

## Department of Commerce's Bureau of Industry and Security Eyes Enforcement and Voluntary Disclosure Review Policy Changes

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June 23, 2022

### Key Takeaways:

- Bureau of Industry and Security ("BIS") policy changes and recent remarks from the Department of Justice signal stricter enforcement of export-related violations.
- Proposed BIS policy changes include publishing charging letters on the day of their filing, limiting the use of no admit/no deny settlements, and increasing administrative penalties.
- Voluntary Self Disclosure review process may be streamlined to allow for BIS to focus on investigations of serious violations and quickly process minor technical or administrative violations.

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In two recent speeches, Matthew Axelrod, Assistant Secretary for Export Enforcement at the Department of Commerce's Bureau of Industry and Security ("BIS"), has signaled policy changes related to the enforcement of the Export Administration Regulations ("EAR"). If the changes are implemented, BIS would take a more forceful approach to cases it chooses to pursue while quickly adjudicating (presumably without taking any action) violations of a technical or administrative nature.

The BIS policy changes align with [recent remarks](#) made by Deputy Attorney General Lisa Monaco in which she highlighted the centrality of national security concerns to the Department of Justice's ("DOJ") white collar enforcement efforts. She stressed that the U.S. would continue to take an "all-tools" approach to corporate criminal enforcement, particularly where national security interests intersect with anti-corruption, sanctions, and export controls enforcement, and repeated her characterization of sanctions as "the new FCPA." And she underscored the DOJ's emphasis on rewarding companies that "develop the capacity to identify misconduct within the organization, and then come forward and voluntarily disclose that misconduct to the department." These remarks and the BIS policy changes signal stricter enforcement of export controls-related violations by the U.S. government going forward, making it even more important for entities to invest in robust export compliance programs.

### I. BIS Reconsidering Its Enforcement Policies

On May 16, 2022, Axelrod, BIS's top enforcement official, [announced](#) that the department is reviewing its enforcement policy and that it is contemplating changes in its administrative enforcement programs. The proposed changes aim to deter violations, increase transparency, and incentivize implementation of compliance programs.

There are three main policy changes that BIS is contemplating:

#### 1. Publication of Charging Letters on the Day of Filing

Currently, BIS does not make its administrative charging letters public until after an enforcement action is resolved. This means that the public does not receive notice of violations until the matter closed, which can often take years. Going forward, BIS is considering publishing charging letters on the day of their filing to highlight the consequences of violating the EAR in real time and disincentivize entities from engaging in similar misconduct. BIS has already started publishing charging letters for unresolved cases.

Earlier this month, BIS issued a [charging letter](#) accusing Russian oligarch Roman Abramovich of illegally exporting U.S.-origin aircraft to Russia. BIS has also issued another [charging letter](#) accusing a Montana businessman of violating the EAR after trying to ship controlled items with knowledge that they would end up in Iran.

## 2. *Reconsideration of the Use of No Admit/No Deny Settlements*

BIS currently permits persons and entities to settle administrative matters without a trial by paying a monetary penalty without admitting any misconduct. BIS is considering limiting the use of no admit/no deny settlements as it believes that requiring companies or individuals to admit misconduct would deter others from engaging in similar conduct.

## 3. *Increasing Administrative Penalties*

BIS is also considering increasing administrative penalty amounts for export violations as a means to incentivize entities to invest in export compliance programs.

## II. Streamlining Voluntary Disclosure Review Process

More recently, on June 14, 2022, at a meeting of the Regulations and Procedures Technical Advisory Committee, Axelrod stated that BIS is considering making changes to the Voluntary Self Disclosure (“VSD”) review process. The VSD process allows entities to disclose violations or suspected violations of export regulations and describes their effort to remediate the root causes of such violations. The contemplated changes could allow VSDs of minor technical or administrative violations to be reviewed and returned quickly, which would allow BIS to spend more time reviewing and investigating VSDs that disclose more serious violations.

## III. Impact of Proposed Policy Changes on Voluntary Disclosures

Historically, BIS has declined to pursue penalties in connection with the vast majority of all VSDs submitted and has strongly encouraged companies to make voluntary disclosures. Although BIS is promising to review VSDs related to technical/administrative violations of the EAR more quickly, the harder line it proposes to take on more serious violations may result in individuals and companies reconsidering whether a VSD is the right approach.

Companies considering whether to file a VSD should carefully consider the benefits and potential risks of doing so. Members of Foley Hoag LLP’s [Trade Sanctions and Export Controls](#) practice have conducted hundreds of investigations into potential violations of the EAR and can assist with determining whether submitting a VSD is advisable and assist in the preparation of a VSD.

Additional contributions to this alert were made by summer associate Chawkat Ghazal.

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