

**Attachment to the Recommendations of the American Association of  
Exporters and Importers to the**

**House Foreign Affairs Committee  
on the Export Control Review  
January 8, 2010**

**Penalties for Negligence, Gross Negligence and Fraud**

**(a) Prohibition**

**(1) General Rule**

A person shall exercise reasonable care in complying with the provisions of this Act including any regulation, order or license issued under this statute. No person by negligence, willful negligence or fraud—

(A) may export or attempt to export any merchandise, technology, or software from the United States in violation of any regulation, order or without obtaining the applicable license required by law complying with the terms of any applicable export authorization, or

(B) may conspire to aid or abet any other person to violate subparagraph (A).

**(2) Exception**

Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct.

**(b) Procedures**

**(1) Warning notice**

**(A) In general**

If the Secretary of Commerce has reasonable cause to believe that there has been a violation of subsection (a) of this section and determines that further administrative proceedings are warranted, it shall issue to the person concerned a written notice of its intention to issue a charging letter for a monetary penalty. Such notice shall—

(i) describe the merchandise;

(ii) set forth the details of the export, the attempted export, or the conspiracy to aiding the export;

(iii) specify all laws and regulations allegedly violated, including the basis on which the merchandise required a license or other export restriction;

(iv) disclose all the material facts which establish the alleged violation;

(v) state whether the alleged violation occurred as a result of fraud, gross negligence, or negligence;

(vi) taking into account all circumstances, the amount of the proposed monetary penalty; and

(vii) inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated.

**(B) Exceptions**

The preceding subparagraph shall not apply if—

- (i) the export with respect to which the violation of subsection (a) of this section occurs is not subject to a regulation, order or license administered by the Secretary of Commerce, or
- (ii) the amount of the penalty in the penalty claim issued under paragraph (2) is \$1,000 or less.

**(2) Charging letter of civil penalty**

After a period of not less than 30 days to receive representations, if any, made by the person concerned pursuant to the warning notice issued under paragraph (1), the Secretary of Commerce shall determine whether any violation of subsection (a) of this section, as alleged in the warning notice, has occurred. If the Secretary of Commerce determines that there was no violation, it shall promptly issue a written statement withdrawing the warning notice stating the basis of its determination to the person to whom the warning notice was sent. If the Secretary of Commerce determines that there was a violation, it shall issue a written charging letter, including any penalty, suspension or revocation of export privileges, to such person. The written charging letter shall specify all changes in the information provided under clauses (i) through (v) of paragraph (1)(A). Such person shall then have a reasonable opportunity to make representations, both oral and written, seeking remission or mitigation of the monetary penalty, suspension or revocation of export privileges. At the conclusion of any proceeding under this section, the Secretary of Commerce shall provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.

**(c) Maximum penalties**

**(1) Fraud**

A fraudulent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed a fine of up to \$250,000.

**(2) Gross negligence**

A willfully negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount of not more than \$125,000.

**(3) Negligence**

A negligent violation of subsection (a) of this section is punishable by a civil penalty fine of up to \$50,000.

**(4) Voluntary disclosure**

If the person concerned discloses the circumstances of a violation of subsection (a) of this section and tenders a written statement identifying the shipments covered by the disclosure before, or without knowledge of, the commencement of a formal investigation of such violation, with respect to such violation, any monetary penalty to be assessed under subsection (c) of this section shall not exceed \$50,000 if the violation resulted from fraud and \$10,000 if such violation resulted from negligence or gross negligence.

The person asserting lack of knowledge of the commencement of a formal investigation has the burden of proof in establishing such lack of knowledge. For purposes of this section, a formal investigation of a violation is considered

to be commenced with regard to the disclosing party and the disclosed information on the date recorded in writing by the Secretary of Commerce as the date on which facts and circumstances were discovered or information was received which caused the Secretary of Commerce to believe that a possibility of a violation of subsection (a) of this section existed. The Secretary of Commerce shall produce written evidence demonstrating the commencement of a formal investigation to rebut the person's factual basis for claiming the lack of knowledge of the commencement of such formal investigation.

**(d) Court of International Trade proceedings**

Notwithstanding any other provision of law, in any proceeding commenced by the United States in the Court of International Trade under Section 301 of the U.S. Court of International Trade Improvements Act, \_\_\_ P.L. \_\_\_\_, codified at 28 U.S.C. § 1581 for the recovery of any monetary penalty, suspension or revocation of export privileges claimed under this section—

- (1) all issues, including the amount of the penalty or basis of denying export privileges, shall be tried de novo;
- (2) if the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence;
- (3) if the monetary penalty is based on willful negligence, the United States shall have the burden of proof to establish all the elements of the alleged violation; and
- (4) if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.