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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 766

[Docket No. 151204999-6179-02]

RIN 0694-AG73

Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This final rule revises the Bureau of Industry and Security's (BIS) guidance regarding administrative enforcement cases based on violations of the Export Administration Regulations (EAR). The rule rewrites that guidance in the EAR, setting forth the factors that the Office of Export Enforcement (OEE) considers when setting penalties in settlements of administrative enforcement cases and when deciding whether to pursue administrative charges or settle allegations of EAR violations. This final rule does not apply to alleged violations of regulations concerning restrictive trade practices and boycotts, which would continue to be subject to the guidance.

DATES: Effective date: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]

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SUPPLEMENTARY INFORMATION:

Background

The mission of the Office of Export Enforcement (OEE) at BIS is to enforce the provisions of the Export Administration Regulations (EAR), secure America's trade, and preserve America's technological advantage by detecting, investigating, preventing, and deterring the unauthorized export and reexport of 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. Export Enforcement at BIS is the only federal law enforcement agency exclusively dedicated to the enforcement of export control laws and the only agency constituted to do so with both administrative and criminal export enforcement authorities. OEE's criminal investigators and analysts leverage their subject-matter expertise, unique and complementary administrative enforcement tools, and relationships with other federal agencies and industry to protect our national security and promote our foreign policy interests. OEE protects legitimate exporters from being put at a competitive disadvantage by those who do not comply with the law. It works to educate parties to export transactions on how to improve export compliance practices, supporting American companies' efforts to be reliable trading partners and reputable stewards of U.S. national and economic security. BIS also discourages, and in some circumstances prohibits, U.S. companies from furthering or supporting any unsanctioned foreign boycott (including the Arab League boycott of Israel).

OEE at BIS may refer violators of export control laws to the U.S. Department of Justice for criminal prosecution, and/or to the Department's Office of the Chief Counsel for Industry and Security for administrative prosecution. In cases where there has been a willful violation of the EAR, violators may be subject to both criminal fines and administrative penalties.

Administrative penalties may also be imposed when there is no willful intent, allowing administrative cases to be brought in a much wider variety of circumstances than criminal cases. OEE has a unique combination of administrative enforcement authorities including both civil penalties and denials of export privileges. BIS may also place individuals and entities on lists that restrict or prohibit their involvement in exports, reexports, and transfers (in-country).

In this rule, BIS amends the EAR to update its Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases (the "BIS Guidelines") found in Supplement No. 1 to part 766 of the EAR in order to make civil penalty determinations more predictable and transparent to the public and aligned with those promulgated by the Treasury Department's Office of Foreign Assets Control (OFAC). OFAC administers most of its sanctions programs under the International Emergency Economic Powers Act (IEEPA), the same statutory authority by which BIS implements the EAR. OFAC uses the transaction value as the starting point for determining civil penalties pursuant to its Economic Sanctions Enforcement Guidelines. Under IEEPA, criminal penalties can reach 20 years imprisonment and $1 million per violation, and administrative monetary penalties can reach $250,000 (subject to adjustment in accordance with U.S. law, *e.g.*, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74, sec. 701)) or twice the value of the transaction, whichever is greater. Both agencies coordinate and cooperate on investigations involving violations of export controls that each agency enforces, including programs relating to weapons of mass destruction, terrorism, Iran, Sudan, Specially Designated Nationals and Specially Designated Global Terrorists. This guidance would not apply to civil administrative enforcement cases for violations under part 760 of the EAR – Restrictive Trade Practices and Boycotts. Supplement No. 2 to Part 766 continues to apply to enforcement cases involving part

760 violations. This guidance also will not apply to pending matters where, as of [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], there are ongoing settlement negotiations and a charging letter has not been filed.

Proposed Rule and Comments

On December 28, 2015, BIS published a proposed rule to amend the BIS Guidelines (80 FR 80710). BIS received eleven submissions commenting on the proposed rule.

Overall Approach and Relation to Export Control Reform

Comment: Several commenters, although making suggestions or raising concerns about specific provisions in the proposed rule, commended OEE and BIS for making the BIS Guidelines more transparent, predictable and consistent and for aligning them with OFAC's Economic Sanctions Enforcement Guidelines ("OFAC Guidelines"). One commenter noted that the OFAC Guidelines have "[h]istorically . . . withstood the test of time" and that "using them as a general model makes sense."

One submission, however, stated that the proposed rule fails to discuss how it advances the goal of Export Control Reform ("ECR") by not aligning the BIS Guidelines with the administrative penalties and procedures promulgated by the Department of State, Directorate of Defense Trade Controls ("DDTC") in the International Traffic in Arms Regulations ("ITAR"). The author submits that the alignment of BIS's enforcement policies and procedures with those of DDTC for enforcing export violations under the shared jurisdiction of BIS and DDTC would be more in line with the objectives of ECR.

Response: One of the primary goals of ECR is to transfer less sensitive military items from the United States Munitions List ("USML") to the more flexible licensing authority of the Commerce Department's Commerce Control List ("CCL"). ECR would thus enhance national

security by (i) improving interoperability of U.S. military forces with allied countries, (ii) strengthening the U.S. industrial base by, among other things, reducing incentives for foreign manufacturers to "design out" and avoid U.S.-origin content and services, and (iii) allowing export control officials to focus government resources on transactions that pose greater concern. This goal has been largely accomplished.

It does not necessarily follow, however, that the manner in which controls are enforced on the items transferred to the CCL from the USML should involve aligning BIS Guidelines with those enforcement policies and procedures of DDTC. The licensing and enforcement functions of all three regulatory agencies – DDTC, BIS and OFAC – are encompassed within the ECR initiative. All three have defined jurisdictional roles over licensing exports. BIS has maintained a robust enforcement posture regarding violations of the EAR, and its policies and practices – including with regard to voluntary self-disclosures ("VSDs"), consideration of mitigating and aggravating factors, settlements and the imposition of civil monetary penalties – have historically been much more closely aligned with those of OFAC.

As stated in the proposed rule, both BIS and OFAC administer their regulations under the authority of the International Emergency Economic Powers Act, and the OFAC Guidelines serve as the only other published example of enforcement policies and practices promulgated under that statute. It is therefore consistent with the principles of ECR to bring the BIS Guidelines further into alignment with the OFAC Guidelines, which are more recent than BIS's current Guidelines and account for the higher penalties set forth in the International Emergency Economic Powers Enhancement Act of 2007.

Furthermore, the "higher fences" principle of ECR, referring to the more focused and concentrated enforcement efforts around the more significant military items that remain on the

USML also applies to enforcement of items transferred to the CCL. Because of the more flexible licensing authority of the EAR that serves to facilitate trade (*e.g.*, License Exception STA), it is also paramount that the diversion risk with respect to such items of lesser military significance be monitored closely and that the deterrent effect of a strong enforcement response to violations be maintained.

Nevertheless, the proposed rule and this final rule share some characteristics with the enforcement policy of DDTC. Both DDTC and OEE have long placed great emphasis on the importance of VSDs, a policy that is reiterated and reinforced in the proposed rule and in this final rule. More generally, OEE sought to convey in the proposed rule the importance it places on the submission of VSDs, and underscored the fact that, over the past several years, on average only three percent of VSDs submitted have resulted in a civil monetary penalty. OEE does not expect that rate to change significantly, and OEE's practice is consistent with DDTC in responding to most VSDs submitted to it with a warning letter. Additionally, the proposed rule and this final rule provide that the use of funds that would otherwise be paid as a civil penalty may, in some cases, be suspended conditioned upon the respondent using funds in an equivalent amount for compliance activities required under the final order including improving internal compliance programs and conducting audits. Although such suspensions have been used by DDTC in the past, OEE has generally suspended penalties only due to inability to pay. For the foregoing reasons, BIS believes that aligning the BIS Guidelines with the OFAC Guidelines with the adoption of the DDTC practice noted above supports goals of the Export Control Reform Initiative and is making no changes in response to the comment that suggested otherwise.

Comment: One commenter stated that setting a base penalty amount based on whether a violation is egregious or non-egregious reduces uncertainty because exporters can assess whether

a violation would be considered egregious based on past Office of Export Enforcement behavior for similar violations.

Response: BIS agrees with this comment and notes that all settlement agreements, charging letters and final orders are posted in the BIS electronic Freedom of Information Act reading room on the BIS website for public access.

Voluntary Self-Disclosures

A significant change in the proposed rule was the introduction of the concept of base penalty amounts for egregious and non-egregious apparent violations and the principle of reducing the base penalty amount by one-half if the case is based on a VSD. Base penalty amounts could then be adjusted based on aggravating, mitigating and general factors (which could be either aggravating or mitigating). The existing guidelines treat a VSD as a mitigating factor of "GREAT WEIGHT."

Comment: Several commenters expressed concern over the rule's treatment of VSDs, stating that the rule would reduce the incentive for voluntary disclosure and that it seemed to diminish the importance of VSDs. Some stated that the rule would unduly restrict OEE's ability to consider all aggravating and mitigating factors present in a complex fact pattern because the determination of the base penalty amount is based on only four factors. Others indicated that the rule was likely to result in civil penalties in cases that currently receive only a warning letter. One commenter predicted that the proposed rule's treatment of VSDs could limit the government's options for seeking a "global settlement" in a criminal case. The commenters suggested several changes to the base penalty amount calculation and to the mitigating factors recognized by the guidelines to address, *inter alia*, the impact of the proposed guidelines on the

incentive to voluntarily self-disclose violations. Those specific proposals are addressed under the headings "Base Penalty Policy" and "Mitigating Factors" below.

Response: OEE has not changed its view regarding the importance of VSDs and believes that the concern expressed by the commenters that OEE appears to be diminishing the role and importance of VSDs is misplaced. According a VSD 50% mitigation up front in determining the base penalty amount does not "diminish" the importance that OEE accords VSDs. The proposed rule would simply formalize the long-standing practice of OEE to accord up to 50% mitigation to VSDs by assigning them "great weight" as a mitigating factor. While in most instances OEE's practice has been to assign 50% mitigation for the submission and completion of VSDs that meet the requirements of § 764.5, the proposed rule would remove the discretion to assign anything less than that, thus enhancing, not diminishing, the importance of VSDs, and providing that they will result in an initial 50% reduction in the base penalty amount of any penalty to be determined.

OEE continues to encourage the submission of VSDs by persons who believe they may have violated the EAR. The purpose of an enforcement action includes raising awareness, increasing compliance, and deterring future violations, not merely punishing past conduct. VSDs are an indicator of a person's present intent and future commitment to comply with U.S. export control requirements. The purpose of mitigating the enforcement response in voluntary self-disclosure cases is to encourage the notification to OEE of apparent violations about which OEE would not otherwise have learned. As stated in the proposed rule, the submission of VSDs is a critical component of OEE's ability to collect information in carrying out its national security mission. Investigative leads provided by the public, including in the context of VSDs, provide an important tool used by the U.S. Government to enforce export regulations. OEE also

is cognizant of the time, energy and financial expense of self-disclosing an apparent violation, especially when undertaken by small and medium enterprises.

OEE believes that the existing incentive of 50% mitigation is sufficient to encourage the submission of VSDs, which is further reinforced by the very low percentage of VSDs that result in civil monetary penalties. As noted above, over the past several years, on average only three percent of VSDs submitted have resulted in a civil monetary penalty. OEE does not expect that rate to change significantly as a result of these guidelines.

This final rule also makes changes to the formula for calculating the base penalty amounts and to the maximum effect of mitigating factors in response to the comments about their impact on VSDs and to comments suggesting that the base penalty amounts as proposed would provide OEE with insufficient flexibility in settlements. The changes to the base penalty amounts and impact of mitigating factors are discussed under the headings "Base Penalty Policy" and "Mitigating Factors" below.

Base Penalty Policy

Comment: Several commenters recommended changes to the proposed base penalty amounts. One commenter suggested that 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. Another stated that this formula could result in reduced prospects for settling cases because the penalty would be unrealistically high in cases with multi-million dollar transaction values. Another commenter suggested that this lack of flexibility could limit the government's options for seeking a comprehensive or "global" settlement of all civil and criminal penalties. To further encourage the submission of VSDs, one commenter advocated further decreasing the

base penalty amount of the civil monetary penalty in instances involving VSDs as set forth in the Base Penalty Matrix. A commenter also urged that a reference to VSDs be added to the BIS Guidelines for purposes of evaluating General Factor E. - *Compliance Program* and to Mitigating Factor F. *Remedial Response,* in determining an appropriate civil monetary penalty amount.

Commenters proposed three different changes to the base penalty amount calculation to address this perceived lack of flexibility.

One proposed change was to set the base penalty for an egregious case that results from a VSD within a range from one-half the transaction value up to one-half of the statutory maximum and to set the base penalty in an egregious case that results from some source other than a VSD within a range from the applicable schedule amount and up to the statutory maximum.

Another proposed change was to set the base penalty amount of the civil monetary penalty in non-egregious cases involving a VSD at no greater than 10 percent of the transaction value, capped at a maximum of $25,000 per violation and in egregious cases involving a VSD to set base penalty at no greater than 10 percent of the statutory maximum applicable to the violation.

A third proposed change was to set a single range for base penalties in egregious cases from the applicable schedule amount to the applicable statutory maximum.

Response: OEE agrees that the formula stated in the proposed rule may have been too rigid and/or unduly restricted OEE's discretion in settling cases, potentially resulting in cases unlikely to be settled because of the unrealistically high penalties in certain cases. OEE is also cognizant of the concern that the potential inflexibility of the proposed formula could have

limited the Government's options for seeking a comprehensive or "global settlement" of all criminal and civil penalties and the need to further encourage the submission of VSDs.

Accordingly, this final rule adopts a variation of the first of the proposals for calculating the base penalty amount noted above. The base penalty amount for an egregious case that results from a VSD will be changed from one-half the statutory maximum to a range of up to one-half of the statutory maximum. The base penalty amount for an egregious case that results from some source other than a VSD will be set at a range up to the statutory maximum whereas the proposed rule would have set the base penalty at the applicable statutory maximum. OEE believes that the adoption of this formula, along with changes related to the impact of mitigating factors on the penalty amount discussed below, will provide the degree of flexibility necessary to obtain a reasonable result in settlement negotiations.

OEE did not adopt the second proposal for calculating the base penalty amount which would have set the base penalty amount of the civil monetary penalty in non-egregious cases involving a VSD at no greater than 10 percent of the transaction value, capped at a maximum of $25,000 per violation and in egregious cases involving a VSD to set base penalty at no greater than 10 percent of the statutory maximum applicable to the violation. This proposal focused exclusively on cases based on VSDs and thus would not have addressed the need for greater flexibility in setting the base penalty amount for egregious cases that are not based on VSDs. In addition, this proposal would have set an extremely low base penalty amount for cases based on VSDs, which would then be subject to further adjustment based on other applicable factors. The selected proposal is in keeping with OEE's existing practice of a 50 percent reduction in the case of voluntary disclosures.

OEE did not adopt the third proposal, which would have set a single range from the applicable schedule amount to the applicable statutory maximum for all egregious cases whether based on a VSD or not. This proposal would have abandoned the principle of providing 50 percent reduction in base penalty amount in cases based on a VSD.

Aggravating Factors

Comment: One commenter stated that, under the proposed rule, a warning letter with no civil penalty could result only from a situation where there are no aggravating factors. The commenter stated that some aggravating factors are likely to be present in any transaction that results in a violation even though the violation does not result in harm to national security, economic or political concerns. The commenter listed some examples of conduct that might be construed as being within the scope of aggravating factor III.B.2 -- "having a reason to know based on readily available information." Those examples are: misdelivering goods that are recovered and incorrectly entering data into the Automated Export System. Freight forwarders often input information from conflicting data provided by shippers or make inadvertent mistakes in entering names into screening software. Under the current guidelines, the commenter asserted, these cases likely would result in a warning letter or a no action letter.

Response: The commenter is incorrect. OEE would continue to issue warning letters in many cases including cases with some level of aggravation. In determining whether to conclude enforcement action with a warning letter or a no action letter, OEE would consider all aggravating, general and mitigating factors that apply to the action at issue. OEE does not anticipate that new penalty guidelines would increase the number of administrative enforcement actions brought by OEE. OEE believes that no change to the regulatory text is needed to make this point.

Comment: One commenter stated that the determination that a company acted with willfulness or recklessness because it "should reasonably have been on notice" that the conduct was a violation of the EAR should be modified to limit the applicability of Factor A. *Willful or Reckless Violation of Law* to instances where the company was on notice and clearly understood that its conduct was unlawful. The commenter stated that determining that a company acted with willfulness or recklessness because it "should reasonably have been on notice" that its conduct violated U.S. law would not be appropriate. Ignorance, the commenter said, 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 OEE determine that willfulness or recklessness was involved.

Response: Use of the phrase "should reasonably have been on notice" as an example of conduct encompassed within the aggravating factor "*Willful or Reckless Violation of Law"* is adopted from the general factors set forth in the OFAC guidelines (*see* 31 CFR part 501, Appendix A, III.A.5). A higher threshold in BIS guidelines would create unnecessary inconsistencies between the agencies' policies and furthermore, OEE is not aware of any significant issue that OFAC's use of this language has created. Additionally, raising the threshold from "should reasonably have been on notice" to "was on notice" would unnecessarily increase the evidentiary burden on OEE. Therefore, OEE is making no changes to the rule in response to this comment.

Comment: One commenter observed that the first four factors (factors A, B, C and D in the proposed rule) upon which a determination of egregiousness may be made for purposes of determining the base penalty amount also appear to factor into the determination of the final penalty amount as aggravating factors. The commenter questioned whether this procedure risks penalizing the company twice for the same factors. The commenter recommended that the

factors be limited to one phase or the other or that an internal mechanism be used 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.

Response: As noted above, the proposed rule and this final rule differ in the method for determining the base penalty amount in egregious cases. The proposed rule would have set the base penalty amount at one-half of the applicable statutory maximum if the case was based on a VSD and at the statutory maximum if the case was based on something other than a VSD. Under this final rule, the base value in an egregious case will be an amount up to one-half of the applicable statutory maximum if the case is based on a VSD and an amount up to the applicable statutory maximum if the case is based on something other than a VSD. Under this procedure, substantial weight will generally be given to Factors A ("willful or reckless violation of law"), B ("awareness of conduct at issue"), C ("harm to regulatory program objectives"), and D ("individual characteristics"), with particular emphasis on Factors A, B, and C. 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. A determination by OEE that a case is "egregious" must have the concurrence of the Assistant Secretary of Commerce for Export Enforcement.

Aggravating factors A through D are thus germane at two stages of the process: first in determining whether a case is egregious or not and second in determining the degree of egregiousness. Once a case is determined to be egregious based on those factors, a range for determining the final penalty amount is established, either up to half the statutory maximum or up to the statutory maximum, depending upon whether or not the case was brought to OEE's attention pursuant to a VSD. The same factors will necessarily be considered in determining

what final penalty will be set within the prescribed range. A determination as to whether a case is egregious is separate and apart from an evaluation of the degree of egregiousness. This rule thus does not preclude consideration of any of the factors A through D in determining the final penalty amount.

General Factors

Comment: One commenter stated that General Factor D - *Individual Characteristics,* which is also the fourth criterion for determining whether a violation is egregious, likely could be read in more than one way and that some amplification in the final rule would be welcomed. The commenter did not pose any specific questions about this factor.

Response: The proposed rule discussed five illustrative factors that could be considered in assessing this criterion. They are: the respondent's commercial sophistication, the size and sophistication of its operations, the volume and value of its apparent violations relative to the volume and value of all of its transactions, its regulatory history, any other illegal conduct in connection with the export, and prior criminal convictions of the respondent. Given the infinite possibilities for variation in human behavior, OEE cannot predict in advance all of the possible characteristics of the parties involved in an apparent violation that will ever be relevant in determining whether that apparent violation is egregious. The factors discussed in the proposed rule were intended to provide reasonable guidance as to how OEE would apply this factor. The commenter did not note any specific ambiguity or uncertainty in the proposed regulatory text describing this factor. On that basis, OEE concludes that additional discussion would not likely provide sufficient additional information to be useful and is making no changes to the rule in response to this comment.

Comment: One commenter expressed concern that the proposed rule appeared to diminish the importance of VSDs and could thereby discourage activities or programs by regulated parties to discover violations. To remedy this situation, the commenter recommended that a reference to VSDs be added to the elements of General Factor E – *Compliance Program* and to Mitigating Factor F - *Remedial Response*.

Response: As stated above, the importance of VSDs has not diminished and OEE certainly encourages activities designed to uncover violations. Accordingly, this final rule adds references to VSDs to the elements of General Factor E - *Compliance Program* and to Mitigating Factor F - *Remedial Response*. This rule also provides that a fully suspended monetary penalty is possible with conditions in certain non-egregious VSD cases.

Comment: One commenter said that not including past violations of an acquired entity where an acquirer takes reasonable action to discover, correct and disclose violations is a welcomed addition.

Response: OEE acknowledges the comment.

Mitigating Factors

Comment: One commenter stated that tips and leads from industry are valuable to enforcement; however, the companies that provide them receive little or no benefit for doing so. The commenter recommended creating a clear incentive for companies to provide information that comes to their attention by adding as a specific mitigating factor the phrase "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?"

Response: OEE agrees with the commenter's reasoning on this issue. In this final rule, Mitigating Factor G is modified to include the question: "Has the Respondent previously made substantial voluntary efforts to provide information (such as providing tips that led to

enforcement actions against other parties) to federal law enforcement authorities in support of the enforcement of U.S. export control regulations?"

Comment: Another submission noted that in an apparent violation, a license exception may have been available but was not used or was used incorrectly. The commenter recommended that Factor H. License Was Likely to Be Approved be amended to acknowledge the availability of a license exception.

Response: OEE agrees that if a license exception that would have authorized the export was available at the time of export, but was not properly utilized or asserted by the respondent, that license exception availability should be treated as a mitigating factor. Accordingly, this final rule amends Mitigating Factor H by adding the question: "Would the export have qualified for a license exception?"

Comment: One commenter stated that the order in which mitigating factors are captured and applied in the mathematical formula is not clear. The commenter also stated that "to further complicate the equation, there is a cumulative mitigation cap at 75%."

Response: OEE believes that the order in which mitigating factors are considered will not affect the outcome of a case. Therefore this final rule does not specify the order in which the factors are to be considered. In recognition of the importance of voluntary self-disclosures, this final rule removes the proposed 75 percent limit on mitigation when the when the apparent violation is not egregious and investigation is based on a voluntary self-disclosure, but retains that limit in other cases.

Other Relevant Factors Considered on a Case-by-Case Basis

Comment: One commenter stated that violations should not be considered egregious on the basis of charging multiple violations on a single export.

Response: OEE agrees and would not consider multiple violations arising out of the same act in and of itself to constitute egregiousness. Consistent with current practice, for cases that settle before filing of a charging letter with an Administrative Law Judge, OEE will generally charge only the most serious violation per transaction. If OEE issues such a proposed charging letter and subsequently files a charging letter with an Administrative Law Judge because a mutually agreeable settlement cannot be reached, OEE will continue to reserve its authority to proceed with all available charges based on the facts presented. In this final rule, Section III.A.4 *Pattern of Conduct* has been modified to make this practice clear.

Comment: One commenter asserted that the criteria for determining whether violations are related would change under the proposed rule. The commenter noted that the current guidelines appear to use the criterion "whether they stemmed from the same underlying error or omission" to determine whether violations are related and stated that such language does not appear in the proposed guidelines. The commenter asserted that under the current guidelines, the insertion of inaccurate Electronic Export Information (EEI) data in many transactions because the respondent did not realize that a default value would have to be overridden likely would be considered related violations and probably would not result in increased penalties. The commenter stated that it is not clear whether the results would be the same under the proposed guidelines. Another commenter stated that the proposed rule would allow OEE to consider a lesser charge on related violations or it can consider them as separate chargeable offenses. The commenter stated that related violations should be lesser. The commenter asserted that the EAR could add on so many reporting requirements that one clerical mistake could result in an infinite number of violations. This would be unfair to the respondent. Related violations should not be treated as separate offenses.

Response: In certain situations where multiple recurring violations resulted from a single inadvertent error, such as misclassification, when determining whether to bring charges, OEE will generally regard that as one violation instead of multiple violations in determining if the matter is considered egregious. However, when determining a penalty, each violation is potentially chargeable. In this final rule Factor A.4 *Pattern of Conduct* is revised to make this point explicit.

Comment: A commenter questioned whether multiple shipments being exported to the same end user under an expired license would be counted separately or as one violation?

Response: OEE recognizes the importance of distinguishing between truly unrelated multiple violations and multiple violations arising out of the same fact pattern. OEE will continue to consider inadvertent, compounded clerical errors as related and not separate infractions for the purpose of determining if the case is egregious. In this final rule, Factor III.I *Related Violations* has been revised to make this point explicit.

No Action and Warning Letters

Comment: One commenter expressed appreciation of the introduction of "no action" determinations. To assist in emphasizing this option, the commenter recommended referring to it in the second sentence under heading "II. Types of Responses to Apparent Violations" and under the heading "III. Factors Affecting Administrative Sanctions"

Response: OEE agrees and this final rule adopts the recommendation.

Comment: One commenter stated that the guidelines appear to lower the threshold for issuing warning letters, resulting in the possibility of issuing warning letters in the absence of a violation. The commenter noted that current and proposed guidelines provide for a "no action" letter when OEE determines that there is insufficient evidence to conclude that a violation has

occurred. However, the commenter referred to a difference between the current and proposed guidance regarding letters. The current guidelines provide that "OEE will not issue a warning letter if, based on available information, it concludes that a violation did not occur." The proposed guidelines, state that "If OEE determines that a violation may have occurred. . . .OEE may issue a warning letter." The proposed guidelines do not explicitly state that OEE will not issue a warning letter based on its conclusion that a violation did not occur as appears in the current guidelines. The commenter asserted that this difference between the current and proposed guidelines could mean the issuance of warning letters in situations where a violation did not occur. If such is the case, the commenter observed the difference could be significant in future investigations because the proposed guidelines provide that generally the base penalty amount will be reduced by up to 25 percent in the Respondent's first violation and 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. The commenters recommend that the guidelines state that there must be at least an apparent violation before a warning letter is issued.

Response: OEE would not issue a warning letter based on its conclusion that a violation did not occur. OEE agrees, however, that the consideration of warning letters within a 3-year time frame for purposes of determining whether a Respondent is entitled to up to 25% mitigation as a "first offense" is inconsistent when the warning letter does not constitute a finding that a violation did occur, with an opportunity for the Respondent to respond to the allegation.

Accordingly, this final rule revises Section IV.B.2.b of the guidelines to provide that first offense mitigation will therefore be determined without regard to the prior issuance of warning letters received by that Respondent. Prior issuance of a warning letter may, however, evidence a

pattern and practice of non-compliance and failure to rectify compliance shortcomings and be considered aggravating under General Factor E. *Compliance Program* and Aggravating Factor A. *Willful or Reckless Violation of Law*. For example, if OEE alerted a Respondent to unlawful conduct through issuance of a warning letter and the current charges are a continuation of that conduct, or involve similar conduct, that fact may be taken into account.

Comment: One commenter observed that the statement in the proposed rule that warning letters will typically be issued for VSDs absent the presence of aggravating factors implies that in cases where aggravating factors are present, a civil monetary penalty would necessarily ensue.

Response: As discussed above, the commenter misunderstands the impact on VSDs. OEE issues a warning letter for almost all VSDs including those with aggravating factors. In recent years, OEE has only sought charges in a small percentage of VSD cases. While all cases charged had significant aggravating factors, many of the cases with warning letters also had aggravating factors, though less serious than in the cases charged. OEE does not believe that these guidelines will result in a significant change in the number of cases charged and is making no change to the guidelines in response to this comment.

Comment: Some commenters suggested that more certainty was needed with respect to the meaning of no action letters and warning letters. One commenter stated that the proposed rule would allow OEE to take no action if it determines that there is insufficient evidence to conclude that a violation has occurred, determines that a violation did not occur and/or, based on an analysis of the Factors outlined in Section III of the guidelines, concludes that the conduct does not rise to a level warranting an administrative response. However, the commenter asserted, OEE can "put time back on the clock anytime it desires and reprocess a 'final

determination.'" The commenter stated that exporters need closure at some point. This practice is no less than double jeopardy, the commenter asserted.

Another commenter noted that a warning letter does not constitute a final agency determination as to whether a violation has occurred. This leaves the recipient in a state of uncertainty as to whether a violation occurred and, therefore, how to proceed in similar situations in the future. The commenter requested that OEE eliminate that perceived uncertainty by ensuring that a warning letter provide guidance as to whether OEE believes a violation occurred, and, if so, limit the warning to the substance of the violation.

Response: As stated in the proposed rule, the majority of cases brought to the attention of OEE through VSDs result in the issuance of warning letters, containing a finding that an apparent violation may have taken place. No action letters are simply that: no action will be taken in cases where there is insufficient evidence to conclude that a violation may have taken place. The use of the words "apparent" and "may" simply reflect that reality. In instances where it appears to OEE that a violation(s) did occur but that pursuing a civil monetary penalty is not appropriate under the circumstances, a warning letter will also be issued.

Although warning letters and no action letters constitute the final OEE disposition of the matter, neither constitutes final agency action with respect to a violation of the EAR. To help clarify this point, this final rule refers to OEE's disposition when describing OEE's action with respect to warning letters and no action letters, and clearly states that these are not "final agency actions."

Neither the proposed rule nor this final rule state that OEE may resume an investigation into a matter concerning which it previously issued a no action letter "anytime it desires." The proposed rule text stated that "A no-action determination represents a final determination (OEE's

. . . disposition in this final rule) as to the apparent violation, unless OEE later learns of additional information regarding the same or similar transactions or other relevant facts." Reopening an investigation or inquiry because the enforcement agency learns of new relevant information does not constitute double jeopardy as that term is understood in connection with Fifth Amendment to the United States Constitution. OEE believes that no change to the rule is needed on this point.

Warning letters currently identify the transaction or conduct OEE believes violated the EAR and will continue to do so.

Transaction Value

Several commenters addressed the question of determining transaction value.

Comment: One commenter stated that where a violation is related to a transaction that has been reported into the Automated Export System (AES), that value should be relied upon as the transaction value unless there is evidence indicating that the reported AES value was erroneous or otherwise flawed because the commenter believed that approach to determining the transaction value is accurate. Two commenters pointed out the difficulty in determining the transaction value of the export or deemed export of technology. One commenter stated that the proposed rule standard of "the economic benefit derived by the Respondent" is extremely subjective and open to wide interpretation. The other commenter stated that "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." (Emphasis in the original.)

Response: This final rule amends the definition of "transaction value" by adding a reference to AES filings. However, it is impossible for OEE to determine in advance the appropriate method by which to value all exports or deemed exports of technology, particularly where the technology at issue is not traded widely enough to provide a basis for determining a market value, is being transferred to a firm related to the exporter, or is being transferred as part of a larger transaction involving an agreement to produce or repair a part or product. In such instances, OEE will have to apply the "the economic benefit derived by the Respondent" standard, which remains in this final rule.

Comment: Two commenters objected to penalizing a freight forwarder using the monetary value of a shipment, given that forwarding fees almost always represent a minor fraction of the value of goods being exported.

Response: OEE recognizes that the consequence of using the same transaction value for both forwarders and exporters may create the impression of disproportionate penalties on forwarders. However, OEE has and will continue to take into account that transaction values may not be indicative of the nature of a party's role in the transaction, including applying mitigation based on general factor D where appropriate. OEE believes that definition of "transaction value" provides adequate flexibility to achieve fair results and that a specific separate standard for freight forwarders is not needed. Accordingly, this final rule makes no changes in response to this comment.

Comment: One commenter raised six specific questions about how transaction value would be determined. OEE's response is set forth immediately following each question. OEE does not believe that any changes to the proposed rule are needed in response to these questions and this final rule makes none.

1. "In the proposed definition, what transaction is the 'subject transaction'"?

Response: The subject transaction is the transaction or transactions identified in a proposed charging letter or charging letter wherein OEE alleges that a violation occurred.

2. "How will the referenced documents (*e.g.*, commercial invoices, bills of lading, signed Customs declarations, or similar documents) be used in determining value"?

Response: In many cases, such documents will list a price or value that is likely to be the appropriate transaction value. However, in instances where OEE believes that the price or value listed in such documents is inaccurate or is otherwise inappropriate as a measure of transaction value, it may, in accordance with the definition, consider the market value of the items that were the subject of the transaction and/or, in limited situations, "the economic benefit derived by the Respondent" standard as noted above.

3. "How will BIS reconcile inconsistent information found in these related documents"?

Response: This will have to be determined on a case-by-case basis depending on the facts of each case.

4. "At what point in BIS's internal deliberations will the transaction value be considered as 'not otherwise ascertainable'"?

Response: This will have to be determined on a case-by-case basis depending on the facts of each case.

5. "Will the disclosing or investigated party be allowed an opportunity to speak to that issue before the conclusion is reached"?

Response: The respondent would have the opportunity to challenge OEE's transaction value determination during settlement negotiations or in pleadings before an administrative law judge.

6. “How will ‘market value’ and ‘economic benefit’ be evaluated”?

Response: OEE cannot determine in advance a method that always will be appropriate under any circumstance that may occur in the future. These determinations will have to be made on a case-by-case basis depending on the facts of each case.

Settlements

Two commentators expressed concern regarding the statements in the proposed Guidelines 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” and that “[i]f a case does not settle before issuance of a charging letter and the case proceeds to adjudication, the resulting charging letter may include more violations than alleged in the proposed charging letter.” The commenters stated that such practices could put inappropriate pressure to settle even if the respondent has a legitimate defense, or feels that the proposed penalty is excessive. They could constitute coercion and a denial of procedural due process. One commenter stated that BIS should establish reasonable limits concerning when it is appropriate for OEE to tack on additional charges or seek higher penalties than originally proposed.

Response: OEE notes that it is common in settlement negotiations for parties to seek early resolution in hopes of avoiding the expenditure of resources necessary to litigate a case. Doing so is not coercive, but the most efficient means of reaching resolution. It is common government practice for an agency, in an effort to reach settlement before trial, to propose a subset or sampling of charges, reserving the ability to bring a fuller set of charges should litigation prove necessary. It also is commonly recognized that the additional resources the government must expend to take a case to trial also can justify a penalty greater than the amount the agency may

have accepted prior to litigation. Both practices are designed to efficiently utilize limited government resources and provide an incentive for early settlements. OEE considers the totality of the circumstances in charging and penalty determinations, including any defenses raised in response to a proposed charging letter and any arguments made concerning the appropriate penalty levels. OEE is making no changes to the proposed rule in response to these comments.

Comment: Two commenters suggested that the proposed rule seemed to state or at least imply that cases could not or would not be settled once adjudication begins or once a decision is made to initiate an enforcement action.

Response: Cases may be settled after OEE decides to initiate an enforcement action or after administrative adjudication begins. Section II.C of the proposed rule and this final rule state: "Cases may be settled before or after the issuance of a charging letter. *See* § 766.18 of the EAR." OEE believes that no change to the text of the proposed rule is needed to address this point.

OEE and BIS

Comment: Several commenters stated that references to OEE and BIS in the proposed rule are confused and undefined. That it is difficult to understand exactly who in BIS is responsible for doing what in the administrative enforcement process.

Response: OEE is the organizational unit of BIS that has been delegated the responsibility for determining what cases will be referred to the Department of Justice for criminal prosecution and what administrative sanctions will be sought. The reference to BIS in this final rule is therefore changed in most instances to refer specifically to OEE. This change was made throughout the guidelines for ease of reference even though, for example under § 764.1 of the EAR, OEE does not issue penalties.

Stylistic change to the structure of the base penalty matrix.

Comment: One commenter proposed delete the subheading "Egregious Case" from the base penalty matrix and changing the headings above the two columns by substituting "Non-Egregious" for "NO" and "Egregious" for "YES." The commenter stated that this change would make the penalty matrix easier to understand.

Response:

This final rule addresses this matter by adding question marks immediately following the phrases "Egregious Case" and "Voluntary Self Disclosure," making clear that they are questions to which a yes or no answer is appropriate.

Rulemaking requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action," although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid OMB Control Number. This rule does not contain any collections of information.

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq., generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute. Under section 605(b) of the RFA, however, if the head of an agency certifies that a rule will not have a significant impact on a substantial number of small entities, the statute does not require the agency to prepare a regulatory flexibility analysis. Pursuant to section 605(b), the Chief Counsel for Regulation, Department of Commerce, certified to the Chief Counsel for Advocacy, Small Business Administration at the proposed rule stage that this rule would not have a significant impact on a substantial number of small entities. The rationale for that certification is at 80 FR 80710, 80712 (December 28, 2015) and is not repeated here. BIS received no comments on the certification. Consequently, BIS has not prepared a final regulatory flexibility analysis.

Export Administration Act

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013), and as extended by the Notice of August 7, 2015, (80 Fed. Reg. 48233 (Aug. 11, 2015)), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as

appropriate and to the extent permitted by law, pursuant to Executive Order 13222 as amended by Executive Order 13637.

List of Subjects in 15 CFR Part 766

Administrative practice and procedure, Confidential business information, Exports, Law Enforcement, Penalties.

Accordingly, this rule amends part 766 of the Export Administration Regulations (15 CFR parts 730-774) (EAR) as follows:

PART 766 – [AMENDED]

1. The authority citation for part 766 continues to read as follows:

Authority: 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 7, 2015, 80 FR 48233 (August 11, 2015).

2. Supplement No. 1 to Part 766 is revised to read as follows:

Supplement No. 1 to Part 766 – Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases

Introduction

This Supplement describes how the Office of Export Enforcement (OEE) at the Bureau of Industry and Security (BIS) responds to apparent violations of the Export Administration Regulations (EAR) and, specifically, how OEE makes penalty determinations in the settlement of civil administrative enforcement cases under part 764 of the EAR. This guidance does not

apply to enforcement cases for violations under part 760 of the EAR – Restrictive Trade Practices or Boycotts. Supplement No. 2 to part 766 continues to apply to civil administrative enforcement cases involving part 760 violations.

Because many administrative enforcement cases are resolved through settlement, the process of settling such cases is integral to the enforcement program. OEE carefully considers each settlement offer in light of the facts and circumstances of the case, relevant precedent, and OEE's objective to achieve in each case an appropriate penalty and deterrent effect. In settlement negotiations, OEE encourages parties to provide, and will give serious consideration to, information and evidence that parties believe are relevant to the application of this guidance to their cases, to whether a violation has in fact occurred, or to whether they have an affirmative defense to potential charges.

This guidance does not confer any right or impose any obligation regarding what penalties OEE may seek in litigating a case or what posture OEE may take toward settling a case. Parties do not have a right to a settlement offer or particular settlement terms from OEE, regardless of settlement positions OEE has taken in other cases.

I. Definitions

Note: See also: Definitions contained in § 766.2 of the EAR.

Apparent violation means conduct that constitutes an actual or possible violation of the Export Administration Act of 1979, the International Emergency Economic Powers Act, the EAR, other statutes administered or enforced by BIS, as well as executive orders, regulations, orders, directives, or licenses issued pursuant thereto.

Applicable schedule amount means:

1. $1,000 with respect to a transaction valued at less than $1,000;

2. $10,000 with respect to a transaction valued at $1,000 or more but less than $10,000;

3. $25,000 with respect to a transaction valued at $10,000 or more but less than $25,000;

4. $50,000 with respect to a transaction valued at $25,000 or more but less than $50,000;

5. $100,000 with respect to a transaction valued at $50,000 or more but less than $100,000;

6. $170,000 with respect to a transaction valued at $100,000 or more but less than $170,000;

7. $250,000 with respect to a transaction valued at $170,000 or more.

Note to definition of applicable schedule amount. The applicable schedule amount may be adjusted in accordance with U.S. law, *e.g.*, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74, sec. 701).

Transaction value means the U.S. dollar value of a subject transaction, as demonstrated by commercial invoices, bills of lading, signed Customs declarations, AES filings or similar documents. Where the transaction value is not otherwise ascertainable, OEE may consider the market value of the items that were the subject of the transaction and/or the economic benefit derived by the Respondent from the transaction, in determining transaction value. In situations involving a lease of U.S.-origin items, the transaction value will generally be the value of the lease. For purposes of these Guidelines, "transaction value" will not necessarily have the same meaning, nor be applied in the same manner, as that term is used for import valuation purposes at 19 CFR 152.103.

Voluntary self-disclosure means the self-initiated notification to OEE of an apparent violation as described in and satisfying the requirements of § 764.5 of the EAR.

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 may have

occurred, OEE investigations may lead to no action, a warning letter or an administrative enforcement proceeding. A violation may also be referred to the Department of Justice for criminal prosecution. The type of enforcement action initiated by OEE will depend primarily on the nature of the violation. Depending on the facts and circumstances of a particular case, an OEE investigation may lead to one or more of the following actions:

A. *No Action*. If OEE determines that there is insufficient evidence to conclude that a violation has occurred, determines that a violation did not occur and/or, based on an analysis of the Factors outlined in Section III of these Guidelines, concludes that the conduct does not rise to a level warranting an administrative response, then no action will be taken. In such circumstances, if the investigation was initiated by a voluntary self-disclosure (VSD), OEE will issue a letter (a no-action letter) indicating that the investigation is being closed with no administrative action being taken. OEE may issue a no-action letter in non-voluntarily disclosed cases at its discretion. A no-action determination by OEE represents OEE's disposition of the apparent violation, unless OEE later learns of additional information regarding the same or similar transactions or other relevant facts. A no-action letter is not a final agency action with respect to whether a violation occurred.

B. *Warning Letter*. If OEE determines that a violation may have occurred but a civil penalty is not warranted under the circumstances, and believes that the underlying conduct could lead to a violation in other circumstances and/or that a Respondent does not appear to be exercising due diligence in assuring compliance with the statutes, executive orders, and regulations that OEE enforces, OEE may issue a warning letter. A warning letter may convey OEE's concerns about the underlying conduct and/or the Respondent's compliance policies, practices, and/or procedures. It may also address an apparent violation of a technical nature,

where good faith efforts to comply with the law and cooperate with the investigation are present, or where the investigation commenced as a result of a voluntary self-disclosure satisfying the requirements of § 764.5 of the EAR, provided that no aggravating factors exist. In the exercise of its discretion, OEE may determine in certain instances that issuing a warning letter, instead of bringing an administrative enforcement proceeding, will achieve the appropriate enforcement result. A warning letter will describe the apparent violation and urge compliance. A warning letter represents OEE's enforcement response to and disposition of the apparent violation, unless OEE later learns of additional information concerning the same or similar apparent violations. A warning letter does not constitute a final agency action with respect to whether a violation has occurred.

C. *Administrative enforcement case.* If OEE determines that a violation has occurred and, based on an analysis of the Factors outlined in Section III of these Guidelines, concludes that the Respondent's conduct warrants a civil monetary penalty or other administrative sanctions, OEE may initiate an administrative enforcement case. The issuance of a charging letter under § 766.3 of the EAR initiates an administrative enforcement proceeding. Charging letters may be issued when there is reason to believe that a violation has occurred. Cases may be settled before or after the issuance of a charging letter. *See* § 766.18 of the EAR. OEE may prepare a proposed charging letter which could result in a case being settled before issuance of an actual charging letter. *See* § 766.18(a) of the EAR. If a case does not settle before issuance of a charging letter and the case proceeds to adjudication, the resulting charging letter may include more violations than alleged in the proposed charging letter, and the civil monetary penalty amounts assessed may be greater that those provided for in Section IV of these Guidelines. Civil monetary penalty amounts for cases settled before the issuance of a charging

letter will be determined as discussed in Section IV of these Guidelines. A civil monetary penalty may be assessed for each violation. The maximum amount of such a penalty per violation is stated in § 764.3(a)(1), subject to adjustments under the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461), which are codified at 15 CFR 6.4. OEE will afford the Respondent an opportunity to respond to a proposed charging letter. Responses to charging letters following the institution of an enforcement proceeding under part 766 of the EAR are governed by § 766.3 of the EAR.

D. *Civil Monetary Penalty*. OEE may seek a civil monetary penalty if OEE determines that a violation has occurred and, based on the Factors outlined in Section III of these Guidelines, concludes that the Respondent's conduct warrants a monetary penalty. Section IV of these Guidelines will guide the agency's exercise of its discretion in determining civil monetary penalty amounts.

E. *Criminal Referral*. In appropriate circumstances, OEE may refer the matter to the Department of Justice for criminal prosecution. Apparent violations referred for criminal prosecution also may be subject to a civil monetary penalty and/or other administrative sanctions or action by BIS.

F. *Other Administrative Sanctions or Actions*. In addition to or in lieu of other administrative actions, OEE may seek sanctions listed in § 764.3 of the EAR. BIS may also take the following administrative actions, among other actions, in response to an apparent violation:

License Revision, Suspension or Revocation. BIS authorizations to engage in a transaction pursuant to a license or license exception may be revised, suspended or revoked in response to an apparent violation as provided in §§ 740.2(b) and 750.8 of the EAR.

Denial of Export Privileges. An order denying a Respondent's export privileges may be issued, as described in § 764.3(a)(2) of the EAR. Such a denial may extend to all export privileges, as set out in the standard terms for denial orders in Supplement No. 1 to part 764 of the EAR, or may be narrower in scope (*e.g.*, limited to exports of specified items or to specified destinations or customers). A denial order may also be suspended in whole or in part in accordance with § 766.18(c).

Exclusion from practice. Under § 764.3(a)(3) of the EAR, any person acting as an attorney, accountant, consultant, freight forwarder or other person who acts in a representative capacity in any matter before BIS may be excluded from practicing before BIS.

Training and Audit Requirements. In appropriate cases, OEE may require as part of a settlement agreement that the Respondent provide training to employees as part of its compliance program, adopt other compliance measures, and/or be subject to internal or independent audits by a qualified outside person. In those cases, OEE may suspend or defer a portion or all of the penalty amount if the suspended amount is applied to comply with such requirements.

G. *Suspension or Deferral*. In appropriate cases, payment of a civil monetary penalty may be suspended or deferred during a probationary period under a settlement agreement and order. If the terms of the settlement agreement or order are not adhered to by the Respondent, then suspension or deferral may be revoked and the full amount of the penalty imposed. *See* § 764.3(a)(1)(iii) of the EAR. In determining whether suspension or deferral is appropriate, OEE may consider, for example, whether the Respondent has demonstrated a limited ability to pay a penalty that would be appropriate for such violations, so that suspended or deferred payment can be expected to have sufficient deterrent value, and whether, in light of all of the circumstances, such suspension or deferral is necessary to make the financial impact of the penalty consistent

with the impact of penalties on other parties who committed similar violations. OEE may also take into account when determining whether or not to suspend or defer a civil penalty whether the Respondent will apply a portion or all of the funds suspended or deferred to audit, compliance, or training that may be required under a settlement agreement and order, or the matter is part of a "global settlement" as discussed in more detail below.

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. Where the imposition of an administrative penalty is deemed appropriate, as a general matter, OEE will consider some or all of the following Factors in determining the appropriate sanctions in administrative cases, including the appropriate amount of a civil monetary penalty where such a penalty is sought and is imposed as part of a settlement agreement and order. These factors describe circumstances that, in OEE's experience, are commonly relevant to penalty determinations in settled cases. Factors that are considered exclusively aggravating, such as willfulness, or exclusively mitigating, such as situations where remedial measures were taken, are set forth below. This guidance also identifies General Factors – which can be either mitigating or aggravating - such as the presence or absence of an internal compliance program at the time the apparent violations occurred. Other relevant Factors may also be considered at the agency's discretion.

While some violations of the EAR have a degree of knowledge or intent as an element of the offense, OEE may regard a violation of any provision of the EAR as knowing or willful if the facts and circumstances of the case support that conclusion. For example, evidence that a

corporate entity had knowledge at a senior management level may mean that a higher penalty may be appropriate. OEE will also consider, in accordance with Supplement No. 3 to part 732 of the EAR, the presence of any red flags that should have alerted the Respondent that a violation was likely to occur. The aggravating factors identified in the Guidelines do not alter or amend § 764.2(e) or the definition of "knowledge" in § 772.1, or other provisions of parts 764 and 772 of the EAR. If the violations are of such a nature and extent that a monetary fine alone represents an insufficient penalty, a denial or exclusion order may also be imposed to prevent future violations of the EAR.

Aggravating Factors

A. *Willful or Reckless Violation of Law*. OEE will consider a Respondent's apparent willfulness or recklessness in violating, attempting to violate, conspiring to violate, or causing a violation of the law. Generally, to the extent the conduct at issue appears to be the result of willful conduct - a deliberate intent to violate, attempt to violate, conspire to violate, or cause a violation of the law - the OEE enforcement response will be stronger. Among the factors OEE may consider in evaluating apparent willfulness or recklessness are:

1. *Willfulness*. Was the conduct at issue the result of a decision to take action with the knowledge that such action would constitute a violation of U.S. law? Did the Respondent know that the underlying conduct constituted, or likely constituted, a violation of U.S. law at the time of the conduct?

2. *Recklessness/gross negligence*. Did the Respondent demonstrate reckless disregard or gross negligence with respect to compliance with U.S. regulatory requirements or otherwise fail to exercise a minimal degree of caution or care in avoiding conduct that led to the apparent

violation? Were there warning signs that should have alerted the Respondent that an action or failure to act would lead to an apparent violation?

3. *Concealment*. Was there a deliberate effort by the Respondent to hide or purposely obfuscate its conduct in order to mislead OEE, federal, state, or foreign regulators, or other parties involved in the conduct, about an apparent violation?

Note: Failure to voluntarily disclose an apparent violation to OEE does not constitute concealment.

4. *Pattern of Conduct*. Did the apparent violation constitute or result from a pattern or practice of conduct or was it relatively isolated and atypical in nature? In determining both whether to bring charges and, once charges are brought, whether to treat the case as egregious, OEE will be mindful of certain situations where multiple recurring violations resulted from a single inadvertent error, such as misclassification. However, for cases that settle before filing of a charging letter with an Administrative Law Judge, OEE will generally charge only the most serious violation per transaction. If OEE issues a proposed charging letter and subsequently files a charging letter with an Administrative Law Judge because a mutually agreeable settlement cannot be reached, OEE will continue to reserve its authority to proceed with all available charges in the charging letter based on the facts presented. When determining a penalty, each violation is potentially chargeable.

5. *Prior Notice*. Was the Respondent on notice, or should it reasonably have been on notice, that the conduct at issue, or similar conduct, constituted a violation of U.S. law?

6. *Management Involvement*. In cases of entities, at what level within the organization did the willful or reckless conduct occur? Were supervisory or managerial level staff aware, or should they reasonably have been aware, of the willful or reckless conduct?

B. *Awareness of Conduct at Issue:The Respondent's awareness of the conduct giving rise to the 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 OEE enforcement response will be. In the case of a corporation, awareness will focus on supervisory or managerial level staff in the business unit at issue, as well as other senior officers and managers. Among the factors OEE may consider in evaluating the Respondent's awareness of the conduct at issue are:

1. *Actual Knowledge*. Did the Respondent have actual knowledge that the conduct giving rise to an apparent violation took place, and remain willfully blind to such conduct, and fail to take remedial measures to address it? Was the conduct part of a business process, structure or arrangement that was designed or implemented with the intent to prevent or shield the Respondent from having such actual knowledge, or was the conduct part of a business process, structure or arrangement implemented for other legitimate reasons that consequently made it difficult or impossible for the Respondent to have actual knowledge?

2. *Reason to Know*. If the Respondent did not have actual knowledge that the conduct took place, did the Respondent have reason to know, or should the Respondent reasonably have known, based on all readily available information and with the exercise of reasonable due diligence, that the conduct would or might take place?

3. *Management Involvement*. In the case of an entity, was the conduct undertaken with the explicit or implicit knowledge of senior management, or was the conduct undertaken by personnel outside the knowledge of senior management? If the apparent violation was undertaken without the knowledge of senior management, was there oversight intended to detect and prevent violations, or did the lack of knowledge by senior management result from disregard for its responsibility to comply with applicable regulations and laws?

C. *Harm to Regulatory Program Objectives: The actual or potential harm to regulatory program objectives caused by the conduct giving rise to the apparent violation*. This factor would be present where the conduct in question, in purpose or effect, substantially implicated national security, foreign policy or other essential interests protected by the U.S. export control system, in view of such factors as the reason for controlling the item to the destination in question; the sensitivity of the item; the prohibitions or restrictions against the recipient of the item; and the licensing policy concerning the transaction (such as presumption of approval or denial). OEE, in its discretion, may consult with other U.S. agencies or with licensing and enforcement authorities of other countries in making its determination. Among the factors OEE may consider in evaluating the harm to regulatory program objectives are:

1. *Implications for U.S. National Security*: *The impact that the apparent violation had or could potentially have on the national security of the United States*. For example, if a particular export could undermine U.S. military superiority or endanger U.S. or friendly military forces or be used in a military application contrary to U.S. interests, OEE would consider the implications of the apparent violation to be significant.

2. *Implications for U.S. Foreign Policy: The effect that the apparent violation had or could potentially have on U.S. foreign policy objectives*. For example, if a particular export is, or is likely to be, used by a foreign regime to monitor communications of its population in order to suppress free speech and persecute dissidents, OEE would consider the implications of the apparent violation to be significant.

General Factors

D. *Individual Characteristics: The particular circumstances and characteristics of a Respondent*. Among the factors OEE may consider in evaluating individual characteristics are:

1. *Commercial Sophistication*: *The commercial sophistication and experience of the Respondent*. Is the Respondent an individual or an entity? If an individual, was the conduct constituting the apparent violation for personal or business reasons?

2. *Size and Sophistication of Operations: The size of a Respondent's business operations, where such information is available and relevant*. At the time of the violation, did the Respondent have any previous export experience and was the Respondent familiar with export practices and requirements? Qualification of the Respondent as a small business or organization for the purposes of the Small Business Regulatory Enforcement Fairness Act, as determined by reference to the applicable standards of the Small Business Administration, may also be considered.

3. *Volume and Value of Transactions: The total volume and value of transactions undertaken by the Respondent on an annual basis, with attention given to the volume and value of the apparent violations as compared with the total volume and value of all transactions*. Was the quantity and/or value of the exports high, such that a greater penalty may be necessary to serve as an adequate penalty for the violation or deterrence of future violations, or to make the penalty proportionate to those for otherwise comparable violations involving exports of lower quantity or value?

4. *Regulatory History: The Respondent's regulatory history, including OEE's issuance of prior penalties, warning letters, or other administrative actions (including settlements), other than with respect to antiboycott matters under part 760 of the EAR*. OEE will generally only consider a Respondent's regulatory history for the five years preceding the date of the transaction giving rise to the apparent violation. When an acquiring firm takes reasonable steps to uncover, correct, and voluntarily disclose or cause the voluntary self-disclosure to OEE of conduct that

gave rise to violations by an acquired business before the acquisition, OEE typically will not take such violations into account in applying these factors in settling other violations by the acquiring firm.

5. *Other illegal conduct in connection with the export*. Was the transaction in support of other illegal conduct, for example the export of firearms as part of a drug smuggling operation, or illegal exports in support of money laundering?

6. *Criminal Convictions*. Has the Respondent been convicted of an export-related criminal violation?

Note: Where necessary to effective enforcement, the prior involvement in export violation(s) of a Respondent's owners, directors, officers, partners, or other related persons may be imputed to a Respondent in determining whether these criteria are satisfied.

E. *Compliance Program: The existence, nature and adequacy of a Respondent's risk-based BIS compliance program at the time of the apparent violation*. OEE will take account of the extent to which a Respondent complies with the principles set forth in BIS's Export Management System (EMS) Guidelines. Information about the EMS Guidelines can be accessed through the BIS Web site at www.bis.doc.gov. In this context, OEE 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 the submission of a VSD and steps to prevent reoccurrence of the violation that are reasonably calculated to be effective.

Mitigating Factors

F. *Remedial Response:* The Respondent's corrective action taken in response to the apparent violation. Among the factors OEE may consider in evaluating the remedial response are:

1. The steps taken by the Respondent upon learning of the apparent violation. Did the Respondent immediately stop the conduct at issue? Did the Respondent undertake to file a VSD?

2. In the case of an entity, the processes followed to resolve issues related to the apparent violation. Did the Respondent discover necessary information to ascertain the causes and extent of the apparent violation, fully and expeditiously? Was senior management fully informed? If so, when?

3. In the case of an entity, whether it adopted new and more effective internal controls and procedures to prevent the occurrence of similar apparent violations. If the entity did not have a BIS compliance program in place at the time of the apparent violation, did it implement one upon discovery of the apparent violation? If it did have a BIS compliance program, did it take appropriate steps to enhance the program to prevent the recurrence of similar violations? Did the entity provide the individual(s) and/or managers responsible for the apparent violation with additional training, and/or take other appropriate action, to ensure that similar violations do not occur in the future?

4. Where applicable, whether the Respondent undertook a thorough review to identify other possible violations.

G. *Exceptional Cooperation with OEE: the nature and extent of the Respondent's cooperation with OEE, beyond those actions set forth in Factor F*. Among the factors OEE may consider in evaluating exceptional cooperation are:

1. Did the Respondent provide OEE with all relevant information regarding the apparent violation at issue in a timely, comprehensive and responsive manner (whether or not voluntarily self-disclosed), including, if applicable, overseas records?

2. Did the Respondent research and disclose to OEE relevant information regarding any other apparent violations caused by the same course of conduct?

3. Did the Respondent provide substantial assistance in another OEE investigation of another person who may have violated the EAR?

4. Has the Respondent previously made substantial voluntary efforts to provide information (such as providing tips that led to enforcement actions against other parties) to federal law enforcement authorities in support of the enforcement of U.S. export control regulations?

5. Did the Respondent enter into a statute of limitations tolling agreement, if requested by OEE (particularly in situations where the apparent violations were not immediately disclosed or discovered by OEE, in particularly complex cases, and in cases in which the Respondent has requested and received additional time to respond to a request for information from OEE)? If so, the Respondent's entering into a tolling agreement will be deemed a mitigating factor.

Note: A Respondent's refusal to enter into a tolling agreement will not be considered by OEE as an aggravating factor in assessing a Respondent's cooperation or otherwise under the Guidelines.

H. *License Was Likely To Be Approved*. Would an export license application have likely been approved for the transaction had one been sought? Would the export have qualified for a License Exception? Some license requirements sections in the EAR also set forth a licensing policy (*i.e.*, a statement of the policy under which license applications will be evaluated), such as

a general presumption of denial or case by case review. OEE may also consider the licensing history of the specific item to that destination and if the item or end-user has a history of export denials.

Other Relevant Factors Considered on a Case-by-Case Basis

I. *Related Violations.* Frequently, a single export transaction can give rise to multiple violations. For example, an exporter who inadvertently misclassifies an item on the Commerce Control List may, as a result of that error, export the item without the required export license and file Electronic Export Information (EEI) to the Automated Export System (AES) that both misstates the applicable Export Control Classification Number (ECCN) and erroneously identifies the export as qualifying for the designation "NLR" (no license required) or cites a license exception that is not applicable. In so doing, the exporter commits three violations: one violation of § 764.2(a) of the EAR for the unauthorized export and two violations of § 764.2(g) of the EAR for the two false statements on the EEI filing to the AES. OEE will consider whether the violations stemmed from the same underlying error or omission, and whether they resulted in distinguished or separate harm. OEE generally does not charge multiple violations on a single export, and would not consider the existence of such multiple violations as an aggravating factor in and of itself. It is within OEE's discretion to charge separate violations and settle the case for a penalty that is less than would be appropriate for unrelated violations under otherwise similar circumstances, or to charge fewer violations and pursue settlement in accordance with that charging decision. OEE generally will consider inadvertent, compounded clerical errors as related and not separate infractions when deciding whether to bring charges and in determining if a case is egregious.

J. *Multiple Unrelated Violations.* In cases involving multiple unrelated violations, OEE is more likely to seek a denial of export privileges and/or a greater monetary penalty than OEE would otherwise typically seek. For example, repeated unauthorized exports could warrant a denial order, even if a single export of the same item to the same destination under similar circumstances might warrant just a civil monetary penalty. OEE takes this approach because multiple violations may indicate serious compliance problems and a resulting greater risk of future violations. OEE may consider whether a Respondent has taken effective steps to address compliance concerns in determining whether multiple violations warrant a denial order in a particular case.

K. *Other Enforcement Action.* Other enforcement actions taken by federal, state, or local agencies against a Respondent for the apparent violation or similar apparent violations, including whether the settlement of alleged violations of BIS regulations is part of a comprehensive settlement with other federal, state, or local agencies. Where an administrative enforcement matter under the EAR involves conduct giving rise to related criminal or civil charges, OEE may take into account the related violations, and their resolution, in determining what administrative sanctions are appropriate under part 766 of the EAR. A criminal conviction indicates serious, willful misconduct and an accordingly high risk of future violations, absent effective administrative sanctions. However, entry of a guilty plea can be a sign that a Respondent accepts responsibility for complying with the EAR and will take greater care to do so in the future. In appropriate cases where a Respondent is receiving substantial criminal penalties, OEE may find that sufficient deterrence may be achieved by lesser administrative sanctions than would be appropriate in the absence of criminal penalties. Conversely, OEE might seek greater administrative sanctions in an otherwise similar case where a Respondent is not subjected to

criminal penalties. The presence of a related criminal or civil disposition may distinguish settlements among civil penalty cases that appear otherwise to be similar. As a result, the factors set forth for consideration in civil penalty settlements will often be applied differently in the context of a "global settlement" of both civil and criminal cases, or multiple civil cases, and may therefore be of limited utility as precedent for future cases, particularly those not involving a global settlement.

L. *Future Compliance/Deterrence Effect: The impact an administrative enforcement action may have on promoting future compliance with the regulations by a Respondent and similar parties, particularly those in the same industry sector*.

M. *Other Factors That OEE Deems Relevant*. On a case-by-case basis, in determining the appropriate enforcement response and/or the amount of any civil monetary penalty, OEE will consider the totality of the circumstances to ensure that its enforcement response is proportionate to the nature of the violation.

IV. Civil Penalties

A. *Determining What Sanctions Are Appropriate in a Settlement*.

OEE will review the facts and circumstances surrounding an apparent violation and apply the Factors Affecting Administrative Sanctions in Section III above in determining the appropriate sanction or sanctions in an administrative case, including the appropriate amount of a civil monetary penalty where such a penalty is sought and imposed. Penalties for settlements reached after the initiation of litigation will usually be higher than those described by these guidelines.

B. *Amount of Civil Penalty*.

1. *Determining Whether a Case is Egregious*. In those cases in which a civil monetary penalty is considered appropriate, OEE will make a determination as to whether a case is deemed "egregious" for purposes of the base penalty calculation. If a case is determined to be egregious, OEE also will also determine the appropriate base penalty amount within the range of base penalty amounts prescribed in paragraphs IV.B.2.a.iii and iv below. These determinations will be based on an analysis of the applicable factors. In making these determinations, substantial weight will generally be given to Factors A ("willful or reckless violation of law"), B ("awareness of conduct at issue"), C ("harm to regulatory program objectives"), and D ("individual characteristics"), with particular emphasis on Factors A, B, and C. 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. A determination by OEE that a case is "egregious" must have the concurrence of the Assistant Secretary of Commerce for Export Enforcement.

2. *Monetary Penalties in Egregious Cases and Non-Egregious Cases*. The civil monetary penalty amount shall generally be calculated as follows, except that neither the base penalty amount nor the penalty amount will exceed the applicable statutory maximum:

a. *Base Category Calculation and Voluntary Self-Disclosures*.

i. In a non-egregious case, if the apparent violation is disclosed through a voluntary self-disclosure, the base penalty amount shall be one-half of the transaction value, capped at a maximum base penalty amount of $125,000 per violation.

ii. In a non-egregious case, if the apparent violation comes to OEE's attention by means other than a voluntary self-disclosure, the base penalty amount shall be the "applicable schedule

amount," as defined above (capped at a maximum base penalty amount of $250,000 per violation).

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

The following matrix represents the base penalty amount of the civil monetary penalty for each category of violation:

BASE PENALTY MATRIX

		Egregious Case?	
		NO	YES
Voluntary Self-Disclosure?	YES	(1) One-Half of the Transaction Value (capped at $125,000 per violation)	(3) Up to One-Half of the Applicable Statutory Maximum

NO	(2) Applicable Schedule Amount (capped at $250,000 per violation)	(4) Up to the Applicable Statutory Maximum

Note to paragraph IV.B.2. The dollar values that appear in IV.B.2.a.i and .ii, and in the Base Penalty Matrix may be adjusted in accordance with U.S. law, *e.g.*, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74, sec. 701).

b. *Adjustment for Applicable Relevant Factors*.

In non-egregious cases the base penalty amount of the civil monetary penalty may be adjusted to reflect applicable Factors for Administrative Action set forth in Section III of these Guidelines. In egregious cases the base penalty amount of the civil monetary penalty will be set based on applicable Factors for Administrative Action set forth in Section III of these Guidelines. A Factor may result in a lower or higher penalty amount depending upon whether it is aggravating or mitigating or otherwise relevant to the circumstances at hand. Mitigating factors may be combined for a greater reduction in penalty, but mitigation will generally not exceed 75 percent of the base penalty, except in the case of VSDs, where full suspension is possible with conditions in certain non-egregious cases. Subject to this limitation, as a general matter, in those cases where the following Mitigating Factors are present, OEE will adjust the base penalty amount in the following manner:

In cases involving exceptional cooperation with OEE as set forth in Mitigating Factor G, but no voluntary self-disclosure as defined in § 764.5 of the EAR, the base penalty amount generally will be reduced between 25 and 40 percent. Exceptional cooperation in cases involving voluntary self-disclosure may also be considered as a further mitigating factor.

In cases involving a Respondent's first violation, the base penalty amount generally will be reduced by up to 25 percent. An apparent violation generally will be considered a "first

violation" if the Respondent has not been convicted of an export-related criminal violation or been subject to a BIS final order in five years, preceding the date of the transaction giving rise to the apparent violation. A group of substantially similar apparent violations addressed in a single Charging Letter shall be considered as a single violation for purposes of this subsection. In those cases where a prior Charging Letter within the preceding five years involved conduct of a substantially different nature from the apparent violation at issue, OEE may consider the apparent violation at issue a "first violation." Warning Letters issued within the preceding five years are not factored into account for purposes of determining eligibility for "first offense" mitigation. When an acquiring firm takes reasonable steps to uncover, correct, and disclose or cause to be disclosed to OEE conduct that gave rise to violations by an acquired business before the acquisition, OEE typically will not take such violations into account as an aggravating factor in settling other violations by the acquiring firm.

iii. In cases involving charges pertaining to transactions where a license exception would have been available or a license would likely have been approved had one been sought as set forth in Mitigating Factor H, the base penalty amount generally will be reduced by up to 25 percent.

In all cases, the penalty amount will not exceed the applicable statutory maximum. Similarly, while mitigating factors may be combined for a greater reduction in penalty, mitigation will generally not exceed 75 percent of the base penalty, except in the case of VSDs, where full suspension is possible with conditions in certain non-egregious cases.

C. *Settlement Procedures*.

The procedures relating to the settlement of administrative enforcement cases are set forth in § 766.18 of the EAR.

Dated: June 15, 2016

David W. Mills

Assistant Secretary for Export Enforcement

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