

Public Comments on  
Proposed Rule Guidance on Charging and Penalty Determinations in Settlement of  
Administrative Enforcement Cases, Revision of Supplement No. 1 to Part 766 of  
the Export Administration Regulations – 80 F. Reg. 80710, December 28, 2015

Aerospace Industries Association

Airbus Group

Bartlett, James

Boeing Co., The

Menefee, Mark

National Customs Brokers and Freight Forwarders Association of America

Pacific Northwest National Laboratory

Pelak, Steven

Semiconductor Industry Association

Steele, Charles

V Alexander & Co.



February 25, 2016

David W. Mills  
Assistant Secretary for Export Enforcement  
U.S. Department of Commerce  
Regulatory Policy Division, Room 2099B  
Bureau of Industry and Security  
Washington, DC

Subject: Federal Register Proposed Rule, Volume 80, No. 248, December 28, 2015  
RIN 0694-AG73

Dear Mr. Mills:

The Aerospace Industries Association (AIA) welcomes the opportunity to provide comment in response to the subject Federal Register Notice relating to penalty determinations and changes to the Export Administration Regulations (EAR). AIA appreciates the efforts the Department of Commerce has made to provide clarity in the methodology applied to reviewing possible EAR violations; in particular, the addition of *No Action* determinations as proposed in Supplement No. 1 to Part 766, Section II.A.

To assist in emphasizing this settlement option, AIA recommends the following minor edits to the proposed language to Supplement No. 1 to Part 766.

Recommendations:

## **II. Types of Responses to Apparent Violations**

OEE, among other responsibilities, investigates apparent violations of the EAR, or any order, license or authorization issued thereunder. When it appears that such a violation has occurred, OEE investigations may lead to ***no action***, a warning letter or an administrative enforcement proceeding.....

## **III. Factors Affecting Administrative Sanctions**

Many apparent violations are isolated occurrences, the result of a good-faith misinterpretation, or involve no more than simple negligence or carelessness. In such instances, absent the presence of aggravating factors, the matter frequently may be addressed with a **no action determination letter or if deemed necessary a** warning letter.....

AIA appreciates the opportunity to provide input and looks forward to working with BIS on this and future projects.

Best Regards,

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Remy Nathan  
Vice President – International Affairs  
Aerospace Industries Association



**Request for Comments:**

**Public Notice RIN 0694-AG73**

**Guidance on Charging and Penalty Determination in Settlement of Administrative Enforcement Cases – Revision to Supplement No 1 to Part 766 of the Export Administration Regulations**

Email to [publiccomments@bis.doc.gov](mailto:publiccomments@bis.doc.gov)

Airbus Group offers the following comments in response to **Public Notice RIN 0694-AG73:**

**Importance of Voluntary Self-Disclosure:**

Airbus is concerned that the appearance of diminishing importance related to Voluntary Self-Disclosure may discourage the discovery of apparent violations (such as implemented through “hot lines” or “whistleblower” programs). We believe that the Voluntary Self-Disclosure process is also a self-improvement tool, which should not be feared, especially for minor violations. We encourage BIS to acknowledge the benefits of engaging into a Voluntary Self-Disclosure beyond just monetary limits.

For this purpose we suggest the following language:

*General Factors*

*E. Compliance program*

*BIS will also consider whether a Respondent’s export compliance program uncovered a problem, thereby preventing further violations, and whether the Respondent has taken steps to address compliance concerns raised by the violation, **to include a Voluntary Self-Disclosure**, ....*

*Mitigating Factors*

*F Remedial Response*

.....

*1 The steps taken by the Respondent upon learning of the apparent violation.*

***Did the Respondent undertake to file a Voluntary Self-Disclosure?***

***Did the Respondent immediately stop the conduct at issue?***



Acknowledgement of License Exceptions:

In some instances, an EAR exception may have been available and either not used or incorrectly implemented by the exporter or re-exporter, we suggest that Mitigating Factor H include the availability of an EAR exception, in addition to whether a license was likely to be approved:

*Mitigating Factors*

*H. License Was Likely To Be Approved: Would an export license application have likely been approved for the transaction had one been sought? **Was an EAR exception available, had one been used?***

For further information, please contact Corinne Kaplan at 703-466-5741 or Corinne.Kaplan@airbusna.com.

Respectfully,

A handwritten signature in blue ink, appearing to read "P. Cardin", with a horizontal line extending to the right.

Pierre Cardin

SVP, Group Export Compliance Officer

A handwritten signature in blue ink, appearing to read "A. Groba", written in a cursive style.

Alexander Groba

Coordinator U.S. Regulations

**LAW OFFICE OF JAMES E. BARTLETT III**

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February 26, 2016

Director, Regulatory Policy Division  
Bureau of Industry and Security  
U.S. Department of Commerce  
Room 2099B  
14th Street and Pennsylvania Avenue NW  
Washington, DC 20230  
(Copy by email to [publiccomments@bis.doc.gov](mailto:publiccomments@bis.doc.gov))

Subject: Comment on RIN 0694-AG73, *Guidance on Charging and Penalty Determinations*

This is a response to the invitation by the Bureau of Industry and Security (BIS) in 80 Fed. Reg. 80710-80718 (Dec. 28, 2015), for comments on the proposed *Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, Revision of Supplement No. 1 to Part 766 of the Export Administration Regulations* (Proposed Rule).

This comment recommends that the Proposed Rule be withdrawn and reissued after including a discussion of how it contributes to the Administration's Export Control Reform Initiative (ECR).

**SUMMARY**

1. The Proposed Rule fails to discuss how it advances the goal of ECR to align enforcement of the Export Administration Regulations (EAR) with enforcement of the International Traffic in Arms Regulations (ITAR). Although the goal of ECR is to combine the two major export licensing agencies, this Proposed Rule fails to discuss alignment with the administrative penalties and procedures promulgated by the Department of State, Directorate of Defense Trade Controls (DDTC), in ITAR Part 127, *Violations and Penalties*, and ITAR Part 128, *Administrative Procedures*.
2. The use of OFAC policies for enforcement of sanctions and embargoes by BIS as a model for BIS enforcement of EAR licensing requirement is unjustified and unexplained. The Proposed Rule should attempt to coordinate with DDTC to develop BIS and DDTC enforcement policies and practices rather than using OFAC practices as a model for BIS policies.
3. The roles and authority of BIS and the Office of Export Enforcement (OEE) are confused and undefined in the Proposed Rule.
4. The Proposed Rule fails to provide a realistic penalty matrix for "egregious" violations. The Proposed Rule sets a fixed penalty of one-half the statutory maximum, which may result in cases unlikely to be settled because of the unrealistically high penalty for cases involving multi-million-dollar transaction values.
5. The Proposed Rule contains grammar and punctuation errors, and fails to follow *Government Printing Office (GPO) Style Manual* rules.

## DISCUSSION

### 1. The Proposed Rule Fails to Further the Implementation of Export Control Reform.

The Proposed Rule fails to discuss how its publication will advance one of the goals of ECR, to align enforcement of the Export Administration Regulations (EAR) with enforcement of the International Traffic in Arms Regulations (ITAR). The stated goals of the Administration's Export Control Reform Initiative<sup>1</sup> were to merge the State and Commerce Departments' jurisdictions over exports of articles on the U.S. Munitions List<sup>2</sup> and the Commerce Control List<sup>3</sup> into a single control list administered by a single licensing agency, and to "combine the forces of existing myriad law enforcement agencies."<sup>4</sup> Of the four goals of ECR,<sup>5</sup> the one most relevant to this Proposed Rule was to create a single "coordinating" enforcement agency to "enhance our enforcement efforts and minimize enforcement conflicts, . . . detect, prevent, disrupt, investigate, and prosecute violations of U.S. export control laws, and . . . share intelligence and law enforcement information related to these efforts to the maximum extent possible, consistent with national security and applicable law."<sup>6</sup> The Proposed Rule's revision and expansion of separate BIS enforcement policies and procedures, while ignoring the Administration's goal of combining the EAR and ITAR into one licensing regulation appears to be

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<sup>1</sup> See Press Release, The White House Office of the Press Secretary, President Obama Lays the Foundation for a New Export Control System to Strengthen National Security and the Competitiveness of Key U.S. Manufacturing and Technology Sectors (Aug. 30, 2010), <https://www.whitehouse.gov/the-press-office/2010/08/30/president-obama-lays-foundation-a-new-export-control-system-strengthen-n>. See also Export.Gov, *About Export Control Reform* (undated), <http://export.gov/ecr/index.asp> (last reviewed Feb. 26, 2016).

<sup>2</sup> 22 C.F.R. § 121.1.

<sup>3</sup> 15 C.F.R. Part 774, Supp. No. 1.

<sup>4</sup> Press Release, Robert M. Gates, U.S. Sec'y of Defense, Remarks Before the Business Executives for Nat'l Sec. on Export Control Reform (Apr. 20, 2010), *reprinted in* James E. Bartlett III and Jonathan C. Poling, *Defending the "Higher Walls" - The Effects of U.S. Export Control Reform on Export Enforcement*, 14 SANTA CLARA J. INT'L L. 1 (2015), available at <http://digitalcommons.law.scu.edu/scujil/vol14/iss1/1>.

<sup>5</sup> U.S. Dep't of Commerce, *Export Control Reform Initiative Fact Sheet #1: The Basics* (Nov. 27, 2013), <http://1.usa.gov/1zN7OZI> (Phase III will require legislation to implement a government reorganization that would consolidate the current system into a Single Control List; Single Licensing Agency; Single Primary Enforcement Coordination Agency; Single IT System.").

<sup>6</sup> Exec. Order No. 13,558, 3 C.F.R. 271 (2011).

contrary to the purpose of ECR. The Proposed Rule fails to mention the ECR goals, which has been routinely provided in the introductory remarks in recent proposed amendments to the EAR<sup>7</sup> and ITAR.<sup>8</sup>

The issue of how BIS and DDTC will coordinate jurisdiction over violations of restrictions on exports authorized by DDTC for combined exports of dual-use articles as well as defense articles<sup>9</sup> and violations involving “600 Series” defense articles moved from the U.S. Munitions List under DDTC jurisdiction to the Commerce Control List under BIS jurisdiction<sup>10</sup> further illustrate the need for coordination between BIS and DDTC to attempt to establish similar policies and procedures for enforcing export violations under the shared jurisdiction of BIS and DDTC.

## 2. The Use of OFAC Enforcement Policies by BIS is Unjustified and Unexplained.

The Proposed Rule states that “BIS is proposing these changes to make administrative penalties more predictable to the public and aligned with those promulgated by the Department of the Treasury, Office of Foreign Assets Control (OFAC).”<sup>11</sup> OFAC was not mentioned in the Administration’s ECR plans. Although OFAC’s mission includes the regulation of exports to a few statutorily designated countries, OFAC is dedicated to enforcing U.S. sanctions and embargoes, not to enforcing the licensing and regulation of general exports covered by the EAR, which is the BIS mission. The Proposed Rule should attempt to coordinate with DDTC to develop BIS and DDTC enforcement policies and practices rather than using OFAC practices as a model for BIS policies.

## 3. The Roles and Authority of BIS and the Office of Export Enforcement (OEE) Are Confused and Undefined in the Proposed Rule.

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<sup>7</sup> See, e.g., Revisions to the Export Administration Regulations (EAR): Control of Fire Control, Laser, Imaging, and Guidance and Control Equipment the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 81 Fed. Reg. 8421 (proposed Feb. 19, 2016) (to be codified at 15 C.F.R. Part 774, Supp. No. 1) (“This proposed rule is part of the Administration’s Export Control Reform Initiative (Initiative), the objective of which is to protect and enhance U.S. national security interests. The Initiative began in August 2009 when President Obama directed the Administration to conduct a broad-based review of the U.S. export control system to identify additional ways to enhance national security.”).

<sup>8</sup> See, e.g., Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XII, Fire Control, Range Finder, Optical and Guidance and Control Equipment, 81 Fed. Reg. 8438 (proposed Feb. 19, 2016) (to be codified at 22 C.F.R. §121.1, Cat. XII) (“As part of the President’s Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise Category XII ...”).

<sup>9</sup> 22 C.F.R. § 122.5(b).

<sup>10</sup> ECCN 9A610.x. See generally DDTC Frequently Asked Questions, Export Control Reform, <http://pmddtc.state.gov/fags/ECR.html#;> (Feb. 26, 2015), reprinted in James E. Bartlett III, *Bartlett’s Annotated International Traffic in Arms Regulations* Appx. D4 (2016).

<sup>11</sup> 80 Fed. Reg. 80710 (Dec. 28, 2015).

The Proposed Rule should clearly state the authority and roles of BIS and OEE. A few of the many references to actions that may be taken by BIS or OEE, include:

- “If OEE determines that there is insufficient evidence ....”<sup>12</sup>
- “If OEE determines that a violation may have occurred ....”<sup>13</sup>
- “BIS will afford the Respondent an opportunity to respond to a proposed charging letter.”<sup>14</sup>
- “BIS may seek a civil monetary penalty if BIS determines that a violation has occurred ....”<sup>15</sup>
- “BIS may refer the matter to the Department of Justice ....”<sup>16</sup>
- “BIS may seek sanctions listed in § 764.3 of the EAR [and]take the following actions ....”<sup>17</sup>
- “OEE may require as part of a settlement agreement ... In those cases OEE may suspend or defer a portion of all of the penalty amount ....”<sup>18</sup>

#### 4. The Proposed Rule Fails to Provide a Realistic Penalty Matrix for “Egregious” Violations.

The Proposed Rule sets a fixed penalty of one-half the statutory maximum, which appears to be too inflexible, and may result in cases unlikely to be settled because of the unrealistically high penalty for cases involving multi-million-dollar transaction values. For example, in a case like Balli Aviation, Ltd., which involved unlawful export of 747 aircraft to Iran,<sup>19</sup> the Proposed Rule matrix would set a penalty in the hundreds of millions of dollars. A better choice may be to prescribe a range for egregious penalties, "from applicable schedule amount to applicable statutory maximum."

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<sup>12</sup> Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, Revision of Supplement No. 1 to Part 766 of the Export Administration Regulations (hereinafter Proposed Rule), 81 Fed. Reg. 80710-80718, § 766.II.A, at 80713 (Dec. 28, 2015)

<sup>13</sup> *Proposed Rule*, *supra* note 12, § 766.II.C, at 80714.

<sup>14</sup> *Id.*, § 766.II.C, at 80714.

<sup>15</sup> *Id.*, § 766.II.D, at 80714.

<sup>16</sup> *Id.*, § 766.II.E, at 80714.

<sup>17</sup> *Id.*, § 766.II.F, at 80714.

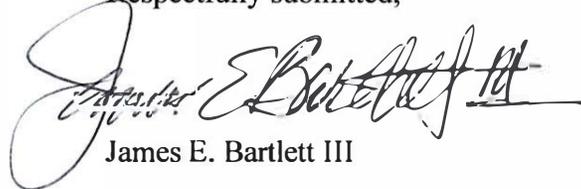
<sup>18</sup> *Id.*, § 766.II.F, at 80714.

<sup>19</sup> *British Firm Managed to Sell, Deliver a 747 to Iran*, World Tribune, Feb. 8, 2010, available at <http://bit.ly/1XQyGAS> (“Balli Aviation Ltd., a subsidiary of Britain's Balli Group, has pleaded guilty to the illegal export of a Boeing 747 aircraft from the United States to Iran. In a plea bargain, Balli agreed to pay a \$2 million fine and placed on corporate probation for five years. ... Balli was fined \$17 million, \$15 million of which was part of a civil settlement with the Commerce Department and Treasury Department.”). See also David W. Mills, Assistant Sec’y for Export Enforcement, U.S. Dep’t of Commerce, Remarks Before the Bureau of Industry and Security Annual Update Conference (Sept. 1, 2010), <http://1.usa.gov/1Q9Nho7> (“We issued a Temporary Denial Order to stop that transfer, using this unique administrative authority to name the Balli Group, its involved subsidiaries and principal officers, and Mahan Air and its front company. Consequently, we were successful not only in interdicting the transfer of three additional aircraft from a third country to Iran, but also in effectively grounding the three aircraft already there.”)

5. The Proposed Rule Contains Grammar and Punctuation Errors, and Fails to Follow *Government Printing Office (GPO) Style Manual* Rules.

A list of spelling, grammar, and usage errors will be mailed to BIS under separate cover.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James E. Bartlett III". The signature is fluid and cursive, with a long horizontal stroke at the end. It is positioned above the printed name "James E. Bartlett III".

James E. Bartlett III



February 26, 2016

Regulatory Policy Division  
Bureau of Industry and Security  
U.S. Department of Commerce  
Room 2099B  
14th Street and Pennsylvania Avenue NW  
Washington, DC 20230

**Subject: Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, RIN 0694-AG73**

**Reference: Federal Register / Vol. 80, No. 248 / Monday, December 28, 2015 / Proposed Rules**

The Boeing Company (“Boeing”) appreciates the opportunity to provide comments on proposed revisions by the Bureau of Industry and Security (“BIS”) to Supplement No. 1 to Part 766 of the Export Administration Regulations (“EAR”), which sets forth penalty factors to be considered when deciding how to disposition administrative enforcement cases. Overall, Boeing welcomes the predictability and clarity that these guidelines will provide. As stated in the proposed guidelines, BIS intends to align its civil penalty determinations with those issued by the Department of the Treasury Office of Foreign Assets Control (“OFAC”). Historically, those guidelines have withstood the test of time and using them as a general model makes sense.

As we understand the proposed approach, BIS would first decide whether an enforcement case should be categorized as egregious or non-egregious. It would also look at whether or not the apparent violations had been voluntarily disclosed by the exporter. These two factors, taken together with the *transaction value* (defined as the total U.S. dollar value of the transaction) and the maximum applicable penalty for each violation, as determined by law<sup>1</sup>, would be used to calculate a “base amount” for assessing penalties in the case. Finally, BIS would ascertain how many apparent violations of the EAR had occurred.

### **Factors Related to “Egregious”**

BIS includes proposed criteria to determine egregious conduct as:

- “willful or reckless violation of law”;
- “awareness of conduct giving rise to an apparent violation”;

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<sup>1</sup> See continued applicability of “International Emergency Economic Powers Act” (“IEEPA”).

- “harm to regulatory program objectives”; and
- “individual characteristics of the parties involved”

We do not take issue with such criteria. We do, however, have two comments. First, we would like to see more fidelity around the fourth criteria as to “individual characteristics”. There is likely more than one way in which to read that criteria so amplification in the final guidelines would be welcomed.

Second, some note that these same criteria appear to be part of your analysis a second time, after determining the base penalty amount, to adjust the final penalty amount. Our question then is does this not risk essentially penalizing a company twice for the same factors; first by using the four factors to deem a case egregious, then again to increase the base penalty? We recommend, therefore, that the Department address this in one of two possible ways. First, it could limit these four factors to only one of the two phases. Alternatively, it could establish an internal mechanism to safeguard against the inadvertent stacking of these factors – perhaps with a monetary limit after employing the factors the first time in the base phase.

### **Number of Violations**

The proposed guidelines indicate that BIS retains the discretion to determine how many violations have occurred in a given enforcement case. The concept of what constitutes a legal “count” in a violation of law is one that is too complex to address here and likely beyond the scope. However, we ask BIS to consider the following: what is an equitable manner in which to determine the number of violations?

For instance, if an incorrect Export Control Classification Number (“ECCN”), price, or product description has been entered in multiple fields of a license application or AES filing will each of those errors be counted as a single export violation or as multiple separate violations? Alternatively, what if three shipments of the same commodity were exported to the same end user authorized under the same *expired* license? Will that be counted as three violations or one?

Resolution of this question would go a long way in allaying industry concern that violations, even if deemed not egregious, will not result in unexpectedly large monetary penalties.

### **Transaction Value**

Finally, we turn to the proposed definition of “Transaction Value”. We will not repeat it here but rather pose the following questions in no particular order:

- In the proposed definition, what transaction is the “subject transaction”?
- How will the referenced documents (*e.g.*, commercial invoices, bills of lading, signed Customs declarations, or similar documents) be used in determining value?
- How will BIS reconcile inconsistent information found in these related documents?
- At what point in BIS’s internal deliberations will the transaction value be considered as “not otherwise ascertainable”?
- Will the disclosing or investigated party be allowed an opportunity to speak to that issue before the conclusion is reached?
- How will “market value” and “economic benefit” be evaluated?

As to transactions involving technology, the value of a transaction identified on commercial invoices, Customs declarations, or similar documents *may reflect the value of the media transferred instead of the technical data itself*, especially in situations where the data is not being sold, but is being used for offshore production or some other related activity.

We hope that these comments and questions will prove helpful in the finalization of the guidelines. Please do not hesitate to contact Janelle Gamble in Boeing’s Arlington, VA office at 703-465-3224 or at [janelle.f.gamble@boeing.com](mailto:janelle.f.gamble@boeing.com) with any questions.

Sincerely,



Bryon Angvall  
Director, Global Trade Controls

February 18, 2016

Regulatory Policy Division  
Bureau of Industry and Security  
U.S. Department of Commerce  
Room 2099B  
14<sup>th</sup> Street & Pennsylvania Avenue NW  
Washington, DC 20230

Re: RIN 0694-AG73

Dear Sir or Madam,

Thank you for the opportunity to submit comments concerning the proposed rule *Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, Revision of Supp. No. 1 to Part 766 of the EAR*.

Based on my experience as a former director of the Office of Export Enforcement and as a private attorney who has advised clients on compliance issues, voluntary self-disclosures, and settlement of administrative enforcement actions, I offer for your consideration the following recommendations.

Overall, the proposed rule is excellent. It would provide significant support for the Government's efforts to enforce the EAR, and for exporters' good faith efforts to comply with those regulations.

That said, there are three ways in which the proposed rule could be improved.

1. Base Penalty: Egregious Case

The proposed rule would restrict OEE's discretion too much in egregious cases. Concerning egregious cases where a voluntary self-disclosure (VSD) is made, the proposed rule sets the penalty at one-half of the applicable statutory maximum. This would not provide OEE with any discretion to seek a penalty below that fixed figure, regardless of the mitigating factors that might be present.

Likewise, concerning egregious cases where no VSD is made, the proposed rule sets the penalty at the applicable statutory maximum. OEE would not have the discretion to adjust the proposed penalty downward based on mitigating factors.

This needlessly rigid approach would undercut the Government's ability to impose appropriate civil penalties in precisely those cases where tempered judgment is most needed, namely, factually complex cases OEE has determined to be egregious.

I recommend providing OEE with more discretion when it seeks to impose penalties in egregious cases. This can be accomplished by revising IV. Civil Penalties, B. Amount of Civil Penalty, 2. Monetary Penalties in Egregious Cases and Non-Egregious Cases, a. Base Category Calculation and Voluntary Self-Disclosures, to read as follows:

iii. In an egregious case, if the apparent violation is disclosed through a voluntary self-disclosure, the base amount shall be an amount between one-half the transaction value up to one-half of the statutory maximum penalty applicable to the violation.

iv. In an egregious case, if the apparent violation comes to OEE's attention by means other than a voluntary self-disclosure, the base amount shall be an amount between the applicable schedule amount up to the statutory maximum penalty applicable to the violation. (Emphasis supplied)

For your consideration, I offer the following reasons for these revisions:

- Egregious cases can, and they often do, involve complex sets of facts. In complex factual situations, it is more likely than not that OEE will have to consider both aggravating and mitigating factors when making its determinations about the amount of the civil penalty to seek to impose. According to IV.B.1 of the proposed rule, in making its determination that a case is egregious, OEE would give substantial weight to Factors A (willful or reckless violation of the law), B (awareness of conduct at issue), C (harm to regulatory program objectives), and D (individual characteristics). The proposed rule states “A case will be considered an ‘egregious case’ where the analysis of the applicable Factors, with a focus on Factors A, B, and C indicates that the case represents a particularly serious violation of the law calling for a strong enforcement response.” Without some flexibility in a factually complex egregious case, OEE might be unable to seek a civil monetary penalty that takes into account its determinations about all of the aggravating and mitigating factors that are present.
- The proposed rule would hamper the resolution of cases where the Government seeks to impose criminal as well as civil penalties. If OEE cannot make some adjustments to its proposed civil penalty in an egregious case, this could limit the Government’s options for seeking a comprehensive or “global settlement” of all criminal and civil penalties.

2. Confusing use of “BIS” and “OEE”

The proposed rule uses “BIS” ambiguously, which is confusing to all concerned parties in enforcement matters. Perhaps the source of confusion comes from Part 766, Administrative Enforcement Proceedings. Section 766.2 defines “BIS” in this manner:

Bureau of Industry and Security (BIS). Bureau of Industry and Security, U.S. Department of Commerce (formerly the Bureau of Export Administration) and all of its component units, including, in particular for purposes of this part, the Office of Antiboycott Compliance, the Office of Export Enforcement, and the Office of Exporter Services.

This is not the best definition in the EAR. It commits the logical fallacy of equivocation, where the meaning of a word is changed during the course of an argument, with the different meanings being used to support an ill-founded conclusion.

As Lewis Carroll illustrated in a dialogue between Alice and the White Queen in Through the Looking Glass and What Alice Found There (1871):

“It’s very good jam,” said the Queen. “Well, I don’t want any today at any rate.” “You couldn’t have it if you did want it,” the Queen said. “The rule is jam tomorrow and jam yesterday, but never jam today.” “It must come sometimes to ‘jam today,’” Alice objected. “No, it can’t,” said the Queen. “It’s jam every other day: today isn’t any other day, you know.”

Naming three component units of BIS separately and then renaming them collectively as one entity does not help the reader understand exactly who in BIS is responsible for doing what in the administrative enforcement procedures described in Part 766.

In the proposed rule, it appears that sometimes “BIS” refers to OEE. Yet at other times “BIS” appears to refer to other parts of BIS, which are not identified, or perhaps to the Commerce Department’s Office of Chief Counsel, which advises BIS and represents BIS in enforcement proceedings, but is not a unit administered by BIS. Using “BIS” and “OEE” precisely can eliminate this confusion.

By way of comparison, Part 764 uses these two names correctly. For example, EAR section 764.5(a) provides that

BIS strongly encourages disclosure to OEE 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 by OEE.

The first sentence sets forth the broad, high-level policy of BIS to strongly encourage VSDs. The sentence then pivots, to tell you that the particular office within BIS to which you must submit your VSD is OEE.

The second sentence identifies the particular organizational unit of BIS, namely, OEE, which is responsible for determining what administrative sanctions will be sought. Please note that it does not say that “BIS” will make determinations about sanctions. This sentence makes it clear that OEE bears full – and sole -- responsibility for implementing the broad VSD policy of BIS.

One especially glaring error the proposed rule makes in substituting “BIS” for “OEE” is found in II. Types of Responses to Apparent Violations, E. Criminal Referral, which states “In appropriate circumstances, BIS may refer the matter to the Department of Justice for criminal prosecution.” Only OEE, as the designated criminal enforcement authority of BIS, can make what

properly could be termed a “referral” of a case to the Department of Justice for possible criminal prosecution, not “BIS.” For an example of how to do it correctly, please see EAR section 764.5(d)(5), which provides that, in a VSD situation, “OEE” may refer the matter to the Department of Justice for criminal prosecution.

Other confusing misuses of “BIS” are found, in a jumbled fashion, in III. Factors Affecting Administrative Sanctions. In each instance, “OEE” should be used instead of “BIS” because reference is made to the particular investigative and sanctions responsibilities of OEE, and not to BIS. For example:

- “As a general matter, BIS will consider some or all of the following Factors in determining the appropriate sanctions in administrative cases....”
- “BIS will consider a Respondent’s apparent willfulness or recklessness in violating, attempting to violate, conspiring to violate, or causing a violation of the law.”
- “Was there a deliberate effort by the Respondent to hide or purposely obfuscate its conduct in order to mislead BIS, federal, state, or foreign regulators, or other parties involved in the conduct, about an apparent violation?”
- “Generally, the greater a Respondent’s actual knowledge of, or reason to know about, the conduct constituting an apparent violation, the stronger the BIS enforcement response will be....”
- But then two sentences later the proposed rule switches back to OEE: “Among the factors OEE may consider in evaluating

the Respondent’s awareness of the conduct at issue are....”  
(Emphasis added)

I recommend replacing all references to “BIS” with “OEE” in the proposed rule. For the sake of consistency and clarity, I also recommend that EAR section 764.5(e), which refers to Supp. No. 1 to Part 766, be revised to replace “BIS” with “OEE.” Further consistency and clarity could be achieved by revising section 766.2 to define organizational names precisely.

### 3. Revise the Matrix chart

At the end of the proposed rule, there is a chart, entitled “Base Penalty Matrix.” It is an excellent idea to provide a chart summarizing the new guidance, as this facilitates the training of exporters.

First, I recommend making the following minor revisions to the Matrix to make it easier for the reader to understand:

- Delete the subheading “Egregious Case”
- Change the headings above the two columns by substituting “Non-Egregious” for “NO” and “Egregious” for “YES”

Second, and consistent with the recommended revisions to the text of the rule discussed in 1 above, I recommend revising the text in boxes (3) and (4), which are in the “Egregious” (currently the “YES”) column:

- In box (3), insert “Between One-Half of the Transaction Value up to” before “One-Half of the Applicable Statutory Maximum”

- In box (4), insert “Between the Applicable Schedule Amount up to the” before “Applicable Statutory Maximum”

If BIS makes the revisions suggested above, I believe the new guidance will prove to be highly effective.

Thanks and best regards,

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**BEFORE THE  
DEPARTMENT OF COMMERCE  
BUREAU OF INDUSTRY AND SECURITY**

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**DOCKET NO. 151204999-5999-01**

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**GUIDANCE ON CHARGING AND PENALTY DETERMINATIONS IN  
SETTLEMENT OF ADMINISTRATIVE ENFORCEMENT CASES,  
REVISION OF SUPPLEMENT NO. 1 TO PART 766 OF THE EXPORT  
ADMINISTRATION REGULATIONS**

**COMMENTS OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS  
ASSOCIATION OF AMERICA, INC.**

The National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA” or “Association”) submits these comments in response to the Proposed Rule (“PR”) published in this docket December 28, 2015 (80 Fed. Reg. 80710).

As relevant here, the NCBFAA is the national trade association representing the interests of freight forwarders, non-vessel operating common carriers (“NVOCCs”) and indirect air carriers (“IACs”) in the international shipping industry. The NCBFAA’s 1,000 regular members and 28 affiliated regional associations are directly affected by the proposed changes to the Guidelines that the Bureau of Industry and Security (“BIS”) and its Office of Export Enforcement (“OEE”) are contemplating.

The NCBFAA appreciates the opportunity to provide its comments and appreciates BIS’ efforts to align its penalty enforcement Guidelines with those promulgated by the Office of Foreign Assets Control (“OFAC”). At the same time, for the reasons stated below, the NCBFAA is concerned that certain of the proposed changes, while well intended, may ultimately create an unduly rigid enforcement mechanism. As expressed in the PR, the OEE appears to be exchanging its current flexible methodology for addressing enforcement issues for a somewhat

rigid, formulaic process that would likely lead to more enforcement cases being initiated and ratchet up the amounts of penalties in the interest of achieving uniformity. But, just as there is mounting criticism in numerous quarters that the Department of Justice Sentencing Guidelines improperly and unfairly deprive judges of the ability to vary sanctions based on the myriad of factors present in different prosecutions, the NCBFAA is concerned that a similar degree of inflexibility may result from the PR. Similarly, the Association is concerned that BIS' stakeholders could be exposed to sizable penalties for violations that are currently resolved without agency action or by a warning letter with no commensurate benefit to agency objectives.

Specifically, and as explained in greater detail in this comment, the Association is concerned primarily with the following:

- having OEE issue warning letters even in cases where OEE concedes there may not have been a violation;
- basing monetary penalties on the dollar value of transactions any express recognition that the transaction value will likely vary significantly for different participants to the transaction;
- diminishing the role and importance of voluntary self-disclosures;
- coercing settlements of enforcement matters by threatening to present new charges and increased penalties; and
- seeming to remove some of the factors OEE considers in determining whether violations are related.

Under the current Guidelines in Supplement No. 1 to Part 766, OEE is afforded a great degree of discretion in matters relating to the determination of whether an administrative enforcement is warranted and the amount of penalties appropriate under given circumstances.

To date, the NCBFAA believes that the agency has done a good job in promoting compliance and deterring future violations by using common sense and its understanding of the subtleties of the industry while reserving the ability to impose significant sanctions for the relatively few “bad” cases. Moreover, BIS has been able to achieve its compliance goals without imposing unduly harsh financial and regulatory burdens on stakeholders. The Association is concerned that the PR would upend this well-established system by removing discretion and creating a relatively inflexible process that limits OEE’s ability to respond appropriately to the variety of circumstances arising in export transactions.

The following constitutes the Association’s views on the five main issues that warrant further review.

#### **I. Types of Responses**

Perhaps this is only a matter of phraseology, but the discussion in the PR about the possible types of OEE responses to violations seems less clear than what appears in the current Guidelines.

Under both the existing Guidelines in 15 C.F.R. Part 766 Supp. 1 and the PR, when OEE determines that there is insufficient evidence to conclude that a violation has occurred, it will issue a “no action” letter and close the file. It appears, however, that there would now be a subtle, but perhaps significant, difference in OEE’s use of the warning letter response. Under the existing Guidelines, a warning letter might be issued where there was an *apparent* violation of a technical nature or where a voluntary self-disclosure is submitted and there are no so-called aggravating factors exist. And, the existing Guidelines go on to state that “OEE will not issue a warning letter if it concludes, based on available information, that a violation did not occur.” The PR, however, appears to change the threshold test for issuing a warning letter from one in which some violation did take place to one in which OEE determines that a violation *may* have

occurred but a civil penalty is not warranted. In other words, by moving from there “was an apparent violation” to “may have been a violation,” the PR appears to contemplate issuing warning letters even if no violation occurred.

While the difference between the two responses may seem fairly innocuous as neither “no action” nor a “warning letter” actions result in immediate monetary or other penalties, in practice the issuance of warning letter is a serious matter. Under the PR, the lack of previous violations is considered a mitigating factor that may allow the reduction of the base penalty by up to 25 %. A violation is considered a “first violation” if the respondent, among other things, did not receive a warning letter in three years preceding the date of the transaction giving rise to the violation. If, however, the respondent has received a warning letter sometime within the three years preceding the current violation, that reduction of penalty would not be available.

By this departure from the language in the current Guidelines – which provide that a warning letter would only be issued if OEE finds that “an apparent violation has occurred” – a company could be facing significantly higher penalties if it did commit a violation during the following three year period than would be the case if no warning letter had been issued. In other words, the mere issuance of a warning letter – whether or not there has actually been a violation – creates a non-compliance record for respondent that precludes its ability to use a clean record for mitigation purposes.

The NCBFAA accordingly suggests that the final Guidelines return to the existing language of necessitating that there at least be an “apparent” violation before a warning letter will be issued.

## **II. Determination of Civil Penalty**

The NCBFAA recognizes that that violations of the Export Administration Regulations are subject to the sanctions established by the International Emergency Economic Powers Act

("IEEPA") and that the Office of Foreign Assets Controls often uses the transaction value as the starting point for determining civil penalties. The Association is concerned, however, that establishing this as a rigid policy would deprive the OEE of the necessary discretion and flexibility to assess penalties on a reasonable basis and will result in unfairly ratcheting up the penalty amounts in many situations where crucial national security interests are not involved.

As we understand the proposal, if the violation comes to OEE's attention via a VSD, the base amount of a proposed penalty – and the starting point for settlement negotiations – would be one-half of the transaction value, capped at a maximum base amount of \$125,000 per violation. If the violation comes to OEE's attention via means other than a VSD, the base amount would be the applicable schedule amount, depending on the transaction value (i.e., \$1,000 with respect to a transaction valued at less than \$1,000; \$10,000 with respect to a transaction valued at \$1,000 or more but less than \$10,000; etc.) capped at a maximum base amount of \$250,000.

The tying of the base penalty amount to the transaction value would be particularly problematic for forwarders if OEE always uses the value to the exporter as the standard. As BIS is well aware, the transaction value to a forwarder of any given export is significantly less than the value of the same transaction to the exporter and its customer. The value of any export transaction to a forwarder is typically limited to some marginal additive to the freight and logistical costs of third parties, whereas the value to the exporter and its customer is the value of the goods being exported. As the proposal does not address this difference in the role of these parties, OEE might take the position going forward that there is no distinction. If so, the proposed Guidelines may result in the agency's imposition of severely disproportionate penalties on forwarders.

For example, assume a freight forwarder is asked to handle a shipment of a piece of equipment worth \$1,000,000. Under the PR, if the exporter of this shipment commits a non-egregious violation which OEE deems warranting enforcement, it could be liable for \$125,000 in penalties, subject of course to the consideration of the various mitigating and aggravating factors. When viewed against the \$1,000,000 transactional value for the exporter, using \$125,000 as a starting point may not be disproportionate. On the other hand, if the same transactional value is used to determine a starting point for a non-egregious violation committed by the forwarder, especially a forwarder that acts only as the AES filing agent and takes on no “exporter” responsibilities under 15 C.F.R. §758.3, the amount of \$125,000 would be wildly excessive when viewed against the true transactional value to the forwarder. Indeed, for many forwarders, penalties of that magnitude could drive the company out of business.

Forwarding fees almost always represent a minor fraction of the value of goods being exported. Yet, unless a forwarder is willfully involved in a conspiracy to export controlled items in violation of the EAR or other sanctions programs, there seems little reason to link the forwarder to the value of the goods in those instances where some actionable non-compliance does occur. The Association does not disagree with BIS’ view that forwarders play an important role in furthering the goals of the EAR and helping to prevent unauthorized exports. Nonetheless, unless there is some egregious behavior by a forwarder, the Guidelines should embody some sense of proportionality in determining the base amounts of a proposed penalty.

The Association accordingly suggests that the transaction value, for the purpose of determining the base amount of a proposed penalty, be defined in a way that accounts for differences in the financial stake in an export transaction as between exporters and their customer on the one hand, and freight forwarders on the other.

### **III. Voluntary Self-Disclosures**

Under the current Guidelines voluntary self-disclosures (“VSDs”) are afforded “great weight” in determining what action, if any, is to be taken to address violations. Because a VSD is treated as a significant mitigating factor, submitting one for the relatively minor violations in which forwarders are typically involved (such as failing to note license numbers on AES submissions, accidentally misdelivering licensed cargo even if the goods are recovered, failing to recognize that some cargo may be controlled and require ECCNs) usually result in the issuance of a warning letter rather than a significant penalty or other administrative action. These are human error types of infringements and, given the enormous volume of international shipments, it is not surprising that these types of mistakes do take place. Yet, these types of errors normally do not tend to compromise national security, economic or political concerns. BIS properly notes in the PR that the purpose of mitigating enforcement responses in VSD cases is to encourage the “notification to OEE of apparent violations about which OEE would not otherwise have learned.” Further, “OEE’s longstanding policy of encouraging the submission of VSDs involving apparent violations is reflected by the fact that, over the past several years, on average only three % of VSDs submitted have resulted in a civil penalty.”

Perhaps unintentionally, the PR appears to change this. Under the proposal, VSDs not only would lose their treatment as “great weight” mitigating factors, but would cease to be considered mitigating factors altogether. Instead, it appears that the disclosure of a violation in a VSD would only be taken into account for the purpose of determining the base amount of a civil penalty. In that regard, a VSD would be afforded a deduction of 50% in the transaction value for non-egregious violations or, for egregious cases, 50% of the statutory maximum. The only exception under the PR would be VSD cases without any aggravating factors, which will continue to result in warning letters issued by the agency.

The effect of this change would appear to be significant, as OEE would lose the discretion and flexibility necessary to give appropriate responses to minor violations. Given the extensive list of aggravating factors provided in the PR, a case without an aggravating factor of some kind is almost unimaginable. Since the PR indicates that warning letters will no longer be issued in response to violations involving an aggravating factor, most cases would result in imposition of monetary penalties even though at the moment the vast majority of these cases are being closed with a “no action” or a “warning letter” issued by the agency.

For example, under the PR, OEE would be required to impose a penalty on a forwarder for violating the regulations by inadvertently misdelivering a licensable item to a wrong party even if the goods are recovered, because that act would likely be deemed to involve an aggravating factor with implications for the U.S. national security or foreign policy. In contrast, under the current Guidelines, the usual responses to this type of violation have been a “no action” or a “warning letter.”

Similarly, as a significant number of inadvertent violations committed by freight forwarders result from conflicting data provided by shippers or inadvertent mistakes in inputting search terms in denied party software, the aggravating factor of “having a reason to know based on readily available information” could be present in most cases. Again, OEE would apparently be compelled to impose a penalty, as a “no action” or a “warning letter – the likely responses under the current Guidelines – would not be an option in the future due to the presence of an aggravating factor.

This departure from the existing treatment of VSDs would have significant adverse consequences for both the industry stakeholders and BIS. Although BIS indicates that it does not expect that adoption of these Guidelines would increase the number of cases that are charged

administratively rather than closed with a warning letter, the NCBFAA believes that the agency may have underestimated the effect of the PR. The reservation of issuance of warning letters only in response to violations without aggravating factors, coupled with the extensive list of circumstances and behaviors that amount to such aggravating factors and the new base point for calculating penalties, would almost necessarily result in an increased number of cases proceeding to the penalty or adjudication stage.

And, once a decision is made to initiate enforcement action, it appears that OEE would no longer have flexibility in negotiating penalty amounts. Even where a case would be initiated as a result of a VSD, the PR would fix the available reduction of the penalty amount at a maximum of 50%. The Association recognizes that the PR also provides for a limited list of mitigating factors; however, as mitigating factors combined may not exceed 75% of the base penalty, forwarders would still face considerable penalties in the future that would not be the case under the existing Guidelines.

Consequently, the proposed change would likely result in a significant decrease in the number of VSDs submitted by industry participants. Since VSDs would no longer be recognized as mitigating factors to which the agency attributes great weight, but rather would merely play a role in decreasing the base penalty, parties may reconsider whether to come forward with disclosures. In many instances, at least with respect to some of the usual EAR issues that pertain to the export process, the fact that some violation has occurred is normally discovered after the fact by a forwarder during its routine compliance audit. Under the present Guidelines, a forwarder would likely determine to submit a VSD and take corrective action, such as amending the relevant AES transmission and providing correct ECCNs, etc. But, if the submission of a VSD necessarily means that the forwarder will be subject to an enforcement proceeding and a

likely penalty (the amount of which could well be significant, as discussed above in Section II), the calculus for coming forward changes. Many companies may elect to roll the dice and take their chances that OEE will not discover what occurred. That result is not in any one's interest. To the contrary, the submission of VSDs should be encouraged, not discouraged.

#### **IV. Settlement Provisions**

BIS noted in the PR that if a case does not settle before issuance of a charging letter but proceeds to adjudication, the resulting charging letter may include more violations than alleged in the proposed charging letter. Moreover, BIS stated that “[p]enalties for settlements reached after the initiation of an enforcement proceeding and litigation through the filing of a charging letter will usually be higher than those described by these Guidelines.”

The Association understands the desire of BIS to promote early settlements in order to preserve the agency's resources. However, the Association believes that codifying a process that threatens to broaden the scope of charges or demand a higher penalty in cases where a respondent does not settle after a proposed charging letter is issued seems unduly coercive. As proposed, this practice could put inappropriate pressure on a respondent to settle a case even where it has a legitimate defense to the disclosed charges or feels that the amount of the proposed penalty is excessive under those circumstances. While the efforts of BIS to promptly resolve cases without litigation are commendable, the agency should be careful about the process for doing so. Piling on additional charges just to coerce a settlement, where the respondent may have a legitimate defense or believes the demanded settlement amount is excessive, can be seen as an abusive use of the agency's discretion rather than just efficient. The NCBFAA suggests that BIS establish reasonable limits concerning when it is appropriate for OEE to tack on additional charges or seek higher penalties than originally proposed.

## V. Related Violations & Unrelated Violations

The PR provides that in cases involving multiple unrelated violations, OEE is more likely to demand a stronger enforcement response, including a denial order. While the NCBFAA recognizes BIS's reasoning that a number of unrelated violations may indicate systemic compliance issues, it is important that the Guidelines clearly differentiate between truly unrelated multiple violations and multiple violations arising out of the same fact pattern.

The current Guidelines note the factors that BIS would take into consideration in deciding whether or not the violations are related by providing that in exercising its discretion BIS "typically looks to factors such as whether the violations resulted from knowing or willful conduct, willful blindness to the requirements of the EAR, or gross negligence; *whether they stemmed from the same underlying error or omission*; and whether they resulted in distinguished or separate harm." (emphasis added.) This language, relating to the same underlying error, has not been retained in the PR. The reason for the omission of this phrase has not been stated, but the NCBFAA nevertheless thinks it is important that this principle not be lost.

Situations in which the determination of whether several violations are related arise fairly frequently in the forwarding industry. For instance, where a respondent forwarder does not realize that its IT program inadvertently inserted inaccurate EEI data by default unless the export clerk manually overrode the entries, it is likely that the erroneous entries of the exact same nature would appear on the AES submissions for subsequent shipments. Under the current Guidelines, such violations would likely be considered related and accordingly would probably not result in the increased penalties. Under the PR, however, it is unclear whether BIS would reach the same conclusion. That would be an unfortunate result and, again, lead to situations where penalty amounts are pushed upwards without any concomitant, salutary benefit of enhancing compliance.

**CONCLUSION**

The NCBFAA agrees that having transparency on how and when penalties are assessed is generally a good idea, but nonetheless is concerned that rigid adherence to some formula is likely to create a number of unfair and unduly harsh results. It is important that BIS and OEE maintain some flexibility so that all administrative enforcement is not artificially placed in a “one size fits all” matrix, the value of prior disclosures is not diminished and that the institution of penalty cases and the amounts of penalty assessments are not increased in the name of uniformity. The Association accordingly urges BIS to recognize and address these concerns in its final rule.

Respectfully submitted,



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AMERICA, INC.

Date: February 24, 2016



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February 26, 2016

U.S. Department of Commerce  
Bureau of Industry and Security, Regulatory Policy Division  
Room 2099B, 14<sup>th</sup> Street and Constitution Avenue, NW  
Washington, DC 20230

Dear Ms. Norma Curtis:

COMMENTS REGARDING THE PROPOSED RULE ON GUIDANCE REGARDING  
ADMINISTRATIVE ENFORCEMENT CASES – **RIN 0694-AG73**

On December 28, 2015, DOC/BIS published its proposed rule revising Supplement No. 1 to Part 766 of the Export Administration Regulations, Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases in the Federal Register. See 80 Fed. Reg. 248. Our comments herein are provided on behalf of the Pacific Northwest National Laboratory (PNNL) in Richland, Washington. PNNL is managed by Battelle Memorial Institute for the U.S. Department of Energy's Office of Science under a Management and Operations (M&O) contract. PNNL addresses many of America's most pressing issues in energy, the environment, and national security through advances in basic and applied science. Founded in 1965, PNNL employs approximately 4,300 staff and has an annual budget of more than \$1 billion. The PNNL research mission includes Fundamental and Computational Sciences, Energy and Environment, and National Security, and is staffed with leading experts in the fields of chemical and molecular sciences, chemical engineering, biological systems science, climate change science, environmental subsurface science, applied materials science and engineering, applied nuclear science and technology, advanced computer science, visualization, and data systems engineering and integration, and large-scale user facilities/advanced instrumentation. Through these capabilities, we develop science and technology that enables the world to live prosperously, safely, and securely.

**Our primary comment is to recommend an expansion of Mitigating Factor G or a new Mitigating Factor that considers a Respondent's prior voluntary cooperation with U.S. federal law enforcement agencies on export control matters beyond the specific course of conduct in question.**

For over a decade, PNNL has conducted research in support of the U.S. Department of Energy National Nuclear Security Administration to define self-regulatory approaches that encourage the regulated community to go beyond minimum regulatory compliance with their export control

obligations. One major element of our research has been to analyze the information sharing approaches between industry and government. We have conducted dozens of interviews with U.S. suppliers of controlled dual-use commodities and published several studies on this topic.<sup>1, 2</sup> Our research indicates that the proposed rule misses an opportunity to further BIS' regulatory goals.

Investigative leads provided by the public represent an important tool used by the U.S. Government to enforce export regulations. BIS' Office of Export Enforcement has stated that tips from the regulated community regarding suspicious activities "help our investigations" and that "we need [industry's] support"<sup>3, 4</sup> in identifying suspicious activities. Other federal law enforcement agencies with export-related authorities also conduct outreach to regulated entities to encourage information sharing. For example, the U.S. Department of Homeland Security's Project Shield America program actively encourages industry and academia to report suspicious inquiries to ICE "as quickly as possible" while the FBI establishes "tripwire" relationships with those private businesses and individuals who can provide information when "a risk may be developing into a WMD threat."<sup>5, 6</sup>

Though some firms do voluntarily share tips with the federal government, others have told us in interviews that they do not always share suspicious requests. Some company representatives are concerned that if they pass tips to law enforcement, law enforcement will use those tips as a pretext to investigate other company activities, exposing the company to liability. Representatives also voiced their perception that the federal government does not value cooperation because it does not appear to review the tips provided. For a company, there is no perceived risk associated with simply ignoring a suspicious request, while sharing this information with the federal government takes time and effort and may lead to further scrutiny from law enforcement. From the perspective of some regulated entities, keeping quiet appears to serve their interests better than saying something.

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<sup>1</sup> Kurzrok, Andrew and Gretchen Hund. "Stopping Illicit Procurement: Lessons from Global Finance." *Arms Control Today* 44, no. 5 (June 2014): 13-17. Reprinted in *WorldECR* 36 (Nov/Dec 2014): 26-29.

<sup>2</sup> Morris FA, AM Seward, and AJ Kurzrok. 2012. "A Nonproliferation Third Party for Dual-Use Industries: Legal Issues for Consideration." PNNL-21908. Pacific Northwest National Laboratory, Richland, WA.

<sup>3</sup> "Reporting Violations Form." U.S. Department of Commerce Bureau of Industry and Security. Accessed February 18, 2016. Available online at: <http://www.bis.doc.gov/index.php/component/rsform/form/14?task=forms.edit>.

<sup>4</sup> Mills, David. "Remarks at the 2015 Update Conference." 2015 Update on Export Controls and Policy. Washington, D.C. November 3, 2015. Available online at: <https://www.bis.doc.gov/index.php/about-bis/newsroom/speeches/173-about-bis/newsroom/speeches/speeches-2015/947-david-w-mills-remarks-at-the-2015-update-conference-2>.

<sup>5</sup> "Shield America – A Partnership to Protect America." U.S. Immigration and Customs Enforcement. Last updated January, 2009. Accessed February 18, 2016. Available online at: <http://www.ice.gov/doclib/project-shield/pdf/shield-america-brochure.pdf>.

<sup>6</sup> "Key Programs." U.S. Federal Bureau of Investigation. Accessed February 18, 2016. Available online at: <https://www.fbi.gov/about-us/investigate/terrorism/wmd/key-programs>.

The administrative enforcement guidelines represent an opportunity to provide a concrete incentive to regulated entities to encourage them to go beyond minimum compliance and share tips with the federal government. Therefore, OEE may consider a new factor within Mitigating Factor G or a new Mitigating Factor to cover “Prior Cooperation on Export Control Enforcement.” **The new factor or Mitigating Factor could consider the question “Has the Respondent previously made substantial voluntary efforts to provide information to federal law enforcement authorities in support of U.S. export control legislation and regulations?”** Specifically articulating that BIS will consider prior voluntary cooperation during an administrative enforcement proceeding would encourage potential Respondents to undertake a highly desirable behavior that is not legally mandated.

Though certain elements of the proposed guidelines as drafted may support the goal of encouraging cooperation, none are equivalent to discrete consideration of prior voluntary export control cooperation as a mitigating factor in enforcement cases, as proposed above. Specifically:

- BIS could apply Mitigating Factor M to make a discretionary decision to recognize a Respondent’s prior contributions to U.S. national security. However, the potential for Factor M to be used in this way is unlikely to persuade an already hesitant firm to voluntarily share suspicious activities with law enforcement, especially without direct language indicating that BIS is likely to use this factor to that effect.
- Factor 3 of Mitigating Factor G (“Did the Respondent provide substantial assistance in another OEE investigation of another person who may have violated the EAR?”) could be construed to apply to a prior, unrelated instance of assistance. However, this factor may not be compelling to a Respondent if their cooperation (such as providing tips) did not lead to an active investigation or was with a different law enforcement agency and not OEE. Some companies report exclusively to one law enforcement agency because they have a trusting relationship with a specific agent or field office.
- Recognizing that the factors specifically listed within Mitigating Factor G are “among” the factors that BIS “may” consider—rather than guarantees of consideration—BIS could choose to exercise its judgment and acknowledge prior exceptional cooperation even if it did not lead to an OEE investigation. However, it is unreasonable to expect that a Respondent would expect this Mitigating Factor to be invoked if the cooperation was with another federal agency.

The decision by a regulated entity to provide export enforcement information to any federal law enforcement agency supports U.S. national security, foreign policy, and economic goals. Given the stated intent of OEE policy to reward exceptional cooperation by including it as a mitigating factor in its guidelines, the OEE should specifically enumerate the various types of cooperative behavior it desires from the regulated community. As currently written, the guidelines do not. While cooperation after an apparent violation can be highly valuable, proactive cooperation when an entity first identifies a suspicious request can protect unwitting U.S. companies from making mistakes later.

Therefore, we strongly recommend that the proposed rule expressly enumerate that prior export control cooperation with any federal law enforcement agency is a mitigating factor that could be taken into account.

If you have any questions, please contact Andrew Kurzrok at (206) 646-5225 or Gretchen Hund at (206) 528-3338.

Sincerely,



Steven D. Cooke  
Assistant General Counsel

SDC/amb

cc: Andrew Kurzrok  
Gretchen Hund

From: Steven Pelak <SWPelak@hollandhart.com>  
Sent: Friday, February 26, 2016 5:56 PM  
To: PublicComments  
Cc: Norma Curtis  
Subject: RIN 0694-AG73 -- Comments to Proposed Rule regarding Guidance on Charging and Penalty Determinations, Supp. No.1 to Part 766 of the EAR

Dear Ms. Curtis,

I write to submit comments in response to the proposed revisions to the Department of Commerce/Bureau of Industry and Security's "Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases", Supplement No. 1 to Part 766 of the Export Administration Regulations ("EAR"). I note that my comments reflect solely my personal views and are offered as a private citizen of our great Republic and do not reflect the views of any clients or my law firm.

You and your colleagues should be commended upon undertaking the effort to refine and improve further the Guidelines for Charging and Penalty Determinations. You have rightly and properly focused upon transparency and consistency in the Guidelines. The revised Guidelines appear to secure well the essential mission of the Office of Export Enforcement ("OEE") at BIS, as you have described in the December 28, 2015 Federal Register Notice: "detecting, investigating, preventing, and deterring the unauthorized export and reexport of the U.S.-origin items to parties involved with: (1) Weapons of mass destruction programs; (2) threats to national security or regional stability; (3) terrorism; or (4) human rights abuses."

My comments thus are limited to two items of relatively small note to which you may wish to devote further consideration: (A) the Further Encouragement of Voluntary Self-Disclosures and (B) Transparency and Consistency in the Description of the Administrative Enforcement Process.

**A. The Further Encouragement of Voluntary Self-Disclosures.**

The OEE/BIS is an important part of our federal government's collection of information in the service of our national security. With the movement of certain arms and munitions from the U.S. Munitions List to regulation under the EAR, that role has only increased in recent years. With that role in mind, I respectfully recommend that the proposed Guidelines be revised to encourage further the submission of voluntary self-disclosures of EAR violations.

Specifically, I respectfully suggest that OEE/BIS consider further decreasing the base amount of the civil monetary penalty in instances involving voluntary self-disclosures. As currently written, the proposed Guidelines read as follows:

"In a non-egregious case, if the apparent violation is disclosed through a voluntary self-disclosure, the base amount

shall be one-half of the transaction value, capped at a maximum base amount of \$125,000 per violation."

"In an egregious case, if the apparent violation is disclosed through a voluntary self-disclosure, the base amount shall be one-half of the statutory maximum penalty applicable to the violation."

To best serve OEE/BIS's principal mission of detecting, investigating, preventing, and deterring the unauthorized export of strategic dual-use technology to our adversaries and to arm our nation's intelligence community and military services and planners with additional information about military and dual-use technology improperly made available to foreign nationals, the Guidance should be structured to place PARAMOUNT focus and incentive upon voluntary self-disclosures. Understanding that less than five percent of voluntary self-disclosures annually may result in a civil penalty, the proposed Guidelines nonetheless should provide maximum incentive to a for-profit commercial business to encourage voluntary self-disclosures.

To that end, I respectfully recommend the following revision to the proposed Guidelines concerning the calculation of base penalty amounts for voluntary self-disclosures:

(i) In a non-egregious case, if the violation is disclosed through a voluntary self-disclosure, the base amount should be no greater than 10% of the transaction value and capped at a maximum of \$25,000 per violation; and

(ii) In an egregious case, if the violation is disclosed through a voluntary self-disclosure, the base amount should be no greater than 10% of the statutory maximum penalty applicable to the violation.

Under the proposed revision, OEE/BIS will maintain sufficient flexibility to increase the ultimate penalty as warranted in matters involving voluntary self-disclosures based on the presence of aggravating factors and certain general factors or the absence of mitigating factors. At the same time, the reduction in the anticipated base amount will provide a further strong and persuasive incentive upon commercial actors to disclose their EAR violations.

Particularly for small commercial businesses, one should not underestimate the importance of the calculated base amount in the decision-making process of a small business as it considers whether to undertake the time, energy, and financial expense of self-disclosing a violation. In light of the paramount interest of the OEE/BIS and its military and intelligence community partners in securing such information, every reasonable incentive should be employed to encourage companies to submit voluntary self-disclosures. Reducing the base amount to 10% of the transaction value in non-egregious violations and 10% of the applicable statutory maximum penalty in egregious violations represents, in my view, such a reasonable incentive. As wisely noted by OEE/BIS in the December 28 Federal Register Notice, "VSDs are a compelling indicator of a person's present intent and future commitment

to comply with U.S. export control requirements." Drawing additional small businesses into the Tent-of-Voluntary Self-Disclosures will aid the national security and further cement more companies' commitment to comply with U.S. export controls.

#### **B. Transparency and Consistency in the Description of the Administrative Enforcement Process.**

In its December 28 Federal Register Notice, OEE/BIS wisely notes that it is revising its Guidance "to make civil penalty determinations more predictable and transparent to the public." To a small business or to any person facing a governmental penalty process, one of the most important features of a transparent and fair governmental adjudicatory process is the identification of the initial decision-maker. In other words, who determines, as an initial matter, the type of response or administrative action to an apparent EAR violation?

In describing possible responses to apparent violations, it appears that the proposed Guidelines may not consistently delineate the role of OEE versus BIS generally. For instance, the proposed Guidelines describe various types of responses to apparent violations and state that the "type of enforcement action initiated by OEE will depend primarily on the nature of the violation." 80 Fed.Reg. at 80713 (within the section titled "II. Types of Response to Apparent Violations"). Although that passage of the proposed Guidelines suggests that OEE is the initial locus or place of decision for an enforcement action, the text following in the proposed Guidelines is not consistent in describing the office or actor within the Bureau of Industry and Security which initially determines the appropriate enforcement action.

The proposed Guidelines describe seven actions or responses (A through G) which may arise as a result of an apparent EAR violation. The proposed Guidelines describe OEE as the relevant actor or decision-maker with regard to a "No Action" response and a "Warning Letter" response, e.g., "If OEE determines that there is insufficient evidence . . ." and "If OEE determines that a violation may have occurred but a civil penalty is not warranted . . ." Yet, for responses involving an "Administrative Enforcement Case", "Civil Monetary Penalty", or "Criminal Referral", the initial Commerce Department actor is described more generally as "BIS". For instance, the proposed Guidelines state: "If BIS determines that a violation has occurred . . . , BIS may initiate an administrative enforcement case"; "BIS may seek a civil monetary penalty if BIS determines that a violation has occurred . . ."; and "In appropriate circumstances, BIS may refer the matter to the Department of Justice . . ."

One of the essential characteristics of a fair administrative penalty process is transparency with regard to the initial decision-making authority. By use of the acronym "BIS" rather than "OEE" in describing when an administrative enforcement case, civil monetary penalty, or criminal referral may be sought, the proposed Guidelines create potential ambiguity and inconsistency concerning the identification of the initial actor or decision-making authority within BIS.

Although one might read the proposed Guidelines to suggest that the appropriate "type of enforcement action" will be "initiated by OEE", the use of "BIS" rather than "OEE" to describe the most serious administrative responses (i.e., administrative enforcement action, monetary penalty, and criminal referral) inserts ambiguity and uncertainty into the administrative enforcement process. Particularly in the arena of governmental enforcement and imposition of penalties, the public interest as well as the interest of the administrative agency are best served by clarity in the identification of the initial decision-maker and the avoidance of any suggestion that the initial decision-maker may be changed depending upon the parties or matter involved. Whether the initial actor within the Bureau of Industry and Security with regard to determining those three noted administrative responses should be the OEE, the Deputy Assistant Secretary, or the Assistant Secretary for Export Enforcement, others more experienced than I can say. Regardless of that choice, the actor should be noted and set forth specifically in the Guidelines rather than by a general reference to "BIS".

Again, you and your colleagues are to be commended on the excellent revisions to the Guidance on Charging and Penalty Determinations. Speaking as a private citizen, thank you for those efforts and, more generally, all that you do on behalf of the People in this important arena.

Thanks, Steve

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February 25, 2016

Ms. Hillary Hess  
Director  
Regulatory Policy Division  
Room 2099B  
Bureau of Industry and Security  
U.S. Department of Commerce  
14th Street & Pennsylvania Ave., N.W.  
Washington, D.C. 20230

Re: Revisions Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, Revision of Supplement No. 1 to Part 766 of the Export Administration Regulations (*Federal Register* Notice of December 28, 2015; RIN 0694-AG73)

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Dear Ms. Hess:

The Semiconductor Industry Association (SIA) is the voice of the U.S. semiconductor industry, one of America's top export industries and a key driver of America's economic strength, national security, and global competitiveness. Semiconductors – microchips that control all modern electronics – enable the systems and products we use to work, communicate, travel, entertain, harness energy, treat illness, and make new scientific discoveries. The semiconductor industry directly employs nearly a quarter of a million people in the U.S. In 2015, U.S. semiconductor company sales totaled \$166 billion, and semiconductors make the global trillion dollar electronics industry possible. SIA seeks to strengthen U.S. leadership of semiconductor manufacturing, design, and research by working with Congress, the Administration and other key industry stakeholders to encourage policies and regulations that fuel innovation, propel business and drive international competition.

SIA is pleased to submit the following public comments in response to the request for public comments issued by the Commerce Department's Bureau of Industry and Security ("BIS") on proposed revisions to guidance on charging and penalty determinations in settlement of administrative enforcement cases based on violations of the Export Administration Regulations (EAR).<sup>1</sup>

The Proposed Guidance indicates that the base penalty depends on whether the violation is egregious or non-egregious. Should the Rule be adopted, an exporter would have the ability to

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<sup>1</sup> "Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, Revisions of Supplement No. 1 to Part 766 of the Export Administration Regulations," 80 Fed. Reg. 80,710 (Dec. 28, 2015) ("Proposed Guidance").

assess whether a violation or set of violations will be considered egregious based on past Office of Export Enforcement (OEE) behavior for similar violations. This enhanced visibility would reduce uncertainty and would be an important benefit to exporters.

The Proposed Guidance indicates that transaction value will be critical in determining the base penalty amount in non-egregious cases – either directly (if a voluntary self-disclosure was made) or indirectly (if a voluntary self-disclosure was not made). Where a violation is related to a transaction that has been reported into the Automated Export System (“AES”), BIS should rely upon that value as the transaction value unless there is evidence indicating that the reported AES value was erroneous or otherwise flawed.

In cases involving exports or deemed exports of technology, the value of the export transaction is difficult to decipher. It is unclear how BIS will determine transaction value of technology exports. While BIS notes that it may employ “the economic benefit derived by the Respondent” in such situations,<sup>2</sup> such a standard is extremely subjective and open to wide-ranging results. SIA urges BIS to provide more definitive guidance on how it will determine the transaction value of technology exports.

Cumulative mitigating factors are possible but the order in which they are captured and applied in the mathematical formula is not clear. In addition, and to further complicate the equation, there is a cumulative mitigation cap at 75%. BIS should not determine violations to be egregious on the basis of charging multiple violations on a single export. The consideration of not including past violations of an acquired entity where an acquirer takes reasonable action to discover, correct and disclose violations is a welcomed addition.

Among the factors BIS indicates it may consider in evaluating apparent willfulness or recklessness is Prior Notice – *i.e.*, whether the Respondent was on notice or “should . . . reasonably have been on notice” that the conduct at issue constituted a violation of U.S. law.<sup>3</sup> It would be inappropriate for BIS to determine that a company acted with willfulness or recklessness because it “should reasonably have been on notice” that its conduct violated U.S. law. SIA recognizes that the EAR is a strict liability statute and that a violation of the EAR remains such even if the entity committing the violation was unaware that it was violating the law. However, ignorance should not be equated with willfulness or recklessness. Only if a company actually was on notice and clearly understood that its conduct violated U.S. law should BIS determine that willfulness or recklessness was involved.

BIS indicates that a warning letter,

*represents OEE’s enforcement response to the apparent violation, unless OEE later learns of additional information concerning the same or similar apparent violations.*<sup>4</sup>

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<sup>2</sup> *Id.* at 80,713.

<sup>3</sup> Proposed Guidance at 80,715.

<sup>4</sup> Proposed Guidance at 80,714.

BIS also indicates that a warning letter “does not constitute a final agency determination as to whether a violation has occurred.”<sup>5</sup> Such a situation necessarily places an exporter in a state of “limbo” uncertain as to whether in fact a violation was committed and therefore uncertain as to how to proceed in future similar situations. SIA urges BIS to eliminate this uncertainty by ensuring that a warning letter provide guidance as to whether BIS believes a violation occurred, and, if so, limiting the warning to the substance of the violation.

SIA appreciates the opportunity to comment on the Proposed Revisions and looks forward to continuing its cooperation with the U.S. Government on export control reform. Please feel free to contact the undersigned or Joe Pasetti, Director of Government Affairs at SIA, if you have questions regarding these comments.

Sincerely,



Cynthia Johnson  
Co-Chair, SIA Export Control Committee



Mario R. Palacios  
Co-Chair, SIA Export Control Committee

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<sup>5</sup> Id.

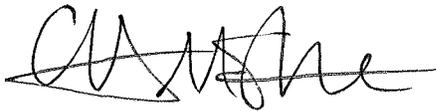
**Comment on Proposed Rule: Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, Revision of Supplement No. 1 to Part 766 of the Export Administration Regulations**

**RIN 0694-AG73**

I suggest adding language to the proposed rule to provide more flexibility as to Boxes 3 and 4 in the penalty matrix. As currently drafted, the numbers there (particularly in box 4) will often be very large, sometimes clearly too high to use as a reasonable basis (even as a base penalty) for the ultimate penalty. In those situations, OEE may be faced with the prospect of feeling obliged to apply the other factors in such a way as to reduce the base penalty to a more appropriate level, which could produce a result-oriented exercise not entirely consistent with the purpose of the guidelines.

One way to approach this would be to insert the following phrase (underlined here) in section IV.B.2.a.iii of the proposed rule: “In an egregious case, if the apparent violation is disclosed through a voluntary self-disclosure, the base amount shall be an amount between one-half the transaction value up to one-half of the statutory maximum penalty applicable to the violation”; and, to insert the following phrase (underlined here) in section IV.B.2.a.iv of the proposed rule: “In an egregious case, if the apparent violation comes to OEE’s attention by means other than a voluntary self-disclosure, the base amount shall be an amount between the applicable schedule amount up to the statutory maximum penalty applicable to the violation”. Corresponding changes can be made in boxes 3 and 4 of the Base Penalty Matrix. This will give OEE more flexibility in arriving at the base penalty amount.

Also, there seem to be a number of places in the proposed rule where references to “BIS” should instead be references to “OEE.” The proposed rule might benefit from another close review in that regard.

A handwritten signature in black ink, appearing to read 'Charles Steele', with a stylized, cursive script.

Charles Steele

February 23, 2016

February 24, 2016

Regulatory Policy Division  
Bureau of Industry and Security  
U.S. Department of Commerce  
Room 2099B  
14th Street and Pennsylvania Avenue NW  
Washington, DC 20230

Reference: [RIN0694-AG73](#)

Greetings,

The attempt to make 15 CFR Part 766 more transparent seems for the most part to be successful. We would like to address several areas which we feel need closer scrutiny and deliberation before a final decision is reached.

In regard to the Amended 766, the BIS is afforded the opportunity to consider a lesser charge on “Related Violations” but it is also given the opportunity to consider them as separate chargeable offenses. While the intent to make “Related Violations” a lesser overall penalty is a proper pursuit in penalization, the option to make inchoate offenses separate in penalty is unfair to the respondent. The EAR, by virtue of new regulations, could add on so many subcategories to its reporting requirements that an infinite number of offenses could be triggered by one clerical mistake. Please consider “Related Violations” just that, without the opportunity to make them separate offenses.

One response to apparent violations makes mention of a “No Action” decision. Where the OEE takes “no action” in some voluntary self-disclosures (VSD) as well as some non-voluntary disclosed cases, the no-action determination represents a “final determination”. The new proposed action allows the OEE to put time back on the clock anytime it desires and reprocess a “final determination”. It is not feasible for exporters to not have closure at some point. This practice is no less than double jeopardy.

We would also ask that you review the policy proposal to bring Administrative Enforcement cases to adjudication. It has been suggested that settlements of these cases will be allowed at various stages until adjudication begins. The BIS seems to coerce a respondent to settle before adjudication or be threatened with further charges, thereby refusing procedural due process of the original charges.

The item, from a freight forwarder's view, which needs the most clarification is the liability facing that of the freight forwarder. If our reading of the proposed change is to hold a forwarder responsible for the same monetary value of a shipment as that of the exporter, it is sorely out of balance. A forwarder has no stake in the ownership of the cargo and therefore should not be penalized based upon the same level as an exporter.

Your review of these items would be greatly appreciated and we trust that you would advise us of your findings.

Respectfully yours,

Gary F. Brown  
Executive Vice President