THE GLOBAL TRADE LAW JOURNAL

Volume 2, Number 2 March–April 2025

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Volume 2, No. 2 March–April 2025

THE GLOBAL TRADE LAW JOURNAL (ISSN 2995-1089) at $495.00 annually is published six times per year by Full Court Press, a Fastcase, Inc., imprint.

For customer support, please contact Fastcase, Inc., 729 15th Street, NW, Suite 500, Washington, D.C. 20005, 202.999.4777 (phone), or email customer service at support@fastcase.com.

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Publisher: Leanne Battle
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Cover Art Design: Morgan Morrissette Wright and Sharon D. Ray

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Cite this publication as:

The Global Trade Law Journal (Fastcase)

A Full Court Press, Fastcase, Inc., Publication

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729 15th Street, NW, Suite 500, Washington, D.C. 20005
https://www.fastcase.com/

POSTMASTER: Send address changes to THE GLOBAL TRADE LAW JOURNAL, 729 15th Street, NW, Suite 500, Washington, D.C. 20005.

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ISSN 2995-1089

U.S. Department of Commerce's Bureau of Industry and Security Enhances Its Enforcement Discretion: Revamps Voluntary Self-Disclosure Process, Abolishes Penalty Caps, and Amends Penalty Guidelines

Francesca M.S. Guerrero, Samir D. Varma, Aaron C. Mandelbaum, and Scott E. Diamond*

In this article, the authors discuss the final rule published recently by the Department of Commerce's Bureau of Industry and Security revising voluntary self-disclosure provisions and penalty guidelines of the Export Administration Regulations.

The Department of Commerce's Bureau of Industry and Security (BIS) has published a final rule[1] revising the voluntary self-disclosure provisions and penalty guidelines of the Export Administration Regulations (EAR). The revisions to the voluntary self-disclosure (VSD) process modify the regulations about conduct that constitutes a violation of the EAR and the possible sanctions for such violations by incorporating the three policy memoranda BIS has announced every year beginning in 2022.

The three memoranda have:

1. Highlighted BIS's desire to focus its limited resources on addressing more serious export control violations,
2. Introduced mechanisms for exporters to more easily submit VSDs, and
3. Expanded incentives for exporters who choose to submit a VSD.

The Global Trade Law Journal / March–April 2025, Vol. 2, No. 2, pp. 137–145.

ISSN 2995-1089.

The revisions also update Supplement No. 1 to Part 766 of the EAR entitled "Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases" (BIS Penalty Guidelines) by granting greater latitude to BIS when calculating and imposing penalties in administrative cases in response to an apparent export control violation. Both revisions under the September 12 final rule took effect September 16, 2024.

Revisions to the VSD Process (15 C.F.R. § 764.5)

The final rule codifies the three VSD policy memoranda noted above so that "industry will not be required to look to multiple [memoranda] to understand [BIS]'s procedures and expectations regarding the submission of VSDs." The referenced memoranda include:

1. "Further Strengthening Our Administrative Enforcement Program," dated June 30, 2022 (2022 Policy Memorandum);[2]
2. "Clarifying Our Policy Regarding Voluntary Self-Disclosures and Disclosures Concerning Others," dated April 18, 2023 (2023 Policy Memorandum);[3] and
3. "Further Enhancements to Our Voluntary Self-Disclosure Process," dated January 16, 2024 (2024 Policy Memorandum).[4]

In doing so, the final rule amends the VSD process in four major ways, discussed below.

Updating the General Policy for Submitting VSDs

The first significant change impacts the first provision of the VSD regime. Previously, the regulations stated: "BIS strongly encourages disclosure . . . if you believe that you may have violated the EAR, or any order, license[,] or authorization issued thereunder. Voluntary self-disclosure is a mitigating factor in determining what administrative sanctions, if any, will be sought[.]" In other words, the general policy for submitting a VSD used to be that an exporter could receive mitigation credit by choosing to engage in the process. Section 764.5(a) now adds, however, that BIS will also consider a “deliberate decision” not to disclose a significant apparent violation as an “aggravating factor” when determining what administrative sanctions, if any, will be sought. Correspondingly, this change is also reflected as new Aggravating Factor D in the BIS Policy Guidelines. This additional disclaimer in the VSD general policy therefore buttresses the mitigating effect of a VSD by warning exporters of enhanced penalties upon making the “deliberate decision” not to engage in the process.

Bifurcating the VSD Process into the Long-Envisioned “Dual-Track System”

The second change to the VSD process is both procedural and substantive. Procedurally, the change inserts a new paragraph (c) into § 764.5, thus redesignating the remaining paragraphs of this section. New paragraph (c) establishes procedures for VSDs “involving minor or technical violations,” and paragraph (d) is now updated to focus solely on procedures for VSDs “involving significant violations”—thus cementing the two types of VSDs or, as BIS calls it, “the dual-track system” of VSDs, first expressed in its policy memoranda.

Substantively, new paragraph (c) codifies the provisions related to minor or technical violations addressed in the 2024 Policy Memorandum. For example, new paragraph (c)(1) describes a “minor or technical violation” as one that does not include any aggravating factors as defined in the BIS Penalty Guidelines. New paragraph (c)(2) incorporates the procedures for submitting an “abbreviated narrative account” for minor or technical violations and includes the condition that the Director of BIS’s Office of Export Enforcement—the leader of the organizational unit within BIS that is responsible for enforcing the provisions of the EAR—reserves the authority to require a full narrative account on suspicion that aggravating factors are present. Finally, new paragraph (c)(3) authorizes parties to “bundle” multiple minor or technical violations into one overarching submission via an abbreviated narrative account and to do so on a quarterly basis if such violations occurred within the preceding quarter.

Meanwhile, the revised paragraph (d) largely retains the language it prescribed as former paragraph (c), but with the additional definition that a "significant violation" is one that "involves one or more of the aggravating factors" listed in the BIS Penalty Guidelines and the additional instruction that exporters "unsure of whether their possible disclosure relates to a minor or technical violation, or a significant violation" should err on the side of caution and "follow the [VSD] procedure . . . for a significant violation."

Clarifying BIS's Responses Under the New "Dual-Track System"

The third notable change to the VSD process updates the actions BIS's Office of Export Enforcement (OEE) can take under the new dual-track system. Specifically, under revised paragraph (e), this system now incorporates the "fast-track" provision articulated in the 2022 Policy Memorandum for VSDs covering minor or technical violations: such VSDs will generally be resolved within 60 days with the submitter learning that OEE will issue either a no-action letter or a warning letter. This final rule also reaffirms the five possible enforcement actions OEE could take but qualifies that such options are now only reserved for "significant violations."

Modifying How Unlawfully Exported Items May Be Treated

The final major change to the VSD process expands the provisions of § 764.5 describing how unlawfully exported items may be treated following a VSD. Previously, § 764.5 provided that "at the time that a voluntary self-disclosure is made, the person making the disclosure may [also] request permission from BIS to engage in the activities described in § 764.2(e) [e.g., acting with knowledge of a violation] . . . that would otherwise be prohibited." Consistent with the 2024 Policy Memorandum, though, now any person—not just the party submitting a VSD—may notify BIS that a violation has occurred and then request permission to engage in the otherwise proscribed list of activities described in § 764.2(e), which includes (among other activities) the buying, removing, or transferring of an item that is the subject of an export control violation.

Revisions to the BIS Penalty Guidelines (Supplement No. 1 to Part 766 of the EAR)

Noting the BIS Penalty Guidelines were last revised in June 2016,[5] the final rule makes substantial changes to all four of its sections. As a result, exporters can expect major changes regarding how BIS calculates and applies penalties in its enforcement proceedings.

Eliminating Financial Penalty Caps on Export Control Violations

For example, in Section I of the BIS Penalty Guidelines (Definitions), the final rule removes the definition of "applicable schedule amount" altogether. As explained by the final rule, these schedule amounts, which limited the penalty amount BIS could impose, often failed to inflict a "sufficient deterrent effect" on exporters, especially "in situations where transaction values are high"; under the "applicable schedule amount," for instance, a transaction valued at $170,000 or more would have been capped at a financial penalty of $250,000. By deleting the "applicable schedule amount" from the BIS Penalty Guidelines, the final rule "allow[s] penalties to be calculated based on transactional value instead of progressive brackets that round up."

Incorporating "Non-Monetary Resolutions" as an Alternative Response Mechanism

The final rule changes Section II of the BIS Penalty Guidelines (Types of Responses to Apparent Violations) by inserting a new paragraph that codifies the "non-monetary resolution for less serious violations" response option espoused in the 2022 Policy Memorandum. As the final rule explains, this new type of penalty response to resolve enforcement is meaningful because it provides BIS with another means to address "non-egregious conduct . . . that ha[s] not resulted in serious national security harm, but remain[s] serious enough to warrant more than a warning letter or no-action letter." This newly incorporated response option often mandates that an exporter improve its compliance program and, the final rule adds, is thus an especially useful tool in situations where "a monetary penalty would not be appropriate or the value of such a [monetary] penalty would be too low to have a deterrent effect."

In updating Section II of the BIS Penalty Guidelines, the final rule also eliminates the previous practice BIS extended to violators: the opportunity to withhold a portion of a financial penalty and—with BIS's knowledge and consent—apply such funds to enhance the violator's compliance program instead. This change reflects BIS's modified view that companies must independently make appropriate investments in their compliance programs and not expect credit for doing so from engaging in misconduct.

Updating the Aggravating, General, and Mitigating Factors Considered in the Penalty Rubric

Arguably, the most crucial changes instituted by the final rule regarding the BIS Penalty Guidelines pertain to Section III (Factors Affecting Administrative Sanctions), which enumerates the three types of factors affecting administrative sanctions: aggravating, general, and mitigating. Regarding the aggravating factors, the final rule amends Aggravating Factor C (Harm to Regulatory Program Objectives) by adding "the enabling of human rights abuses" as a specific consideration when BIS assesses the potential impact of an apparent violation on U.S. foreign policy objectives.

The final rule's changes to the general and mitigating factors, however, better reflect how BIS is undertaking a more aggressive posture toward enforcement of violations. For example, under General Factor E, which relates to a respondent's regulatory history, BIS has removed the exclusion that a respondent's history of complying with the EAR's antiboycott provisions would not be considered in an export control enforcement proceeding, thereby enabling BIS to scrutinize a respondent's broader compliance efforts more holistically. The final rule also strikes BIS's lookback period of "the five years preceding the date of the transaction giving rise to the apparent violation," thereby affording BIS the ability to examine a respondent's comprehensive regulatory history.

Likewise, the final rule broadens consideration of a respondent's "export-related" criminal convictions by clarifying that BIS will now consider whether a respondent has been "convicted of a criminal violation" in general or at least "entered into a resolution with the Department of Justice or other prosecutorial authority related to a criminal violation," such as a Deferred Prosecution Agreement or a Non-Prosecution Agreement.

Regarding the mitigating factors listed in Section III of the BIS Penalty Guidelines, the final rule modifies Mitigating Factor H consistent with a policy expressed in the 2023 Policy Memorandum. Specifically, the final rule revises this mitigating factor (Exceptional Cooperation with OEE) by including the additional consideration of whether a respondent has previously disclosed information regarding the conduct of other exporters that resulted in an enforcement action. As reaffirmed by the final rule, this change incentivizes exporters to disclose the misconduct of other exporters to BIS, which in turn promotes transparency and accountability within the broader U.S. exporting community.

Removing Restrictions in "Non-Egregious" Cases and Other Credits from the Penalty Matrix

Finally, the final rule updates aspects of the penalty matrix prescribed in Section IV of the BIS Penalty Guidelines (Amount of Civil Penalty). Consistent with removing the "applicable schedule amount" definition in Section I of the BIS Penalty Guidelines, the final rule also eliminates the financial penalty caps BIS imposed in "non-egregious" cases, tying such penalties to the export's transaction value instead. Consequently, in non-egregious cases initiated by a VSD, "the base penalty amount is no longer capped at a maximum of $125,000, but is instead capped at one-half of the [export's] transaction value," while non-egregious cases not initiated by a VSD "is no longer . . . capped at $250,000, but is instead capped at the full transaction value." Likewise, the final rule removes references to percentages and other reductions an apparent violation could previously benefit from that would have prompted BIS to reduce a base penalty amount.

In Summary

- The final rule took effect September 16, 2024.
- The final rule codifies the series of "policy memoranda" BIS began issuing in 2022 to clarify the agency's evolving attitude toward voluntary self-disclosures, which in turn aimed to encourage companies, universities, and individuals to

engage in the process after believing a violation of the Export Administration Regulations, or any order, license, or authorization issued thereunder had been violated.

- The final rule also updates the BIS Penalty Guidelines for the first time since June 2016, thus modifying how BIS calculates and applies penalties for export control violations.
- The changes to the BIS Penalty Guidelines confer greater discretion to BIS in enforcement proceedings, signifying the agency's renewed aggressive posture to clamp down on export control violations.

Conclusion

As evidenced by the various policy memoranda issued by BIS over the past few years, the agency has been actively signaling to the U.S. exporting community a renewed commitment to clamp down on export violations by encouraging industry and academia to submit VSDs as a means for efficiently resolving infractions, especially those of a minor or technical nature. Indeed, this renewed commitment is also evident in BIS's recent enforcement actions, such as in April 2023 when the agency imposed its largest stand-alone administrative penalty in its history. Accordingly, by codifying the policy memoranda into formal regulations and updating the BIS Penalty Guidelines for the first time in nearly a decade, BIS's final rule not only solidifies the agency's policies, procedures, and expectations of the U.S. exporting community with legal effect, but also sheds valuable light on BIS's priorities and mechanisms for enhancing the effectiveness and enforceability of its regulatory regime.

Notes

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1. https://public-inspection.federalregister.gov/2024-21013.pdf?utm_campaign=pi+subscription+mailing+list&utm_medium=email&utm_source=federalregister.gov.

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

3. https://www.bis.doc.gov/index.php/documents/enforcement/3262-vsd-policy-memo-04-18-2023/file.

4. https://www.bis.doc.gov/index.php/documents/enforcement/3435-vsd-policy-memo-01-16-2024/file.

5. See 81 Fed. Reg. 40499, https://www.federalregister.gov/documents/2016/06/22/2016-14770/guidance-on-charging-and-penalty-determinations-in-settlement-of-administrative-enforcement-cases.