS. The subpoena demands that records be produced to the BIS and/or that a

representative from the exporter appear with the records at the BIS offices for questioning. An exporter receiving a subpoena should promptly contact legal counsel familiar with export control laws and regulations. Although an exporting company or freight forwarder receiving a subpoena does not automatically mean that the U.S. Government is accusing it of any wrongdoing, the subpoena is an indication that the U.S. Government is investigating some suspected export violation(s) in which the subpoenaed company played some role.

The suspected export violation could be a one or a combination of the following: (1) undervaluing exported merchandise, (2) shipping to a party on the BIS's Entity List, (3) shipping to a company on one of a number of special lists created by the U.S. Government for narcotics trafficking or terrorism, (4) shipping to a country with which the U.S. has a trade embargo, (5) shipping cargo without an export license issued by the BIS, (6) shipping more cargo than allowed by the export license issued by the BIS, (7) using a freight forwarder not authorized by the BIS to transport the cargo, (8) filing or causing to be filed a Shipper's Export Declaration with the U.S. Government containing false statements regarding the authorization of the export, and (8) exporting a licensed shipment to an unauthorized country, company, or person.

The BIS is more aggressive in its investigations of violations, oftentimes not being satisfied with assessing a monetary penalty against the exporter or "U.S. principal party in interest" (PPI). The regulations

enforced by the BIS provide that any party connected with an illegal export may also be subject to a monetary penalty by the BIS.

15 CFR § 764.2 Violation.

(b) Causing, aiding, or abetting a violation.

No persons may cause, or aid, abet, counsel, command, induce, procure, or permit the doing of any act prohibited, or the omission of any act required, by the EAA, the EAR, or any order, license, or authorization issued thereunder.

This provision may snare a supplier of merchandise to the exporter, or a freight forwarder which made arrangements based upon the instructions of the exporter.

Once the suspected violation has been investigated by the Special Agents within the OEE of the BIS, the typical standard operating procedure of the BIS is that the report is forwarded to BIS Headquarters in Washington, D.C. There, an attorney within the Chief Counsel for Industry and Security prepares a "Proposed Charging Letter". The Proposed Charging Letter is signed by the Director of the Office of Export Enforcement, and sent by certified mail to the suspected violator. The Proposed Charging Letter describes the alleged violations, and requires a written response within 30 days. The Letter specifically states that the alleged violator "is entitled to be represented by counsel or other authorized representative who has power of attorney to represent it." It is increasingly common for the BIS to issue a Proposed Charging Letter against the company and a separate Letter to each manager, officer, director, or employee actively involved in the alleged violation, making the individual personally liable for the penalty to BIS.

The BIS may resolve a Proposed Charging Letter by (1) cancelling it, (2) issuing a warning letter, (3) not approving any more export licenses, (4) cancelling any export licenses previously approved by the BIS, and (5) issuing significant monetary penalties. Upon receipt of a Proposed Charging Letter, the export or other alleged violator then has a few choices. The exporter may do nothing which will be considered a default, submit a written response and schedule an in-person or telephonic response with the assigned BIS attorney, or demand a formal hearing before an Administrative Law Judge.

My preferred response to a Proposed Charging Letter is to file a written response, followed by scheduling an informal settlement conference with the BIS attorney. In both the written response and the meeting with the BIS attorney, the exporter and its attorney may present facts that contradict the allegations made by the BIS, or may otherwise explain them in context. Even if the violation did occur as alleged in the Proposed Charging Letter by the BIS, the exporter should diligently attempt to advise the BIS attorney of the facts and circumstances of the violation, the efforts subsequently made by the exporter to correct the problem, the creation and implementation of an export compliance system, training of employees in export laws and regulations, and commitment of upper management of compliance with export rules. To reduce the amount of a monetary penalty, the exporter's attorney should be very familiar with the Small Business Regulator Enforcement Flexibility Act and BIS's own mitigation penalty guidelines entitled "Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, provided in Supplement No. 1 to Part 766 of the BIS regulations.

Monetary penalties against exporters have skyrocketed in both number of cases against violators and the amount of the monetary penalty. Whereas just a few years ago, the maximum monetary penalty was only

\$11,000 per violation, penalties are now \$250,000 per export violation. IEEPA penalties were increased by a statutory amendment set forth in the USA Patriot Act Improvement and Reauthorization Act of 2005, which became effective on March 9, 2006. In other words, for violations that were committed between October 23, 1996 and March 9, 2006, the maximum penalty was \$11,000 per violation, but after March 9, 2006, the maximum penalty was increased to \$50,000. On October 16, 2007, President Bush signed into law the International Emergency Economic Powers Enhancement Act to increase the deterrent of export control violations. Consequently, for violations occurring on or after October 16, 2007, monetary penalties against violators are now an incredible \$250,000!

Obviously, the alleged violator which received a Proposed Charging Letter wants, at a minimum, to persuade the BIS attorney that the incident was an isolated occurrence, was against company policy, and that the company has an otherwise excellent compliance history. On the other hand, if the BIS attorney suspects that the company attempted to hide the violation or demonstrated a serious disregard for its export compliance responsibilities, there will be no reduction of the penalty.

After the written response and oral presentation to the BIS attorney, hopefully the BIS attorney has been persuaded to at least reduce the monetary penalty

assessed against the company. Procedurally, the BIS attorney will prepare a "Settlement Agreement" to be signed and dated by an authorized representative of the alleged violator and then by the Director of the Office of Export Enforcement. The Settlement Agreement is always a public record, however, it typically contains a statement that the alleged violator "neither admits nor denies the allegations contained in the Proposed Charging Letter." The Settlement Agreement sets forth the amount of amount of any monetary penalty agreed to by the parties. The Settlement Agreement will be accompanied by an Order signed by the Assistant Secretary of Commerce for Export Enforcement. Typically, the monetary penalty must be paid within 30 days of the date of the Order.

In conclusion, because BIS has a record number of Special Agents, because the Bush Administration and the U.S. Congress consider homeland security and a top priority, because there are more regulations that ever before regarding exports from the United States, because there are more investigations and monetary penalties being issued by the BIS, and because the monetary penalty maximum has increased from \$11,000 to \$250,000 per violation, every company involved in exporting should have an effective export compliance system in place and should train its employees on export controls. Whenever contacted by or visited by a BIS Special Agent, receiving a BIS subpoena, or receiving a Proposed Charging Letter, promptly seek the advice of an international trade attorney. ■

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