

Professional Perspective

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Jennifer Diaz and Sharath Patil, Diaz Trade Law

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Submitting Voluntary Self-Disclosures to Bureau of Industry & Security

Contributed by [Jennifer Diaz](#) and [Sharath Patil](#), Diaz Trade Law

If a company or individual believes it has violated the Export Administration Regulations and the Bureau of Industry & Security is unaware of this violation, proactively and voluntarily disclosing the potential wrongdoing can substantially reduce penalties. A system of disclosures, known as Voluntary Self-Disclosures (VSDs) and Prior Disclosures (PDs), exists for a wide array of federal agencies.

Enforcement Background

The [Bureau of Industry & Security](#) (BIS) is an agency of the U.S. Department of Commerce that is responsible for advancing U.S. national security, foreign policy, and economic objectives by ensuring an effective export control and treaty compliance system and promoting continued U.S. strategic technology leadership. BIS is chiefly responsible for enforcing the Export Administration Regulations (EAR). The EAR ([15 C.F.R.730](#) et seq) are a set of regulations that govern whether a person may export, reexport, or transfer of goods, software, and technology outside of the U.S. or to non-U.S. citizens. The purpose of the EAR is to safeguard U.S. national security interests by ensuring that certain controlled technologies do not fall into the wrong hands.

Practice Tip: The term “exports” is broadly defined in the EAR. [15 C.F.R.730.5](#) explains that the scope of “exports” includes certain actions that you might not regard as an “export” in other contexts. For example, the release of technology to a foreign national in the U.S. through such means as demonstration or oral briefing is deemed an export. Similarly, the transmission of certain information as an email attachment or by uploading to a cloud server could also be considered an export.

To determine whether a potential export requires export authorization, exporters should consult the detailed requirements of the EAR. Generally, exports fall into one of the following categories:

- The proposed export is not subject to the EAR as defined by [15 C.F.R.734.2](#)
- The proposed export does not require a license (known as “[No License Required](#)” (NLR))
- The proposed export would ordinarily require a license but a valid [license exception](#) applies
- The proposed export requires [export authorization](#) from BIS in the form of a license

Practice Tip: The Export Control Decision Tree in [15 C.F.R.732 Supplement No. 1](#) of the EAR provides an easy-to-follow flowchart to determine whether your proposed export requires BIS export authorization.

Voluntary Self-Disclosure Process

BIS encourages the submission of VSDs by parties who believe they may have violated the EAR. According to [BIS](#), VSDs are an “excellent indicator of a party's intent to comply with U.S. export control requirements and may provide BIS information on other ongoing violations.” Details on BIS’ VSD program are found in the EAR at [15 C.F.R.764.5](#).

If a company or individual suspects it has violated the EAR, the party should inform BIS to benefit from the possibility of mitigated penalties offered by a VSD. The party should begin by submitting an initial notification to BIS. The initial notification should be submitted in writing on company or law firm letterhead and addressed to:

Director, Office of Export Enforcement

1401 Constitution Ave.

Room H4514

Washington, DC 20230

Before submitting an initial notification, you should ensure that:

- No federal agency has already learned of the same or substantially similar information
- No federal agency has commenced an investigation or inquiry in connection with that information.

If either of the above two circumstances has occurred, a notification to BIS of an apparent violation will not be considered a valid VSD and the submitting party cannot enjoy the mitigating benefits of submitting the VSD.

Initial Notification

The initial notification component of a BIS VSD should be transmitted as soon as possible after violations are discovered.

The initial notification should contain the following information:

- The name of the person making the disclosure
- A brief description of the suspected violations
- The contact information of a point-person including their current business street address, email address, and telephone number
- A description of the general nature and extent of the violations

Practice Tip: There may be exigent circumstances in which it is not practical to provide an initial notification in writing. In those circumstances, an oral transmission of the initial disclosure is acceptable. For example, if a shipment of controlled items leaves the U.S. without the required license, and there is still an opportunity to prevent the receipt of the item by unauthorized persons, an urgent oral notification to BIS's OEE is acceptable.

After BIS receives an initial notification, BIS will notify the disclosing party in writing of the date that it receives the initial notification. The case will be assigned a case number and assigned to an analyst. The analyst will notify the party of any additional information required. A complete supplemental narrative account is due within 180 days of the date that the initial notification was received by BIS. The director of OEE may approve an extension for submitting the supplemental narrative.

Practice Tip: If a submitting party requires an extension to submit a supplemental narrative, an extension request should be submitted to the director of OEE. The extension request should explain either that the U.S. government's interests would be served by an extension, or that the person making the initial notification has shown that more than 180 days is reasonably necessary to complete the narrative account.

Five-Year Retrospective Review

Immediately after submitting the initial notification and before drafting a supplemental narrative response, the submitting party should conduct a thorough review of all export-related transactions where possible violations are suspected. BIS recommends that the review period cover five years prior to the date that BIS receives the initial notification. The findings from this retrospective review, the nature of the review, and the measures taken to minimize the likelihood of those violations re-occurring in the future should all be described in the supplemental narrative.

Practice Tip: As part of a five-year review, submitting parties should pull a report from U.S. Customs and Border Protection's (CBP) Automated Commercial Environmental (ACE) of all exports during the review period. An ACE export report of the review period can provide meaningful insight into exports during the review period, and help identify necessary information for the supplemental narrative.

Supplemental Narrative

Upon the completion of the retrospective review, parties should timely submit a supplemental narrative. The supplemental narrative should contain the following information:

- The kind of violations involved
- An explanation of when and how the violations occurred

- The complete identities and addresses of all domestic and foreign individuals and organizations involved in the activities giving rise to the violations
- License numbers
- The description, quantity, U.S. dollar value, [Export Control Classification Number](#) (ECCN), and any other relevant classifications of the items involved
- A description of any mitigating circumstances

Practice Tip: Failure to meet the 180-day deadline (or a valid amended deadline after an extension request is approved) may reduce or eliminate the mitigating impact of the VSD. Submitting parties should be careful to ensure that the supplemental narrative is timely submitted.

Practice Tip: An important element that should be included in the supplemental narrative is the submitting party's export compliance plan. If the party does not have an export compliance plan, the submitting party should strongly consider developing one. If the party does have an export compliance plan, the submitting party should consider improving the plan to address the violations described. Additionally, the submitting party should describe all relevant export compliance training for its employees. If the training has been inadequate or additional training is necessary to ensure that the violations described do not re-occur, the submitting party should commit in its mitigating circumstances to scheduling such trainings as soon as possible.

The supplemental narrative should be accompanied by the following supporting documentation:

- Licensing documents such as license applications, licenses, import certificates and end-user statements
- Shipping documents such as Shipper's Export Declarations, air waybills, and bills of lading
- Other documents demonstrating evidence of written or oral communications, internal memoranda, purchase orders, invoices, letters of credit and brochures

Additionally, a certification must be submitted stating that all representations made in connection with the VSD are true and correct to the best of the submitting person's knowledge and belief.

Bureau of Industry & Security Response & Penalty Mitigation

After BIS has been provided with all the required information, BIS will acknowledge the disclosure by letter, provide the person making the disclosure with a point of contact, and take whatever additional action it deems appropriate. BIS may take any of the following actions:

- Inform the person making the disclosure that BIS plans to take no action
- Issue a [warning letter](#)
- Issue a [proposed charging letter](#) and attempt to settle the matter
- Issue a [charging letter](#) if settlement is not reached
- Refer the matter to the U.S. Department of Justice for criminal prosecution

BIS assigns weight to VSDs as a mitigating factor in a BIS enforcement proceeding. However, the weight given to VSDs is solely within the discretion of BIS and the mitigating effect of VSDs may be outweighed by aggravating factors.

Limitations of Voluntary Self-Disclosures

Although BIS VSDs can be a useful mitigating procedure, the VSDs do have important limitations that parties should consider before submitting a VSD. These limitations include the following:

- The scope of the VSD does not apply to restrictive trade practices and anti-boycott actions described in [Part 760](#) of the EAR

- The mitigating benefits of the VSD program only apply when the information transmitted to BIS for review is received prior to BIS or any other federal agency learning the same or substantially similar information from another source and has commenced an investigation
- A firm will not be deemed to have made a disclosure if an individual filed the disclosure without the full knowledge and authorization of the firm's senior management

Practice Tip: Historically, BIS has reacted unfavorably to a routine pattern of VSD submissions instead of establishing a comprehensive export compliance plan. The VSD process can be a useful process for reporting past violations. However, companies should be careful not to substitute the important process of developing and maintaining an export compliance program with a routine pattern of VSD filings.