- The agency can still refer the matter to Justice for criminal prosecution, especially in egregious cases.

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).[26]

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."[27] 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. Failure to respond can result in additional violations, waiver of rights and additional penalties.[28]

- 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[29] 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.

The remainder of this article is available in Part II to follow.

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.

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[2] 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."

[3] See 18 USC §1519.

[4] See Upjohn Co. v. United States, 449 U.S. 383 (1981).

[5] This covers false classifications of quality or value, entry of goods by paying less that the amount of duty legally due, and similar violations.

[6] 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).

[7] See, eg., 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).

[8] 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.

[9] §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 mere 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."

[10] United States v. Bishop, 740 F.3d 927 (4th Cir. 2014).

[11] 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.

[12] Bryan v. United States, 524 U.S. 184 (1998).

[13] See for example United States v. Hsu, 364 F.3d 192, 198 n.2 (4th Cir. 2004); United States v. Roth, 628 F.3d 827 (6th 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 (3d 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 (1st 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 (8th Cir. 1987) in which the court interprets willfully to require that a defendant knew that the underlying exported items were on the Munitions List.

[14] 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."

[15] Which deal with violations including false classifications, making false statements in import transactions and duty evasion.

[16] 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 (3rd 1990).

[17] 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.

[18] 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.

[19] See 19 USC §1592(a).

[20] See 31 CFR Part 501 Appendix A.

[21] 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.

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

[23] 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.

[24] See In the Matter of Sigma-Aldrich Business Holdings, Inc.

[25] 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.

[26] See 22 CFR §§ 126.1(e)(2) and 123.17(j).

[27] 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.

[28] 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.

[29] 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.

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