



OFFICE OF ADVOCACY FACTSHEET

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Advocacy Urges Commerce to Analyze Impacts on Small Exporters of the Bureau of Industry and Security's Proposed "Knowledge" Rule

On December 15, 2004, the U.S. Small Business Administration's Office of Advocacy (Advocacy) filed comments with the Department of Commerce's Bureau of Industry and Security (BIS) on its notice of proposed rulemaking on *Revised "Knowledge" Definition, Revision of "Red Flags" Guidance and Safe Harbor*.

Advocacy's comments can be found at www.sba.gov/advo/laws/comments.

- Current regulations require a "high probability" that the exporter knew that he/she was violating exporting controls. The proposal revises the definition of "knowledge" for determining whether or not an exporter knew that he/she was violating exporting controls. BIS proposes to replace the phrase "high probability" with "more likely than not." BIS also proposed to update its "red flags" guidance, increasing the number of circumstances identified as creating a red flag of potential violations of Export Administration Regulations, and to create a safe harbor from certain knowledge-based violations if the exporter takes certain steps.
- Rather than perform an initial regulatory flexibility analysis of the proposed rule's impacts on small exporters, BIS certified that because the change was a "clarification," it would not have a significant economic impact on a substantial number of small entities.
- Advocacy does not agree that the proposed change is a mere clarification. Advocacy noted that BIS was proposing to change the definition in a way that lowered the requirements for establishing whether the exporter had knowledge of a potential export control violation. Small businesses that might not have been liable in the past could potentially be held liable for an export control violation under the proposed new standard and incur more legal expenses, fines, and penalties.
- Under the proposed "safe harbor" provision, businesses can learn whether BIS agrees that the transaction qualifies for a safe harbor. This provision is intended to help businesses avoid fines and penalties, which BIS believes would mitigate the impact of the rule. To prevent a small business from waiting an inordinate amount of time for the opinion, Advocacy asked BIS to give full consideration to alternatives from the industry, such as imposing a 30-day time frame for BIS to provide an opinion on whether the transaction qualifies for a safe harbor. Advocacy also asked BIS to give full consideration to the suggestion that BIS allow for concurrent consideration of license applications while an exporter's request is pending a determination through the safe harbor process.
- Advocacy recommended that BIS perform an initial regulatory flexibility analysis to determine the full economic impact on small entities and to consider significant alternatives to meet its objective while minimizing the impact on small exporters. This analysis should be published for public comment in advance of the agency considering a final rule.

For more information, visit Advocacy's webpage at www.sba.gov/advo or contact Jennifer Smith at 202-205-6943.