STEPTOE & JOHNSON LLP

EXPORT ADMINISTRATION REGULATIONS (EAR) PENALTY GUIDANCE IN THE SETTLEMENT OF ADMINISTRATIVE ENFORCEMENT CASES

Overview of Final Rule

15 C.F.R. Supp. 1 to Part 766

February 2004

On Friday, February 20, 2004, the U.S. Department of Commerce Bureau of Industry and Security ("BIS") published in the Federal Register (68 Fed. Reg. 54402) guidance regarding penalty determinations in the settlement of civil administrative enforcement cases under part 764 of the EAR. The guidance is non-binding, and is intended to promote consistency and transparency in BIS enforcement actions. The guidance does not apply to antiboycott matters arising under part 760 of the EAR. If you have any questions, please contact Ed Krauland (202-429-8083) or Meredith Rathbone (202-429-6437).

Potential Civil Enforcement Penalties Arising from a BIS Export Case

BIS has a variety of civil enforcement actions at its disposal in investigating potential violations of the EAR, including:

- **Warning Letters** — BIS has determined that a violation has occurred, but that a warning letter may effectively bring about future compliance (e.g., violation of a technical nature; good faith effort to comply with the law and cooperate with the investigation; investigation commenced as the result of a voluntary self-disclosure and no aggravating factors exist).
- **Civil Penalty** — BIS may assess a monetary penalty for each violation of the EAR in accordance with section 764.3(a)(1).
- **Denial of Export Privileges** — Section 764.3(a)(2) of the EAR allows for the denial of a party's export privileges. Such a denial may extend to all export privileges, or may be narrower in scope, such as a restriction on the export of specified items or to specified destinations or customers.
- **Exclusion From Practice** — Under section 764.3(a)(3) of the EAR, any person who acts in a representative capacity in any matter before the BIS may be excluded from practice before the BIS.

In deciding whether to penalize a party by denial of export privileges or exclusion from practice, BIS considers the following factors particularly relevant: the presence of mitigating or aggravating factors of great weight, the degree of willfulness involved, the extent to which senior management participated in or was aware of the conduct in question; the number of violations; the existence and seriousness of prior violations; the likelihood of future violations (taking into account relevant export compliance efforts); and whether a monetary penalty can be expected to have sufficient deterrent effect.

Criteria Used by BIS in Determining Civil Sanctions

According to the new rule, BIS generally looks to the following factors in determining the appropriate administrative sanction in each settlement:

- **Degree of Willfulness** — In cases involving simple negligence or carelessness, BIS is more likely to seek payment of a civil penalty. In cases involving gross negligence, willful blindness, or knowing or willful violations, BIS is more likely to seek a denial of export privileges or an exclusion from practice, or a greater monetary penalty than might otherwise be imposed. In determining whether a knowing or willful violation occurred, BIS will consider the presence of any red flags and the nature and result of any inquiry made by the party. A denial or exclusion order may also be considered in matters involving just simple negligence or carelessness, particularly if the violations involved harm to national security, a monetary fine alone represents an insufficient penalty, or a denial or exclusion order is necessary to prevent future violations of the EAR.
- **Destination involved** — BIS is more likely to seek a greater monetary penalty and/or denial of export privileges in cases involving countries subject to antiterrorism controls, and exports or reexports to destinations particularly implicated by the type of control that applies to the item in question (e.g., export of items subject to nuclear controls to a country with a poor record of nuclear non-proliferation).
- **Related Violations** — Multiple violations arising from a single export transaction may be treated as one violation or as separate violations. In determining how the violations should be treated, BIS typically looks to factors such as whether the violations resulted from knowing or willful conduct, willful blindness, or gross negligence, whether they stemmed from the same underlying error or omission, and whether they resulted in distinguishable or separate harm.
- **Multiple Unrelated Violations** — Multiple unrelated violations are more likely than other violations to result in denial of export privileges, an exclusion from practice, or an enhanced monetary penalty. BIS believes that multiple violations may indicate serious compliance problems and risk of future violations.
- **Timing of Settlement** — In the interest of conserving government resources, BIS may take early settlement into account in determining settlement terms.
- **Related Criminal or Civil Violations** — Where an EAR enforcement matter involves conduct giving rise to related criminal or civil charges, BIS may take the related violations and their resolution into account in determining appropriate administrative actions. A criminal conviction indicates serious, willful misconduct and a high risk of future violations absent administrative sanctions. However, a guilty plea can indicate that a party is taking seriously its export responsibilities. Sometimes, substantial criminal penalties can lessen the need for stiff administrative sanctions, and BIS might seek greater administrative sanctions in a similar case where the party does not face criminal penalties.
- **Specific Mitigating and Aggravating Factors** — In addition to the general factors listed above, BIS also looks to the presence or absence of specific mitigating and aggravating factors in determining appropriate sanctions. The listing of factors is not exhaustive, and BIS may choose to consider other factors in addition to those specifically listed. BIS has noted certain mitigating factors to which it gives "GREAT WEIGHT," indicating that it gives that factor considerably more weight than others.

Mitigating and Aggravating Factors

The following lists of aggravating and mitigating factors describe circumstances that, in BIS's experience, are commonly relevant to penalty determinations in settled cases. Parties have opportunities to settle with BIS at various stages in a civil proceeding prior to the issuance of a final agency determination. Those factors to which BIS accords the greatest weight are so noted. At BIS's discretion, various mitigating and aggravating factors in addition to those listed below may be considered in determining settlement amounts:

Mitigating Factors:

- Voluntary self-disclosure satisfying the requirements of §764.5 of the EAR. Voluntary disclosures afforded the greatest mitigating effect will typically be those concerning violations with no BIS investigation at the time of disclosure. GREAT WEIGHT.
- Effective compliance program in existence, and overall compliance efforts have been of high quality. In determining the effectiveness of the compliance program, BIS will consider the extent to which a party follows BIS's Export Management System (EMS) Guidelines. BIS will consider whether a party's export compliance program uncovered the problem and prevented further violations, and whether the party has taken steps to address compliance concerns raised by the violation, including steps to prevent a recurrence of similar violations. GREAT WEIGHT.
- The violation was an isolated occurrence or the result of a good-faith misinterpretation.
- Authorization for the export would likely have been granted upon request.
- The party has never been convicted of an export-related criminal violation; in the past 5 years the party has not entered into settlement of, or been found liable in, an export-related enforcement action; in the past 3 years the party has not received a warning letter from BIS; or, in the past 5 years the party has not otherwise violated the EAR.
- The party has cooperated with BIS in the investigation.
- The party has provided substantial assistance to BIS in investigation of another party who may have violated the EAR.
- The violation will not likely involve harm of the nature that the applicable provision of the EAR was intended to prevent.
- At the time of the violation, the party (a) had little or no export experience, and (b) was not familiar with export practices and requirements.

Aggravating Factors:

- The party made a deliberate effort to hide or conceal the violation(s). GREAT WEIGHT.
- The party's conduct demonstrated a serious disregard for export compliance responsibilities. GREAT WEIGHT.
- The violation was significant in light of the sensitivity of the items involved and/or the reason for controlling them to the destination. For example, violations of controls based on nuclear, biological and chemical weapon proliferation, missile technology proliferation, and national security concerns, and exports proscribed in part 744 of the EAR. GREAT WEIGHT.
- The violation was likely to involve harm of the nature that the applicable provisions of the regulations are principally intended to protect against. For example, a statement on an SED that an export was destined for a non-embargoed country when, in fact, it was destined for an embargoed country.
- The quantity or value of exports was high, warranting a greater penalty to serve as an adequate deterrence of future violations, or to make the penalty proportionate to comparable violations involving exports of lower quantity or value.
- The transaction involved violations of laws other than those enforced by BIS.
- The party has been convicted of an export-related criminal violation; in the past 5 years the party has entered into a settlement of, or been found liable in, an export-related enforcement action; in the past 3 years the party has received a warning letter from BIS; or in the past 5 years, the party otherwise violated the EAR.
- The party exports regularly, but lacked a systematic export compliance program.