



THE ICAT LOGISTICS

Bottom Line Newsletter



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BIS Enforcement Running High

SUMMARY

In January, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) announced that 2023 was a record year for export enforcement. It said its investigations had resulted in the "highest number ever" of convictions, temporary denial orders, and post-conviction denial orders.

BACKGROUND

Compared to more headline-grabbing enforcement priorities like the Foreign Corrupt Practices Act ("FCPA"), export-control penalties levied by BIS have been relatively low, with limited exceptions for "egregious" misconduct. However, since the arrival of Matt Axelrod as the Assistant Secretary for Export Enforcement in late 2021, BIS has repeatedly expressed intent to pursue a far more muscular approach to EAR enforcement. On June 30, 2022, BIS announced it would increase the use of its administrative enforcement powers, highlighting that it would impose significantly higher penalties than it had historically, use non-monetary resolutions for less severe violations, eliminate "no admit, no deny" settlements so companies would have to admit the underlying factual conduct and begin processing VSDs faster when they involved minor infractions.

On April 19, 2023, BIS backed up its new enforcement philosophy when it imposed a \$300 million civil penalty against California-based Seagate Technology LLC and Singapore-based Seagate International Headquarters Pte. Ltd. (collectively, "Seagate"), based on multiple sales totaling millions of hard disk drives to a company listed on the BIS Entity List. In addition to the penalty, Seagate was subjected to a multiyear audit and reporting requirement and a suspended Denial Order. BIS stated that \$300 million was more than twice the company's estimated net profits from the exports and indicated that Seagate had ignored warnings from its suppliers about its customer being an Entity List designee.

In December 2023, House Foreign Affairs Committee Chairman Michael McCaul criticized BIS in a 61-page report that detailed a sweeping range of shortcomings. It argued that BIS has too readily approved the export of sensitive technologies to Chinese companies, prioritized U.S. companies' business interests, and moved reluctantly to penalize companies violating American regulations. The report calls for BIS to expand the types of technologies and companies it controls, adopt a clear, near-blanket denial policy for shipments of controlled technology to China, and renegotiate terms with the Asian country to allow better visibility into how licensed technology is used. McCaul also says that Congress should develop new standards for prosecuting export-control violators,





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mandate regular reports from BIS about its licensing decisions, and allow BIS to charge fees on certain licenses to generate money for enforcement.

CURRENT STATUS

At the New York Forum on Economic Sanctions, officials from numerous agencies, including the Department of Justice's National Security Division (NSD), the Treasury Department's Office of Foreign Asset Control (OFAC) and Financial Crimes Enforcement Network (FinCEN), and the Commerce Department's Bureau of Industry and Security (BIS) convened to discuss lessons learned and predictions for the year to come. Every regulator emphasized the importance of new cross-agency task forces to tackle emerging challenges.

Today, the Department of Justice and the Department of Commerce are launching the Disruptive Technology Strike Force. Under the leadership of the Justice Department's National Security Division and the Commerce Department's Bureau of Industry and Security (BIS), the strike force will bring together experts throughout government – including the FBI, Homeland Security Investigations (HSI) and 14 U.S. Attorneys' Offices in 12 metropolitan regions across the country – to target illicit actors, strengthen supply chains and protect critical technological assets from being acquired or used by nation-state adversaries. The strike force's work will focus on investigating and prosecuting criminal violations of export laws, enhancing administrative enforcement of U.S. export controls, fostering partnerships with the private sector, leveraging international partnerships to coordinate law enforcement actions and disruption strategies, utilizing advanced data analytics and all-source intelligence to develop and build investigations; conducting regular training for field offices; and strengthening connectivity between the strike force and the Intelligence Community.

IMPACT

BIS has repeatedly demonstrated its commitment to enforcing EAR, and violations can carry heavy penalties. Civil penalties may be up to \$300,000 per violation or twice the value of the transaction, whichever is greater. EAR violations can even result in criminal liability, such as a \$1 million criminal penalty per violation or up to 20 years in prison. EAR violations can also result in the surrender of cargo and loss of export privileges.

Melissa Mannino, a trade and national security lawyer with BakerHostetler and former chief of enforcement and litigation at the BIS chief counsel office, said that an increase in public penalties could be helpful for many compliance departments, which can use the cases to lobby their managers for more resources or "get the attention of the senior officials." But she also said it





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means risk levels are rising, and she urged companies to pay even closer attention to their sanctions screening and record-keeping.

RESOURCES:

- [Former BIS Official: "I've Never Seen Enforcement Environment Like This."](#) (Export Compliance Daily)
- [Republican Slams Lax Enforcement of China Tech Trade Curbs](#) (Yahoo Finance)
- [Justice and Commerce Departments Announce Creation of Disruptive Technology](#) (Office of Public Affairs)
- [BIS Regulatory Updates: 2023 Significant Changes](#) (Diaz Trade Law)
- [BIS Continues Enforcement Policy Ramp-Up](#) (JDSupra)
- [Sanctions 2024 Trends and Challenges](#) (National Law Review)

