IV. Approval of the Office of the Secretary of Energy

The Office of the Secretary has approved the issuance of this rule.

List of Subjects in 10 CFR Part 600

Administrative practice and procedure.

Issued in Washington, DC on February 11, 2004.

Richard H. Hopf,

Director, Office of Procurement and Assistance, Management/Office of Management, Budget and Evaluation, Department of Energy.

Robert C. Braden,

Director, Office of Procurement and Assistance Management, National Nuclear Security Administration.

■ Part 600 of Chapter II, Title 10 of the Code of Federal Regulations, is amended as follows:

PART 600—FINANCIAL ASSISTANCE RULES

■ 1. The authority citation for part 600 continues to read as follows:

Authority: 42 U.S.C.7101 *et seq*; 31 U.S.C. 6301–6308; 50 U.S.C. 2401 *et seq.* unless otherwise noted.

§ 600.8 [Amended]

■ 2. Section 600.8 is amended by revising:
■ a. The section title.
■ b. Paragraph (a) introductory text.
■ c. Paragraph (a)(2).
■ d. Paragraph (c).
The revisions read as follows:

§ 600.8 Program announcements.

(a) *General.* Program announcements include any issuance used to announce funding opportunities that would result in the award of a discretionary grant or cooperative agreement, whether it is called a program announcement, program notice, solicitation, broad agency announcement, research announcement, notice of program interest, or something else.

(a)(1) * * *

(a)(2) DOE must post synopses of its program announcements and modifications to the announcements at the Grants.gov Internet site, using the standard data elements/format, except for:

(i) Announcements of funding opportunities for awards less than $25,000 for which 100 percent of eligible applicants live outside of the United States.

(ii) Single source announcements of funding opportunities which are specifically directed to a known recipient.

* * * * *

(c) Announcement format. DOE must use the government-wide standard format to publish program announcements of funding opportunities.

§ 600.9 [Removed and Reserved]

■ 3. Section 600.9 is removed and reserved.

§ 600.10 [Amended]

■ 4. Section 600.10 is amended in paragraph (b) by removing the word ''solicitation'' from the first sentence and adding the words ''program announcement'' in their place.

[FR Doc. 04–3608 Filed 2–19–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 764 and 766

[Docket No. 030909226–4048–02]

RIN 0694–AC92

Export Administration Regulations: Penalty Guidance in the Settlement of Administrative Enforcement Cases

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: On September 17, 2003, the Bureau of Industry and Security (BIS) published a proposed rule regarding penalty guidance in the settlement of administrative enforcement cases (68 FR 54402). After considering public comments on that proposed rule, BIS is issuing this final rule, which discusses the comments received and the extent to which they were adopted. This final rule amends the Export Administration Regulations by incorporating guidance on how BIS makes penalty determinations when settling administrative enforcement cases under the Export Administration Regulations (EAR). This guidance also addresses related aspects of how BIS responds to violations of the EAR, such as charging decisions. This rule also amends other parts of the EAR to conform to this guidance.

DATES: This rule is effective February 20, 2004.

FOR FURTHER INFORMATION CONTACT: Roman W. Sloniewsky, Deputy Chief Counsel for Industry and Security, Room 3839, United States Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, at (202) 482–5301.

SUPPLEMENTARY INFORMATION:

Background

As an essential part of its administration of the export control system, BIS brings administrative enforcement actions for violations of the Export Administration Regulations (EAR). Many administrative enforcement cases are resolved through settlements between BIS and the respondent.

This rule incorporates guidance in the EAR—specifically, in a new Supplement No. 1 to part 766—on how BIS determines what penalty is appropriate for the settlement of an administrative enforcement case. This guidance identifies both general factors, such as the destination for the export and degree of willfulness involved in violations, and specific mitigating and aggravating factors which BIS typically takes into account in determining an appropriate penalty. The guidance also describes factors that BIS's Office of Export Enforcement (OEE) typically considers in describing whether a violation should be addressed in a warning letter, rather than in an administrative enforcement case. The guidance does not apply to antiboycott matters arising under part 760 of the EAR.

The rule also amends section 764.5(e) of the EAR to state that Supplement No. 1 to part 766 describes how BIS typically exercises its discretion regarding whether to pursue an administrative enforcement case regarding violations reported in a voluntary self-disclosure under section 764.5, and what administrative sanctions to seek in settling such a case.

In part 766, the rule amends section 766.3(a) to state that Supplement No. 1 to part 766 describes how BIS typically exercises its discretion regarding the issuance of charging letters, other than in antiboycott matters under part 760. The rule amends section 766.18 to add a new paragraph (f), stating that Supplement No. 1 to part 766 describes how BIS typically exercises its discretion regarding the terms under which it is willing to settle particular cases, other than antiboycott matters under part 760.

This guidance is consistent with the objectives of section 223 of the Small Business Regulatory Enforcement Fairness Act (Title II, Pub. Law 104–121).

Response to Comments

BIS received five comments on the notice of proposed rulemaking published in the **Federal Register** on September 17, 2003 (68 FR 54402). BIS revised the final rule in various respects

to address concerns expressed by the commenters and to clarify certain provisions. The major concerns addressed in the comments and BIS's responses are as follows:

1. *General comments.*

a. Two commenters suggested that BIS provide guidance on compliance with the ''catch-all'' license requirements of the Enhanced Proliferation Control Initiative (EPCI), contained in part 744. BIS expects to address these issues through separate action.

b. Two commenters called for an express statement that BIS will follow the Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases (''Guidance''). BIS believes that the first paragraph of the Guidance and the references to the Guidance in new subparagraph (e) of Section 764.5 and the amended subparagraph (a) of Section 766.3 make clear that BIS intends to consider cases in accordance with the Guidance.

2. *Issuance of warning letters.* Several comments addressed the provision of Supplement No. 1 to part 766 concerning the issuance of warning letters.

a. Three commenters suggested that the proposed rule was ambiguous as to whether the criteria for issuing a warning letter were in the disjunctive, *i.e.*, whether a warning letter could be issued if some, but not all, of the listed criteria were present. BIS has revised this provision to state: ''OEE often issues warning letters for 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 section 764.5, provided that no aggravating factors exist.'' Thus, in the absence of aggravating factors, a warning letter generally could be considered if one of the enumerated criteria is present.

b. Three commenters suggested that the reference in the proposed rule to violations ''based on technicalities'' was unclear. The corresponding language in the final rule refers to an apparent violation ''of a technical nature.'' Because BIS believes that it should retain considerable discretion regarding whether a particular case should be resolved by a warning letter, BIS does not believe that a more specific formulation of this criterion is useful.

c. One commenter suggested an express statement that OEE would not issue a warning letter if it concludes that a violation did not take place. BIS has added such a statement to Section I.A. of the Guidance.

d. Two commenters suggested an express statement that a warning letter or administrative penalty will terminate BIS investigation and result in the closing of the case file. Although in practice BIS takes no further action in most such cases, BIS has not adopted this suggestion because it believes that in some circumstances investigation should continue after issuance of a warning letter or imposition of an administrative penalty, *e.g.*, when one set of violations is resolved while investigation of other violations is still underway.

e. Two commenters suggested the use of ''education letters,'' in addition to warning letters. As suggested, ''education letters'' would not reflect a finding of an apparent violation, but would point out weaknesses in compliance efforts that, if not corrected, could result in future violations. In cases where BIS determines that a voluntary self-disclosure did not actually involve a violation, BIS typically informs the party of this determination. BIS concluded that it is unnecessary to establish a broader mechanism by which enforcement agents provide feedback on compliance efforts in the absence of a violation, and notes that it provides guidance for compliance efforts through other means, such as its Export Management System (EMS) Guidelines.

f. Two commenters suggested that voluntary self-disclosures should result in a ''rebuttable presumption'' that violations will be resolved with a warning letter. BIS concluded that no single factor should carry a presumption that no penalty will be sought. BIS notes that the submission of a voluntary self-disclosure that satisfies the requirements of Section 764.5 is designated a ''great weight'' mitigating factor in determining an appropriate penalty in the settlement of an administrative enforcement case.

3. *Treatment of high-volume, generally compliant exporters.* A number of comments suggested that certain aspects of the proposed rule inadequately took into account the circumstances of high-volume exporters with sound overall compliance practices who, despite their best efforts, occasionally violate the EAR. These comments stated that it was nearly impossible to reduce to zero the frequency of violations by parties who engage in a very large number of export transactions, especially insofar as they involve commodities that are subject to complex regulatory requirements. BIS considered these comments and determined that, as a general matter, it would be inappropriate to adopt guidance suggesting that, other things being equal, a violation by a large-volume exporter would be treated more leniently than an identical violation by a smaller business or a business that only occasionally engages in exporting. BIS also notes that an effective, high-quality compliance program is a ''great weight'' mitigating factor, and that a party who submits a voluntary self-disclosure satisfying the requirements of section 764.5 qualifies for a second ''great weight'' factor. Specific suggestions directed at the circumstance of the generally compliant, high-volume exporter are included in the response to the following comments:

a. Two commenters suggested that the discussion of multiple unrelated violations in section III.A of the Guidance should state that the number of such violations should be considered in the context of the overall volume of a party's export activities. BIS did not modify the Guidance in this regard; however, as stated in the Guidance, BIS will consider in appropriate cases a party's contention that information about the volume and nature of a party's export activities is ''relevant to the application of this guidance'' to such party's case. See Introduction to the Guidance.

b. Two commenters suggested adding a statement to the discussion of related violations to the effect that penalties for multiple violations will not be sought where they stem from the same underlying error or omission and the exporter exercised reasonable care to comply. While BIS did not adopt this suggestion; however, as stated in the Guidance, BIS will consider in appropriate cases a party's contention that the fact that multiple violations stemmed from the same error or omission is ''relevant to the application of this guidance'' to such party's case. *See* Introduction to the Guidance.

c. Two commenters suggested that what constitutes an ''isolated occurrence'' for purposes of mitigating factor 3 should be considered in the context of the party's overall volume of exports. BIS did not modify the Guidance in this regard; however, as stated in the Guidance, BIS will consider in appropriate cases a party's contention that information about the volume and extent of a party's export activities is ''relevant to the application of this guidance'' to such party's case. *See* Introduction to the Guidance.

4. *The effect of prior violations (mitigating factor 5 and aggravating factor 7).* Similarly, four commenters expressed concerns that the weighing of

prior violations under mitigating factor 5 and aggravating factor 7 unfairly disadvantaged high-volume, generally compliant exporters. Specific comments included:

a. Two commenters suggested that warning letters that resulted from prior voluntary self-disclosures should not be considered in applying these factors. BIS considered this suggestion, but determined that, rather than excluding such prior violations from consideration, it was more appropriate to afford them relatively less weight.

b. Two commenters suggested that the relevant time periods should be measured from the time that the violation occurred, rather than from the time of resolution (*e.g.*, settlement or a warning letter). A third commenter characterized the time periods in the proposed rule as ''arbitrary'' and suggested that the relevance of prior violations be viewed in the context of the volume and complexity of a party's export business. BIS did not adopt these suggestions. The time periods reflected in the proposed rule were carefully selected in an effort to balance the significance of a history of prior violations with a recognition that the relevance of certain violations diminishes with time.

c. Two commenters suggested elimination of consideration of violations that have not resulted in a settlement, an adjudicated administrative enforcement action, a criminal conviction or a warning letter. BIS did not adopt this suggestion because in certain circumstances it may be appropriate to consider such violations—for example, where it is desired to resolve one class of violations, but it is clear (*e.g.*, from a voluntary self-disclosure) that a party committed other, as yet unresolved, violations.

d. Three commenters had suggestions regarding the potential effect on an acquiring company of violations that an acquired company committed prior to the acquisition. BIS adopted in substance the suggestion of one commenter that, when the acquiring firm takes reasonable steps to uncover, correct, and disclose to BIS the conduct that gave rise to such violations, BIS typically will not take such violations into account in settling other violations by the acquiring firm.

5. *Comments on other general, mitigating, and aggravating factors.*

a. Two commenters suggested adding a reference to ''reasonable care'' to the discussion of degree of wilfulness in Section III.A of the Guidance, to make clear that violations despite reasonable care to comply may be resolved more leniently than comparable violations resulting from negligence. BIS has not adopted the suggested revision, but notes that the principle that reasonable compliance efforts may be weighed in a respondent's favor is reflected in ''great weight'' mitigating factor 2.

a. BIS has adopted the suggestion of one commenter that the final rule expressly state that the listing of specific mitigating and aggravating factors is not exhaustive.

b. The comments included a number of suggestions for additional mitigating factors. Several of these suggested factors rest on considerations, especially compliance efforts, that are already reflected in mitigating factors in the proposed rule. Others refer to factors that may, in certain circumstances, be viewed as mitigating, but are unlikely to arise in a large number of cases (*e.g.*, exporter confusion arising from a jurisdictional dispute). BIS has not expressly incorporated these factors into the Guidance. However, since the listing of mitigating and aggravating factors is non-exhaustive, BIS will consider a party's contention that circumstances not specifically identified as mitigating should be given such effect in the context of a particular case.

c. One commenter suggested adding a new, ''great weight'' mitigating factor for steps taken to address compliance concerns raised by the violation, including efforts to prevent the reoccurrence of the violation. BIS has revised ''great weight'' mitigating factor 2 to include such steps.

d. Two commenters suggested that mitigating factor 4—that proper authorization would likely have been granted, if requested—should receive great weight. BIS has concluded that it would not generally afford this circumstance the same weight as the mitigating factors identified as ''great weight,'' and therefore has not adopted this suggestion. BIS notes that many cases implicating mitigating factor 4 also will implicate mitigating factor 8 (that the violation was not likely to involve harm of the nature that the applicable provisions of the EAA, EAR or other authority (*e.g.*, a license condition) were intended to protect against).

e. Two commenters suggested that mitigating factor 6 was unduly restrictive in its reference to an ''exceptional'' level of cooperation. BIS concluded that this language was appropriate, insofar as all parties are generally expected to cooperate with investigations.

f. Two commenters suggested revising mitigating factor 8, so that it would encompass any violation that did not fall under aggravating factor 3. BIS did not adopt this suggestion because it concluded that it would better serve the objectives of this Guidance to retain a middle category of violations that do not fall within mitigating factor 8 or aggravating factor 3, *i.e.*, that may have involved harm of the nature that the applicable provisions of the EAA, EAR or other authority (*e.g.*, a license condition) were intended to protect against, but did not, in purpose or effect, substantially implicate national security or other essential interests protected by the U.S. export control system.

g. One commenter suggested a new mitigating factor for valid legal defenses, such as First Amendment or other constitutional claims. BIS did not add such a specific mitigating factor, but notes that the Guidance states that BIS ''will give serious consideration to information and evidence that parties believe are relevant * * * to whether they have affirmative defenses to potential charges.''

h. Two commenters suggested revising aggravating factor 1 to state that discovering a past violation, taking corrective action, but not self-disclosing the violation would not constitute deliberate concealment for purposes of this factor. BIS has not revised the Guidance in this regard, but observes that it would not consider failure to self-disclose a violation, in and of itself, a circumstance that would implicate aggravating factor 1.

Rulemaking Requirements

1. This rule has been determined to be not significant for purposes of E.O. 12866.

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 involves a collection of information subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). This collection has been approved by the Office of Management and Budget under Control Number 0694–0058, and carries an annual burden hour estimate of 800 hours and a cost to the public of approximately $32,000.

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

4. Pursuant to 5 U.S.C. 553(b)(A), the provisions of the Administrative Procedure Act requiring a notice of

proposed rulemaking and the opportunity for public comment are waived, because this regulation involves a general statement of policy and rule of agency procedure. No other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. However, in view of the importance of this rule, which represents the first comprehensive statement of BIS's approach toward these issues, BIS sought and considered public comments before issuing a final rule. Those public comments, and the extent to which BIS adopted them, are summarized above. This regulation is now being issued in final form.

List of Subjects

15 CFR Part 764

Administrative practice and procedure, Exports, Foreign trade, Law enforcement, Penalties.

15 CFR Part 766

Administrative practice and procedure, Confidential business information, Exports, Foreign trade.

■ Accordingly, this rule amends part 764 and part 766 of the EAR as follows:

■ 1. The authority citation for 15 CFR part 764 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *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, 2003 (68 FR 47833, August 11, 2003).

PART 764—[AMENDED]

■ 2. Section 764.5, paragraph (e) is revised to read as follows:

§ 764.5 Voluntary self-disclosure.

* * * * *

(e) *Criteria.* Supplement No. 1 to part 766 describes how BIS typically exercises its discretion regarding whether to pursue an administrative enforcement case under part 766 and what administrative sanctions to seek in settling such a case.

■ 3. The authority citation for 15 CFR part 766 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *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, 2003 (68 FR 47833, August 11, 2003).

PART 766—[AMENDED]

■ 4. Section 766.3, paragraph (a) is revised to read as follows:

§ 766.3 Institution of administrative enforcement proceedings.

(a) *Charging letters.* The Director of the Office of Export Enforcement (OEE) or the Director of the Office of Antiboycott Compliance (OAC), as appropriate, or such other Department of Commerce official as may be designated by the Assistant Secretary of Commerce for Export Enforcement, may begin administrative enforcement proceedings under this part by issuing a charging letter in the name of BIS. Supplement No. 1 to this part describes how BIS typically exercises its discretion regarding the issuance of charging letters, other than in antiboycott matters under part 760 of the EAR. The charging letter shall constitute the formal complaint and will state that there is reason to believe that a violation of the EAA, the EAR, or any order, license or authorization issued thereunder, has occurred. It will set forth the essential facts about the alleged violation, refer to the specific regulatory or other provisions involved, and give notice of the sanctions available under part 764 of the EAR. The charging letter will inform the respondent that failure to answer the charges as provided in § 766.6 of this part will be treated as a default under § 766.7 of this part, that the respondent is entitled to a hearing if a written demand for one is requested with the answer, and that the respondent may be represented by counsel, or by other authorized representative who has a power of attorney to represent the respondent. A copy of the charging letter shall be filed with the administrative law judge, which filing shall toll the running of the applicable statute of limitations. Charging letters may be amended or supplemented at any time before an answer is filed, or, with permission of the administrative law judge, afterwards. BIS may unilaterally withdraw charging letters at any time, by notifying the respondent and the administrative law judge.

* * * * *

■ 5. Section 766.18 is amended to add a new paragraph (f) to read as follows:

§ 766.18 Settlement.

* * * * *

(f) Supplement No. 1 to this part describes how BIS typically exercises its discretion regarding the terms under which it is willing to settle particular cases, other than antiboycott matters under part 760 of the EAR.

■ 6. Part 766 is amended to add a new Supplement No. 1 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 BIS responds to violations of the Export Administration Regulations (EAR) and, specifically, how BIS 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 antiboycott violations under part 760 of the EAR.

Because many administrative enforcement cases are resolved through settlement, the process of settling such cases is integral to the enforcement program. BIS carefully considers each settlement offer in light of the facts and circumstances of the case, relevant precedent, and BIS's objective to achieve in each case an appropriate level of penalty and deterrent effect. In settlement negotiations, BIS 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 BIS may seek in litigating a case or what posture BIS may take toward settling a case. Parties do not have a right to a settlement offer, or particular settlement terms, from BIS, regardless of settlement postures BIS has taken in other cases.

I. Responding to Violations

The Office of Export Enforcement (OEE), among other responsibilities, investigates possible violations of the Export Administration Act of 1979, as amended, the EAR, or any order, license or authorization issued thereunder. When it appears that such a violation has occurred, OEE investigations may lead to a warning letter or a civil 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.

A. *Issuing a warning letter:* Warning letters represent OEE's conclusion that an apparent violation has occurred. 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 fully explain the apparent violation and urge compliance. OEE often issues warning letters for 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.

OEE will not issue a warning letter if it concludes, based on available information, that a violation did not occur. A warning letter does not constitute a final agency determination that a violation has occurred.

B. *Pursuing 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. BIS prepares a proposed charging letter when a case is settled before issuance of an actual charging letter. *See* section 766.18(a). In some cases, BIS also sends a proposed charging letter to a party in the absence of a settlement agreement, thereby informing the party of the violations that BIS has reason to believe occurred and how BIS expects that those violations would be charged.

C. *Referring for criminal prosecution:* In appropriate cases, BIS may refer a case to the Department of Justice for criminal prosecution, in addition to pursuing an administrative enforcement action.

II. Types of Administrative Sanctions

There are three types of administrative sanctions under §764.3(a) of the EAR: a civil penalty, a denial of export privileges, and an exclusion from practice before BIS. Administrative enforcement cases are generally settled on terms that include one or more of these sanctions.

A. *Civil penalty:* A 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 Adjustment Act of 1990 (28 U.S.C. 2461, note (2000)), which are codified at 15 CFR 6.4.

B. *Denial of export privileges:* An order denying a party'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, or may be narrower in scope (*e.g.*, limited to exports of specified items or to specified destinations or customers).

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.

III. How BIS Determines What Sanctions Are Appropriate in a Settlement

A. *General Factors:* BIS usually looks to the following basic factors in determining what administrative sanctions are appropriate in each settlement:

Degree of Willfulness: Many violations involve no more than simple negligence or carelessness. In most such cases, BIS typically will seek a settlement for payment of a civil penalty (unless the matter is resolved with a warning letter). In cases involving gross negligence, willful blindness to the requirements of the EAR, or knowing or willful violations, BIS is more likely to seek a denial of export privileges or an exclusion from practice, and/or a greater monetary penalty than BIS would otherwise typically seek. While some violations of the EAR have a degree of knowledge or intent as an element of the offense, *see, e.g.*, §764.2(e) of the EAR (acting with knowledge of a violation) and §764.2(f) (possession with intent to export illegally), BIS 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. In deciding whether a knowing violation has occurred, BIS will consider, in accordance with Supplement No. 3 to part 732 of the EAR, the presence of any red flags and the nature and result of any inquiry made by the party. A denial or exclusion order may also be considered even in matters involving simple negligence or carelessness, particularly if the violations(s) involved harm to national security or other essential interests protected by the export control system, if the violations are of such a nature and extent that a monetary fine alone represents an insufficient penalty or if the nature and extent of the violation(s) indicate that a denial or exclusion order is necessary to prevent future violations of the EAR.

Destination Involved: BIS is more likely to seek a greater monetary penalty and/or denial of export privileges or exclusion from practice in cases involving:

(1) Exports or reexports to countries subject to anti-terrorism controls, as described at §742.1(d) of the EAR.

(2) Exports or reexports to destinations particularly implicated by the type of control that applies to the item in question—for example, export of items subject to nuclear controls to a country with a poor record of nuclear non-proliferation.

Violations involving exports or reexports to other destinations may also warrant consideration of such sanctions, depending on factors such as the degree of willfulness involved, the nature and extent of harm to national security or other essential interests protected by the export control system, and what level of sanctions are determined to be necessary to deter or prevent future violations of the EAR.

Related Violations: Frequently, a single export transaction can give rise to multiple violations. For example, an exporter who mis-classifies an item on the Commerce Control List may, as a result of that error, export the item without the required export license and submit a Shipper's Export Declaration (SED) that both misstates the applicable Export Control Classification Number (ECCN) and erroneously identifies the export as qualifying for the designation ''NLR'' (no license required). In so doing, the exporter committed three violations: one violation of § 764.2(a) of the EAR for the unauthorized export and two violations of § 764.2(g) for the two false statements on the SED. It is within the discretion of BIS to charge three separate violations and settle the case for a penalty that is less than would be appropriate for three unrelated violations under otherwise similar circumstances, or to charge fewer than three violations and pursue settlement in accordance with that charging decision. In exercising such discretion, BIS typically looks to factors such as whether the violations resulted from knowing or willful conduct, willful blindness to the requirements of the EAR, or gross negligence; whether they stemmed from the same underlying error or omission; and whether they resulted in distinguishable or separate harm.

Multiple Unrelated Violations: In cases involving multiple unrelated violations, BIS is more likely to seek a denial of export privileges, an exclusion from practice, and/or a greater monetary penalty than BIS 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 monetary penalty. BIS takes this approach because multiple violations may indicate serious compliance problems and a resulting risk of future violations. BIS may consider whether a party has taken effective steps to address compliance concerns in determining whether multiple violations warrant a denial or exclusion order in a particular case.

Timing of Settlement: Under § 766.18, settlement can occur before a charging letter is served, while a case is before an administrative law judge, or while a case is before the Under Secretary for Industry and Security under § 766.22. However, early settlement—for example, before a charging letter has been served—has the benefit of freeing resources for BIS to deploy in other matters. In contrast, for example, the BIS resources saved by settlement on the eve of an adversary hearing under § 766.13 are fewer, insofar as BIS has already expended significant resources on discovery, motions practice, and trial preparation. Because the effective implementation of the U.S. export control system depends on the efficient use of BIS resources, BIS has an interest in encouraging early settlement and may take this interest into account in determining settlement terms.

Related Criminal or Civil Violations: Where an administrative enforcement matter under the EAR involves conduct giving rise to related criminal or civil charges, BIS may take into account the related violations, and their resolution, in determining what administrative sanctions are appropriate under part 766. 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 party accepts responsibility for complying with the EAR and will take greater care to do so in the future. In appropriate cases where a party is receiving substantial criminal penalties, BIS may find that sufficient deterrence may be achieved by lesser administrative sanctions than would be appropriate in the absence of criminal penalties. Conversely, BIS might seek greater administrative sanctions in an otherwise similar case where a party 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.

B. Specific Mitigating and Aggravating Factors: In addition to the general factors described in Section III.A. of this Supplement, BIS also generally looks to the presence or absence of the following mitigating and aggravating factors in determining what sanctions should apply in a given settlement. These factors describe circumstances that, in BIS's experience, are commonly relevant to penalty determinations in settled cases. However, this listing of factors is not exhaustive and, in particular cases, BIS may consider other factors that may indicate the blameworthiness of a party's conduct, the actual or potential harm associated with a violation, the likelihood of future violations, and/or other considerations relevant to determining what sanctions are appropriate.

Where a factor admits of degrees, it should accordingly be given more or less weight. Thus, for example, one prior violation should be given less weight than a history of multiple violations, and a previous violation reported in a voluntary self disclosure by an exporter whose overall export compliance efforts are of high quality should be given less weight than previous violation(s) not involving such mitigating factors.

Some of the mitigating factors listed in this section are designated as having ''great weight.'' When present, such a factor should ordinarily be given considerably more weight than a factor that is not so designated.

Mitigating Factors

1. The party made a voluntary self-disclosure of the violation, satisfying the requirements of § 764.5 of the EAR. All voluntary self-disclosures meeting the requirements of § 764.5 will be afforded ''great weight,'' relative to other mitigating factors not designated as having ''great weight.'' Voluntary self-disclosures receiving the greatest mitigating effect will typically be those concerning violations that no BIS investigation in existence at the time of the self-disclosure would have been reasonably likely to discover without the self-disclosure. (GREAT WEIGHT)

2. The party has an effective export compliance program and its overall export compliance efforts have been of high quality. In determining the presence of this factor, BIS will take account of the extent to which a party 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, BIS will also consider whether a party's export compliance program uncovered a problem, thereby preventing further violations, and whether the party has taken steps to address compliance concerns raised by the violation, including steps to prevent reoccurrence of the violation, that are reasonably calculated to be effective. (GREAT WEIGHT)

3. The violation was an isolated occurrence or the result of a good-faith misinterpretation.

4. Based on the facts of a case and under the applicable licensing policy, required authorization for the export transaction in question would likely have been granted upon request.

5. Other than with respect to antiboycott matters under part 760 of the EAR:

(a) The party has never been convicted of an export-related criminal violation;

(b) In the past five years, the party has not entered into a settlement of an export-related administrative enforcement case with BIS or another U.S. Government agency or been found liable in an export-related administrative enforcement case brought by BIS or another U.S. Government agency;

(c) In the past three years, the party has not received a warning letter from BIS; and

(d) In the past five years, the party has not otherwise violated the EAR.

Where necessary to effective enforcement, the prior involvement in export violation(s) of a party's owners, directors, officers, partners, or other related persons may be imputed to a party in determining whether these criteria are satisfied. When an acquiring firm takes reasonable steps to uncover, correct, and disclose to BIS conduct that gave rise to violations by an acquired business before the acquisition, BIS typically will not take such violations into account in applying this factor in settling other violations by the acquiring firm.

6. The party has cooperated to an exceptional degree with BIS efforts to investigate the party's conduct.

7. The party has provided substantial assistance in BIS investigation of another person who may have violated the EAR.

8. The violation was not likely to involve harm of the nature that the applicable provisions of the EAA, EAR or other authority (*e.g.*, a license condition) were intended to protect against; for example, a false statement on an SED that an export was ''NLR,'' when in fact a license requirement was applicable, but a license exception was available.

9. At the time of the violation, the party: (1) Had little or no previous export experience; and (2) Was not familiar with export practices and requirements. (Note: The presence of only one of these elements will not generally be considered a mitigating factor.)

Aggravating Factors

1. The party made a deliberate effort to hide or conceal the violation(s). (GREAT WEIGHT)

2. The party's conduct demonstrated a serious disregard for export compliance responsibilities. (GREAT WEIGHT)

3. The violation was significant in view of the sensitivity of the items involved and/or the reason for controlling them to the destination in question. This factor would be present where the conduct in question, in purpose or effect, substantially implicated national security or other essential interests protected by the U.S. export control system, in view of such factors as the destination and sensitivity of the items involved. Such conduct might include, for example, violations of controls based on nuclear, biological, and chemical weapon proliferation, missile technology proliferation, and national security concerns, and exports proscribed in part 744 of the EAR. (GREAT WEIGHT)

4. The violation was likely to involve harm of the nature that the applicable provisions of the EAA, EAR or other authority (*e.g.*, a license condition) are principally intended to protect against, *e.g.*, a false statement on an SED that an export was destined for a non-embargoed country, when in fact it was destined for an embargoed country.

5. The quantity and/or value of the exports was 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.

6. The presence in the same transaction of concurrent violations of laws and regulations, other than those enforced by BIS.

7. Other than with respect to antiboycott matters under part 760 of the EAR:

(a) The party has been convicted of an export-related criminal violation;

(b) In the past five years, the party has entered into a settlement of an export-related administrative enforcement case with BIS or another U.S. Government agency or has been found liable in an export-related administrative enforcement case brought by BIS or another U.S. Government agency;

(c) In the past three years, the party has received a warning letter from BIS; or

(d) In the past five years, the party otherwise violated the EAR.

Where necessary to effective enforcement, the prior involvement in export violation(s) of a party's owners, directors, officers, partners, or other related persons may be imputed to a party in determining whether these criteria are satisfied. When an acquiring firm takes reasonable steps to uncover, correct, and disclose to BIS conduct that gave rise to violations by an acquired business before the acquisition, BIS typically will not take such violations into account in applying this factor in settling other violations by the acquiring firm.

8. The party exports as a regular part of the party's business, but lacked a systematic export compliance effort.

In deciding whether and what scope of denial or exclusion order is appropriate, the following factors are particularly relevant: the presence of mitigating or aggravating factors of great weight; the degree of willfulness involved; in a business context, the extent to which senior management participated in or was aware of the conduct in question; the number of violations; the existence and seriousness of prior violations; the likelihood of future violations (taking into account relevant export compliance efforts); and whether a monetary penalty can be expected to have a sufficient deterrent effect.

IV. How BIS Makes Suspension and Deferral Decisions

A. *Civil Penalties:* In appropriate cases, payment of a civil monetary penalty may be deferred or suspended. *See* § 764.3(a)(1)(iii) of the EAR. In determining whether

suspension or deferral is appropriate, BIS may consider, for example, whether the party 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 impact of the penalty consistent with the impact of BIS penalties on other parties who committed similar violations.

B. *Denial of Export Privileges and Exclusion from Practice:* In deciding whether a denial or exclusion order should be suspended, BIS may consider, for example, the adverse economic consequences of the order on the respondent, its employees, and other parties, as well as on the national interest in the competitiveness of U.S. businesses. An otherwise appropriate denial or exclusion order will be suspended on the basis of adverse economic consequences only if it is found that future export control violations are unlikely and if there are adequate measures (usually a substantial civil penalty) to achieve the necessary deterrent effect.

Dated: February 11, 2004.

Kenneth I. Juster,

Under Secretary of Commerce for Industry and Security.

[FR Doc. 04–3639 Filed 2–19–04; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL–7625–1]

National Oil and Hazardous Substance Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Direct final notice of deletion of the Wheeler Pit Superfund Site from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA), Region V is publishing a direct final notice of deletion of the Wheeler Pit, Superfund Site (Site), located in Janesville, Wisconsin, from the National Priorities List (NPL).

The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is appendix B of 40 CFR part 300, which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). This direct final deletion is being published by EPA with the concurrence of the State of Wisconsin, through the Wisconsin Department of Natural Resources, because EPA has determined that all appropriate response actions under CERCLA have been completed and, therefore, further remedial action pursuant to CERCLA is not necessary at this time.

DATES: This direct final notice of deletion will be effective April 20, 2004 unless EPA receives adverse comments by March 22, 2004. If adverse comments are received, EPA will publish a timely withdrawal of the direct final notice of deletion in the **Federal Register** informing the public that the deletion will not take effect.

ADDRESSES: *Comments:* Comments may be mailed to: Darryl Owens, Remedial Project Manager (RPM) at (312) 886–7089, *Owens.Darryl@EPA.Gov* or Gladys Beard, State NPL Deletion Process Manager at (312) 886–7253, *Beard.Gladys@EPA.Gov*, U.S. EPA Region V, 77 W. Jackson, Chicago, IL 60604, (mail code: SR–6J) or at 1–800–621–8431.

Information Repositories

Comprehensive information about the Site is available for viewing and copying at the Site information repositories located at: EPA Region V Library, 77 W. Jackson, Chicago, Il 60604, (312) 353–5821, Monday through Friday 8 a.m. to 4 p.m.; Hedberg Public Library, 316 S. Main Street, Janesville, Wisconsin 53545, Monday through Friday 9 a.m. to 9 p.m., Saturday 9 a.m. to 5 p.m. and Sunday 1 p.m to 5 p.m.

FOR FURTHER INFORMATION CONTACT: Darryl Owens, Remedial Project Manager at (312) 886–7089, *Owens.Darryl@EPA.Gov* or Gladys Beard, State NPL Deletion Process Manager at (312) 886–7253, *Beard.Gladys@EPA.Gov* or 1–800–621–8431, (SR–6J), U.S. EPA Region V, 77 W. Jackson, Chicago, IL 60604.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

EPA Region V is publishing this direct final notice of deletion of the Wheeler Pit, Superfund Site from the NPL.

The EPA identifies sites that appear to present a significant risk to public health or the environment and maintains the NPL as the list of those sites. As described in § 300.425(e)(3) of the NCP, sites deleted from the NPL remain eligible for remedial actions if conditions at a deleted site warrant such action.

Because EPA considers this action to be non-controversial and routine, EPA is taking it without prior publication of a notice of intent to delete. This action will be effective April 20, 2004 unless EPA receives adverse comments by March 22, 2004 on this document. If adverse comments are received within the 30-day public comment period on this document, EPA will publish a timely withdrawal of this direct final deletion before the effective date of the deletion and the deletion will not take effect. EPA will, as appropriate, prepare a response to comments and continue with the deletion process on the basis of the notice of intent to delete and the comments already received. There will be no additional opportunity to comment.

Section II of this document explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses the Wheeler Pit Superfund Site and demonstrates how it meets the deletion criteria. Section V discusses EPA's action to delete the Site from the NPL unless adverse comments are received during the public comment period.

II. NPL Deletion Criteria

Section 300.425(e) of the NCP provides that releases may be deleted from the NPL where no further response is appropriate. In making a determination to delete a release from the NPL, EPA shall consider, in consultation with the State, whether any of the following criteria have been met:

i. Responsible parties or other persons have implemented all appropriate response actions required;

ii. all appropriate Fund-financed (Hazardous Substance Superfund Response Trust Fund) responses under CERCLA have been implemented, and no further response action by responsible parties is appropriate; or

iii. the remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, the taking of remedial measures is not appropriate.

Even if a site is deleted from the NPL, where hazardous substances, pollutants, or contaminants remain at the deleted site above levels that allow for unlimited use and unrestricted exposure, CERCLA section 121(c), 42 U.S.C. 9621(c), requires that a subsequent review of the site be conducted at least every five years after the initiation of the remedial action at the deleted site to ensure that the action remains protective of public health and the environment. If new information becomes available which indicates a