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Exporters Should Approach Self-Disclosure With Caution

By **Eric Sandberg-Zakian, Komal Shah and Eric Carlson** (February 14, 2024, 4:52 PM EST)


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On Jan. 16, Assistant Secretary for Export Enforcement Matthew S. Axelrod at the Bureau of Industry and Security's Office of Export Enforcement, or OEE, issued a memorandum announcing changes to the BIS' voluntary self-disclosure process for reporting violations of the Export Administration Regulations, or EAR.

The changes make the disclosure process more user-friendly, in particular by allowing abbreviated submissions in cases that are not significant, and by promising that the OEE will help expedite some requests for authorization to engage in otherwise prohibited activity in connection with voluntary disclosures.

Nonetheless, companies that may wish to avail themselves of the new abbreviated submission option should proceed cautiously in light of the current enforcement climate at the OEE.

The Office of Export Enforcement's New Memorandum

The memorandum announced three changes.

The first and most notable relates to the scope and detail of voluntary disclosures.

Under the EAR provisions governing voluntary disclosures, disclosing parties are instructed to "conduct a thorough review of all export-related transactions where violations are suspected," typically "covering a period of five years," then to submit "a narrative account that sufficiently describes the suspected violations so that their nature and gravity can be assessed," along with "copies of documents that explain and support" that account.[1]

However, pursuant to the new memorandum, the OEE will now accept less detailed submissions from parties disclosing violations that involve minor or technical infractions, i.e., violations with no aggravating factors.

Under BIS enforcement guidelines, aggravating factors that may result in an administrative penalty or other action include (1) a willful or reckless violation of law, (2) awareness of the conduct giving rise to the violation, and (3) harm to regulatory program objectives caused by the conduct giving rise to the violation.

The memorandum explains that the OEE will consider violations without aggravating factors as not significant. For those violations deemed not significant, a company can now provide "an abbreviated narrative account" that does not provide the same level of detail required by the regulations.

In addition, a company need not submit with the abbreviated disclosure all the required accompanying documentation or conduct a full review for similar violations in the preceding five years, unless specifically requested by the OEE.

Second, the memorandum provides that the OEE will now help review and expedite BIS responses to General Prohibition 10 waiver requests.

The EAR's General Prohibition 10 prohibits anyone from doing almost anything with an item if they have knowledge that it was the subject of an EAR violation, including exporting, reexporting, transferring, storing, disposing of or servicing the item.

The EAR provides that parties may ask the BIS to waive particular restrictions on an item imposed by General Prohibition 10 by submitting a request to the Office of Exporter Services, a BIS office that is separate from and does not report to the OEE.

The ability to seek and obtain a General Prohibition 10 waiver is often a valuable benefit of making a voluntary disclosure, as a waiver can allow parties to resume business activities that have been paused for compliance reasons. If the OEE is able to work within the BIS to expedite the issuance of waivers, parties making disclosures and waiver requests may see commercial benefits.

Third, the memorandum encourages submissions of disclosures through email, rather than by hard copy, and describes website changes emphasizing that violations may be disclosed by any person, not just the party that committed the violation.

Assessing the New Memorandum in the Broader Enforcement Context

These changes are part of a series of enforcement policy modifications that the OEE has undertaken since 2022. Previous changes have been intended to increase the importance, visibility and impact of BIS enforcement cases.

On June 30, 2022, Axelrod announced that the OEE would impose significantly higher penalties by more aggressively and uniformly applying aggravating and mitigating factors under existing BIS penalty guidelines.[2] In the same memorandum, Axelrod stated that companies are now required, as part of settlement agreements with the BIS, to admit to having committed the conduct underlying any alleged violations.

On April 18, 2023, Axelrod announced that the failure to voluntarily disclose significant possible violations would be considered an aggravating factor for purposes of determining a monetary penalty under the BIS's penalty guidelines. Axelrod also encouraged individuals and companies to report the violations of others, and stated that the BIS will treat such reports as a mitigating factor "if a future enforcement action, even for unrelated conduct, is ever brought against the disclosing party."

Other changes the BIS made in the last year and a half — including the creation of specialized export enforcement task forces, increased coordination with trade controls enforcement authorities in other

countries and the publication at an earlier stage in the enforcement process of charging letters on the BIS website — have also added to the challenges faced by companies navigating the export enforcement landscape.

Likewise, a host of recent developments outside the BIS have increased the trade-control enforcement risks facing corporations, including greater Congressional and media scrutiny on trade-control compliance, efforts by the U.S. Department of Justice to bring more corporate criminal trade-control cases, and moves by major U.S. trade-control targets China and Russia to make fact gathering within their borders more difficult and impose counter-measures that penalize cooperation with U.S. controls.[3]

In contrast, the changes in this most recent Jan. 16 memorandum may make the voluntary disclosure process less burdensome for some disclosing companies, perhaps even persuading companies to report violations that they previously would have chosen not to disclose.

In particular, accepting abbreviated disclosures of nonsignificant violations can reduce the burden on companies that wish to make voluntary self-disclosure of minor or technical infractions, but are deterred by the cost or complexity of a full narrative that includes a five-year look-back and accompanying documentation.

Likewise, if General Prohibition 10 waivers are granted more quickly, some companies will see a greater commercial benefit from disclosing.

At the same time, however, navigating the voluntary disclosure process remains a complex strategic undertaking.

The memorandum offers the option of submitting an abbreviated disclosure only for violations that are not significant. However, it also notes that if the "OEE suspects the presence of aggravating factors that are not disclosed, the OEE Director will request a full narrative account, including the five-year look-back, with accompanying documentation."

As a result, companies that want to disclose violations they believe do not present aggravating factors must assess not only their own view of the facts, but also the OEE's likely view. No company wants to submit an abbreviated narrative account only to receive a request for a full narrative account motivated by OEE suspicion.

Even worse, no company wants to submit an abbreviated narrative account, obtain a quick closure of the matter without penalty, and then see the case reopened, and a full narrative account sought if facts later come to the agency's attention that suggest aggravating factors.

Either scenario reduces the benefits of disclosure. In the former, the company surely experiences the erosion of some of the goodwill obtained through disclosure. In the latter, the company loses both goodwill and the finality of knowing that a matter is behind it and that there will be no future agency action.

On the flip side, companies may worry that submitting a full narrative account and conducting a five-year look-back concedes that aggravating factors are present. Of course, companies can attempt to mitigate that risk by arguing explicitly in their submissions that aggravating factors are not present.

Even so, we can expect that the OEE will devote more attention to full narrative accounts, and scrutinize them more closely for aggravating factors as compared to the abbreviated disclosures that the memorandum commits to closing "within 60 days of final submission" — consistent with the agency's previous creation of a dual-track system promising 60-day closure for disclosures of less serious violations.

At bottom, these risks stem from the possibility of a mismatch between a company's view of aggravating factors and the agency's view. And in the short term, companies will need to be particularly attentive to that possibility, since the agency's past assessment of aggravating factors may not be predictive going forward.

Axelrod's June 2022 announcement that the OEE would seek to apply the aggravating factors outlined in its existing settlement guidelines more aggressively reveals that the agency's orientation toward aggravating factors has changed — but precisely what that will mean in practice remains to be seen.

While the increased importance of predicting how the agency may view aggravating factors in a planned disclosure is the clearest complexity added by the memorandum's changes, it is not the only one. Consider, for example, the memorandum's announcement that the OEE intends "to help ... ensure decisions to grant [General Prohibition 10 waiver] requests are appropriate."

Companies make waiver requests for different reasons. In many cases, a company may be required to do so, most notably when knowingly in possession of an item that has been the subject of a violation, and which the company is prohibited from using, storing or disposing of without a waiver.

In other cases, a company may submit a waiver request to implement corrective actions or to restart suspended business. In those circumstances, companies have to consider how the agency will perceive the request not only on its own terms, but as an early submission in the OEE's consideration of the underlying voluntary disclosure.

Given this interplay, companies will want to be particularly attentive to the impact a waiver request submission may have on the OEE's assessment of a disclosure.

Risks to assess include a waiver request conveying an inaccurate statement or locking the company into certain concessions before fact-finding is complete, before a final voluntary disclosure is drafted and before the company's advocacy strategy is fully formed.

Of course, those risks have always been present in waiver requests submitted early in the voluntary disclosure process, especially since the EAR has long contemplated that the Office of Exporter Services would consult with the OEE when deciding whether to grant waiver requests.

But with the OEE now contemplating a more active role in the review of waiver requests, companies should be prepared for closer scrutiny of their requests by the very same enforcement officials who ultimately will decide whether to charge them with violations.

Conclusion

Over the last year and a half, the OEE's voluntary disclosure process has become more complex and challenging to navigate. Companies should be highly attuned to their export enforcement risk, as the OEE has made clear that resources devoted to corporate enforcement and the dollar value of corporate

penalties are increasing.

Corporations can mitigate their risk first and foremost by investing in compliance and reducing the likelihood of violations. When violations are discovered, companies may benefit from the OEE's recent changes to its voluntary disclosure program. They must first give careful thought, however, to decisions about whether and how to disclose.

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[1] 15 C.F.R. § 764.5.

[2] https://www.bis.doc.gov/index.php/documents/enforcement/3062-administrative-enforcement-memo/file.

[3] https://www.law360.com/articles/1588715/where-doj-s-focus-on-criminal-corporate-trade-may-lead.