7. Personal Liability For Export and Import Violations. Individuals have long been subject to personal civil and criminal liability for violations of export laws. See, for example, cases involving Timothy Gormley,[45] Peter Gromacki,[46] LeAnne Lemeister,[47] John Reese Roth,[48] Mozaffar Khazaee,[49] Guerman Goutorov and Eric Carlson, to name just a few. In some instances the individuals were acting in their capacities as employees (Gormley) or officers (Goutorov and Carlson) of exporting companies, and in others they were acting alone (Gromacki). In one instance the employee was a senior export compliance officer and empowered official of a major U.S. defense contractor (Lemeister). Many of the cases against individuals are criminal prosecutions with significant financial penalties and prison sentences (Timothy Gromley was sentenced to 42 months imprisonment). (See Corporate Officers Charged Personally For Export Violations).

Individuals are also subject to personal liability for import violations in certain instances. In one recent noteworthy case, United States v. Trek Leather, Inc. et al., the U.S. Court of Appeals for the Federal Circuit held that a company's president can be personally liable for civil Customs violations under 19 USC §1592.[50] Similarly, many of the recent criminal prosecutions for Customs violations cited above have targeted individual officers and directors of importers. See, eg., United States v. Wolff et al, (cited above).

In 2015, Deputy Attorney General Sally Yates issued the now famous "Yates Memorandum" directing federal prosecutors to focus on individuals personally involved in corporate wrongdoing in federal enforcement cases. In the recent Volkswagen auto emissions case, involving the largest Customs penalty to date, six Volkswagen executives were also personally indicted and one arrested for their roles in the case, signaling that the Yates mandate to prosecute business executives personally would continue.[51] While at the time of this writing it is unclear if the Yates mandate will continue in the new Trump administration, regardless of the Yates policy it is expected that individuals will continue to be subject to personal liability for export and import violations as was the case prior to the Yates memorandum. Consequently individuals should continue to use great care in their export/import compliance activities to protect both their organizations and themselves.

The above are just a number of the issues to consider in an enforcement situation and there may be additional issues depending on the facts of your case.

Note: This article contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not intended and should not be construed as legal advice.

EXHIBIT A

ENFORCEMENT LEGAL AUTHORITIES FOR EXPORT AND IMPORT VIOLATIONS

The following are some of the principal enforcement legal authorities under U.S. export and import laws.

[25] The BIS Publication "Don't Let This Happen To You" provides the following regarding export liability from acquisition transactions:

> Businesses can be held liable for violations of the EAR committed by companies that they acquire. Businesses should be aware that the principles of successor liability may apply to them and should perform "due diligence" in scrutinizing the export control practices of any companies that they plan to acquire. A properly structured due diligence review can determine whether an acquired company has violated any export laws. This review should examine the company's export history and compliance practices, including commodity classifications, technology exchanges, export licenses and authorizations, end-users, end-uses, international contracts, the status of certain foreign employees who have access to controlled technologies, and the company's export policies, procedures, and compliance manuals. Voluntary self-disclosures should be submitted outlining any violations that this review uncovers, if not by the company responsible, then by the company seeking to acquire it. Failure to scrutinize properly an acquired company's export practices can lead to liability being imposed on the acquiring company. The case of C.A. Litzler Co., Inc. (page 51) demonstrates the importance of conducting due diligence reviews during the acquisition of a company, or in this particular case, the acquisition of a substantial portion of a company's assets. See p. 19.

[26] See 22 CFR §§ 126.1(e)(2) and 123.17(j).

[27] Under the DOJ Guidance, to receive the benefits of a voluntary self-disclosure, the submission must be made on a timely basis, must disclose all of the relevant facts and must be submitted "prior to an imminent threat of disclosure or government investigation." (citing U.S.S.G. §8C2.5(g)(1)). In addition, the Guidance provides that the submitting party must provide proactive cooperation to Justice in its investigation of the matter and timely and appropriate remediation. If a company meets these criteria, the company can may become eligible for "a significantly reduced penalty, to include the possibility of a non-prosecution agreement (NPA), a reduced period of supervises compliance, a reduced fine and forfeiture and no requirement for a monitor." DOJ Guidance p. 8. The DOJ Guidance does not set forth specific levels of relief that will be afforded as in the OFAC and BIS Enforcement Guidlines, but rather states that the ultimate resolution will be determined based upon on an evaluation of the totality of the circumstances in a particular case. If more aggravating circumstances are present, a more stringent resolution will be required. The DOJ Guidance states: "Nevertheless, the company would still find itself in a better position than if it had not submitted a VDS, cooperated, and remediated." Guidance, p. 9.

[28] It may be possible to obtain an extension of time in which to respond to the request, however there is no assurance that the agency will agree to this so you should submit your extension request early and be prepared in case the request is denied. In addition, while a short extension may be granted, longer extensions are more difficult to obtain.

[29] These typically require exporters and importers to maintain records of export and/or import transactions for a five year period and longer in certain instances.

[30] For ITAR, see 22 CFR Part 128; for EAR see 15 CFR Part 766, for OFAC Sanctions Programs see 31 CFR Part 501 and provisions in regulations for each of the individual sanctions programs, and for Customs see 19 USC §1592(b).

[31] The OFAC Sanctions Compliance and Evaluations Division handles enforcement for financial institutions and the Enforcement Division handles other enforcement matters.

[32] The National Security Division attorneys in Washington also often provide specialized expertise to individual U.S. Attorney offices in handling these cases.

[33] The office is administered by DHS, with a team that includes officials from DHS, the Federal Bureau of Investigation, the Departments of Commerce, State, Justice, Defense, Treasury, Energy, Office of the Director of National Intelligence and the Postal Inspection Service.

[34] This includes regulations administered by the Food and Drug Administration, Consumer Product Safety Commission, Federal Trade Commission, International Trade Commission and the enforcement of federal intellectual property laws.

[35] See United States of America v. LM Import-Export, Inc., et al., Case No. 1:11-cv-20765 (S.D. Fl.) and United States of America v. Hung Lam, et al., Case No. 12-20048-CR (S.D. Fla.).

[36] For example, in a recent case involving National Oilwell Varco, Inc. ("Varco") for violations involving Cuba, Iran and Sudan, Varco was subject to investigations by OFAC, BIS and the U.S. Attorney in the Southern District of Texas. See: https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20161114_varco.pdf

[37] See 22 CFR §§ 128.14 and 128.17.

[38] However where the administrative law judge determines that documents containing the sensitive matter need to be made available to a respondent to avoid prejudice, the judge may direct BIS to provide an unclassified summary of the documents to the respondent. The judge may provide the parties opportunity to make arrangements that permit a party or a representative to have access to such matter without compromising sensitive information. Such

arrangements may include obtaining security clearances, or giving counsel for a party access to sensitive information and documents subject to assurances against further disclosure, including a protective order, if necessary. See 15 CFR 766.11.

[39] Administrative Procedure Act, 5 USC §§551 to 559.

[40] ITAR Section 128.1 provides that administration of the AECA is expressly exempt from various provisions of the APA. This section provides:

> "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."

Similarly, EAR Sec. 766.1 provides:

> "This part does not confer any procedural rights or impose any requirements based on the Administrative Procedure Act for proceedings charging violations under the EAA, except as expressly provided for in this part."

[41] See for example, Bernstein v. United States Department of State, 945 F. Supp. 1279 (N.D. Cal. 1996), 974 F. Supp. 1288 (N.D. Cal. 1997); Bernstein v. United States Department of Justice, 176 F.3d 1132 (9th Cir. 1999); Bernstein v. Department of Commerce, No. 95-0582 (N.D. Cal. 2003); Junger v. Daley, et al, 209 F.3d 481 (6th Cir. 2000); U.S. v. Zhen Zhou Wu, Nos. 11-1115, 11-1141 (1st Cir. 2013); Defense Distributed and Second Amendment Foundation, Inc. v. U.S. Department of State, et al., No. 1:15-CV-372-RP (W.D. Tex..), and Micei International v. Department of Commerce, No. 09-1155 (DC Cir. 2010). Under §13(c)(3) of the Export Administration Act parties are entitled to judicial review of BIS determinations directly to the U.S. Court of Appeals for the District of Columbia, however the EAA has expired. IEEPA, the current statutory authority for the EAR, is silent on issues involving judicial review except in connection with determinations based upon classified information. The EAR previously provided for judicial review pursuant to 15 CFR §766.22(e) which directed the parties to pursue an appeal as set forth in the EAA's judicial review provision under §13(c)(3), however this provision (§766.22(e)) was deleted from the EAR in technical amendments in 2010.

[42] See eg., 31 CFR.§ 560.704 (Iran), 31 CFR §742.703 (Syria), 31 CFR §538.704 (Sudan) and 31 CFR §547.703 (Dem. Republic of the Congo).

[43] In light of the important constitutional issues involved in unilateral presidential authority in national emergencies, IEEPA has been the subject of numerous court challenges. See, eg., Dames & Moore v. Regan. 453 U.S. 654 (1981), Kindhearts For Charitable Humanitarian Development, Inc. v. Timothy Geithner, et al, 647 F.Supp.2d 857 (N.D. Ohio 2009) and U.S. v. Ali Amirnazmi, No. 10-1198, (3d Cir. 2011). More recently, parties have been able to obtain judicial review of OFAC sanctions programs under the provisions of the APA. See for example Epsilon Electronics, Inc. v. United Stated Department of the Treasury, Office of Foreign Assets Control, et al., 168 F.Supp.3d 131 (D.C. 2016).

[44] For example, in Epsilon Electronics (see footnote above) Epsilon appealed OFAC's determination that the company engaged in unauthorized exports to Iran in the U.S. District Court for the District of Columbia. The appeal was based upon violations of the APA and constitutional protections. The court upheld OFAC's determination and its $4,073,000 civil penalty assessment. Of significance, the court stated that in reviewing OFAC actions courts are required to be "extremely differential" to the agency in reviewing agency actions in light of OFAC's national security and foreign affairs functions: The court stated:

> When reviewing agency decisions in the area of foreign relations, courts must be mindful that "[m]atters related 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or inference.'" Regan, 468 U.S. at 242 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)). Thus, "[a]s a general principal, . . . [a reviewing court] should avoid impairment of decisions made by the Congress or the President in matters involving foreign affairs or national security." Glob. Relief Found. v. O'Neill, 207 F. Supp. 2d 779, 788 (N.D. Ill. 2002) (citing Haig v. Agee, 453 U.S. 280, 292 (1981)). Accordingly, a review of a decision made by OFAC is "extremely deferential" because OFAC operates "in an area at the intersection of national security, foreign policy, and administrative law." Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 734 (D.C. Cir. 2007). Epsilon, p.8-9.

[45] See http://www.justice.gov/usao-edpa/pr/north-wales-man-sentenced-illegally-exporting-goods.

[46] See https://www.fbi.gov/newyork/press-releases/2012/four-individuals-charged-in-the-southern-district-of-new-york-with-exporting-various-goods-from-the-united-states-to-iran-and-china.

[47] See http://www.state.gov/t/pm/rls/othr/misc/218216.htm.

[48] United States v. Roth, 628 F.3d 827 (6th Cir., 2011).

[49] See also actions involving Mozaffar Khazaee in the US District Court for the District of Connecticut on October 23, 2015 - http://www.justice.gov/opa/pr/former-connecticut-resident-sentenced-over-eight-years-prison-attempting-send-us-military, and Alexander Posobilov, Shavkat Abdullaev and Anastasia Diatlova in the Eastern District of New York on October 26, 2015 - http://www.justice.gov/opa/pr/three-defendants-convicted-conspiring-illegally-export-controlled-technology-russian-military.

[50] See United States v. Trek Leather, Inc. et al., No. 11-1527 (Fed. Cir. 2014).

[51] In January 2017 Justice and CBP announced that Volkswagen had agreed to pay $4.3 billion in combined criminal and civil penalties in connection with the case. The $1.45 civil penalty component of this payable to CBP to resolve Customs civil fraud charges was described by CBP as the largest civil penalty collected by CBP. See https://www.cbp.gov/newsroom/spotlights/cbp-joins-doj-fbi-and-epa-announcing-settlement-against-volkswagen-result-their and https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six