



GLOBAL TRADE EDUCATIONAL CONFERENCE

# National Educational Institute of the NCBFAA: Global Trade Education Conference

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# **CES Session: Avoid Surprises When the Government Comes Calling on Export Violations**



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Do you have questions about importing/exporting?

<http://www.grcustomslaw.com>

### CBP Doubles the Penalties Against U.S. Companies, Says Commissioner

At the National Customs Brokers and Forwarders Association of America (NCBFAA) Annual Conference held in Orlando, Florida, last week, U.S. Customs and Border Protection (CBP) Commissioner Kerlikowske made some surprising comments in his prepared remarks.

Regarding the topic of "Trade Enforcement" by CBP, the Commissioner stated:

Even before my confirmation as Commissioner last year, I heard from trade and Congressional leaders about the importance of enforcing U.S. trade laws, and the critical role CBP plays in protecting American business and the U.S. market. I recognize those concerns, and we have made some important strides.

For example, CBP and Immigration and Customs Enforcement, Homeland Security Investigations (ICE/HSI) continue to enhance training, processes, and operations to attack smuggling and explosive growth in shipments of counterfeit goods, many of which pose serious threats to public health, safety and both national and economic security.

And here is where it gets really interesting; where the rubber meets the road. Commissioner Kerlikowske exclaimed:

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**GRAY ROBINSON**  
ATTORNEYS AT LAW

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# Questions??



# Reminder:

## Destination Control Statements

- Purpose is to alert parties outside the U.S. that receive an item that:
  - The item is subject to the EAR
  - The item was exported in accordance with the EAR
  - That diversion contrary to U.S. law is prohibited



# Export Enforcement Federal Agencies

1. OFAC



2. BIS



3. TSA



Transportation  
Security  
Administration

4. CBP



5. U.S. Census Bureau



6. Homeland Security Investigations (HSI)



7. DDTC

# FedEx settles with BIS – Charges of Causing, Aiding and Abetting Unlicensed Exports

- FedEx paid \$370,000 in Civil Penalty to BIS to settle allegations it committed six (6) violations of EAR when it facilitated attempted transport of electronic components of companies on the Commerce Department's Entity List.

The FedEx logo, featuring the word "FedEx" in a bold, sans-serif font. The "Fed" is purple and the "Ex" is orange.

# Federal Agency Penalty Process

- Step 1- transportation or attempted transportation of shipment
- Step 2- violation
- Step 3- penalty or voluntary disclosure
- Step 4- Federal agency administrative resolution





# Federal Investigations for Export Activities

- Criminal
- Administrative
- Target, Suspect, Witness, Other



# OFAC Enforcement

- What triggers an investigation?
  - Reports of blocked property or rejected transactions
  - Self-Disclosures
  - Referrals from other USG offices
  - Referrals from foreign government agencies
  - Ongoing/existing cases
  - Informants
  - Other publicly available information



# OFAC Sanctions Program

1. Specially Designated National List (SDN List)
2. Counter Terrorism Sanctions
3. Counter Narcotics Trafficking Sanctions
4. Non-proliferation sanctions
5. Country specific sanctions (Cuba, Iran, Syria, etc).



# OFAC Subpoena Power

## 31 C.F.R. 501.602

- **Broad Subpoena Power.** “Every person is required to furnish under oath... at any time as may be required... complete information relative to any transaction... subject to the provision of this chapter or relative to any property in which any foreign country or any national thereof has any interest of any nature whatsoever, direct or indirect.”







DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

ENF

DEC 28 2012

Miami, FL

Re: Administrative Subpoena

Dear Mr. :

The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") has reason to believe you may have exported or imported goods or services to or from Iran. OFAC is conducting a civil investigation into such potential exports or imports.



# Failure to Furnish Requested Information to OFAC Pursuant to 31 CFR 501.602

1. \$20,000 Penalty
2. \$50,000 Penalty if value involves more than \$500,000



# OFAC Responses to Apparent Violations

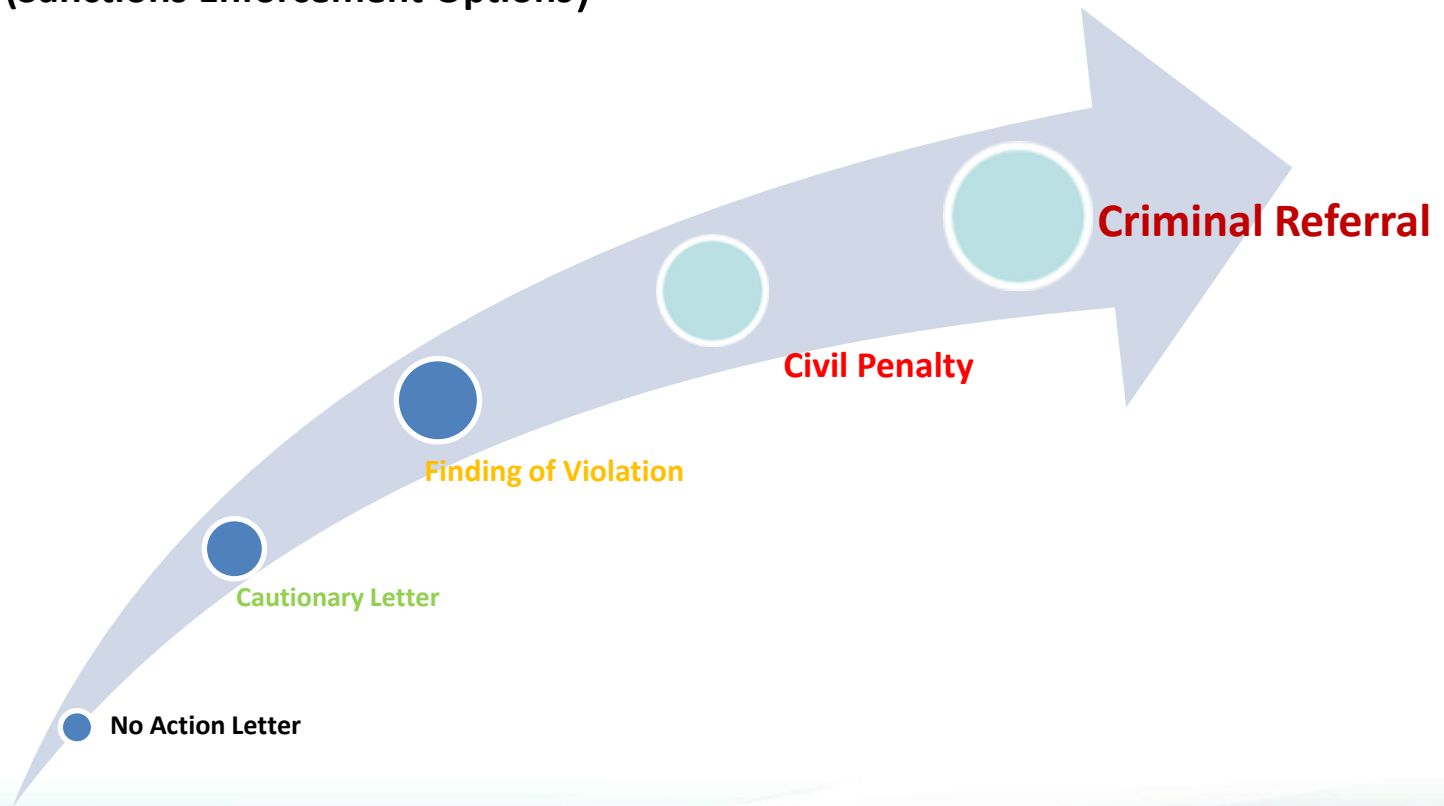
An OFAC Investigation May Lead to:

- No Action
- Request for Further Information
- Cautionary Letter
- Finding of Violation (Non-Monetary)
- Civil Monetary Penalty
- Criminal Referral
- Other
  - License Suspension
  - Cease and Desist Order



# Enforcement

Resolution (Sanctions Enforcement Options)







DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

ENF:

Peter A. Quinter  
GrayRobinson, P.A.  
1221 Brickell Avenue, Suite 1600  
Miami, FL 33131

FEB 1 2013

Subject: Cautionary Letter to

Dear Mr. Quinter:

The Department of the Treasury's Office of Foreign Assets Control ("OFAC") appreciates your assistance during its investigation of your client, ]

OFAC has decided to address this matter by issuing the enclosed Cautionary Letter to Mr. .  
Please ensure that your client receives this Cautionary Letter.

Should you have any questions, please contact me at (202) 622-6059 or at  
[Matthew.Glass@treasury.gov](mailto:Matthew.Glass@treasury.gov).

Sincerely,

Matthew Glass  
Enforcement Officer  
Office of Foreign Assets Control

Enclosure





DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

**CAUTIONARY LETTER**

ENF

FEB 1 2013

Dear Mr. \_\_\_\_\_ :

Thank you for your response of April 5, 2011 to an administrative subpoena of February 14, 2011 from the United States Department of the Treasury's Office of Foreign Assets Control ("OFAC") regarding a potential violation of the Iranian Transactions and Sanctions Regulations, 31 C.F.R. part 560.

OFAC has completed its review the eight transactions detailed in your response, three of which involved personal remittances to parties in Iran and five of which involved payments to \_\_\_\_\_ . Engaging in commercial transactions with entities who do not utilize transparent payment methods poses an increased risk for U.S. persons as the lack of transparency makes it difficult for U.S. persons to ensure compliance with the Regulations.

OFAC has decided to address this matter by issuing you this Cautionary Letter instead of pursuing a civil monetary penalty. This Cautionary Letter represents a final enforcement response to the apparent violations but does not constitute a final agency determination as to whether violations occurred, nor does it preclude OFAC from taking future enforcement action should new or additional information warrant renewed attention. Under applicable law, each violation of the Regulations is subject to a civil monetary penalty of up to the greater of \$250,000 or twice the value of the transaction.

Should you have any questions, you may contact Enforcement Officer Matthew Glass at (202) 622-6059.

Sincerely,

Maura K. Rezendes  
Enforcement Section Chief  
Office of Foreign Assets Control



# OFAC Enforcement Guidelines

- 31 CFR Part 501, Appendix 501, Appendix A
- Final Rule issued November 9, 2009
- Set forth the General Factors that OFAC may consider in determining the appropriate administrative action in response to an apparent violation of U.S. sanctions.



# OFAC Civil Penalty Process

1. Pre-Penalty Notice
2. Response to Pre-Penalty Notice
3. Penalty Notice
4. Referral to DOJ for Collection.





# OFAC Enforcement

- The General Factors:
  - A. Willful or Reckless Violation of Law
  - B. Awareness of Conduct at Issue
  - C. Harm to Sanctions Program Objectives
  - D. Individual Characteristics
  - E. Compliance Program
  - F. Remedial Response
  - G. Cooperation with OFAC
  - H. Timing of Apparent Violation
  - I. Other Enforcement Action
  - J. Future Compliance/Deterrence Effect
  - K. Other Relevant Factors



# BIS Compliance and Enforcement

Export Enforcement continues to detect, investigate, and deter the unauthorized export and reexport of U.S.-origin items to parties involved with:

- Unauthorized military modernization
- Weapons of mass destruction programs
- Terrorism
- Human rights abuses

Our partnership with industry is important



# International Trade Data Systems and Compliance

- Automated Export System (AES) and Automated Commercial Environment (ACE)
- Working with U.S. Customs and Border Protection, Census Bureau and others to implement new functionality in AES.
- This will allow exporters to make real time changes



# Voluntary Self-Disclosure

- Turning yourself in: Bureau of Industry and Security
- Outline: Violations, The Process, Sanctions, & Disclosure v. Non-Disclosure





## **Voluntary Self-Disclosures to BIS:**

BIS encourages the submission of Voluntary Self Disclosures (VSDs) by parties who believe they may have violated the EAR. VSDs are an excellent indicator of a party's intent to comply with U.S. export control requirements and may provide BIS important information on other ongoing violations. BIS carefully reviews VSDs received from disclosing parties to determine if violations of the EAR have occurred and to determine the appropriate corrective action when violations have taken place. Most VSDs are resolved by means other than the issuance of an administrative penalty. In instances in which BIS determines that the issuance of an administrative penalty is appropriate for the resolution of a VSD, BIS affords the submission of a VSD "great weight" in assessing and mitigating the penalty. In appropriate cases, fines and other administrative penalties may be significantly reduced.

Pursuant to Part 764.5 of the EAR, the information constituting a VSD or any other correspondence pertaining to a VSD may be submitted to:

Director, Office of Export Enforcement  
1401 Constitution Ave., Room H4514  
Washington, DC 20230  
Tel: (202) 482-1208  
Facsimile: (202) 482-5889



# Voluntary Self-Disclosure: What is a violation?

- (a) Engaging in prohibited conduct
- (b) Causing, aiding, or abetting a violation
- (c) Solicitation
- (d) Conspiracy
- (e) Acting with knowledge of a violation
- (f) Possession with intent to export illegally
- (g) Misrepresentation and concealment of facts
- (h) Evasion
- (j) License alteration
- (k) Acting contrary to the terms of a denial order



# VSD: The Process

- ALL Voluntary Self-Disclosures should be made to the BIS Office of Export Enforcement
- OEE: Procedures
- VSD: Only a Mitigating Factor
- Other Mitigating and Aggravating Factors



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# VSD: Procedural Requirements

## Initial Disclosure:

- Initial notification

## After the initial notification:

- Narrative account
  - The kind of violation involved
    - Explanation of violation
    - Identities
    - Description of Items involved
    - Supporting documents, shipping documents & mitigating circumstances





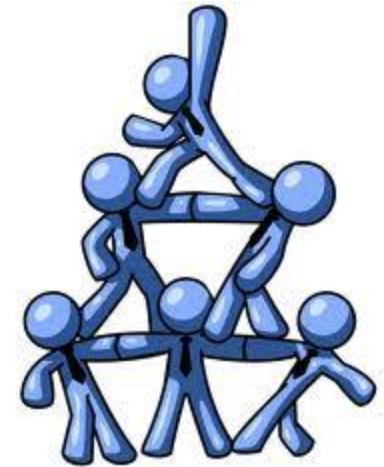
# BIS Special Mitigating Factors

1. Voluntary Self-Disclosure
2. Effective export compliance program
3. Violation was isolated occurrence
4. License would have been issued
5. Cooperating with Agency




# Elements of an Effective Export Management and Compliance Program

1. Management Commitment
2. Continuous Risk Assessment
3. Formal written export management and compliance program
4. Ongoing training and awareness
5. Follow recordkeeping requirements
6. Periodic internal and external audits
7. Reporting procedure to export compliance problems.



# BIS Base Penalty Matrix

## Egregious Case

	No	Yes
<p>Voluntary Self-Disclosure</p> <p>Yes</p>	(1) One-Half of Transaction Value (Capped at \$125,000 per violation/\$32,500 per TWEA Violation)	(3) One-Half of Applicable Statutory Maximum
<p>No</p>	(2) Applicable Schedule Amount (Capped at \$250,000 per violation/\$65,000 per TWEA violation)	(4) Applicable Statutory Maximum



# BIS Penalty Procedure

- Supplement No. 1 to Part 766 – Guidance on Charging and Penalty Determinations in settlement of Administrative Enforcement Cases.
- Factors
  - Degree of willfulness
  - Destination involved
  - Related violations
  - Timing of Settlement



Voluntary Self- Disclosures to  
Directorate of Defense Trade Controls  
U.S. Department of State





United States of America Department of State  
Application/License for Permanent Export of Unclassified  
Defense Articles and Related Unclassified Technical Data

22. Applicants Statement-

- An empowered official (22 CFR § 120.25) or an official of a foreign government entity in the U.S., hereby apply for a license to complete the transaction above; warrant the truth of all statements made herein; and acknowledge, understand and will comply with the provisions of Title 22 CFR § 120-130, and any conditions and limitations imposed.



## § 127.1 - Violations.

(a) It is unlawful:

- (1) To export or attempt to export from the United States, or to reexport or retransfer or attempt to reexport or retransfer from one foreign destination to another foreign destination by a U.S. person of any defense article or technical data or by anyone of any U.S. origin defense article or technical data or to furnish any defense service for which a license or written approval is required by this subchapter without first obtaining the required license or written approval from the Directorate of Defense Trade Controls;
- (3) To conspire to export, import, reexport or cause to be exported, imported or reexported, any defense article or to furnish any defense service for which a license or written approval is required by this subchapter without first obtaining the required license or written approval from the Directorate of Defense Trade Controls;
- (4) To violate any of the terms or conditions of licenses or approvals granted pursuant to this subchapter.



## **§ 127.6 - Seizure and forfeiture in attempts at illegal exports.**

- (a) Whenever it is known or there is probable cause to believe that any defense article is intended to be or is being or has been exported or removed from the United States in violation of law, such article and any vessel, vehicle or aircraft involved in such attempt is subject to seizure, forfeiture and disposition as provided in section 401 of title 22 of the United States Code.



## § 127.12 Voluntary disclosures.

*General policy.* The Department strongly encourages the disclosure of information to the Directorate of Defense Trade Controls by persons, firms, or any organizations that believe they may have violated any export control provision of the Arms Export Control Act, or any regulation, order, license, or other authorization issued under the authority of the Arms Export Control Act. Voluntary Self-Disclosure may be considered a voluntary disclosure as a mitigating factor in determining the administrative penalties, if any, that should be imposed. Failure to report a violation may result in circumstances detrimental to U.S. national security and foreign policy interests, and will be an adverse factor in determining the appropriate disposition of such violations.



*Limitations. –*

(2) The provisions of this section apply only when information is received by the Directorate of Defense Trade Controls for review **prior to such time** that either the Department of State or any other agency, bureau, or department of the United States Government obtains knowledge of either the same or substantially similar information from another source and commences an investigation or inquiry that involves that information, and that is intended to determine whether the Arms Export Control Act or these regulations, or any other license, order, or other authorization issued under the Arms Export Control Act has been violated.

(3) The violation(s) in question, despite the voluntary nature of the disclosure, may merit penalties, administrative actions, sanctions, or referrals to the Department of Justice to consider criminal prosecution. In the latter case, the Directorate of Defense Trade Controls will notify the Department of Justice of the voluntary nature of the disclosure, although the Department of Justice is not required to give that fact any weight. The Directorate of Defense Trade Controls has the sole discretion to consider whether “voluntary disclosure,” in context with other relevant information in a particular case, should be a mitigating factor in determining what, if any, administrative action will be imposed.





# DDTC Mitigating Factors

- (1) Whether the transaction would have been authorized, and under what conditions, had a proper license request been made;
- (2) Why the violation occurred;
- (3) The degree of cooperation with the ensuing investigation;
- (4) Whether the person has instituted or improved an internal compliance program to reduce the likelihood of future violation;
- (5) Whether the person making the disclosure did so with the full knowledge and authorization of the person's senior management.





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# Thank You!



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