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New BIS Enforcement Policy Further Encourages Disclosures and Whistleblowers

By **Thomas J. McCarthy**, **Kimberly M. Myers**, **Cameron Peek**, **Mahmoud (Mac) Fadlallah**, **George E. Pence**, **Jonathan C. Poling**, **Jaelyn Edwards Judelson**, **Anne E. Borkovic**, **Susan M.C. Kovarovics**, **Nnedinma C. Ifudu Nweke**, **Shiva Aminian** and **Kevin J. Wolf**

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Key Points

- The U.S. Department of Commerce, Bureau of Industry and Security (BIS) issued a policy memo stating that it will now treat the deliberate nondisclosure of "significant" violations of the Export Administration Regulations (EAR) as an "Aggravating Factor" under its settlement guidelines. Companies that have violated the EAR should factor this into their decisions whether or not to disclose, as nondisclosure of matters with "significant" violations will carry an increased risk of a harsher penalty if the underlying violations are discovered by BIS.
- The policy memo also encourages parties to disclose EAR violations committed by third parties and observes that such disclosure could level the competitive playing field and qualify the disclosing party for favorable treatment in concurrent or future enforcement actions, including potential financial awards, through the Financial Crimes Enforcement Network (FinCEN), if the underlying conduct also relates to U.S. sanctions violations or Bank Secrecy Act violations.
- Companies should be aware that third parties may be motivated to disclose violations of others, even where the third party has no violations. This policy memo underscores that those who disclose **any** significant violations—their own or others'—may receive financial incentives and mitigation credit in related **or unrelated** future enforcement actions. Additionally, the failure to disclosure may be treated as an aggravating factor. In other words, companies who failed to disclose previously risked losing disclosure credit in a mitigation analysis. Now, the failure to disclose may be treated as an aggravating factor and **increase** the penalties for the violations.

BIS Will Treat Deliberate Nondisclosure of Significant EAR Violations as an "Aggravating Factor"

On April 18, 2023, the U.S. Department of Commerce, Bureau of Industry and Security (BIS) Assistant Secretary for Export Enforcement, Matthew Axelrod published a **policy memo** (the Memo) clarifying the policy of BIS regarding Voluntary Self-Disclosures (VSDs) and disclosures concerning third parties. Under the new policy described in the Memo, BIS intends to further incentivize companies to disclose "significant violations" of the Export Administration Regulations (EAR). Axelrod notes that "[w]hen someone chooses to file a VSD, they get concrete benefits; when they affirmatively choose not to file a VSD, we want them to know that they risk incurring concrete costs."

Specifically, with respect to VSDs, the Memo clarifies that, effective immediately, BIS will consider a company's deliberate decision not to disclose a "significant" possible violation of the EAR as an "aggravating factor" under **BIS's settlement guidelines** (Section III to Supplement No. 1 to Part 766 of the EAR). The Memo clarifies that BIS is not seeking to increase the number of VSDs disclosing minor or technical violations, and BIS encourages companies to report such instances of noncompliance in single, global disclosures, where possible.

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The Memo describes “significant violations” as violations that “reflect potential national security harm,” but does not define the term or provide concrete examples. The EAR also does not define this term, but suggests that BIS would consider an apparent violation to be “significant” if it involved an export that could negatively impact U.S. national security (e.g., undermining U.S. military superiority, endangering U.S. or friendly military forces, being used in military applications contrary to U.S. interests) or U.S. foreign policy (e.g., being used by a foreign regime to monitor communications of its population to suppress free speech and persecute dissidents) (Section III of Supplement No. 1 to Part 766, “Aggravating Factors” paragraph C.1 and C.2). Similarly, neither the Memo nor the EAR define the term “deliberate,” but the Memo suggests that BIS would find nondisclosure to be deliberate when a company “uncovers a significant possible violation but then affirmatively chooses not to file a VSD.” The lack of definitions of these terms will give BIS discretion in interpreting them and create questions for companies in how to understand when violations are “significant” or when nondisclosure will be considered “deliberate.”

Overall, this policy change puts greater pressure on companies to disclose the violations that come to their attention, especially where BIS could view the violations as “significant.” Where BIS has historically treated the filing of VSD as a mitigating factor in adjudicating potential administrative penalties (and will continue to do so in the future), it has not historically treated the decision **not** to file a VSD as an aggravating factor.

BIS Is Encouraging Disclosure of Third Parties’ Violations

The Memo also encourages individuals, companies and universities to report third parties’ violations of the EAR to BIS, emphasizing that such reporting carries benefits for the reporter. First, reporting competitors’ violations could help level the competitive playing field; BIS does not want parties to “suffer in silence when they’re forgoing sales because of [BIS’s] controls while their competitors continue to book revenue.”

Second, the Memo describes that efforts to provide information to enforcement authorities in support of U.S. export control regulations is an example of “Exceptional Cooperation with OEE,” one of the “mitigating factors” BIS considers in its settlement guidelines. As such, providing the Office of Export Enforcement (OEE) with tips that result in enforcement actions against third parties could result in BIS treating the disclosing party more favorably, should the disclosing party ever itself be the subject of an enforcement action. This is significant in that this “exceptional cooperation” is not necessarily limited to the set of facts that the disclosing party shares with BIS, but rather could extend to unrelated (past, present or future) conduct, essentially confirming that the act of disclosing can establish goodwill and possible penalty mitigation between the disclosing party and BIS.

Third, disclosure of violations of U.S. sanctions programs or the Bank Secrecy Act to the Financial Crimes Enforcement Network (FinCEN) or the Department of Justice (DOJ) could result in a financial award for the disclosing party. FinCEN is able to pay awards to whistleblowers whose information leads to enforcement of the regulations it enforces as well as “related actions.” This means that the FinCEN could pay awards related to export control violations, if the Departments of the Treasury or Justice take a qualifying action based on the disclosed information.

These benefits related to the disclosure of third party violations are not new developments and do not reflect any changes in BIS enforcement policy. These considerations have also factored into companies electing to respond to voluntary requests for information from BIS related to specific transactions or shipments of products. However, BIS’s reinforcement of these benefits, including its explicit linking of them to FinCEN financial rewards, is a signal to the public to further encourage parties to work with BIS to surface information related to violations by third parties. As such, it also serves as a powerful reminder to companies that choose not to disclose violations that the flow of information related to a potential violation might not be exclusively within their control.

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Guidance for Compliance Personnel

Decisions on whether to disclose potential EAR violations to BIS are often complex and multifaceted. They often involve significant resource commitments from exporters to investigate and prepare submissions to BIS that are complete and accurate. They can also involve significant factual and legal questions, particularly as the rules have continued to grow increasingly complicated in recent years.

The policy articulated in the Memo must be considered as part of the various factors regarding whether to disclose EAR violations to BIS. Exporters should incorporate an analysis of whether a violation is "significant" in their decisions about whether to disclose. In addition, exporters should ensure that the potential consequences of not disclosing are evaluated carefully, particularly because BIS could become aware of information related to their EAR violations through separate sources.

Decisions not to disclose should be carefully considered and documented in a manner that places the nondisclosing party in a position to defend itself against potential whistleblower claims and arguments by BIS that the decision should be treated as an aggravating factor.

Finally, companies should carefully review their notification, indemnification and confidentiality contractual provisions in light of this new approach to encouraging third-party disclosures, as these may play a role in determining whether to disclose the violations of someone else or in determining how to best position the company for the event that someone else discloses a violation made by the company.

If you have questions about this client alert, please contact any Akin lawyer or advisor below:

Thomas J. McCarthy
tmccarthy@akingump.com
+1 202.887.4047

Kimberly M. Myers
kmyers@akingump.com
+1 202.887.4423

Cameron Peek
cpeek@akingump.com
+1 202.887.4518

Mahmoud (Mac) Fadlallah
mfadlallah@akingump.com
+971 4.317.3030

George E. Pence
gpence@akingump.com
+1 310.552.6475

Jonathan C. Poling
jpoling@akingump.com
+1 202.887.4029

Jaelyn Edwards Judelson
jjudelson@akingump.com
+1 310.552.6477

Anne E. Borkovic
aborkovic@akingump.com
+1 202.887.4432

Susan M.C. Kovarovics
skovarovics@akingump.com
+1 202.887.4088

Nnedinma C. Ifudu Nweke
nifudu@akingump.com
+1 202.887.4013

Shiva Aminian
saminian@akingump.com
+1 310.552.6476

Kevin J. Wolf
kwolf@akingump.com
+1 202.887.4051

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