BIS Issues Final Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases

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In December 2015, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) proposed to revise the enforcement guidance followed by its Office of Export Enforcement (OEE) to more closely align with guidelines applied by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC). Our analysis of the proposed changes was the subject of a previous alert. On June 22, 2016, after receiving and reviewing comments from eleven submitters, BIS promulgated a final rule revising its enforcement guidelines. The final rule largely tracked the proposed rule with a few important exceptions:

- The final rule changes the base penalty amounts, both for egregious cases resulting from voluntary self-disclosures (VSDs), and for other egregious cases. In the proposed rule, the base penalty amount for an egregious case that results from a VSD was set at one-half the statutory maximum. The final rule makes the base penalty amount a range of *up to* one-half of the statutory maximum. Similarly, the base penalty amount for an egregious case that results from a source other than a VSD will be a range up to the statutory maximum, whereas the proposed rule would have set the base penalty at the applicable statutory maximum. These changes were in response to concerns from commentators that the proposed rule's rigid approach to base penalty amounts may have discouraged the filing of VSDs, unduly restricted OEE in settling cases and limited the government's ability to achieve "global" settlements of civil and criminal penalties.

- The final rule modifies proposed Mitigating Factor G (Exceptional Cooperation with OEE) to include the question: "Has the Respondent previously made substantial voluntary efforts to provide information (such as providing tips that led to enforcement actions against other parties) to federal law enforcement authorities in support of the enforcement of U.S. export control regulations?" This change was designed to provide an incentive to exporters to voluntarily provide tips and leads to law enforcement.

- The final rule amends proposed Mitigating Factor H (License Was Likely To Be Approved) by adding the question: "Would the export have qualified for a license exception?" This modification conveys OEE's agreement that the availability of a license exception, even if not properly utilized or asserted, should be treated as a mitigating factor in export violation cases, just as the availability of an export license would be.

- Also with a view to emphasizing the importance of VSDs, the final rule removes the proposed 75 percent limit on mitigation when the apparent violation is not egregious and investigation is based on a VSD, but retains that limit in other cases. In addition, reverences to VSDs were added to the discussion of Factor III.E (Compliance Program) and Factor III.F (Remedial Response).

- The final rule makes changes to two of the proposed factors to be weighed by OEE (Factor III.A.4, which addresses patterns of conduct, and Factor III.I, which addresses related violations) to ensure that OEE would not consider multiple violations arising out of the same act "in and of itself" to constitute an aggravating factor or egregiousness. OEE will be "mindful" of cases in which multiple recurring violations resulted from a single inadvertent error and generally will not consider "inadvertent, compounded clerical errors" as discrete violations when assessing egregiousness, but continues to reserve the authority to charge multiple violations and assess penalties accordingly.

- The final rule makes clear that although warning letters and no action letters constitute final OEE disposition of an investigation, neither constitutes final agency action with respect to a violation of the EAR. To help clarify this point, this final rule refers to "OEE's disposition" when describing OEE's action with respect to warning letters and no action letters, and states that these are not "final agency actions." VSD filers should be mindful that OEE and OFAC enforcement personnel commonly use this clause in an attempt to (a) avoid making their "final determination" subject to review under the Administrative Procedures Act, and (b) reserve the right to open a matter based upon new evidence. The preamble to the Federal Register notice issuing the final rule does not explain how or when a warning letter or no action letter will ever become a "final agency action." In the preamble, OEE declined to require that warning letter provide guidance as to whether OEE believes a violation occurred. Nonetheless, a recipient of a warning letter or no action letter that is unclear as to whether a violation occurred and who therefore does not know how to proceed in similar situations in the future should consider challenging the letter or seek an advisory from the Office of Export Administration of BIS.

- In response to another comment regarding the effect of warning letters, the final rule adjusts the proposed approach to adjusting civil penalty amounts for mitigating factors to provide that warning letters within the past five years will not be considered when considering eligibility for "first offense mitigation."

- The final rule amends the proposed definition of "transaction value" by adding AES filings as an additional source of evidence of transaction value. However, OEE will retain the right to consider market value and/or the economic benefit derived by the exporter from the transaction. In discussing this change, the Federal Register notice states that "where the technology at issue is not traded widely enough to provide a basis for determining a market value, is being transferred to a firm related to the exporter, or is being transferred as part of a larger transaction involving an agreement to produce or repair a part or product, OEE will have to apply 'the economic benefit derived' standard." OEE indicates it cannot predict the proper means to measure "transaction value" or the "economic benefit derived" and does not define the standard in the preamble or text of the rule. Instead, OEE will disclose value calculations in settlement discussions.

Adopted from Proposed Guidance

The final rule adopts much of the proposed guidance, including, but not limited to, the following:

- The factors to be considered in determining whether a civil penalty is warranted and the amount of the penalty have been revised and grouped by category (including mitigating and aggravating factors to be considered in determining whether a case is egregious).

- The new concept of a "base penalty amount" -- adopted from the OFAC enforcement guidelines -- will be the starting point for any civil penalty determination.

- The option of issuing a no-action letter is now formalized.

- The final rule 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.

- The final rule allows implementation of hybrid approaches to suspension or deferral of payment of civil penalties.

Remaining Concerns

Not all of the concerns regarding the proposed guidance submitted to BIS by commentators or noted in our previous alert were addressed by the final rule. As discussed in the previous alert, not all of the factors previously considered by OEE in determining administrative sanctions are included in the new guidance, and the new guidance no longer addresses the types of cases in which denial or exclusion orders may be warranted. The OFAC approach to recordkeeping and reporting obligations has not been adopted, and the level of cooperation that will be considered a mitigating factor remains high.

Effective Date

The new guidance becomes effective on July 22, 2016, but will not apply to anti-boycott violations, which will continue to be governed by Supplement No. 2 to Part 766 of the EAR. The new guidance also will not apply to cases in which settlement negotiations are ongoing as of July 22, 2016 and a charging letter has not been filed.

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