Changes to OEE enforcement policy and voluntary self-disclosure calculus

Over the past month, the Bureau of Industry and Security ("BIS") Office of Export Enforcement ("OEE") has taken a number of actions signaling a substantial change in OEE's approach to its enforcement of the Export Administration Regulations ("EAR") under new Assistant Secretary for Export Enforcement Matthew Axelrod. While these actions preview OEE's stepped-up approach to administrative and criminal enforcement, they also may foretell a recalculation of how companies decide whether and when to file voluntary self-disclosures, given the increasingly harsh enforcement policies and penalties that have been promised.

The OEE memorandum

On 30 June, Assistant Secretary Axelrod issued a memorandum[1] to all OEE employees announcing four changes to the agency's enforcement policies ("Axelrod Memo"), as described below. The stated purpose of these changes is to focus OEE's attention on the most serious violations and prioritize cases that involve the greatest harm to national security.

1) Imposition of significantly higher penalties

OEE stated that it will "use all of [its] existing regulatory and statutory authorities to ensure that the most serious administrative violations trigger commensurately serious penalties." Specifically, OEE has "improved" its process for applying mitigating and aggravating factors described in the existing settlement guidelines at Supplement 1 to EAR Part 766, and will "aggressively and uniformly" apply the existing settlement guidelines to "ensure that all appropriate cases are properly deemed 'egregious.'" This will "open the door for more significant penalties" under the EAR. In addition, OEE will ensure that existing aggravating penalty factors set forth in Supplement 1 are applied more uniformly "to escalate penalty amounts where appropriate."[2] OEE stated that it aims to achieve three goals by imposing "appropriately stiff penalties": reaching resolutions that adequately reflect the national security harm caused by the violations; creating a strong disincentive for those considering circumvention; and maintaining a level playing field for those that invest in a strong compliance program. Bottom line:

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although OEE's aggravating and mitigating factors will remain unchanged, application of those factors will now yield more severe results.

2) Using non-monetary resolutions for less serious violations

For pending administrative cases that rise above the level of cases warranting a warning letter or no-action letter, but are not egregious and have not resulted in serious national security harm, OEE will offer non-monetary settlement agreements. These settlement agreements "will require remediation through the imposition of a suspended denial order with certain conditions", such as training and compliance requirements, and "will be contingent on the alleged violator's willingness to accept responsibility, to admit their conduct, and to commit to enhanced compliance measures." Thus, as before, non-egregious cases may still result in no-action letters, but with more strings attached and a greater potential for follow-on penalties.

3) Elimination of "no admit, no deny" settlements

OEE announced that it is ending its use of "no admit, no deny" settlements, in which an individual or company resolves the allegations against them but does not admit their conduct. OEE's stated rationale for this change is that resolving parties should have to admit their conduct in order to obtain the credit that comes from entering into a settlement. Thus, OEE joins the long procession of agencies that have tried to do away with "no admit" settlement agreements in order to obtain admissions of wrongdoing as part of the price for settlement, with all of the attendant adverse legal consequences and negative public relations for the admitting company. It remains to be seen whether OEE will fare any better than those agencies that have trod this path before it.

4) Dual-track processing of voluntary self-disclosures

OEE intends to process voluntary self-disclosures on a dual-track system, placing disclosures that involve minor or technical infractions on a "fast track," and issuing a warning letter or no-action letter within 60 days of the final disclosure submission. In contrast, disclosures that indicate potentially more serious violations will be assigned both a field agent and a Department of Commerce Office of Chief Counsel ("OCC") attorney, and in the most serious cases, the Department of Justice Counterintelligence and Export Control Section ("CES") will assign an attorney as well. The assigned agent and attorney or attorneys will follow up with the individual or company to obtain further information about the disclosure. Based on how this policy change is described in the Axelrod Memo, it would appear that the government will pursue more cases criminally, and voluntary self-disclosures (some of which may contain information that would otherwise have been protected by attorney-client privilege), will be followed by more in-depth requests for information and evidence.

These policy changes come after BIS published a final rule[3] in early June that amended EAR Section 766.20(c)(2)(ii). Under the revised rule, OEE may publish export enforcement case charging letters to the OEE website[4] as soon as they are issued, and before administrative disposition of the matter.

[1] https://bis.doc.gov/index.php/documents/enforcement/3062-administrative-enforcement-memo/file
[2] The aggravating factors set forth in Supplement 1 are willful or reckless violation of law; awareness of conduct at issue (the respondent's awareness of the conduct giving rise to the apparent violation); and harm to regulatory program objectives (the actual or potential harm to regulatory program objectives caused by the conduct giving rise to the apparent violation), each of which has several components.
[3] https://www.federalregister.gov/documents/2022/06/06/2022-11885/export-administration-regulations-revisions-to-russia-and-belarus-sanctions-and-related-provisions
[4] https://efoia.bis.doc.gov/index.php/electronic-foia/index-of-documents/7-electronic-foia/230-charging-letters
[5] In addition to the Axelrod Memo and the amendment to the EAR Section 766.20 rules on the publication of charging letters, Assistant Secretary Axelrod gave remarks at BIS's 2022 Update Conference on Export Controls and Policy on 30 June 2022, describing these recent changes to OEE's enforcement approach. He also spoke to the National Association of College and University Attorneys on 28 June 2022, describing the risks to national security arising from work at and with colleges and universities, setting forth OEE's expectations for what colleges and universities will do to ensure compliance with the EAR, and establishing a new "Academic Outreach Initiative".
[6] https://ilr.law.uiowa.edu/print/volume-103-issue-1/admissions-in-sec-enforcement-cases-the-revolution-that-wasnt/

Practical effects of recent OEE changes

The stated reasons for the recent changes to OEE policy and EAR revisions are laudable. Few could argue with the virtues of increased government transparency, uniform application of the law, quick resolution of disclosures involving minor and technical infractions, non-monetary resolutions to less serious violations, and the allocation of finite government resources to the most serious violations and violations that caused real harm to national security. But the results may not be what OEE intends or anticipates.

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In the Axelrod Memo and other recent OEE actions and statements,[5] Assistant Secretary Axelrod has made it clear that he is bringing his DOJ perspective to OEE and intends to develop an institutional preference for increased penalties and punishment. This change could disrupt the voluntary self-disclosure norms to which companies have become accustomed. Today, companies and trade compliance professionals understand that voluntary self-disclosures are part of the overall get-well process, by which companies identify a potential issue or violation, conduct root cause analysis to understand their compliance weaknesses, and then commit to remediating the issue and enhancing their compliance programs. In turn, companies have come to expect the government to impose serious punishment only in the most egregious circumstances. But if a matter that previously would have resulted in a warning letter might now end with an OEE-mandated public admission of wrongdoing and a suspended denial order, a company might think twice before making a voluntary self-disclosure part of its get-well process.

Further, the prospect of increased criminal scrutiny may weigh heavily on a company's decision to disclose serious violations, even when the company is convinced that it acted without willfulness. Time and again over the past several years we have seen the FBI and OEE execute criminal search warrants at companies based on allegations that could not withstand the light of day and, eventually, resulted in criminal declinations – typically without administrative enforcement either. But the financial cost and emotional toll that companies incur when defending these cases criminally can be extreme. Thus, OEE's apparent intention to convert more matters into criminal cases may give companies greater pause when deciding whether to submit a voluntary self-disclosure, rather than stay silent in hopes that an over-taxed OEE will not identify the potential issue on its own.

Last, we note that history indicates that OEE may find it difficult to eliminate "no admit, no deny" settlements. A few years after the 2008 financial crisis, the SEC sought to eliminate its long-standing policy of allowing no-admit, no-deny settlements, and publicly insisted that most settlements would require an admission of wrongdoing. However, a study published in the *Iowa Law Review* four years later[6] found that only 2% of the cases brought under the new policy resulted in an admission of wrongdoing. This result is understandable, considering the legal consequences that flow from a company's admission of wrongdoing and the proliferation of shareholder suits.

Ultimately, it remains to be seen whether OEE's newly stated preference for enhanced penalties will have an across-the-board effect on most companies filing disclosures, or will impact only the most serious wrongdoers. It also may be the case that the new racking-and-stacking measures set forth in the Axelrod Memo will have the main effect of increasing agency efficiency, and yield quicker closure memos for companies uninvolved in serious wrongdoing and nothing more. But if OEE does become increasingly focused on imposing escalating, headline-grabbing penalties, then the unintended consequence of these policies may be that companies decide the benefits of voluntary self-disclosure described in the Supplement 1 Base Penalty Matrix no longer outweigh the risk of an uninvited investigation. Then, OEE will really have its work cut out for it. ■

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