

Policy Issues Alert!

Export Update: Bureau Of Industry And Security Issues Guidance On Settlement Of Administrative Enforcement Cases

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In a notice published in the Federal Register on September 17, 2003, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") proposed to amend the Export Administration Regulations ("EAR") by incorporating a discussion of factors considered relevant by the agency in the commencement and disposition of enforcement actions. Although the guidance has been published as a "proposed rule," the document provides an instructive view of the agency's current decision-making process regardless of whether the concepts presented are finally adopted as part of the EAR.

Enforcement actions and management of voluntary disclosures are not new to BIS. The difficulty in the past (at least as perceived by BIS) has been that dispositions of these proceedings were inconsistent. To correct that perceived weakness, BIS instituted in 2002 the Administrative Case Review Board – an informal, ad hoc committee comprising senior executives from BIS – to review cases and apply some consistent guidelines to settlements and penalties. But this innovation drew criticism from industry because it appeared to be opaque and arbitrary. We believe that the Federal Register notice discussed here responds, at least in part, to these criticisms.

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BIS explains in the notice that its Office of Export Enforcement ("OEE") is charged with investigating possible violations of the Export Administration Act, the EAR, or any order, license or authorization issued thereunder. If it appears that a violation has occurred, OEE may commence one of three different types of enforcement actions:

- **Warning Letter** – A warning letter may be issued to first-time offenders for an apparent "technical" violation of law. OEE considers a warning letter appropriate where the investigation commenced as a result of a voluntary self-disclosure, where good faith efforts to comply with the law and cooperate with the investigation are present, and where no aggravating factors exist.

- **Administrative Enforcement Case** – Civil penalties, denials of export privileges and/or exclusions from practice before BIS (for attorneys, freight forwarders, and others acting in a representative capacity) may be pursued by OEE in a charging letter initiating an administrative enforcement proceeding. Charging letters are issued when OEE has reason to believe that a violation has

occurred.

- **Criminal Prosecution** – OEE may refer the results of its investigation to the U.S. Department of Justice for prosecution where the facts indicate a criminal violation has occurred.

The guidance document stresses the importance of negotiated settlements to BIS' overall enforcement activities, and thus much of the notice is devoted to a discussion of the factors which BIS will consider in settling the administrative cases it brings. General factors considered relevant by the agency include:

- **Degree of Willfulness** – BIS states that the agency will typically seek a civil penalty in cases involving simple negligence, while a denial of export privileges is more likely in cases involving gross negligence. Knowing violations, naturally, will result in greater sanctions and may be revealed by the presence of any "red flags" and the nature of any inquiry made by the party.

- **Destination Involved** – BIS is more likely to seek a greater monetary penalty and/or denial of export privileges in cases involving exports to countries subject to anti-terrorism controls or countries particularly implicated by the type of control applicable to the item in question (e.g., exports of items subject to nuclear controls to a country with a poor record of nuclear non-proliferation).

- **Related Violations** – Where a single error results in violations of multiple laws, BIS may, in its discretion, settle the case for a penalty that is less than would be appropriate for multiple unrelated violations under otherwise similar circumstances.

- **Multiple Unrelated Violations** – BIS is more likely to seek denial of export privileges or greater monetary penalties where an exporter has committed multiple unrelated violations of law (e.g., repeated unauthorized exports). Such circumstances may indicate insufficient attention to compliance and therefore warrant greater sanctions.

- **Timing of Settlement** – The early settlement of a case (for example, before a charging letter is issued) is viewed favorably by BIS, as it frees agency resources for other matters.

- **Related Criminal or Civil Violations** – According to BIS, a criminal conviction may indicate serious, willful misconduct creating a high risk of future violations in the absence of administrative sanctions. Conversely, BIS may view a guilty plea as a sign that the exporter accepts responsibility for its actions and thus future EAR compliance may be achieved without the imposition of administrative sanctions.

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In addition to these general factors, BIS lists numerous specific factors in the notice which the agency will consider in determining the sanctions to be imposed in a given case. Certain of these factors are considered by the agency to bear "great weight" in the ultimate disposition of its cases, and are designated in bold type in the list below:

Mitigating Factors

1. Voluntary self-disclosure
2. Presence of effective export compliance program

3. Violation was an isolated occurrence
4. Export authorization would likely have been granted upon request
5. No prior convictions for export-related violations and no administrative enforcement actions for export-related violations over the past 5 years
6. Exceptional cooperation with BIS' investigation of the party's conduct
7. Provision of substantial assistance to BIS in the investigation of another party
8. Violation was "technical" (i.e., involving harm which the applicable law

2. Conduct demonstrating serious disregard for export compliance responsibilities

3. Significant violation considering item/destination involved

4. Violation involved harm of the nature which the applicable law was intended to protect against (e.g., a statement of ultimate destination on an SED indicating shipment to a non-embargoed country when shipment, in fact, was destined for an embargoed country)

5. Quantity/value of the exported articles is significant

6. Concurrent violations of laws enforced by agencies other than BIS

7. Prior convictions for export-related violations and no administrative enforcement actions for export-related violations over the past 5 years

8. Party lacked a systematic export compliance effort

The implementation of a comprehensive export-control program is the most effective way to ensure the highest level of compliance with all relevant laws and regulations governing a company's export activities. Companies should evaluate their current compliance programs by identifying the internal policies and procedures (written or otherwise) which govern the conduct of their export transactions and testing the operation of these controls through a review of export documentation selected at random from company export files. With compliance procedures and voluntary disclosures now playing a central role in BIS administrative enforcement decisions, it is more important than ever for companies to devote time and resources to these issues.

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9. Exporter had little or no previous export experience and was unfamiliar with export practices and requirements

Aggravating Factors

1. Deliberate effort to conceal the violation

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(Signed) Albert W. Driver, Editor

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