Commerce Department Proposes New Enforcement Guidance for Export Control Violations

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The U.S. Department of Commerce's Bureau of Industry and Security (BIS), the federal agency responsible for enforcing the Export Administration Regulations (EAR), has proposed new guidance on how it would handle export enforcement cases. The guidance describes a series of aggravating, general, mitigating and other relevant circumstances BIS will consider in determining how to respond to apparent export violations, and, in particular, how it will arrive at proposed penalty determinations. If adopted, the new guidelines would be modeled closely, but not entirely, on guidelines currently followed by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) in addressing apparent violations of economic sanctions laws.

The stated goal of BIS in proposing the new guidance is to bring more transparency and predictability to the export controls enforcement process and align administrative penalties issued by the BIS Office of Export Enforcement (OEE) with those issued by OFAC. If this is the stick against which the proposed guidance is to be measured, it falls short in several key respects, most notably by casting doubt on the traditional role of the voluntary self-disclosure in determining the appropriate enforcement action. Moreover, certain other important features of the existing guidance have been eliminated.

The most significant new concept introduced by the proposed guidance is the "base penalty amount," which would be the amount used as the starting point for any civil penalty determination. This amount would be calculated using a matrix approach identical to the OFAC Base Penalty Matrix, depending upon whether the case resulted from a voluntary self-disclosure and whether the case had been determined to be egregious. The base penalty amount may be reduced if various mitigating circumstances described in the guidance are present, but the guidance provides that "mitigation will generally not exceed 75 percent of the base penalty." However, the proposed BIS Base Penalty Matrix, like its OFAC counterpart, would not come into play unless it had been determined, in accordance with the factors described in the guidance, that a civil monetary penalty would be appropriate. As a result, the proposed guidance does not appear to signal a departure from current BIS practice of resolving the great bulk of its enforcement matters with either a warning letter or by taking no action, although the impact of a voluntary disclosure on the decision that a civil penalty is not warranted is not made clear, as discussed below.

In fact, the proposed guidance would formalize the option of issuing a no-action letter, which is an option identified by the OFAC guidelines that is not addressed in the current BIS guidance. In cases where there is insufficient evidence of a violation, a determination that a violation did not occur or a conclusion (after considering the enumerated factors) that an administrative response is not warranted, a no-action letter will be issued in cases initiated by a voluntary self-disclosure, and may be issued in other cases at the discretion of BIS. Under both the OFAC guidelines and the proposed BIS guidance, a no-action letter constitutes a final agency determination regarding the matter, unless additional relevant information emerges.

Under the existing BIS guidance, warning letters represent a determination that an apparent violation has occurred, and the guidance expressly states that BIS will not issue a warning letter if it concludes that a violation did not occur. The proposed guidance, on the other hand, allows BIS to issue a warning letter when a violation may have occurred but a civil penalty is not warranted and the underlying conduct could lead to a violation or arose from inadequate due diligence on the part of the exporter in ensuring compliance. In addition to citing the current examples of BIS's use of warning letters, the proposed guidance would expressly authorize BIS to utilize a warning letter to convey its concerns about the underlying conduct and the exporter's compliance policies, practices and procedures. The result would be that the BIS approach to warning letters would be more aligned

with the OFAC "cautionary letter" approach, although unlike OFAC warning letters, which represent a final enforcement response, the BIS guidance would continue to provide that while a warning letter constitutes an "enforcement response," it does not constitute a final agency determination as to whether a violation has occurred. In addition, as the proposed guidance does not adopt the "finding of violation" approach found in the OFAC guidelines, it appears that under the new guidance, BIS intends to utilize a warning letter approach both in the type of case for which OFAC would issue a cautionary letter and in cases in which a violation has been found but a civil penalty is not warranted.

Like the existing BIS guidance, the proposed guidance contemplates a range of enforcement actions, including pursuing an administrative enforcement case or referring the matter for criminal prosecution, and identifies a number of possible sanctions in administrative enforcement cases. In addition to the imposition of civil monetary penalties, denial of export privileges or exclusion from practice pursuant to Section 764.3 of the EAR cited as possible enforcement responses in the existing guidance, the proposed guidance lists license revision, suspension or revocation (mirroring the OFAC approach although these sanctions already are permitted under Sections 740.2(b) and 750.8 of the EAR), as well as imposition of training and audit requirements as part of a settlement agreement (a type of response not enumerated in OFAC's guidelines, but commonly utilized). The proposed guidance also contains an expanded discussion of the approach to suspension or deferral of payment of civil penalties.

The existing guidance lists three categories of factors usually considered by BIS in determining what administrative sanctions are appropriate -- general, mitigating and aggravating. Unlike the OFAC guidance, which simply lists eleven "general" factors broken into 32 subcategories, the proposed guidance adds a fourth category ("other relevant factors considered on a case-by-case basis") and redistributes the factors within each category. Thus, for example, the degree of willfulness, currently a "general" factor, becomes an "exclusively aggravating" factor, while the existence of a compliance program, currently a mitigating factor of great weight, becomes a general factor.

The proposed guidance would replace the existing twenty-three somewhat overlapping factors with thirteen factors spread across the four categories and broken into 32 subcategories (coincidentally, the same number found in the OFAC guidelines, although many of the subcategories are different). In addition, the proposed rule does away with the existing "great weight" designation currently applied to certain of the factors. Under the proposed rule, factors are considered either "exclusively" mitigating or "exclusively" aggravating, or general (i.e., they can be either mitigating or aggravating, depending upon the circumstances). The "other relevant factors" may also be considered at the discretion of BIS. The proposed guidance provides that in determining whether a case is egregious, substantial weight will be given to aggravating factors A ("willful or reckless violation of law"), B ("awareness of conduct at issue"), C ("harm to regulatory program objectives") and general factor D ("individual characteristics"), with particular emphasis on A, B and C. The OFAC guidelines, on the other hand, give substantial weight only to factors A, B and C, with particular emphasis on A and B. However, neither the proposed BIS guidance nor the OFAC guidelines suggest how the factors are to be weighed in determining whether a civil monetary penalty is warranted.

All of the existing factors would survive under the proposed guidance, with two exceptions. The timing of settlement is no longer a factor, although the proposed guidance makes it clear that only civil monetary penalties for cases settled before the issuance of a charging order are to be determined using the Base Penalty Matrix and mitigation methodology described above, and that penalties assessed in cases in which settlement is reached only after the initiation of litigation will usually be higher than those described in the guidelines. As a result, the factors would appear not to give credit for early settlement in the proposed charging letter or earlier phases of an enforcement matter, and, unlike the OFAC guidelines, would not take into account the timing of the violations in relation to relevant changes in the applicable regulations. In light of the ECR learning curve currently faced by exporters, this departure from the OFAC approach is somewhat surprising.

More notable, however, is the absence from the list of factors of the making of a voluntary disclosure (currently a mitigating factor of great weight). The background to the proposed guidance explains that "[v]oluntary self-disclosures (VSDs) would no longer be listed as mitigating factors in and of themselves, but credit accorded to VSDs would be built into the determination of the base penalty amount." This begs the question of what role voluntary self-disclosure is to play in the determination whether a civil penalty

is warranted in the first place, given that the same list of factors is to be used to determine both the appropriate sanction and the amount of any civil penalty. Is it to be relegated to the final catch-all factor, "other factors that BIS deems relevant on a case-by-case basis," to be considered at the agency's discretion? The OFAC guidelines, on the other hand, explicitly include as a factor for consideration whether the apparent violations were voluntarily disclosed. In this respect, therefore, the proposed guidance falls short of the stated intention of aligning the BIS approach with that of OFAC, and would put BIS out of step with other export agencies as well. Having said that, the "Background" section of the Federal Register notice issuing the proposed guidance does shed further light on the intended approach, stating that "OEE will issue warning letters in cases involving inadvertent violations and cases involving minor isolated compliance deficiencies, absent the presence of aggravating factors."

The proposed guidelines represent a departure from the OFAC approach in various other ways as well. Importantly, BIS has elected not to follow the OFAC lead in providing a separate process (and lower maximum penalties) for failure to comply with recordkeeping or reporting obligations. The "harm to regulatory objectives" factor is couched somewhat differently but this is understandable in view of the BIS mission, which differs from that of OFAC. Unlike the OFAC guidelines, the new BIS guidance would signal that "[f]ailure to voluntarily disclose an apparent violation to OEE does not constitute concealment." The guidance also would continue to signal that a high quantity and value of exports involved in the violation would attract higher penalties. In addition, BIS would continue to measure adequacy of an exporter's compliance program against the BIS Export Management System (EMS) Guidelines, and will consider both the role of the compliance program in uncovering violations and whether improvements to the compliance program were implemented along with any other remedial measures or corrective actions.

Another, and very significant, departure from the OFAC approach is the proposed description of what would constitute the currently undescribed mitigating circumstance of "exceptional cooperation." If adopted, the proposed guidance would specify that "exceptional cooperation" would involve full disclosure of "all relevant information" in a "timely, comprehensive and responsive manner ... including ... overseas records," the "research and disclosure" of any information regarding other violations of the export laws, the provision of substantial assistance regarding investigations into others who may have violated the export controls laws or signature of a statute of limitations tolling agreement. This differs from the OFAC approach to cooperation, which recognizes voluntary self-disclosure as an element of cooperation, and makes no reference to the manner of disclosure of relevant information or the requirement to disclose overseas records. Under the proposed approach, it appears that "exceptional cooperation" would be noted only if an extensive internal investigation is conducted. As noted in the "Background" section of the Federal Register notice, "[t]his level of cooperation goes beyond what would be considered minimally necessary to address a violation and take corrective measures. In cases not involving a VSD, the Respondent must have provided substantial additional information regarding the apparent violation and/or other apparent violations caused by the same course of conduct."

A few departures from the existing BIS guidance also are noteworthy. Left on the cutting-room floor in the process of developing the proposed guidance are those passages of the existing guidance which deal with the types of cases in which exclusion or denial orders should be considered and the factors to be weighed in deciding whether and what scope of such an order may be appropriate. In addition, both the existing guidance and the proposed guidance state that "when an acquiring firm takes reasonable steps to uncover, correct and voluntarily self-disclose" to BIS pre-acquisition violations by the acquired business, "BIS typically will not take such violations into account when considering the respondent's civil regulatory history in settling other violations by the acquiring firm." However, under the proposed guidance this policy would not apply to prior criminal convictions, as it does under the existing guidance. Furthermore, all regulatory history, including warning letters, for the previous five years will be reviewed under the proposed guidance, whereas under the existing policy only warning letters received during the preceding three years need be considered.

Although the proposed guidance would relegate a compliance program to the "general" rather than the "mitigating" factor category, the proposed guidance continues to emphasize the importance of an effective compliance program in other ways. Particularly if the fact of voluntary self-disclosure is not to be weighed in considering the appropriate enforcement response, and recordkeeping and reporting violations may be handled under the same process as "egregious" cases, the need for compliance programs to prevent violations from occurring in the first place and help spot them quickly when they do happen takes on a heightened sense of urgency.

Of course, not just any compliance program will do -- a generic program that does not meet the BIS EMS standards will not be accorded the same weight as one that does. In addition, the proposed approach to recognizing "exceptional cooperation" highlights the need to respond to any suspected violations of the export control laws in a timely, thorough and professional way. This is a good time for companies to review whether their compliance programs and their internal investigation practices measure up to these standards.

Exporters and interested parties whose interests may be affected by the new guidance should consider providing comments, which are due to BIS by February 26, 2016.

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