RECORD OF COMMENTS: EXPORT ADMINISTRATION REGULATIONS: PENALTY GUIDANCE IN THE SETTLEMENT OF ADMINISTRATIVE ENFORCEMENT CASES

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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 764 and 766

[Docket No. 030909226–3226–01]

RIN 0694–AC92

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

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed rule.

SUMMARY: The Bureau of Industry and Security (BIS) proposes to amend the Export Administration Regulations by incorporating guidance on how BIS makes penalty determinations when settling administrative enforcement cases under part 766 of the Export Administration Regulations (EAR), 15 CFR 730–799 (2003). This guidance also addresses related aspects of how BIS responds to violations of the EAR, such as charging decisions. This rule also proposes to amend parts 764 and 766 of the EAR to conform to this guidance.

DATES: Comments must be received by November 17, 2003.

ADDRESSES: Written comments should be addressed to: Chief Counsel for Industry and Security, Attention: Philip D. Golrick, Room H–3839, United States Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Please mark envelopes containing comments with the words "Settlement Guidance."

FOR FURTHER INFORMATION CONTACT: For further information regarding this proposed rule, contact Philip D. Golrick, Office of Chief Counsel for Industry and Security, United States Department of Commerce, 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.

The rule proposes to incorporate guidance in the EAR on how BIS determines what penalty is appropriate for the settlement of an administrative enforcement case. This guidance would appear in a new Supplement No. 1 to part 766 of the EAR. The proposed 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 proposed 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 would not apply to antiboycott matters arising under part 760 of the EAR.

In part 764, the rule proposes to amend section 764.5(e) 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 proposes to amend 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 proposes to amend 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. L. 104–121).

Rulemaking Requirements

1. This proposed 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 proposed rule, which represents the first comprehensive statement of BIS's approach toward these issues, BIS is seeking public comments before the proposed rule takes effect. The period for submission of comments will close November 17, 2003. BIS will consider all comments received before the close of the comment period in developing a final rule. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. BIS will not accept public comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. BIS will return such comments and materials to the persons submitting the comments and will not consider them in the development of the final rule. All public comments on this proposed rule must be in writing (including fax or e-mail) and will be a matter of public record, available for public inspection and copying. The Office of Administration, Bureau of Industry and Security, U.S. Department of Commerce, displays these public comments on BIS's Freedom of Information Act (FOIA) Web site at *http://www.bis.doc.gov/foia*. This office does not maintain a separate public inspection facility. If you have technical difficulties accessing this web site, please call BIS's Office of Administration at (202) 482–0637 for assistance.

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.

For the reasons discussed in the preamble, this proposed rule would amend Parts 764 and 766 of the EAR as follows:

1. The authority citation for 15 CFR part 764 is amended 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. 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 by adding 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.

6. Part 766 is amended by adding 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 is 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 to first-time offenders for an apparent violation based on technicalities; where good faith efforts to comply with the law and cooperate with the investigation are present; where the investigation commenced as a result of a voluntary self-disclosure satisfying the requirements of §764.5; and where no aggravating factors exist. 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 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. BIS prepares a proposed charging letter when a case is settled before issuance of an actual charging letter. *See* § 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 section 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 section 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). 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), 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) (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, 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).

(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) 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 above, 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. 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 factors listed below 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. (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 *http://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. (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:

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 violations 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.

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. (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:

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 violations 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.

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)(iii). 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: September 9, 2003.

Kenneth I. Juster,

Under Secretary of Commerce for Industry and Security.

[FR Doc. 03–23499 Filed 9–16–03; 8:45 am]

BILLING CODE 3510–33–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 30, 31, 33, 35 and 40

[Docket ID No. OA–2002–0001; FRL–7560–7]

RIN 2020–AA39

Public Hearings on Participation by Disadvantaged Business Enterprises in Procurement Under Environmental Protection Agency (EPA) Financial Assistance Agreements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; public hearings.

SUMMARY: This document announces the dates and locations of public hearings wherein EPA will take comments on its proposed rule for "Participation by Disadvantaged Business Enterprises in Procurement under Environmental Protection Agency (EPA) Financial Assistance Agreements," published on July 24, 2003 at 68 FR 43824. These public hearings will be held during the 180-day public comment period for the proposed rule, which ends on January 20, 2004. EPA will publish information concerning additional public hearings during the comment period when that information becomes available.

EPA also will hold meetings with Tribal officials/representatives during the 180-day public comment period. EPA will publish information concerning such Tribal hearings when that information becomes available.

DATES: See **SUPPLEMENTARY INFORMATION** for hearing dates.

ADDRESSES: See **SUPPLEMENTARY INFORMATION** for addresses.

Sun Microsystems, Inc.
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Chief Counsel for Industry and Security
Attention: Philip D.Golrick
Room H-3839
U.S. Department of Commerce
14 St. and Constitution Ave. NW
Washington, DC 20230

10/17/03

Dear Mr. Golrick,

Sun Microsystems welcomes the opportunity to comment on the proposed Penalty Guidance in the Settlement of Administrative Enforcement Cases in response to the solicitation in the Federal Register of September 17, 2003 (Docket No. 030909226-3226-01).

Sun views this draft as an important breakthrough in ensuring fair and consistent settlement of civil export enforcement cases. In particular, we applaud the clear recognition of voluntary self-disclosure and the implementation of internal control programs as factors of great weight in mitigating imposition of civil penalties.

Despite the high quality of the Guidelines, they fail to address some important issues, and in some specific areas appear to reflect misconceptions that distort important characteristics of the business environment. If left unaddressed, these problems could undermine the intent of the proposal. Areas for improvement include:

1. Issuance of Warning Letters (Section 766.18, Supp. 1, I.A.)

This section of the guidelines suggests extremely high standards for the issuance of warning letters as opposed to the initiation of administrative enforcement proceedings. As the section states, "OEE often issues warning letters for a first-time offenders for an apparent violation based on technicalities, ..."

Large exporting companies in the Information Technology industry manage export volumes in the tens of billions of dollars each year involving hundreds of thousands of parts and products and tens of thousands of customers. Many companies have been conducting business of this volume and complexity for many years, and virtually all such exports are subject to some form of export control or documentation requirements under the EAR.

Under such conditions, "apparent violations based on technicalities" are inevitable due to human and mechanical error, and could potentially limit or eliminate the use of warning letters as a tool to improve compliance among America's leading technology companies. We doubt whether this was the intent of the drafters, but this paragraph should be clarified to state that various factors might be considered in the issuance of such letters, and that complexity and volume of business should be an important consideration.

2. Prior History as Mitigation and Aggravation (Supp. 1, III.B)

Along similar lines, parties that have not received a warning letter in the last three years, nor entered into a settlement of an enforcement case in the last five years, are favorably considered under the mitigation factors when considering penalties. Conversely, companies that have settled or received warning letters within these timeframes are penalized under the aggravating factors.

Consideration of prior history in assigning penalties is fair and logical, but assigning arbitrary benchmarks without consideration of business volumes and complexity is not. While the present standard may make sense for small exporters, it is clearly discriminatory against complex enterprises with high volumes of export transactions.

We strongly urge that these arbitrary time frames be removed from the proposal, and replaced by statements assigning due consideration to the prior record of compliance history, but with regard to the context of business volumes and complexity of export activity.

3. Role of Third Party involvement

Mitigating consideration must be provided to situations where a third party (reseller, distributor, or other party) who is beyond the control of the original exporter was responsible in full or in part for the violation. While such parties are often beyond the practical reach of U.S. enforcement authorities, the burden of penalties and sanctions must be directed at responsible parties.

4. Successor Liability

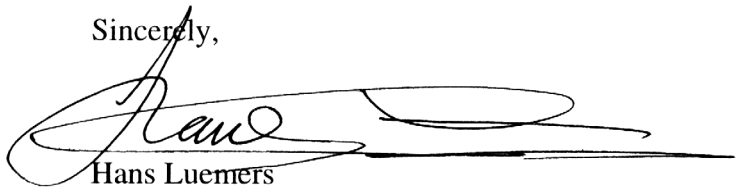
Companies that acquire other businesses are obliged to exercise due diligence in reviewing the regulatory and compliance history of the purchased firm prior to the transaction. However, due to the scope and complexity of export requirements, it is sometimes the case that even a thorough due-diligence review does not uncover potential export violations.

Mitigating consideration must be afforded to companies that have conducted responsible due-diligence reviews of export compliance, but which discover violations only after assuming operational control of the acquired company. Specifically, any violations discovered under such circumstances should not be considered as aggravating factors in settlement of other violations that may have been committed by the acquiring firm prior to assumption of operational control.

Sun would again wish to thank BIS Management and staff for this important effort to impose standards on Export Enforcement activity. Particularly with the clarifications that we suggest, the document will make a valuable and permanent contribution to the nation's export control program.

We also strongly urge BIS to supplement this penalty guidance by the addition of enforcement and due diligence criteria in cases involving the Enhanced Proliferation Control Initiative, including the use of automated export screening programs.

Sincerely,



Hans Luemers
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November 14, 2003

Chief Counsel for Industry and Security
Attention: Philip D. Golrick
U.S. Department of Commerce, Room H-3839
14th Street and Pennsylvania Avenue, NW
Washington, D.C. 20230

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

Dear Mr. Golrick:

We are writing to provide comments in response to the Federal Register notice (the "Notice") published on September 17, 2003, by the Bureau of Industry and Security ("BIS"), requesting such comments on proposed Penalty Guidance in the Settlement of Administrative Enforcement Cases (the "Guidance"). *68 Fed. Reg. 54,402.*

These comments are submitted by the American Bar Association's Section of International Law and Practice (the "Section"). The views expressed in these comments are presented only on behalf of the Section. They have not been approved by the ABA House of Delegates or Board of Governors, and should not be construed as representing the policy of the ABA.

The following comments on the proposed Guidance are intended to provide suggestions for BIS's consideration to assist in furthering the important policy goals of enhancing export controls compliance and encouraging voluntary compliance and disclosure.

Background

As an essential part of its administration of the export control system, the Commerce Department's Bureau of Industry and Security (BIS) brings administrative enforcement actions for violations of the Export Administration Regulations (EAR). *15 C.F.R. §730 et seq.* Many administrative enforcement cases are resolved through settlements between BIS and the respondent.

As proposed, the Guidance would incorporate into the EAR guidelines on how BIS will determine appropriate penalties during settlement of administrative enforcement cases. The Guidance identifies general factors as well as specific mitigating and aggravating factors that BIS typically takes into account in penalty determinations. The proposed 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.[1] The Guidance would appear in a new Supplement No. 1 to part 766 of the EAR. Several other EAR provisions would be revised to reflect the existence of the new Supplement.

Discussion

Through these comments, the Section hopes to assist BIS to further the important policy goals of enhancing export controls compliance and encouraging voluntary compliance and disclosure.

In this regard, the Section commends the BIS for its efforts in preparing and issuing the proposed Guidance. While the Section recognizes that many of the issues and factors discussed in the proposed Guidance have been part of BIS's past practice, BIS is providing a valuable service to the exporting community by codifying these issues and factors. By promoting consistency and predictability in BIS's approach to export enforcement actions, the Guidance will further encourage exporters and their representatives to see the value of complying with the EAR and cooperating with BIS. The Section strongly supports the Guidance's emphasis on, and encouragement of, voluntary compliance given that exporters serve as the front line of export enforcement.

The following are the Section's specific comments on the proposed Guidance and are set forth in the order of how the matters appear in the Guidance rather than in order of priority:

1. *BIS should clearly state that it will follow the Guidance in enforcement cases.*

The Introduction to the Guidance should state affirmatively that BIS will follow the Guidance in enforcement cases that it brings. Such a statement would be consistent with the approach taken by other federal agencies' enforcement guidelines. For example, U.S. Customs and Border Protection (CBP) enforcement guidelines state: "The guidelines below will be used by the Customs Service in arriving at a just and reasonable assessment and disposition of liabilities . . . within the stated limitations." *19 C.F.R. Pt. 171 App. B.* Inclusion of a similar phrase will reassure the exporting public that BIS will implement and consistently apply the Guidance in all cases. Moreover, such a statement would complement BIS's statement in the Introduction that the "guidance does not confer any right or impose any obligation regarding what penalties BIS may seek . . . " The Section recommends adding this affirmative commitment to the Guidance at the end of the Introduction before subheading "I. Responding to Violations".

2. *BIS should provide a definition or examples of "technicalities."*

[1] The Guidance would not apply to antiboycott matters arising under part 760 of the EAR.

Section I.A of the proposed Guidance states that warning letters may be issued for, among other things, an "apparent violation based on technicalities." The term "technicalities" is a vague, non-legal term, for which there is no meaning under the EAR. It would be useful if the Guidance provided examples of "technicalities." Examples might include the following: (1) listing the wrong license exception or NLR on a Shipper's Export Declaration when another authorization applies; (2) clerical errors in identifying the ECCN when the correct one authorizes the export without a license; or (3) other inaccuracies or omissions in export documentation that do not themselves result in harm to national security or otherwise compromise export controls, even though they may be ancillary to a substantive violation.

3. *BIS should consider issuing "education letters" in certain instances when it is unclear that a violation occurred.*

The Section notes that the OEE previously issued "education letters" in certain situations not warranting a warning letter. As an affirmation that EAR compliance is a partnership between industry and government, we believe the final Guidance should permit OEE to reinstitute this practice. An education letter could be issued to advise of flaws or shortcomings in a company's compliance system that, left uncorrected, could result in EAR violations. In issuing the education letter, OEE would reach no conclusion as to the commission of a violation of the EAR, but rather, as a matter of effective preventive compliance, would seek to inform a company of what OEE believes is a specific vulnerability in company compliance practices that should be corrected at the earliest possible date.

4. *BIS should clarify the list of factors in proposed section I.A for which a warning letter may be issued.*

The Section points BIS to the list of factors at the conclusion of section I.A. that appear to be conjunctive (connected by "and" rather than "or"). The word "and" should be replaced by the word "or" to make clear that these factors are independent of one another. Additionally, a semi-colon should be inserted after the phrase "first-time offenders" to make clear that a warning letter may be issued to parties other than first-time offenders.

Moreover, we believe BIS should not be bound to these listed factors alone as meriting a warning letter. Thus, the final Guidance should state clearly that these are simply examples of factors that merit a warning letter.

5. *Voluntary disclosures should receive a rebuttable presumption that a warning letter is the appropriate response.*

The Section suggests that proposed section I. of the Guidance should be modified to accord voluntary disclosures a rebuttable presumption that a warning

letter, rather than a more stringent sanction, is the appropriate response. We do not expect, nor do we recommend, that this would be a rigid rule, as we fully understand that circumstances may vary dramatically. However, implementing such a rebuttable presumption would help create and maintain mutual confidence between the "compliance" and the "enforcement" communities. Including this presumption in the final Guidance will encourage companies to make voluntarily disclosures, thus allowing the BIS to devote its resources to other areas.

At minimum, where there is a voluntary disclosure regarding circumstances for which a license could have been obtained if applied for, and absent substantial aggravating factors, there should be a rebuttable presumption of a warning letter. This is consistent with CBP's "no harm no foul" approach to prior disclosure in the case of negligent or grossly negligent violations of 19 U.S.C. § 1592.

6. *BIS should clarify that a warning letter or administrative penalty ends the BIS investigation.*

BIS should make clear in the final Guidance that a warning letter or the imposition of an administrative penalty will terminate the investigation and will result in the closing of the BIS file unless new facts are found that warrant reopening the matter.

7. *BIS should follow "national treatment" principles with cooperating non-U.S. parties.*

Although the Section does not propose any specific change to the draft Guidance in this respect, we note that OEE has had a practice of issuing "proposed" or "draft" charging letters to U.S. parties who are in settlement discussions, while issuing only formal charging letters to similarly situated non-U.S. parties, even when the non-U.S. party is represented by U.S. counsel. We strongly recommend that OEE follow "national treatment" principles when dealing with cooperating non-U.S. parties. There is no basis for treating non-U.S. persons differently than U.S. persons in this regard.

8. *BIS should make clear that its list of mitigating factors is not exhaustive.*

While the Section recognizes the value of delineating particular factors that influence penalty determinations, we suggest that BIS include the following sentence at the beginning of section III.A. of the Guidance: "These are guidelines and specific facts may result in other mitigating or aggravating factors."

9. *BIS should clarify what constitutes "willfulness."*

The Section believes that in section III.A. of the Guidance ("Degree of Willfulness"), BIS should specify treatment for exporters who exercise reasonable

care yet still may commit a violation. There should be a clear distinction made between exporters that take reasonable care to comply with the export laws and those who willfully or knowingly violate them. Introducing this additional degree of proportionality would contribute to the fairness of the Guidance. Accordingly, we recommend adding the following sentence at the end of the section:

> "In determining the penalty in cases of a violation where the exporter showed reasonable care to comply with the U.S. export control system, BIS will maintain discretion to take no action, issue a warning letter, or seek to settle for payment of a civil penalty that would be lower than in other cases of simple negligence."

10. *BIS should clarify the term "Related Violations."*

With respect to section III.A. of the Guidance ("Related Violations"), the Section believes that an exporter should not be liable for aggregate reporting or clerical tasks that are the direct result of an initial violation, even if the exporter took reasonable care to comply with the export control laws. For example, an exporter who reasonably relies on a third-party for a classification of that third-party's product and takes steps to validate the classification should not be held liable in the event of a violation for reporting or clerical tasks that results from the product classification. Accordingly, we recommend that BIS add the following statement at the end of the section:

> "BIS will not seek penalties for multiple violations where the violations stem from the same underlying error or omission and the exporter exercised reasonable care to comply."

11. *Proposed mitigating factor No. 4 should receive "Great Weight."*

The Section believes that BIS should afford "Great Weight" to proposed mitigating factor No. 4,[2] which applies when the "required authorization for the export transaction in question would likely have been granted upon request." The fact that BIS would have authorized the export transaction in question had a license been sought is a very significant factor and should be weighed heavily in BIS penalty determinations. Assigning "Great Weight" to this mitigating factor also would bring parity to the number of aggravating and mitigating factors assigned great weight.

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[2] Proposed mitigating factor No. 4 states as follows: "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."

12. *Proposed mitigating factor No. 5 should be amended to encourage compliance and voluntary disclosure.*[3]

The Section does not believe parties should be evaluated on the basis of behavior that took place more than five years ago, nor on the basis of (i) a warning letter issued due to a valid voluntary disclosure of a violation or alleged violation and (ii) behavior that took place more than three years ago. Evaluating a party on the basis of a warning letter issued as a result of that party's voluntary disclosure, especially a disclosure from several years prior or more, could discourage parties from making voluntary disclosures. Given that a warning letter "does not constitute a final agency determination that a violation has occurred", according to the Guidance, BIS should not automatically count prior warning letters as an aggravating factor. Similarly, we believe that this and other factors should not penalize a party that discovers a violation of the EAR as a result of its effective export compliance program and chooses to remedy the problems that led to the violation. Accordingly, we recommend that mitigating factor No. 5 as proposed should be replaced by the following:

> "Other than with respect to antiboycott matters under part 760:
> a. The party has never been convicted of an export-related criminal violation;
> b. The party has not entered into a settlement with BIS or another U.S. Government agency of an export-related administrative enforcement case involving violations or alleged violations that have occurred in the past five years;
> c. The party has not been found liable in an export-related administrative enforcement case brought by BIS or another U.S. Government agency of violations that have occurred in the past five years; or
> d. The party has not received a warning letter from BIS in the past three years, or such a warning letter was issued as a result of a valid voluntary disclosure made in that period or otherwise was issued under circumstances that do not

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[3] Proposed mitigating factor No. 5 reads as follows: "5. Other than with respect to antiboycott matters under part 760:
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 violations 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."

represent an agency determination that a violation has occurred.
Where necessary to effective enforcement, the prior involvement in export violations 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."

14. *BIS should consider including in the Guidance the following mitigating factors:*

A) The violation resulted out of a genuine confusion as to the party's regulatory responsibilities due to ambiguous or inconsistent guidance, or a dispute within the U.S. Government as to which Department has jurisdiction over a particular product or technology. In the case of individuals, such confusion also might stem from an apparent language barrier or other impediment to understanding the regulations and obligations imposed by them.

B) "Actions by the exporter to correct any violation. GREAT WEIGHT." In many cases, exporters will be uniquely positioned to halt the harm from unauthorized export transactions. BIS should explicitly recognize and encourage this critical compliance measure.

C) Proposed Mitigating Factor No. 8 should be expanded to account for the concepts expressed in aggravating factor No. 3, especially the phrase "substantially implicated national security."[4] Accordingly, we recommend replacing proposed mitigating factor No. 8 with the following:

> "8. The violation did not significantly implicate national security or other essential interests protected by the U.S. export control system, and therefore was not likely to involve harm of the nature against which the applicable provisions of the EAA, EAR, or other authority (*e.g.*, a license condition) were intended to protect. Such violations include, for example, failure to apply for government

[4] Proposed mitigating factor No. 8 states 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; 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." Proposed aggravating factor No. 3 states as follows: "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. (GREAT WEIGHT)"

classification of encryption software where the software would clearly qualify, a false statement on an SED that an export was 'NLR' when in fact a license exception was available, or an instance in which an EAR99 item is inadvertently exported to an entity on the Proliferation Entity list, but that item is not controlled to the destination where the Entity is located."

D) "An unauthorized recipient of a dual-use item(s) could have obtained the item(s) lawfully in some other way, *e.g.*, from a non-U.S. supplier."

E) "The defendant has valid legal defenses, such as First Amendment or other constitutional claims."

F) "The respondent's export compliance system detected the problem and thereby may have prevented further violations."

G) "Corrective actions were taken internally to prevent future violations, especially when the exporter's top management has accepted responsibility."

H) "The regulations are unclear, or have been applied inconsistently." We note that when there are internal disagreements within BIS and among agencies as to which ECCN should apply to a particular item, an exporter's good faith efforts to comply should be recognized as mitigation.

I) "If no export compliance program is in place when the violation occurs, but respondent implements one upon discovering, or being notified by BIS of, the violation."

J) "In certain cases in which the violation pertains to a transaction that is humanitarian in nature."

14. *BIS should remove the qualifying phrase "exceptional degree" from proposed mitigating factor No. 6.*[5]

The Section recommends that the qualifying phrase "exceptional degree" be deleted from mitigating factor No. 6 in the final Guidance. In this regard, the Section notes that CBP's penalty mitigation guidelines provide simply that "cooperation with the investigation" will be considered as a mitigating factor. *19 C.F.R. Part 171 App. B (G) (2).* In order to qualify for mitigation under this factor, the violator "must exhibit extraordinary cooperation beyond that expected from a persona under investigation from a Customs violation," including the following:

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[5] Proposed mitigating factor No. 6 provides as follows: "6. The party has cooperated to an exceptional degree with BIS efforts to investigate the party's conduct."

"assisting Customs officers to an unusual degree in auditing the books and records of the violator (*e.g.*, incurring extraordinary expenses in providing computer runs solely for submission to Customs to assist the agency in cases involving an unusually large number of entries and/or complex issues)"

and

"assisting Customs in obtaining additional information relating to the subject violation or other violations. Merely providing the books and records of the violator should not be considered cooperation justifying mitigation inasmuch as Customs has the right to examine an importer's books and records pursuant to 19 U.S.C. §§ 1508-1509."

The Section suggests that such examples or others like those provided by CBP would be preferable to an undefined (and seemingly very high) standard such as "exceptional degree."

15. *BIS should make clear that exporters have no affirmative duty to disclose violations in many circumstances.*

While the Section recognizes the value of encouraging compliance and disclosures, we note the Guidance's understanding that exporters often have no affirmative duty to disclose violations. In many cases, the exporter may discover a past violation and implement corrective measures, without disclosing the violation. Accordingly, the Guidance does not suggest that such a decision by the exporter constitutes a "deliberate effort to hide or conceal," or fall within aggravating factor No. 1. It would be useful to state this more clearly.

16. *Warning letters issued due to voluntary disclosures should not be considered aggravating factors.*

As noted in comment 12, above, the Section does not believe that warning letters issued due to voluntary disclosures should be considered aggravating factors in BIS penalty determinations, as to do so undermines disclosures and other voluntary measures exporters take to remedy problems. Accordingly, we recommend that proposed aggravating factor No. 7 be replaced by the following:

"7. Other than with respect to antiboycott matters under part 760:
a. The party has been convicted of an export-related criminal violation;

b. The party has entered into a settlement with BIS or another U.S. Government agency of an export-related administrative enforcement case involving violations or alleged violations that have occurred in the past five years;
c. The party has been found liable in an export-related administrative enforcement case brought by BIS or another U.S. Government agency of violations that have occurred in the past five years; or
d. The party has received a warning letter from BIS in the past three years other than a warning letter issued as a result of a valid voluntary disclosure made in that period.
Where necessary to effective enforcement, the prior involvement in export violations 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."

In the alternative, we recommend that BIS not count as an aggravating factor those warning letters issued as a result of a valid voluntary disclosure. Counting such warning letters as an aggravating factor discourages voluntary disclosures and the compliance program improvements that often result when voluntary disclosures are made. We therefore recommend amending proposed aggravating factor No. 7.c. to read as follows: "In the past three years, the party has received a warning letter from BIS other than a warning letter that is the result of a valid voluntary disclosure."

17. *The BIS should remove or amend the proposed Guidance provision stating that an export's quantity and value may affect the penalty.*

Quantity and value should not be considered factors (whether aggravating or mitigating) in BIS penalty determinations. The quantity and value of the export is merely a fact, not an affirmative action undertaken (or not undertaken) by an exporter, as the other listed factors are. We therefore recommend that BIS delete this proposed provision from the Guidance.

Alternatively, the Section notes that this factor fails to account for the significant penalty that exporters endure in the form of negative publicity. BIS should recognize that such public relations damage is perhaps the greatest penalty for an exporter found to have violated the law. While we understand that BIS has heard some persons suggest that monetary penalties for large value shipments could be viewed as a "cost of business," in our experience this is not the prevailing view of most exporters. Moreover, to the extent necessary, this issue can be addressed in individual cases.

The quantity and value of an export will not necessarily correlate with the risk to national security posed by a particular export. For instance, a machine tool

may cost $300,000 and be harmless to national security, while a $2 vial of certain toxin could be very harmful to national security.

In any event, the Section recommends that BIS consider the size and nature of an exporter's operations when determining the appropriate response to violations. Such an approach is used by other agencies in enforcement cases. For example, CBP commonly uses a policy, detailed below, to effectively address an analogous issue. To illustrate the CBP policy (and why it would be pertinent to BIS penalty determinations), imagine that a large importer filed 1,000 entries with the same mistake caused by a simple clerical error programmed into a computer database. For CBP's purposes, if the importer discovered the error and disclosed it, the violation is considered to be technical in nature. Thus, even though this large importer has violated CBP regulations on 1,000 occasions, the violations are treated as less significant (and thus less punitively) than a similar non-technical violation on this scale.

The Section suggests that a similarly flexible approach to export violations might be warranted for inclusion in the Guidance. For example, an exporter that makes hundreds of thousands of annual shipments will tend to have more violations of very complicated regulations like the EAR than an exporter that makes a hundred annual shipments. Both large and small exporters (and every exporter in between) should be encouraged to make voluntary disclosures, but a penalty system that automatically counts warning letters against them inherently will discourage such disclosures.

* * * * * * * *

The Section appreciates the opportunity to submit these comments on the proposed Guidance. When finalized, the Guidance will serve as a valuable tool for exporters, their legal counsel, and BIS. However, the Section believes that the additions and changes discussed above will significantly improve the final version of the Guidance.

Respectfully submitted,

A. Joshua Markus,
Chair

ICOTT INDUSTRY COALITION ON TECHNOLOGY TRANSFER
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November 14, 2003

Chief Counsel for Industry and Security
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Washington DC 20230

Re: Export Administration Regulations: Penalty Guidance in the Settlement of Administrative Enforcement Cases—Proposed Rule (68 Fed. Reg. 54402 (Sept. 17, 2003))

Dear Mr. Golrick:

The Industry Coalition on Technology Transfer ("ICOTT") hereby responds to the request of the Bureau of Industry and Security ("BIS") for comment on the above-referenced proposed rule (the "Proposed Rule"). The Proposed Rule would incorporate in the Export Administration Regulations ("EAR") a new Supplement No. 1 to Part 766, containing guidelines (the "Guidelines") on how BIS determines the appropriate penalties in administrative enforcement cases. We offer a number of general and specific comments below.

General Comments

1. The Importance of Providing Public Guidance on BIS Penalty Practices. At the outset, ICOTT commends BIS for its effort to provide transparent and rational guidance regarding its settlement practices in administrative cases. ICOTT has long urged the Department of Commerce to publish enforcement guidelines for export control cases, most recently in our letter to BIS of May 16, 2003, a copy of which is enclosed with these comments.

The absence of public enforcement guidelines has engendered uncertainty about how BIS initiates and conducts investigations, what factors it considers and how it weighs factors. Such uncertainty about BIS enforcement policies takes a significant toll on private sector compliance efforts by making it difficult for industry to determine how best to deploy export compliance resources. For example, reports of internal differences within BIS on the treatment of voluntary self-disclosures have reportedly had the effect of discouraging some

exporters from making self-disclosures, thereby limiting the positive impact of this potentially useful compliance tool.

The publication of clear and appropriate penalty guidance would enhance government-industry understanding and cooperation in the enforcement of dual use export controls. Such transparent guidance should help promote greater consistency and fairness in BIS settlement practices and will assist the private sector in both settlement proceedings and in its understanding of BIS enforcement practices generally. Perhaps most important, well-crafted penalty guidelines will provide greater clarity and thereby will enable the private sector to target its compliance efforts more effectively.

2. The Need for Further Public Guidance in Other Enforcement Areas. Cooperation between BIS and the private sector on export controls could be further strengthened if BIS were to formulate and propose additional guidance for exporters on other aspects of export enforcement and compliance. As set forth in additional detail in our May 16, 2003 letter (enclosed), ICOTT urges BIS to formulate transparent and appropriate public guidance on other critical matters, including (i) revised knowledge standards and "red flags" for dual use cases, (ii) enforcement and due diligence criteria in cases involving the Enhanced Proliferation Control Initiative ("EPCI"), (iii) criteria for automated export screening programs under EPCI and (iv) improved proliferation and other proscribed lists. Clear and well-crafted public guidance in these and other areas could improve export enforcement by helping assure that government and industry export control resources are more effectively deployed and are focused on activities that are truly antithetical to U.S. national security.

3. The Importance of Addressing the Circumstances of High-Volume and Compliant Exporters. As discussed in greater detail in our specific comments, ICOTT is concerned that the Guidelines, as currently formulated, take a "one-size-fits-all" approach—an approach that fails to address the circumstances of high-volume exporters and exporters with well-developed export compliance programs. Exporters subject to export controls range from firms that make only a few exports annually to those that make thousands of separate exports of controlled goods, data and services. Additionally, while some infrequent exporters require only rudimentary export compliance programs, responsible high-volume exporters can devote extensive resources to sophisticated export control compliance programs.

The Guidelines fail to acknowledge these significant differences among firms that dot the landscape of export controls. As a consequence, the Guidelines would unfairly disadvantage high-volume exporters and firms with well-developed export compliance systems. These firms include many entities that are among the Government's most effective partners in controlling exports of concern.

A number of specific examples illustrate these serious problems with the Guidelines as currently written --

- Section III.A. of the Guidelines states that BIS would take into account "multiple unrelated violations" in evaluating possible sanctions. However, the guidance on this important factor fails to account for differences in export volumes among exporters. For a small-volume exporter, for example, three unrelated violations may indicate very serious compliance problems. On the other hand, a record of only three unrelated violations may constitute a strong indication that a high-volume exporter has a good compliance program.

- The mitigating factors in Section III.B. of the Guidelines provide that penalties may be mitigated if the party has "never" been convicted of a export control violation and has "not," during specified periods, entered into a settlement in an export-related administrative case, received a warning letter, or otherwise violated the EAR. Conversely, if a party has done any of these things—even once—that conduct is an aggravating factor under the Guidelines. For the reasons noted above, these criteria would have an unfair and disparate impact on high-volume exporters. For such exporters, for example, a few warning letters may actually indicate a very good compliance record when considered in proportion to the exporter's total exports.

- Warning letters or other enforcement actions resulting from the self-disclosure of violations can often be a strong indication that an exporter's export control compliance program is working effectively. Indeed, in evaluating whether a party has an effective compliance program, the Guidelines note (under "Mitigating Factors") that BIS will "consider whether a party's export compliance program uncovered a problem, thereby preventing further violations." This key consideration, however, is nowhere mentioned in the Guidelines' discussions of past conduct, including the discussions of "multiple unrelated violations" in Section III.A. and of past violations and warnings in the context of mitigating and aggravating factors.

These examples demonstrate that the Guidelines as currently written likely would have an unfair and disparate impact on high-volume exporters and exporters with well-run compliance programs. Any final penalty guidelines issued by BIS should be revised to assure fair and equitable treatment of these exporters. We have proposed specific language to address these concerns in our specific comments.

4. The Importance of Encouraging Good Compliance Practices. The primary focus of the Guidelines is to provide clear and consistent guidance on BIS settlement practices. However, if properly formulated, the Guidelines can have a critically important additional

effect—the encouragement of good compliance practices that can prevent export violations in the first place. In view of the extensive resources that the private sector devotes to export compliance, such improved compliance could, in turn, make a significant contribution to protecting the national security. Accordingly, in revising the proposed Guidelines, BIS should assure that the Guidelines provide clear guidance that is useful in the compliance context, as well as appropriate incentives to further encourage the private sector to serve as an effective partner in export enforcement. For example, as discussed below, creating a rebuttable presumption that BIS will issue a warning letter where an exporter has made a voluntary disclosure could have a major positive impact on compliance and enforcement by providing a strong incentive for finding and fixing internal control deficiencies and thereby preventing future violations.

Specific Comments

ICOTT offers the following specific comments and suggestions regarding particular provisions of the Guidelines as proposed by BIS:

1. BIS should state that it will follow the Guidelines. The Introduction to the Guidelines should include an express statement that BIS will follow the Guidelines in its enforcement activities. The Introduction currently provides that the Guidelines do 'not confer any right or impose any obligation regarding what penalties BIS may seek." While it is appropriate to state that the Guidelines do not create rights to specific penalties, it is equally appropriate to at least provide the exporting community with the assurance that BIS will employ the Guidelines in all cases and in a fair and consistent manner. Such a statement would also underscore the importance of the Guidelines as an additional and meaningful tool in private sector compliance activities and thereby would help to prevent future export violations. The trade-related enforcement guidelines of other federal agencies contain similar statements. For example, the enforcement guidelines employed by U.S. Customs in Section 592 cases state: "The guidelines below will be used by the Customs Service in arriving at a just and reasonable assessment and disposition of liabilities . . . within stated limitations." 19 C.F.R. Pt. 171, App. B. ICOTT recommends that a similar sentence be added at the conclusion of the Introduction to the Guidelines.

2. The Guidelines should clarify the circumstances in which warning letters may be issued. There is currently considerable confusion in the exporting community about the circumstances in which BIS issues warning letters. This confusion complicates both the settlement of enforcement cases and private sector compliance activities. Section I.A. of the Guidelines, if appropriately modified, could help to eliminate some of the confusion about when warning letters may be issued.

ICOTT recommends a number of specific modifications to proposed Section I.A. to bring additional clarity to the discussion of warning letters. First, the statement that BIS often issues warning letters "for apparent violations based on technicalities" fails to provide clear guidance because the term "technicalities" is vague and uncertain, having no established

meaning under the EAR or in export control practice. ICOTT recommends that this statement be clarified by employing terms that have some fixed meaning under the EAR or the law generally and/or by setting forth in the Guidelines specific examples of what BIS considers to be "technical' violations. Second, in the same sentence, the Guidelines should include a semi-colon after the term "first-time offenders," to clarify that it can be appropriate to issue warning letters to parties who are not first-time offenders. Third, in the same sentence, the list of circumstances in which warning letters may be issued should be connected by the disjunctive "or" rather than by the conjunctive "and" to make clear that warning letters can be issued where *any* of these circumstances exist.

3. The Guidelines should create a rebuttable presumption that BIS will issue a warning letter where an exporter has made a valid voluntary disclosure. ICOTT strongly recommends that the Guidelines' discussion of warning letters in Section I.A. be modified to create a rebuttable presumption that a warning letter—and not some more stringent sanction—will be the default response to a voluntary disclosure. For the reasons discussed in our general comments, such a statement would provide clear guidance and a strong incentive for private sector compliance officials to seek out and correct internal problems that could lead to more serious and widespread violations in the future. At the same time, making the presumption "rebuttable" would reserve to BIS the discretion and flexibility to impose more stringent sanctions where there are aggravating circumstances. The trade-related enforcement guidelines of other federal agencies (including the U.S. Customs Section 592 guidelines cited above) contain express reductions of penalties for voluntary disclosure.

4. The Guidelines should expressly state that BIS will not issue warning letters where it determines that a violation did not occur. The discussion of warning letters should be amplified to make clear that warning letters are never to be issued when OEE has formally or informally determined that a violation has not occurred. The Guidelines note that a warning letter represents OEE's conclusion that "an apparent violation" has occurred. Relying on evidence of an "apparent violation" for warning letters can be appropriate for a variety of reasons. For example, OEE may not have completed a full investigation of the underlying facts at the time that OEE decides to issue a warning letter or at the time a party agrees to accept such a letter in settlement. However, evidence of an "apparent violation" should not be a basis for issuing a warning letter where OEE has, in fact, formally or informally determined that a violation has not occurred. In the past, OEE enforcement officials have suggested to parties that warning letters can be issued in these circumstances. The issuance of warning letters to parties who have not committed a violation is highly inappropriate, particularly given that past warning letters would be an aggravating factor under the Guidelines as proposed by BIS.

To clarify this important point, ICOTT proposes that the following language be added at the end of the discussion of warning letters in Section I.A. of the Guidelines:

> OEE will not issue a warning letter if it determines that a violation did not occur, notwithstanding evidence that may suggest an apparent violation.

5. The Guidelines should expressly state that a warning letter or an administrative penalty ends a BIS investigation. The Guidelines should expressly state that the issuance of a warning letter or the imposition of an administrative penalty will terminate a BIS investigation and result in the closing of the case file.

6. BIS should consider issuing "education letters" in appropriate cases. In the past, OEE frequently issued "education letters" in certain circumstances in which warning letters were not appropriate (*e.g.,* where there was not sufficient evidence of a violation or even an "apparent violation"). Among other things, OEE employed such education letters to inform exporters of compliance failings uncovered in the course of an investigation that could result in future violations if not corrected. ICOTT recommends that BIS reinstate this practice in the context of the Guidelines. Such education letters could help improve private sector compliance by providing clear guidance on specific steps that particular exporters could take to prevent future violations. Additionally, the receipt of such a letter from BIS enforcement officials would be a powerful incentive for taking any required corrective action. Finally, the option of issuing education letters could help assure that warning letters are not issued in circumstances that are not appropriate. This is particularly important in light of the fact that the existence of past warning letters received by an exporter is an aggravating factor under the Guidelines as proposed by BIS. Education letters should not be aggravating factors, nor should they otherwise be considered, in determining whether an enforcement action (beyond a warning letter) will be taken. Additionally, where there is clearly no violation, issuing an education letter might not be appropriate.

7. The Guidelines' discussion of "willfulness" should address the treatment of exporters who have exercised reasonable care. The Guidelines could further promote proactive compliance efforts by exporters and overall fairness by distinguishing violations that occur notwithstanding the exporter's reasonable care from willful or knowing violations. ICOTT recommends that Section III.A. of the Guidelines ("Degree of Willfulness") be modified to incorporate this distinction. Specifically, we recommend that the following new sentence be added at the end of that section:

> In determining the penalty in cases of a violation where the exporter showed reasonable care to comply with the U.S. export control system, BIS will maintain discretion to take no action, issue a warning letter, or seek to settle for a civil penalty that would be lower than in other cases of simple negligence.

8. The Guidelines' discussion of "related violations" should generally exclude certain related violations that flow from an initial violation. The discussion of "Related Violations" in Section III.A. of the Guidelines should provide that BIS will not seek additional penalties for multiple violations occasioned by aggregate reporting or clerical tasks that are the direct result of an initial violation. The imposition of additional penalties in such cases is unfair, particularly to high-volume exporters who have good compliance programs and who otherwise exercise reasonable care. ICOTT recommends that BIS add the following language at the conclusion of Section III.A.:

> BIS will not seek penalties for multiple violations where the violations stem from the same underlying error or omission and the exporter exercised reasonable care to comply.

9. The Guidelines' discussion of "multiple unrelated violations" should take into account the circumstances of high-volume and compliant exporters. Section III.A. of the Guidelines provides guidance on the treatment of multiple unrelated violations by BIS. As noted above in our general comments, this discussion fails to take into account the circumstances of high-volume exporters and exporters with well-functioning compliance programs. To address these concerns, ICOTT proposes that the following additional language be added before the final sentence in the discussion of multiple unrelated violations in Section III.A. of the Guidelines:

> In evaluating multiple unrelated violations, BIS considers all relevant facts and circumstances. BIS will evaluate the number multiple unrelated violations in the context of a party's overall volume of exports. For a party with a limited volume of exports, even a few unrelated violations may indicate serious compliance problems. For a party with a significant volume of exports, on the other hand, the same number of unrelated violations may be strong evidence of an effective export compliance program. BIS may also take into account that unrelated past violations uncovered by a party's export compliance program and voluntarily disclosed to BIS by the exporter may be evidence of a well-run compliance program, particularly where the exporter has a significant volume of exports.

10. Mitigating factor #3 (isolated occurrence) should be revised to take into account the circumstances of high-volume exporters. The third mitigating factor in Section III.B. of the Guidelines provides that a violation may be mitigated if it was "an isolated occurrence or the result of a good-faith misinterpretation." As discussed previously, it is critical that the Guidelines relate a party's current or past violations to the overall volume of the party's exports. An "isolated violation" can and should have different meanings for infrequent exporters and high-volume exporters. Accordingly, ICOTT proposes that the third mitigating factor be revised to read as follows:

3. The violation was the result of a good-faith misinterpretation, or was an isolated occurrence when considered in the context of the party's overall volume of exports.

11. Mitigating factor #4 (authorization likely would have been granted) should be afforded "great weight." The fourth mitigating factor in Section III.B. of the Guidelines provides that penalties may be mitigated where "required authorization for the export transaction would likely have been granted upon request." This is a highly relevant mitigating factor, because it separates those violations that pose little or no risk to the national security from those that potentially raise serious concerns. In recognition of the importance of this factor, it should be accorded "great weight" in the Guidelines.

12. Mitigating factor #5 (past violations) should be revised to take into account the circumstances of high-volume and compliant exporters and other important considerations. The fifth mitigating factor provides that a violation may be mitigated if a party has "never" been convicted of an export related criminal violation and has "not," within specified time periods, settled export cases, received warning letters or otherwise violated the EAR. Past violations are an important and necessary consideration in determining whether to mitigate violations. However, as explained above in our general comments, the proposed formulation of this factor seriously prejudices parties having a high volume of exports and exporters with effective compliance programs.

The proposed formulation of this factor has other serious flaws. The proposed language could penalize parties for conduct that may have occurred many years ago because of its focus on the time cases were *settled* or when *findings were made,* rather than on the time the alleged underlying misconduct occurred. Moreover, the treatment of warning letters should differentiate between letters issued as a result of a voluntary disclosure and letters issued in other circumstances. Automatically penalizing an exporter for letters issued in response to a disclosure could provide a powerful disincentive to such disclosures and reduce the effectiveness of that important compliance tool. Also, factor "d" in the proposed BIS formulation of this factor (other EAR violations within the past five years) should be eliminated because there would be no determination of a violation in the absence of a warning letter, a settlement or an administrative determination. Finally, the Guidelines should take into account that past violations by predecessor firms often have no bearing on the export compliance record of an acquiring firm.

To address these concerns, ICOTT proposes that the fifth mitigating factor be reformulated to read as follows:

5. The party has a good record of compliance in export related matters (excluding antiboycott matters under Part 760) based on an evaluation of the following factors:

a. Whether the party has ever been convicted of an export-related criminal violation;

b. Whether the party has entered into a settlement of an export-related administrative enforcement case with BIS or another U.S. Government agency involving violations or alleged violations that occurred in the past five years;

c. Whether the party has been found liable in an export-related administrative enforcement case brought by BIS or another U.S. Government agency involving violations that have occurred in the past five years; and

d. Whether, in the past three years, the party has received a warning letter from BIS, other than a warning letter that was issued as a result of a valid voluntary disclosure.

BIS will consider all relevant facts and circumstances in evaluating these factors. BIS will consider the number of past violations and/or warnings in the context of the party's overall volume of exports. A party with a limited volume of exports will normally be expected to have none of the past violations or warnings described above. For a party with a significant volume of exports, a reasonable number and proportion of such past violations and/or warnings may be consistent with a good record of compliance. BIS may also take into account that past violations that were uncovered by a party's export compliance program may be consistent with a good record of compliance. Because past violations by an acquired company often have no relation to the export compliance record and program of an acquiring company, BIS will generally not consider such violations to be past violations of the acquiring company in the settlement of other violations by the acquiring company. Where necessary to effective enforcement, the prior involvement in export violations of a party's owners, directors, officers, partners, or other related persons may be imputed to a party in evaluating these factors.

13. Mitigating factor #6 (cooperation with BIS) should not require "exceptional" cooperation. The sixth mitigating factor provides that a violation may be mitigated if the party "has cooperated to an exceptional degree with efforts to investigate the party's conduct." ICOTT proposes that the term "exceptional" be deleted from the formulation of this factor. This limitation unnecessarily circumscribes the discretion of BIS in evaluating a party's cooperation. For example, the proposed formulation would preclude BIS from giving

any credit to a party cooperating to the utmost of its ability if this cooperation is deemed to be only "very good" in relation to other cases. Limiting the cooperation that may be a mitigating factor only to "exceptional" cooperation is also unnecessary in light of the statement earlier in Section III.B. of the Guidelines that "[w]here a factor admits of degrees, it should accordingly be given more or less weight." Based on this language, the formulation proposed by ICOTT would reserve to BIS the discretion to afford little or no mitigation credit for a party's limited cooperation.

14. Mitigating factor #8 should be revised to reflect the concepts set forth in aggravating factor #3. The eighth mitigating factor in the Guidelines should be revised to include the concepts set forth in the corresponding aggravating factor (#3), particularly the concept of whether the violation "significantly implicate[s] national security." ICOTT recommends that this mitigating factor be revised to read as follows:

> 8. The violation did not significantly implicate national security or other essential interests protected by the U.S. export control system, and therefore was not likely to involve harm of the nature against which the applicable provisions of the EAA, EAR, or other authority (*e.g.*, a license condition) were intended to protect. Such violations include, for example, failure to apply for government classification of encryption software where the software would clearly qualify, a false statement on an SED that an export was 'NLR' when in fact a license exception was available, or an instance in which an EAR99 item is inadvertently exported to an entity on the Proliferation Entity list, but that item is not controlled to the destination where the Entity is located.

15. The Guidelines should make steps to address compliance concerns an additional mitigating factor. ICOTT proposes that the list of mitigating factors be amended to include an additional, tenth factor—whether the party has taken effective steps to address compliance concerns highlighted by a violation or alleged violation. The Guidelines mention this important factor in the discussion of multiple unrelated violations in Section III.A, but fail to include it in the mitigating factors listed in Section III.B. Efforts to address compliance concerns raised by a violation or alleged violation are an important tool in improving compliance and preventing future violations. Under current practice, parties often include explanations of compliance enhancements in self-disclosures, settlement offers, etc. Making such efforts an express mitigating factor to be evaluated by BIS will further encourage this highly desirable conduct. Indeed, BIS should underscore the importance of promptly correcting identified compliance flaws by according "great weight" to this factor. Among other things, making compliance improvement a key mitigating factor may help an exporter's compliance personnel obtain additional resources for compliance from firm management. ICOTT suggests that this additional mitigating factor read as follows:

10. 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).

16. Aggravating factor #1 (deliberate concealment) should be clarified. The first aggravating factor in Section III.B. of the Guidelines provides that penalties may be enhanced where a party "made a deliberate effort to hide or conceal" violations. The Guidelines should acknowledge, however, that parties often have no affirmative duty to disclose violations. For example, responsible exporters sometimes uncover past violations and take appropriate corrective action without disclosing the past violation to BIS. The Guidelines should make clear that such conduct does not constitute deliberate concealment of violations.

17. Aggravating factor # 7 (past violations) should be revised to take into account the circumstances of high-volume and compliant exporters and other important considerations. The seventh aggravating factor listed in the Guidelines provides that a violation may be aggravated if a party has ever, within defined periods, committed past violations or received warnings. For the reasons noted above, this formulation could seriously prejudice parties having a high volume of exports or an effective compliance program. It also has other flaws, including unfairly considering settlements or findings for misconduct that may have occurred many years ago and thereby providing strong disincentives to make voluntary disclosures. ICOTT proposes that this factor be reformulated to parallel our proposed changes in the fifth mitigating factor set forth above, as follows:

7. The party has a poor record of compliance in export related matters (excluding antiboycott matters under Part 760) based on an evaluation of the following factors:

   a. Whether the party has ever been convicted of an export-related criminal violation;

   b. Whether the party has entered into a settlement of an export-related administrative enforcement case with BIS or another U.S. Government agency involving violations or alleged violations that occurred in the past five years;

   c. Whether the party has been found liable in an export-related administrative enforcement case brought by BIS or another U.S. Government agency involving violations that have occurred in the past five years; and

   d. Whether, in the past three years, the party has received a warning letter from BIS, other than a warning letter that was issued as a result of a valid voluntary disclosure.

> BIS will consider all relevant facts and circumstances in evaluating these factors. BIS will consider the number of past violations and/or warnings in the context of the party's overall volume of exports. For a party with a limited volume of exports, the existence of any of the past violations or warnings described above will normally be an aggravating factor. For a party with a significant volume of exports, more than a reasonable number and proportion of such past violations and/or warnings may indicate a poor record of compliance. BIS may also take into account whether or not past violations were uncovered by a party's export compliance program in evaluating a party's compliance record. Because past violations by an acquired company often have no relation to the export compliance record and program of an acquiring company, BIS will generally not consider such violations to be past violations of the acquiring company in the settlement of other violations by the acquiring company. Where necessary to effective enforcement, the prior involvement in export violations of a party's owners, directors, officers, partners, or other related persons may be imputed to a party in evaluating these factors.

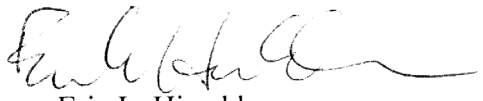
* * * * *

ICOTT appreciates the opportunity to comment on this important proposed guidance and looks forward to continuing to work with BIS in the development of clear and appropriate guidelines on the full range of BIS enforcement matters.

ICOTT is a nonprofit group of major trade associations (names listed below) whose thousands of individual member firms export controlled goods and technology from the United States. ICOTT's principal purposes are to advise U.S. Government officials of industry

concerns about export controls, and to inform ICOTT's member trade associations (and in turn their member firms) about the U.S. Government's export control and embargo activities.

Sincerely yours,



Eric L. Hirschhorn
Executive Secretary

ICOTT Member Trade Associations

American Association of Exporters and Importers
Electronic Industries Alliance
Semiconductor Equipment and Materials International
Semiconductor Industry Association

Enclosure

ICOTT INDUSTRY COALITION ON TECHNOLOGY TRANSFER
1400 L Street, N.W., Washington, D.C. 20005 Suite 800 (202) 371-5994

May 16, 2003

Mr. Karan Bhatia
Deputy Under Secretary for
Industry and Security
Bureau of Industry and Security
U.S. Department of Commerce
14th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20230

Dear Mr. Bhatia:

The Industry Coalition on Technology Transfer (ICOTT) and its member trade associations would appreciate the opportunity to meet at your earliest convenience to discuss concrete proposals that would greatly enhance the enforcement of dual-use export controls and U.S. national security.

As you know, the high technology sector makes important contributions to the national security of the United States. The technological innovation fostered by high technology companies adds significantly to the Nation's economic strength and, as recent events vividly illustrate, provide a critical edge to U.S. national defense. Our members and their companies are strongly committed to protecting the national security by assuring that their exports comply fully with all export control requirements. These firms serve as the first line of export enforcement, devoting extensive human and financial resources to export compliance activities.

Like the government, however, the high technology sector does not have unlimited resources to devote to export compliance. If industry is to be a fully effective partner in the export control process and employ its resources effectively, export enforcement needs to keep pace with changes in dual use export controls.

Two important transformations have occurred in dual use controls over the last decade or so. First, in 1991, the Enhanced Proliferation Control Initiative effectively made all EAR items subject to complex proliferation end-use controls regardless of their level of technology, cost or destination. This shift to end-use/end-user controls required the creation of complex, costly control programs at a time when high-technology companies were expanding and integrating their global operations. It also increased the likelihood of inconsistent and arbitrary enforcement, because the inadvertent mis-shipment, especially by electronic means, of items costing a few dollars and having no strategic significance could, in principle, result in hundreds of thousands of dollars in

civil penalties. Additionally, in our experience, although EPCI requirements apply to all companies, EPCI enforcement burdens have fallen disproportionately on high technology firms, particularly for items not otherwise requiring export licenses.

The second major change has been in the dominant form of export authorization. Before 1991, it was not unusual for BIS or its institutional predecessors to process 100,000 individual validated licenses each year. Now, this volume is less than 10,000 and the vast majority of exports are made under license exceptions or without any licensing requirement. This important change has, in turn, shifted the lion's share of export compliance cost and management responsibility from Government to industry.

ICOTT and its members believe that more can be done in the enforcement area to respond to these important developments. We offer a number of specific suggestions and concrete proposals that will improve the nation's export control posture.

Enforcement of EPCI could be enhanced significantly if enforcement practices focused on the more serious threats to national security, promoted greater government-industry cooperation, and provided more consistent and equitable enforcement. For example, there is the widespread belief in the exporting community that many EPCI enforcement actions involve items for which (absent an end use/user of proliferation concern) no license would have been required. In these cases, there can be an EPCI violation even though the relevant item makes no material contribution to proliferation activity. Although such EPCI enforcement is authorized under the EAR, it diverts government and industry resources that could be better employed in more strategically important areas. These practices also make it difficult to measure the real effectiveness of EPCI enforcement because they can result in a high volume of cases that involve no serious proliferation concerns.

We strongly encourage BIS to review its enforcement of EPCI to determine whether the national security could be enhanced if government and industry enforcement and compliance resources were deployed in a more effective and focused manner. In particular, the Government's enforcement efforts must concentrate on those activities that are truly antithetical to U.S. nonproliferation policy.

EPCI enforcement can also be greatly improved by laying out a basic standard for exporter due diligence. Such a standard should provide companies with the flexibility to implement proliferation screening in a manner that best promotes effective compliance within a particular business environment. The standard should also recognize that most screening programs are built around automated tools employing a comprehensive list of "proscribed" entities (including Proliferation Entities, Unverified Parties, Denied Parties and Treasury Specially Designated Nationals).

ICOTT proposes that the implementation of a screening program employing proscribed lists should be deemed to be appropriate due diligence in EPCI cases involving "no license required" shipments. This approach would establish a clear, achievable standard and would enable the regulated community to better deploy its export

compliance resources. Additionally, it would reasonably limit exporter liability and costs in situations that, by definition, pose no threat to the national security.

This approach would be enhanced by improving the quality of published proliferation and other proscribed lists. This could be done by better cooperation among relevant agencies and inclusion of entities that have been the subject of "is informed" communications (or adverse licensing actions) involving individual exporters. Interagency agreement on the content and format of data (e.g., inclusion of addresses, etc.) would greatly assist in automating screening processes.

Government-industry cooperation in the enforcement of dual use controls could also be greatly enhanced through the publication of enforcement guidelines by BIS. Currently there is considerable uncertainty about how investigations are initiated and conducted, along with concern about the potential for arbitrary and inconsistent enforcement actions. This uncertainty prevents industry from deploying its export compliance resources in the most effective manner. Moreover, reported differences in policy and outlook on self-disclosure can discourage self-disclosure by industry. As you know, consistent and far treatment of self-disclosure can have a major positive impact on both compliance and effective enforcement by providing incentives for finding and fixing internal control deficiencies and thereby preventing future violations.

To be sure, publishing a set of enforcement guidelines would not completely eliminate uncertainty, but it would be a major step forward. We note that the Office of Foreign Assets Control published enforcement guidelines for comment on January 29, 2003. Although we do not agree with every element of those guidelines, they do address many areas of concern. We strongly recommend that a similar set of published guidelines be developed, with industry input, for enforcement of the EAR.

Finally, it is important that these enforcement issues be systematically addressed prior to any substantial increase in civil penalties. Otherwise, any increased civil penalties probably won't result in substantial enhancement of national security but will place additional, unfair burdens on the regulated community.

In these times of international uncertainty, export controls are a vital element of the nation's security. ICOTT believes that the foregoing proposals will promote improved enforcement of and compliance with U.S. export control laws. We are committed to working with BIS to bring about these important and necessary changes.

ICOTT is a nonprofit group of major trade associations (names listed below) whose thousands of individual member firms export controlled goods and technology from the United States. ICOTT's principal purposes are to advise U.S. Government officials of industry concerns about export controls, and to inform ICOTT's

member trade associations (and in turn their member firms) about the U.S. Government's export control and embargo activities.

Sincerely,

Edward F. Gerwin, Jr.
Deputy Executive Secretary

EFG:bd

ICOTT Member Associations

American Association of Exporters and Importers (AAEI)
Electronic Industries Alliance (EIA)
Semiconductor Equipment and Materials International (SEMI)
Semiconductor Industry Association (SIA)

cc: Eric L. Hirschhorn

301476.3

United Technologies Corporation
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1401 Eye Street, N.W.
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United Technologies

Rec'd 11/17/03

November 17, 2003

Chief Counsel for Industry and Security
Attention: Philip D. Golrick
Room H-3839
U.S. Department of Commerce
14th Street and Constitution Ave., N.W.
Washington, D.C. 20230

Re: Export Administration Regulations: Penalty Guidance in the Settlement of Administrative Enforcement Cases (68 Fed. Reg. 54402) – Comments on Proposed Rule

Dear Mr. Golrick:

United Technologies Corporation ("UTC")[1] submits these comments in response to the September 17, 2003, request for public comment on the above-referenced proposal to amend the Export Administration Regulations ("EAR") to incorporate guidance on penalty determinations in settling administrative enforcement cases under Part 766 of the EAR ("Penalty Guidance"). UTC welcomes the Bureau of Industry and Security's ("BIS") initiative to provide the exporting community with guidance on its policies and practices in civil enforcement proceedings. The issuance of clear enforcement guidelines will help improve the transparency and predictability of the administrative settlement process, and should enable industry to operate as a more effective partner in export compliance and enforcement.

UTC offers the following comments and suggestions regarding various provisions of the proposed Penalty Guidance:

I. Responding to Violations – Circumstances for Issuing a Warning Letter (Section I.A)

There are several ambiguities in the proposal's description of circumstances in which BIS may issue a warning letter in response to an apparent violation. The first factor states that a warning letter may be an appropriate response to a violation "based on technicalities." The term "technicalities" has no generally accepted meaning under the statute or EAR, and there otherwise is no guidance on what violations BIS considers to be of a technical nature or a "technicality." BIS should provide further definition of this term or specific examples of technical violations to help exporters understand how BIS will apply this factor in practice. BIS should also clarify whether this factor will be considered only in the context of "first-time" offenses. If that is the intent, it would significantly narrow the factor's applicability. A truly technical violation should merit no more than a warning letter regardless of whether it is a first-time offense.

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[1] UTC is a global, diversified corporation based in Hartford, Connecticut. UTC posted revenues of $28.2 billion in 2002, with more than half generated outside the United States. UTC supplies a broad range of high technology products and support services to the building systems, transportation, security, power generation and aerospace industries. UTC's companies are industry leaders, and its best known products include Pratt & Whitney aircraft engines, space propulsion systems and industrial turbines, Carrier heating, air conditioning and refrigeration systems, Otis elevators and escalators, Sikorsky helicopters, Hamilton Sundstrand aerospace and industrial systems, UTC Fuel Cells power systems, and Chubb security systems.

In addition, the list of circumstances uses the conjunctive "and" at the end of the listing, suggesting that all four factors must be present in order for BIS to consider a warning letter. Again, such a construction would significantly narrow the scope and applicability of the warning letter enforcement mechanism. BIS should eliminate this uncertainty by using the term "or" to indicate that warning letters may be issued when any of the listed factors are present.

II. How BIS Determines Appropriate Sanctions (Section III)

A. General Factors (Section III.A)

In the discussion concerning the degree of willfulness, BIS states that it will consider "the presence of red flags and the nature and result of any inquiry made by a party" in determining whether a "knowing" or "willful" violation has occurred. UTC understands that BIS is currently reviewing and intends to issue regulatory guidance that expands on its red flag concepts and due diligence practices in reviewing export transactions. We strongly encourage additional guidance on this subject, particularly on the nature and scope of due diligence inquiries and corresponding responses that BIS considers appropriate in the presence of red flags. Given the serious penalties that may ensue for willful or knowing violations, it is important to provide clear and comprehensive guidance on how to spot and respond to red flags so that exporters may exercise reasonable care and be confident they will not be subject to more severe sanctions in these circumstances.

Section III.A also provides guidance on the treatment of multiple unrelated violations by exporters. The guidance does not specifically address BIS' discretion, in considering multiple violations, to distinguish between exporters that have a substantial volume of dual use export transactions involving multiple business segments with a wide range of controlled goods, data and services, and those that export infrequently or on a reduced scale. For most large, high-volume exporters that devote substantial resources to export compliance, the existence of multiple unrelated violations does not signify a systemic weakness or defect in their internal compliance programs. Instead, it may be an indication of a well-functioning program that is uncovering and correcting problems on a continuous basis. The same incidence of violations for a low-volume exporter, on the other hand, may signify a more serious compliance breakdown or lack of controls. BIS should explicitly acknowledge in the proposed guidelines its discretion to consider multiple violations in the context of the overall volume and composition of a party's export activity.

B. Mitigating and Aggravating Factors (Section III.B)

Along the same lines as the preceding comment, there are several mitigating factors set forth in Section III.B of the Penalty Guidance that do not, on their face, acknowledge any discretion to distinguish among exporters based on the overall volume and composition of their exports. For example, mitigating factor no. 3 provides that a violation may be mitigated if it was "an isolated occurrence." Mitigating factor no. 5 calls for consideration of a party's past settlements, warning letters or other violations that occurred within a specified period of time (five years for administrative settlements and other violations, and three years for warning letters). In determining whether a party's compliance or settlement track record should be a mitigating (or, alternatively, aggravating) factor, BIS should take account of the differences among exporters in a way that does not prejudice high-volume exporters with active reporting and disclosure programs. The presence of prior settlements or warning letters within a given time period should not be a *per se* bar to

receiving mitigating credit, but should be considered as factors in an overall determination of a party's compliance record.

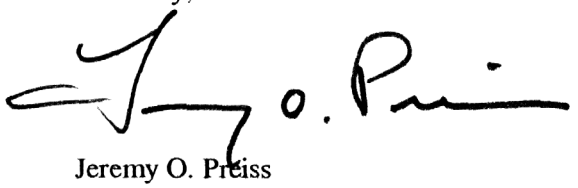
It appears BIS acknowledges this concept in the preamble to Section III.B, where it states that "one prior violation should be given less weight than a history of multiple violations, and a previous violation reported in a voluntary self disclosure by an exporter should be given less weight than previous violation(s) not involving such mitigating factors." We propose that BIS acknowledge that the criteria list in mitigating factor no. 5 and aggravating factor no. 7 will be part of an overall evaluation of the party's compliance record for the purposes of establishing a mitigating or aggravating factor.

In addition, we propose that BIS address how it will apply these principles in cases where a party has inherited liability for export violations through the acquisition of another business, but where the underlying conduct occurred prior to the acquisition. When an acquiring company takes reasonable steps to uncover, correct and disclose the conduct that gave rise to violations under a previous owner, BIS should not count the settlement or other disposition of those violations to be part of the acquiring company's compliance record.

* * *

UTC appreciates the opportunity to present its views to BIS on the proposed Penalty Guidance. We look forward to the opportunity to engage further with your office on these issues.

Sincerely,



Jeremy O. Preiss

Chief International Trade Counsel
United Technologies Corporation

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November 17, 2003

Chief Counsel for Industry and Security
Attention: Philip D. Golrick
Room H-3839
United States Department of Commerce
14th and Constitution Avenue, NW
Washington, DC 20230

Dear Mr. Golrick:

Subject: Settlement Guidance

The National Council on International Trade Development (NCITD) is pleased to respond to the request published in the *Federal Register* on September 17, 2003 for comments on settlement guidance. NCITD is a non-profit membership organization, supported by a diverse membership of large, mid-size and small firms. Membership includes exporters and importers, freight forwarders and brokers, ocean and air carriers, banks, attorneys, trade groups, and consulting firms.

NCITD appreciates the efforts of the Bureau of Industry and Security (BIS) to bring clarity to the regulations by incorporating guidance on how BIS makes penalties determinations when settling administrative enforcement cases. By codifying such guidance, BIS is providing a valuable service to the exporting community.

We wish to comment on several points. In the past, when a company committed a violation involving a licensable shipment, the Office of Export Enforcement (OEE) considered each shipment two violations -- one for failure to obtain a license, and the second for using the wrong license designation/exception on the Shipper's Export Declaration (SED). This rule proposes that each such instance be three violations, with the third entering the incorrect Export Control Classification Number (ECCN) on the SED. The NCITD believes that two violations per shipment are adequate. Three violations is unnecessarily punitive

The NCITD concurs that a voluntary disclosure when a violation occurs should be given GREAT WEIGHT as a mitigating factor. A company should not be penalized when it discovers a violation as a result of its adherence to a strong and effective internal compliance program and takes action to remedy the problems that led to the violation.

Thank you for the opportunity to submit comments.

Sincerely,

Mary O. Fromyer

Mary O. Fromyer
Executive Director