STEPTOE OUTSIDE COUNSEL

Conquering fears of US export control voluntary disclosures

Mistakes are not uncommon given the complexity of export controls compliance under the US Export Administration Regulations ("EAR") and the US International Traffic in Arms Regulations ("ITAR"). Even with the best intentions, training, and automated systems, compliance professionals periodically receive "red alerts" of potential violations.

How should you approach a potential voluntary disclosure when you uncover an EAR- or ITAR-related error?

First, don't panic. Many potential violations are not actual violations – the first step is to get some initial facts, consider how the facts apply to the regulations, and determine whether there is an actual violation. You may find a gap in compliance knowledge, but not an actual violation.

While you are working through the facts, take steps to prevent any ongoing or potential violations. Ask employees to save relevant files and records.

If you do determine in your initial review that there is a violation of the EAR or ITAR, you will need to decide whether to disclose the violation and how to approach any disclosure. Some disclosures are mandatory or quasi-mandatory. If it is a mandatory disclosure – such as a violation related to an ITAR arms embargo under Part 126 – you must disclose, promptly. If your company has ongoing time-sensitive activity associated with the violation – resulting in a separate violation under General Prohibition 10 of the EAR – disclose and seek authorization through BIS's special authorization process for future activity.

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In other situations, you may want to disclose because you need to seek permission from an agency for related activity; because there is a significant risk that the agency will uncover the violation; to demonstrate a compliance program able to detect and fix errors; to alert the US government to potentially serious national security implications; to mitigate penalties; or because it is necessary to position the company for a merger or other transaction. Companies may determine not to disclose based on an assessment of the likelihood of the agency finding out on its own, as well as the desire to avoid penalties or lawsuits. Some companies prefer to fix and move on from small errors rather than be seen as a repeat violator.

If the violation is significant or if your company does not yet have a policy on how to handle voluntary disclosures, involve senior leadership. You may also want to involve outside counsel or other experts if you need assistance with the internal investigation, assessing risk, considering disclosure requirements, drafting the disclosure, closing the compliance gap, or working with the agency. It may be necessary to involve internal or external legal advisors early in the investigation to address other legal issues, such as those arising under employment and privacy law, and to maintain privilege.

If you have decided to submit a disclosure, review the EAR and ITAR disclosure rules and follow the requirements for what to disclose and timing requirements for initial and final reports. An initial report can be very short – just the basics. For the final report, write a clear and simple narrative. Get to the point up front, and include relevant details with headings. Include more complex details in attachments (such as spreadsheets showing what was exported, when, and to whom), along with copies of back-up documentation. Identify the root cause(s) of the problem and describe any mitigating factors and corrective actions already taken and to be taken. Most voluntary disclosures result in a warning letter – you increase your chances of getting that result with a well-drafted disclosure.

Consider whether there may be benefits to disclosing to another agency: an EAR or ITAR export violation may also involve errors in customs records or a violation of sanctions restrictions governed by the US Office of Foreign Assets Control, or could implicate Justice Department disclosure guidance.

After submitting any disclosure, follow through with closing the gap that led to the error. Corrective actions should be realistic and practical – and implemented, including with training. A second disclosure about the same error after ineffective corrective actions will not get the same treatment as the first.

Finally, if you don't have one, consider implementing a voluntary disclosure policy. A policy can guide your response in working with employees, senior leadership, and export agencies. ■

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