DHL Settles BIS and OFAC Allegations for $9.44 Million

The U.S. Commerce and Treasury Departments announced last week that DPWN Holdings (USA), Inc. (formerly known as DHL Holdings (USA) Inc.) and DHL Express (USA) Inc. (collectively, “DHL”), recently settled allegations by the Bureau of Industry and Security (“BIS”) and the Office of Foreign Assets Control (“OFAC”) that DHL committed numerous violations of the Export Administration Regulations (“EAR”) and OFAC regulations prohibiting U.S. persons from trading with Iran, Sudan and Syria, and an even greater number of EAR and OFAC recordkeeping violations.

In the joint settlement with BIS and OFAC, DHL has agreed to pay a civil penalty of $9,444,744 and to hire an unaffiliated third-party consultant to conduct external audits covering all of DHL’s exports or reexports to Iran, Syria and Sudan from March 2007 through December 2011; further, DHL will provide complete copies of the audit reports to the Commerce Department’s Office of Export Enforcement. According to BIS, “This case represents the largest joint settlement involving BIS and OFAC, and is the result of closer collaboration between the two agencies.” The Treasury Department also credited U.S. Customs and Border Protection for intercepting many of the shipments, reporting them to OFAC, and assisting in the five and a half year investigation that led to the settlement with DHL.

1. BIS Allegations

In a proposed charging letter, BIS alleged that, on eight occasions from June 2004 to September 2004, DHL caused, aided or abetted the export of items subject to the EAR to Syria when it transported such items to Syria without the required licenses. BIS also alleged that DHL failed to maintain air waybills and other required documents in connection with 90 export transactions from the United States to Syria from May 2004 to November 2004. In this respect, the DHL settlement is a warning to freight forwarders and other agents who might take comfort in not being the “exporter” for EAR purposes. Although the exporter is normally the person responsible for determining export authorization requirements and obtaining any required licenses, all parties to an export transaction, including agents, are required to comply with the EAR. Moreover, the EAR recordkeeping requirements apply, without limitation, to any person subject to U.S. jurisdiction who, as a principal or agent, participates in an export transaction subject to the EAR.
2. OFAC Allegations

In an October 2008 prepenalty notice, OFAC alleged that DHL apparently exported or attempted to export four unlicensed shipments from the United States to Sudan and 63 unlicensed shipments from the United States to Iran in violation of the Sudanese Sanctions Regulations (“SSR”) and the Iranian Transactions Regulations (“ITR”), respectively, from December 2002 through March 2007. These allegedly unlicensed exports and attempted exports were made on behalf of several different shippers and pertained to a wide variety of specifically identified merchandise, including such items as art supplies, clothing, medicine, cosmetics products, software, electronics, laptops and computer equipment. OFAC also alleged that DHL imported one unlicensed shipment of merchandise from Iran to the United States. Further, OFAC alleged that DHL failed to maintain records of what it shipped to Iran in thousands of exports from August 2002 through April 2006. According to a Treasury Department press release on the DHL settlement, “Descriptions of the contents of the packages . . . were missing from thousands of air waybills.” The August 2009 settlement agreement indicates that DHL’s response to the OFAC prepenalty notice provided “new information” on the extent of DHL’s alleged violations of the OFAC regulations.

3. Penalty Amount Considerations

In the DHL settlement, the government did not apply the dramatically increased penalties provided for by Congress in October 2007 with regard to violations of the EAR, the SSR, the ITR and other regulations issued under the International Emergency Economic Powers Act (“IEEPA”). The October 2007 statute allows BIS and OFAC to assess civil penalties for violations of such IEEPA-based regulations in an amount up to the greater of $250,000 per violation or twice the amount of the transaction that is the basis of the violation, and states that such enhanced maximum penalties shall be available in enforcement actions “pending or commenced” on or after October 16, 2007. In its October 2008 prepenalty notice to DHL, OFAC stated that it was applying the “pre-October 16, 2007” maximum civil penalties in this matter, and arrived at a preliminary penalty estimate of $826,000 for the 68 allegedly illegal shipments or attempted shipments and a preliminary penalty estimate of $322,272,000 for the 32,228 recordkeeping violations alleged in that notice.

In its October 2008 prepenalty notice, OFAC cited the following aggravating and mitigating factors with regard to the 68 allegedly illegal shipments or attempted shipments:

a. Aggravating Factors:
   - DHL had reason to know that the conduct giving rise to the violations took place because it actually entered information concerning shipments to Iran and Sudan into its database;
   - DHL may have conferred a significant economic benefit to sanctioned countries that potentially created extraordinarily adverse harm to sanctions program objectives;
   - DHL did not have an effective OFAC compliance program in place at the time of the alleged violations; and
   - DHL’s alleged violations comprise a large pattern of misconduct over an extended period of time.

b. Mitigating Factors:
   - DHL has cooperated with OFAC by providing relevant information regarding the apparent violations to the extent that such information existed;
   - DHL has improved its OFAC compliance program since receiving OFAC’s Cease and Desist Order dated April 17, 2006; and
   - DHL agreed to a statute of limitation waiver.

In the prepenalty notice, OFAC found the above aggravating and mitigating factors to “balance out,” so that no mitigation was warranted with respect to the shipment allegations.

At the same time, OFAC decreased its recordkeeping penalty computation by over $300 million based on an “additional and unique mitigating factor”—namely, OFAC’s awareness that “many of the underlying shipments for which adequate records were not kept may have been exports of informational materials, which were not prohibited by the ITR.” OFAC added that it
had “reason to believe that such shipments of informational materials may have made up as much as 90 percent or more of the shipments for which DHL failed to keep adequate records.” (Note: The “informational materials” exemption of the ITR and other OFAC sanctions programs is not unlimited; it generally does not, for example, apply to commodities, software or technology controlled for export for national security or foreign policy reasons.) Additional mitigation of the civil penalty amount was accorded to DHL in the joint settlement with BIS and OFAC announced last week, though the settlement requires DHL not only to pay the $9.44 million civil penalty, but also, presumably, to bear the cost of an external audit covering most of 2007 and all of calendar years 2008 to 2011.

4. Conclusion

OFAC noted last week that “DHL did not voluntarily disclose this matter to OFAC or BIS.” The EAR provide that a voluntary self-disclosure satisfying applicable regulatory criteria will be treated as a “great weight” mitigating factor, and the OFAC regulations also provide substantial mitigation for voluntary self-disclosures. The DHL settlement shows that, as significant as a voluntary self-disclosure can be, it is but one mitigating factor, and that other mitigating factors can also be of great significance, even in the absence of a voluntary self-disclosure. Furthermore, this settlement underscores the point that compliance with the EAR and OFAC regulations must be the concern of all parties to an export transaction, including not only the principal parties in interest, but also forwarders and other agents.