

# LEGAL ISSUES IN OUTBOUND ENFORCEMENT

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# DETENTION AND SEIZURE AUTHORITY



- U.S. Constitution 4<sup>th</sup> Amendment
  - The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, **but upon probable cause,**
- U.S. Constitution 5<sup>th</sup> Amendment
  - No person shall . . . be deprived of life, liberty, **or property,** **without due process of law**

# DETENTION AND SEIZURE AUTHORITY

- 19 USC 1595a(d) “merchandise exported or sent from the U.S., or attempted to be exported . . . **contrary to law**, and any property used to facilitate exporting, purchase, receipt, transportation etc prior to exportation, shall be seized and forfeited to the United States.”
- 22 USC 401 “whenever an attempt is made to export . . . any arms or munitions of war **or other articles in violation of law**, or whenever there is probable cause to believe [such articles] are intended to be exported in violation of law, the Secretary of Treasury [CBP and ICE] may seize and detain such articles.”

# DETENTION AND SEIZURE AUTHORITY

- What is an “export contrary to law”?
  - Prohibited merchandise (drug paraphernalia, unapproved drugs)
  - Goods requiring an export license from BIS, DDTTC, OFAC, etc
  - Goods intended for an embargoed destination, or Denied Person/SDN
  - Exports with missing or incorrect AES data?
  - Issue is being litigated in a handful of auto export seizure cases (U.S. v. 34 Luxury Cars, MD Fla)
    - New vehicles declared as “used” under Part 192
    - New vehicles allegedly purchased through mail/wire fraud

# DETENTION AND SEIZURE AUTHORITY

- AES Enforcement Statute, 13 USC 305
  - Authorizes forfeiture upon criminal conviction
  - Authorizes civil penalties for non filing, late filing and false filing
  - Does not authorize civil seizure or forfeiture
  - FTR 15 CFR 30.71 (implements 305)
  - Do 1595a(d) or 22 USC 401 authorize seizure and forfeiture for AES violations?

# EXAMINATION and DETENTION PROCESS

- Legal Authority for Outbound Examination
  - Goods are NOT in customs custody, and thus not subject to examination under 19 USC 1499
  - No statutory authority for outbound examinations.
  - Former EAA 50 USC 2411 – 20 day deadline for CBP to detain goods; must release if not subject to export license requirements
  - EAR 15 CFR 758.7(b)(6) – authorizes CBP to “detain any shipment for review of AES record or physical inspection when necessary to assure compliance with EAR.” – no express time limit for detention

# EXAMINATION and DETENTION PROCESS

- Is there a legal obligation to honor an export “hold”?
- Is there a legal obligation to honor an export “detention notice”, if not issued pursuant to law?
  - Imports – felony to remove goods from customs custody
  - Exports – ?? (not in customs custody)
  - Carrier’s bond 19 CFR 113.64(k) – CBP can demand redelivery and assess liquidated damages if carrier exports detained or seized goods without CBP authorization
- CBP has broad authority to search outbound cargo at the border without a warrant.
- Under 4<sup>th</sup> Amendment case law a “search” becomes a seizure if unreasonable in duration.
- Practical considerations

# EXAMINATION and DETENTION PROCESS

- Requirements for CBP to seize outbound cargo
  - Must be “probable cause” to believe that the export violates some law. (4<sup>th</sup> Amendment)
  - Is a warrant required?
    - 19 USC 1595 and 1603
    - 4<sup>th</sup> Amendment and border search authority
    - Exports are not in legal customs custody; when are they “at the border”?



# Goods Are Seized: How do I get them back?

- Petition for Relief:
  - Value under \$100,000 decided at port
  - Value over \$100,000 decided at HQ
- Request for Early Release—expedites decision but often requires payment of penalty and storage charges
- Guidelines for 1595a(d) – 10%-30% of value first offense
- Guidelines for 22 USC 401 –
  - Substantive violation: \$2500 first offense
  - Technical violation: \$500 first offense
- Can you later appeal the remission penalty?
  - You can file a supplemental petition, but . . .
  - What if HQ grants no further relief? 19 CFR 171.23

# Goods Are Seized: How do I get them back?

- If CBP won't remit, are there options other than begging?
- Request judicial proceedings
  - Govt has burden to prove probable cause for forfeiture
  - If you “substantially prevail,” government must pay your legal fees and costs
  - If no probable cause for initial seizure, owner might recover damages under tort claims act
  - Might prompt settlement with CBP counsel's office
- Rule 41 Motions filed directly in federal district court
  - Court can order CBP to return seized property – no penalty or storage charges
  - Remedy for unreasonably long detention
  - Can be settled with US Attorney's office

# Statutory Authority for CBP Export Penalties

- Old fashioned way: Grab the goods and extort a remission penalty
  - 19 USC 1595a(d): allows seizure and forfeiture of the “proceeds or value” of goods exported contrary to law
- 13 USC 305 and 15 CFR 30.71(b) (Foreign Trade Regulations)
  - \$10,000 per violation of FTR
  - Enforcement delegated to CBP

CBP has no other statutory authority to assess penalties for export violations

# TIPS FOR AVOIDING EXPORT SEIZURES AND PENALTIES

- Don't screw up, and never admit screwing up
- Obtain advanced BIS commodity classifications for potentially questionable products
- Obtain commodity jurisdictions from DDTC
- If HTS or Schedule B seems inconsistent for product, get a CBP classification ruling, or ruling from foreign customs authority
- File EEI on time and accurately
- Ensure accurate BIS and DDTC license info
- Audit past shipments for errors, and take steps to avoid before CBP catches them



# THE END

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