

New Export Control Enforcement Guidance from BIS Emphasizes Voluntary Disclosures and Risk-Based Compliance Programs

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On June 22, the Department of Commerce's Bureau of Industry and Security (BIS) issued a final rule revamping guidance on how it responds to certain violations of the Export Administration Regulations (EAR). The changes may be broadly summarized as bringing BIS's enforcement policies more in line with how the Department of Treasury's Office of Foreign Assets Control (OFAC) enforces violations of its respective sanctions programs. In addition, BIS placed renewed emphasis on the benefits of voluntary self-disclosure of apparent violations, and instituted a 50% cap on maximum penalties when companies self-report.

Investigations into export violations may result in a no action letter; a warning letter; an administrative enforcement proceeding (which could warrant civil fines, license revocation, or other administrative sanctions under § 764.3 of the EAR); or a referral to DOJ for criminal prosecution. Maximum penalties can reach 20 years' imprisonment and \$1 million per violation on the criminal side. On the civil side, administrative penalties can reach the larger of \$250,000 or twice the value of the transaction, even if the violations were only reckless and not knowing.

The guidance's primary emphasis was on voluntary self-disclosure. BIS noted that, historically, less than 3% of voluntary self-disclosure submissions have resulted in a civil penalty. In addition, voluntary self-disclosure is weighted significantly within multiple mitigating factors. The maximum civil penalty for a non-egregious violation that is voluntarily disclosed is cut in half.

In addition to voluntary disclosure, BIS emphasized the importance of risk-based compliance programs that comply with BIS's Export Management System (EMS) Guidelines. Such a compliance program is a mitigating factor in the event a violation occurs. In addition, where a penalty has been assessed, BIS stated it could require, as part of a settlement agreement, that a respondent provides employee training, consents to external audits, or institutes other compliance-program-related measures. In some cases, BIS may even suspend a penalty if the respondent applies the value of the penalty to its compliance program.

Companies concerned about their export compliance should consult with legal professionals. Winston's professionals are experienced in investigating and assessing companies' export compliance programs, and can assist in training and development programs as well as investigation and voluntary self-reporting.

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