Recent Developments in Enforcement of U.S. Export Controls and Sanctions Laws

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International Trade

Over the past few months, the agencies responsible for criminal and civil enforcement of U.S. export control and economic sanctions laws have implemented a number of important changes in their enforcement practices. In October 2016, the U.S. Department of Justice ("DOJ"), National Security Division ("NSD") published guidance on voluntary self-disclosures of criminal export control and sanctions violations. In June 2016, the U.S. Department of Commerce, Bureau of Industry and Security ("BIS") updated its guidance on charging and penalty determinations for civil violations of export control regulations. And effective August 2016 and January 2017, the agencies responsible for civil enforcement of export control and sanctions regulations increased the maximum civil penalties for violations of those regulations. Each of these recent updates is discussed in more detail below.

DOJ Guidance on Voluntary Self-Disclosures of Criminal Violations of Export Control and Sanctions Laws

On October 2, 2016, DOJ's NSD issued formal policy guidance to encourage businesses to disclose willful export controls and sanctions violations to NSD's Counterintelligence and Export Control Section ("CES"). Such disclosures would be in addition to voluntary disclosures that companies have long made to primary trade controls regulators at the Commerce, State, and Treasury Departments. The guidance does not require the disclosure of violations to CES. However, the guidance states NSD's view that when a company becomes aware that an export controls or sanctions violation "may have been willful, it should within a reasonably prompt time also submit a [voluntary self-disclosure] to CES." In return for such a disclosure, the guidance indicates, "a company may be eligible for a significantly reduced penalty" and may be able to obtain less burdensome non-monetary conditions in a settlement.

Under the new policy guidance, DOJ will consider a disclosure to be voluntary if:

- The company discloses the conduct prior to an imminent threat of disclosure or government investigation;
- The company discloses the conduct to CES and the appropriate regulatory agency within a reasonably prompt time after becoming aware of the offense (with the burden on the company to demonstrate timeliness); and
- The company discloses all relevant facts known to it, including all relevant facts about the individuals involved in the conduct.

The guidance also provides that CES will consider disclosures voluntary even if they describe violations of the International Traffic in Arms Regulations ("ITAR") that involve arms-embargoed countries and are thus subject to the ITAR's mandatory disclosure requirement. The guidance does not specify how soon after discovering a potential violation a company must make a disclosure in order for the disclosure to be considered timely. Under DOJ's analogous Foreign Corrupt Practices Act ("FCPA") Pilot Program for disclosing potential FCPA violations, DOJ has indicated that a disclosure would be timely if made within three months of discovering an FCPA violation. It is possible that CES will look to the FCPA Pilot Program for insight and may adopt a similar approach to timeliness.

In addition to voluntarily disclosing potentially willful violations, the guidance states that companies should cooperate fully with CES investigations and remediate any compliance shortcomings that contributed to violations. The guidance provides details on DOJ's understanding of what is required to cooperate and remediate satisfactorily, emphasizing in particular DOJ's expectation that companies will provide "proactive" cooperation by disclosing facts of potential relevance even if not specifically asked to do so and identifying opportunities for the government to obtain evidence from third parties.

Despite asserting that DOJ policy is to reward disclosure and cooperation, the guidance generally focuses on enforcement action that DOJ would expect to take against companies that disclose willful violations. It does not address the question of whether disclosure and cooperation by a company might ever persuade DOJ to decline enforcement action against a company or focus only on the individual employees who engaged in the willful violations. The guidance sets out examples of resolutions that DOJ would seek in four different factual scenarios. Notably, these sample resolutions would appear to penalize companies to a greater degree than, for example, we would expect under DOJ's FCPA Pilot Program. In addition (and unlike the FCPA Pilot Program), the guidance lists aggravating facts that would lead to higher penalties for parties making disclosures.

As a result, the guidance would seem to offer less attractive incentives to companies considering disclosing willful trade controls violations to DOJ than the FCPA Pilot Program offers with respect to FCPA violations. This divergence in the two programs may have been intentional. Whereas the FCPA Unit appears to be focused on motivating companies to self-disclose by emphasizing the prospect of leniency for companies that disclose (i.e., the "carrot"), NSD appears to be focused on motivating companies to self-disclose by emphasizing the prospect of harsher penalties for companies that do not self-disclose (i.e., the "stick"). This difference in approach may reflect a more rigid view within DOJ regarding an appropriate range of outcomes in trade controls cases than in FCPA cases, given the potential impacts on national security presented in the trade controls arena.

It is unclear whether companies will take advantage of the new guidance and make voluntary disclosures to CES of potential willful violations. Indeed, in light of the limited potential benefits of voluntary disclosure for willful violations, the guidance may have the unintended effect of reducing voluntary disclosures to primary regulators. In our experience, companies have traditionally disclosed isolated instances of serious misconduct by individual employees to the Commerce, State, and Treasury Departments with the expectation that those agencies would not refer such cases to DOJ for criminal investigation absent evidence of management involvement or meaningful corporate compliance failures. This guidance suggests that CES believes such cases routinely justify criminal investigation and resolution, which could reduce incentives for bringing them to the attention of any part of the U.S. government.

More generally, the guidance should prompt companies to consider the criminal law implications of internal trade controls investigations and disclosures. In particular, companies faced with internal investigations and possible disclosures of such violations will more regularly require advice not just from trade controls counsel, but also from white collar criminal defense counsel.

Revisions to BIS's Charging and Penalty Guidance for Civil Violations of the EAR

In June 2016, BIS issued a final rule revising its guidance on charging and penalty determinations when settling administrative enforcement cases based on violations of the Export Administration Regulations ("EAR"), other than violations involving the EAR's antiboycott provisions. The rule modified the factors considered by BIS's Office of Export Enforcement ("OEE") when making civil penalty determinations. The modifications are intended to make the determinations more predictable and transparent and to better align BIS's guidance with penalty guidelines issued by the U.S. Department of the Treasury, Office of Foreign Assets Control ("OFAC"). The revisions took effect on July 22, 2016, but will not apply to pending matters that are the subject of ongoing settlement negotiations where a charging letter had not yet been issued as of the effective date.

In broad terms, the new rule sets forth various general factors, aggravating factors, mitigating factors, and other relevant factors that are considered by OEE when determining appropriate penalties in administrative enforcement matters. Where OEE determines that a civil monetary penalty is appropriate, the revised guidance provides that the applicable base penalty hinges on whether the case is "egregious" (meaning the case "represents a particularly serious violation of the law calling for a strong enforcement response") and whether or not the violation was voluntarily self-disclosed. The new rule formalizes OEE's customary 50 percent reduction in the base penalty amount for violations brought to OEE's attention by voluntary self-disclosures, although the range for "egregious" cases will be "up to" one-half of the statutory maximum. Furthermore, the rule adopts the U.S. Department of State, Directorate of Defense Trade Controls' ("DDTC") practice of permitting, in some cases, the suspension of civil penalties to allow offenders to use the funds for compliance activities required under the final order, such as improving internal compliance programs and conducting audits.

The new guidance continues OEE's past emphasis on the importance of voluntary self-disclosures, assigning "great weight" to voluntary self-disclosures as a mitigating factor and expressly contemplating a reduction in base penalties for violations properly and completely disclosed by voluntary self-disclosure. According to OEE, only approximately three percent of voluntary self-disclosures have resulted in a civil monetary penalty in the past several years, and the rule notes that OEE does not expect the rate to change significantly.

Increased Civil Penalties for Export Control and Sanctions Violations

U.S. government agencies also recently adjusted for inflation the civil monetary penalties applicable to export control and sanctions violations pursuant to the Federal Civil Penalties Adjustment Act of 1990.

Effective August 1, 2016, OFAC increased the maximum civil monetary penalties that may be assessed for U.S. economic sanctions violations. Specifically, OFAC adjusted the maximum civil penalty for violations of sanctions issued pursuant to the International Emergency

Economic Powers Act (“IEEPA”)—which is the authorizing statute for most U.S. sanctions regulations, including the Iran, Sudan, North Korea, Syria, and Ukraine-/Russia-related sanctions—from $250,000 to $284,582 per violation, or twice the value of the transaction, whichever is greater. OFAC also adjusted the maximum civil monetary penalty under the Trading with the Enemy Act, the statutory basis for the Cuba sanctions, from $65,000 to $83,864 per violation. These new civil monetary penalty amounts apply to penalties assessed after August 1, 2016, for which the associated violations occurred after November 2, 2015.

Similarly, effective August 1, 2016, DDTC modified its civil monetary penalty under the ITAR, based on an inflation adjustment, from a maximum civil penalty of $500,000 to $1,094,010, per violation. The last time such an increase was made was in 1985. Importantly, all violations for which civil monetary penalties are assessed after the effective date (August 1, 2016) will be assessed at the adjusted penalty level, regardless of whether the violation occurred before the effective date.

BIS also adjusted its civil monetary penalties for violations of IEEPA, the statute under which the EAR are promulgated. Effective January 15, 2017, the maximum civil monetary penalty for violations of the EAR increased from $284,582 to $289,238 per violation, or twice the amount of the transaction that is the basis of the violation, whichever is higher. The adjusted penalty applies to all violations for which civil monetary penalties are assessed after the effective date (January 15, 2017), regardless of whether the violation occurred before the effective date. This adjustment comes on the heels of a penalty increase in July 2016 that had increased the maximum civil penalty from $250,000 to $284,582.

The increase in civil monetary penalties may provide additional incentive to voluntarily disclose potential violations to the relevant agencies so as to benefit from the disclosure as a mitigating factor in the penalty assessment. Despite the increased civil monetary penalties, agencies still retain the discretion to assess lower penalties.

These changes do not affect the maximum monetary criminal penalties for willful trade controls and sanctions violations, which remain in all cases the greater of $1 million per violation or, pursuant to Title 18 of the U.S. Criminal Code, twice the gain to the defendant from committing the violation, or twice the loss to the victim resulting from the violation.

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