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Top News

BIS Disclosure Policy Changes Viewed as Helpful but Questions Remain

Industry lawyers and advisers see the Bureau of Industry and Security's revamped voluntary disclosure policies as a positive set of moves that could reduce compliance burdens on exporters and encourage more companies to come forward with tips about their competitors. But at least one former government official said corporations should remain skeptical about the changes until BIS offers more clarity about how it will implement them in practice.

"I think for most practitioners, it's probably not going to change much in terms of how they're doing the work for companies behind the scenes," said Jonathan Poling, who previously worked on export control cases as part of DOJ's National Security Division. "The risk is too great of getting it wrong."

BIS has rolled out several rounds of updates to its administrative enforcement policies over the past two years, including one clarifying that BIS will consider a company's failure to disclose a more serious potential violation as an "aggravating factor" when the agency calculates penalty amounts, and another saying BIS would start giving credit to companies that tip off the agency about their competitors' wrongdoings (see 2304180071). The latest update, released in January, made a host of other changes, including that BIS will no longer always require exporters to launch a five-year review of transactions that took place before their voluntary disclosure (see 2401170059).

Reid Whitten, a trade lawyer with Sheppard Mullin, called that change "fantastic" and said it could reduce compliance costs for exporters, who sometimes automatically spend money conducting that five-year "look back" after discovering a possible violation. For some businesses, that extra cost may dissuade them from speaking to BIS agents and "discourages candor with the regulators," Whitten said.

"I think this announcement allows the possibility of companies making more disclosures at less cost for them," he said.

In some ways, the new policies "made it more attractive" to submit a disclosure, said Don Pearce, a former agent with the BIS Office of Export Enforcement. He said he wasn't surprised by an announcement last month from Matthew Axelrod, the agency's top enforcement official, that BIS saw an 80% increase in serious disclosures last year.

"It represents, I think, an increased lack of risk tolerance on the part of companies involved in transactions that went sideways," said Pearce, now a senior adviser with Torres Trade Advisory.

But he also said he doesn't "know many large organizations that roll the dice and don't" submit disclosures. He said the vast majority of disclosures submitted to BIS result in warning letters, and Axelrod has said he wants his agents spending less time on disclosures involving paperwork errors and more time on issues with serious national security implications.

"Most agents catch a [voluntary self-disclosure] and just want to get rid of it. They just want to get it out the door," Pearce said. "It's like being a fisherman. You want to catch the fish you wanted to catch, not a sunfish, and these are sunfish."

But despite increased BIS focus on more serious violations, companies shouldn't rush to confess all potential export control breaches to the agency, even if they believe they're minor, Poling said. That's partly because it still isn't clear what BIS will consider a minor violation and what it will consider a more serious one, which can be the difference between a warning letter and a public penalty. Poling, now an Akin Gump trade lawyer, also said he's seeing more cases being referred to DOJ.

"It's a difficult message for BIS to say: 'Here, do this very quick and simple disclosure, and trust us, we'll take good care of you and close this out quickly,'" he said. "But on the other hand, if you get it wrong, they may make it into the biggest export case in U.S. history, and DOJ may assign prosecutors to it."

But Whitten said BIS has established a somewhat reliable track record for how it treats certain disclosures. "BIS has not been unpredictable," he said, adding that lawyers sometimes see "dozens or hundreds of similar" disclosures and get a "sense" for how the agency will treat them. "They are pretty consistent about what they view as technical and what they view as more serious."

Pearce—who served as the acting unit chief for liaison and interdiction before retiring from BIS in 2020—said deciding whether to submit a disclosure can sometimes depend on the company. He pointed to Seagate, the technology company that was fined a record $300 million in April for violating export controls against Huawei (see 2304190071). Pearce said those violations may have been technical because they involved a misinterpretation of the agency's complex foreign direct product rule, but they weren't minor.

"Minor to Seagate is different than minor to the mom-and-pop shop, where one transaction might mean the difference between staying in the black or going into the red," Pearce said.

"That's where the devil is living in the details," he added. "How do you define a minor issue?"

He said some cases are more obvious than others: An export to Iran or to an advanced semiconductor facility in China, for example, will likely "never" be considered minor. But for violations that are less clear, BIS should offer guidance in its news releases that describe "more of that methodology that goes behind making the decision," Pearce said.

Poling said he also wants more information. "There are a lot of announcements coming out of this agency right now, a lot of press releases and a lot of new policies," he said. "But really, we need to see how the enforcement record develops to assess what it all means yet."

He did say, however, that BIS has begun returning disclosures faster than usual. Axelrod in January said the agency's processing time for a minor disclosure is now "well under" the required 60-day window, and Poling said he's seeing BIS issue some warning letters for technical or minor violations within a week of receiving them. "That's very fast," Poling said.

Pearce called that a "net gain," adding, "No agent wants to spend more than a trivial amount of time on what to them seems to be a trivial issue."

Whitten also called BIS "pretty quick," especially compared with the Treasury Department's Office of Foreign Assets Control, whose response times on disclosures can stretch to eight months or longer. "It's nowhere near where BIS is," he said.

BIS would be even faster if the agency had more resources and agents, Pearce said. Commerce Secretary Gina Raimondo and BIS Undersecretary Alan Estevez have both made pitches for more resources (see 2312070074 and 2312040041), and Axelrod has said Homeland Security Investigations at DHS has more agents in its Tampa office than BIS has across the country.

"There should be 100 more [agents], maybe even 500 more, with additional field offices," Pearce said.

He said a good first step until the agency gets more resources was a change BIS made last year to how it measures agent performance, which was outlined in a speech Axelrod gave last month. The agency

is hoping those changes incentivize agents to focus less on minor issues and more on high-priority ones, such as possible export control violations involving critical technologies or human rights abusers.

"Back when I was an agent, if you closed an administrative enforcement case with a warning letter, you got the same credit that you got for closing a criminal case with a conviction," Pearce said. "I think agents should be encouraged to go after the more complicated cases." **— *Ian Cohen***