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# Defending the “Higher Walls” – The Effects of U.S. Export Control Reform on Export Enforcement

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“What a troublesome thing a wall is! I thought it was to defend me, and not I it!”

-- Henry David Thoreau<sup>3</sup>

## Abstract

The goal of the current U.S. Export Control Reform Initiative is to create a single control list, a single licensing agency, a unified information technology system, and a single primary enforcement coordination agency, and to move criminal law enforcement functions currently in the Commerce Department’s Office of Export Enforcement (OEE) to the Department of Homeland Security (DHS). The plan to create a single control list, a single licensing agency, a single IT system, and a single enforcement coordination center has received support from exporters, but the movement of agents from OEE to DHS has raised concerns and objections. Is the proposed combination of enforcement agencies necessary, and in the best interests of national security and foreign policy? The authors believe that specialized export law enforcement officers of the type currently assigned to the Commerce Department’s OEE should be located within the single export licensing agency, and that the agency should include the more compliance-focused review practices currently used by the State Department. Until a single licensing agency is created by Congress, however, it is best to continue the current compliance and enforcement practices of both the Commerce and State Departments.

## I. Introduction

In August 2009, President Obama raised the hopes of U.S. manufacturers of defense articles and of their foreign customers when he called for reforms of U.S. export control regulations. This effort would relax controls on exports of many articles that have both military and civilian uses, and present a lower risk to national security interests and foreign policy objectives.<sup>4</sup> In his 2011 State of the Union address, President Obama also addressed export control enforcement challenges, noting that “there are twelve different agencies that deal with exports.”<sup>5</sup> Depending on how one defines “agencies” and “deal with exports,” there are even more.<sup>6</sup>

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3. HENRY D. THOREAU, *A YANKEE IN CANADA, WITH ANTI-SLAVERY AND REFORM PAPERS* 74 (1866).
  4. Press Release, *Notice Regarding the Export Administration Act*, THE WHITE HOUSE, OFFICE OF THE PRESS SEC’Y (Aug. 13, 2009), <https://www.whitehouse.gov/the-press-office/notice-regarding-export-administration-act>.
  5. See Press Release, *Remarks by the President in State of Union Address*, THE WHITE HOUSE, OFFICE OF THE PRESS SEC’Y (Jan. 25, 2011), <http://1.usa.gov/1bvegnK>.
  6. See JOHN R. LIEBMAN, ROSZEL C. THOMSEN II, & JAMES E. BARTLETT III, UNITED STATES

Secretary of Defense Robert M. Gates followed in April 2010, by announcing the Export Control Reform Initiative (ECR),<sup>7</sup> a plan that would simplify U.S. export control regulations by merging defense articles on the State Department’s U.S. Munitions List (USML)<sup>8</sup> with dual-use articles on the Commerce Department’s Commerce Control List (CCL),<sup>9</sup> by creating a single licensing agency, and by creating a single enforcement coordination agency to combine the forces of existing myriad law enforcement agencies.<sup>10</sup> The Administration also proposed as part of ECR to merge the Department of Commerce’s criminal investigative functions within the Office of Export Enforcement (OEE) into the Department of Homeland Security’s (DHS) Immigration and Customs Enforcement (ICE) agency,<sup>11</sup> thus separating the enforcement agents from the licensing specialists.<sup>12</sup>

Secretary Gates criticized the current definitions of articles subject to export classification and control as overly broad, which he said makes it more difficult to enforce export controls on items and technologies that truly need to stay in this country. “Frederick the Great’s famous maxim that ‘he who defends everything defends nothing’ certainly applies to export control,” Gates said, adding that ECR would result in increased controls on fewer items, or “[i]n short, a system where higher walls are placed around fewer, more critical items,”<sup>13</sup> thus echoing the

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EXPORT CONTROLS § 1.03 (7th ed. 2014) (U.S. Federal agencies with control over exports include the Dep’t of Agric., Animal and Plant Health Inspection Service, Agric. Marketing Serv., and Foreign Agric. Serv.; Dep’t of Commerce, Bureau of Indus. & Sec. and Bureau of Census; Dep’t of Energy, Office of Imports and Exports; Dep’t of Defense, Defense Tech. Sec. Agency; Dep’t of State, Directorate of Defense Trade Controls; Dep’t of Treasury, Office of Foreign Assets Control; Agency for Int’l Dev.; Nuclear Regulatory Comm’n, Overseas Private Inv. Corp., U.S. Int’l Trade Admin.; Export-Import Bank of the U.S.; Small Bus. Admin.; U.S. Drug Enforcement Admin.; and U.S. Trade Rep.); *See Export.gov’s Partner Agencies*, EXPORT.GOV (June 27, 2012, 6:58 AM), <http://1.usa.gov/1xaVBu2>.

7. *See* Press Release, *President Obama Lays the Foundation for a New Export Control System To Strengthen National Security and the Competitiveness of Key U.S. Manufacturing and Technology Sectors*, THE WHITE HOUSE, OFFICE OF THE PRESS SEC’Y (Aug. 30, 2010), <http://1.usa.gov/14uULyw>.

8. 22 C.F.R. § 121.1 (2015).

9. 15 C.F.R. § 774 (Supp. I 2012).

10. Robert M. Gates, U.S. Sec’y of Defense, Remarks Before the Business Executives for Nat’l Sec. on Export Control Reform (Apr. 20, 2010), <http://archive.defense.gov/Speeches/Speech.aspx?SpeechID=1453>.

11. BUSINESS USA, EXPORT CONTROL REFORM INITIATIVE FACT SHEET #6: EXPORT CONTROL ENFORCEMENT (2012), *available at* [https://business.usa.gov/export-portal?static/ECR%20Factsheet%206%20-%20Enforcement\\_Latest\\_eg\\_main\\_047477.pdf](https://business.usa.gov/export-portal?static/ECR%20Factsheet%206%20-%20Enforcement_Latest_eg_main_047477.pdf).

12. U.S. GOV’T ACCOUNTABILITY OFFICE, PROPOSED REFORMS CREATE OPPORTUNITIES TO ADDRESS ENFORCEMENT CHALLENGES 30 (2012) [hereinafter PROPOSED REFORMS CREATE OPPORTUNITIES] (discussing the “potential challenge with planned reform efforts [that] include[] the potential for separating criminal and administration enforcement functions currently administered by OEE” and noting that although the effort would require legislation, “it could result in the transfer of OEE enforcement personnel to ICE and the administrative enforcement functions to a single licensing agency”).

13. *Id.*

remark by former national security advisor McGeorge Bundy in Congressional testimony, “If we guard our toothbrushes and diamonds with equal zeal, we will lose fewer toothbrushes and more diamonds.”<sup>14</sup>

Although creating a single list and single licensing agency, and merging OEE into DHS will require Congressional action, which may be unlikely,<sup>15</sup> significant portions of ECR have been implemented, including the transition of less significant items from the more tightly controlled USML to the CCL.<sup>16</sup> Some have criticized the transition of certain items from the USML to the CCL as “deregulation,”<sup>17</sup> but the reforms have been generally well received by American industry and its foreign customers, who had long complained that the current system was unnecessarily burdensome.<sup>18</sup>

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14. Adam Yarmolinsky, *Shades of McCarthyism*, N.Y. TIMES, Mar. 5, 1989, available at <http://nyti.ms/1vEfaFu> (quoting McGeorge Bundy’s Congressional testimony).
  15. CECIL HUNT & THOMAS M. DEBUTTS, OVERVIEW OF U.S. EXPORT CONTROLS 2 (Practicing Law Institute Program, Coping with U.S. Export Controls 2009) (“Competing committee jurisdictions, divergent policy objectives, and limited leadership interest, make it unlikely that Congress will produce the ‘one law, one agency’ system that most countries enjoy.”).
  16. U.S. DEP’T OF COMMERCE, EXPORT CONTROL REFORM INITIATIVE FACT SHEET #1: THE BASICS (2013), available at <http://1.usa.gov/1iU8oy7> (“The control list-related reforms will move less sensitive items, mostly parts and components, from the State munitions list to the Commerce list.”).
  17. See, e.g., *The Export Administration Act: A Review of Outstanding Policy Considerations: Hearing Before the Subcomm. on Terrorism, Nonproliferation and Trade of the H. Comm. on Foreign Affairs*, 111th Cong. 22 (2009) (statement of Arthur Shulman, General Counsel, Wisconsin Project on Nuclear Arms Control) (“The focus of export control reforms should be on ensuring that the system protects U.S. national security in the 21st century - not on removing the remaining speed bumps on the export superhighway.”); David R. Fitzgerald, *Leaving the Back Door Open: How Export Control Reform’s Deregulation May Harm America’s Security*, 15 N.C.J.L. & TECH. 65, 89 (2014) (former Army Ranger and Afghanistan War veteran criticizing justifications advanced for Export Control Reform); Benjamin Goad, *Export Control Overhaul Sparks National Security Scrap*, THE HILL (Oct. 17, 2013, 12:47 AM), available at <http://bit.ly/1CQenvT> (“In my mind, it’s a major deregulation,” said Steven Pelak, a former national coordinator for export control enforcement at the Justice Department. Pelak . . . said the effort would make it easier for nations like Iran and China ‘to obtain our spare parts.’”); Editorial, *Shortsighted Arms Deregulation*, N.Y. TIMES, Oct. 23, 2013, available at <http://nyti.ms/1xeeA8D> (“The White House has said that the old system strained resources by trying to protect all items on the control lists instead of focusing on the most militarily significant ones. It also said that the system disadvantaged American companies competing with foreign enterprises not subject to rigorous controls. Those are not strong arguments. The United States already dominates the international arms market, with nearly 80 percent of the sales, and the State Department denied a mere 1 percent of the arms export license requests from 2008 to 2010.”).
  18. See, e.g., *Export Control Reform: The Agenda Ahead, Hearing Before the H. Comm. on Foreign Affairs*, 113th Cong. 4 (Apr. 24, 2013) (statement of Thomas Kelly, Acting Assistant Sec’y, Bureau of Political-Military Affairs, U.S. Dep’t of State) (“But because our current export controls are confusing, time consuming, and many would say overreaching, our allies increasingly seek to design out U.S. parts and services thus avoiding our export controls, and use monitoring that comes with them, in favor of indigenous design. This threatens the viability of our defense industrial base especially in these austere times.”); *Export Controls: Are We Protecting Security and Facilitating Exports?: Hearing Before the Subcomm. on Terrorism, Nonproliferation, & Trade of the H. Comm.*

The movement of certain items on the USML to the CCL and the differing approaches to export control enforcement by the Departments of State and Commerce, however, results in a strange outcome; items that are most sensitive (remaining on the USML) continue to be controlled by the State Department, the agency with weaker enforcement authorities and an approach historically focused on compliance rather than on enforcement, whereas less sensitive items (on the CCL), including those that were once on the USML, are now administered by the agency with a dedicated group of law enforcement agents wielding sweeping administrative and criminal enforcement authority.<sup>19</sup>

This inconsistency does not appear to have troubled the White House, as the Administration uses the presence of agents in the Department of Commerce as a way to defend against allegations that ECR is a de-regulation or de-control effort. One White House fact sheet, for example, posed the following “myths and facts”:

**Myth 3:** This decontrol effort will result in U.S.-origin items being more widely available for use in human rights abuses.

**Fact:** ECR is a prioritization of controls and not a de-control effort. . . . For items on the Commerce Control List, administrative **and criminal** export violations are also enforced by the Department of Commerce . . . , which has over 100 special agents dedicated exclusively to export control enforcement. . . . As a result of the transition of less sensitive items from the U.S. Munitions List to the Commerce Control List, the U.S. Government has **more export enforcement agents** investigating possible violations of Commerce-administered controls.<sup>20</sup>

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*on Foreign Affairs*, 110th Cong. (June 26, 2007) (statement of John Engler, President of the Nat’l Assoc. of Mfrs.) (“The current [export control] system is a relic of a different era when technology evolved more slowly, the United States dominated high-technology industries, and U.S. companies concentrated their manufacturing and R&D in U.S. facilities.”); Michael N. Gold, *Conference on Space and Telecommunications Law: The Wrong Stuff: America’s Aerospace Export Control Crisis*, 87 NEB. L. REV. 521, 528 (2008) (“In short, if the objectives of the 1998 export control reforms expanding the ITAR were to cripple domestic U.S. capacity, lose billions of dollars, and bolster European competition, all without impacting Chinese capabilities, then we should rest assured that the mission has been accomplished.”); Howard L. Berman, Op-Ed., *U.S. Export-Control Policy in Dire Need of an Update*, SAN JOSE MERCURY NEWS, Jan. 15, 2010.

19. LIEBMAN, THOMSEN, & BARTLETT, *supra* note 6, § 4.01[1][b] (“Defense manufacturers occasionally quip that the goal of the Department of Commerce is to help American export U.S. goods and services, but the goal of the Department of State is to *stop* them. There is usually a grain of truth in hyperbole, and that grain is found in the difference between the effects of the . . . EAR (footnote omitted) and the . . . ITAR. The EAR generally permits the export of dual-use goods and services without license unless specifically listed in the EAR, but the ITAR prohibits the export of all defense articles and services unless specifically permitted by the process described in the ITAR.”).
20. U.S. DEP’T OF COMMERCE, EXPORT CONTROL REFORM INITIATIVE FACT SHEET #2: MYTHS AND FACTS 2013) (emphasis in original), *available at* <http://1.usa.gov/1GWZXOh>.

Under ECR, therefore, part of the justification the Administration uses to support changes to the controls of items in Phase II would be negated by planned legislative changes in Phase III.<sup>21</sup>

Another anomaly arises from Section 305 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, which the President signed into law. That section essentially authorizes OEE special agents to exercise their law enforcement powers when enforcing the Export Administration Regulations (EAR) during periods when the Export Administration Act (EAA) has lapsed and the EAR are in force pursuant to an Executive Order issued pursuant to International Emergency Economic Powers Act (IEEPA). Previously the OEE special agents' enforcement powers were authorized only by the EAA and during periods of lapse the agents had received their enforcement powers by means of special deputation by the U.S. Marshals Service. The implication of the grant of permanent police powers to OEE, in legislation enacted by the Congress and signed into law by President Obama, and the establishment of the Export Enforcement Coordination center, is that the Government remains committed to using the complementary strengths of multiple law enforcement agencies to police export control laws, rather than a single agency approach.

This article provides an overview of export enforcement, explores how the statutory creation a single licensing agency affects enforcement, and discusses whether creating an export enforcement agency under the Department of Homeland Security, separated from the licensing agency, is achievable and desirable. We conclude that if the State and Commerce licensing agencies are combined by Congress, the single licensing agency should include a law enforcement branch similar to OEE, and that the agency should combine the State Department's compliance review process with the Commerce Department's criminal investigation methods. Absent those changes, continuing the current separate agency enforcement practices will better achieve U.S. national security and foreign policy objectives for export controls than would merging OEE into DHS.

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21. *About Export Control Reform*, EXPORT.GOV (Oct. 22, 2012, 1:00 PM), [http://export.gov/ecr/eg\\_main\\_047329.asp](http://export.gov/ecr/eg_main_047329.asp) ("The Administration is implementing the reform in three phases. Phases I and II reconcile various definitions, regulations, and policies for export controls, all the while building toward Phase III, which will create a single control list, single licensing agency, unified information technology system, and enforcement coordination center.").

## II. U.S. Export Controls Overview<sup>22</sup>

The U.S. Constitution gives Congress authority to “regulate Commerce with foreign nations,”<sup>23</sup> and numerous acts of Congress have given the President relatively continuous authority to regulate exports of weapons and war supplies, primarily for national defense, but also to preserve materials deemed to be in short supply.<sup>24</sup> The first peacetime comprehensive export controls legislation for “dual use” articles – those with both civilian and military applications – was the 1949 Export Control Act,<sup>25</sup> which was conceived as a temporary measure, but was

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22. Several thorough summaries of U.S. export laws and regulations are available. *See generally* JOHN R. LIEBMAN, ROSZEL C. THOMSEN II, & JAMES E. BARTLETT III, UNITED STATES EXPORT CONTROLS (7th ed. 2014); ERIC L. HIRSCHHORN, THE EXPORT CONTROL AND EMBARGO HANDBOOK (3d ed. 2010); Harold J. Berman & John R. Garson, *United States Export Controls—Past, Present, and Future*, 67 COLUM. L. REV. 67 (1967); Stephen M. Boyd & Linda A. Whisman, *The U.S. Law of Export Controls: A Selected Bibliography*, 18 INT’L LAW. 483–90 (1984); Bert Chapman, *Export Controls: A Contemporary History*, PURDUE UNIV. E-PUBS (Dec. 13, 2013), <http://bit.ly/1vGcqfY>; Christopher F. Corr, *The Wall Still Stands! Complying with Export Controls on Technology Transfers in the Post-Cold War, Post-9/11 Era*, 25 HOUS. J. INT’L L. 441 (2003); Homer E. Moyer, Jr. & Linda A. Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 LAW & POL’Y INT’L BUS. 1 (1983).
23. U.S. CONST. art. I, § 8, cl. 3.
24. In 1774, Congress outlawed the export of goods to Great Britain and its colonies, thus establishing the first statutory American export controls. THE ARTICLES OF ASSOCIATION, art. 4, Oct. 20, 1774, *available at*, [http://www.constitution.org/bcp/art\\_assoc.htm](http://www.constitution.org/bcp/art_assoc.htm) (“[W]e will not directly or indirectly, export any merchandise or commodity whatsoever to Great-Britain, Ireland, or the West-Indies, except rice to Europe.”). Since then, the United States has imposed export controls for a variety of reasons. *See, e.g.*, Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (codified as amended at 50 U.S.C. app. §§ 2401–13) (expired 1979); Arms Export Control Act, Pub. L. No. 90-629, 82 Stat. 1321 (1968) (codified as amended at 22 U.S.C. §§ 2751–99aa-2); Export Control Act of 1949, Pub. L. No. 81-11, ch. 11, 63 Stat. 7 (codified as amended at 50 U.S.C. app. §§ 2021–32 (1964)) (repealed 1969); Neutrality Act of 1939, Pub. L. No. 54-2, ch. 2, 54 Stat. 4 (demonstrating there were three related neutrality statutes that, *inter alia*, prohibited arms sales to belligerents to maintain the neutrality of the United States); Neutrality Act of 1937, ch. 146, § 2(a), 50 Stat. 122; Tin Protection Act, ch. 74, 49 Stat. 1140 (1936) (previously codified at 50 U.S.C. §§ 86–88) (prohibiting unlicensed exports of tin plate scrap); Neutrality Act of 1935, ch. 837, 49 Stat. 1081 (codified at 22 U.S.C. § 441 note); Trading with the Enemy Act of 1917, ch. 106, 40 Stat. 411 (codified as amended at 12 U.S.C. §§ 95a–95b and 50 U.S.C. app. §§ 1–44); Embargo Act, 2 Stat. 451 (1807) (prohibiting all exports from the United States on civilian vessels). *See generally* Berman & Garson, *supra* note 22. *But see* U.S. ARTICLES OF CONFEDERATION, art. IX, § 1 (1778), *available at* <http://1.usa.gov/1Bl2kST> (prohibiting the United States from restraining the respective states “from prohibiting exportation or importation of any species of goods or commodities whatsoever”).
25. Export Control Act of 1949, Pub. L. No. 81-11, ch. 11, 63 Stat. 7 (1949) (codified as amended at 50 U.S.C. app. §§ 2021–31 (1964)), *repealed by* Arms Export Control Act, Pub. L. No. 90-629, 82 Stat. 1320 (1968) (codified as amended at 22 U.S.C. §§ 2751–99).



successively renewed until 1969,<sup>26</sup> when it was repealed<sup>27</sup> and replaced by the Export Administration Act (EAA),<sup>28</sup> in which Congress delegated to the executive branch its authority to control the exportation of dual-use goods and technologies.<sup>29</sup>

In 1976, Congress enacted the Arms Export Control Act (AECA),<sup>30</sup> giving the President the authority to control the import and export of defense articles and services, and other items listed by the President on the USML<sup>31</sup> in the International Traffic in Arms Regulations (ITAR),<sup>32</sup> as administered by the Secretary of State<sup>33</sup> through the Directorate of Defense Trade Controls (DDTC).<sup>34</sup>

Violations of the ITAR and EAR may also be charged under or in association with other statutes, including U.S. customs laws<sup>35</sup> and the Foreign Trade Regulations<sup>36</sup>

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26. Pub. L. No. 103-277, 108 Stat. 1407 (1994); Pub. L. No. 103-10, § 2, 107 Stat. 40 (1993); Pub. L. No. 100-418, tit. II, § 2431, 102 Stat. 1362 (1988); Pub. L. No. 99-64, tit. I, § 120, 99 Stat. 155 (1985); Pub. L. No. 98-222, 98 Stat. 36 (1984); Pub. L. No. 98-207, 97 Stat. 1391 (1983); Pub. L. No. 98-108, § 1, 97 Stat. 744 (1983); Pub. L. No. 96-72, § 20, 93 Stat. 535 (1979).
  27. Pub. L. No. 91-105, § 1, 83 Stat. 169 (1969) (providing for termination of 50 U.S.C. app. §§ 2021–32 on Dec. 31, 1969).
  28. 50 U.S.C. app. §§ 2401–20 (2006). The EAA has lapsed, as happens periodically, because it is a temporary statute with a set expiration date. *See id.* § 2419; Pub. L. No. 96-72, § 20, 93 Stat. 503, 535 (1979). *See generally* Wisc. Project on Nuclear Arms Control v. U.S. Dep’t of Commerce, 317 F.3d 275, 278 (D.C. Cir. 2003) (discussing lapses of EAA and declarations of national emergencies to continue EAR); Electronic Frontier Found. v. U.S. Dep’t of Commerce, No. C12–3683-TEH, 2013 U.S. Dist. LEXIS 98625 (N.D. Cal. July 12, 2013) (discussing lapses of EAA and declarations of national emergencies to maintain export controls).
  29. 50 U.S.C. app. § 2404 (2015).
  30. 22 U.S.C. §§ 2751–99 (2015).
  31. *Id.* § 2778(a)(1) (The AECA gives the President authority, *inter alia*, to: “control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.”); 22 C.F.R. § 121.1 (2015).
  32. 22 C.F.R. §§ 120–130 (2015). The ITAR was promulgated by the Secretary of State pursuant to Exec. Order No. 11,958, 42 Fed. Reg. 4311 (Jan. 18, 1977).
  33. The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services, and the temporary import of defense articles, is delegated to the Secretary of State by Exec. Order No. 13,637, 3 C.F.R. § 223 (2013). The ITAR implements that authority.
  34. By virtue of delegations of authority by the Secretary of State, the ITAR is administered by the Deputy Assistant Secretary of State for Defense Trade Controls, Bureau of Political-Military Affairs. 22 C.F.R. § 120.12; *Key Personnel*, U.S. DEP’T OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROL (Oct. 29, 2015), <http://1.usa.gov/1tp5XIW> (a table of the organization of DDTC and contact information for key employees); *See generally Overview of U.S. Export Control System*, U.S. STATE DEP’T, <http://www.state.gov/strategictrade/overview> (last visited Nov. 1, 2015).
  35. *E.g.*, 19 U.S.C. §§ 1592, 1641 (2012); 19 C.F.R. pts. 0-192 (2015).
  36. 15 C.F.R. pt. 30 (2015) (administered by the Department of Commerce’s Bureau of Census and enforced by its Office of Export Enforcement and the Department of Homeland Security’s Immigration and Customs Enforcement and Customs Border Protection).

that require filing Electronic Export Information reports.<sup>37</sup> Other statutes used to enforce export control violations include smuggling,<sup>38</sup> money laundering,<sup>39</sup> wire fraud,<sup>40</sup> and false statements.<sup>41</sup> The Justice Department<sup>42</sup> has also prosecuted illicit international procurement networks using a conspiracy charge or conspiracy to defraud the United States charge often asserted under 18 U.S.C. § 371.<sup>43</sup> This

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37. 15 C.F.R. § 30.71 (2014).

38. 18 U.S.C. § 554 (2012) (“Whoever fraudulently or knowingly exports or sends from the United States, or attempts to export or send from the United States, any merchandise, article, or object contrary to any law or regulation of the United States, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise, article or object, prior to exportation, knowing the same to be intended for exportation contrary to any law or regulation of the United States, shall be fined under this title, imprisoned not more than 10 years, or both.”); *see also* United States v. Yang, 3:12-cr-00165-MMA (S.D. Cal. Jan. 13, 2012) (charging a Chinese national with smuggling goods from the United States relating to the unlawful export of accelerometers used in aircraft, missiles and other “smart” munitions and in measuring explosives); United States v. Hong Wei Xian, 1:10-cr-00207-GBL (E.D. Va. Oct. 7, 2011) (sentencing defendant to 24 months in prison for conspiracy to violate AECA and smuggle goods unlawfully from the United States in connection with efforts to export to China radiation hardened microchips used in satellite systems).

39. 18 U.S.C. §§ 1956–57 (2012). These statutes were brought into existence by the Money Laundering Control Act of 1986, tit. I, § 1352(a), Pub. L. No. 99-570, 100 Stat. 3207–18, which has since been expanded. In general, these statutes prohibit knowingly engaging in financial transactions using funds derived from a “specified unlawful activity” (SUA). Each of the export control and sanctions statutes, such as the EAA and AECA, are referred to as a SUA. *See, e.g.*, United States v. Modanlo, No. 10-cr-0295, 2014 U.S. Dist. LEXIS 12683 (D. Md. Jan. 31, 2014) (referencing six counts of money laundering in violation of 18 U.S.C. §§ 1956–57 against a defendant in connection with violations of IEEPA).

40. 18 U.S.C. § 1343 (2012); *see, e.g.*, United States v. Chih-Kwang Hwa, No. 2:13-cr-00226-JLR (W.D. Wash. Aug. 14, 2013) (Precision Image Corporation owner, Chih-Kwang Hwa, pled guilty to wire fraud for violations arising from illegal exports under AECA).

41. 18 U.S.C. § 1001 (2012); *see, e.g.*, United States v. Zhen Zhou Wu, 711 F.3d 1, 11 (1st Cir. 2013) (noting charges against defendants for falsifying “Shipper’s Export Declarations” in violation of 18 U.S.C. § 1001(a)(1)).

42. The President appointed the first Assistant Attorney General (AAG) for the National Security Division in 2006 and among his first tasks, Ken Wainstein appointed the first ever National Export Control Coordinator. *See* Press Release, *Justice Department Appoints National Export Control Coordinator as Part of Enhanced Counter-Proliferation Effort*, U.S. DEP’T OF JUSTICE (June 20, 2007), <http://1.usa.gov/1ECv0gd> (“The Justice Department has appointed Steven W. Pelak, an 18-year veteran federal prosecutor, to serve as the Justice Department’s first-ever National Export Control Coordinator to improve the investigation and prosecution of illegal exports of U.S. arms and sensitive technology, Kenneth L. Wainstein, Assistant Attorney General for National Security, announced today.” In announcing the appointment of Steven W. Pelak to this position, AAG Wainstein called the threat posed to the United States by illegal exports of controlled technology “substantial” and noted a report by the Office of the National Counterintelligence Executive that identified “108 nations . . . involved in collection efforts against sensitive U.S. technologies in fiscal year 2005.”).

43. 18 U.S.C. § 371 (2012) (providing that “If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.”); *see also* United States v. Monsieir, No. 1:09-cr-00186-WS-C (S.D. Ala. Oct. 1, 2010) (sentenced to twenty-three months in prison for conspiracy to illegally export F-5 fighter jet engines from

occurred, for example, in *United States v. Larijani*, where the U.S. charged an alleged illicit procurement network involving components for improvised explosive devices and certain export control violations, which led to the first extradition of Singaporean nationals on charges of export control violations.<sup>44</sup>

#### **A. Defense Articles Regulated Under the AECA and ITAR by State/DDTC**

The ITAR prohibits<sup>45</sup> the export<sup>46</sup> and temporary import<sup>47</sup> of defense articles<sup>48</sup> and technical data,<sup>49</sup> the provision of defense services<sup>50</sup> to foreign persons,<sup>51</sup> and the brokering<sup>52</sup> of defense articles or defense services by all persons<sup>53</sup> in the United States<sup>54</sup> and by U.S. persons<sup>55</sup> wherever located, unless approved in advance<sup>56</sup> by a DDTC-issued export license,<sup>57</sup> agreement,<sup>58</sup> or by qualifying for an ITAR

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the United States to Iran). See Pub. L. No. 110-96, 121 Stat. 1011 (2007) (on October 16, 2007, the President signed into law amendments to IEEPA that increased the civil and criminal penalties and also to include conspiracy as a basis for a violation).

44. *United States v. Larijani*, No. 1:10-cr-00174 (D.D.C. Oct. 16, 2013) (extradited defendants sentenced for a “Klein conspiracy” in connection with illegally exporting goods to Iran); Press Release, *Two Extradited from Singapore in Connection with Plot to Illegally Export Military Antennas*, FEDERAL BUREAU OF INVESTIGATION (Dec. 21, 2012), <http://1.usa.gov/1BuS8JV>; see also *United States v. Akhtar*, No. 1:10-cr-00103-JFM (D. Md. Jan. 12, 2012) (sentenced to thirty-seven months in prison for pleading guilty to conspiracy to commit export violations and defraud the United States for sending nuclear related materials to Pakistan); INTERNAL REVENUE MANUAL § 9.1.3.4.8.2 (citing 18 U.S.C. § 371) (“A Klein conspiracy, which is named for the leading case of *United States v. Klein*, is a conspiracy to defraud the government by impeding and impairing the lawful functions of the IRS in computing, assessing and collecting Federal income taxes.”). See generally Press Release, *Summary of Major U.S. Export Enforcement, Economic Espionage, Trade Secret and Embargo-Related Criminal Cases*, U.S. DEPT OF JUSTICE (Oct. 2014), <http://1.usa.gov/1xKW9KS>.
45. Although some writers refer to the ITAR and EAR with plural verbs (“the ITAR prohibit” or “were amended”), in this article we follow State Department usage of the singular verb. See, e.g., Amendment to the International Traffic in Arms Regulations: Libya and UNSCR 2009, 76 Fed. Reg. 68,313 (Nov. 4, 2011) (“The ITAR is amended . . .”) (emphasis added).
46. 22 C.F.R. § 120.17 (2013).
47. *Id.* § 120.18. The President delegated his authority under the AECA to regulate the *permanent* import of defense articles on the U.S. Munitions Import List, 27 C.F.R. § 447.21, to the Attorney General. Exec. Order No. 13,284, 68 Fed. Reg. 4075 (Jan. 23, 2003). The enforcement of controls on the permanent import of defense articles is outside the scope of this article.
48. 22 C.F.R. § 120.6.
49. *Id.* § 120.10.
50. *Id.* § 120.9.
51. *Id.* § 120.16.
52. *Id.* § 129.1.
53. *Id.* § 120.14.
54. *Id.* § 120.13.
55. *Id.* § 120.15.
56. *Id.* § 123.1(a).
57. *Id.* § 120.20; *id.* pt. 123.
58. *Id.* §§ 120.21–.23; *id.* pt. 124.

exemption<sup>59</sup> under the ITAR licensing requirements. Any person in the United States who manufactures, exports, or temporarily imports defense articles, furnishes defense services to foreign persons, or brokers defense articles or services must register with DDTC<sup>60</sup> and maintain records of regulated activities for 5 years.<sup>61</sup> Persons who pay certain fees or commissions to secure the sale of defense articles or services must report those payments to DDTC.<sup>62</sup>

The AECA authorizes punishment of ITAR violations with fines, imprisonment, and debarment,<sup>63</sup> and DDTC has authority to impose civil penalties up to \$500,000 without a criminal conviction.<sup>64</sup> Criminal penalties for a violation of the ITAR may now result in up to 20 years’ imprisonment and \$1,000,000 in fines.<sup>65</sup> Exporters suspected of egregious violations often voluntarily consent to paying civil penalties and performing corrective actions to obtain a “consent agreement” with DDTC.<sup>66</sup> The consent agreement is initiated by DDTC preparing a draft charging letter and order listing the charged violations and proposed penalties and corrective actions, and upon receiving the consent of the accused party, DDTC forwards the charging letter, consent agreement, and order to the Assistant Secretary for Political-Military Affairs for approval.<sup>67</sup> Cases that are settled in that manner may not be reopened or appealed,<sup>68</sup> but failure of the charged party to comply with the terms of the consent agreement and order may result in a requirement to pay the civil penalty and comply with other punitive terms of the order.<sup>69</sup>

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59. *Id.* § 123.1(a).

60. *Id.* §§ 122.1(a), 129.3.

61. *Id.* §§ 122.5, 123.26.

62. *Id.* pt. 130.

63. 22 U.S.C. § 2778(c) (2012) (violations may result in fines not more than \$1,000,000, imprisonment for not more than 20 years, or both); 22 C.F.R. § 127.3 (2015); *id.* § 127.7 (permitting Assistant Sec’y of State for Political-Military Affairs to administratively debar and thereby prohibit any person from activities subject to the ITAR).

64. 22 U.S.C. §§ 2778(e); 22 C.F.R. § 127.10(a).

65. 22 U.S.C. § 2778(c).

66. 22 C.F.R. § 128.11(b) (2015); *see also* U.S. Dep’t of State, Bureau of Political-Military Affairs, Intersil Corp., at 2 (June 16, 2014), <http://1.usa.gov/1xIxK8P>; U.S. Dep’t of State, Bureau of Political-Military Affairs, Raytheon Co., at 2 (Apr. 30, 2013), <http://1.usa.gov/1ByQgOf>; U.S. Dep’t of State, Bureau of Political-Military Affairs, Xe Services, LLC, at 2 (Aug. 18, 2010), <http://1.usa.gov/149npWw>.

67. 22 C.F.R. § 128.11(b).

68. *Id.*

69. Hughes Network Systems (Beijing) Co. Ltd. (HNS China), a wholly-owned subsidiary of Hughes Network Systems Corporation (“HNS”), was under a Consent Agreement dated March 2003 with DDTC for their activities related to failed satellite launches in the People’s Republic of China (PRC). Alleged violations of the Consent Agreement led to DDTC’s May 2004 imposition of a policy of denial against HNS for a period of one year and in January 2005, DDTC entered into a new Consent Agreement with HNS and its successor DirectTV Group, Inc. *See* U.S. Dep’t of State, Notice of Debarment Involving Hughes Network Systems (Beijing) Co. Ltd, 70 Fed. Reg. 35,333 (June 17, 2005).

The ITAR authorizes ICE and Customs and Border Protection (CBP) to “ensure observance” of the ITAR “as to the export of any defense article or technical data”<sup>70</sup> and to use “any other lawful means or authorities to investigate such a matter.”<sup>71</sup> CBP may also require exporters to produce other relevant documents and information relating to the export.<sup>72</sup> The Department of Defense Security Service (DSS) is also authorized to take appropriate action when export of classified technical data or defense articles are involved and DSS may require production of documents and information relating to the proposed export.<sup>73</sup> But the ITAR does not provide exclusive investigative authority over the ITAR to any single law enforcement agency and other law enforcement agencies, including the FBI, are frequently involved in investigations of ITAR violations. Historically, DDTC has had at least one liaison agent both from ICE and the FBI to help coordinate licensing determinations relating to ongoing investigations and handle potential referrals from DDTC for further investigation by law enforcement.<sup>74</sup> DDTC uses a standard form to submit referrals to law enforcement agencies containing the facts of suspected violations, but does not generally provide copies of voluntary disclosures to law enforcement agencies.<sup>75</sup>

***B. Dual-Use Items Regulated Under the EAA, IEEPA, and EAR by Commerce/BIS***

Like the ITAR, the EAR prohibits exports of listed items unless authorized by an export license or qualifying for an exception<sup>76</sup> to the licensing requirements. The differences between the two separate lists, USML and CCL, are being reduced by the transfer of controls on some articles and technology from the USML to the CCL,

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70. 22 C.F.R. § 127.4(a) (2013).

71. *Id.* § 127.4(d). Interview with Sue Gainor, Director, Office of Defense Trade Controls, Compliance, U.S. Department of State (Jan. 9, 2015) (the yearly number of DHS/ICE indictments under the AECA were as follows: FY2007: 121; FY2008: 180; FY2009: 240; FY2010: 232; FY2011: 392; FY2012: 603; FY2013: unavailable; and FY2014: unavailable. The yearly number of DHS/ICE convictions under the AECA were as follows: FY2007: 91; FY2008: 119; FY2009: 194; FY2010: 162; FY2011: 263; FY2012: 443; FY2013: unavailable; and FY2014: unavailable).

72. 22 C.F.R. § 127.4(c).

73. *Id.* § 125.3.

74. Interview with Sue Gainor, *supra* note 71; U.S. GOV'T ACCOUNTABILITY OFFICE, PROPOSED REFORMS CREATE OPPORTUNITIES, *supra* note 12, at 19–20; Glen E. Smith, Chief, Enforcement Div., Office of Defense Trade Controls Compliance, *OFAC International Trade Symposium: Defense Trade Compliance 3* (May 15, 2009), <http://1.usa.gov/14IYZmT>; *see also* Interview with Sue Gainor, *supra* note 71 (the yearly number of DDTC referrals to ICE and/or the FBI were as follows: FY2007: 34; FY2008: 25; FY2009: 19; FY2010: 37; FY2011: 31; FY2012: 41; FY2013: 35; and FY2014: 22).

75. Interview with Sue Gainor, *supra* note 71.

76. 15 C.F.R. § 740.1(a) (2014). While the EAR consistently uses the word “exception” from licensing requirements, the ITAR uses the equivalent word “exemption” in the same context. *See, e.g.*, 22 C.F.R. § 120.20.

but the historical difference has been that the USML, as its name indicates, primarily contains munitions and military technology without significant civil uses, while the CCL controls dual-use items that have substantial civil use but may have military uses as well. EAR controls on CCL items are generally less strict than ITAR controls on USML items requiring a license, exemption, or other authorization from DDTC, but items on the CCL do not require a license for export to most destinations unless specifically indicated in the EAR. The EAA<sup>77</sup> was the primary statutory authority for the EAR,<sup>78</sup> which is administered by the Department of Commerce’s Bureau of Industry and Security (BIS).<sup>79</sup> Like the expired Export Control Act, the EAA was also a temporary measure, and when enacted, was set to terminate under its “sunset clause” on September 30, 1983.<sup>80</sup> On many occasions, Congress has reauthorized the EAA by simply postponing its expiration date,<sup>81</sup> but it does not always do so before the Act’s termination. As a result, there have been several periods of lapse, ranging in length from a few days to many years between the Act’s expiration and revival.<sup>82</sup> The EAA expired most recently on August 20, 2001.<sup>83</sup> Since then, various bills have been introduced that would revive it,<sup>84</sup> but none has been enacted. However, the President has continued controlling the exports of dual-use items by issuing annual notices of renewal of an Executive Order issued in 2001, the latest on August 11, 2015,<sup>85</sup> under authority provided by the National Emergencies Act<sup>86</sup> and the IEPPA,<sup>87</sup> which provides that upon declaration of a national emergency with respect to an “unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States,”<sup>88</sup> the President may

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77. See 50 U.S.C. app. §§ 2401–20.

78. 15 C.F.R. § 730.2 (2015).

79. *Id.*

80. Export Administration Act of 1979, Pub. L. No. 96-72, § 20, 93 Stat. 503, 535 (codified at 50 U.S.C. app. § 2419 (2001)).

81. See, e.g., Pub. L. No. 98-108, § 1, 97 Stat. 744, 744 (1983) (codified at 50 U.S.C. app. § 2419).

82. See, e.g., Pub. L. No. 103-277, 108 Stat. 1407 (1994) (reauthorizing EAA after four-day lapse); Pub. L. No. 98-207, 97 Stat. 1391 (1983) (reauthorizing EAA after seven-week lapse). See generally IAN F. FERGUSSON, CONG. RESEARCH SERV., RL31832, THE EXPORT ADMINISTRATION ACT: EVOLUTIONS, PROVISIONS, AND DEBATE (2003).

83. 50 U.S.C. app. § 2419 (2000).

84. See FERGUSSON, *supra* note 82, at 3–5.

85. Exec. Order No. 13,222, 66 Fed. Reg. 44,025 (Aug. 22, 2001). In that order, per section 202(d) of the National Emergencies Act, 50 U.S.C. § 1622(d), the President declared a national emergency with respect to the national security, foreign policy, and economy of the United States in light of the expiration of the Export Administration Act of 1979. In 2015, President Obama renewed that order for an additional year. Continuation of the National Emergency With Respect to Export Control Regulations, 78 Fed. Reg. 48,233 (Aug. 11, 2015).

86. 50 U.S.C. § 1622(d) (2015).

87. *Id.* §§ 1701–07.

88. *Id.* § 1701(a).

“regulate . . . exportation of . . . any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.”<sup>89</sup> The validity of the extension of the EAA by Executive Order has been a subject of debate,<sup>90</sup> but has generally been upheld.<sup>91</sup>

IEEPA authorizes the imposition of criminal and administrative penalties for EAR violations.<sup>92</sup> Violations of the EAR can result in criminal penalties of up to \$1,000,000 and not more than 20 years’ imprisonment per violation,<sup>93</sup> and civil penalties equal to the greater of \$250,000 per violation or twice the value of the transaction that is the basis of the violation.<sup>94</sup>

### ***C. Debarment/Denial Orders and Designations Used by DDTC and BIS***

Although the financial and reputational repercussions for violations of the EAR or ITAR are severe, an even more significant enforcement tool available to both DDTC and BIS is the authority to administratively prevent persons from exporting and re-exporting articles controlled by the ITAR and EAR by issuing a debarment

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89. *Id.* § 1702(a)(1)(B).

90. *See, e.g.*, Joel B. Harris & Jeffrey P. Bialos, *The Strange New World of United States Export Controls Under the International Emergency Economic Powers Act*, 18 VAND. J. TRANSNAT’L L. 71, 81 (1985); Matthew A. Goldstein, *The Impact of Export Controls by Fiat*, DEFENSE TRADE LAW BLOG (Nov. 24 2014), <http://bit.ly/1tH7F8y>.

91. *E.g.*, *Wisc. Project on Nuclear Arms Control v. U.S. Dep’t of Commerce*, 317 F.3d 275, 278 (D.C. Cir. 2003) (holding expired provision of the EAA could provide the basis for the Department of Commerce to withhold certain export data under Exemption 3 of the Freedom of Information Act (FOIA), which permits agencies to withhold records exempted from disclosure by statute); *United States v. Groos*, 616 F. Supp. 2d 777, 785–89 (N.D. Ill. 2008) (upholding extension of EAA by Executive Order under IEEPA and citing cases holding same). *But see* *Micei Int’l v. U.S. Dep’t of Commerce*, 613 F.3d 1147, 1151 (D.C. Cir. 2010) (holding IEEPA does not authorize the President the authority to grant jurisdiction to any federal court and stating that “the executive order extending the export regulatory regime does not confer direct-review jurisdiction upon this court. With the EAA in lapse and the general savings statute inapposite, no statute does either. Accordingly, we conclude that this court lacks jurisdiction. . . .”).

92. 50 U.S.C. § 1705.

93. *Id.* § 1705(c).

94. *Id.* § 1705(b).

order<sup>95</sup> or Temporary Denial Order (TDO)<sup>96</sup> that can effectively put an exporter out of business. DDTC and BIS may, respectively, also designate parties on the DDTC Debarred Parties List,<sup>97</sup> which prohibits the listed party from participating in any ITAR-controlled activity,<sup>98</sup> or the BIS Entity List,<sup>99</sup> which imposes a licensing requirement for certain exports or re-exports subject to the EAR.<sup>100</sup>

Use or the threat of the use of TDOs and Entity List designations, among other types as well, has grown over the years as a powerful tool used to enhance U.S. law enforcement’s investigations of export control violations.<sup>101</sup> These mechanisms are further enhanced by the government’s ability to immediately place a person or entity

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95. See 22 C.F.R. § 127.7(a) (2013) (for ITAR violations, the Assistant Secretary of State for Political-Military Affairs may administratively debar, and thereby prohibit any person from activities subject to the ITAR for an appropriate time “which shall generally be for a period of three years”); *Id.* (reinstatement is not automatic, and the debarred person must submit a request for reimbursement and be reinstated before engaging in any ITAR-controlled activities). Persons convicted of violating or conspiring to violate AECA are subject to statutory debarment under 127.7(b). See also Lists of Parties Debarred Pursuant to the ITAR, U.S. DEP’T OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROLS (Sept. 24, 2015), [https://www.pmdtcc.state.gov/compliance/debar\\_intro.html](https://www.pmdtcc.state.gov/compliance/debar_intro.html); Interview with Sue Gainor, *supra* note 71 (the yearly number of reinstatement requests submitted to DDTC were as follows: FY2007: 2; FY2008: 0; FY2009: 53; FY2010: 2; FY2011: 4; FY2012: 0; FY2013: 3; and FY2014: 2).
  96. 15 C.F.R. § 766.24 (2010) (for EAR violations, the Assistant Secretary for Export Enforcement may issue or renew a TDO, denying any or all export privileges of a company or individual to prevent an imminent or on-going export control violation. TDOs are issued for a renewable 180-day period and cut off not only the right to export from the United States, but also the right to receive or participate in exports from the United States).
  97. 22 C.F.R. § 127.7(b); List of Statutorily Debarred Parties, U.S. DEP’T OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROLS (Apr. 15, 2015), <http://1.usa.gov/1xBUHHm>.
  98. 22 C.F.R. § 120.1(c)(2)-(d).
  99. 15 C.F.R. pt. 744 (Supp. IV 2014).
  100. *Id.*; 22 C.F.R. § 127.1.
  101. Upon announcing an indictment in the case of *United States v. Fishenko*, No. 1:12-cr-00626 (E.D.N.Y. Sept. 28, 2012), against eleven members of a Russian military procurement network operating in the United States and Russia, as well as a Texas-based export company and a Russia-based procurement firm, for illegally exporting high-tech microelectronics from the United States to Russian military and intelligence agencies, BIS took the historic step of adding at one time 165 foreign persons and companies to the Entity List who received, transshipped, or otherwise facilitated the export of controlled commodities by the defendants. See also *United States v. Li Fangwei*, No. 1:14-cr-00144-LAP (S.D.N.Y. Feb. 28, 2014) (U.S. Department of Commerce designation to the Entity List of nine China-based suppliers to Li Fangwei at the same time criminal charges were announced); *United States v. Balli Aviation*, No. 1:09-c-r-00366 (D.D.C. Dec. 22, 2009) (issuing TDO against Balli defendants and others prior to criminal charges); *Iran Sanctions: Ensuring Robust Enforcement, and Assessing Next Steps: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 113th Cong. 44 (June 4, 2013) (statement of Eric L. Hirschhorn, Under Sec’y of Commerce for Industry and Security) (“Because companies and banks worldwide screen against [the Entity] list, publicly naming entities involved in illicit export activity helps prevent export violations by discouraging resellers and other parties from doing business with targeted entities and the procurement networks of which they are a part.”). Interview with Sue Gainor, *supra* note 71 (the yearly number of statutory debarments issued by DDTC were as follows: FY2007: 23; FY2008: 0; FY2009: 53; FY2010: 56; FY2011: 0; FY2012: 111; FY2013: 22; and FY2014: 0).



on an excluded party list merely by sending a “notice of proposed debarment” without providing the person or entity any due process, including the ability to present any information to the government.<sup>102</sup> In practice, it is much easier for a person or entity to be designated than it is for a person or entity to challenge successfully the designation by BIS or DDTC.

### III. Current Export Control Enforcement Agencies

In the United States, the export laws and regulations are enforced by two methods which are not mutually exclusive: civil and criminal enforcement. The two primary *civil* enforcement agencies for export control laws are the Departments of Commerce and State. The agencies involved in *criminal* enforcement of export control laws, however, are numerous, and include the Department of Commerce (but not the Department of State) and a host of other law enforcement agencies, as well as the Department of Justice Counterintelligence and Export Control Section<sup>103</sup> with specialized prosecutorial expertise for export control cases.

While many Americans may not be aware of the threat presented by those seeking to obtain unlawfully export controlled items from the United States, law enforcement agencies often encounter sophisticated persons and global networks motivated often by profit or ideology to circumvent U.S. export control regulations.<sup>104</sup> Ryan Fayhee, former National Export Coordinator for the Department of Justice, described the challenge for enforcement agencies:

Proliferators spearheading [] procurement networks are able to quickly locate products for sale anywhere in the world with just a few keystrokes. They are then able to communicate that information via email to their middlemen overseas and direct them to specific U.S. suppliers. These foreign middlemen agents may change their names frequently and may never see or touch the products they order from the United States. They work in conjunction with freight forwarders, who at their instruction remove and replace the inbound shipping records with outbound shipping

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102. Jared Serbu, *Suspension and Debarments Rise Amid Pressure from Congress*, FEDERAL NEWS RADIO (June 14, 2012), <http://bit.ly/1HoOcMx>.

103. *National Security Division*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/nsd> (last visited Nov. 12, 2015).

104. A review of the Department of Justice's summary of enforcement cases involving export control prosecutions shows that even in a heightened enforcement environment, the Justice Department has not exercised its prosecutorial discretion to focus on cases involving dual-use goods being exported to European Union or other close economic and security partners of the United States. Instead, most cases prosecuted by the Justice Department involve countries where there are arms embargoes, such as China, sponsor terrorism, such as Iran, involve restricted persons or entities, or involve illegal gun trafficking across the border. *See generally* U.S. DEP'T OF JUSTICE, SUMMARY OF MAJOR U.S. EXPORT ENFORCEMENT, ECONOMIC ESPIONAGE, TRADE SECRET AND EMBARGO-RELATED CRIMINAL CASES (2015).

records to facilitate the transshipment of the goods to prohibited end-users. The location of the middlemen may or may not be in the same country as the shipping route of the goods or the flow of money.<sup>105</sup>

Often this is done without knowledge of the U.S. companies involved in the transactions.<sup>106</sup>

Generally, to determine liability for an export control transaction civil and criminal enforcement agencies examine whether:

- (1) U.S. government authorization was required for the transaction;
- (2) authorization existed, and covered the relevant conduct; and
- (3) the party knowingly and willfully failed to obtain authorization or to adhere to the authorization provided.<sup>107</sup>

The existence of the first two elements is typically sufficient for the government to allege a civil violation on a strict liability basis,<sup>108</sup> and the existence of evidence demonstrating intent would allow the government to allege a criminal violation has occurred as well.<sup>109</sup> While this basic overview is simplified here, the regulations that determine whether a transaction may require a license are complex.

Enforcement cases may begin in any number of ways: anonymous tips to agency hotlines;<sup>110</sup> leads driven by the CBP on out-bound shipments;<sup>111</sup> voluntary self-disclosures filed by companies or persons that identify other companies or persons; subpoenas issued to companies;<sup>112</sup> search warrants resulting in leads of potential

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105. Ryan Fayhee, *Extradition in Export Enforcement Cases*, 61 U.S. ATTORNEYS’ BULL. 1, 2 (2013).

106. Robert S. Mueller III, FBI Director, Remarks at the U.S. Dep’t of Commerce, Bureau of Industry and Security Annual Update Conference on Export Controls and Policy (July 18, 2012), *available at* <http://1.usa.gov/1B0bDK2> (“We do recognize that genuine mistakes do occur. In many instances, there is no knowledge on the part of the exporter that a violation is underway. That is one reason why these cases are so challenging for us.”).

107. *See, e.g.*, *United States v. Homa Int’l Trading Corp.*, 387 F.3d 144, 147 (2d Cir. 2004); *United States v. Tsai*, 954 F.2d 155, 162 (3d Cir. 1992); *see also* *United States v. Habibion*, No. 1:11-cr-00118-ESH (D.D.C. Aug. 17, 2011) (government’s proposed jury instructions).

108. 50 U.S.C. § 1705(a)–(b) (2007); 50 U.S.C. app. § 2410(c) (1988); 15 C.F.R. § 764.3(a) (2013); 22 C.F.R. § 127.10 (2013); 31 C.F.R. pt. 501, app. A (2009).

109. *See* 22 C.F.R. § 127.1 (2013); *Kuhali v. Reno*, 266 F.3d 93, 104 (2d Cir. 2001) (stating criminal conviction under AECA “entails proof of four elements: the (1) willful (2) export or attempted export (3) of articles listed on the United States Munitions List (4) without a license”); *United States v. Murphy*, 852 F.2d 1, 6–7 (1st Cir. 1988); 22 C.F.R. § 127.1 (2013); Fifth Circuit Pattern Criminal Jury Instructions § 2.93 (2012).

110. Mark Schapiro, *The Middleman*, MOTHER JONES, June 2005, *available at* <http://bit.ly/1zN5cGn> (discussing anonymous sources that led to prosecution of Asher Karni for export control violations).

111. Miller & Chevalier, *CBP Identifies Most Common Reasons for Outbound Detentions and Seizures*, MILLER CHEVALIER (Aug. 10, 2010), <http://bit.ly/1IdMBYy>.

112. The Commerce Department and State Department can subpoena books and records of parties to export transactions for use in civil and administrative proceedings. *See* 22 U.S.C. § 2778(e) (2014); 50 U.S.C. app. § 2411 (2004).

export control violations;<sup>113</sup> negative post-shipment or pre-shipment verifications;<sup>114</sup> statements made by companies regarding detained shipments;<sup>115</sup> leads generated from industry outreach visits conducted by law enforcement;<sup>116</sup> confidential informants within industry;<sup>117</sup> inspections of shipments;<sup>118</sup> whistleblowers or disgruntled employee;<sup>119</sup> press reports;<sup>120</sup> undercover operations with the full range of authorities administered by DHS or FBI;<sup>121</sup> evidence received from other non-export control cases, such as money laundering or sanctions matters;<sup>122</sup> submissions made by companies trying to have names removed from the Entity List or a TDO; and observations made by immigration officers at ports of entry or during secondary screenings.<sup>123</sup>

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113. *United States v. Moller-Butcher*, 560 F. Supp. 550, 557–58 (D. Mass. 1983) (upholding a search warrant that sought “records which are required under the Export Administration Act . . . by all businesses sending electronic equipment outside of the United States”).
114. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-613, EXPORT CONTROLS: U.S. AGENCIES NEED TO ASSESS CONTROL LIST REFORM’S IMPACT ON COMPLIANCE ACTIVITIES 16 (2012) [hereinafter REFORM’S IMPACT ON COMPLIANCE ACTIVITIES] (“The three locations where [the U.S. Department of Commerce] conducted site visits—Hong Kong, Singapore, and UAE—represented about 36 percent of Commerce end-use checks conducted globally for this period and nearly 62 percent of unfavorable determinations worldwide.”).
115. *United States v. Yip*, No. 5:11-cr-00516 (W.D. Tex. Oct. 29, 2012).
116. *See, e.g.*, John T. Morton, Director, ICE, Remarks Prepared for the Wash. Inst. for Near East Pol’y (Sept. 2, 2010), <http://bit.ly/1Kd9Up1> (discussing industry outreach visit leading to arrest for violations of export control laws).
117. *See, e.g., id.* (discussing tip from confidential informant leading to arrest of individual for export control violations).
118. 15 C.F.R. § 758.7(b)(5) (2014) (inspection authority under the EAR); 22 C.F.R. § 127.4 (2013) (inspection authority under ITAR); *see, e.g.*, *United States v. Khazaei*, No. 3:14-cr-00009 (D. Conn. Jan. 21, 2014) (indicted former defense contractor engineer for export control violations after inspection of a shipment to a freight forwarder bound for Iran located boxes of sensitive technical manuals, specification sheets, and other propriety material relating to the U.S. Air Force’s F-35 Joint Strike Fighter Program); *see also* *United States v. Ramsey*, 431 U.S. 606, 619 (1977) (noting that the “longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless ‘reasonable’ has a history as old as the Fourth Amendment itself”).
119. *See, e.g.*, Jared Serbu, *FBI Investigating NASA Whistleblower Reports of Chinese Data Breach*, FEDERAL NEWS RADIO (Mar. 8, 2013, 5:13 AM), <http://bit.ly/1Ad0x5z>.
120. David W. Mills, Assistant Sec’y for Export Enforcement, U.S. Dep’t of Commerce, Keynote Speech at BIS Annual Update Conference (July 30, 2014), <http://1.usa.gov/1Bfvsvk> (“OEE has initiated a number of investigations based on press reporting and information released on the internet by opposition members and internet hackers that identified the presence of U.S. equipment in Syria and in Iran.”).
121. *See, e.g.*, *United States v. Jangraw*, No. 1:14-cr-00174-JEB (D.D.C. Aug. 29, 2014); *United States v. Bo Cai*, No. 1:13-cr-04044-MV (D.N.M. July 23, 2014).
122. *See, e.g.*, Press Release, *Chesterfield Man Sentenced to 18 Months in Prison for Theft of DuPont Trade Secrets*, U.S. DEPT OF JUSTICE (Mar. 18, 2010), <http://www.justice.gov/sites/default/files/criminal-ccips/legacy/2012/03/15/mitchellSent.pdf> (noting that charges of trade secret theft led to investigation of export control violations).
123. *See* Press Release, *California Couple Charged with Conspiring to Export Sensitive Technology to People’s Republic of China*, U.S. ATTORNEY’S OFFICE (Oct. 15, 2010), available at <https://www.fbi.gov/losangeles/press-releases/2010/la101510-1.htm> (“U.S. Customs and Border

With these numerous pipelines of information also comes a number of overlapping U.S. Government enforcement agencies with potential jurisdiction over the investigation, including the Departments of State, Commerce, Homeland Security, and Justice. Each Department also inevitably includes different agencies and sections separately responsible for different aspects of export control. The three law enforcement agencies most often involved in investigating export control violations are (1) DOJ’s Federal Bureau of Investigation,<sup>124</sup> (2) Homeland Security’s Immigration and Customs Enforcement (ICE),<sup>125</sup> including Homeland Security Investigations (HSI), a division of ICE,<sup>126</sup> and (3) Commerce’s BIS Office of Export Enforcement (OEE).<sup>127</sup> OEE investigative authority is limited to investigating violations of the EAR and IEEPA, which can involve separate investigations of other statutes related to the illegal export of an item controlled under the EAR.<sup>128</sup> FBI and HSI, in contrast, have broader authority, authorizing them to investigate all export regulation violations, as well as many other federal statutes.<sup>129</sup>

With the number of enforcement agencies that can be involved in export control matter, the intersections that can occur with ongoing intelligence priorities and foreign policy, and the number of different licensing regimes, inter-agency

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Protection officials stopped the engineers upon their return to the United States and allegedly found computer files and documents indicating illegal technology transfer involving GTSI and China.”).

124. *What We Investigate*, FEDERAL BUREAU OF INVESTIGATION, <http://1.usa.gov/1kCPIgu> (last visited Nov. 2, 2015).
125. See Homeland Security Act of 2002, Pub. L. No. 107-296, tit. IV, § 442, 116 Stat. 2135, 2193. That Act created the Bureau of Border Security, which has since been renamed ICE. Name Change From the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement, and the Bureau of Customs and Border Protection to U.S. Customs and Border Protection, 72 Fed. Reg. 20,131 (Apr. 23, 2007).
126. *History: HSI – Historic Origins*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/hsi> (last visited Nov. 2, 2015) (“In 2010, HSI was formed within ICE from elements of ICE’s previous Offices of Investigations, Intelligence and International Affairs.”); *ICE Realigns Itself, But Won’t Call It a Restructuring*, SISKIND’S IMMIGRATION BULLETIN, June 30, 2010, <http://www.jdsupra.com/legalnews/siskinds-immigration-bulletin-june-30-66644/> (last visited Nov. 7, 2015) (“Immigrations and Customs Enforcement announced to its employees this week that it will realign its offices under three new directorates: Homeland Security Investigations, Enforcement and Removal Operations and Management Administration.”).
127. *Office of Export Enforcement*, U.S. DEPT’ OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, <http://1.usa.gov/1zOQJcL> (last visited Nov. 2, 2015).
128. *Export Control Enforcement*, EXPORT.GOV, <http://1.usa.gov/1BrwNRx> (last visited Nov. 2, 2015).
129. *Id.*; 28 C.F.R. § 0.85(d) (1997) (FBI has authority to investigate violations of the AECA, EAA, TWEA, and IEEPA if the investigation relates “to any foreign counterintelligence matter.”); *Overview: HSI – A Diverse, Global Force*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/hsi> (last visited Nov. 2, 2015) (ICE and HSI have “broad legal authority to enforce a diverse array of federal statutes,” including “Financial crimes, money laundering and bulk cash smuggling; Commercial fraud and intellectual property theft; Cybercrimes; Human rights violations; Human smuggling and trafficking; Immigration, document and benefit fraud; Narcotics and weapons smuggling/trafficking; Transnational gang activity; Export enforcement; and, International art and antiquity theft.”).

coordination has always been critical to successful enforcement. One of the identified goals of the President's ECR is to create a single primary enforcement coordination agency to reduce the number of separate law enforcement agencies with jurisdiction over investigations of export control violations. The Administration proposed that it would, during the third and final ECR phase, "seek legislation that would merge the Department of Commerce's criminal investigative function into a single dedicated export enforcement unit in DHS/ICE and stand up a new consolidated administrative enforcement unit comprising compliance and enforcement officials from Commerce and State in the Single Control Agency."<sup>130</sup> The President has observed that "[a] multitude of agencies—Commerce, Defense, Homeland Security, Justice, State, and the Treasury—each have authority to investigate and/or enforce some or all of the three licensing agencies' export controls [and that] [a]ll these departments operate on a number of separate information technology (IT) systems."<sup>131</sup> The obvious disadvantage of this arrangement is that

multiple departments and agencies with full, partial, or tangential involvement with export enforcement can be confusing, both within and outside the U.S. Government (USG), including with foreign law enforcement authorities, and has resulted in occasionally disjointed and inefficient USG-wide export enforcement efforts, including inadvertent 'blue on blue' instances where one law enforcement agency negatively impacts the investigation of another law enforcement agency.<sup>132</sup>

Current export control enforcement methods also have been criticized by the General Accountability Office (GAO) as being overly complex,<sup>133</sup> and numerous reforms have been proposed.<sup>134</sup> GAO has noted that export control enforcement involve multiple agencies with overlapping jurisdiction that "carry out various activities, including inspecting shipments, investigating potential export control violations, and taking punitive actions that can be criminal or administrative

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130. *Export Control Reform Initiative Fact Sheet #6*, *supra* note 11; *see also* IAN F. FERGUSSON & PAUL K. KERR, CONG. RESEARCH SERV., R41916, THE U.S. EXPORT CONTROL SYSTEM AND THE PRESIDENT'S REFORM INITIATIVE 11 (2014) ("While the Administration has not proffered specific details about this new agency, it is expected to take over the licensing functions of BIS, DDTC, and OFAC. Civil and administrative enforcement functions of BIS and DDTC are likely to be housed in the new unified licensing agency."); *id.* at 20 ("ICE conducts investigations and criminal enforcement for DDTC and OFAC, and by virtue of its authority under the IEEPA, it shares dual-use investigations with OEE. Removal of OEE to ICE will end this overlap of authority.").

131. *Export Control Reform Initiative Fact Sheet #1*, *supra* note 16.

132. *Export Control Reform Initiative Fact Sheet #6*, *supra* note 11.

133. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-278, GAO'S HIGH-RISK SERIES, AN UPDATE 107-09 (2011); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-265, EXPORT CONTROLS: CHALLENGES EXIST IN ENFORCEMENT OF AN INHERENTLY COMPLEX SYSTEM 2-3 (2006).

134. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, PROPOSED REFORMS CREATE OPPORTUNITIES, *supra* note 12, at 28.

against violators of export control laws and regulations.”<sup>135</sup> The focus of the criticism, however, was not on the mere existence of several different enforcement agencies with overlapping jurisdiction,<sup>136</sup> but on the risk of those agencies not coordinating or doing so inefficiently in such a high stakes area with national security and foreign policy implications.

#### **A. Department of Justice: Federal Bureau of Investigation**

The FBI, with over 35,000 employees and well over 13,000 Special Agents,<sup>137</sup> has authority to investigate almost all Federal crimes, but when investigating export control violations, it most often involves classified information and “a nexus with foreign counterintelligence.”<sup>138</sup> As of two years ago, the FBI had over 1,500 pending cases that involved export control-related violations.<sup>139</sup> The former Director of the FBI Robert Mueller noted at a recent BIS conference, “Now, what does the FBI bring to the table? We are one of several agencies responsible for the enforcement of export control laws and regulations. Our primary interest relates to export matters with a national security nexus.”<sup>140</sup> As national security threats have changed, the FBI has found export control laws as a useful tool to combat theft of sensitive data and cyberespionage cases.<sup>141</sup>

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135. U.S. GOV'T ACCOUNTABILITY OFFICE, EXPORT CONTROLS: CHALLENGES EXIST IN ENFORCEMENT OF AN INHERENTLY COMPLEX SYSTEM, *supra* note 133, at 7.

136. Export controls is by no means the only area where multiple law enforcement agencies share overlapping jurisdiction. See Robert S. Mueller, III, Director of FBI, Remarks at the 15th Annual RSA Conference, San Jose, CA (Feb. 15, 2006), available at <https://www.fbi.gov/news/speeches/protecting-cyberspace-by-working-together-and-sharing-information> (“The FBI and the Secret Service share federal jurisdiction for investigating cybercrime; our roles in detecting and suppressing computer-based crimes are complementary. We must continue to share information and resources.”); *E.g.*, Joe Palazzolo, *Rival Agencies Agree to Halt Turf Battles*, MAINJUSTICE.COM (Aug. 10, 2009), <http://bit.ly/1tTpbql> (the Drug Enforcement Agency and ICE have overlapping jurisdiction over drug cases).

137. *Frequently Asked Questions*, FEDERAL BUREAU OF INVESTIGATION, <http://1.usa.gov/1yswtST> (last visited Nov. 2, 2015) (On October 31, 2013, a total of 35,344 people worked for the FBI, including 13,598 special agents and 21,746 professional staff).

138. FBI has authority to investigate violations of AECA and IEEPA if the investigation relates “to any foreign counterintelligence matter.” 28 C.F.R. § 0.85(d) (1997). See, *e.g.*, Delegations of Authority; Federal Bureau of Investigation, 69 Fed. Reg. 65,542 (Nov. 15, 2004); BERT CHAPMAN, EXPORT CONTROLS: A CONTEMPORARY HISTORY 166 (2013).

139. Mueller, *supra* note 106.

140. *Id.*

141. In *United States v. Chung*, a Boeing engineer and naturalized U.S. citizen was identified by the FBI from evidence obtained in an export control investigation as a suspect who was being tasked by the Chinese government to obtain restricted technology and trade secrets relating to the Space Shuttle’s Delta IV rocket. See Press Release, *Former Boeing Engineer Convicted of Economic Espionage in Theft of Space Shuttle Secrets for China*, U.S. DEP’T OF JUSTICE (July 16, 2009), <http://www.justice.gov/opa/pr/former-boeing-engineer-convicted-economic-espionage-theft-space-shuttle-secrets-china>; see also *United States v. Liu*, No. 2:11-cr-00208-SRC (D.N.J. Mar. 26, 2013) (convicted former L3 engineer and sentenced to 70 months in prison for exporting controlled

The FBI places export control enforcement in its Counterproliferation Center at FBI Headquarters, which brings together the expertise of its Weapons of Mass Destruction Division and Counterintelligence Division.<sup>142</sup>

The “dual hat” that the FBI wears often places it in a unique position to provide valuable intelligence to the intelligence community about transshipment networks, technology of concern, and intersections with other intelligence priorities.<sup>143</sup> Over the years, the FBI has found value in reviewing export control cases begun in other agencies, such as OEE, both from intelligence and law enforcement perspectives, watching illicit procurement networks, and sometimes pursuing them with criminal arrests and charges. On export control cases that the FBI jointly investigates, there can be tension with other law enforcement agencies, because the FBI’s interests in learning the complex tradecraft of how export-controlled data was stolen or how a procurement network operated, for example, are not always entirely aligned with agencies more interested in returning criminal charges. As both a law enforcement agency and a member of the U.S. intelligence community, the FBI must often balance these two priorities.<sup>144</sup>

The FBI has the unique ability to obtain and use search warrants or Foreign Intelligence Surveillance Act warrants<sup>145</sup> in export control cases, and broad access

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military technology to China, stealing trade secrets, and lying).

142. After the National Export Control Coordinator was appointed, on October 11, 2007, the U.S. Department of Justice announced a National Counter-Proliferation Initiative (CPI). *See* Press Release, *Justice Department and Partner Agencies Launch National Counter-Proliferation Initiative*, U.S. DEP’T OF JUSTICE, (Oct. 11, 2007), <http://1.usa.gov/13Rb48I>. At the date of the CPI announcement, ICE had doubled the number of agents assigned to export control cases and reports making 149 export-related arrests last fiscal year and FBI reported that it is investigating roughly 125 economic espionage cases and has increased counterintelligence instruction for new agents by 240 percent. *Id.* In announcing CPI, the Assistant Attorney General for National Security stated: “The threat posed by illegal foreign acquisition of restricted U.S. technology is substantial and growing.” *Id.* The FBI’s prioritization and additional resources provided to combat cybercrime and cyberespionage will certainly have significant and continued intersections with export control enforcement. *See, e.g.*, David W. Mills, Assistant Sec’y for Export Enforcement, U.S. Dep’t of Commerce, Remarks Before the West Coast Export Enforcement Forum (Feb. 25, 2014), <http://1.usa.gov/1wfHNvV> (“Let me be clear, the theft of export controlled information from your computer systems as a result of foreign cyber actors is a threat to U.S. national security interests and your company’s competitive lifeblood: intellectual property.”).
143. U.S. GOV’T ACCOUNTABILITY OFFICE, PROPOSED REFORMS CREATE OPPORTUNITIES, *supra* note 12, at 12 (“The FBI, with both an investigative and intelligence mission, does not allocate resources solely for export control enforcement and officials told us they view these activities as a tool to gain intelligence that may lead to more robust cases.”).
144. *See* 50 U.S.C. § 3041 (2007); *see also* Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981) (the National Security Act of 1947, as amended, designated the FBI as a member of the U.S. Intelligence Community and Executive Order 12,333 and the Attorney General Guidelines for Domestic Operations, appoint the FBI as the lead domestic agency for conducting counterintelligence activities); *see also* U.S. DEP’T OF JUSTICE, FBI, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE (2011).
145. The FBI is authorized to apply for search warrants, and to apply for Foreign Intelligence Surveillance

to classified information, where other agencies may not be authorized by similar authorities or have the same type of access to critical information in the intelligence community.<sup>146</sup> Given this role, the FBI, as with HSI, has historically had a liaison agent at DDTC and in the last several years has developed a closer working relationship with OEE.<sup>147</sup>

***B. Department of Homeland Security: Immigration & Customs Enforcement (ICE) and Homeland Security Investigations (HSI)***

U.S. Immigration and Customs Enforcement (ICE) enforces federal laws governing border control, customs, trade, and immigration to promote homeland security and public safety. ICE was created in 2003 through a merger of the investigative and interior enforcement elements of the former U.S. Customs Service and the Immigration and Naturalization Service. ICE now has more than 20,000 employees in more than 400 offices in the United States and 48 foreign countries. The agency has an annual budget of approximately \$6 billion, primarily devoted to two operational directorates — Homeland Security Investigations (HSI) and Enforcement and Removal Operations (ERO). A third directorate, Management and Administration (M&A), is charged with providing professional management and mission support to advance the ICE mission.<sup>148</sup>

HSI is an investigative arm of DHS and focuses on combating criminal organizations illegally exploiting the United States’ travel, trade, financial, and immigration systems. HSI’s workforce includes special agents, analysts, auditors, and support staff. HSI has broad legal authority to enforce a diverse array of federal statutes involving cross-border activity, including violations of the ITAR and EAR. HSI’s historical legacy connection with CBP,<sup>149</sup> a liaison role with DDTC, significant

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Act warrants. 50 U.S.C. §§ 1801–1885c (2015). OEE agents do not have that authority, and must seek assistance from FBI when an OEE investigation justifies warrants. *See, e.g.,* United States v. Shu Quan-Sheng, No. 2:08-cr-00194 (E.D. Va. Apr. 10, 2009) (conviction of naturalized U.S. citizen and Ph.D. physicist for illegally exporting space launch technical data and services to PRC and offering bribes to Chinese government officials).

146. *See generally* John Shiffman & Duff Wilson, *Turf Battles Hinder U.S. Efforts to Thwart Smugglers*, REUTERS (Dec. 17, 2013), <http://reut.rs/1BdO6nf> (“Each agency also has distinct crime-fighting powers. Only FBI agents can deploy Foreign Intelligence Surveillance Act wiretaps. Only Commerce agents can issue administrative sanctions. Only Homeland Security agents can search packages at the border without a warrant. State and Treasury officials who are not federal agents can issue administrative and financial sanctions for regulatory violations.”).

147. Interview with Sue Gainor, *supra* note 71.

148. *See generally* *Who We Are*, U.S. DEPT OF HOMELAND SECURITY, <http://www.ice.gov/about> (last visited Nov. 2, 2015).

149. The EAA was first passed in 1979, Pub. L. No. 96-72, 98 Stat. 503, and amended in 1985 with the passage of the EAA Amendments Act, Pub. L. No. 99-64, 99 Stat. 120. *See* EAA history, *supra* notes 25–29 and accompanying text. Congress and the President recognized the overlap of enforcement authorities between OEE and Customs and attempted to clarify investigative roles between



presence overseas, and administration of the new Export Enforcement Coordination Center (E2C2), which was created by the President's Executive Order, are all considerable benefits in export control enforcement cases. According to HSI, its ability and expertise in conducting undercover operations has also given it an advantage over other agencies, such as OEE, that lack that capability.<sup>150</sup> In *United States v. Ardebili*,<sup>151</sup> for example, HSI agents used undercover tactics to lure out of Iran and arrest an Iranian arms dealer for violations of U.S. export control laws.<sup>152</sup>

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domestic and foreign investigations. In the legislative history for the Export Administration Amendments Act of 1985, Section 12(a) of the Act was amended to clarify enforcement authorities. The legislative history explains Section 12(a) was drafted to "clarify as precisely as possible in statutory language the relationship between the Department of Commerce and the Customs Service in enforcing the [Export Administration Act]." H.R. CONF. REP. NO. 99-180, at 62 (1985), *reprinted in* 1985 U.S.C.C.A.N. 108, 124. The enforcement authorities were clarified in the history as follows:

With respect to overseas enforcement activities, the conferees intend that the Customs Service have the primary enforcement responsibility, particularly in countries where the Customs Service has an enforcement agreement with the host government. The Commerce Department's overseas enforcement role is limited to those areas discussed *infra*. It is intended that investigations beyond U.S. borders of allegations of wrongdoing should be investigated by the Customs Service . . . [T]he Commerce Department's overseas enforcement activities shall consist of alleged boycott violation investigations[,] . . . investigations of firms prior to the issuance of a license which the firm has applied for, or for which the firm is indicated to be the overseas consignee and post-shipment verifications.

H.R. CONF. REP. NO. 99-180, at 62–63 (1985), *reprinted in* 1985 U.S.C.C.A.N. at 124–25; *see also* Enforcement Responsibilities of Commerce and Customs Under the Export Administration Act, 50 Fed. Reg. 41,545 (Oct. 11, 1985) (noting that Commerce and Customs may conduct EAA investigations "either independently or jointly, and Commerce shall focus its efforts on the discovery and deterrence of domestic circumvention of the export licensing system" and requiring that if Commerce discovers an allegation of evidence of wrongdoing outside the United States, it "shall promptly inform Customs" and "Customs shall then be responsible for pursuing the foreign aspects of the investigation").

150. OEE officials disagree and note that OEE agents conduct undercover operations, but that they do not have the ability to collect any funds obtained from those operations. *See, e.g., United States v. Mangelsen*, No. 4:02-cr-40026-JPG (S.D. Ill. Aug. 2, 2002) (following OEE undercover operations indictment filed against individuals for conspiracy to defraud the United States in connection with diversion of unauthorized items to Libya which ultimately led to successful prosecution). *United States v. Mahmood*, No. 1:04-cr-00365 (D.D.C. Jan. 24, 2006) (sentence of 17 months imposed for conspiracy to divert unauthorized items to Iran following OEE undercover operation).
151. No. 1:07-cr-00155 (D. Del. Dec. 14, 2009).
152. John T. Morton, *Combating Export Violations to Iran: The Role of ICE Homeland Security Investigations* (Sept. 2, 2010), in WASH. INST. FOR NEAR EAST POLY, OBAMA'S NATIONAL SECURITY VISION: CONFRONTING TRANSNATIONAL THREATS WITH GLOBAL COOPERATION 11–12 (Dr. Matthew Levitt ed., 2010). The use of undercover operations has had success, but may be more difficult to leverage in cases involving the illicit cyber intrusion of export-controlled data.

**C. Department of Commerce: Bureau of Industry & Security’s Office of Export Enforcement (OEE)**

The BIS Export Enforcement Division consists of the Office of Enforcement Analysis (OEA), the Office of Antiboycott Compliance (OAC), and the Office of Export Enforcement (OEE). OEE was created by the Export Administration Act,<sup>153</sup> and its mission is to enforce export controls on dual-use and certain munitions items for the Department of Commerce through the EAR under the authority of the IEEPA.<sup>154</sup> Several Commerce Department officials interviewed for this article acknowledge that OEE’s mission of enforcing export control violations is viewed by some as contrary to the Commerce Department’s role of promoting U.S. exports.<sup>155</sup> Scott B. Quehl, former Chief Financial Officer & Assistant Secretary for Administration, U.S. Dep’t of Commerce, countered that perception by observing that “Export Enforcement at BIS plays defense on the Commerce Department’s export promotion team.”<sup>156</sup>

OEE conducts investigations of suspected violations, assists other law enforcement agencies with export violation investigations, reviews voluntary self-disclosures submitted to BIS, and assists exporters with EAR compliance issues.<sup>157</sup> BIS’s Export Enforcement division has three program offices: the Office of Export Enforcement (OEE), the Office of Export Analysis (OEA), and the Office of Antiboycott Compliance (OAC).<sup>158</sup> In December, 2014, BIS OEE employed 110 Special Agents, and other administrative staff<sup>159</sup> in OEE’s Washington, D.C. headquarters and in nine field offices across the United States.<sup>160</sup> In contrast with

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153. 50 U.S.C. app. §§ 2401–2420.

154. 50 U.S.C. §§ 1701–1707.

155. The sources of those comments asked not to be identified in this article.

156. Interview with Scott B. Quehl, former Chief Financial Officer & Assistant Secretary for Administration, U.S. Dep’t of Commerce, in Washington, D.C. (Feb. 4, 2015).

157. While the EAA has been expired, OEE agents have investigated EAR violations as deputized U.S. Marshalls. Thomas M. deButts & Cecil Hunt, *Department of Commerce Export Controls, in COPING WITH U.S. EXPORT CONTROLS* 67 (Practicing Law Institute 2007) (“OEE special agents have been deputized by the U.S. Marshals Service during periods of lapse of the EAA, authorizing these agents to exercise full law enforcement powers with respect to laws enforced by BIS.”). Only with the passage of Section 305 of the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010 were the full enforcement authorities contained in the lapsed EAA restored on a permanent bases. See 22 U.S.C. § 8544 (2014).

158. This article focuses on the functions of OEE and OEA. OAC is charged with enforcing U.S. antiboycott laws that prohibit U.S. persons from participating in boycotts of other countries that the United States does not support.

159. Interview with Douglas R. Hassebrock, Director, Office of Export Enforcement, U.S. Dep’t of Commerce, in Washington, D.C. (Dec. 10, 2014). This number of agents is too few to fully perform its mission, in the opinion of its director. *Id.*

160. “OEE conducts its enforcement operation from its headquarters in Washington, D.C., and eight field offices located in Boston, Chicago, Dallas, Los Angeles, Miami, New York, San Jose, and Washington, D.C., and a resident office in Houston.” BIS, Office of Export Enforcement,

DDTC's compliance and enforcement employees, all OEE agents are "1811 Special Agents,"<sup>161</sup> who are "sworn federal law enforcement officers with authority to carry firearms, make arrests, execute search warrants, serve subpoenas, detain and seize items suspected to be illegally exported, and order the redelivery to the United States of items exported in violation of U.S. law."<sup>162</sup> Also different than DDTC compliance employees, who are all assigned to the Washington, D.C. headquarters, OEE agent assignments to field offices enable OEE agents to conduct frequent visits to the companies whose compliance they monitor.<sup>163</sup>

OEE is the only group of government law enforcement agents dedicated solely to export control enforcement, as compared to ICE and HSI agents, who may be assigned to many other agency jurisdiction priorities.<sup>164</sup> According to BIS officials, agents must go through rigorous training, including thirteen weeks at the Federal Law Enforcement Training Center and at least one year of on the job training to learn the regulations and understand enforcement techniques. OEE agents have the primary responsibility for investigating violations of the EAR and where violations are significant from an administrative perspective or reveal evidence of

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<https://www.bis.doc.gov/index.php/enforcement/oeo> (last visited Oct. 9, 2015). *See also Investigations*, U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. AND SEC., <http://1.usa.gov/1DbuukX> (listing field offices) (last visited Oct. 9, 2015). At the current time, OEE Special Agents have also been co-located with the FBI in its offices in Portland, Phoenix, Minneapolis, Cincinnati, and Atlanta and with the Department of Defense's Defense Criminal Investigative Service (DCIS) in San Antonio. U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. AND SEC., DON'T LET THIS HAPPEN TO YOU! ACTUAL INVESTIGATIONS OF EXPORT CONTROL AND ANTIBOYCOTT VIOLATIONS 10 (July 2014) [hereinafter DON'T LET THIS HAPPEN TO YOU!], <http://1.usa.gov/1xwCgnF>.

161. The "1811" designation is a reference to the U.S. Office of Personnel Management General Schedule 1811 series job description in the for "criminal investigators" and "covers positions which supervise, lead, or perform work involving planning, conducting, or managing investigations related to alleged or suspected criminal violations of Federal laws." U.S. OFFICE PERSONNEL MANAGEMENT, HANDBOOK OF OCCUPATIONAL GROUPS AND FAMILIES 107 (May 2009), <http://1.usa.gov/1vgFzzA>.
162. DON'T LET THIS HAPPEN TO YOU!, *supra* note 160, at 4; *Investigations*, *supra* note 159.
163. DON'T LET THIS HAPPEN TO YOU!, *supra* note 160, at 17; Interview with Douglas R. Hassebrock, *supra* note 158.
164. *Id.*

intentional violations of the EAR, the agents have the authority to recommend resolving the cases administratively<sup>165</sup> or criminally.<sup>166</sup>

The BIS Office of Enforcement Analysis broadly supports identifying and investigating potential illegal exports, reexports, and transfers by examining export-related transactions, developing potential investigative leads, and providing case support to OEE agents.<sup>167</sup> OEA has several divisions to support this mission, including the Strategic Intelligence Division, International Operations Division, Export Control Officer Program, and the Investigative Analysis Division.<sup>168</sup>

Assistant Secretary for Export Enforcement David Mills highlighted the benefits of the BIS model in his keynote remarks at the 2014 BIS Update Conference, noting that “over the last 32 years, BIS had evolved into a sophisticated law enforcement agency, with criminal investigators and enforcement analysts working together with licensing officers to identify violations and redress them” and that OEE agents were unique among Federal law enforcement agents for having the “subject matter

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165. *See, e.g.*, DON’T LET THIS HAPPEN TO YOU!, *supra* note 160, at 51-52 (noting that in February 2014 entity Intevac, Inc. assessed \$115,000 civil penalty for releasing controlled technology classified as 3E001 to a Russian national in Santa Clara, California facility without the required license from BIS); *id.* at 50 (noting that in August 2009 DHL Express (USA), et al. assessed a \$9.4 million civil penalty for prohibited exports to several countries and the failure to retain export control documents required under the EAR); *id.* at 38 (noting that in August 2009 FMC Technologies, Inc. assessed a \$610,000 civil penalty for exports and re-exports to a variety of countries of butterfly and check valves classified as 2B350); U.S. Dep’t of Commerce, Bureau of Industry and Security, Order Relating to Ingersoll Machine Tools, Inc. 3 (Aug. 11, 2008), <http://1.usa.gov/13Rjxq6> (assessing a \$126,000 civil penalty for several deemed exports of production and development technology classified as 1E001 and 2E002 to Indian and Italian nationals).

166. *See, e.g.*, Deferred Prosecution Agreement, United States v. Weatherford Services Ltd., No. 4:13-cr-00733 (S.D. Tex. Nov. 26, 2013) (with no individuals charged, entering a deferred prosecution agreement and guilty pleas for export control, FCPA, and sanctions violations and assessment of \$252,690,606 in civil and criminal penalties and fines); Judgment in a Criminal Case, United States v. Talebi, 1:12-cr-00295-LTS (S.D.N.Y. Feb. 19, 2013) (defendant sentenced to 12 months in prison for conspiring to illegally export from the United States to Iran parts and goods designed for use in industrial operations.); Judgment in a Criminal Case, United States v. Hajian, No. 8:12-cr-00177-VMC-TGW (M.D. Fla. Oct. 24, 2012) (defendant sentenced to four years in prison and ordered to forfeit \$10 million for conspiring to unlawfully export enterprise level computer and related equipment under ECCN 4A001 and EAR99 from the United States to Iran).

167. *See, e.g.*, DON’T LET THIS HAPPEN TO YOU!, *supra* note 160, at 6.

168. The Strategic Intelligence Division examines industry information and intelligence and confirms the bona fides of the parties to license applications and allow BIS to make informed decisions on licensing issues. The International Operations Division screens BIS license applications and reviews export documentation for the purposes of identifying transactions or companies that may be selected for pre-license checks or post shipment verifications, collectively referred to as “end use checks.” *Id.* at 6. The Export Control Officer Program consists of Special Agents, detailed to foreign embassies in currently six overseas locations: Beijing, Hong Kong, Dubai, New Delhi, Moscow and Singapore. U.S. GOV’T ACCOUNTABILITY OFFICE, PROPOSED REFORMS CREATE OPPORTUNITIES, *supra* note 12, at 14. The Investigative Analysis Division also provides research and analytical support on OEE investigations. DON’T LET THIS HAPPEN TO YOU!, *supra* note 160, at 6.

expertise in the area of export controls, coupled with [BIS's] unique and complementary administrative enforcement tools.”<sup>169</sup>

#### **D. Export Enforcement Coordination Center (E2C2)**

One of the four goals of ECR<sup>170</sup> was to create a single “coordinating” enforcement agency to “enhance our enforcement efforts and minimize enforcement conflicts, . . . detect, prevent, disrupt, investigate, and prosecute violations of U.S. export control laws, and . . . share intelligence and law enforcement information related to these efforts to the maximum extent possible, consistent with national security and applicable law.”<sup>171</sup> Secretary Gates remarked that “the coordination of our currently dispersed enforcement resources by one agency will do a great deal to strengthen enforcement, particularly abroad, as well as coordination with the intelligence community. Those who endanger our troops and compromise our national security will not be able to hide behind jurisdictional uncertainties or game the system. Violators will be subject to thorough investigation, prosecution, and punishment severe enough to deter law breaking.”<sup>172</sup>

On November 9, 2010, President Obama issued Executive Order 13,558 requiring the creation of a center administered by DHS to coordinate export enforcement, including industry outreaches, law enforcement actions, civil enforcement cases, prosecutions, and sharing of information with the intelligence community.<sup>173</sup> To the extent a coordinating agency was the goal, this has been largely achieved by the Export Enforcement Coordination Center<sup>174</sup> (sometimes abbreviated “EECC,” but

169. Mills, *supra* note 142.

170. *Export Control Reform Initiative Fact Sheet #1*, *supra* note 16 (Phase III will require legislation to implement a government reorganization that would consolidate the current system into a: Single Control List; Single Licensing Agency; Single Primary Enforcement Coordination Agency; Single IT System.”).

171. Exec. Order No. 13,558, 3 C.F.R. § 271 (2011).

172. Gates, *supra* note 10.

173. Exec. Order No. 13,558, 3 C.F.R. § 271. In order to “enhance . . . enforcement efforts and minimize enforcement conflicts,” the order implores “executive departments and agencies [to] . . . coordinate their efforts to detect, prevent, disrupt, investigate, and prosecute violations of U.S. export control laws, and . . . share intelligence and law enforcement information related to these efforts to the maximum extent possible, consistent with national security and applicable law.” *Id.*

174. Denis McDonough, White House Chief of Staff, Remarks before the BIS Update Conference (July 29, 2014), <http://1.usa.gov/1EH6oD7> (“By coordinating new export enforcement leads through the Coordination Center we have found that in 57 percent of new cases – another department or agency is either already working the lead, or has information that would be helpful to the new investigation. This is making us more efficient, effective... and in the end, keeping us safer.”); John Shiffman, *New Anti-Smuggling Center Uncovers Internal Surprises*, REUTERS (Mar. 6, 2013), <http://reut.rs/1zrWddf> (quoting Deputy Assistant Director of the FBI Vincent Lisi as stating that the FBI was “surprised” to learn that there was a 60% match on E2C2 checks against information on an FBI target and as further stating that “I don’t know that anyone ever anticipated that it would be that high, especially when you consider the number of proliferators around the world

most often referred to as “E2C2”). “The E2C2 organization should not be confused with the office of National Export Control Coordinator, a position held by a Department of Justice chief prosecutor of export control enforcement, who has the authority to determine which cases to bring for criminal prosecution.”<sup>175</sup>

During early ECR planning, questions about who would manage E2C2 and what its role would be generated interagency disputes.<sup>176</sup> The reforms to the varying overlapping enforcement agencies responsible for export enforcement have largely focused on the Departments of State and Commerce. There are significant differences between these Departments, and in particular, the approach each takes towards a potential violation. These differences present significant challenges to merging the enforcement authority of just these two agencies, not considering the other Departments and agencies that participate in export control enforcement.

One specific word in Executive Order 13,558 created its own controversy. Was E2C2 intended by the Administration to be “*the*” point—or only “*a*” point of contact or conduit for law enforcement and/or the intelligence community?<sup>177</sup> Because of concerns that the E2C2 might erode existing authorities of other law enforcement agencies, section 5(c) was added to the Executive Order, providing:

Nothing in this order shall be construed to provide exclusive or primary investigative authority to any agency. Agencies shall continue to investigate criminal and administrative export violations consistent with their existing authorities, jointly or separately, with coordination through the Center to enhance enforcement efforts and minimize potential for conflict.<sup>178</sup>

Thus, regardless of which agency is given jurisdiction or deemed the “primary” enforcement agency, all agencies remain authorized to investigate export control cases.

E2C2 adds the most value when it is able to detect potential conflicts or issues among and between investigations at an earlier stage, and resolve disputes among

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today. . . . But again, proofs in the pudding: right there is why we need the E2C2.”)

175. FERGUSSON & KERR, *supra* note 130, at 20. The creation of E2C2 coincided with the departure of the first National Export Coordinator—whom DOJ has not replaced, perhaps due to the establishment of the E2C2. Since Mr. Fayhee’s departure in this role, the DOJ’s National Security Division has been unclear on whether it intends to continue with the position of a National Export Coordinator.

176. Interview with Jonathan C. Poling, Partner, Akin Gump Strauss Hauer & Feld LLP, in Washington, D.C. (Dec. 23, 2014).

177. Compare Exec. Order No. 13,558, 3 C.F.R. § 271(3)(a) (“The Center shall . . . serve as *the* primary forum within the Federal Government for executive departments and agencies to coordinate and enhance their export control enforcement efforts . . .), *with id.* at (3)(b) (“The Center shall . . . serve as *a* conduit between Federal law enforcement agencies . . .), and *id.* at (3)(c) (“The Center shall . . . serve as *a* primary point of contact between enforcement authorities and agencies engaged in export licensing.”) (emphases added).

178. Exec. Order No. 13,558, 3 C.F.R. § 271(5)(c).

overlapping, competing agencies. A great deal of time, talent, and money is invested by agencies into overlapping investigations, often resulting in competition and disputes among agencies.<sup>179</sup> Occasionally, investigations involved the same agencies, but on different sides. In one case, DHS and OEE, from their Chicago offices, were at odds with the Boston offices of DHS, OEE, and the FBI.<sup>180</sup> The combination of agencies on a case generally benefits the investigation by preventing duplicative or conflicting investigations, leveraging the strengths and tools of each agency, and allowing new evidence uncovered by one team of agents to reveal previously unknown intersections with another team.

According to several government officials interviewed by the authors, E2C2 has significantly improved resolving interagency disputes, but it is doubtful whether DHS has been provided the funding it needs to properly staff E2C2 to perform its full mission. Although E2C2's "deconfliction" role has been successful, investigators from other law enforcement agencies assigned to the E2C2 see their roles only as a liaisons with their home agencies—in other words, they are FBI or BIS assets first, and E2C2 assets second. Law enforcement and intelligence databases have yet to be integrated into E2C2,<sup>181</sup> so E2C2's deconfliction role relies on the inefficient use of liaisons to inquire within their respective agencies for potential methods of resolving the conflicts. The lack of statutory authority and funding of E2C2 means that E2C2 must for now rely on the willingness of independent agencies to resolve conflicts between competing agencies.<sup>182</sup>

### ***E. Other Enforcement Agencies***

Although FBI, HSI, and BIS are the three primary criminal enforcement agencies, other law enforcement agencies have had significant roles in export enforcement cases. One of the world's most notorious arms dealers, Victor Bout, was

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179. John Shiffman & Duff Wilson, *Turf Battles Hinder U.S. Efforts to Thwart Smugglers*, REUTERS (Dec. 17, 2013), <http://reut.rs/1BdO6nf> ("There was so much animosity over who is in charge and isn't in charge, rather than over substance," said a White House counter-proliferation official."). *But see* E-mail from Douglas R. Hassebrock, Director, Office of Export Enforcement, U.S. Dep't of Commerce to Jonathan C. Poling, Akin Gump Strauss Hauer & Feld LLP (Jan. 22, 2015) (on file with author) ("OEE has worked well with our partners and had great success in joint cases. As to the charges that the multitude of agencies has led to 'confusion and problems,' I must admit, that in my tenure as Director it's just not been an issue. The E2C2 is a great forum to deconflict issues, but the more important matter is establishing close relationships with fellow agents so we can handle matters if they do come up in a sensible manner.").

180. Interview with Jonathan C. Poling, Partner, *supra* note 176; *see also* Michael Froman, U.S. Trade Rep., Remarks at the Bureau of Industry and Security Update Conference on Export Controls and Policy (July 24, 2013), <http://1.usa.gov/1GX2qs0> (noting the "significant potential that the uncoordinated actions of one agency might jeopardize the investigation of another").

181. *See* FERGUSSON & KERR, *supra* note 130, at 20–21.

182. *See id.*

apprehended and arrested by agents of the Drug Enforcement Agency, and charged with, among other things, conspiracy to acquire and export a missile system designed to destroy aircraft, in violation of 18 U.S.C. § 2332g1.<sup>183</sup> The Air Force Office of Special Investigations was instrumental in the investigation and arrest of Noshir S. Gowadia, who illegally transmitted to the People’s Republic of China sensitive and highly controlled technology relating to the B-2 Spirit Stealth Bomber.<sup>184</sup> The Department of Defense’s Defense Criminal Investigative Service (DCIS) was part of the investigation team that secured the then record setting \$100 million guilty plea against ITT Corporation for illegally exporting night vision goggle technology to China, Singapore, and the United Kingdom.<sup>185</sup> Other DCIS cases have started as procurement fraud cases while DCIS investigated companies subject to the Buy American Act that illegally outsourced the production of materials to foreign countries, and in doing so, illegally transferred export controlled technical data to manufacture the items.<sup>186</sup>

Many complex export control cases have involved cooperation and coordination among and between different enforcement agencies.<sup>187</sup> The involvement of several law enforcement agencies is often required, because different law enforcement agencies have differing capabilities and limits on their authority—all of which may be needed on more complex cases. For instance, in *United States v. Chitron*

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183. See, e.g., Press Release, *International Arms Dealer Viktor Bout Convicted in New York of Terrorism Crimes*, U.S. DEPT OF JUSTICE, (Nov. 2, 2011), <http://1.usa.gov/13FrN7>; Indictment, *United States v. Bout*, No. 1:08-cr-00365 (S.D.N.Y. Apr. 24, 2008). After Bout’s conviction was affirmed, 731 F.3d 233 (2d Cir. 2013), he has sought a new trial based on alleged newly discovered evidence, Jonathan Stempel, *Arms Dealer Bout Seeks New Trial, Hires Ashcroft Law Firm*, REUTERS (Dec. 5, 2014), <http://reut.rs/17dUNwv>.

184. Indictment, *United States v. Gowadia*, No. 1:05-cr-004866 (D. Haw. Nov. 8, 2005).

185. Plea Agreement, *United States v. ITT Corp.*, No. 7:07-cr-00022 (W.D. Va. Mar. 28, 2007).

186. See, e.g., Indictment, *United States v. Robert*, No. 3:13-cr-00671 (D.N.J. Oct. 10, 2013) (DCIS and HSI investigation that led to the indictment of New Jersey defense contractor that illegally transmitted technical data to India to manufacture the products outside the United States and in order to submit bids to foreign governments and foreign customers); Plea Agreement, *United States v. Precision Image Corp.*, No. 13-cr-00226 (W.D. Wash. July 30, 2013) (arrested by NCIS and HSI and convicted for illegally exporting technical data to Taiwan to manufacturer supply circuit boards for the U.S. Navy). See generally PROPOSED REFORMS CREATE OPPORTUNITIES, *supra* note 12, at 14–16 (discussing law enforcement agencies working through local task forces in the United States on export control enforcement cases).

187. In *United States v. Roth*, No. 3:08-cr-00069 (E.D. Tenn. May 20, 2008), FBI, HSI, AFOSI, and OEE worked to secure the arrest and conviction of Reece Roth, Ph.D., an adjunct professor of the University of Tennessee, for allowing two foreign national students to access export controlled data and equipment, and export some of the data from the contract on a trip to China in violation of the AECA. This case marked the first ever prosecution of a university professor for the transfer of controlled technology to a foreign student. See Press Release, *Former University of Tennessee Professor John Reece Roth Begins Serving Four-Year Prison Sentence on Convictions of Illegally Exporting Military Research Data*, FBI (Feb. 1, 2012), <http://1.usa.gov/1H5N5B2>.



*Electronics Company Ltd.*,<sup>188</sup> an extensive joint investigation by federal agents of OEE, HSI, FBI, and DCIS resulted in the conviction of Chitron-U.S., Inc., and two named defendants, Zhen Zhou Wu and his ex-wife, Yufeng Wei, for violating U.S. export control laws by illegally exporting sensitive electronics from the U.S. to China for the PRC military.<sup>189</sup>

#### IV. Voluntary Disclosure & Compliance Review Process

DDTC and BIS authorize and encourage exporters to voluntarily disclose export violations. The ITAR and EAR contain instructions for preparing and submitting voluntary disclosures,<sup>190</sup> and imply—but not promise—that a voluntary disclosure is a mitigating factor that may result in lesser penalties, but warn that failure to report known violations will be an adverse factor, as failure to report such violations may be detrimental to U.S. national security and foreign policy interests.<sup>191</sup> Disclosures of violations will be deemed by the agencies to be voluntary only if disclosed before the government obtains knowledge from other sources.<sup>192</sup> Despite the possible mitigation of penalties by disclosing violations, some individuals are reluctant to do so, especially in more egregious cases not otherwise likely to be discovered by the government, as the disclosure may waive an individual disclosing party's Fifth Amendment rights against self-incrimination.<sup>193</sup> Another deterrent to voluntary disclosures of serious violations likely to result in penalties is that an

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188. *United States v. Wu*, No. 1:08-cr-10386 (D. Mass. Dec. 18, 2008).

189. *United States v. Wu*, 711 F.3d 1 (1st Cir. 2013).

190. 22 C.F.R. § 127.12(c)(2) (2012); 15 C.F.R. § 764.5(c) (2013).

191. 22 C.F.R. § 127.12(a); 15 C.F.R. § 764.5(b)(4). *But see* 15 C.F.R. § 764.5(b)(1) (stating that the provisions of § 764.5 do not apply to disclosures of violations relating to EAR part 760 (Restrictive Trade Practices or Boycotts)). There has been disagreement as to whether a disclosure covers individual liability of employees. *See, e.g., United States v. Gormley*, 2:12-cr-00423-GP (E.D. Pa. Jan. 18, 2013) (sentencing a trade compliance official for export control violations to 42 months in prison, despite disclosure of his violations by his employer); U.S. Dep't of State, Bureau of Political-Military Affairs, Consent Agreement, BAE Sys. PLC (May 16, 2011), <http://1.usa.gov/1HbV2F6>; U.S. Dep't of State, Bureau of Political-Military Affairs, Consent Agreement, Xe Servs. LLC (Aug. 18, 2010), <http://1.usa.gov/149npWw>; U.S. Dep't of State, Bureau of Political-Military Affairs, Consent Agreement, ITT Corp. (Dec. 21, 2007), <http://1.usa.gov/1CQf34i>; *see also* Liebman, Thomsen & Bartlett, *supra* note 6, at § 5.05[2] (“[I]t appears that BIS is operating from the premise that all violations should attract the maximum penalties, and that a voluntary disclosure simply reduces them slightly. . .”).

192. 22 C.F.R. § 127.12(b)(2); 15 C.F.R. § 764.5(b)(3).

193. *See* Jonathan C. Poling & Stephen Martin, *Corporate and Individual Liability After VSDs and Gormley Case*, in *THE EXPORT PRACTITIONER* 3 (May 2014) (“VSDs may provide no protection to individual employees, who may have separate and independent civil and criminal liability. The Gormley case is an example where an employee was not only criminally charged after a VSD was filed, but the VSD clearly assisted law enforcement in developing the criminal charges against him.”). *But see* *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 288–89 (1968) (“It has long been settled . . . that the constitutional privilege against self-incrimination . . . cannot be utilized by or on behalf of any organization, such as a corporation.” (internal quotation marks omitted)).

exporter who has made a voluntary disclosure is less able to negotiate a settlement figure in return for admissions of guilt, as guilt has already been established by the disclosure.<sup>194</sup>

Voluntary disclosures are the source of the largest percentage of export violations investigated by DDTC, with the remainder originating from violations discovered by the DDTC export licensing division, by whistleblowers, as a consequence of a related violation of other companies, or developed by outside enforcement investigations.<sup>195</sup> By comparison, voluntary *self*-disclosures (“VSDs”)<sup>196</sup> to BIS were the source of less than ten percent of the enforcement matters investigated in 2014, with most matters originating from investigations by OEE agents or other law enforcement agencies.<sup>197</sup> In 2014, DDTC received 1,134 VSDs,<sup>198</sup> while BIS received approximately 225 VSDs.<sup>199</sup>

#### **A. Department of State, Directorate of Defense Trade Controls Compliance<sup>200</sup>**

The Directorate of Defense Trade Controls enforces ITAR violations through its Office of Trade Controls Compliance (OTCC)<sup>201</sup> and within this office, the Compliance, Registration, and Enforcement Division.<sup>202</sup> The enforcement staff at DDTC contains approximately seventy employees, of which about thirty-five or half are non-civil service compliance specialists employed by a government contractor.<sup>203</sup> Assignments for the contractor employees are described by the contractor as:

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194. See also Liebman, Thomsen & Bartlett, *supra* note 6, at § 5.05[2][a].

195. Interview with Sue Gainor, *supra* note 71.

196. 15 C.F.R. § 764.5(b)(4). The ITAR uses the term “voluntary disclosure,” 22 C.F.R. § 127.12, but the same action is inexplicably described by the EAR as a “voluntary *self*-disclosure,” 15 C.F.R. § 764.5(b)(4). The Commerce Department Foreign Trade Regulations also use the term “voluntary *self*-disclosure,” *id.* § 30.74. The word “self” is unnecessary in this context, because a disclosure submitted by someone other than the person who committed the violation would not qualify as voluntary.

197. Interview with Douglas R. Hassebrock, *supra* note 159.

198. Interview with Sue Gainor, *supra* note 71. Number of yearly voluntary disclosures submitted to DDTC that were treated as civil matters (no proof of willfulness) were as follows: FY2007: 759; FY2008: 1,000; FY2009: 1,036; FY2010: 1,260; FY2011: 1,224; FY2012: 1,371; FY2013: 1,936 (of which 288 were submitted by United Technologies Corp.); FY2014: 1,134. Number of yearly directed disclosures were as follows: FY2007: 47; FY2008: 107; FY2009: 117; FY2010: 58; FY2011: 88; FY2012: 111; FY2013: 79; FY2014: 59. *Id.*

199. Interview with Douglas R. Hassebrock, *supra* note 159.

200. Substantive facts in this section are, unless otherwise indicated, generally attributed to the interview with Sue Gainor, *supra* note 71.

201. 22 C.F.R. § 120.1(b)(2)(ii) (2014).

202. See *Key Personnel*, U.S. DEP’T OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROLS (Oct. 29, 2015) <http://1.usa.gov/1tp5XIW>.

203. One contractor supplying contract employees to DTCC is Henderson Group Unlimited, Inc., of Alexandria, VA, advertising that they “provide[] administrative support services to Federal, State, and Local Government Agencies.” Job posting by Henderson Group Unlimited, Inc., for “Defense

Take initial action on all incoming voluntary disclosures from the defense industry on civil violations of the AECA and ITAR. For disclosures of a minor violation, create a computer record and draft a response for the chief's signature. For incomplete disclosures, draft a letter with response deadline for the chief's signature, maintain a tracking system and insure receipt of full disclosure information. For all other violations, create a computer record and assign to appropriate employee.

Review and take action on voluntary disclosures assigned by the division chief, initially working minor violations. Follow office policies and procedures and guidance received from the division chief or senior specialist. Plan an approach, conduct fact-finding, perform search of records, attend meetings and then document findings. Initiate discovery of additional facts. Consult with supervisor and take action. Prepare letter for division chief signature responding to the violation, including requirements for corrective action to close each case. Perform any follow-up as directed by division chief. . . .<sup>204</sup>

A question may be asked as to whether these duties, when performed by non-civil service employees, might be subject to U.S. law prohibiting contractors from performing "inherently governmental functions,"<sup>205</sup> but at DTCC, the contractors are supervised by DTCC civil service managers, have no authority to make final decisions regarding compliance matters, and the DTCC director must approve the recommendations of the contractor employees. Whether or not the practice is allowed by law, and even though all contract employees sign non-disclosure agreements, companies that disclose suspected violations and compliance weaknesses to DDTC may ask whether it is appropriate for an employee of a private company to participate in the review of sensitive and proprietary information of another private company.

Voluntary disclosures to DDTC are initially reviewed by a "Triage Team" consisting of three civil service DTCC employees and two contractor employees.<sup>206</sup> For each new VD, the team recommends one of three actions: (1) refer to HSI or FBI serious matters that indicate willful actions that may affect national security, such

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Trade Control Compliance Analyst". Advertisement for Defense Trade Control Compliance Analyst Position, Henderson Group Unlimited Inc., <http://bit.ly/1CTHpL9> (last visited Nov. 10, 2015).

204. *Id.*

205. *See* Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16,188, 16,194 (Mar. 31, 2010) (advising that a government contractor's work "would be inappropriate where the contractor's involvement is or would be so extensive, or the contractor's work product so close to a final agency product, as to effectively preempt the federal officials' decision-making process, discretion or authority").

206. Unlike OEE, DTCC does not have field offices. All disclosures are reviewed in their Washington D.C. headquarters. Interview with Sue Gainor, *supra* note 71.

as unauthorized end use, diversions, and retransfers, and substantial involvement with denied parties or prohibited countries,<sup>207</sup> and often result in criminal charges and plea agreements;<sup>208</sup> (2) assign to experienced DTCC compliance reviewers the intermediate matters that indicate systemic compliance issues, repeated violations, or other indications that a Consent Agreement may be justified; and (3) close out minor matters that indicate the disclosing party has adequately explained the incident, and has taken appropriate corrective actions.<sup>209</sup> An average of sixty to seventy percent of VDs are resolved in the latter category.<sup>210</sup> Unless VDs result in criminal charges or Consent Agreements, disclosures and agency responses are not in the public record and not subject to release under Freedom of Information Act requests.<sup>211</sup>

DDTC penalizes companies whose conduct shows systemic violations or widespread disregard for regulations.<sup>212</sup> Where the case appears to involve

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207. Director Gainor stated, “DDTC does not look for countries most likely to be proliferating or retransferring defense articles to target. We rely on HSI and other law enforcement agencies for that, because that is their job. They handle the criminal investigations, we handle the civil compliance. The State Department conducts ‘Blue Lantern’ end-use checks using U.S. embassy and consulate staff members, but those are not law enforcement investigations – those end-use checks are compliance verification. If the Blue Lantern checks find that exported items are missing, we refer the information to law enforcement agencies to make an independent decision regarding whether to open an investigation.” *Id.*
208. *E.g.*, Plea Agreement, United States v. United Technologies Corporation, Hamilton Sundstrand Corporation and Pratt & Whitney Canada Corp. (June 28, 2012), <http://1.usa.gov/1yaR9MI>. *See, e.g.*, Consent Agreement, BAE Sys. PLC, *supra* note 191; U.S. Fines BAE \$79 Million Over Arms-Control Breaches, REUTERS, May 17, 2010, <http://reut.rs/1w9Mmad> (There were 2,591 violations of the AECA and ITAR involved. The company also pleaded guilty to one charge of conspiring to make false statements to the U.S. government and paid a fine of \$400 million.); Consent Agreement, Xe Servs. LLC, *supra* note 191; Consent Agreement, ITT Corp., *supra* note 191. *See also supra* note 74 and accompanying text.
209. Interview with Sue Gainor, *supra* note 71. The number of yearly Consent Agreements concluded by DDTC, and any associated civil penalties assessed, were as follows: FY2007: 0; FY2008: 4, with \$47M in civil penalties assessed; FY2009: 2, with \$600,000 in civil penalties assessed; FY2010: 3, with \$43M in civil penalties assessed; FY2011: 1, with \$79M in civil penalties assessed; FY2012: 3, with \$55M in civil penalties assessed; FY2013: 3, with \$41M in civil penalties assessed; and FY2014: 2, with \$30M in civil penalties assessed. *Id.* If a Consent Agreement is not concluded and DDTC proceeds with prosecution, it has the ability to issue pre-trial certifications of classification of the items alleged to have been used or transferred in violation of export control laws that significantly limit the ability of a defendant to challenge the agency’s classification. The yearly number of pre-trial certifications issued by DDTC were as follows: FY2007: 88; FY2008: 117; FY2009: 121; FY2010: 156; FY2011: 197; FY2012: 230; FY2013: 162; and FY2014: 239. *Id.*
210. Interview with Daniel J. Buzby, Senior Compliance Advisor, Office of Defense Trade Controls Compliance, Directorate of Defense Trade Controls, U.S. State Dep’t (Jan 9, 2015).
211. *See* 5 U.S.C. § 552(b)(4) (2015) (FOIA provision exempting from disclosure commercial or financial information received from a person that is confidential); 22 C.F.R. § 171.13 (2015) (corresponding Department of State regulation regarding FOIA business information exemption).
212. *Id.* *See generally* FRIED FRANK, ITAR ENFORCEMENT DIGEST 3 (July 2012) (“[C]ases settled in recent years have reflected a trend for DDTC to penalize companies that it perceives have flouted DDTC’s authority, questioned its judgment, or deceived the agency in some manner.”).

intentional violations, DDTC may refer cases for investigation by HSI or FBI. This occurred in *United States v. Pratt Whitney Canada Corp.*, where voluntary disclosures submitted to DDTC were reviewed by HSI agents who then originated a criminal investigation.<sup>213</sup> DDTC may prepare a proposed charging letter alleging AECA and ITAR violations,<sup>214</sup> and offer the disclosing company the choice of entering a Consent Agreement in which the respondent will stipulate to the facts of the violations (although not necessarily the element of willfulness), and agree to settle the matter by paying a fine and taking specific corrective actions, such as hiring and training adequate staff, installing new information technology systems, and requiring oversight by the company's law department.<sup>215</sup> The corrective actions often permit a company to spend all or a portion of the amount of its fine on corrective measures in lieu of payment to the government.<sup>216</sup>

DDTC has a reputation with the exporter community of being more attentive to company compliance deficiencies than OEE's reputation of taking a primary interest in discovering and punishing violations. With an obvious comparison to OEE practices, Kenneth B. Handelman, Deputy Assistant Secretary of State for the Office of Defense Trade Controls in the Bureau of Political-Military Affairs, stated the following about DDTC's philosophy regarding enforcement:

We don't have people with guns and badges, and even if we did have them, we wouldn't have enough of them. We rely on HSI and FBI. If something goes wrong, you all can come in and tell us about it. We'll determine if it is a one-time or systemic violation. Our people are not rewarded by the number of violations they find or the penalties imposed.<sup>217</sup>

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213. U.S. Dep't of State, Bureau of Political-Military Affairs, Consent Agreement, United Technologies Corp. (June 19, 2012), *available at* [http://www.pmdtc.state.gov/compliance/consent\\_agreements/pdf/UTC\\_CA.pdf](http://www.pmdtc.state.gov/compliance/consent_agreements/pdf/UTC_CA.pdf).
214. *E.g.*, U.S. Dep't of State, Office of Trade Controls Compliance, Proposed Charging Letter, Intersil Corporation (July 18, 2014), <http://1.usa.gov/1tZlA14>; U.S. Dep't of State, Bureau of Political-Military Affairs, Proposed Charging Letter, Esterline Tech. Corp. (Mar. 5, 2014), <http://1.usa.gov/14Pl6HJ>; U.S. Dep't of State, Bureau of Political-Military Affairs, Proposed Charging Letter, Meggitt-USA, Inc. (Aug. 23, 2013), [http://www.pmdtc.state.gov/compliance/consent\\_agreements/pdf/Meggitt\\_PCL.pdf](http://www.pmdtc.state.gov/compliance/consent_agreements/pdf/Meggitt_PCL.pdf).
215. 22 C.F.R. § 128.11 (2006).
216. *See, e.g.*, U.S. Dep't of State, Office of Trade Controls Compliance, Consent Agreement, Intersil Corp. (July 18, 2014), <http://1.usa.gov/1A7M1qI> (of the \$10 million fine, \$4 million was eligible for corrective actions); U.S. Dep't of State, Office of Trade Controls Compliance, Consent Agreement, Esterline Tech. Corp. (Mar. 5, 2014), <http://1.usa.gov/1xgJicr> (of the \$20 million fine, \$10 million was eligible for corrective actions); U.S. Dep't of State, Office of Trade Controls Compliance, Consent Agreement, Meggitt-USA, Inc. (Aug. 23, 2013), <http://1.usa.gov/1BTttdp> (of the \$25 million fine, \$22 million was eligible for corrective actions).
217. Kenneth B. Handelman, former Deputy Assistant Secretary of State for the Office of Defense Trade Controls, Speech at BIS Annual Update Conference (July 30, 2014).

This description was expanded by Sue Gainor, Director, Office of Defense Trade Controls Compliance, who stated:

We don’t assume or even suspect willfulness at the outset of reviewing a VD. We know that honest mistakes are a part of doing business. Fines and other penalties discourage voluntary disclosures. We have a partnership with industry that is important. The VD and the corrective actions guided by DDTC are important to the improvement of industry compliance. The disclosing company becomes a better company because we have educated them and helped them see how they made mistakes, and showed how to avoid mistakes in the future.<sup>218</sup>

***B. Department of Commerce, Office of Export Enforcement***<sup>219</sup>

Voluntary self-disclosures of EAR violations submitted to BIS are initially reviewed by OEE’s director in Washington, D.C., but unlike the DTCC method of handling all VDs at headquarters, VSDs are assigned to the Special Agent-in-Charge of the OEE field office nearest where the disclosing company is located.<sup>220</sup> When responsible OEE agents receive VSDs, they have the authority, with approval of the OEE Special Agent-in-Charge, to close the matter, or to initiate further investigative steps. If a VSD results in a recommendation for enforcement action, an agent may refer the matter to the Justice Department and/or recommend to the OEE director that a charging letter be issued to the suspected violator, termed a Respondent.<sup>221</sup> Recommendations for potential charging letters are reviewed by the BIS Induction Committee, an internal BIS committee currently chaired by the Assistant Secretary for Export Enforcement. Referrals of VSDs to DOJ for criminal prosecution are rare. One case in 2013 involved criminal charges against the compliance official of a company that submitted a VSD, but the company avoided criminal action and the financial penalty was suspended in its entirety.<sup>222</sup> Another criminal case that involved a VSD was given judicial scrutiny as to whether it met the requirements of a VSD, whether individuals should have been prosecuted, and

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218. Interview with Sue Gainor, *supra* note 71.

219. Substantive facts in this section are, unless otherwise indicated, attributed to the interview with Douglas Hassebrock, *supra* note 159.

220. OEE has eight field offices in the United States. *Id.* DDTC has no field offices. Interview with Sue Gainor, *supra* note 71. While DDTC and BIS have differing processes for the review of voluntary disclosures/voluntary self-disclosure, there is no legislative impediment to the agencies collaborating to develop and implement several enhances to making more consistent the review of disclosures and the outcome more predictable to industry. For example, DDTC and BIS could develop and publish a common policy and procedures for reviewing disclosures and for developing when compliance or enforcement actions should be initiated.

221. 15 C.F.R. § 764.5(d) (2013).

222. United States v. Gormley, No. 2:12-cr-00423-GP (E.D. Pa. Jan. 18, 2013).

whether the terms of the deferred prosecution agreement (“DPA”) were appropriate.<sup>223</sup> The Court rejected the settlement, calling it “grossly disproportionate to the gravity of Fokker Services’ conduct in a post-9/11 world.”<sup>224</sup> All proposed settlements are submitted by the Director of OEE and must be approved by the Assistant Secretary for Export Enforcement. OEE often requires outside audits as a way to bring companies into compliance, as it results in a quantifiable and tangible benefit to the Government in terms of results, but does not use the DDTC type of consent agreements where respondents agree to pay a fine, but are then permitted to use a portion of that fine for internal corrective actions.<sup>225</sup>

Industries historically regulated under the ITAR have expressed concern regarding different approaches taken by BIS and DDTC at State, particularly with regard to the disposition of VSDs. During the past few years at BIS, only a very small percentage of VSDs have resulted in administrative penalties, generally varying from 3 to 6 percent.<sup>226</sup> Assistant Secretary David W. Mills made the following statement regarding the generally accepted difference between how the BIS and DDTC handle disclosures:

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223. See *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. Sept. 30, 2014).

224. *Id.* at 12. Although DOJ accepted that the company’s disclosure was voluntary, it proceeded with prosecution, and proposed settlement by DPA. See Sam Gilston, *Justice Won’t Prosecute Firms that File Complete Voluntary Self-Disclosures*, THE EXPORT PRACTITIONER 25 (May 2012) (“It is the Justice Department’s long-standing policy not to undertake the criminal prosecution of companies that make ‘truthful, complete, self-initiated voluntary disclosures,’ said [National Export Coordinator] Steve Pelak.”). There is disagreement as to whether a disclosure meets this criteria and whether the disclosure itself covers individual liability of employees. See Andrew Zajac & Greg Farrell, *Fokker Sanctions Deal Clouded by Agent on Iran Confession*, BLOOMBERG (July 24, 2014, 12:31 PM), <http://www.bloomberg.com/news/articles/2014-07-24/fokker-sanctions-case-delayed-on-new-probe-information> (discussing federal court’s deliberation of the proposed DPA and consideration of whether the disclosure was truthful, complete, and self-initiated, and whether the conduct disclosed was known to the government before the disclosure was filed). The Court accepted that Fokker voluntarily disclosed the violations, but rejected the settlement and its terms as being too lenient, suggesting the need for prosecutions of individuals, an independent monitor, and more significant fines, given the revenue generated from the over 1,000 illegal transactions. *Fokker*, No. 1:14-cr-00121-RJL, at 12 (D.D.C. Feb. 5, 2015) (“Finally, the DPA does not call for an independent monitor, or for any periodic reports to be made to either this Court or the Government verifying the company’s compliance with U.S. law over this very brief 18-month period. As such, the court is being left to rely solely on the self-reporting of Fokker Services. One can only imagine how a company with such a long track record of deceit and illegal behavior convinced the Department of Justice to agree to that!”) (citation omitted).

225. E-mail from Douglas R. Hassebrock, Director, Office of Export Enforcement, U.S. Dep’t of Commerce to James E. Bartlett III (Jan. 12, 2015) (on file with author) (“It seems inaccurate to call something a ‘fine’ and then allow the penalized party to use it to pay somebody else. The ‘fine’ should be paid to the Government as punitive action for the violation. The Government should expect you to have compliance program to avoid further penalties. In our cases, we include the cost of the Audit in our internal deliberations and settlement discussions as part of the overall penalty.”).

226. David W. Mills, Assistant Sec’y for Export Enforcement, U.S. Dep’t of Commerce, Remarks at BIS Annual Update Conference on Export Controls and Policy (July 24, 2013), available at <http://1.usa.gov/1xuz0fl>.

I recognize there has been some angst in the export community about the compliance philosophies of BIS versus DTC with regard to military items. . . . [I]t is my sense that we will handle the 600 Series VSDs in a manner very similar to that of DDTC and that most will result in a warning letter or no action at all, as is the case with most VSDs previously filed under the EAR. What this issue primarily speaks to is how the two agencies handle cases under the doctrine of strict liability, which I believe to be substantially the same.<sup>227</sup>

Assistant Secretary Mills also offered the following reassurance to possibly concerned exporters at the 2013 Annual Update Conference: “Our objective is not to exercise our authority to hold parties strictly liable for every inadvertent and insignificant violation of the EAR that might take place. Absent evidence of systemic problems recurring over a period of time, inadvertent and insignificant violations will generally be resolved through warning letters.”<sup>228</sup> One trade group opined that although the exporters viewed voluntary disclosures as the duty of a good corporate citizen, OEE views a VSD as the initial phase of a criminal investigation.<sup>229</sup> When OEE receives a VSD, its law enforcement officers, who are trained to look for possible criminal violations, may be more focused on finding a criminal charge or systemic series of violations than just dealing with the disclosed minor violation, and addressing and remediating routine compliance deficiencies, as usually is the case with DDTC.<sup>230</sup>

#### **IV. ECR Plan to Merge OEE into Department of Homeland Security**

In conducting interviews for this article with current and former law enforcement officials with several agencies, the authors found considerable disagreement over which agency, if any, is best positioned to handle export control investigations. Those supporting a robust enforcement agency within the Department of Commerce

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227. David W. Mills, Assistant Sec’y for Export Enforcement, U.S. Dep’t of Commerce, Keynote Speech at BIS Annual Update Conference on Export Controls and Policy (July 30, 2014), *available at* <http://1.usa.gov/1NKNeQ0>.

228. Mills, *supra* note 226, at 18.

229. See Defense Trade Advisory Group, *Export Control Reform – Unintended Consequences* 6, <http://1.usa.gov/1BfDgNE>. (“Voluntary Disclosures Under ECR—Industry views their responsibility as a good corporate citizen to proactively disclose violation infractions, where[as] OEE enforcement views VSD as the initial phase of an investigation.”).

230. E-mail from Douglas R. Hassebrock, *supra* note 225. Several export compliance officers who did not wish to be identified commented about how OEE special agents interviewed employees as compared to DTCC compliance officers. OEE investigators sometimes “acted like stereotypical cops interrogating a suspect, flashing their badges and subtly displaying their guns, while the DDTC compliance specialists seemed genuinely concerned with correcting compliance problems, not out to play ‘gotcha’ with employees.”



maintain that OEE agents are a small, well-trained, and experienced group of criminal investigators with specialized expertise in Commerce Department regulations, and are able to best leverage the efficiency of TDOs and Entity List designations. Those arguing for legislation to implement OEE's merger into HSI highlight the border authority of HSI, its overseas presence, and its legacy relationship with CBP.

Despite the criticism of the disadvantages of overlapping jurisdiction and dispersed authorities on export control enforcement, many major export enforcement cases were successfully investigated by multiple agencies,<sup>231</sup> and several federal prosecutors interviewed by the authors of this article expressed concerns that moving to a single criminal enforcement agency with exclusive jurisdiction would reduce the beneficial effects of competition between the agencies, which often results in arrests that would otherwise not have been made.<sup>232</sup>

While some support legislation to transition OEE agents to HSI units under the control of the Department of Homeland Security, other current and former government officials, including a former OEE official, noted that BIS did not favor that plan, stating that one of the most important attributes of BIS agents is that they are dedicated solely to export control enforcement—in comparison to HSI agents, who may be reassigned to other DHS priorities, like immigration or child pornography.<sup>233</sup> The White House agreed with the plan to merge these agencies,<sup>234</sup> but has issued no directions on how a consolidation of enforcement agencies would be accomplished. This has bolstered some criticism that ECR may be undermining national security.<sup>235</sup>

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231. See, e.g., Gregory W. Bowman, *A Prescription for Curing U.S. Export Controls*, 97 MARQ. L. REV. 599, 620 (2013) (citing only one report to Congress by one enforcement agency and determining that although civil and criminal penalties are possible for violations of U.S. export control laws and regulations, investigations, they are “rare”). But see U.S. GOV'T ACCOUNTABILITY OFFICE, PROPOSED REFORMS CREATE OPPORTUNITIES, *supra* note 12, at 24 (finding an increase in enforcement cases, and detailing that between 2006–2010, ICE had obtained 1,498 arrests, 1,177 indictments, and 859 convictions for defense and dual use items cases and OEE had obtained 116 arrests, 222 indictments, and 156 convictions for dual use cases).

232. Several federal prosecutors who did not wish to be identified stated that each enforcement agency has unique skills and strengths that could often be leveraged in an investigation and “when they like each other and work with each other,” it can be a very strong deterrent against those seeking to obtain products or technology illegally from the United States. One senior prosecutor stated, “If HSI does not want to look at some records, I will just ask the FBI, and a little healthy competition among enforcement agencies has never hurt anyone.”

233. Interview with Mark Menefee, former Director, Bureau of Industry & Security Office of Export Enforcement (Jan. 26, 2015).

234. See, e.g., *Export Control Reform Initiative Fact Sheet #6*, *supra* note 11; McDonough, *supra* note 174.

235. See, e.g., Brittany Benowitz & Barry Kellman, *Rethink Plans to Loosen U.S. Controls on Arms Exports*, ARMS CONTROL TODAY (Apr. 2013), <http://bit.ly/1tHzX2I> (“Does the Commerce Department have the requisite expertise and statutory authority to ensure effective detection and

The movement of items from the USML to the CCL and the differing approaches to export control enforcement by the Departments of State and Commerce demonstrate part of the basis for this criticism: Defense articles, around which “higher fences” should exist because they remain on the USML, are administered by a licensing agency without internal law enforcement investigators, and with an approach historically focused on compliance rather than enforcement. Meanwhile, the items moved from the USML to the CCL because they are less sensitive are administered by BIS—an agency with its own group of specialized export law enforcement agents. OEE’s stricter enforcement methods may have an unintended chilling effect on disclosures. A company that may have misplaced some “toothbrushes,” but knows that if they submit a VSD to OEE they will be treated like diamond thieves, will be less likely to report it. The type of compliance assistance that DDTC gives after reviewing VDs, sometimes compelled by Consent Agreements, which helps companies guard their diamonds as well as their toothbrushes, will no longer be available for companies dealing in items that move from the USML to the CCL, and become subject to the enforcement practices of OEE.

DDTC has no interest at this point in adding enforcement officers or agents to its staff, and is comfortable handling violations using its internal compliance specialists, and relying on FBI and HSI for criminal investigations.<sup>236</sup> Although OEE has the advantage of internal special agents whose only responsibility is to enforce the EAR, OEE lacks the statutory authority exercised by HSI and FBI in the following areas: (1) greater and permanent overseas investigative authority since BIS must conduct overseas investigations through an arrangement with DHS;<sup>237</sup> (2)

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prosecution of violators?”); WILLIAM D. HARTUNG, CTR. FOR INT’L POL’Y, RISK AND RETURNS: THE ECONOMIC ILLOGIC OF THE OBAMA ADMINISTRATION’S ARMS EXPORT REFORMS 4 (Aug. 2013), <http://bit.ly/1xfveVz>; U.S. GOV’T ACCOUNTABILITY OFFICE, REFORM’S IMPACT ON COMPLIANCE ACTIVITIES, *supra* note 114, at 25; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-354, EXPORT CONTROLS: IMPROVEMENTS NEEDED TO PREVENT UNAUTHORIZED TECHNOLOGY RELEASES TO FOREIGN NATIONALS IN THE UNITED STATES 37 (Feb. 2011).

236. Interview with Sue Gainor, *supra* note 71.

237. See also *Addressing Potential Threats from Iran: Administration Perspectives on Implementing New Economic Sanctions One Year Later: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 112th Cong. 71 (2011) (response to Chairman Sen. Tim Johnson’s written questions by David W. Mills, Assistant Sec’y for Export Enforcement, U.S. Dep’t of Commerce) [hereinafter Mills, *Addressing Potential Threats*] (“Having permanent, independent overseas investigative authority would reduce the bureaucratic steps OEE currently has to take, thereby streamlining the investigative process.”); see also U.S. DEP’T OF COMMERCE, BUREAU OF INDUS. AND SEC., FISCAL YEAR 2015 PRESIDENT’S SUBMISSION: BUDGET ESTIMATE BIS-50 (2014), <http://1.usa.gov/14eUAqX> (requesting additional funds for increase in Export Control Officers stationed abroad to enhance ability to inspect potentially unlawful exports); U.S. DEP’T OF COMMERCE, BUDGET IN BRIEF: FISCAL YEAR 2014 65–66 (2013), <http://1.usa.gov/14eV4gY> (“Failing to fund the enforcement aspect of ECR will leave this Presidential Initiative incomplete and could undermine the current effectiveness of BIS’s Export Enforcement efforts. . . . These new resources will expand current Export Control Officer (ECO) operations, enhance current Intelligence efforts, and expand the Bureau’s national

expanded undercover investigative authority that would allow BIS to participate in the full scope of undercover activities, including setting up front companies and receiving payments;<sup>238</sup> (3) forfeiture authority, which would allow BIS to participate in the Treasury Forfeiture Fund;<sup>239</sup> and finally, (4) wiretapping authority, which would give BIS the ability to participate in obtaining wire taps.<sup>240</sup>

Opponents of the proposed merger of OEE into HSI brought to the authors' attention the unsuccessful attempts during the 1980s and 1990s to merge two other

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enforcement and analytical capabilities.”); *Advancing Export Control Reform: The Agenda Ahead: Before the H. Comm. on Foreign Affairs*, 113th Cong. 8 (2013) (statement of Kevin J. Wolf, Assistant Sec’y of Commerce, BIS), available at <http://1.usa.gov/17ekNlf> (“Commerce has made clear that additional resources would increase operational efficiencies and activities. The President’s Fiscal Year 2014 budget requests \$8.291 million for additional resources to augment BIS enforcement capabilities. These include additional analysts, Special Agents, and three new Export Control Officers, two of which would be dedicated to conducting end-use checks in STA-eligible countries, with the third expanding our regional footprint in the Middle East.”).

238. Mills, *Addressing Potential Threats*, *supra* note 237, at 71–72 (“BIS is currently dependent on the participation and support of other law enforcement agencies in undercover operations and is thus limited by the priorities, resources and availability of those agencies. Providing BIS with independent undercover investigative authority would remove this impediment.”); *A Strategic and Economic Review of Aerospace Exports: Hearing Before the Terrorism, Nonproliferation and Trade Subcomm. of the H. Comm. on Foreign Affairs*, 111th Cong. 5 (2009) (statement of Matthew S. Borman, Deputy Assistant Sec’y for Export Admin., BIS, U.S. Dep’t of Commerce); *id.* (statement of Kevin J. Wolf, Assistant Sec’y of Commerce, BIS), <http://1.usa.gov/17ekNlf> (“Commerce has made clear that additional resources would increase operational efficiencies and activities. The President’s Fiscal Year 2014 budget requests \$8.291 million for additional resources to augment BIS enforcement capabilities. These include additional analysts, Special Agents, and three new Export Control Officers, two of which would be dedicated to conducting end-use checks in STA-eligible countries, with the third expanding our regional footprint in the Middle East.”); *see also* Export Enforcement Act of 2007, S. 2000, 110th Cong. § 4 (2007) (proposed legislation providing BIS with authority to conduct undercover operations).
239. Mills, *Addressing Potential Threats*, *supra* note 237, at 72 (“The independent authority to obtain forfeiture of the fruits and proceeds of export violations and to participate in the Treasury Forfeiture Fund would provide BIS with the practical ability to attack the underlying economic motives for export violations, and deprive violators of the profits of their illegal activities.”); U.S. DEP’T OF COMMERCE, SECTION-BY-SECTION ANALYSIS: THE EXPORT ENFORCEMENT ACT OF 2007 3, [http://2010-2014.commerce.gov/sites/default/files/documents/2014/january/eea\\_sectional\\_041307.pdf](http://2010-2014.commerce.gov/sites/default/files/documents/2014/january/eea_sectional_041307.pdf) (noting that proposed amended to EEA would “make clear that BIS is a member of [the U.S. Treasury Forfeiture Fund]” as doing so requires statutory authority); *see also* Export Enforcement Act of 2007, S. 2000, 110th Cong. §§ 3, 4, 9 (2007) (proposed legislation providing BIS for mandatory forfeiture and participation in U.S. Treasury Forfeiture Fund).
240. Mills, *Addressing Potential Threats*, *supra* note 237, at 72 (“Wiretap authority would give OEE access to the inner workings of export control conspiracies as they are occurring, thereby providing invaluable evidence for a prosecutor seeking to prove the elements of a conspiracy, including evidence to present to a jury about the intent of the parties.”); SECTION-BY-SECTION ANALYSIS: THE EXPORT ENFORCEMENT ACT OF 2007, *supra* note 239, at 2 (“Undercover and wiretap authorities are essential to the effective enforcement of export controls and related laws, and greatly enhance the ability of the Departments of Commerce and Homeland Security, in addition to other federal agencies authorized to enforce the Act, to effectively and efficiently investigate export control violations.”); *see also* Export Enforcement Act of 2007, S. 2000, 110th Cong. § 9 (2007) (proposed legislation providing BIS with authority to obtain wiretaps).

federal law enforcement agencies, the Drug Enforcement Administration and the Federal Bureau of Investigation, and suggested that the proposed OEE/HSI merger is analogous. The DEA/FBI merger was initially proposed, then dropped, by the Reagan Administration in both 1982<sup>241</sup> and in 1985,<sup>242</sup> and the Clinton Administration in 1993,<sup>243</sup> as part of Vice President Al Gore’s efforts to reduce government costs by combining agencies with redundant missions. In 1993, Senate debate over the proposed merger of DEA into FBI contained arguments for and against merger of the agencies that are similar to today’s discussions of the proposed merger of OEE into HSI.<sup>244</sup>

The arguments favoring the DEA/FBI merger were that the merger would (1) reduce the cost of administration of two separate law enforcement agencies; (2) allow the redundant administrative officers to be assigned to street investigations; (3) provide the Director of the FBI with the flexibility to shift the combined agency officers from one area of investigation or enforcement such as bank robbery or organized crime to another area, depending on FBI needs, rather than having all DEA agents restricted to drug law enforcement; and (4) would resolve jurisdictional disputes regarding which agency had the lead in investigating certain matters.<sup>245</sup>

Opponents of the merger argued it would (1) wipe out the only Federal law enforcement agency focused exclusively to fighting drugs, reducing that specialized agency to one of ten or so divisions of the FBI, and the former DEA entity would then have to compete for funds, personnel, and resources with other FBI programs; (2) erase DEA’s distinct drug investigative techniques and operating culture, built over

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241. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD-90-59, JUSTICE DEPT—COORDINATION BETWEEN DEA AND FBI (1990) (An order by the Attorney General in 1982 directing coordination between the two agencies requiring the Administrator, DEA, to report through the Director, FBI, to the Attorney General was never followed, and was rescinded by the Attorney General.); DRUG ENFORCEMENT ADMIN., 1980-1985 43, 46 <http://www.dea.gov/about/history/1980-1985.pdf>.

242. Washington Post, *Meese Moves To Merge FBI, Drug Agency*, ORLANDO SENTINEL (May 26, 1985), [http://articles.orlandosentinel.com/1985-05-26/news/0300210230\\_1\\_dea-agents-fbi-academy-dea-administrator](http://articles.orlandosentinel.com/1985-05-26/news/0300210230_1_dea-agents-fbi-academy-dea-administrator).

243. See *A DEA-FBI-BATF Merger?*, INTELLIGENCE ONLINE (Sept. 13, 1993), <http://www.intelligenceonline.com/community-watch/1993/09/15/a-dea-fbi-batf-merger.64179-ART>. See generally Neil A. Lewis, *White House Seeks to Combine F.B.I. with Drug Agency*, N.Y. TIMES, Aug. 19, 1993, <http://www.nytimes.com/1993/08/19/us/white-house-seeks-to-combine-fbi-with-drug-agency.html>. (“In a move that has touched off a ferocious debate within the Government, the Clinton Administration is proposing to consolidate the fight against drugs by merging the Drug Enforcement Administration into the Federal Bureau of Investigation, officials said today. The idea has drug agency officials preparing to wage war to preserve or enhance their status, and scurrying to find allies in Congress, where significant opposition has already surfaced. . . . The drug agency, in papers distributed throughout the Government, has warned that the effort to fight illegal drugs would be irreparably crippled if its agents were forced under the command of the bureau.”)

244. *FBI and DEA: Merger or Enhanced Cooperation?: Hearing Before the H. Comm. of the Judiciary*, 103rd Cong. (1993) [hereinafter *Merger Hearing*].

245. *Merger Hearing*, *supra* note 244, at 9 (statement by Sen. F. James Sensenbrenner, Jr.).

years of experience; (3) result in a loss of trust of foreign governments with whom DEA had developed close relationships; (4) result in the need to splice the drug agency into yet another agency in a few years given that DEA's important regulatory enforcement responsibility depends on DEA agents' specialized knowledge of the drug laws, an area that FBI would not easily take on; and (5) send the silent but powerful message that the government does not care as much about fighting drugs.<sup>246</sup>

Regarding the assumed benefit of reducing rivalry between DEA and the FBI, Senator Charles Schumer stated, "Some rivalry is healthy, as well as inevitable. It is healthy within the proper bounds because it inspires competition. As long as it is properly managed, competition between these two agencies may get better results—more cases, more investigations, and more convictions."<sup>247</sup> Senator Schumer concluded his objection to the merger by stating, "In sum, I fear that this well-intentioned effort to cut costs and duplication would cost more than we would save. It would mean less efficiency on the street, where it counts, and fewer traffickers behind bars."<sup>248</sup>

Rep. William J. Hughes, former Chair of the House Subcommittee on Crime, opposed the merger on several grounds, but chiefly because he believed that the expertise of DEA agents, both in the regulations they enforced and their familiarity with the persons in the drug community would be lost if DEA agents were merged into the wide ranging jurisdiction of the FBI.<sup>249</sup> Congressman Hughes was also concerned with the disruptive effect it would have on the two organizations, especially for the DEA agents. While proponents described it as a "merger" or "consolidation," Hughes stated "the fact is, it is a hostile takeover."<sup>250</sup>

Although there are similarities between the proposed DEA/FBI and OEE/HSI mergers, the analogy is weakened by the facts that DEA is a much larger agency than BIS, that FBI lacked the substantial contacts with foreign governments that DEA had, and that both DEA and FBI were already under the management of the U.S. Attorney General in the Department of Justice. Congress has not yet debated the proposed merger of OEE into HSI, but the similarities with the unsuccessful proposals to merge DEA with FBI may provide congressional opponents with arguments leading to a similar outcome.

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246. *Id.*

247. Merger Hearing, *supra* note 244, at 10 (statement by Sen. Charles E. Schumer).

248. *Id.*

249. Merger Hearing, *supra* note 244, at 11 (statement by Rep. William J. Hughes).

250. *Id.*

## **VI. Conclusions and Recommendations**

OEE is currently an efficient and effective (although arguably underfunded) law enforcement agency, consisting of over 100 special agents and compliance specialists in Washington, D.C., and nationwide field offices, whose sole mission is to enforce the EAR. The Administration’s latest ECR plan would remove OEE agents from BIS to combine them with other investigative agencies controlled by the Department of Homeland Security. Each agency’s compliance system has its pros and cons, with BIS having the advantage of internally assigned and certified law enforcement investigators, and with DDTC having the advantage of compliance specialists with business experience who are more concerned and familiar with the day-to-day business of defense industry manufacturers and exporters than are OEE agents.

If a single licensing agency is eventually created as planned by ECR, it should employ dedicated law enforcement officers like OEE agents, reporting to the head of the licensing agency, coordinated with other federal law enforcement agencies by E2C2, with independent authority to conduct domestic and overseas undercover criminal investigations and to apply for search warrants and wiretap authorization. The single licensing agency should also include a DDTC-style “Triage Team” process of reviewing voluntary disclosures by compliance specialists, referring only the egregious matters to law enforcement officers for investigation. Unless a single export licensing agency is created by Congress, both BIS and DDTC should maintain their current separate compliance review procedures.

In the opinion of one of this article’s authors, DDTC has the better disclosure review and settlement process. BIS could substantially improve its handling of VSDs without legislation by adding a DDTC-style administrative compliance staff to initially review all VSDs, by handling routine compliance matters at the headquarters level before referring the suspected criminal violations for investigation by OEE officers, and by negotiating consent agreements with corporations that would motivate them to spend money on improving their compliance programs, under OEE supervision, that would otherwise be paid as fines to the government.

In the other author’s opinion, the current BIS method of VSD reviews by OEE officers is, on the whole, the better method, because it is not always clear whether someone has misplaced a toothbrush or unlawfully transferred diamonds. Although many items are being transferred from the USML to the CCL to take advantage of a more relaxed BIS licensing policy, both agencies—DDTC and BIS—guard a combination of toothbrushes and diamonds. Skilled investigators need early opportunities to recognize the egregious matters and follow facts to develop actionable evidence. Both agencies must have the resources and authorities to test corporate representations made about the nature and extent of serious violations

that may be disguised to look benign in voluntary disclosures.<sup>251</sup> While disclosures are something both DDTC and BIS wish to promote, concerns of heavy-handed treatment by BIS agents have not resulted in data that suggests fewer disclosures are filed or more enforcement actions arise from VSDs to OEE.

We agree, however, that at this time, legislation should not be enacted to merge OEE into DHS, as that would result in a serious loss of enforcement expertise in a rapidly increasing segment of controlled exports. Although a single list of controlled items, a single licensing agency, and a single IT system will improve the U.S. export control system, the current separate enforcement system works well, and the proposed combination of enforcement agencies would degrade enforcement. There may be a better future solution once a single licensing agency is established, but for the present, we recommend that Congress follow the old adage, “if it ain’t broke, don’t fix it.”

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251. See, e.g., Press Release, *United Technologies Subsidiary Pleads Guilty to Criminal Charges for Helping China Develop New Attack Helicopter*, U.S. DEPT OF JUSTICE (June 28, 2012) (announcing settlement and noting how the companies failed to disclose to the United States government illegal exports for several years and only after an investor group raised questions and when the disclosures were filed they contained “numerous false statements”).