



The Bottom Line

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INCENTIVES TO DISCLOSE EXPORT VIOLATIONS

Summary

To protect the technology of the United States, the Department of Commerce and Department of Justice have announced a new two-part export compliance enforcement system.

Background

The United States imposes export controls to protect national security interests and promote foreign policy objectives. The U.S. also participates in various multilateral export control regimes to prevent the proliferation of weapons of mass destruction and prevent destabilizing accumulations of conventional weapons and related material.

The Office of Export Enforcement (OEE), among other responsibilities, investigates apparent violations of the EAR or any order, license, or authorization. When such a violation appears to have occurred, OEE investigations may lead to no action, a warning letter, or an administrative enforcement proceeding. A violation may also be referred to the Department of Justice for criminal prosecution. The type of enforcement action initiated by OEE will depend primarily on the nature of the violation.

Last June, to mitigate the efforts of the nation-states seeking to illicitly acquire sensitive U.S. technologies that could be used to enhance military capability, the Department of Commerce made four policy changes to prioritize violations that involve the most significant harm to national security. These included:

- The imposition of significantly higher penalties,
- Using non-monetary resolution for less severe offenses,
- The elimination of "No Admit, No Deny" settlements, and
- Dual-Track Processing of Voluntary Self-Disclosures.

Since the onset of the dual-track system, the Bureau of Industry and Standards (BIS) reports that most VSDs involving minor or technical infractions are now resolved with a warning or 'no action' letter within 60 days.

Current Status

About two-thirds of the Justice Department's corporate criminal settlements since last October have implicated U.S. national security, according to Marshall Miller, a senior Justice Department official. In addition, U.S. foreign policy has increasingly embraced sanctions



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and export controls, imposing sweeping restrictions on Russia in response to its Ukraine invasion and tightening exports of sensitive technology to China amid growing tensions with Beijing.

Deputy Attorney General Lisa Monaco describes her department's focus as "promoting cultures of corporate compliance while also ensuring consistency and predictability in the way the government treats corporate crime. (The) goal is to empower companies to do the right thing by investing in compliance, in culture, and in good corporate citizenship — while at the same time empowering our prosecutors to hold accountable those who don't follow the law."

An April memo from the DOC reinforces this effort, clearly incentivizing the filing of Voluntary Self-Disclosures (VSDs) by reducing the applicable civil penalty under the base penalty matrix. If the violation is considered non-egregious, the base penalty amount is one-half of the transaction value and capped at a maximum of \$125,000 per violation. However, when a company affirmatively chooses not to file a VSD, that decision will be applied as an aggravating factor under the existing guidelines. In addition to the benefit offered for companies that disclose their own violations, a company that reports violative conduct of a third party that results in an enforcement action, that disclosure could be considered a mitigating factor in a future enforcement action against the disclosing party, even for unrelated conduct.

Impact

From now on, the deliberate non-disclosure of "significant" possible violations of the EAR will be treated as an aggravating factor when BIS considers penalties. "Significant" violations "reflect potential national security harm" compared to more technical violations.

BIS effectively provides for future compliance credit to companies that report third parties for suspected export control violations that result in an enforcement action. This policy clarification is grounded in the "exceptional cooperation" mitigating factor in the [BIS enforcement guidelines](#). This is a significant incentive: a tip leading to an enforcement action against a third party will be considered a mitigating factor in any future action against the disclosing party—even for unrelated conduct.

Resources:

- [BIS Memo: Clarifying Our Policy Regarding Voluntary Self-Disclosures Concerning Others](#) (DOC)
- [BIS Memo: Further Strengthening Our Administrative Enforcement Program](#) (DOC)
- [Guidance on Charging and Penalty Determinations in Settlement of Admin Enforcement Cases](#) (CFR)
- [US Staffs Up for Sanctions Crackdown](#) (Reuters)
- [Commerce Dept. to Penalize Failure to Voluntarily Self-Disclose Export Violations](#) (Kramer Levin)
- [Deputy Attorney General Delivers Remarks at American Bar Association National Institute on White Collar Crime](#) (DOJ)