

Enforcement Keynote Address
Assistant Secretary Darryl W. Jackson
BIS Export Control Forum 2008
Newport Beach, CA
March 17, 2008

Good afternoon. Thank you for the warm welcome. And thank you for your attendance and participation. You have made this year's Export Control Forum a great success. It is truly fitting that we hold the Export Control Forum here in California. California's economy is very impressive for a state – indeed, it would be impressive even for a country. California has a wide variety of industries, including technology, entertainment – and even wine.

The Golden State is strong when it comes to exports. The Department of Commerce's International Trade Administration (ITA) gives us some interesting facts in that regard. According to ITA, California ranked second only to Texas in export shipments of merchandise in 2007. California exported to over 200 foreign destinations in 2007. The top destinations for its exports were Mexico, Canada, Japan, China and South Korea. Computers and electronic products were California's leading category of exports in 2007, and represented almost a third of its total merchandise exports.

The fact that California exports computers, electronic products and other goods in significant amounts is, in part, why two of our eight field offices are in this state – one in Los Angeles, and the other in San Jose. We are happy to have Rick Weir, who is the Assistant Special Agent-in-Charge of our Los Angeles Field Office, here during the conference.

Globalization, Innovation – and the “Brave New War”

Let me begin by thanking all of you for your efforts in helping the Bureau of Industry and Security (BIS) achieve its goal of advancing the national security, foreign policy and economic interests of the United States. All of you well-understand and appreciate the importance and necessity of export controls and export enforcement in today's world. Various forces that are at work today, including globalization and innovation, have produced incredible technological advancements that meet, and even surpass those envisioned by the early science fiction writers. But those of you who conduct legitimate business are not the only ones who seek to use those advancements.

In his book, *Brave New War*, author John Robb says that “globalization is quickly layering new skill sets on ancient mind-sets. Warriors in our current context of global guerrillas are ...wired, educated, and globally mobile. They build complex supply chains, benefit from global money flows, travel globally, innovate with technology, and attack shrewdly. In a nutshell, they are modern.”

As President Bush said in a speech at the National Defense University in Washington, D.C., in 2004, “What has changed in the 21st century is that, in the hands of terrorists, weapons of mass destruction would be a first resort – the preferred means to further their ideology of suicide and random murder.” The President went on to say, “These terrible weapons are becoming easier to acquire, build, hide and transport. Armed with a single vial of a biological agent or a single nuclear weapon, small groups of fanatics, or failing states, could gain the power to threaten great nations, threaten the world peace.” Anyone who doubts that – even for a moment – need only look back at what happened in Washington, D.C. a few years ago, when anthrax was sent through the U.S. mails. Several people were killed and several federal buildings, including congressional buildings on Capitol Hill, were temporarily shut down.

Export Enforcement’s Mission and Priorities

BIS has responded to the challenge of countering the post-9/11 threats to our country. Those of us in Export Enforcement at BIS describe our mission as “Keeping the most sensitive goods and technology out of the most dangerous hands.” The Special Agents in our Office of Export Enforcement focus 75 percent of their active investigative efforts on three priorities: countering WMD proliferation, terrorism and terrorist-support, and unauthorized military end-use. Eighty percent of the criminal convictions we obtained in the last fiscal year and 91 percent of the Final Orders in our administrative cases were in those three priority areas.

I am very proud to say that our Special Agents are doing a fantastic job. But they cannot do it alone. They need those of you in industry to be vigilant as you are exporting. BIS will continue to conduct outreach to industry to underscore the importance of complying with export laws and to assist you in doing so. Special Agent Tom Madigan, who joined BIS last year as the Assistant Director of Investigations in the Office of Export Enforcement (OEE), will discuss OEE’s efforts in more detail during the Enforcement Panel that follows. Tom is currently serving as the Acting Director of OEE.

The Department of Justice’s Export Enforcement Initiative

Attorney General Mukasey recently underscored the national security implications of export controls violations. In his testimony last month before the House Judiciary Committee, he discussed the Department of Justice’s recently launched nationwide export enforcement initiative. He said the initiative is geared “to combat the growing national security threat posed by illegal exports of restricted U.S. military and dual-use technology to foreign nations and terrorist organizations” and that the initiative will “leverage the counter-proliferation assets of U.S. law enforcement, export control, and intelligence agencies.” Among other things, the initiative involves the formation of Counter-Proliferation Task Forces across the country, the expansion of export control training for investigators and prosecutors, and the appointment of a National Export Control Coordinator. We look forward to continuing to work on these important investigations with the Department of Justice, as well as our other fellow law enforcement agencies.

Antiboycott Compliance

We have a fourth priority in Export Enforcement, which is antiboycott compliance. Our Office of Antiboycott Compliance (OAC) works to ensure that U.S. businesses comply with the antiboycott provisions of the Export Administration Regulations (EAR). We also bring enforcement actions to enforce those regulations, as appropriate. OAC's efforts support the important goal of fostering free trade. On the Enforcement Panel that follows, Cathleen Ryan, who is the Assistant Director of Enforcement for OAC, will discuss boycotting trends, as well as Voluntary Self-Disclosures under the provisions of the Antiboycott Penalty Guidelines that we put into place last year.

End Use Checks

We also conduct end use checks around the world, to ensure that U.S. goods and technology are where they should be, and that they are being used for the purposes for which they were exported. Todd Willis, our new Assistant Director for the Operations Division of our Office of Enforcement Analysis (OEA) is here and will discuss end use checks on the Enforcement Panel that follows.

A Law Enforcement-Focused EAA Renewal is Critical

We have discussed some of the current challenges that underscore the importance of export enforcement in today's environment. The Congress must take the next major step to address those challenges and pass a law enforcement-focused renewal of the Export Administration Act (EAA). It is long overdue.

To ensure that our Special Agents can perform their jobs in the most effective manner in the post-9/11 world, we need an EAA renewal that modernizes their law enforcement tools and authorities. As you know the EAA has been in lapse for much of the past 30 years. As a result, it is out of date, which causes problems that law enforcement should not encounter, especially in national security cases.

Nearly three years ago, the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction transmitted its report (WMD report) to the President. Therein, the Commission, which was co-chaired by U. S. Circuit Judge Lawrence Silberman and former Senator Charles Robb, acknowledged the contributions BIS has made in this critical area. The report stated that renewing the EAA would provide BIS with needed investigative tools and increased penalties, thereby increasing BIS's ability to protect our national security. It is time that we heeded the WMD Commission's call.

S. 2000 – The Export Enforcement Act of 2007

The Administration-backed bill introduced by Senator Dodd last year as S. 2000 – the Export Enforcement Act of 2007 – will correct these long-standing issues.

- **Permanent Law Enforcement Authorities**

It will provide our Special Agents with permanent law enforcement authorities that do not sunset with the rest of the EAA. That will eliminate the need for them to be deputized by other law enforcement agencies in order to perform their most basic duties, such as arresting violators and executing search warrants to obtain evidence. Having permanent law enforcement authorities will allow our Special Agents to perform their duties efficiently, and also with the dignity they deserve.

- **Foreign Investigative Authority**

Among other things, the bill will also provide our Special Agents with foreign investigative authority, which will allow them to follow the evidence wherever it leads.

- **Wiretaps**

The bill will give federal agents the authority to conduct wiretaps under the EAA and International Emergency Economic Powers Act (IEEPA). That will allow them to gather important evidence concerning the knowledge and intent of the parties involved in illicit export transactions and present that evidence to a jury.

- **Increased Penalties**

The increased penalties the bill provides will foster deterrence and also give an incentive to violators to cooperate with law enforcement as it investigates and prosecutes other conspirators.

As the President said earlier this month in his speech at the fifth anniversary of the U.S. Department of Homeland Security in Washington, D.C. “We have no greater responsibility, no greater charge, than to stop our enemies and to protect our fellow citizens.” Passing a law enforcement-focused renewal of the EAA will give BIS’s Special Agents better tools with which to do so. Given the significant periods during which the EAA has been in lapse and the dramatically changed circumstances in today’s post-9/11 world, renewing the EAA in this manner truly amounts to a “good government” measure. It would also help ensure that legitimate businesses do not operate at a disadvantage relative to their less scrupulous competitors. We hope that the pending bill will pass before this Congress expires later this year.

The Importance of Compliance

In taking up my final topic for today, let me say that, the government has an important role to play in national security through its enforcement efforts and outreach, and in other ways. But so do you. So does every good citizen – both corporate citizens and individuals. No responsible citizen or company can merely look to make profits today at the cost of our national security. The fact that you are here today shows you care

a great deal about these issues. Let me share with you *the* most significant thing that you can do to continue to help – which is ensuring compliance with the export control laws.

Compliance is the first line of defense in protecting our national security. So, for my final topic today, I am going to turn to the need for effective compliance programs, and I will discuss the nine principles we apply to evaluate those programs in assessing our administrative penalties. It is a topic that we are discussing publicly for the first time today.

BIS's Administrative Penalties

As you know, one of the important responsibilities I have as the Assistant Secretary for Export Enforcement is approving the charging and settlement of our administrative cases. For effective compliance programs, we give “great weight mitigation” – a reduction of 25 percent – in assessing the penalties in administrative cases. The penalties for those cases were recently increased by the IEEPA Enhancement Act. And, as we have discussed, the Department of Justice is focusing more resources on export violations, so you should expect to see an increase in criminal prosecutions. Thus, compliance is more important than ever. Compliance will help you avoid enforcement actions. And, if you cannot avoid an enforcement action, having an effective compliance program will get you great weight mitigation in our administrative cases if the program was in place before the violation occurred and you have taken steps to address any compliance concerns raised by the violation.

Principles of Effective Compliance Programs for Great Weight Mitigation in BIS's Administrative Cases

Kevin Delli-Colli is our new Deputy Assistant Secretary (DAS). As the DAS, he also serves as the Chair of the Administrative Case Review Board (ACRB), which advises me regarding charging and settlement in our administrative cases. As you know, as the Assistant Secretary, I am free to accept, reject or modify the ACRB's recommendations. Kevin will discuss effective compliance programs in greater detail during the Export Enforcement Panel that follows. To set the stage for that further discussion, let me outline the nine principles we apply in deciding whether a compliance program is effective and entitled to great weight mitigation.

There is no “one size fits all” compliance program. But, to be effective, all export compliance programs, no matter how large or small the company, no matter how simple or complex the business, will evidence the following nine principles. Those principles must appear in the design of the program and they also must be actually implemented. Put differently, it is difficult to implement that which is not in the design of a plan. But conversely, merely having a well-designed compliance plan is not enough – the plan also must be operational.

Here are the nine principles we apply in deciding whether a compliance program is effective and entitled to great weight mitigation.

1. Whether the company has performed a meaningful risk analysis.

You conduct risk analyses in other aspects of your business, and you must do so in fashioning an effective compliance program as well. A meaningful risk analysis is the baseline from which an effective compliance program is designed. Among other things, you must consider the types of goods you are exporting, and the destinations they are bound for, as well as the likelihood of diversion. It is critical that you periodically revisit your risk analysis as your business model changes over time and becomes different or more complex, so that you modify your compliance plan to take those new circumstances into account.

2. The existence of a formal written compliance program.

Without a written compliance program, there is no baseline from which to measure its effectiveness. There are no common goals set or communicated to others for the program.

3. Whether appropriate senior organizational officials are responsible for overseeing the export compliance program.

Put people at a high level of responsibility into oversight positions for this and all other export-related matters. Please, do not leave these important issues to some isolated, lower-level person in the company. That is not the way companies deal with important issues.

4. Whether adequate training is provided to employees.

You will have to train your employees so that they know what is required of them for your company to be in compliance. For them to stay abreast of developments, the training will have to be ongoing. In order to hold them accountable, you will have to maintain records showing that you provided appropriate training.

5. Whether the company adequately screens its customers and transactions.

Your program has to have put the proper controls in place, including the various export screening mechanisms. On BIS's website, you will find "Know Your Customer" guidance, and the various lists against which you should screen export transactions.

6. Whether the company meets recordkeeping requirements.

The EAR has recordkeeping requirements, and your company should make sure that it meets them. You should also maintain the kinds of records commonly expected in

your line of business, all of which properly document the transactions in which you have engaged.

7. The existence and operation of an internal system for reporting export violations.

Your compliance program should have an internal system through which employees can report suspected export violations. Such reporting systems provide you with the ability to look into such matters further and take appropriate action, including making Voluntary Self-Disclosures, for which we mitigate administrative penalties by 50 percent.

8. The existence and result of internal/external reviews or audits.

You will have to test your program by running periodic audits of some kind, which will show you how well it is working. You will have to modify your company's procedures in light of what those audits show. Moreover, you will need to review, revise and update your compliance programs. If you have not taken a look at your program recently, it is probably time to do so. And it is probably time to revise it, in light of recent developments that have occurred in the law, in business and elsewhere.

9. Whether remedial activity has been taken in response to export violations.

Under your compliance plan, it is important that you take appropriate disciplinary actions against employees who put your company and our nation at risk – not merely sweep those problems under the rug. If either the prosecutors or I get to those problems and employees first, it will be worse for everyone involved, including your company.

Meeting Your Burden for Great Weight Mitigation

Let me finish this discussion by underscoring that the burden is on you to demonstrate that your compliance program is effective. You are seeking great weight mitigation from us, which, by definition, is a significant reduction in the administrative penalty. You will have to clearly demonstrate that you are entitled to it. Accordingly, everything that you do, including the manner in which you present the papers to us, should be geared toward carrying that burden. Merely sending the lawyers in our Office of Chief Counsel (OCC) a binder of materials, or conducting what we lawyers call a "document dump" on them, is not likely to send them scurrying off to meet *your* burden. They are good at what they do and as fair-minded a group of people as I have ever met. But you cannot rely on them to prove *your* case. That is your job. And if you have not done it, you should expect them to push back. If you do not meet the burden, I expect them ultimately to recommend that I not grant you great weight mitigation. In the event that they do recommend that you receive great weight mitigation, you should make them look good, because the final decision is mine. I will not accept their recommendation if I find it is not adequately supported by the evidence you have submitted. I will not put our country's national security and other interests at risk in such a way.

Conclusion

As I conclude, let me extend my deepest gratitude to you once again for attending this year's Export Control Forum and making it a great success. You put compliance first. As you know, we value your partnership as we work together to protect our national security and keep our country prosperous. I look forward to continuing our work together.