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U.S. Department of Commerce
Room 2099B
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Submitted by e-mail to: publiccomments@bis.doc.gov

Subject: RIN 0694-AF59
Proposed Rule: Time Limit for Completion of Voluntary Self-Disclosures

Ladies and gentlemen:

We appreciate the opportunity to comment on the above-referenced proposed rule published in the ***Federal Register*** on November 7 with regards to the voluntary self-disclosure (VSD) provisions of the EAR (15 CFR §764). Our comments and recommendations are as follows:

I. The proposed changes do not contemplate the potential negative effect of a deadline on the quality and thoroughness of a disclosure.

While there is merit to the intent of this proposed change—i.e., to compel with a reasonable deadline the resolution of an exporter's review and submission of a "completed" voluntary disclosure—it may result in detrimental unintended consequences. It is conceivable that the scope of an exporter's VSD is of such complexity that submission of a compliant VSD may be difficult to achieve within a 180-day window. Often the complexity of an internal investigation is not known at the beginning of the investigation. A responsible exporter will presumably work diligently and in good faith to complete a comprehensive VSD, but as the deadline approaches the exporter may sacrifice thoroughness in order to submit the disclosure in a timely manner. In other cases, a deadline unfortunately may provide unintended incentive to an exporter to delay submission of the VSD beyond the date that they would otherwise—were there no deadline—submit their VSD. (For example, an exporter may use the deadline to delay its submission until the next fiscal year begins, or until after an IPO, stockholders' meeting, or M&A transaction occurs.) Whether one believes that "playing the clock" with a hidden motive is a questionable or a legitimate tactic for an exporter to use, the imposition of a regulatory deadline creates potential dilemmas that serve neither BIS nor the exporter well (nor, indeed, the general public or the company's shareholders and business partners)—and may very well subvert the intended objective of the proposed deadline.

II. The proposed changes do not clearly define the start of the 180-day clock.

We recommend that BIS clarify the exact date that the proposed 180-day window begins. The proposed new language of §764.5(c)(2)(i) requires that the exporter "…completes and submits to OEE the narrative account … such that OEE receives the narrative account within 180 days of its receipt of the initial notification[.]" However, §764.5(c)(2)(i) currently does not provide clear guidance on the official date of initial notification ("…the disclosure will be deemed to have been made on the date of the initial notification…"). Does this mean the date postmarked, or accepted by a courier? Or is it the date actually

received by OEE? This distinction is of little importance under the current regulations but it gains critical importance with the addition of the 180-day deadline, and therefore we recommend in the interest of clarity that (c)(2)(i) be amended to explicitly define the exact date of initial notification as the date when BIS receives the initial notification (which appears to be what BIS intends).

III. The proposed changes do not clearly define the process for requesting an extension.

The proposed changes provide no guidance on when, or under what conditions, an extension to the 180-day deadline may be requested by an exporter. Can the request be made, with sufficient justification, as part of the initial notification? Can it be made at *any* subsequent time, up to and including the final day of the 180-day window? What are the consequences if the request is received by OEE on Day 179 but the extension is not approved until after the 180-day window closes (or, worse, what if OEE decides to deny the extension request after the window closes)? How will extensions or denials be officially communicated to the exporter, and how quickly? And what circumstances would serve to justify an extension? The regulations should be written to eliminate these ambiguities.

IV. The proposed changes are vague regarding conditions that may be attached to an extension.

The proposed changes include a vague statement that the "…Director of OEE in his or her discretion may place conditions on the approval of an extension" and an example is offered. While the need for exigent conditions is understandable under certain circumstances (a tolling agreement, for example), it would benefit all parties if a set of standard conditions were created (just as BIS has established a set of standard license conditions that exporters have come to expect when licenses are issued). Whether such conditions are specifically included in the regulations or are published as agency guidance, publishing the standard conditions that an exporter may be asked to accept before an extension is granted will assist exporters in drafting a more thorough VSD, facilitate constructive communication between an exporter and OEE, reduce the number of potential misunderstandings, and enhance response times. Of course, providing standard conditions would not prevent OEE from imposing additional conditions based on the unique circumstances of a disclosure.

V. The proposed changes are vague regarding the requirements of a "completed" disclosure.

We recommend that BIS provide an explicit definition of what constitutes a "completed" VSD. We urge BIS to adopt a definition that requires only those elements described in §764.5(c)(3), (4) and (5). If an exporter prepares a VSD in good faith that reasonably addresses all applicable elements in §764.5(c)(3), (4) and (5), then the exporter should be granted the presumption of acceptance as "complete" when received by OEE. An explicit definition will ensure consistency of understanding and uniformity of submissions, which will result in a far more efficient and transparent process for all parties. The acceptance of a VSD as "complete" will not preclude OEE from requesting additional information or documentation (per §764.5(d)), but it will protect an exporter, acting in good faith, from consequences not explicitly provided for by regulation.

VI. BIS also should be held to a reasonable time constraint.

In the BACKGROUND section of the proposed rule, BIS notes that "[t]oo often, initial notifications are not promptly followed by comprehensive narrative accounts, and as a result, OEE must maintain open files on voluntary disclosures for extended periods of time without making sufficient progress towards resolving the matter disclosed." As we have said, we believe there is merit to the addition of a time constraint regarding an exporter's submission of a completed VSD. However, we also believe there is merit to the implementation of reciprocal time constraints with regards to OEE's acceptance and subsequent disposition of the disclosure.

We believe that an exporter acting in good faith deserves some measure of certainty after its VSD is submitted. Therefore, we recommend that the proposed regulation include a provision that requires OEE to acknowledge, within a reasonable time frame (perhaps 30 or 45 days after receipt), the submission of a "completed" VSD. Further, we recommend that any VSD not formally acknowledged within this time frame will be deemed to be a "completed" disclosure.

Although it is perhaps impractical to define a time period in which OEE must complete its final disposition of a VSD, it *is* practical to expect that OEE will dispose of a VSD as promptly as possible based on the specific circumstances of the disclosure. We recommend that §764.5(d) be amended to require that OEE provide a status report to the exporter within 180 days of receipt of a "completed" VSD, and within every subsequent 90-day period, until final disposition. We believe that such a requirement will help to facilitate action, and is entirely consistent with BIS's desire to "promote expeditious resolution" of a VSD. As noted above, BIS offers as justification for subjecting an exporter to a deadline the argument that "OEE must maintain open files on voluntary disclosures for extended periods of time without making progress towards resolving the matter disclosed." We agree that the need to keep a case file open beyond a date of reasonable resolution results in the inefficient allocation of BIS' valuable resources; however, we respectfully suggest in the spirit of reciprocity that this very same argument can be made on behalf of the exporting community. Given the costs, in terms of time and money, that an exporter may incur in resolving a VSD (including legal fees from outside counsel), and given the fact that the circumstances may require that significant funds be set aside for many months in anticipation of potential expenditures, we believe that expeditious resolution is in the best common interest of exporters and BIS. And we wish to note that the imposition of a deadline upon action by BIS is not without precedence in the EAR; see, as one example, §740.17(d)(2)(ii).

Thank you for the opportunity to comment on the proposed changes to the EAR. The already strong partnership between BIS and the exporting community will be further enhanced by a thoughtful revision to the VSD regulations. Voluntary self-disclosures are, by their very nature, matters of extreme importance for both exporters and the government, and both will benefit if the regulations are as comprehensive, reasonable, practical and explicit as possible.

Respectfully,

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