

Export Enforcement Issues – A Trade Perspective

- > Future Direction of Enforcement
 - National Export Initiative
- > Enforcement Trends – Recent History
 - Counter-Proliferation Task Force
 - OFAC Penalties
 - AES Penalties



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- > Enforcement message from BIS Update
 - Secretary Locke
 - “Export enforcement will continue to be a crucial part of our export control system. And by reforming how we license dual-use products and technologies, we will free up our export enforcement agents to focus on interdicting those exports that pose the greatest potential risk to our national security. ...With a more efficient and rational export control system, we can free up more of our enforcement and licensing teams to focus their resources on these real threats.”
 - Undersecretary Hirschhorn
 - “[E]nforcement will become an even higher priority...I ask that you carry a message back to your senior management and those who market your products: ...we are planning increased efforts against individuals who flout the rules and against companies whose inadequate internal compliance programs tell us that they are indifferent to whether they follow the rules.”



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- > Goal to double exports over 5 years
 - Current status of U.S. export controls places U.S. business at a competitive disadvantage
 - How to fix this without negatively impacting National Security?
- > Export Control Reform:
 - Single Control List;
 - Single Information Technology (IT) System;
 - Single Licensing Agency; and
 - **Single Primary Enforcement Coordination Agency**



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> Phase I

– Creation of Enforcement Fusion Center

- Clues related to criminal activity often remain undiscovered in disconnected law enforcement databases
- Fusion centers bring data into one place or otherwise make it generally accessible by various groups

> Phase II

– Expand enforcement outreach and compliance

> Phase III

– Consolidate enforcement activities



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Recent History in Penalties



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- > October 2007 creation of Multidepartment Counter-Proliferation Task Forces formed to combat illegal exports of military and dual-use technology
- > Participation by:
 - Department of Justice;
 - U.S. Immigration and Customs Enforcement;
 - National Security Administration;
 - FBI Counterintelligence Division;
 - Department of Commerce, Office of Export Enforcement;
 - Defense Criminal Investigative Service; and
 - State Department.
- > Criminal prosecutions for export violations rose by about 30 percent the following year and have remained higher



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- > OFAC Penalties
- > International Emergency Economic Powers Act (IEEPA)*
 - March of 2006, penalties for violations of the IEEPA increased from \$10,000 to \$50,000
 - October 2007
 - Civil penalties increased to the greater of \$250,000 or 2 x the amount of the transaction
 - Criminal penalties to \$1 million per violation and up to 20 years imprisonment
- > * Applicable to all OFAC sanctions programs except Cuba, and violations of the EAR



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- > Recent OFAC Penalty totals by year
 - 2005
 - 85 administrative cases
 - \$1.2 million in penalties
 - 2006
 - 32 cases
 - \$10.8 million in penalties
 - 2007
 - 56 cases
 - \$4.3 million in penalties
 - 2008
 - 99 cases
 - \$3.5 million in penalties
 - 2009
 - 27 cases
 - \$772 million in penalties
 - Remove Credit Suisse and Lloyds – still 25 cases, \$19 million
 - 2010 year to date
 - 18 cases
 - \$200 million in penalties



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> Economic Sanctions Enforcement Guidelines

- Interim Final Rule published September 8, 2008
- Final Rule published November 9, 2009
- Attempt to provide subject parties with better guidelines showing how penalties are calculated, how best to obtain mitigation



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- > Non-Egregious Violations

- >

- > **Transaction Value
Schedule**

- > **Applicable
Amount**

>	less than \$1000	Up to \$1,000
>	less than \$10000	Up to \$10,000
>	less than \$25000	Up to \$25,000
>	less than \$50000	Up to \$50,000
>	less than \$100000	Up to \$100,000
>	less than \$170000	Up to \$170,000
>	\$170000 or more	Up to \$250,000

- > Egregious Violations

- Up to \$250,000
- Up to \$125,000 if voluntarily disclosed

- > http://www.ustreas.gov/offices/enforcement/ofac/legal/regs/fr74_57593.pdf



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- > Other factors taken into consideration:
 - Willful or Reckless Violation;
 - Awareness of Conduct;
 - Harm to Sanctions Program Objectives;
 - Individual Characteristics;
 - Compliance Program;
 - Remedial Response;
 - Cooperation with OFAC;
 - Timing of Apparent Violation ;
 - Other Enforcement Action;
 - Future Compliance/Deterrent Effect; and
 - Other Relevant Factors
- > Expect more large penalties assessed against significant violations, fewer penalties against individuals, SME



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> Census Penalties

- Final Rules for Implementation of Mandatory AES published June 2, 2008
 - Increase from \$100 to \$1,100 per day for late/non-Files
 - Increase from maximum \$1,000 to \$10,000 per violation
 - Criminal penalties increased to \$10,000 per violation and/or 10 years' imprisonment



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- > Census Penalties – a Current Trend
- > Foreign Trade Regulations
 - Title 13 U.S.C. authorizes the Commissioner of Customs (now Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) officials) to enforce and conduct investigations under the Foreign Trade Regulations
 - With implementation of FTR, penalties increased from \$1,100 per violation to \$10,000 per violation
 - More opportunity for revenue collection has resulted in significant increases in enforcement activity



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- > Examples of penalty activity for “corrections”:
 - Addition of a line item for mis-classified items
 - EEI filed for 2,000 items under one HTS/Schedule B for \$6,000
 - Filing later corrected to 1,000 items under each of 2 separate HTS/Schedule B’s for \$3,000 each
 - Change for in-transit sale
 - EEI filed for 10,000 units sold to Company A
 - Company A changes order to 6,000 units
 - 4,000 units sold in-transit to Company B
 - EEI filed to reflect change in sale



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- > Inflation of Penalty Amounts:
- > Foreign Trade Regulations
 - *“Failure to file or delayed filing violations. A civil penalty not to exceed \$1,100 for each day of delinquency beyond the applicable period prescribed in § 30.4, but not more than \$10,000 per violation, may be imposed for failure to file information or reports in connection with the exportation or transportation of cargo.”* 15 C.F.R. § 30.71(b)(1)
- > CBP Guidelines state a “failure to file” occurs when:
 - “the government discovers that there is no record in the AES for an export transaction by the date that the record is required and that discovery is made and communicated to the USPPI (United States Principal Party in Interest), authorized agent, or other party before the violation is corrected.”
 - “failure to file” = \$10,000 penalty – regardless of when the filing is made



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> Recommendations:

- Revisit your AES compliance policies and procedures
- Ensure good communication with your filer/agent
- Take advantage of voluntary disclosure program with Census
 - Filing a voluntary disclosure with Census BEFORE you modify your EEI may foreclose a penalty from CBP



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