

Freight Forwarder Guidance

Members of the international forwarding community play a key role in ensuring the security of the global supply chain, stemming the flow of illegal exports, and helping to prevent Weapons of Mass Destruction (WMD) and other sensitive goods and technologies from falling into the hands of proliferators and terrorists.

Responsibilities of the Forwarding Community

Forwarding agents may have compliance responsibilities under the Export Administration Regulations (EAR) even when their actions are dependent upon information or instructions given by those who use their services. However, hiring a forwarding or other agent (hereafter "agent") to perform various tasks does not necessarily relieve a party of its compliance responsibilities.

Agents are responsible for the representations they make in filing export data. Moreover, no person, including agents, may proceed with any transaction knowing that a violation of the EAR has, is about to or is intended to occur. It is the agent's responsibility to understand its obligations.



Agents, especially those acting as the "exporter" in routed export transactions (see below), should understand the "Know Your Customer" guidance and "Red Flags" found in Supplement No. 1 to Section 732 of the EAR. Agents and exporters should determine if red flags are present, exercise due diligence in inquiring about them and ensure that suspicious circumstances are not ignored. Failure to do so could constitute a violation of the EAR.

Agents should be thoroughly familiar with the ten General Prohibitions set forth in Section 736 of the EAR; and with the violations outlined in Section 764 of the EAR. Engaging in prohibited conduct or committing the violations set out in the EAR may subject violators to significant penalties - up to 20 years imprisonment and fines of up to \$1,000,000 upon criminal conviction; and penalties of up to \$250,000 per violation for administrative offenses.

Routed Export Transactions

Primary responsibility for compliance with the EAR falls on the "**principal parties in interest**" (PPI) in a transaction. Generally, the PPIs in an export transaction are the U.S. seller and foreign buyer. See the following Sections of the EAR for additional information: Section 748.5, regarding parties to a transaction; Section 758 on export clearance; and relevant definitions in Section 772.

In a "**routed export transaction**," in which the foreign PPI authorizes a U.S. agent to facilitate the export of items from the United States, the U.S. PPI may obtain from the foreign PPI a writing in which the foreign PPI expressly assumes responsibility for determining licensing requirements and obtaining authorization for the export. In this case, the U.S. agent acting for the foreign PPI is the "exporter" under the EAR, and is responsible for determining licensing authority and obtaining the appropriate license or other authorization for the export.

An agent representing the foreign PPI in this type of routed export transaction must obtain a power of attorney or other written authorization in order to act on its behalf.

In a routed export transaction, if the U.S. PPI does not obtain from the foreign PPI the writing described above, then the U.S. PPI is the "exporter" and must determine licensing authority and obtain the appropriate license or other authorization.

In a routed export transaction in which the foreign PPI assumes responsibility for determining the appropriate authorization for the export, the EAR require the U.S. PPI to furnish the foreign PPI and its agent, upon request, with the correct Export Control Classification Number (ECCN) or sufficient technical information to determine the ECCN. In addition, the U.S. PPI must provide the foreign PPI and its agent with any information that it knows will affect the determination of license authority.

In a transaction that is not a routed export transaction, if the U.S. PPI authorizes an agent to prepare and file the export declaration on its behalf, the U.S. PPI is the "exporter" under the EAR and is required to :

(A) provide the agent with the information necessary to complete the SED;

(B) authorize the agent to complete the SED by power of attorney or other written authorization, or by signing the authorization block on the SED; and

(C) maintain documentation to support the information provided to the agent for completing the SED.

If authorized by either the U.S. or foreign PPI, the agent is responsible for:

(A) preparing the SED based on information received from the U.S. PPI;

(B) maintaining documentation to support the information reported on the export declaration; and

(C) upon request, providing the U.S. PPI with a copy of the SED filed by the agent.

Both the agent and the PPI which has hired it are responsible for the correctness of each entry made on a SED. Good faith reliance on information obtained from the PPI can help

protect an agent, but the careless use of pre-printed "No License Required" forms or unsupported entries can get an agent into trouble. Agents should avoid making commodity classifications for which it lacks technical expertise, and should obtain support documentation for ECCNs and other material.

Mitigating the Risk

As noted above, forwarders may be subject to criminal prosecution and/or administrative penalties for violations of the EAR. BIS has not hesitated to hold forwarders liable for participating in illegal transactions. For example, in 2003, DSV Samson Transport was sentenced to 5 years corporate probation, a \$250,000 criminal fine and a \$399,000 administrative penalty for forwarding over 30 illegal shipments to listed entities in India. These violations were committed after DSV had received repeated warnings from BIS that such exports constituted violations of the EAR.

This case, and many others involving forwarders, demonstrate the need for forwarders to know their customers and be aware of suspicious circumstances and Red Flags that may be present in an export transaction. When presented with Red Flags, forwarders have an obligation to inquire about the facts of the transaction, evaluate all of the information after inquiry and refrain from engaging in the transaction if the Red Flags cannot be resolved. These steps help protect not only the forwarder but also the forwarder's client, who may be unknowingly engaging in a prohibited transaction.

Forwarders can take steps to mitigate their own and their clients' risk of liability by establishing a compliance program that scrutinizes export transactions, checks the parties to transactions against BIS's and other U.S. Government agencies' various Lists to Check. Forwarders should also familiarize themselves with the types of activities to avoid in suspicious transactions as described in the BIS publication, Don't Let This Happen To You.

Parties who believe they may have committed a violation of the EAR are encouraged to submit a Voluntary Self Disclosure (VSD) to BIS. VSDs are an important indicator of a party's desire to bring their export activities into compliance, and also may provide important information to BIS helping to identify foreign proliferation networks. Parties submitting VSDs may be eligible for significant reductions in administrative penalties. Procedures for submitting VSDs may be found in Section 764.5 of the EAR.

Working with the Office of Export Enforcement

Forwarders are uniquely placed to identify suspicious transactions and Red Flags. While it is important to protect yourselves and your clients from engaging in transactions that might constitute violations, it is equally important that the Office of Export Enforcement (OEE) be able to fulfill its mission of keeping the most sensitive goods out of the most dangerous hands. Prompt notification by forwarders to OEE of suspicious transactions, and assistance to OEE Special Agents in gathering the evidence necessary to disrupt illicit proliferation networks and bring export violators to justice, are important steps in helping to achieve these goals.

OEE welcomes the opportunity to work with the international forwarding community to help ensure compliance with U.S. export requirements and keep sensitive goods out of the hands of proliferators and terrorists.