



A Basic Guide To U.S. Export Controls Penalties & Voluntary Disclosure

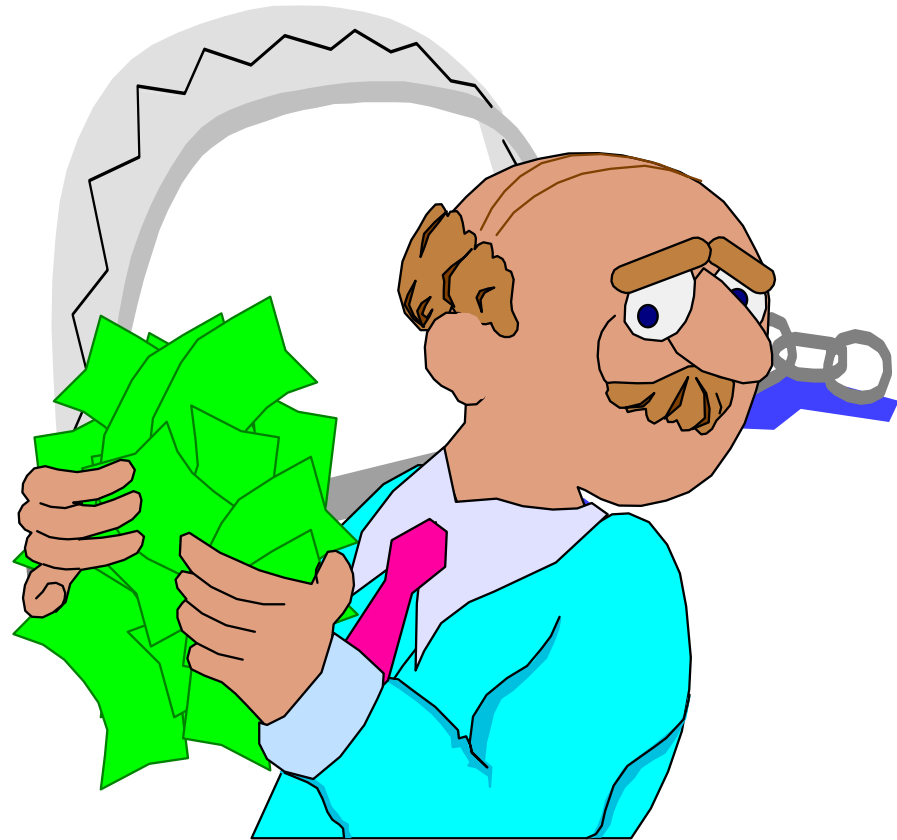
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What are the Penalties Under The EAR?

- BIS Export violations
 - Civil penalty of \$10,000 to 100,000 per transaction
 - Possible Loss of Export Privileges
 - Criminal penalties and jail time (usually probation or controlled release)
- Violations are typically measured on a per-shipment basis and there can be multiple violations in a single shipment.





Penalties Under IEEPA

- Since August 21, 2001, the Export Administration Act has been in lapse.
- By Executive Order, the EAR has been extended and continued under the International Emergency Economic Powers Act (“IEEPA”) (50 U.S.C. § 1701 – 1706 (2000))
- Penalties For Violation of EAR under IEEPA
 - On October 16, 2007, President Bush signed the International Emergency Economic Powers Enhancement Act.
 - Under the amended IEEPA, the maximum civil penalty per violation increases from \$50,000 to the greater of \$250,000 or twice the amount of the transaction that is the basis of the violation.



Penalties Under IEEPA

- The increase imposed by the IEEPA Enhancement Act followed a 2006 increase in penalties from \$11,000 to \$50,000 per violation.
- Act also increases criminal penalties to \$1 million per violation and prison terms of up to 20 years.
- The new penalties are partially retroactive for civil violations because the law applies to violations in which “enforcement action is pending or commenced” on or after October 16, 2007.
- IEEPA penalties also apply to violations of OFAC regulations.



EAR Violations

- Two types of EAR Violations
 - Strict liability
 - Knowledge based violations



Strict Liability Violations

- Examples of Strict Liability Violations
 - Export or reexport of articles to a country without a license when one is otherwise required
 - Export or reexport of an article to a party that has had its export privileges revoked, or is otherwise identified as an entity that requires an export license



EAR “Knowledge” Based Controls

- Various requirements of the EAR are dependent upon a person's knowledge of the end-use, end user, ultimate destination, or other facts relating to a transaction or activity.
- These provisions include the non-proliferation-related “catch-all” sections and the prohibition against proceeding with a transaction with knowledge that a violation of the EAR has occurred or is about to occur.



Knowledge Based Violations

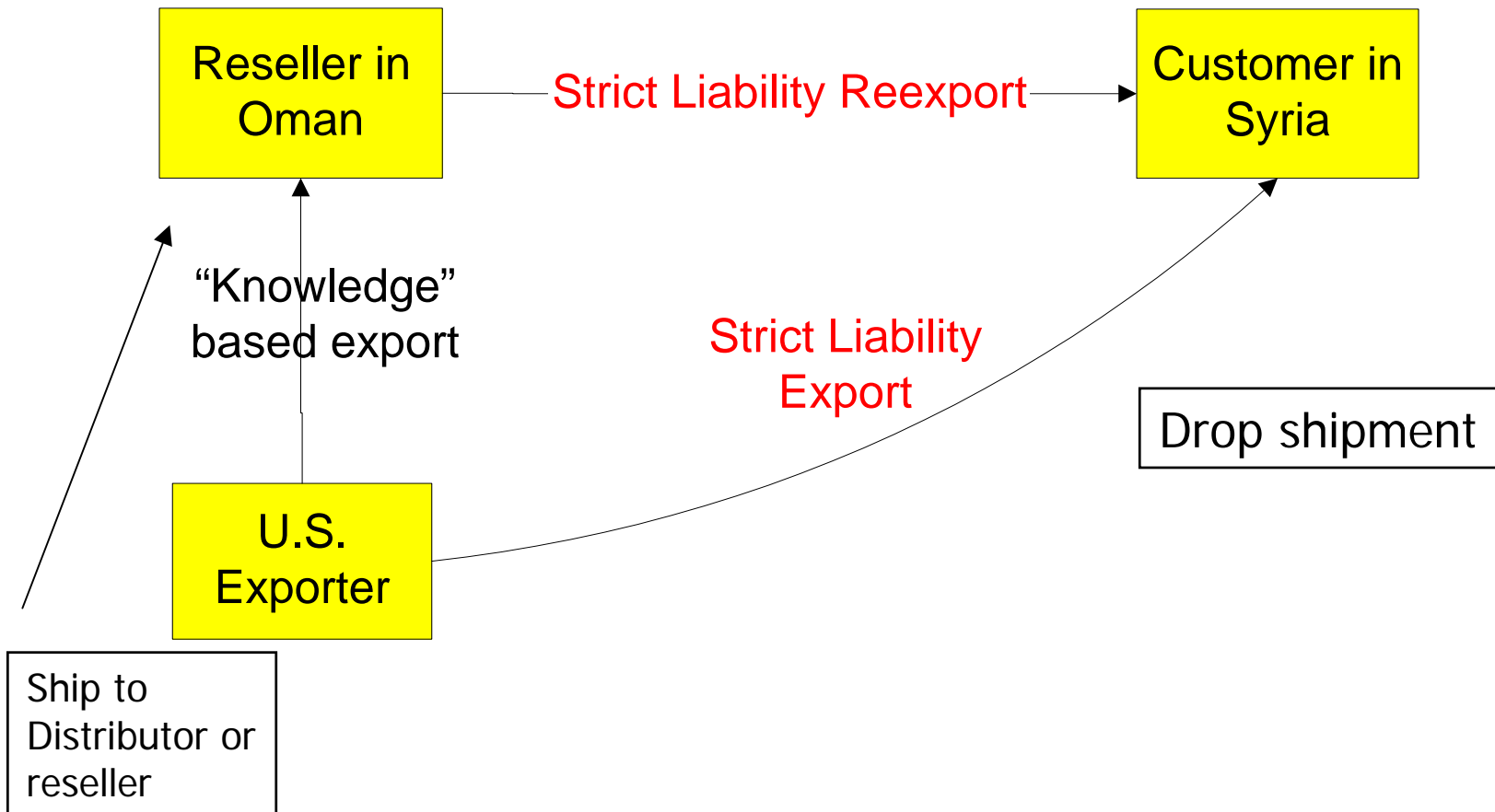
- Examples of Knowledge Based Violations
 - Selling, exporting or reexport goods or technology when one knows, or has reason to know, that items may be put to an unauthorized use
 - Selling, exporting or reexport goods (or technology) when one knows, or has reason to know, that items may exported, reexport or diverted to an unauthorized destination or end user [I.e., Syria, Iran, Cuba]



Knowledge Based Restrictions

- The EAR requires an exporter to submit a validated license application if:
 - the exporter "knows" has “reason to know” that an export that is otherwise exempt from the validated licensing requirements is
 - for end-uses involving nuclear, chemical, and biological weapons (CBW), or related missile delivery systems

Knowledge Based Violations





What does “Knowledge” Mean?

- EAR 772.1 definition –
- Knowledge of a circumstance includes:
 - positive knowledge that the circumstance exists or is substantially certain to occur,
 - awareness of a high probability of its existence or future occurrence.
 - Awareness can also be **inferred** from evidence of a conscious disregard of facts known to a person or
 - **Inferred** from a person's willful avoidance of facts.
- The term "knowledge includes" "reason to know," or "reason to believe"



Voluntary Self-Disclosures

- Bureau of Industry and Security
 - Voluntary disclosures for non-boycotted related violations are found in Sec 764.5 (EAR).
 - <http://www.bis.doc.gov/complianceandenforcement/vsdpaper101105.pdf>
 - <http://www.bis.doc.gov/news/2007/cases/fy2006vsd.pdf>
 - Mitigations range from 30% to 40% of maximum penalty



Voluntary Self-Disclosures

VOLUNTARY SELF DISCLOSURE CASES FY2006

(28 VSD Cases)

ORDER DATE	CASE NAME	CHARGES	SECTIONS VIOLATED	RESULT	PENALTY BREAKDOWN
09/07/06	In the Matter of Cerac, Inc.	Exported specialty inorganic materials to India, Israel, the People's Republic of China, Taiwan and Thailand and exported quantities of Iron and Selenium to the Inter University Consortium in India, an organization which was then on the Entity List without the required licenses and with knowledge that violations would occur; made false or misleading statements on SEDs concerning authority to export and with knowledge that violations would occur	764.2(a) [30] 764.2(e) [38] 764.2(g) [8]	Settlement Agreement - civil penalty of \$297,000	maximum fine was \$836,000 avg: \$3900 fine was 36% of the maximum partial VSD
08/16/06	In the Matter of Spectrum Laboratory Products, Inc.	Exported troilamine and phosphorus oxychloride to Israel and Hong Kong without the required licenses	764.2(a) [4]	Settlement Agreement - civil penalty of \$20,000	maximum fine was \$44,000 avg: \$5000 fine was 45% of the maximum full VSD



Voluntary Self-Disclosures

- Voluntary self-disclosure is a mitigating factor in determining what administrative sanctions, if any, will be applied by BIS or other agencies.
- Agencies strongly encourage disclosure if it is believed there may have been a violation of the agency's regulations, or any order, license or authorization issued there under.
- The weight given to voluntary self-disclosure is solely within the discretion of the agency, and the mitigating effect of voluntary self-disclosure may be outweighed by aggravating factors.



BIS Export Control Disclosures

- Limitations For BIS Export Control Disclosures [764.5(b)]
 - Valid only if received prior to agency learning of or already having commenced an investigation or inquiry
 - Applies only for determining administrative sanctions;
 - Will not preclude matter from being referred to Dept of Justice for criminal prosecution (but will be given weight)
 - To be valid must be done with “full knowledge and authorization of senior management.”



BIS Export Control Disclosures

- What information should be included?
 - Narrative description
 - What kind of violations are involved?
 - exporting out a license
 - Exporting to a restricted party or entity
 - When and how did violations occur?
 - Identify individuals and all entities involved
 - License numbers, description and quantities of merchandise or tech data, ECCNs, etc.,
 - Description of any mitigating circumstances



BIS Export Control Disclosures

- What information should be included?
 - Explanation of nature/scope of review conducted
 - Steps take to minimize likelihood of further violations
 - Compliance program, technology control plan, training of personnel, changes to IT systems, etc.
 - Supporting Documentation
 - Licenses, CCATS decisions, import certificates
 - Shipping documents (AES/SED, waybills, export invoices)
 - Correspondence/ e-mails, payment records, internal memos
 - Certification
 - Disclosures must be signed by upper management and state that all representations are to the best of that person's knowledge and belief "true and accurate"



When To Disclose?

- Immediately or after research and review?
 - OEE suggests initial notification as soon as problem is discovered and then
 - conduct a thorough investigation of all transactions suspected of being within the scope of the disclosure and follow up with written narrative of findings
 - Recommended that review should cover prior five years or until begin of problem
 - Non-disclosed problems are not within protections of disclosure
- How much time between initial notification and completion of disclosure?



Results of a BIS Disclosure

- OEE may take the following actions on a disclosure:
 - Inform the person making the disclosure that, based on the facts disclosed, it plans to take no action
 - Issue a warning letter
 - Issue a proposed charging letter pursuant to §766.18 of the EAR and attempt to settle the matter (penalty)
 - Issue a charging letter pursuant to §766.3 of the EAR if a settlement is not reached; and/or
 - Refer the matter to the Department of Justice for criminal prosecution.