Overview

Submitting a Voluntary Disclosure to Directorate of Defense Trade Controls

Jennifer Diaz and Sharath Patil, Diaz Trade Law

Bloomberg Law

Submitting a Voluntary Disclosure to Directorate of Defense Trade Controls

Contributed by Jennifer Diaz and Sharath Patil, Diaz Trade Law

If a company or individual believes it has violated the Arms Export Control Act (AECA) or the International Traffic in Arms Regulations (ITAR) and the Directorate of Defense Trade Controls is unaware of this violation, proactively and voluntarily disclosing the potential wrongdoing can substantially reduce penalties. A system of disclosures, known as Voluntary Disclosures (VDs) and Prior Disclosures (PDs), exists for a wide array of federal agencies.

Enforcement Background

The Directorate of Defense Trade Controls' (DDTC) is an agency of the U.S. State Department that is responsible for ensuring that commercial exports of defense articles and defense services advance U.S. national security and foreign objectives. DDTC is chiefly responsible for enforcing ITAR (22 C.F.R. 120-130), a set of regulations that control the export of defense articles and services out of the U.S. or to non-U.S. citizens. The purpose of the ITAR is to safeguard U.S. national security interests by ensuring that certain defense articles and services do not fall into the wrong hands.

ITAR defines "defense article" as any item or technical data designated on the U.S. Munitions List (USML) (22 C.F.R. 121.1). The USML is a list of articles, services, and related technology designated as defense-related by the U.S. government via the Arms Export Control Act. Defense articles include:

- Technical data recorded or stored in any physical form
- Models, mockups, or other items that reveal technical data directly related to items on the USML
- Forgings, castings, and other unfinished products that have reached a manufacturing stage where they are clearly identifiable as defense articles

Meanwhile, ITAR defines "defense services" as:

- The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad, in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing, or use of defense articles
- The furnishing to foreign persons, whether in the U.S. or abroad, of any technical data controlled by the USML
- Military training of foreign units and forces, regularly and irregular, including formal or informal instruction of foreign persons in the U.S. or abroad or by correspondence courses, technical education, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice

> **Practice Tip**: The term "exports" is broadly defined in the ITAR. 22 C.F.R. 120.17 explains that the scope of "exports" includes certain actions that you might not regard as an "export" in other contexts. For example, "releasing or otherwise transferring technical data to a foreign person in the U.S. (a "deemed export") can easily take place via a phone call. Similarly, the transmission of certain information in an email attachment or by uploading to a cloud server could also be considered an export.

Voluntary Self-Disclosure Process

DDTC strongly encourages the submission of VDs by parties who believe they may have violated the ITAR. According to DDTC, "[ITAR] violations should be disclosed promptly to [DDTC]. The proper disclosure of a violation, or potential violation… can be a significant mitigating factor in DDTC's analysis of such violations and is strongly recommended." On the other hand, DDTC can consider the failure to submit a VD as an adverse factor when determining penalties because a failure to report a violation may result in circumstances detrimental to U.S. national security and foreign policy interests. Details on DDTC's VD program are found in the ITAR at 22 C.F.R. 127.12.

According to DDTC, common examples of violations reported via the VD process include:

- Exporting without authorization
- Unauthorized access to technical data
- Failure to comply with license provisions
- Failure to maintain required records
- Failure to register or maintain registration
- Misuse of ITAR exemptions

If a company or individual suspects it has violated the ITAR, the party should inform DDTC to benefit from the possibility of mitigated penalties offered by a VD. The party should begin by submitting an initial notification to DDTC. The initial notification should be submitted in writing on company or law firm letterhead. The initial notification should be submitted either via email to dtcc-casestatus@state.gov or by hard copy to DDTC via mail or overnight delivery to the following addresses:

DDTC Postal Mail:

PM/DDTC, SA-1, 12th Floor
Office of Defense Trade Controls Compliance
Directorate of Defense Trade Controls
Bureau of Political-Military Affairs
U.S. Department of State
Washington, D.C. 20522-0112

DDTC Express Mail & Courier Delivery:

U.S. Department of State
PM/DDTC, SA-1, 12th Floor
2401 E Street, NW
Washington, D.C. 20037

Practice Tip: 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 DDTC of an apparent violation will not be considered a valid VD and the submitting party cannot enjoy the mitigating benefits of submitting the VD.

Initial Notification

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

The initial notification should contain the following information:

- Identify who is making the disclosure, and if there is a DDTC registration
- The point of contact information, including name, address, and email
- Identify the disclosure type and previous disclosure numbers (if any)
- Summary of the suspected violation including dates and any documents relating to the suspected violation

Practice Tip: It is essential to discuss any initial notification and the specific details to include with counsel prior to submitting to DDTC. Simultaneously, a company may have corrective actions to undertake, or updates to a compliance plan that counsel is essential to assist with.

Retrospective Audit

After submitting an Initial Notification, the regulations strongly encourage submitters to engage in a thorough review of all defense trade transactions where a violation is suspected.

> **Practice Tip**: CBP's Automated Commercial Environment (ACE) database provides critical data of a party's export history. Gaining access to and auditing this data is a highly recommended component of a submitter's internal auditing process. A summary analysis, such as an export report card, from your trade counsel or customs broker can provide essential insight into any past suspected violations.

Full Notification

If the Initial Notification does not contain all of the information required by 22 C.F.R. 127.12(c)(2), a full disclosure is required to be submitted 60 days after the initial disclosure.

The VD should collectively provide the following required information:

- A precise description of the nature and extent of the violation
- The exact circumstances surrounding the violation
- The complete identifies and addresses of all persons known or suspected to be involved in the activities giving rise to the violation
- DDTC license numbers, exemption citations, or description of any other authorization, if applicable
- U.S. Munitions List (USML) categories and subcategories, product descriptions, quantities, and characteristics or technological capability of the hardware, technical data, or defense service involved
- A description of corrective actions already undertaken that clearly identifies the new compliance initiatives implemented to address the causes of the violations set forth in the VD and any internal disciplinary action taken
- Information on how the above corrective actions are designed to deter those particular violations from occurring again
- The name and address of the person making the disclosure and a point of contact, if different, should further information be needed

Additionally, DDTC recommends the following additional factors be discussed in the VD:

- Whether the violation was intentional or inadvertent
- The degree to which the person responsible for the violation was familiar with the laws and regulations
- Whether the person was the subject of prior administrative or criminal action under the AECA
- Whether the violations are systemic
- Details of compliance measures, processes, and programs, including training, that were in place to prevent such violations, if any

Finally, DDTC recommends the following substantiating documentation to accompany the VD either in the Initial Notification or the Full Notification:

- Licensing documents
- Shipping documents
- Electronic Export Information (EEI) Filings
- Any other relevant documents

A certification stating that all the represents made are true and correct to the best of the submitter's knowledge and belief must also be submitted. The certification must be executed by an empowered official or a senior officer.

If the submitter is unable to provide a full disclosure within the 60-calendar day deadline, an empowered official or a senior officer may request an extension of time in writing. A request for an extension must specify what information required by 22 C.F.R. 127.12(c)(2) could not be immediately provided and the reasons why.

Before approving an extension of time to provide the full disclosure, DDTC may require the requester to certify in writing that they will provide the full disclosure within a specific time period. If the full disclosure is not filed timely or an extension is not requested, DDTC may not consider the disclosure a mitigating factor in determining the appropriate disposition of the violation. In addition, DDTC may direct the requester to furnish all relevant information surrounding the violation.

> **Practice Tip**: DDTC does not require or expect submitters to orally present their position. However, requesting an oral presentation is a proactive way to answer any of DDTC's potential questions and provide sufficient context about the nature and circumstances of the suspected violation and the submitter's corrective actions.

DDTC Response & Penalty Mitigation

DDTC may consider a VD as a mitigating factor in determining the administrative penalties, if any, that should be imposed. Failure to report a violation may result in circumstances detrimental to U.S. national security and foreign policy interests and will be an adverse factor in determining the appropriate disposition of violations.

In addition to the filing of the VD itself, other mitigating factors DDTC may consider include:

- Whether the transaction would have been authorized had a proper license request been made prior to the suspected violation
- Why the violation occurred
- The degree of cooperation with the ensuing investigation
- Whether the person has instituted or improved an internal compliance program to reduce the likelihood of future violations
- Whether the person making the disclosure did so with the full knowledge and authorization of the person's senior management (if not, DDTC will not deem the disclosure voluntary)

Limitations of Voluntary Self-Disclosures

Although DDTC VDs can be a useful mitigating procedure, the VDs do have importation limitations that parties should consider before submitting a VD. These limitations include the following:

- Parties that submit DDTC VDs only potentially benefit from mitigation of DDTC-administered penalties and punitive actions. Potential violations of laws and regulations enforced by other agencies, such as the Export Administration Regulations enforced by the Bureau of Industry of Security, should be reported to that respective agency according to their own VD requirements.
- Parties must submit the VD prior to DDTC or any other U.S. agency's knowledge of the same or substantially similar information. If DDTC or any other U.S. agency is aware of the same or substantially similar information, the VD could be deemed invalid, and submitters will not benefit from potential mitigation.
- Despite the potential mitigation often imposed, submitters can still be subject to penalties, administrative actions, or sanctions, or even be referred to the U.S. Department of Justice for criminal prosecution.
- Parties making the disclosure must do so only with the full knowledge and authorization of senior management, and failure to receive such authorization may result in an invalid disclosure
- Notwithstanding the specific procedural requirements and potential mitigation offered by the VD process, parties still have a duty to inform DDTC of the exportation or transfer of covered merchandise to foreign persons

Practice Tip: Historically, DDTC has reacted unfavorably to a routine pattern of VD submissions instead of establishing a comprehensive export compliance plan. The VD 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 VD filings.