

**§ 127.11 Past violations.**

(a) Pursuant to section 38 of the Arms Export Control Act, licenses or other approvals may not be granted to persons who have been convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter or who are ineligible to receive any export licenses from any agency of the U.S. government, subject to a narrowly defined statutory exception. This provision establishes a presumption of denial for licenses or other approvals involving such persons. This presumption is applied by the Office of Defense Trade Controls to all persons convicted or deemed ineligible in this manner since the effective date of the Arms Export Control Act (Pub. L. 94-329; 90 Stat. 729) (June 30, 1976).

(b) *Policy.* An exception to the policy of the Department of State to deny applications for licenses or other approvals that involve persons described in paragraph (a) of this section shall not be considered unless there are extraordinary circumstances surrounding the conviction or ineligibility to export, and only if the applicant demonstrates, to the satisfaction of the Bureau of Politico-Military Affairs, that the applicant has taken appropriate steps to mitigate any law enforcement and other legitimate concerns, and to deal with the causes that resulted in the conviction, ineligibility, or debarment. Any person described in paragraph (a) of this section who wishes to request consideration of any application must explain, in a letter to the Director, Office of Defense Trade Controls, the reasons why the application should be considered. If the Bureau of Politico-Military Affairs concludes that the application and written explanation have sufficient merit, it shall consult with the Office of the Legal Adviser and the Department of the Treasury regarding law enforcement concerns, and may also request the views of other departments, including the Department of Justice. If the Office of Defense Trade Controls does grant the license or other approval, subsequent applications from the same person need not repeat the information previously provided but should instead refer to the favorable decision.

(c) *Debarred persons.* Persons debarred pursuant to § 127.6(c) (statutory debarment) may not utilize the procedures provided by this section while the debarment is in force. Such persons may utilize only the procedures provided by § 127.7(d) of this part.

**§ 127.12 Voluntary disclosures.**

(a) *General policy.* The Department strongly encourages the disclosure of information to the Office of Defense Trade Controls by persons, firms or any organization that believe they may have violated any export control provision of the Arms Export Control Act, or any regulations, order, license, or other authorization issued under the Arms Export Control Act. Voluntary self-disclosure may be considered a mitigating factor in determining the administrative penalties, if any, that should be imposed by the Department. Failure to report such violation(s) may result in circumstances detrimental to U.S. national security and foreign policy interests.

(b) *Limitations.* (1) The provisions of this section apply only when information is provided to the Office of Defense Trade Controls for its review in determining whether to take administrative action under part 128 of this subchapter concerning violation(s) of the export control provisions of the Arms Export Control Act and these regulations.

(2) The provisions of this section apply only when information is received by the Office of Defense Trade Controls for review prior to such time that either the Department of State or any other agency, bureau or department of the United States Government obtains knowledge of either the same or substantially similar information from another source and commenced an investigation or inquiry that involves that information, and that is intended to determine whether the Arms Export Control Act or these regulations, or any other license, order or other authorization issued under the Arms Export Control Act has been violated.

(3) It is possible that the activity in question—despite voluntary disclosure—might merit penalties, administrative actions, sanctions, or referrals

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to the Department of Justice for consideration as to whether criminal prosecution is warranted. In the latter case, the Office of Defense Trade Controls will notify the Department of Justice of the voluntary nature of the disclosure although the Department of Justice is not required to give that fact any weight. The Office of Defense Trade Controls has the sole discretion to consider whether "voluntary disclosure," in context with other relevant information in a particular case, should be a mitigating factor in determining what, if any, administrative action will be imposed. Some of the mitigating factors the Office of Defense Trade Controls may consider are:

(i) Whether the transaction would have been authorized had proper application been made;

(ii) Why the violation(s) occurred;

(iii) The degree of cooperation with the ensuing investigation;

(iv) Whether the person or firm has instituted or improved an internal compliance program to reduce the likelihood of future violation(s);

(v) Whether the person making the disclosure did so with the full knowledge and authorization of the firm's senior management. (If not, then a firm will not be deemed to have made a disclosure as covered in this section.)

(4) The provisions of this section do not, nor should they be relied on, to create, confer, or grant any rights, benefits, privileges, or protection enforceable at law or in equity by any person, business, or entity in any civil, criminal, administrative, or other matter.

(c) *Notification.* (1) Any person or firm wanting to disclose information that constitutes a voluntary self-disclosure should, in the manner outlined below, initially notify the Office of Defense Trade Controls as soon as possible after violation(s) are discovered and then conduct a thorough review of all export-related transactions where violation(s) are suspected.

(2) Notification of violation(s) must be in writing and should include the following information:

(i) A precise description of the nature and extent of the violation(s) (e.g., an unauthorized shipment, doing business with a party denied U.S. export privileges, etc.);

(ii) The exact circumstances surrounding the violation(s) (a thorough explanation of why, when, where, and how the violation(s) occurred);

(iii) The complete identities and addresses of all individuals and organizations, whether foreign or domestic, involved in the activities giving rise to the violation(s);

(iv) Export license numbers, if applicable;

(v) U.S. Munitions List category and subcategory, product descriptions, quantities, and characteristics of the commodities or technical data involved;

(vi) A description of any corrective actions already undertaken;

(vii) The name and address of the person(s) making the disclosure and a point of contact, if different, should further information be needed.

(3) Factors to be considered include, for example, whether the violation(s) were intentional or inadvertent; the degree to which the person or firm responsible for the violation(s) making the disclosure was familiar with the laws and regulations; and whether the violator was the subject of prior administrative or criminal action under the AECA. In addition to immediately providing written notification, persons, firms, companies and organizations are strongly urged to conduct a thorough review of all export-related transactions where possible violation(s) are suspected.

(d) *Documentation.* (1) The written disclosure should be accompanied by copies of those documents that substantiate it. Where appropriate, the documentation should include, but is not limited to:

(i) Licensing documents (e.g., license applications, export licenses and end-user statements);

(ii) Shipping documents (e.g., shipper's export declarations, airway bills and bills of lading);

(iii) Any other relevant documents must be retained by the person making the disclosure until the Office of Defense Trade Controls requests them or until a final decision on the disclosed information has been made.

(e) *Certification.* A certification must be submitted stating that all of the representations made in connection

with the voluntary self-disclosure are true and correct to the best of that person's knowledge and belief. Certifications made by a firm, corporation or any other organization should be executed by someone with the authority to do so.

(f) *Oral presentations.* It is generally not necessary to augment the written presentation with an oral presentation. However, if the person making the disclosure believes a meeting is desirable, a request for one should be included with the written presentation.

(g) Voluntary disclosures should be sent to:

Compliance Analysis Division, PM/DTC, SA-6, room 200, Office of Defense Trade Controls, Bureau of Politico-Military Affairs, U.S. Department of State, Washington, DC 20522-0602.

## PART 128—ADMINISTRATIVE PROCEDURES

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**AUTHORITY:** Secs. 2, 38, 40, 42, and 71, Arms Export Control Act. 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2791, and 2797); E.O. 11958, 42 FR 4311; 22 U.S.C. 2658; E.O. 12291, 46 FR 1981.

**SOURCE:** 58 FR 39320, July 22, 1993, unless otherwise noted.

### § 128.1 Exclusion of functions from the Administrative Procedure Act.

The Arms Export Control Act authorizes the President to control the import and export of defense articles and services in furtherance of world peace and the security and foreign pol-

icy of the United States. It authorizes the Secretary of State to make decisions on whether license applications or other written requests for approval shall be granted, or whether exemptions may be used. It also authorizes the Secretary of State to revoke, suspend or amend licenses or other written approvals whenever the Secretary deems such action to be advisable. The administration of the Arms Export Control Act is a foreign affairs function encompassed within the meaning of the military and foreign affairs exclusion of the Administrative Procedure Act and is thereby expressly exempt from various provisions of that Act. Because the exercising of the foreign affairs function, including the decisions required to implement the Arms Export Control Act, is highly discretionary, it is excluded from review under the Administrative Procedure Act.

[61 FR 48831, Sept. 17, 1996]

### § 128.2 Administrative Law Judge.

The Administrative Law Judge referred to in this part is an Administrative Law Judge appointed by the Department of State or of the Department of Commerce, as provided in 15 CFR 788.2. The Administrative Law Judge is authorized to exercise the powers and perform the duties provided for in §§ 127.7, 127.8, and 128.3 through 128.16 of this subchapter.

[61 FR 48831, Sept. 17, 1996]

### § 128.3 Institution of Administrative Proceedings.

(a) *Charging letters.* The Director, Office of Defense Trade Controls, with the concurrence of the Office of the Legal Adviser, Department of State, may initiate proceedings to impose debarment or civil penalties in accordance with § 127.7 or § 127.10 of this subchapter respectively. Administrative proceedings shall be initiated by means of a charging letter. The charging letter will state the essential facts constituting the alleged violation and refer to the regulatory or other provisions involved. It will give notice to the respondent to answer the charges within 30 days, as provided in § 128.5(a), and indicate that a failure to answer will be