GUIDE TO AUTHORS

The following is a brief guide concerning the provision of articles which may be of assistance to authors.

1. Articles must be submitted in Microsoft Word format, in their final form, in correct English. Please send the electronic file to the Editor by e-mail, at jsnyder@crowell.com.

2. Special attention should be given to quotations, footnotes and references which should be accurate and complete. In the case of book references please provide the name of the author, publisher, place and year of publication.

3. Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Keep column headings as brief as possible and avoid descriptive matter in narrow columns.

4. A brief biographical note, including both the current affiliation as well as the e-mail address of the author(s), should be provided in the first footnote of the manuscript.

5. Due to strict production schedules it is often not possible to amend texts after acceptance or send proofs to authors for correction.

6. Articles which are submitted for publication to the editor must not have been, nor be, submitted for publication elsewhere.

7. This article should contain an abstract, a short summary of about 100 words, placed at the beginning of the article. This abstract will also be added to the free search zone of the Kluwer Online database.

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The export control and economic sanctions laws are a minefield for U.S. companies that export products and engage in other forms of cross-border transactions. Mistakes are common, even for diligent, well-intentioned exporters.

The company suspecting it has exported an item or technology outside of compliance with these complex laws must consider whether to disclose the violation to the relevant federal agency. Although usually not required by law, a voluntary disclosure can be advisable for many reasons, including avoidance or mitigation of penalties.

But two things are true about the vast majority of violations: Most do not remotely threaten the national security of the United States and most are unlikely to be independently discovered by the enforcing agency. The would-be discloser is justified in wondering what is the merit—for the company and for the national security—in making a disclosure. In addition, where the company does decide to disclose, it confronts a host a questions, including what should be disclosed, how, to whom, and when to make the disclosure.

This article considers these questions in the context of the three primary U.S. export-control and economic sanctions laws: the International Traffic in Arms Regulations (ITAR), administered by the State Department’s Directorate of Defense Trade Controls (DDTC); the Export Administration Regulations (EAR), administered by the Commerce Department’s Bureau of Industry and Security (BIS); and the economic sanctions regulations administered by the Treasury Department’s Office of Foreign Assets Control (OFAC).

1. Three Threshold Questions

Trade controls violations come in all shapes and sizes: Was a Japanese visitor granted access to semiconductor technology previously modified for military application and controlled under the ITAR? Did the engineering department modify the encryption functionality of its software without reevaluating its status under the EAR? Did the Spanish subsidiary of the U.S. company make an investment in Cuba in violation of the OFAC sanctions against that country? The concern may have arisen organically within the company, or it may be prompted by a diligence inquiry from a business partner or potential investor. Whatever the source, the company’s options will be preserved—and its risks minimized—if it quickly tackles three questions.

1.1. Does the Company Need Outside Representation?

When a violation is suspected, the key to achieving the best outcome is balancing speed, factual accuracy in the investigation, and expertise with the applicable laws and regulations. As such, the company lacking in-house legal expertise is usually advised to obtain outside counsel. Particularly where the suspected violation has serious national security implications, contravenes important U.S. foreign policy objectives, or indicates willful misconduct of a potentially criminal nature, having the right legal expertise can be outcome determination.

Even for less significant violations, outside counsel brings experience with the relevant agency and its regulations and an independence that confers legitimacy upon the investigation. An independent lawyer is usually better situated to ensure that privileges are maintained, especially during the early stages of the investigation, before a decision has been made about whether to make a disclosure. Where an individual’s interests or culpability may diverge from that of the company such that they require separate representation, or where circumstances suggest that the board of directors should control the investigation rather than those directly implicated, outside counsel can be especially important.
Another advantage of outside counsel is capacity. Even some large, sophisticated defense contractors who have the requisite in-house expertise rely on outside counsel for internal investigations simply to minimize the diversion of company personnel to the task.

But outside counsel brings disadvantages as well. These include cost, the risk that a more comprehensive investigation uncovers more to be disclosed (which can also be a benefit), and a heightened anxiety among the employees involved in the investigation that is inevitable where outside lawyers are involved.

1.2. Are Relevant Documents Being Preserved?

Documents are immediately important, both as a source of information about the violation and how it occurred and because the U.S. trade laws impose recordkeeping obligations whose breach may constitute independent violations of law. Depending on the company’s size and the nature of the perceived violation, appropriate preservation measures range from segregation of a hard-copy file to implementation of a formal “litigation hold” protocol that includes electronic documents.

A document hold should reach back at least five years to account for the statute of limitations and the applicable recordkeeping obligations. The challenge here is to preserve relevant documents while avoiding undue alarm within the company, as it may be unclear until documents are examined and witnesses interviewed whether a violation has even been committed.

1.3. Does the Violation Require Modification of Existing Practices?

A past violation frequently will impact the company’s current and future operations. The broad, sometimes systemic consequences of an error must be assessed quickly, not only to be factored into whether to disclose a specific violation but also for the more immediate purpose of ensuring that additional violations do not accumulate.

To give one example, the misclassification of an ITAR defense article as “dual use” under the EAR may implicate not only prior exports but also pending ones, or it may complicate the planned or existing employment of foreign nationals to work with technology relating to the item. If a company with knowledge of a misclassification proceeds with exports or technology disclosures without the necessary authority, it may surrender its best defense to an enforcement action, which is that it acted inadvertently.

To change the example slightly, however, what if it is only a potential misclassification? In addition, what if it cannot be resolved short of approaching the agency, inviting delay to the point of frustrating business purpose? Where the company is heavily dependent on the cash flow expected from future exports that may be unlawful but are not clearly so, a conversation about how to proceed can be prickly. May the company continue to export without a license until reaching clarity on whether a license is required? May it continue to provide services (e.g., software patches, help desk support, etc.) for items exported without authorization, which itself may require authorization? Does the company defer a definitive conclusion about the classification—for example, until after the year-end sales have been invoiced and shipped—or does that exacerbate the problem?

The dilemma often pits short-term gains from sales against the company’s long-term interests in preserving corporate integrity and a clean record, not to mention potential impact on national security. It is counsel’s uncomfortable role to clarify the cognitive dissonance in these hard conversations.

2. Deciding Whether the Matter Should Be Disclosed to the Relevant Agency

Having addressed the three important questions above, the company is ready to push the investigative process forward with a first goal of assessing whether the matter must be disclosed to the agency to meet some positive legal obligation (e.g., the company has in its possession property of an OFAC Specially Designated National), or, in the absence of such a duty, whether it nevertheless should be disclosed.

2.1. Has There Been a Violation of Law?

However obvious, an early step in assessing the propriety of a disclosure is determining exactly which laws have been violated and how. What at first appear to be violations frequently have turned out to be “false positives” upon closer analysis. False-positive disclosures result from simple haste, whether from pressure by the applicable regulations to notify the agency “immediately” upon learning of the violation, from concern that a potential whistle-blower or industry competitor will disclose first, or because a contractual
commitment made as a condition of closing an imminent transaction leads to shortcuts in the investigation. Haste causes misapprehensions of facts, which in turn result in misstatements of fact in the disclosure. Even if these misstatements are inadvertent and immaterial, they can be hard to undo and may bring additional scrutiny upon the entire disclosure.

Equally vexing is legal error. The laws can be difficult to apply, even for the practiced professional, as they are riddled with exceptions, exceptions to exceptions, general and specific license opportunities, jurisdictional limitations, statutes of limitation, changes in the law, shifting interpretations within the agency, and other complexities.

Another question is whether the perceived violation implicates more than one set of laws, such that a disclosure to one agency may necessitate disclosures to others. For instance, an unlicensed export in violation of the EAR may also involve a violation of the Foreign Trade Regulations administered by the U.S. Census Bureau, or technology shared with a foreign national may implicate both ITAR and EAR prohibitions.

2.2. What Is the Likelihood of Detection and Enforcement Absent a Disclosure?

A company weighing its options will often want to know the likelihood the violation will be discovered by the agency through other means. This question can be awkward for counsel more accustomed to predicting outcomes of court and agency decision making than to hazarding guesses on the likelihood that a violation will be detected; however, because most disclosures under the trade laws are voluntary rather than obligatory, it is fair and appropriate to consider whether a violation is otherwise likely to be discovered.

These appraisals of risk are likely to be inconclusive because the analysis is so fraught with variables and the sources of potential disclosure so numerous: employees who become whistle-blowers, including to capitalize on laws that reward a portion of the recovery from a penalty; industry competitors; business partners implicated in the violative transaction who elect to disclose or may be required to do so; customs officials who may discover the violation in a routine inspection; and so on.

At the same time, even in an era of heightened enforcement, limited resources demand that agencies prioritize. Not every lead will be pursued. The Directorate of Defense Trade Controls (DDTC), for instance, has historically targeted larger companies—for example, Boeing, BAE Systems, and Xe Services LLC (formerly Blackwater Worldwide)—in splashy enforcement actions more likely to modify conduct industry-wide. Would DDTC bring an enforcement action of consequence against a small outfit whose minor documenting error had no conceivable ramifications for the national security, even if DDTC learned of the violation? Probably not. Should a voluntary disclosure be made in that circumstance, given the costs involved? That is a tougher question, but if independent discovery by the agency is very unlikely, or if a discovered violation is unlikely to be pursued, these are at least feathers on the scale against disclosure.

Technically, a voluntary disclosure is credited as such, and claims mitigating effect, only when made before the agency has otherwise learned of the violation, while this might recommend against a disclosure where the agency already knows of the violation, that view is often shortsighted. The agency will have wide discretion in making enforcement and penalty determinations. As such, a voluntary disclosure—the quintessential symbol of contrition and intent to cooperate—can still be the right approach, demonstrating good faith and transparency that should factor positively in the agency’s decision-making. DDTC has confirmed this point publicly, viewing with favor even those voluntary disclosures made after DDTC has otherwise learned of the violation, while looking askance at high-volume exporters who have never made a voluntary disclosure. From this perspective, periodic voluntary disclosures may evidence a healthy trade compliance function within the company.

Significantly, there is no requirement to state in a voluntary disclosure why it is being made, nor whether the discloser believes it to be new information for the agency. 3

2.3. Will the Company Be Later Forced to Disclose the Violation Anyway?

Some disclosures are ultimately compelled by circumstances that should be predicted, enabling the company to make a disclosure that will be inevitable under circumstances that are still timely and “voluntary.”

One variable that can usually be predicted is whether the company will be involved in a significant corporate transaction in the foreseeable future. This bears directly on the disclosure calculus because acquiring companies routinely require disclosure of

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2 To the same effect, a would-be discloser should consider whether its disclosure will or could expose its business partners (e.g., upstream or downstream suppliers), the commercial ramifications of such exposure and whether the partner should be alerted in advance.

3 An exception falling outside the scope of this article but worth mentioning is the prior disclosure process under the import/Customs laws, under which “[a] disclosing party who claims lack of knowledge of the commencement of a formal investigation has the burden to prove that lack of knowledge.” See 19 C.F.R. § 162.74(g), (i).
past violations before closing the transaction—indeed, corporate acquisitions may animate a larger number of companies to make disclosures than any other single cause. Although this reflexive, new-broom-sweeps-clean approach may not be smart in every circumstance, the trend is clear: If you expect to be a target of acquisition, you should also expect that latent trade violations will be discovered and that you will be made to disclose them to the relevant agency. We ask companies evaluating the disclosure option whether they expect to be acquired or to take on a significant investment within the next five years, which is the limitations period for these trade laws. Although they do not always concede the point, acquiring companies should have diminished leverage to insist on disclosure of violations more than five years old.4

Making a disclosure well in advance of a corporate transaction—rather than in the midst of one—can be a luxury. The disclosure is more likely to be regarded as timely and more “voluntary” than one compelled by the acquiring company. It demonstrates to the eventual corporate suitor a degree of responsibility and transparency. It spares significant headaches during that later period of the corporate transaction when the target company’s resources are stretched to address other, usually more important transactional issues. In any case, with a little luck, the violation disclosed at the earlier point in time might be resolved by the agency before the corporate transaction is ever proposed, allowing the target company to put a clean house on the market.

If the transaction involves a foreign investor, it may be a candidate for notification to the Committee on Foreign Investment in the United States (CFIUS). CFIUS is a multiagency committee charged with reviewing transactions in which a foreign person might exercise control over a U.S. business under circumstances that could pose a threat to the national security. CFIUS includes representatives from the agencies with primary export control responsibility—State, Commerce, and Treasury—among others. The parties to the transaction will want to have disclosing violations of the trade laws well in advance of engaging the CFIUS process, in which such violations are likely to be considered material to the notification and so arguably must be disclosed anyway.5

If the company can anticipate the need to engage the relevant agency in the future, this too should be considered in deciding whether to disclose. For instance, one can request DDTC to determine whether an item or technology is subject to ITAR controls. But this Commodity Jurisdiction procedure compels the submitter to declare whether the item or technology has previously been exported from the United States.6 This conditionally compelled (and arguably unfair) disclosure forces the company to trade away the right not to disclose (and so not to invite possible penalties) in exchange for the opportunity to have the item cleared of ITAR concerns through a favorable agency determination. To a similar effect, a failure to disclose a past unlicensed export could be regarded as a material omission in the application for a license to export a similar item to that same end user. The point once again is to predict the likelihood that the agency will eventually learn of the matter.

In addition, not to be overlooked, the company may be otherwise legally obligated to disclose the violation publicly—for example, by Sarbanes Oxley requirements—which would obviously mean that it should be disclosed to the agency upon or prior to a public disclosure.

2.4. What Is the Likelihood a Penalty Will Be Assessed Nevertheless?

A voluntary disclosure is a mitigating factor and merits reduction in the penalty assessed. Still, there is no guarantee a disclosed violation will not be penalized, and recent data suggest that voluntary disclosure are meeting with penalties more frequently than ever. Moreover, recent admonitions from the Bureau of Industry and Security (BIS) that individual wrongdoing is now a point of emphasis in that agency’s enforcement are certain to complicate both the disclosure decision and the handling of so-called Upjohn issues arising in the internal investigation (this is discussed in section 4 below). Indeed, one must always keep an eye on the prospect of individual criminal liability.

3. Making the Initial Disclosure

The initial disclosure is usually made in a short letter reciting only the most basic elements of the violation. The three objectives of the initial disclosure are (1) to

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4 An exception here would be the criminal charge of conspiracy, for which any “overt act” within the applicable limitations period in furtherance of the conspiracy opens the door to misconduct more than five years old.

5 CFIUS also requires a Verified Statement of the applicable U.S. Munitions List or Export Control Classification Number of the target company’s product or technology—another place where violations caused by product or technology misclassification may emerge.

6 To be clear, the DS-4076 form used for electronic submission of Commodity Jurisdiction requests requires disclosure of past exports of the item or technology being submitted for review; however, per the instructions to the form, the disclosure on the form will not technically qualify as a “voluntary disclosure” and the submitter seeking the benefit of disclosure must follow the procedure at 22 C.F.R. § 127.12.
formally initiate the disclosure process, (2) to obtain mitigating credit by apprising the agency before it otherwise learns of the violation, and (3) to indicate very briefly the relative severity of the violation so that the agency can determine whether to take immediate action to address the national security—which, in most instances, it need not.

These three objectives can usually be accomplished on one, well-written page. The initial disclosure should not undertake a full accounting of facts nor, in most cases, should it identify the cause of the violation, characterize the degree of culpability, or otherwise attempt to make the case for leniency—all matters better deferred until after a careful, comprehensive investigation. In one cautionary tale resolved in 2007, EP MedSystems had voluntarily disclosed exports to Iran made through the company’s foreign subsidiaries. Perhaps parroting language in the EAR, the initial letter to BIS claimed that the violations were being disclosed “immediately” upon discovery; however, an e-mail discovered by BIS contradicted this claim by some five months, and the company agreed to a significant fine—a reminder to keep the initial disclosure short, sweet, and rigorously accurate.

The initial disclosure should adhere to the form, content, and filing method prescribed by the applicable regulations and on the agency’s website. Be sure to obtain a stamped copy or other evidence of filing, as the date of receipt by the agency could become significant, for example, to assess the timeliness of a final report or to contest a claim that the agency otherwise learns of the violation, and (3) to indicate mitigating credit by apprising the agency before it otherwise learns of the violation, and (3) to indicate very briefly the relative severity of the violation so that the agency can determine whether to take immediate action to address the national security—which, in most instances, it need not.

After the initial voluntary disclosure comes a deeper dive into the facts and circumstances of the violation: the who, what, when, where, and why of the unlawful conduct. A five-year retrospective review of all known or suspected violations is prescribed by the agencies, although a shorter review period may sometimes be reasonable. How the investigation of these facts is structured and implemented can determine its quality and in turn may impact whether the company is ultimately penalized by the agency.

4.1. Documents

It is the collective experience of lawyers who conduct independent internal investigations that witnesses are often reluctant to volunteer meaningful information that has not already been discovered in documents relating to the witness. Use of documents to refresh a witness’ recollection of an event, or to confront a witness reluctant to acknowledge the event, is therefore essential, so documents should be collected and reviewed prior to witness interviews.

Relevant documents will fall into one or more of three broad categories. First, there are documents prescribed as relevant by the regulations governing the disclosure—for example, licensing documents, shipping documents, and documents reflecting communications relating to the export or other transaction. Copies of these documents are included with the final report or, where voluminous, retained with an offer to produce them if requested. All relevant original documents should be retained pending a final determination and thereafter in accordance with the recordkeeping requirement in the applicable regulations.

Second, there are documents reflecting the reasons why the violation occurred—for example, e-mails surrounding the particular export that reflect a state of knowledge or belief about the lawfulness of the export or legal opinions on a matter of interpretation under the regulations.

Third, there are documents that provide useful context for characterizing the violation in a sympathetic manner—for example, evidence of an export control compliance program that was well intentioned despite that it did not prevent the disclosed violation.

4.2. Witness Interviews

The nature of the perceived violation, the structure of the company, and the analysis of the documents collected will together dictate the selection of appropriate witnesses to interview. The objective in selecting witnesses is not merely to learn information but also to...
demonstrate to the agency that the company conducted an investigation of sufficient breadth.

Unlike the government, private lawyers conducting internal investigations lack subpoena power or the threat of prosecution for perjury, false statements, or obstruction. They must instead rely on equal doses of charm, flattery, and a subtle leveraging of the employer-employee relationship, all the while steering well clear of witness tampering. Counsel must know the facts as intimately as possible before the interview; after all, a careless comment or misrecollection by the witness may become a part of the permanent record of the investigation that can be difficult to modify.

The specter of the witness’ embarrassment, culpability, or even civil or criminal liability is another complicating factor. Although most interviews will not encounter employee interests that are opposed to the company’s interests, best practices dictate that every interview be treated as potentially presenting a conflict. As such, the interview should start with an Upjohn warning, advising the employee that the lawyer does not represent that employee but rather the company; that the company alone holds the attorney-client privilege; and thus that the company alone can elect to waive that privilege by disclosing information disclosed in the interview, even over the employee’s objection and even if this exposes her to individual liability. In addition, the witness should be asked to maintain complete confidentiality.

This is, of course, a terribly inept way to begin a conversation whose goal is to elicit true facts about violations of law, but the evil is a necessary one—and even more so given an increasing enforcement against individuals. A skillful lawyer can deliver the Upjohn warning with prefatory comments and a calibration of tone appropriate to the perceived risk of conflict. It is something to be rehearsed.

Interviews should usually be conducted one individual employee at a time rather than in the group format sometimes suggested by the company as a way of quickly putting together the mosaic of facts held by various employees or to spare the lawyer’s time and the company’s money. It is an article of faith that interviews conducted in person are better than those by phone, but the budget for the investigation and the apparent significance of the witness will usually dictate whether the interview is conducted in person.

The best witness interviews are conducted by one attorney, with a second attorney or other assistant taking notes of the interview. Assuming again the budget allows, the notes should be converted into a file memorandum, with appended copies of documents used in the interview. Because notes are imperfect and memories quickly fade, adherence to a “24-hour” rule—that is, that the memorandum be completed within 24 hours of the interview—results in better work product. In addition, because the notes and memorandum are work product, they should contain a legend claiming work product and attorney-client privileges and should disclaim that they are a verbatim transcription of what was said during the interview.

One final, optimistic note about privilege: Responding to criticism that it had too frequently pressured disclosing companies to waive attorney-client and work-product protections as a condition of earning cooperating credit, the Department of Justice clarified in an internal memorandum of not long ago that “prosecutors should not ask for such waivers and are not directed to do so.” This does not mean that facts discovered in the investigation are protected, as they are not, but it restores some comfort that for serious violations where the DOJ may be involved, a disclosing company can exercise these protections for documents and communications meriting them.

4.3. Second Interviews

While being respectful of the employee’s time and commitments, it is appropriate to revisit witnesses for follow-up questions where the evolution of the story requires it, as it often will. At the conclusion of the first interview, a polite request that the witness be available for possible follow-up questions can pave the way for a second interview should it become necessary. In addition, remember briefly to revisit the Upjohn conversation in second interviews.

5. Preparing the Final Report

As specified in the applicable regulations, the final report must include all of the relevant facts that explain the violations—once again, the who, what, when, where, and why. The report must also contain the why-it-will-not-happen-again explanation. A proper, comprehensive investigation should have supplied answers to all these questions, but holes discovered during the writing process must be filled by second or third interviews.

Although they are usually drafted by counsel, the assertions of fact must be certified by a corporate official or other authorized person. For this and other

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8 The ITAR certification provision is at 22 C.F.R. § 127.12(e) and that of EAR is at 15 C.F.R. § 764.5(c)(5). OFAC regulations do not formally prescribe a certification for a voluntary disclosure, but it is good practice to include one. To increase the disclosing company’s focus and commitment to the investigation, it can be effective to flag this certification requirement at the outset of the investigation.
obvious reasons, the paramount concern in preparing the final report is accuracy. The old carpentry adage provides the rule: “measure once, cut twice; measure twice, cut once.”

In most cases, the regulations themselves will determine the most appropriate organizational structure for the final report, which ensures that all necessary elements are addressed. However, the prescribed structure should not prevent the company from telling a narrative or from including other useful or persuasive information. The final report is, after all, more advocacy piece than data sheet. Striking just the right tone can sometimes be the hardest part—particularly where the narrative is required to stray from the stock story of the small, under-resourced company that just did not know any better.

The most effective reports accomplish the twin goals of convincing the agency (1) that it has all the necessary facts such that further investigation, questions, or a site visit are unnecessary; and (2) that, on those facts, the company should not be penalized. To accomplish this latter goal, the final report should identify what broader lessons have been learned and what concrete changes have been or will be implemented to ensure compliance going forward. One factor agencies consider is the extent to which the corporate “culture” of the disclosing company enabled or contributed to the violations. Where the facts show a culture of noncompliance, then only a comprehensive overhaul—whether building an export control compliance program from the ground up or tightening an existing one—can be expected to have the desired effect.

Promises made in the disclosure must be fulfilled. If a compliance program has not been finalized and adopted by the time the final report is filed, be sure not to claim or intimate otherwise. In addition, if a compliance program has been adopted, it must be implemented. We ask clients signing on to a compliance program to expect that the agency will pay a visit and demand evidence that what was promised is being delivered. “Off-the-shelf” compliance manuals filed and forgotten cause far more trouble than they are worth.

How past violations of a similar nature have been handled by the agency should inform the presentation in the final report. Charging documents, consent decrees, and related papers from similar past cases lend valuable insight and can help anticipate areas on which any consequent agency investigation is likely to focus. If these areas of concern are addressed proactively, then the likelihood of follow-up questions from the agency can be reduced—and so can the duration between the initial disclosure and a final resolution.

Finally, be mindful of time limits, explicit or prudential. The ITAR imposes a 60-day time limitation for the submission of a final report, subject to extension upon request for good cause, which is typically granted. Disclosures to BIS and OFAC are not subject to a hard time limit; however, because these agencies are also making renewed efforts to resolve disclosures more quickly, 60 days between initial and final disclosures is a good rule of thumb.
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