needs documentation to legally advance loan funds and conduct other business activities with the new or surviving entity. The specific documents required vary according to state law and the particular circumstances of the merger. Most of the information required by RUS consists of copies of documents that the borrower must file with state and local authorities.

The second concerns transitional assistance. Short-term financial stress can follow mergers and consolidations that will in the long term benefit rural America and enhance government loan security. Title 7 CFR part 1717, subpart D, offers transitional assistance to mitigate these stresses. This information collection includes documentation from borrowers requesting such assistance.

Third are the unusual situations where RUS approval of a merger is required. This collection includes the list of documents that RUS needs to approve a merger. Except for a formal transmittal letter and board resolution from each of the companies involved, RUS believes that the information required is prepared by any prudent business attempting to enter into a merger.

RUS may not require borrower to either merge or to study the possibility of merger. The provisions of the rule may be utilized only at the borrower’s request. This collection of information encompasses the procedures for borrowers who wish to enter into mergers or who request transitional assistance.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 10 hour per response.

Respondents: Small cooperatives or similar organizations.

Estimated Number of Respondents: 25.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 249 hours.

Copies of this information collection can be obtained from Dawn Wolfgang, Program Development and Regulatory Analysis, at (202) 720-0812.

Comments are invited on (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency’s estimate of burden including the validity of the methodology and assumption used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques on other forms of information technology. Comments may be sent to F. Lamont Heppe, Jr., Director, Program Development and Regulatory Analysis, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Ave., SW, Stop 1522, Room 4034 South Building, Washington, DC 20250-1522.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: July 30, 1999.

Blaine D. Stockton, Jr.
Acting Administrator, Rural Utilities Service.

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce (DOC) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Office of the Secretary.
Title: Survey of Business Leaders Accompanying the Secretary on Trade Missions.

Agency Form Number: None.
OMB Approval Number: 0690-0017.
Type of Request: Reinstatement of a collection previously approved.
Burden: 5 hours.
Number of Respondents: 100 (approximately 20 per trade mission).
Average Hours Per Response: 3 minutes.

Needs and Uses: Trade missions are one of the most visible means for the Secretary to provide support to the business community in expanding exports. When he leads a mission, a quick survey of business leaders who accompany him on the trip is made. Its purpose is to assess their opinions on the market area they are visiting. The information is used to stimulate discussions during the trip.

Affected Public: Businesses or other for profit organizations.

Frequency: On occasion.
Respondent’s Obligation: Voluntary.
OMB Desk Officer: David Rostker (202) 395-3897.

Copies of the above information collection program can be obtained by calling or writing Linda Engelmeier, Departmental Forms Clearance Officer, (202) 482-3272, Department of Commerce, Room 5033, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at LEngelme@doc.gov).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, 725 17th Street, NW, Washington, DC 20503.

Dated: July 30, 1999.

Linda Engelmeier,
Departmental Forms Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 99-20173 Filed 8-4-99; 8:45 am]
BILLING CODE 3105-FF-P

DEPARTMENT OF COMMERCE

Bureau of Export Administration
[Docket No.: 97-BXA-20]

Re: Aluminum Company of America

On Friday, February 26, 1999, the Federal Register published the Decision and Order issued by the Under Secretary for Export Administration, Bureau of Export Administration, United States Department of Commerce (BXA) on February 19, 1999 (64 FR 9471). However, the Recommended Decision and Order of the Administration Law Judge (ALJ) was inadvertently not included with the Order of the Under Secretary. This notice is to hereby publish the December 21, 1998, Recommended and Decision Order of the ALJ.

Dated: July 21, 1999.

William A. Reinsch,
Under Secretary for Export Administration.

Recommended Decision and Order


Before: Hon. Parlen L. McKenna, United States Administrative Law Judge.

Preliminary Statement

This is a civil penalty proceeding initiated pursuant to the legal authority contained under the Export Administration Act of 1979, as amended (50. U.S.C.A. §§ 2401–2420 (1991 & Supp. 1997) (hereafter known as the “ACT”). It was conducted in accordance with the procedural requirements as found in 15 CFR Parts 768–799 (1991–1995). Those
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Regulations were reorganized and restructured in 1997. The current Regulations are found at 15 CFR Parts 730–744 (1997) which govern these proceedings.

On December 12, 1997, Aluminum Company of America (“ALCOA”) was issued a charging letter by the Office of Export Enforcement, Bureau of Export Administration, United States Department of Commerce (“BXA”) alleging that ALCOA committed 100 violations of the Export Administration Regulations (“EAR”) between 1991 and 1995. The alleged violations are as follows:

**CHARGES 1–50:** On 50 separate occasions between June 14, 1991, and December 7, 1995, ALCOA exported potassium fluoride and sodium fluoride from the United States to Jamaica and Surinam, without obtaining from BXA the validated export licenses required by Section 772.1(b) of the former Regulations by exporting U.S.-origin commodities to any person or to any destination in violation of or contrary to the provisions of the Act or any regulation, order, or license issued thereunder, ALCOA violated Section 787.6 of the former Regulations on 50 separate occasions, for a total of 50 violations.

**CHARGES 51–100:** In connection with the exports described in Charges 1–50 above, on 50 separate occasions between June 14, 1991, and December 7, 1995, ALCOA used Shippers’ Export Declarations, as defined in Section 770.2 of the former regulations, on which it represented, potassium fluoride and sodium fluoride, qualified for exports from the United States to Jamaica and Surinam under general license G-DEST. These chemicals required a validated license for export from the United States to both of those destinations. By making false or misleading statements of material fact, directly or indirectly, to a United States agency in connection with the export control documents to effect exports from the United States, ALCOA violated Section 787.5(a) of the former Regulations in connection with each of the 50 exports, for a total of 50 additional violations.

The maximum civil penalty assessment for each violation is $10,000 (See 15 CFR § 764.3(a) (1)). In addition to the penalty assessment, a denial of export privileges could be imposed (see Section 764.3(a) (2)) and the exclusion from practice (See Section 764.3(a) (3)). BXA proposed a civil penalty assessment of $7,500 for each of the 50 violations of Section 787.6 of the former Regulations and $7,500 for each of the 50 violations of Section 787.5(a) of the former Regulations, for a total civil penalty of $750,000.

On February 9, 1998, a telephonic pre-hearing conference was held which included both parties and the undersigned. As a result of that conference, it was agreed that no hearing would be required since the facts of the case were not in dispute. Accordingly, a schedule was established for the submission of joint stipulations of fact and the filing of initial and reply briefs. Joint stipulations were filed on March 27, 1998. ALCOA had previously filed its Answer to the Charging Letter on January 20, 1998. BXA Replied to ALCOA’s Answer on May 1, 1998. On May 7, 1998, the undersigned issued an order permitting ALCOA to submit BXA’s Reply which was filed on May 13, 1998. In that Reply, Counsel for ALCOA took exception to BXA’s assertion that the parties agreed during the February 9, 1998 prehearing conference that this matter could be resolved without a hearing because the facts were not in dispute. Subsequently, another telephonic conference was heard between the parties and the undersigned. At that time, after listening to the arguments of counsel for ALCOA, it became clear to me that Mr. Rubinoff was asking for Oral Argument and not an evidentiary hearing. Given the complex nature of this case and my desire to insure that ALCOA’s due process rights were fully protected, I granted Oral Argument. Oral Argument in this matter was held in Washington, DC on Monday, July 20, 1998. A transcript of the Oral Argument was released thereafter and the matter is now ripe for decision.

The findings of fact and conclusions of law which follow are prepared upon my analysis of the entire record, including the applicable regulations, statutes, and case law. Each submission of the parties, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration.

**Law and Regulation**

The United States, like many other industrialized nations, restricts the export of goods and services for reasons of national security. The United States Congress, under the President’s signature, statutorily defined the penalties for violating such restrictions in Title 50 of the United States Code—“War and National Defense”—as follows:

§ 2410 Violations

(a) In general

Except as provided in subsection (b) of this section, whoever knowingly violates or conspires to or attempts to violate any provision of this Act [section 2401 to 2420 of this Appendix] or any regulation, order, or license issued thereunder shall be fined not more than five times the value of the exports involved or $1,000,000 whichever is greater; and

(b) Willful violations

(1) Whoever willfully violates or conspires to or attempts contrary to any provision of this Act [sections 2401 to 2420 of this Appendix] for any regulation, order, or license issued thereunder, with knowledge that the exports involved will be used for the benefit of, or that the destination or intended destination of the goods or technology involved is, any controlled country or any country to which exports are controlled for foreign policy purposes—

(A) Except in the case of an individual, shall be fined not more than five times the value of the exports involved or $1,000,000 whichever is greater; and

(B) In the case of an individual, shall be fined not more than $250,000, or imprisoned not more than 10 years, or both.

(2) Any person who is issued a validated license under this Act [sections 2401 to 2420 of this Appendix] for the export of any good or technology to a controlled country and who, with knowledge that such a good or technology is being used by such controlled country for military or intelligence gathering purposes contrary to the conditions under which the license was issued, willfully fails to report such use to the Secretary of Defense—

(A) Except in the case of an individual, shall be fined not more than five times the value of the exports involved or $1,000,000 whichever is greater; and

(B) In the case of an individual, shall be fined not more that $250,000, or imprisoned not more than 5 years, or both.

(3) Any person who possesses any goods or technology—

(A) With the intent to export such goods or technology in violation of an export control imposed under section 5 or 6 of this Act [section 2404 or 2405 of this Appendix] or any regulation, order, or license issued with respect to such control, shall be subject to the penalties set forth in paragraph (1) of this subsection and if, in the case of a violation of an export control imposed under section 6 [section 2405 of this Appendix] (or any regulation, order, or license issued with respect to such control), subject to the penalties set forth in subsection (a).

(B) Knowing or reason to believe that the goods or technology would be so exported, shall, in the case of a violation of an export control imposed under section 5 [section 2404 of this Appendix] (or any regulation, order, or license issued with respect to such control), be subject to the penalties set forth in paragraph (1) of this subsection and, in the case of a violation of an export control imposed under section 6 [section 2405 of this Appendix] (or any regulation, order, or license issued with respect to such control), subject to the penalties set forth in subsection (a).

(4) Any person who takes any action with the intent to evade the provisions of this Act [sections 2401 to 2420 of this Appendix] or any regulation, order, or license issued under this Act [sections 2401 to 2420 of this Appendix] shall be subject to the penalties set forth in subsection (a), except that in the case of an evasion of an export control imposed under section 6 [section 2405 of this Appendix] (or...
any regulation, order, or license issued with respect to such control, such person shall be subject to the penalties set forth in paragraph (1) of this subsection.

(5) Nothing in this subsection or subsection (a) shall limit the power of the Secretary to provide standards for establishing levels of exception.

(c) Civil penalties; administrative sanctions

(1) The Secretary (and officers and employees of the Department of Commerce specifically designated by the Secretary) may impose a civil penalty not to exceed $10,000 for each violation of this Act [sections 2401 to 2420 of this Appendix] or any regulation, order or license issued under this Act [sections 2401 to 2420 of this Appendix], either in addition to or in lieu of any other liability or penalty which may be imposed, except that the civil penalty for each such violation involving national security controls imposed under section 5 of this Act, section 2404 of this Appendix or controls imposed on the export of defense articles and defense services under section 38 of the Arms Export Control Act [22 U.S.C.A. § 2778] may not exceed $100,000.

(2) (A) The authority under this Act [sections 2401 to 2420 of this Appendix] to suspend or revoke the authority of any United States person to export goods or technology may be used with respect to any violation of the regulations issued pursuant to section 8(a) of the Act [section 2407(a) of the Appendix].

(B) Any administrative sanction (including any civil penalty or any suspension or revocation of authority to export) imposed under this Act [sections 2401 to 2420 of this Appendix] for a violation of the regulations issued pursuant to section 8(a) of this Act [section 2407(a) of this Appendix] may be imposed only on notice and opportunity for an agency hearing on the record in accordance with sections 554 through 557 of title 5, United States Code (5 U.S.C.A. §§ 554 to 557).

(C) Any charging letter or other document initiating administrative proceedings for the imposition of sanctions for violations of the regulations issued pursuant to section 8(a) of the Act [section 2407(a) of the Appendix] shall be made available for public inspection and copying.

(3) An exception may not be made to any order issued under this Act [sections 2401 to 2420 of this Appendix] which revokes the authority of a United States person to export goods or technology unless the Committee on Foreign Affairs of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate are first consulted concerning the exception.

(4) The President may by regulation provide standards for establishing levels of civil penalty provided in this subsection based upon the seriousness of the violation, the culpability of the violator, and the violator's record of cooperation with the Government in disclosing the violation.

United States Department of Commerce Regulations

15 CFR 787 — Enforcement

§ 787.1 Sanctions

(a) Criminal (1) Violations of Export Administrative Act (i) General. Except as provided in paragraph (a)(1)(ii) of this section, whoever knowingly violates or conspires to or attempts to violate the Export Administration Act ("the Act") or any regulation, order, or license issued under the Act is punishable for each violation by a fine of not more than $50,000, imposition of a civil penalty of not more than $100,000, or imprisonment for not more than five years, or both.

(ii) Willful violations. (A) Whoever willfully violates or conspires to or attempts to violate any provision of this Act or any regulation, order, license issued thereunder, with knowledge that the exports involved will be used for the benefit of or that the destination or intended destination of the goods or technology involved is any controlled country which exports are controlled for foreign policy purposes, except in the case of an individual, shall be fined not more than five times the value of the export involved or $1,000,000 whichever is greater; and in the case of an individual shall be fined not more than $250,000, or imprisoned not more than 10 years, or both.

(b) Administrative — (1) Denial of export privileges. Whoever violates any law, regulation, order, or license relating to export controls or restrictive trade practices and boycotts is also subject to administrative action which may result in suspension, revocation, or denial of export privileges conferred under the Export Administration Act (See § 788.3 et seq).

(2) Exclusion from public office. Whoever violates any law, regulation, order, or license relating to export controls or restrictive trade practices and boycotts is also subject to administrative action which may result in suspension from practice before the Bureau of Export Administration (See § 790.2(a).

(3) Civil penalty. A civil penalty may be imposed for each violation of the Export Administration Act or any regulation, order or license issued under the Act either in addition to, or instead of, any other liability or penalty which may be imposed. The civil penalty may not exceed $10,000 for each violation except that the civil penalty for each violation involving national security controls imposed under section 5 of the Act may not exceed $100,000.

(4) Seizure. Commodities or technical data which have been, are being, or are intended to be, exported or shipped from or taken out of the United States in violation of the Export Administration Act or any regulation, order or license issued under the Act, or of law.

1 Violations of the Act or regulations, or any order or license issued under the Act, may result in the imposition of administrative sanctions, and also or alternatively of a fine or imprisonment as described in paragraph (a) of this section, seizure or forfeiture of property under section 11(g) of this Act or 22 U.S.C. 401, or any other liability or penalty imposed by law. The U.S. Department of Commerce may compromise and settle any administrative action which may result in suspension, revocation, or denial of export privileges conferred under the Export Administration Act or any regulation, order or license issued under the Act.

2 The U.S. Department of Commerce may refuse the penalty at any time within two years of payment if it is found that there was a material error of fact or of law.
Administration Act or of any regulation, order, or license issued the Act are subject to being seized and detained, as are the vessels, vehicles, and aircraft carrying such commodities or technical data are subject to forfeiture (50 U.S.C. app. 2411(g)) (22 U.S.C. 401, see §786.8(b)(6)).

15 CFR 772.1(b)—Exports Requiring Validated Licenses

No commodity or technical data subject to the Export Administration Regulations may be exported to any destination without a validated license issued by the Office of Export Licensing, except where the export is authorized by a general license or other authorization by the Office of Export Licensing.

15 CFR 787.5—Misrepresentation and Concealment of Facts; Evasion

(A)(1) Misrepresentation and Concealment. No person may make any false or misleading representation, statement, or certification, or falsify or conceal any material fact, whether directly to the Bureau of Export Administration, any Customs Office, or any official of any other United States agency, or indirectly to any of the foregoing through any other person or foreign government agency or official ** **

15 CFR 787.6—Export, Diversion, Reexport, Transshipment

Except as specifically authorized by the Office of Export Licensing, in consultation with the Office of Export Enforcement, no person may export, dispose of, divert, direct, mail or otherwise ship, transship, or reexport commodities or technical data to any person or destination or for any use in violation of or contrary to the terms, provisions, or conditions of any export control document, any prior representation, any form of notification a prohibition against such action, or any provision of the Export Administration Act or any regulation, order, or license issued under the Act.

15 CFR 774.1—Reexport of U.S.-Made Equipment

Unless the reexport of a commodity previously exported from the United States has been specifically authorized in writing by the Office of Export, Licensing prior to its reexport * * *, no person in a foreign country (including Canada) or in the United States may:

(a) Reexport such commodity ** * from the authorized country(ies) of ultimate destination ** *.

Joint Stipulations of Fact

Aluminum Company of America (ALCOA) and the Office of Export Enforcement, Bureau of Export Administration, United States Department of Commerce (BXA) stipulated to the following facts:

1. ALCOA is a corporation organized under the laws of Pennsylvania with its principal offices located at 425 Sixth Avenue, ALCOA Building, Pittsburgh, Pennsylvania 15219.

2. ALCOA is one of the world’s leading producers of alumina, which is both an intermediate product in the production of aluminum and an important chemical product in itself.

3. ALCOA is one of the world’s largest producers of alumina, which is both an intermediate product in the production of aluminum and an important chemical product in itself.

4. During the period June 14, 1991 through December 7, 1995 ("the review period"), ALCOA, through its subsidiary ALCOA Minerals of Jamaica ("AMJ"), and the Government of Jamaica, through its subsidiary Clarendon Alumina Productions ("CAP"), owned an alumina refinery in Clarendon Parish, Jamaica. CAP and AMJ each owned a 50% interest in the alumina refinery.

5. Jamalco is a joint operation, located in Kingston, Jamaica, governed by a Joint Venture Agreement between AMJ and CAP dated March 1, 1988. The joint venture is governed by an eight member Executive Committee, four members each from CAP and AMJ. Article 5 of the Joint Venture Agreement provides that the Executive Committee will appoint a manager who will have full right to responsibilities to manage and control the day to day conduct of the operations of the joint venture. Article 5 further requires that AMJ be appointed as the Manager. AMJ has acted as Manager at all times since 1988.

6. Prior to December 30, 1994, ALCOA operated mining, refining, and smelting operations in Suriname (Suralco). As of December 30, 1994, all of ALCOA's bauxite, alumina and alumina-based chemicals businesses, including Suralco, were restructured and combined into ALCOA Alumina and Chemicals, L.L.C. Subsequently, Suralco has been owned 98% by ALCOA Alumina and Chemicals, L.L.C., and 2% by ALCOA Caribbean Alumina Holdings, L.L.C., each of which is owned 60% by ALCOA and 40% by WMC Limited, an Australian corporation.

7. Since 1984, the alumina refinery in Paranam, Suriname has been co-owned by Suralco and an affiliate of Billiton N.V., a Dutch corporation, and has been operated pursuant to a Refining Joint Venture Operating Agreement dated March 14, 1984, as amended. In accordance with Article 5.02 of the Refining Joint Venture Operating Agreement, Suralco was in 1984 appointed, and has since then acted as Manager of the Paranam refinery.

8. During the review period, the refineries in Jamaica and Suriname used potassium fluoride as the key reagent for refining alumina from bauxite. The raw ore for aluminum.

9. During the review period, the water treatment facility in Suriname used sodium fluoride to treat drinking water. Suralco's water treatment facility was located in the powerhouse which supplied electricity to and was located at Suralco's bauxite mine in Moengo, Suriname. In March 1994, Suralco sold its Moengo powerhouse and water treatment facility to Government of Suriname. In conjunction with the sale of the powerhouse and water treatment facility, Suralco agreed to continue operating the water treatment facility for one year. Consequently, Suralco personnel were on-site at the water treatment facility at all times when ALCOA's Export Supply Division shipped sodium fluoride to Suralec. Also as part of the powerhouse sale agreement, Suralco agreed to provide the chemicals used in the water treatment facility for a period of two years following the sale.

10. During the review period, logistical support for Jamalco and Suralec was provided by ALCOA's Export Supply Division ("ESD"), located in New Orleans, Louisiana.

11. During the review period, Jamalco and Suralec purchased certain items from a scheduled buying list, while other times were purchased only as required in specific instances.

12. During the review period, ESD received requisitions from Jamalco and Suralec, located suppliers, purchased products, and shipped the requested items to Jamalco and Suralec.

13. During the review period, ESD prepared all export and shipping documentation for shipments to Jamalco and Suralec.

14. ESD was responsible for determining the applicable export licensing requirements for items ordered by Jamalco and Suralec during the review period.

15. For each shipment of specially-ordered items to Jamalco and Suralec during the review period, the export compliance procedures in place provided that ESD was to review the Export Administration Regulations to determine the applicable export licensing requirement.

16. On several occasions during the review period, ESD obtained validated licenses from BXA to export specially-ordered items, such as computers, to Jamalco and Suralec.

17. By contrast, once ESD made an initial determination of the export licensing requirements for items on the scheduled buying list, ESD did not thereafter review the Export Administration Regulations for each subsequent shipment of "scheduled buying list" goods to Jamalco and Suralec.

18. Both potassium fluoride and sodium fluoride were on ESD's scheduled buying list for Jamalco and Suralec. ESD shipped the requested items to Jamalco and Suralec.

19. Both potassium fluoride and sodium fluoride were routinely purchased against periodic requisitions regularly submitted by Jamalco and Suralec both before and during the review period.

20. Under the export compliance procedures in place during the review period, ESD did not perform a complete export compliance check for each shipment of potassium fluoride and sodium fluoride to Jamalco and Suralec.

21. Prior to March 13, 1991, exporters were not required to obtain from BXA a validated license to export potassium fluoride and sodium fluoride from the United States to Jamalco and Suralec.


amended the Commerce Control List of the Export Administration Regulations (currently codified at 15 C.F.R. Parts 730–774 (1997)).2 “by expanding the number of countries for which a validated license is required for 39 precursor chemicals. Under the rule, the 39 chemicals required a validated license for export to all destinations except NATO member countries, Australia, Austria, Ireland, Japan, New Zealand, and Switzerland.” Potassium fluoride and sodium fluoride were included on the list of 39 chemicals subject to the regulatory change.

2 At the time BXA promulgated this rule, the Export Administration Regulations were found at 15 CFR Parts 768–799 (1997). Since that time, the Regulations have been reorganized and restructured.

24. As potassium fluoride and sodium fluoride were routinely ordered by Jamlaco and Suralco, ESD failed to attach any significance to the March 1991 amendment, missed the regulatory change, and continued to export these commodities to the refineries during review period without first obtaining from BXA the validated export license required under the Regulations.

25. During the review period, ESD made 47 shipments of potassium fluoride to Jamaica and Suriname without validated license. The total value of these shipments was $104,637.00.

26. During the review period, ESD made three shipments of sodium fluoride to Suralco without validated licenses. The total value of these shipments was $6,603.00.

27. During the review period, ESD used Shippers Export Declarations (“SEDs”), an export control document as defined in the Export Administration Regulations, to effect the export of potassium fluoride and sodium fluoride from the United States to Jamaica and Suriname.

28. With eight exceptions, ALCOA identified the chemicals shipped to Jamlaco and Suralco on the SEDs by their specific nomenclature.

29. As a result of missing the March 1991 regulatory amendment, ALCOA, during the review period, indicated on each SED used for the export of the chemicals from the United States to Jamaica and Suriname that the goods qualified for export from the United States to Jamaica and Suriname under General License G-DST, when in fact the chemicals required a validated license for export from the United States to both destinations.

30. ESD had no intent to make any false or misleading statements on the SEDs accompanying the shipments of potassium fluoride and sodium fluoride to Jamlaco and Suralco during the review period.

31. The exports of potassium fluoride and sodium fluoride during the review period were made to countries that are not suspected of engaging in illicit weapons development.

32. All of the potassium fluoride and sodium fluoride shipped by ESD to Jamlaco and Suralco during the review period was completely consumed on the premises of the refinery and water treatment facilities in Jamaica and Suriname.

33. Once BXA informed ALCOA that ESD had shipped potassium fluoride and sodium fluoride to Jamaica and Suriname during the review period without the required validated export license, ALCOA cooperated fully with BXA in its investigation.

34. After BXA brought to ALCOA’s attention the regulatory change imposing a validated licensing requirement on exports of potassium fluoride and sodium fluoride to Jamaica and Suriname, ALCOA applied for, and BXA granted, a license for shipments of potassium fluoride to Jamaica and Suriname made after the review period.

35. During the review period, there was a presumption of approval, on a case-by-case basis, for license to export potassium fluoride and sodium fluoride from the United States to Jamaica and Suriname.

36. Prior to the initiation of the investigation by BXA, ALCOA retained outside counsel and experts to assist in improving and strengthening ALCOA’s export compliance procedures.

37. As a result of these efforts, ALCOA developed and implemented a new export compliance program that includes an export compliance manual (with specific procedures and policies and training for all exports by ALCOA), training seminars, instructional videos, and other measures.

38. 15 CFR 787.4(a) provides: (a) No person may order, buy, receive, convey, store, use, sell, loan, dispose of, transfer, transport, finance, forward, or otherwise service, in whole or in part, any commodity or technical data exported or to be exported from the United States or which is otherwise subject to the Export Administration Regulations, with knowledge or reason to know that a violation of the Export Administration Act or any regulation, order, or license has occurred, is about to occur, or is intended to occur with respect to any transaction.

39. 15 CFR § 787.4(b) provides: (b) No person may possess any commodities or technical data, controlled for national security or foreign policy reasons under section 5 or 6 of the Act:

(1) With the intent to export such commodities or technical data in violation of the Export Administration Act or any regulation, order, license, or other authorization under the Act, or;

(2) Knowing or having reason to believe that the commodities or technical data would be so exported.

The parties stipulated at the Oral Argument that this regulation does not have a strict liability trigger since it contains a knowledge element (TR–33).

40. 15 CFR 787.5(b) provides:

(b) Evasion. No person may engage in any transaction or take any other action, either independently or through any other person, with intent to evade the provision of the Act, or any regulation, order, license or other authorization issued under the Act.

The parties stipulated at the Oral Argument that this regulation does not have a strict liability trigger since it contains a knowledge or intent element (TR–33).

3. Potassium fluoride is the key reagent used during the refining of alumina from its bauxite ore. Bauxite is crushed and mixed with a caustic soda solution. This solution dissolves the alumina in the bauxite. Potassium fluoride is used to determine the level of dissolved alumina in the caustic solution. Only a small amount of potassium fluoride is used per metric ton of bauxite processed (see Respondent’s Answer dated January 20, 1998, page 2).

4. Sodium fluoride was used by the ALCOA facility in Suriname to treat drinking water for people living in the Suriname refinery area. All of the sodium fluoride exported from the United States to Suriname was used by this ALCOA subsidiary facility and was fully consumed in the water treatment process. ALCOA sold the water treatment facility to the government of Suriname in July 1994. Therefore, Suralco no longer uses any sodium fluoride (see Respondent’s Answer dated January 20, 1998, page 3).

5. All of the potassium fluoride and sodium fluoride exported during the period June 14, 1991 through December 7, 1995 (see Respondent’s Answer dated January 20, 1998, page 2).

6. Prior to March 13, 1991, validated licenses were not required under the EAR for exports of potassium fluoride and sodium fluoride either to Jamaica or Suriname. Therefore, prior to that date, ESD had lawfully exported these products to the refineries under the EAR general license authority. However, on March 13, 1991, the Department of Commerce amended the Commerce Control List of the EAR by expanding the number of countries for which a validated license was required for exports of the ninety-nine (99) commodities.

7. Logistical support for the ALCOA refineries in Jamaica and Suriname was provided by ALCOA’s Export Supply

Findings of Fact1

1. The Respondent and BXA entered into forty (40) Joint Stipulations of Fact which are set forth above. Each and every one of those Joint Stipulations of Fact are hereby accepted by the undersigned and adopted as a Finding of Fact in this proceeding.

2. Aluminum Company of America (ALCOA), the Respondent, was at all times herein a Corporation authorized to and doing business in the United States. As such, the Respondent clearly falls within the definition of “person” set forth in 15 CFR 770.2.

3. The Joint Stipulations of Fact are hereby accepted and made a part of these joint stipulations of fact.

4. During the review period, ESD made 47 shipments of potassium fluoride to Jamaica and Suriname without validated license. The total value of these shipments was $104,637.00.

5. During the review period, ESD made three shipments of sodium fluoride to Suralco without validated licenses. The total value of these shipments was $6,603.00.

6. Prior to March 13, 1991, validated licenses were not required under the EAR for exports of potassium fluoride and sodium fluoride either to Jamaica or Suriname. Therefore, prior to that date, ESD had lawfully exported these products to the refineries under the EAR general license authority. However, on March 13, 1991, the Department of Commerce amended the Commerce Control List of the EAR by expanding the number of countries for which a validated license was required for exports of the ninety-nine (99) commodities.

7. Logistical support for the ALCOA refineries in Jamaica and Suriname was provided by ALCOA’s Export Supply

8. The parties stipulated at the Oral Argument that this regulation does not have a strict liability trigger since it contains a knowledge or intent element (TR–33).
Division ("ESD"), located in New Orleans, LA. Through ESD, the refinery managers regularly purchased certain items from a scheduled buying list, while other items were purchased only as required in specific instances. In this capacity, ESD purchased everything from office surplus and replacement parts to equipment and operating supplies. ESD received requisitions from the refinery, located U.S. suppliers for the requested products, purchased the products, and shipped them to the refinery. ESD prepared all export and shipping documentation for shipments to the refiners (See Respondent’s Answer dated January 20, 1998, page 3).

7. ESD’s sole function was to support the Jamalco and Surinac refineries. It annually handled approximately 25,000 transactions involving 100,000 different items, with a total value of over $125 million. Before, during and after the time periods in question, ESD was aware of the EAR, and sought and obtained validated export licenses for a variety of products, including computer systems and related equipment (See Respondent’s Answer dated January 20, 1998, page 3).

8. Both potassium fluoride and sodium fluoride were ESD’s scheduled buying list for the refineries both before and during the time periods in question and were, in fact, purchased against requisitions submitted by Jamalco and Surinco. Indeed, during the time period in question, ESD made forty-seven (47) shipments of potassium fluoride to the Jamalco and Surinac refineries, and three (3) shipments of sodium fluoride to the Surinac refinery (See Respondent’s Answer dated January 20, 1998, page 3).

9. On 50 separate occasions between June 14, 1991, and December 7, 1995, ALCOA exported potassium fluoride and sodium fluoride from the United States to Jamaica and Suriname, without obtaining from BXA the validated export licenses required by Section 772.1(b) of the former regulations. By exporting U.S.-origin commodities to any person or to any destination as set forth in Section 772.1(b) of the former regulations, ALCOA violated Section 787.6 of the former regulations on 50 separate occasions, for a total of 50 separate violations (See Respondent’s plea of “Admit” to charges 1-50 in its January 1998 Answer, page 5).

10. On 50 separate occasions between June 14, 1991, and December 7, 1995, ALCOA exported potassium fluoride and sodium fluoride from the United States to Jamaica and Suriname, without obtaining from BXA the validated export licenses required by Section 772.1(b) of the former regulations. By exporting U.S.-origin commodities to any person or to any destination as set forth in Section 772.1(b) of the former regulations, ALCOA violated Section 787.6 of the former regulations on 50 separate occasions, for a total of 50 separate violations (See Respondent’s plea of “Admit” to charges 1-50 in its January 1998 Answer, page 5).

Contrary to the arguments of the Respondent, the answer to this issue is clearly set forth in Iran Air v. Kugelman, 996 F.2d 1253 (D.C. Cir. 1993). In that case, then-Judge Ruth Bader Ginsburg found that the “essential question is whether the agency, in its reading of the current regulations, reasonably construed the statute, 50 U.S.C.A. App. § 2410, to allow the imposition of civil penalty * * * based upon the seriousness of the violation, the culpability of the violator, and the violator’s record of cooperation with the Government in disclosing the violation.” Id. At 1254(C)(4). The provisions appear to leave room for civil penalty regulations that include a knowledge requirement * * * or that allow for the imposition of strict liability. Id. At 1258.

Therefore, there can be no question that the United States Congress authorized the Secretary of Commerce to promulgate regulations on a strict liability basis pursuant to § 2410 of the Export Administration Act. In order to determine if the Secretary intended to impose a civil sanction for an unwitting violation of the Act (i.e., strict liability), we must look at the regulation that ALCOA was charged with violating:

15 CFR 787.5 Misrepresentation and Concealment of Facts; Evasion (a)(1) Misrepresentation and Concealment. No person may make any false or misleading representation, statement, or certification, or falsify or conceal any material fact, whether directly to the Bureau of Export Administration, any Customs Office, or an official of any other United States agency, or indirectly to any of the foregoing through any other person or foreign government agency or official.

The drafting of agency regulations has evolved into an art form since the passage of the Administrative Procedure Act (5 U.S.C. §§ 551 et seq.) in 1946. As the Court noted in the Iran Air case, Id. at 1256, the answer to whether a regulation has a strict liability trigger is determined by whether the Secretary, in drafting the regulation, included a “state of mind” requirement. A clear and unbiased reading of this regulation reveals no such requirement and therefore liability attaches on a strict liability basis.

The Respondent acknowledges that this regulation does not contain a “state of mind” element such as “knowledge to cause” (§ 787.2), with “knowledge or reason to

In the Iran Air case, Id., the court specifically found that 15 CFR §774.1 of the regulations had a strict liability trigger.
know” (§ 787.4(a), “with intent” or “knowing or having reason to believe” (§ 787.4(b)), and “with intent to evade” (§ 787.5(b)). See Joint Stipulations of Fact Nos. 38, 39 and 40). However, the Respondent argues that since neither the statute nor the regulations define “false or misleading statements”, the judge must use the “accumulated settled meaning” of these terms as defined in Black’s Law Dictionary and the legal precedent applicable thereto. The Respondent argues that Black’s Law Dictionary defines a “false statement” as one that is made with knowledge that it is false. The word “misleading” is defined as delusive—calculated to lead astray or lead into error. The Respondent cites Feld v. Mans, 116 S. Ct. 437, 445–46 (1995) for the proposition that it is established practice to find meaning in the generally shared common-law when common-law terms are used without further specification. The government disagrees with what it calls the Respondent’s “attenuated lexical-golden rule argument.” The government argues that as to the federal statute issue, had the Congress intended to include a “knowledge” element in the civil penalty provision it would have expressly done so (see, e.g., False Claims Act, 31 U.S.C. § 3729(a). The government is 50 U.S.C. App. § 2410(c)(1)) does not include a “knowledge” element and it is clear in the Iran Air case, Id at 1258, that Congress explicitly left the issue of strict liability vs. knowledge/intent with the Secretary of Commerce. Indeed, the Secretary promulgated a regulatory scheme that included both types of regulations. Thus, where the Secretary intended that a regulation include a “knowledge” or “intent” element, the regulation contained explicit language (see, e.g., §§ 787.4(a), 787.4(b), 787.5(b), § 387.2 (1980) and joint stipulations of fact Nos. 38, 39, and 40). Conversely, where the Secretary intended no such “knowledge” or “intent” element, the regulations did not include such a trigger (see, e.g., §§ 774.1(a), 787.2, 787.5(a)).

In more recent times, the California Supreme Court found mens rea unnecessary and upheld the conviction of a meat market proprietor for “short-weighting” in the sale of meat by his employee. The court noted that “where qualifying words such as knowingly, intent, or knowledge are omitted from provisions creating the offense, it is held that guilty knowledge and intent are not elements of the offense”. The court went on to quote from an Ohio case which stated the basic principle: There are many acts that are so destructive of the social order, or where the ability of the state to establish the element of criminal intent would be so extremely difficult if not impossible of proof, that in the interest of justice the legislature has provided that the doing of the act constitutes a crime, regardless of knowledge or criminal intent on the part of the defendant. (In re Marley (1946) 29 Cal.2d 525, 529, 175 P. 2d 832).

In the Chevron case, supra at 539, the court discusses the well recognized public welfare offenses excepted from the mens rea requirement in criminal prosecution. While not a criminal case, nor the traditional public welfare offense (e.g., water pollution, use of unlicensed poison, sale of improperly branded motor oil, and liability of pharmacist for compounding prescriptions by unlicensed persons), the regulatory violation herein involves materials that could be used for weapons of mass destruction and the injury or death of untold numbers of people. Accordingly, since these regulations deal with the most stringent public welfare national defense issues, the public interest demands that they be strictly construed in the absence of express “knowledge” or “intent” language.

The Respondent asserts that the case of Caesar Electronics, Inc., 55 Fed. Reg. 53016 (Dept Commerce 1990) supports its position that 15 CFR § 787.5(a) requires that liability is imposed only when there exists a relatively high level of knowledge and intent to make false statements. I disagree. The factual circumstances involved therein proceeded on two tracks—a criminal indictment and conviction for violating 15 CFR § 787.5(a)(3) of the Regulations by one of the Respondent’s Vice-Presidents and a subsequent administrative proceeding against the Corporation for violation of 15 CFR § 787.5(a)(1) (1984). The Order from the United States District Court in criminal case served as the underlying factual basis for the joint stipulations of the parties in the administrative case discussed above. The factual circumstances and the Supreme Court of California in United States v. United Optical Research, Inc., 29 Cal.2d 512, 519, 96 L.Ed. 586 (1952). In the Rossel case, the ethics committee of the American Bar Association requested a denial of export privileges (§ 523(a)(2)(A) of the Bankruptcy Code as support for its position that knowledge and intent to deceive is a prerequisite to any violation of § 787.5(a). I disagree. The Iran Air case, supra, clearly spells out that Congress authorized the Secretary to promulgate strict liability and knowledge/ intent based regulations. The Secretary differentiated between the two types of regulations by using “‘state of mind’” language for violations which were not intended to be criminal. This lessened such triggering language where strict liability was intended. Under this circumstance, any caselaw dealing with § 523(a)(2)(A) requiring knowledge and intent to deceive as a predicate to liability where the regulation is silent as to the issue of “state of mind” is simply inapplicable. Moreover, the legislative history, purpose, and construction of the Bankruptcy Code concerns a fresh start for the debtor while the Export Administration Act concerns regulations exports for reasons of national security and foreign policy.

Importantly, an agency has the power to authoritatively interpret its own regulations as a component of it’s delegated rulemaking powers (See Martin v. OSHRC, 499 U.S. 141, 111 S.C. 1177, 11 L.Ed. 2d 117 (1991). This delegation of interpretive authority is ordinarily subject to full judicial review. However, because of the national security and foreign policy issues involved in regulations exports that could become component parts of weapons of nuclear defense, the United States Congress made these Secretarial determinations final and only subject to limited judicial review (See, 50 U.S.C. App. § 2412(c)(1) and (3)).

II What Is The Appropriate Level of Sanctions in This Case?

The Respondent has been found to have 50 separate violations of 15 CFR § 787.6 of the former Regulations and 50 separate violations of 15 CFR § 787.5(a) of the former regulations for a total of 100 violations. Congress has provided for an array of penalties for violations of the Export Administration Act and the regulations promulgated thereunder. These penalties include a criminal fine and/or imprisonment for knowing violators, more severe criminal fines and/or longer prison terms for willful violators and civil penalties against any violator. Since the government apparently did not have proof of willful or intentional acts by the Respondent, criminal charges were not filed (TR-47). Thus, the government commenced this civil penalty action against the Respondent.

The maximum civil penalty assessment for each violation is $10,000 (See 15 CFR § 764.3(a)(1)). In addition to the penalty assessment, the government could have requested a denial of export privileges (§ 764.3(a)(2)) and/or the exclusion from

Cl. 512, 519, 96 L.Ed. 586 (1952). The William A. Roessler, d/b/a Enigma Industries, 62 Fed. Reg 4031 (Dept Commerce 1997) and 56 FR 14916 (Dept Commerce 1991) are similarly not dispositive of the issue since both cases also involved the aggravating factor of “knowledge” or “intentional conduct.”
practice (§ 764.3(a)(3)). However, after investigating this case, the government determined that it would only seek $7,500 per violation and would not seek the denial of its export privileges or its exclusion from practice. Pursuant to 15 CFR 766.17(b)(2) requires that the presiding judge, after a de novo review of the entire record, recommend the appropriate administrative sanction or such other action as he or she deems appropriate. The government argues that any violations that occurred were not intentional or willful, that said violations were entirely consumed at the refineries of Jamaica and Suriname; 1 that prior to the initiation of the export licensing of items on that list or a determination was made concerning the manufacturing of chemical weapons). The government went on to argue that an “exporter cannot reasonably fail to attach significance” to a regulatory change, bemoan the fact that the Respondent’s civil penalty be levied. ALCOA further argues that if the judge decides on the latter approach, that said penalty be suspended on probation.

In support of its position, the Respondent argues that any violations that occurred were not intentional or willful, that said violations resulted from its failure to comprehend the fact that the March 1991 Federal Register Notice added thirty-nine (39) chemicals to the list of chemicals that were identified as precursors for chemical weapons; that there was no risk that the chemicals would be diverted to chemical weapons use; that the Respondent applied to BXA for the necessary validated licenses, they surely would have been granted; that the exports were entirely consumed at the refineries of the Respondent’s subsidiary companies in Jamaica and Suriname; 1 that prior to the initiation of the government’s investigation of this matter, the Respondent began developing and implementing an expanded and more comprehensive export compliance program, and that the Respondent has fully cooperated with the government in its investigation of this matter.

In the government’s reply to the Respondent’s Answer, it argues that the retardation of counsel and experts to assist in improving its export compliance procedures prior to the initiation of the investigation is an aggravating rather than a mitigating factor; that the violations alleged herein are derived from errors that go to the very core of ALCOA’s export compliance procedures; that ALCOA’s methodology did not involve a periodic review of the Regulations for shipment of “scheduled buying list” items; that said violations were entirely consumed at the refineries of Jamaica and Suriname; that the failure of the Respondent to obtain validated licenses from the United States to Jamaica and Suriname; that the failure of the Respondent to obtain validated licenses should be viewed as technical violations; that the government’s logic is distorted since the government has no prima facie case to prove that the Respondent has no prior violations; that the chemicals were shipped to countries that are not suspected of illegal weapons development; that there was a presumption of approval, on a case by case basis, for licenses to export these chemicals from the United States to Jamaica and Suriname; that the earliest days of the republic. While International trade has been regulated from the very core of ALCOA’s export compliance program at all; that while the Act and Regulations may not mention the particular aspects or areas of regulations have varied, the fact of the matter is that those engaged in an industry in which government regulation is likely must be presumed to be aware of, and practitioners in the industry are charged with knowledge of as well as the economic benefits and the presumption with respect to chemical and biological weapons indicating that amendments were properly published in The Federal Register, the Respondent was charged with notice of the contents of the changes (See 44 U.S.C.A. § 1507 (1991)).

In ALCOA’s response to the government’s arguments, it states that there are numerous undisputed mitigating circumstances in this case and no aggravating factors; that under the circumstances, it is inappropriate to waive or suspend sanctions; that included within the mitigating factors the Respondent has no prior violations; that the chemicals were shipped to countries that are not suspected of illegal weapons development; that there was a presumption of approval, on a case by case basis, for licenses to export these chemicals from the United States to Jamaica and Suriname; that the earliest days of the republic. While International trade has been regulated from the very core of ALCOA’s export compliance program at all; that while the Act and Regulations may not mention the particular aspects or areas of regulations have varied, the fact of the matter is that those engaged in an industry in which government regulation is likely must be presumed to be aware of, and practitioners in the industry are charged with knowledge of as well as the economic benefits and the presumption with respect to chemical and biological weapons indicating that amendments were properly published in The Federal Register, the Respondent was charged with notice of the contents of the changes (See 44 U.S.C.A. § 1507 (1991)).

In this regard, the government noted in its May 1, 1998 Reply at page 10:

International trade has been regulated from the earliest days of the republic. While particular aspects or areas of regulations have varied, the fact of the matter is that those engaged in an industry in which government regulation is likely must be presumed to be aware of, and practitioners in the industry are charged with knowledge of as well as the responsibility to comply with the duly promulgated regulations (Citizens United States v. International Minerals and Chemical Corporation, 402 U.S. 558 at 563 & 565, 29 L.Ed. 178(1971)).

1 Importantly, BXA does not have a standard table of orders which lists offenses with a recommended penalty range (e.g., misconduct: 1–3 month suspension) which provides guidance to the judge such as in United States Coast Guard license suspension and revocation cases (46 CFR § 5.569) or a penalty schedule for United States Department of Commerce, National Oceanic and Atmospheric Administration cases where the proposed penalty is based on a published penalty schedule promulgated by the Department of Commerce, National Oceanic and Atmospheric Administration of NOAA noticed in ¶799.1, Supp. 1 (See 15 CFR § 799.1, Supp. 1 (1995)).

1 The Respondent notes that neither of those designations were included in Court Group D: 3, which identifies those designations of particular concern with respect to chemical weapons proliferation (i.e., Iran, Syria, Libya, North Korea, and Cuba) See CFR §799.1, Supp. 1 (See 15 CFR § 799.1, Supp. 1 (1995)).

Of all the aggravating factors in this case, one is particularly damming—that the Respondent, over a period of four and one-half (4 1/2) years, made 50 separate exports of potassium fluoride and/or sodium fluoride in violation of the Export Administration Regulations (emphasis added). Importantly, ALCOA is not a new or small company that doesn't understand the foreign export regulatory process. Quite to the contrary, the Respondent is a large multinational corporation which had a separate division (Export Supply Division) specifically dedicated to receiving requisitions, locating suppliers, purchasing products, and shipping the requested items in accordance with applicable export licensing requirements. Thus, ALCOA's conduct, under this backdrop, was flatly inexcusable and the fact that the violations were not intentional or willful is only relevant to reflect that a federal criminal indictment was not handed down. Respondent's failure to comprehend the change in the Federal Register Notice, given the existence of its Export Supply Division, is also particularly troubling. Moreover, the fact that the unlawful shipments consisted of precursors for chemical weapons regardless of the lack of any potential diversion in these instances, is something that should be viewed as a technical oversight and is clearly an aggravating factor.

In mitigation, ALCOA argues that had it applied for the necessary validated licenses, they would have been presumptively granted. This argument misses the point. Over the past 20 years, a terrorist threat has developed to our Republic and our interests abroad. In order to protect our country and our interests, laws and regulations were passed to allow the government to monitor and regulate the export of precursor chemicals and if necessary, prevent any such exports that pose a clear and present danger. Given the huge number of exports from the United States, how is the government supposed to monitor the export of precursor chemicals if it doesn't know that the shipments were being made over a four and one-half year period? ALCOA responds that it filed under general license G-DEST and implies that the government was aware of these 50 separate exports over a four and one-half year period (See Respondent's Answer dated January 20, 1998, page 8). I disagree. The Respondent did not submit any evidence to support this position. The Respondent cannot shift its responsibility onto the government to do that which it is legally required to do. Given the volume of such exports and the limited public resources to regulate these shipments, the government placed a legal duty on the exporter to file the specific applications with the office charged with such oversight responsibility. The Respondent breached that duty and in so doing, deprived the government of the opportunity to monitor its export of precursor chemicals.

The Respondent also argues that all of the precursor chemicals were entirely consumed at the refineries of the Respondent's subsidiary companies in Jamaica and Suriname. One misses the point. The crucial point here is that the government was deprived of possible vital information in its fight to control terrorism. In other words, if the world-wide export of chemicals/biological agents were a puzzle being put together by a U.S. Department of Commerce security team, this information constituted 50 pieces of that puzzle that the government did not have. While it turned out that there was no problem, the fact remains that the government did not have the whole picture. Without the information; that it's legal department now possesses, in this case, all of the information about precursor chemical exports, catastrophic errors in preventative decision-making could have occurred.

The Respondent argues that prior to the initiation of the investigation into this matter, it began developing and implementing an expanded and more comprehensive export compliance program. The Respondent notes that it developed export control matrices for each of its business units including the Export Supply Division, who is responsible for disseminating export compliance information; that its legal department now monitors the Federal Register daily for changes to the EAR effecting the Respondent's business operations, and disseminates this information to the export liaisons; that the Respondent is also developing a Denial List search application on its new company-wide intranet; and that all key Export Supply Division employees have attended export compliance training seminars.

While the Respondent's January 20, 1998 Answer details the above-recited improvements to its export compliance program, there is no record evidence submitted by the Respondent in Tab 2 of its January 20, 1998 Answer specifying when these improvements were implemented. The EAR amendment occurred on March 13, 1991. The violations occurred between June 14, 1991 and December 7, 1995. During this period of time, the Respondent's export compliance procedures did not involve a periodic review of the requirements for shipments of "scheduled buying list goods" or a through monitoring of pertinent regulations listed in the Federal Register (See Stipulation of Fact No. 17). Thus, the record is void of any meaningful evidence as to what policies and procedures were in effect between March 13, 1991 and December 7, 1995.

Moreover, subsequent to December 7, 1995, the record does not indicate when the above-recited improvements were implemented and in what form those improvements were made. Indeed, the first memorandum from the Legal Department to the Export Supply Division is dated May 9, 1996. Interestingly, the only time this issue is discussed during this time period is set forth in the Joint Stipulations. However, as one can see from reading joint Stipulation of Fact Nos. 17, 20, 27, and 29, these factual recitations only recite what the Respondent did not do as opposed to what program it had in effect and what changes were made.

The Respondent states that anything more than a nominal fine in this case is unreasonable. In support of this position, ALCOA argues that recent BXA enforcement orders based on settlement agreements establish a range from $2,000 per violation to $5,000 per violation, large portions of which were suspended. The Respondent cites the following settlements in support of its argument that the government's proposed $7,500 per violation is excessive and inconsistent with past practice:

1. Gateway 2000 case—This case involved the unlawful export of U.S.—origin computer equipment without a license in violation of § 787.4(a), § 787.5(a) and § 787.6 for a total of 87 violations. The agreed upon fine was $402,000 or $4,620 per violation.

2. Allergen, Inc. case—The Respondent was charged with 412 violations of § 787.6 for violating export controls on biological agents. The fine was $824,000 or $2,000 per violation.

3. Sierin Rutil America, Inc. case—The Respondent was charged with eight unlicensed exports of sodium fluoride to Sierra Leone over a two year period in violation of § 787.6. The settlement resulted in a $30,000 fine or $3,750 per violation with half of the fine remitted on probation. This case did not involve exports to controlled or affiliated entities.

4. Herb Kimiakart and Kinson Chemical Inc. case—The Respondent was charged with two counts of exporting sodium cyanide without a validated license in violation of § 787.6 and § 787.4(a) of the regulations. The fine was $20,000 or $10,000 per violation.

5. Syntex case—The Respondent was charged with 13 violations of unlawfully exporting hydrogen fluoride in violation of § 787.2. The fine was $65,000 or $5,000 per violation. One half of the fine was remitted for 2 years and then waived if there were no further violations.

6. Palmeros Forwarding case—The Respondent was charged with 10 violations wherein it used export control documents which represented that the Syntex hydrogen fluoride did not need export licenses. The fine was $50,000 or $5,000 per violation with a two year denial of export privileges. The fine was export privilege denial were suspended on probation.

7. Villasana case—This case also arose out of the Syntex case. The Respondent was charged with one count and fined $2900 and the denial of export privileges. The fine and export privilege denial were suspended on probation.

8. Chemicals Export Company of Boston case—The Respondent was charged with four counts of exporting sodium cyanide without
a valid export permit in violation of § 787.6. The fine was $16,000 or $4,000 per violation.
9. Southern Information Systems case—The Respondent was charged with five counts for the unlawful export of digital microwave systems in violation of § 787.6. The fine was $2,500 or $5,000 per violation.
10. Advanced Technology case—The Respondent was charged with two counts of re-exporting electronic equipment from Belgium to Russia without a permit in violation of § 787.6. The fine was $10,000 or $5,000 per violation.
11. LEP Profit International, Inc.—The Respondent was charged with seven counts of preparing shipping documents that contained false information in violation of § 0787.5(a). The fine was $60,000 or $5,000 per violation. A portion of the penalty, $15,000, was suspended for two years, then waived so long as LEP complies with the export control regulations.
12. NF&M International Inc.—The Respondent was charged with thirty-three violations for re-exporting titanium alloy products without the necessary export licenses in violation of § 787.6. The fine was $82,500 or $42,500 per violation. The Department agreed to suspend payment of $42,500 for one year and then to waive that payment provided NF&M complies with export control regulations.
13. DATRAC AG—The Respondent was charged with one count for re-exporting U.S.-origin data communications equipment from Switzerland to Singapore without obtaining the required export license in violation of § 787.6. The fine was $2,500.
14. Lasertechnics Inc.—The Respondent in this case was charged with thirty-six violations for exporting U.S.-origin thyatrons from the United States to Hong Kong, Ireland, Malaya, and Singapore without obtaining the individual validated export licenses in violation of § 787.6. The fine was $180,000 or $5,000 per violation. Pursuant to § 766.18(c), the remaining balance of $80,000 was suspended for three years and shall thereafter be waived, provided the Respondent committed no violation of the Act, or any regulation, order, or license issued thereunder.
15. President Titanium—The Respondent was charged with twenty-five violations for exporting U.S.-origin titanium bars to various countries without obtaining the required validated licenses in violation of § 787.6. The fine was $125,000 or $5,000 per violation. Pursuant to § 766.18(c), the remaining balance of $50,000 was suspended for one year provided that, during the period of suspension, the Respondent commit no violation of the Act, or any regulation, order, or license issued thereunder.
16. Allvac—The Respondent was charged with forty-eight counts for exporting titanium alloy solid cylindrical forms with diameters greater than three inches from the United States to various countries and exported titanium steel to Germany without the required validated license in violation of § 787.6. The fine was $122,500 or $2,552 per violation. Pursuant to § 766.18(c), payment of the remaining balance of $47,500 was suspended for one year provided that, during the period of suspension, the Respondent commit no violation of the Act, or any regulation, order, or license issued thereunder.
17. EC Company—The Respondent was charged with four violations of making false or misleading statements on an export control document; exported U.S.-origin spare parts from the United States to Vietnam without validated license in violation of § 787.6; and two counts for exporting spare parts from the United States to Singapore that Respondent imported from Germany and exported from Singapore to Vietnam in violation of § 787.4(a). The fine was $8,000 or $2,000 per violation.
I find the Respondent’s argument regarding the previous settlement of cases by BXX with lower civil penalty assessments to be unpersuasive. Settlements are reached based upon the facts of each case. These facts include the relative strengths and weaknesses of each party’s case; the desires of one or both sides to extricate themselves from the litigation; the government’s view and a determination that such a settlement is a good business decision in the case of a Respondent that satisfies the public interest in the case of the government. Moreover, the reasons behind each party’s decision to enter into a settlement are rarely, if ever, made public where foreign policy and/or national security issues are involved. As the government points out, this phenomenon is especially true in export cases (TR. 42).
During the Oral Argument in this matter, Counsel for the government stated: All parties in this courtroom know that citing a series of case names and corresponding settlement figures knowing nothing of the details of what actually transpired during the settlement negotiations, much less any internal discussions of litigation strategy or what not, is really not particularly helpful.
BXX does not maintain a rubric. It does not keep records of cases that were settled, the maximum range should not exceed $2,000 to $5,000. I disagree. Congress established a statutory scheme which provides for a full panoply of penalties ranging from federal prison time and/or severe monetary fines to mere administrative action which could involve civil penalties, denial of export privileges, exclusion from public contracts or any combination thereof. When viewed in this context, it becomes readily apparent that the government has recommended an unreasonably low sanction (emphasis added).
Indeed, the government might well have opted to argue in a criminal forum for an ALCOA’s conduct was so grossly negligent as to constitute a willful disregard of federal law. In this case, the amount of care demanded by the standard of reasonable conduct on the part of the Respondent must be in proportion to the apparent risk. As the danger becomes greater, the Respondent is required to exercise caution commensurate with that increased risk. Since the Respondent was dealing with precursors for chemical weapons, the risk is extremely high. The Federal Register Notice constructively put it on notice that it must exercise a great amount of care because the risk is great. It failed to do so.
Importantly, the government voluntarily lowered the sanction bar all the way down to the level of an administrative civil penalty in this case. That having been done, the Respondent argues that the government is being harsh and should lower the bar further. In effect, the Respondent is attempting to have the government negotiate with itself. This is wrong. Based upon the detailed discussion set forth above, I find the appropriate sanction for each of these unlawful shipments is $10,000. The Respondent is a huge multi-national corporation. As such, a $10,000 penalty per violation is minuscule for ALCOA who describes itself as “one of the world’s leading producers of aluminum.” As at, no time during this proceeding, did ALCOA’s counsel raise financial hardship, no matter how egregious any civil penalty. At some point, ALCOA has to stand up and take responsibility for it’s gross and long-standing breach of legal duty. Conversely, the United States government must set its civil penalties at a high enough level to insure that large multi-national corporations don’t ignore the law and if they get caught, merely consider the fine as a cost of doing business.
Accordingly, it is ordered that Aluminum Company of America, having been found by preponderant evidence to have one hundred violations of the Export Administration Regulations, pay a civil penalty in the amount of $10,000 per violation for a total of $1,000,000.1

1 In addition to the arguments made herein as to the appropriate amount of the monetary penalty for each violation in this case, I hereby accept the arguments of the government as reasonable to the extent they are not inconsistent with the rational set forth in Section II, above. To the extent that the Respondent’s arguments as to sanction are inconsistent with the Recommended Decision and Order, they are specifically rejected.
It is Further Ordered that a copy of this Recommended Decision and Order shall be served on Aluminum Company of America and the Department of Commerce in accordance with § 778.16(b)(2) of the Regulations.

Done and Dated on this 21st day of December 1998, Alameda, California.

Hon. Parlen L. McKenna,
United States Administrative Law Judge.

To be considered in the thirty (30) day statutory review process which is mandated by 50 U.S.C.A. § 2412(c) of the Act, submissions must be received in the Office of the Under Secretary for Export Administration, Bureau of Export Administration, U.S. Department of Commerce, 14th & Constitution Ave., NW., Room H-3998, Washington, DC 20230, within twelve (12) days. Replies to the other party’s submission are to be made within the following eight (8) days (See 15 CFR 766.22(b) and 50 Fed. Reg. 53134 (1985)). Pursuant to 50 U.S.C.A. § 2412(c)(3) of the Act and 15 CFR 766.22(e) of the Final Order of the Under Secretary may be appealed to the U.S. Court of Appeals for the District of Columbia within fifteen (15) days of its issuance.

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BILLING CODE 3510-01-M

DEPARTMENT OF COMMERCE
Under Secretary for Export Administration
[Docket Number 98-BXA-10]

In the Matter of: TIC LTD. Suite C, Regent Centre, Explorers Way, Freeport, Bahamas, Respondent;
Decision and Order


Specifically, the charging letter alleged that, beginning in June 1994 and continuing through about July 1996, TIC conspired with Thane-Coat, Inc., Jerry Vernon Ford, Preston John Engebretson, and TIC Ltd. to bring about acts that constituted violations of the Act, or any regulation, order, or license issued thereunder. The purpose of the conspiracy was for TIC and the others to export U.S.-origin commodities to Libya, a country subject to a comprehensive economic sanctions program. To accomplish their purpose, the conspirators devised and employed a scheme to export U.S.-origin items from the United States through the United Kingdom to Libya, without applying for and obtaining the export authorization that the conspirators knew or had reason to know were required under U.S. law, including the Regulations. See 15 CFR 764.4, previously codified at 15 CFR 785.7 of the former Regulations, and 15 CFR 772.1 of the former Regulations. BXA alleged that, by conspiring or acting in concert with one or more persons in any manner or for any purpose to bring about or to do any act that constitutes a violation of the Act, or any regulation, order or license issued thereunder, TIC violated Section 787.3(b) (redesignated as Section 787A.3(b) on March 25, 1996) of the former Regulations.

BXA alleged that, in furtherance of the conspiracy described above, on 37 separate occasions between on or about February 12, 1995 and on or about April 25, 1996, TIC, as a co-conspirator, exported polyurethane (isocyanate/polyol) and polyether polyurethane (isocyanate/polyol) and otherwise validated export licenses that TIC knew or had reason to know were required under U.S. law, including the Regulations. See 15 CFR 764.4, previously codified at 15 CFR 785.7 of the former Regulations, and 15 CFR 772.1 of the former Regulations. BXA alleged that, by conspiring or acting in concert with one or more persons in any manner or for any purpose to bring about or to do any act that constitutes a violation of the Act, or any regulation, order or license issued thereunder, TIC violated Section 787.3(b) (redesignated as Section 787A.3(b) on March 25, 1996) of the former Regulations.

BXA alleged that, in furtherance of the conspiracy described above, on 37 separate occasions between on or about February 12, 1995 and on or about April 25, 1996, TIC, as a co-conspirator, exported polyurethane (isocyanate/polyol) and polyether polyurethane (isocyanate/polyol) and otherwise validated export licenses that TIC knew or had reason to know were required under Section 787A.6 of the former Regulations in connection with each shipment. Specifically, BXA alleged that TIC committed 32 violations of Section 787A(a) and five violations of Section 787A.4(a) of the former Regulations, for a total of 37 violations.

Finally, BXA also alleged that, in furtherance of the conspiracy described above and to effect the 37 exports described above, on 37 separate occasions between on or about February 12, 1995 and on or about April 25, 1996, TIC, as a co-conspirator, exported polyurethane (isocyanate/polyol) and polyether polyurethane (isocyanate/polyol) and otherwise validated export licenses that TIC knew or had reason to know were required under U.S. law, including the Regulations. See 15 CFR 764.4, previously codified at 15 CFR 785.7 of the former Regulations, and 15 CFR 772.1 of the former Regulations. BXA alleged that, by conspiring or acting in concert with one or more persons in any manner or for any purpose to bring about or to do any act that constitutes a violation of the Act, or any regulation, order or license issued thereunder, TIC violated Section 787.3(b) (redesignated as Section 787A.3(b) on March 25, 1996) of the former Regulations.

BXA alleged that, in furtherance of the conspiracy described above, on 37 separate occasions between on or about February 12, 1995 and on or about April 25, 1996, TIC, as a co-conspirator, exported polyurethane (isocyanate/polyol) and polyether polyurethane (isocyanate/polyol) and otherwise validated export licenses that TIC knew or had reason to know were required under Section 787A.6 of the former Regulations in connection with each shipment. Specifically, BXA alleged that TIC committed 32 violations of Section 787A(a) and five violations of Section 787A.4(a) of the former Regulations, for a total of 37 violations.

Thus, BXA alleged that TIC committed one violation of Section