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§ 766.1 SCOPE

In this part, references to the EAR are references to 15 CFR chapter VII, subchapter C. This part describes the procedures for imposing administrative sanctions for violations of the Export Administration Act of 1979, as amended (the EAA), the Export Administration

Regulations (EAR), or any order, license or authorization issued thereunder. Parts 760 and 764 of the EAR specify those actions that constitute violations, and part 764 describes the sanctions that apply. In addition to describing the procedures for imposing sanctions, this part describes the procedures for imposing temporary denial orders to prevent imminent violations of the EAA, the EAR, or any order, license or authorization issued thereunder. This part also describes the procedures for taking the discretionary protective administrative action of denying the export privileges of persons who have been convicted of violating any of the statutes, including the EAA, listed in section 11(h) of the EAA. Nothing in this part shall be construed as applying to or limiting other administrative or enforcement action relating to the EAA or the EAR, including the exercise of any investigative authorities conferred by the EAA. This part does not confer any procedural rights or impose any requirements based on the Administrative Procedure Act for proceedings charging violations under the EAA, except as expressly provided for in this part.

§ 766.2 DEFINITIONS

As used in this part, the following definitions apply:

Administrative law judge. The person authorized to conduct hearings in administrative enforcement proceedings brought under the EAA or to hear appeals from the imposition of temporary denial orders. The term "judge" may be used for brevity when it is clear that the reference is to the administrative law judge.

Assistant Secretary. The Assistant Secretary for Export Enforcement, Bureau of Industry and Security.

Bureau of Industry and Security (BIS). Bureau of Industry and Security, U.S. Department of Commerce (formerly the Bureau of Export Administration) and all of its component units, including, in particular for purposes of this part, the Office of Antiboycott Compliance, the Office of Export Enforcement, and the Office of Exporter Services.

Final decision. A decision or order assessing a civil penalty, denial of export privileges or other sanction, or otherwise disposing of or dismissing a case, which is not subject to further review under this part, but which is subject to collection proceedings or judicial review in an appropriate Federal district court as authorized by law.

Initial decision. A decision of the administrative law judge in proceedings involving violations relating to part 760 of the EAR, which is subject to appellate review by the Under Secretary of Commerce for Industry and Security, but which becomes the final decision in the absence of such an appeal.

Party. BIS and any person named as a respondent under this part.

Recommended decision. A decision of the administrative law judge in proceedings involving violations other than those relating to part 760 of the EAR, which is subject to review by the Under Secretary of Commerce for Industry and Security, who issues a written order affirming, modifying or vacating the recommended decision.

Respondent. Any person named as the subject of a charging letter, proposed charging letter, temporary denial order, or other order proposed or issued under this part.

Under Secretary. The Under Secretary for Industry and Security, United States Department of Commerce.

§ 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. Supplements Nos. 1 and 2 to this part describe how BIS typically exercises its discretion regarding the issuance of charging letters. 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.

(b) Notice of issuance of charging letter instituting administrative enforcement proceeding

A respondent shall be notified of the issuance of a charging letter, or any amendment or supplement thereto:

(1) By sending a copy by registered or certified mail or by express mail or commercial courier or delivery service addressed to the respondent at the respondent's last known address;

(2) By leaving a copy with the respondent or with an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process for the respondent; or

(3) By leaving a copy with a person of suitable age and discretion who resides at the respondent's last known dwelling.

(4) Delivery of a copy of the charging letter, if made in the manner described in paragraph (b)(2) or (3) of this section, shall be evidenced by a certificate of service signed by the person making such service, stating the method of service and the identity of the person with whom the charging letter was left. The certificate of service shall be filed with the administrative law judge.

(c) The date of service of notice of the issuance of a charging letter instituting an administrative enforcement proceeding, or service of notice of the issuance of a supplement or amendment to a charging letter, is the date of its delivery, or of its attempted delivery, by any means described in paragraph (b)(1) of this section.

§ 766.4 REPRESENTATION

A respondent individual may appear and participate in person, a corporation by a duly authorized officer or employee, and a

partnership by a partner. If a respondent is represented by counsel, counsel shall be a member in good standing of the bar of any State, Commonwealth or Territory of the United States, or of the District of Columbia, or be licensed to practice law in the country in which counsel resides if not the United States. A respondent personally, or through counsel or other representative, shall file a notice of appearance with the administrative law judge. BIS will be represented by the Office of Chief Counsel for Industry and Security, U.S. Department of Commerce.

§ 766.5 FILING AND SERVICE OF PAPERS OTHER THAN CHARGING LETTER

(a) Filing

All papers to be filed shall be addressed to:

EAR Administrative Enforcement Proceedings
U.S. Coast Guard, ALJ Docketing Center
40 S. Gay Street
Baltimore, Maryland 21202-4022

or such other place as the administrative law judge may designate. Filing by United States mail, first class postage prepaid, by express or equivalent parcel delivery service, or by hand delivery, is acceptable. Filing by mail from a foreign country shall be by airmail. In addition, the administrative law judge may authorize filing of papers by facsimile or other electronic means, provided that a hard copy of any such paper is subsequently filed. A copy of each paper filed shall be simultaneously served on each party.

(b) Service

Service shall be made by personal delivery or by mailing one copy of each paper to each party in the proceeding. Service by delivery service or facsimile, in the manner set forth in paragraph (a) of this section, is acceptable. Service on BIS shall be addressed to the

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

Service on a respondent shall be to the address to which the charging letter was sent or to such other address as respondent may provide. When a party has appeared by counsel or other representative, service on counsel or other representative shall constitute service on that party.

(c) Date

The date of filing or service is the day when the papers are deposited in the mail or are delivered in person, by delivery service, or by facsimile.

(d) Certificate of service

A certificate of service signed by the party making service, stating the date and manner of service, shall accompany every paper, other than the charging letter, filed and served on parties.

(e) Computing period of time

In computing any period of time prescribed or allowed by this part or by order of the administrative law judge or the Under Secretary, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a legal holiday (as defined in Rule 6(a) of the Federal Rules of Civil Procedure), in which case the period runs until the end of the next day which is neither a Saturday, a Sunday, nor a legal holiday. Intermediate Saturdays, Sundays, and legal holidays are excluded from the computation

when the period of time prescribed or allowed is seven days or less.

§ 766.6 ANSWER AND DEMAND FOR HEARING

(a) When to answer

The respondent must answer the charging letter within 30 days after being served with notice of the issuance of a charging letter instituting an administrative enforcement proceeding, or within 30 days of notice of any supplement or amendment to a charging letter, unless time is extended under §766.16 of this part.

(b) Contents of answer

The answer must be responsive to the charging letter and must fully set forth the nature of the respondent's defense or defenses. The answer must admit or deny specifically each separate allegation of the charging letter; if the respondent is without knowledge, the answer must so state and will operate as a denial. Failure to deny or controvert a particular allegation will be deemed an admission of that allegation. The answer must also set forth any additional or new matter the respondent believes supports a defense or claim of mitigation. Any defense or partial defense not specifically set forth in the answer shall be deemed waived, and evidence thereon may be refused, except for good cause shown.

(c) Demand for hearing

If the respondent desires a hearing, a written demand for one must be submitted with the answer. Any demand by BIS for a hearing must be filed with the administrative law judge within 30 days after service of the answer. Failure to make a timely written demand for a hearing shall be deemed a waiver of the party's right to a hearing, except for good cause shown. If no party demands a hearing, the matter will go forward in accordance with the procedures set forth in §766.15 of this part.

(d) English language required

The answer, all other papers, and all documentary evidence must be submitted in English, or translations into English must be filed and served at the same time.

§ 766.7 DEFAULT

(a) General

Failure of the respondent to file an answer within the time provided constitutes a waiver of the respondent's right to appear and contest the allegations in the charging letter. In such event, the administrative law judge, on BIS's motion and without further notice to the respondent, shall find the facts to be as alleged in the charging letter and render an initial or recommended decision containing findings of fact and appropriate conclusions of law and issue or recommend an order imposing appropriate sanctions. The decision and order shall be subject to review by the Under Secretary in accordance with the applicable procedures set forth in §766.21 or §766.22 of this part.

(b) Petition to Set Aside Default

(1) Procedure. Upon petition filed by a respondent against whom a default order has been issued, which petition is accompanied by an answer meeting the requirements of §766.6(b) of this part, the Under Secretary may, after giving all parties an opportunity to comment, and for good cause shown, set aside the default and vacate the order entered thereon and remand the matter to the administrative law judge for further proceedings.

(2) Time limits. A petition under this section must be made within one year of the date of

entry of the order which the petition seeks to have vacated.

§ 766.8 SUMMARY DECISION

At any time after a proceeding has been initiated, a party may move for a summary decision disposing of some or all of the issues. The administrative law judge may render an initial or recommended decision and issue or recommend an order if the entire record shows, as to the issue(s) under consideration:

(a) That there is no genuine issue as to any material fact; and

(b) That the moving party is entitled to a summary decision as a matter of law.

§ 766.9 DISCOVERY

(a) General

The parties are encouraged to engage in voluntary discovery regarding any matter, not privileged, which is relevant to the subject matter of the pending proceeding. The provisions of the Federal Rules of Civil Procedure relating to discovery apply to the extent consistent with this part and except as otherwise provided by the administrative law judge or by waiver or agreement of the parties. The administrative law judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. These orders may include limitations on the scope, method, time and place of discovery, and provisions for protecting the confidentiality of classified or otherwise sensitive information.

(b) Interrogatories and requests for admission or production of documents

A party may serve on any party interrogatories, requests for admission, or requests for production of documents for inspection and copying, and a party concerned may apply to the administrative law judge for such enforcement or protective order as that party deems warranted with respect to such discovery. The service of a discovery request shall be made at least 20 days before the scheduled date of the hearing unless the administrative law judge specifies a shorter time period. Copies of interrogatories, requests for admission and requests for production of documents and responses thereto shall be served on all parties, and a copy of the certificate of service shall be filed with the administrative law judge. Matters of fact or law of which admission is requested shall be deemed admitted unless, within a period designated in the request (at least 10 days after service, or within such additional time as the administrative law judge may allow), the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party to whom the request is directed cannot truthfully either admit or deny such matters.

(c) Depositions

Upon application of a party and for good cause shown, the administrative law judge may order the taking of the testimony of any person by deposition and the production of specified documents or materials by the person at the deposition. The application shall state the purpose of the deposition and set forth the facts sought to be established through the deposition.

(d) Enforcement

The administrative law judge may order a party to answer designated questions, to produce specified documents or things or to take any

other action in response to a proper discovery request. If a party does not comply with such an order, the administrative law judge may make a determination or enter any order in the proceeding as the judge deems reasonable and appropriate. The judge may strike related charges or defenses in whole or in part or may take particular facts relating to the discovery request to which the party failed or refused to respond as being established for purposes of the proceeding in accordance with the contentions of the party seeking discovery. In addition, enforcement by a district court of the United States may be sought under section 12(a) of the EAA.

§ 766.10 SUBPOENAS

(a) Issuance

Upon the application of any party, supported by a satisfactory showing that there is substantial reason to believe that the evidence would not otherwise be available, the administrative law judge will issue subpoenas requiring the attendance and testimony of witnesses and the production of such books, records or other documentary or physical evidence for the purpose of the hearing, as the judge deems relevant and material to the proceedings, and reasonable in scope.

(b) Service

Subpoenas issued by the administrative law judge may be served in any of the methods set forth in §766.5(b) of this part.

(c) Timing

Applications for subpoenas must be submitted at least 10 days before the scheduled hearing or deposition, unless the administrative law judge determines, for good cause shown, that extraordinary circumstances warrant a shorter time.

§ 766.11MATTER PROTECTED AGAINST DISCLOSURE

(a) Protective measures

It is often necessary for BIS to receive and consider information and documents that are sensitive from the standpoint of national security, foreign policy, business confidentiality, or investigative concern, and that are to be protected against disclosure. Accordingly, and without limiting the discretion of the administrative law judge to give effect to any other applicable privilege, it is proper for the administrative law judge to limit discovery or introduction of evidence or to issue such protective or other orders as in the judge's judgment may be consistent with the objective of preventing undue disclosure of the sensitive documents or information. Where the administrative law judge determines that documents containing the sensitive matter need to be made available to a respondent to avoid prejudice, the judge may direct BIS to prepare an unclassified and nonsensitive summary or extract of the documents. The administrative law judge may compare the extract or summary with the original to ensure that it is supported by the source document and that it omits only so much as must remain classified or undisclosed. The summary or extract may be admitted as evidence in the record.

(b) Arrangements for access

If the administrative law judge determines that this procedure is unsatisfactory and that classified or otherwise sensitive matter must form part of the record in order to avoid prejudice to a party, the judge may provide the parties opportunity to make arrangements that permit a party or a representative to have access to such matter without compromising sensitive information. Such arrangements may include obtaining security clearances, obtaining a

national interest determination under §12(c) of the EAA, or giving counsel for a party access to sensitive information and documents subject to assurances against further disclosure, including a protective order, if necessary.

§ 766.12 PREHEARING CONFERENCE

(a) The administrative law judge, on the judge's own motion or on request of a party, may direct the parties to participate in a prehearing conference, either in person or by telephone, to consider:

(1) Simplification of issues;

(2) The necessity or desirability of amendments to pleadings;

(3) Obtaining stipulations of fact and of documents to avoid unnecessary proof; or

(4) Such other matters as may expedite the disposition of the proceedings.

(b) The administrative law judge may order the conference proceedings to be recorded electronically or taken by a reporter, transcribed and filed with the judge.

(c) If a prehearing conference is impracticable, the administrative law judge may direct the parties to correspond with the judge to achieve the purposes of such a conference.

(d) The administrative law judge will prepare a summary of any actions agreed on or taken pursuant to this section. The summary will include any written stipulations or agreements made by the parties.

§ 766.13 HEARINGS

(a) Scheduling

The administrative law judge, by agreement with the parties or upon notice to all parties of not less than 30 days, will schedule a hearing. All hearings will be held in Washington, D.C., unless the administrative law judge determines, for good cause shown, that another location would better serve the interests of justice.

(b) Hearing procedure

Hearings will be conducted in a fair and impartial manner by the administrative law judge, who may limit attendance at any hearing or portion thereof to the parties, their representatives and witnesses if the judge deems this necessary or advisable in order to protect sensitive matter (see §766.11 of this part) from improper disclosure. The rules of evidence prevailing in courts of law do not apply, and all evidentiary material deemed by the administrative law judge to be relevant and material to the proceeding and not unduly repetitious will be received and given appropriate weight.

(c) Testimony and record

Witnesses will testify under oath or affirmation. A verbatim record of the hearing and of any other oral proceedings will be taken by reporter or by electronic recording, transcribed and filed with the administrative law judge. A respondent may examine the transcript and may obtain a copy by paying any applicable costs. Upon such terms as the administrative law judge deems just, the judge may direct that the testimony of any person be taken by deposition and may admit an affidavit or declaration as evidence, provided that any affidavits or declarations have been filed and served on the parties sufficiently in advance of the hearing to permit a party to file and serve an objection thereto on the grounds that it is necessary that the affiant or declarant testify at the hearing and be subject to cross-examination.

(d) Failure to appear

If a party fails to appear in person or by counsel at a scheduled hearing, the hearing may nevertheless proceed, and that party's failure to appear will not affect the validity of the hearing or any proceedings or action taken thereafter.

§ 766.14 INTERLOCUTORY REVIEW OF RULINGS

(a) At the request of a party, or on the judge's own initiative, the administrative law judge may certify to the Under Secretary for review a ruling that does not finally dispose of a proceeding, if the administrative law judge determines that immediate review may hasten or facilitate the final disposition of the matter.

(b) Upon certification to the Under Secretary of the interlocutory ruling for review, the parties will have 10 days to file and serve briefs stating their positions, and five days to file and serve replies, following which the Under Secretary will decide the matter promptly.

§ 766.15 PROCEEDING WITHOUT A HEARING

If the parties have waived a hearing, the case will be decided on the record by the administrative law judge. Proceeding without a hearing does not relieve the parties from the necessity of proving the facts supporting their charges or defenses. Affidavits or declarations, depositions, admissions, answers to interrogatories and stipulations may supplement other documentary evidence in the record. The administrative law judge will give each party reasonable opportunity to file rebuttal evidence.

§ 766.16 PROCEDURAL STIPULATIONS; EXTENSION OF TIME

(a) Procedural stipulations

Unless otherwise ordered, a written stipulation agreed to by all parties and filed with the administrative law judge will modify any procedures established by this part.

(b) Extension of time

(1) The parties may extend any applicable time limitation, by stipulation filed with the administrative law judge before the time limitation expires.

(2) The administrative law judge may, on the judge's own initiative or upon application by any party, either before or after the expiration of any applicable time limitation, extend the time within which to file and serve an answer to a charging letter or do any other act required by this part.

§ 766.17 DECISION OF THE ADMINISTRATIVE LAW JUDGE

(a) Predecisional matters

Except for default proceedings under §766.7 of this part, the administrative law judge will give the parties reasonable opportunity to submit the following, which will be made a part of the record:

(1) Exceptions to any ruling by the judge or to the admissibility of evidence proffered at the hearing;

(2) Proposed findings of fact and conclusions of law;

(3) Supporting legal arguments for the exceptions and proposed findings and conclusions submitted; and

(4) A proposed order.

(*b*) *Decision and order*

After considering the entire record in the proceeding, the administrative law judge will issue a written decision.

(1) Initial decision. For proceedings charging violations relating to part 760 of the EAR, the decision rendered shall be an initial decision. The decision will include findings of fact, conclusions of law, and findings as to whether there has been a violation of the EAA, the EAR, or any order, license or authorization issued thereunder. If the administrative law judge finds that the evidence of record is insufficient to sustain a finding that a violation has occurred with respect to one or more charges, the judge shall order dismissal of the charges in whole or in part, as appropriate. If the administrative law judge finds that one or more violations have been committed, the judge may issue an order imposing administrative sanctions, as provided in part 764 of the EAR. The decision and order shall be served on each party, and shall become effective as the final decision of the Department 30 days after service, unless an appeal is filed in accordance with §766.21 of this part.

(2) Recommended decision. For proceedings not involving violations relating to part 760 of the EAR, the decision rendered shall be a recommended decision. The decision will include recommended findings of fact, conclusions of law, and findings as to whether there has been a violation of the EAA, the EAR or any order, license or authorization issued thereunder. If the administrative law judge finds that the evidence of record is insufficient to sustain a recommended finding that a violation has occurred with respect to one or more charges, the judge shall recommend dismissal of any such charge. If the administrative law judge finds that one or more violations have been committed, the judge shall recommend an order imposing administrative sanctions, as provided in part 764 of the EAR, or such other action as the judge deems appropriate. The administrative law judge shall immediately certify the record, including the original copy of the recommended decision and order, to the Under Secretary for review in accordance with §766.22 of this part. The administrative law judge shall also immediately serve the recommended decision on all parties. Because of the time limits established in the EAA for review by the Under Secretary, service upon parties shall be by personal delivery, express mail or other overnight carrier.

(*c*) *Suspension of sanctions*

Any order imposing administrative sanctions may provide for the suspension of the sanction imposed, in whole or in part and on such terms of probation or other conditions as the administrative law judge or the Under Secretary may specify. Any suspension order may be modified or revoked by the signing official upon application of BIS showing a violation of the probationary terms or other conditions, after service on the respondent of notice of the application in accordance with the service provisions of §766.3 of this part, and with such opportunity for response as the responsible signing official in his/her discretion may allow. A copy of any order modifying or revoking the suspension shall also be served on the respondent in accordance with the provisions of §766.3 of this part.

(d) Time for decision

Administrative enforcement proceedings not involving violations relating to part 760 of the EAR shall be concluded, including review by the Under Secretary under §766.22 of this part, within one year of the submission of a charging letter, unless the administrative law judge, for good cause shown, extends such period. The charging letter will be deemed to have been submitted to the administrative law judge on the date the respondent files an answer or on the date BIS files a motion for a default order

pursuant to §766.7(a) of this part, whichever occurs first.

§ 766.18 SETTLEMENT

(a) Cases may be settled before service of a charging letter

In cases in which settlement is reached before service of a charging letter, a proposed charging letter will be prepared, and a settlement proposal consisting of a settlement agreement and order will be submitted to the Assistant Secretary for approval and signature. If the Assistant Secretary does not approve the proposal, he/she will notify the parties and the case will proceed as though no settlement proposal had been made. If the Assistant Secretary approves the proposal, he/she will issue an appropriate order, and no action will be required by the administrative law judge.

(b) Cases may also be settled after service of a charging letter

(1) If the case is pending before the administrative law judge, the judge shall stay the proceedings for a reasonable period of time, usually not to exceed 30 days, upon notification by the parties that they have entered into good faith settlement negotiations. The administrative law judge may, in his/her discretion, grant additional stays. If settlement is reached, a proposal will be submitted to the Assistant Secretary for approval and signature. If the Assistant Secretary approves the proposal, he/she will issue an appropriate order, and notify the administrative law judge that the case is withdrawn from adjudication. If the Assistant Secretary does not approve the proposal, he/she will notify the parties and the case will proceed to adjudication by the administrative law judge as though no settlement proposal had been made.

(2) If the case is pending before the Under Secretary under §766.21 or §766.22 of this part, the parties may submit a settlement proposal to the Under Secretary for approval and signature. If the Under Secretary approves the proposal, he/she will issue an appropriate order. If the Under Secretary does not approve the proposal, the case will proceed to final decision in accordance with §766.21 or §766.22 of this part, as appropriate.

(c) Any order disposing of a case by settlement may suspend the administrative sanction imposed, in whole or in part, on such terms of probation or other conditions as the signing official may specify. Any such suspension may be modified or revoked by the signing official, in accordance with the procedures set forth in §766.17(c) of this part.

(d) Any respondent who agrees to an order imposing any administrative sanction does so solely for the purpose of resolving the claims in the administrative enforcement proceeding brought under this part. This reflects the fact that BIS has neither the authority nor the responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and the Department of Justice.

(e) Cases that are settled may not be reopened or appealed.

(f) Supplements Nos. 1 and 2 to this part describe how BIS typically exercises its discretion regarding the terms under which it is willing to settle particular cases.

§ 766.19 REOPENING

The respondent may petition the administrative law judge within one year of the date of the final decision, except where the decision arises from a default judgment or from a settlement, to reopen

an administrative enforcement proceeding to receive any relevant and material evidence which was unknown or unobtainable at the time the proceeding was held. The petition must include a summary of such evidence, the reasons why it is deemed relevant and material, and the reasons why it could not have been presented at the time the proceedings were held. The administrative law judge will grant or deny the petition after providing other parties reasonable opportunity to comment. If the proceeding is reopened, the administrative law judge may make such arrangements as the judge deems appropriate for receiving the new evidence and completing the record. The administrative law judge will then issue a new initial or recommended decision and order, and the case will proceed to final decision and order in accordance with §766.21 or §766.22 of this part, as appropriate.

§ 766.20 RECORD FOR DECISION AND AVAILABILITY OF DOCUMENTS

(a) General

The transcript of hearings, exhibits, rulings, orders, all papers and requests filed in the proceedings and, for purposes of any appeal under §766.21 of this part or review under §766.22 of this part, the decision of the administrative law judge and such submissions as are provided for by §§766.21 and 766.22 of this part, will constitute the record and the exclusive basis for decision. When a case is settled after the service of a charging letter, the record will consist of any and all of the foregoing, as well as the settlement agreement and the order. When a case is settled before service of a charging letter, the record will consist of the proposed charging letter, the settlement agreement and the order.

(b) Restricted access

On the judge's own motion, or on the motion of any party, the administrative law judge may direct that there be a restricted access portion of the record for any material in the record to which public access is restricted by law or by the terms of a protective order entered in the proceedings. A party seeking to restrict access to any portion of the record is responsible for submitting, at the time specified in §766.20(c)(2) of this part, a version of the document proposed for public availability that reflects the requested deletion. The restricted access portion of the record will be placed in a separate file and the file will be clearly marked to avoid improper disclosure and to identify it as a portion of the official record in the proceedings. The administrative law judge may act at any time to permit material that becomes declassified or unrestricted through passage of time to be transferred to the unrestricted access portion of the record.

(c) Availability of documents

(1) Scope.

(i) For proceedings started on or after October 12, 1979, all charging letters, answers, initial and recommended decisions, and orders disposing of a case will be made available for public inspection in the BIS Freedom of Information Records Inspection Facility, U.S. Department of Commerce, Room H-6624, 14th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20230. The complete record for decision, as defined in paragraphs (a) and (b) of this section will be made available on request. In addition, all decisions of the Under Secretary on appeal pursuant to §766.22 of this part and those final orders providing for denial, suspension or revocation of export privileges shall be published in the *Federal Register*.

(ii) For proceedings started before October 12, 1979, the public availability of the record for decision will be governed by the applicable

regulations in effect when the proceedings were begun.

(2) Timing.

(i) *Antiboycott cases*. For matters relating to part 760 of the EAR, documents are available immediately upon filing, except for any portion of the record for which a request for segregation is made. Parties that seek to restrict access to any portion of the record under paragraph (b) of this section must make such a request, together with the reasons supporting the claim of confidentiality, simultaneously with the submission of material for the record.

(ii) *Other cases*. In all other cases, documents will be available only after the final administrative disposition of the case. In these cases, parties desiring to restrict access to any portion of the record under paragraph (b) of this section must assert their claim of confidentiality, together with the reasons for supporting the claim, before the close of the proceeding.

§ 766.21 APPEALS

(a) Grounds

For proceedings charging violations relating to part 760 of the EAR, a party may appeal to the Under Secretary from an order disposing of a proceeding or an order denying a petition to set aside a default or a petition for reopening, on the grounds:

(1) That a necessary finding of fact is omitted, erroneous or unsupported by substantial evidence of record;

(2) That a necessary legal conclusion or finding is contrary to law;

(3) That prejudicial procedural error occurred, or

(4) That the decision or the extent of sanctions is arbitrary, capricious or an abuse of discretion. The appeal must specify the grounds on which the appeal is based and the provisions of the order from which the appeal is taken.

(b) Filing of appeal

An appeal from an order must be filed with the Office of the Under Secretary for Export Administration, Bureau of Industry and Security, U.S. Department of Commerce, Room H-3898, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, within 30 days after service of the order appealed from. If the Under Secretary cannot act on an appeal for any reason, the Under Secretary will designate another Department of Commerce official to receive and act on the appeal.

(c) Effect of appeal

The filing of an appeal shall not stay the operation of any order, unless the order by its express terms so provides or unless the Under Secretary, upon application by a party and with opportunity for response, grants a stay.

(d) Appeal procedure

The Under Secretary normally will not hold hearings or entertain oral argument on appeals. A full written statement in support of the appeal must be filed with the appeal and be simultaneously served on all parties, who shall have 30 days from service to file a reply. At his/her discretion, the Under Secretary may accept new submissions, but will not ordinarily accept those submissions filed more than 30 days after the filing of the reply to the appellant's first submission.

(e) Decisions

The decision will be in writing and will be accompanied by an order signed by the Under Secretary giving effect to the decision. The

order may either dispose of the case by affirming, modifying or reversing the order of the administrative law judge or may refer the case back to the administrative law judge for further proceedings.

§ 766.22 REVIEW BY UNDER SECRETARY

(a) Recommended decision

For proceedings not involving violations relating to part 760 of the EAR, the administrative law judge shall immediately refer the recommended decision and order to the Under Secretary. Because of the time limits provided under the EAA for review by the Under Secretary, service of the recommended decision and order on the parties, all papers filed by the parties in response, and the final decision of the Under Secretary must be by personal delivery, facsimile, express mail or other overnight carrier. If the Under Secretary cannot act on a recommended decision and order for any reason, the Under Secretary will designate another Department of Commerce official to receive and act on the recommendation.

(b) Submissions by parties

Parties shall have 12 days from the date of issuance of the recommended decision and order in which to submit simultaneous responses. Parties thereafter shall have eight days from receipt of any response(s) in which to submit replies. Any response or reply must be received within the time specified by the Under Secretary.

(c) Final decision

Within 30 days after receipt of the recommended decision and order, the Under Secretary shall issue a written order affirming, modifying or vacating the recommended decision and order of the administrative law judge. If he/she vacates the recommended decision and order, the Under Secretary may refer the case back to the administrative law judge for further proceedings. Because of the time limits, the Under Secretary's review will ordinarily be limited to the written record for decision, including the transcript of any hearing, and any submissions by the parties concerning the recommended decision.

(d) Delivery

The final decision and implementing order shall be served on the parties and will be publicly available in accordance with §766.20 of this part.

§ 766.23 RELATED PERSONS

(a) General

In order to prevent evasion, certain types of orders under this part may be made applicable not only to the respondent, but also to other persons then or thereafter related to the respondent by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business. Orders that may be made applicable to related persons include those that deny or affect export privileges, including temporary denial orders, and those that exclude a respondent from practice before BIS.

(b) Procedures

If BIS has reason to believe that a person is related to the respondent and that an order that is being sought or that has been issued should be made applicable to that person in order to prevent evasion of the order, BIS shall, except in an *ex parte* proceeding under §766.24(a) of this part, give that person notice in accordance with §766.5(b) of this part and an opportunity to oppose such action. If the official authorized to issue the order against the respondent finds that the order should be made applicable to that person in order to prevent evasion of the order

that official shall issue or amend the order accordingly.

(c) Appeals

Any person named by BIS in an order as related to the respondent may appeal that action. The sole issues to be raised and ruled on in any such appeal are whether the person so named is related to the respondent and whether the order is justified in order to prevent evasion.

(1) A person named as related to the respondent in an order issued pursuant to §766.25 may file an appeal with the Under Secretary for Industry and Security pursuant to part 756 of the EAR.

(2) A person named as related to the respondent in an order issued pursuant to other provisions of this part may file an appeal with the administrative law judge.

(i) If the order made applicable to the related person is for a violation related to part 760 of the EAR, the related person may file an appeal with the administrative law judge. The related person may appeal the initial decision and order of the administrative law judge to the Under Secretary in accordance with the procedures set forth in §766.21.

(ii) If the order made applicable to the related person is issued pursuant to §766.24 of this part to prevent an imminent violation, the recommended decision and order of the administrative law judge shall be reviewed by the Under Secretary in accordance with the procedures set forth in §766.24(e) of this part.

(iii) If the order made applicable to the related person is for a violation of the EAR not related to part 760 of the EAR and not issued pursuant to §766.24 of this part, the recommended decision and order of the administrative law judge shall be reviewed by the Under Secretary in accordance with the procedures set forth in §766.22 of this part.

§ 766.24 TEMPORARY DENIALS

(a) General

The procedures in this section apply to temporary denial orders issued on or after July 12, 1985. For temporary denial orders issued on or before July 11, 1985, the proceedings will be governed by the applicable regulations in effect at the time the temporary denial orders were issued. Without limiting any other action BIS may take under the EAR with respect to any application, order, license or authorization issued under the EAA, BIS may ask the Assistant Secretary to issue a temporary denial order on an *ex parte* basis to prevent an imminent violation, as defined in this section, of the EAA, the EAR, or any order, license or authorization issued thereunder. The temporary denial order will deny export privileges to any person named in the order as provided for in §764.3(a)(2) of the EAR.

(b) Issuance

(1) The Assistant Secretary may issue an order temporarily denying to a person any or all of the export privileges described in part 764 of the EAR upon a showing by BIS that the order is necessary in the public interest to prevent an imminent violation of the EAA, the EAR, or any order, license or authorization issued thereunder.

(2) The temporary denial order shall define the imminent violation and state why it was issued without a hearing. Because all denial orders are public, the description of the imminent violation and the reasons for proceeding on an *ex parte* basis set forth therein shall be stated in a manner that is consistent with national security, foreign policy, business confidentiality, and investigative concerns.

(3) A violation may be "imminent" either in time or in degree of likelihood. To establish grounds for the temporary denial order, BIS may show either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations. To indicate the likelihood of future violations, BIS may show that the violation under investigation or charges is significant, deliberate, covert and/or likely to occur again, rather than technical or negligent, and that it is appropriate to give notice to companies in the United States and abroad to cease dealing with the person in U.S.-origin items in order to reduce the likelihood that a person under investigation or charges continues to export or acquire abroad such items, risking subsequent disposition contrary to export control requirements. Lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation.

(4) The temporary denial order will be issued for a period not exceeding 180 days.

(5) Notice of the issuance of a temporary denial order on an *ex parte* basis shall be given in accordance with §766.5(b) of this part upon issuance.

(c) Related persons

A temporary denial order may be made applicable to related persons in accordance with §766.23 of this part.

(d) Renewal

(1) If, no later than 20 days before the expiration date of a temporary denial order, BIS believes that renewal of the denial order is necessary in the public interest to prevent an imminent violation, BIS may file a written request setting forth the basis for its belief, including any additional or changed circumstances, asking that the Assistant Secretary renew the temporary denial order, with modifications, if any are appropriate, for an additional period not exceeding 180 days. BIS's request shall be delivered to the respondent, or any agent designated for this purpose, in accordance with §766.5(b) of this part, which will constitute notice of the renewal application.

(2) Non-resident respondents. To facilitate timely notice of renewal requests, a respondent not a resident of the United States may designate a local agent for this purpose and provide written notification of such designation to BIS in the manner set forth in §766.5(b) of this part.

(3) Hearing.

(i) A respondent may oppose renewal of a temporary denial order by filing with the Assistant Secretary a written submission, supported by appropriate evidence, to be received not later than seven days before the expiration date of such order. For good cause shown, the Assistant Secretary may consider submissions received not later than five days before the expiration date. The Assistant Secretary ordinarily will not allow discovery; however, for good cause shown in respondent's submission, he/she may allow the parties to take limited discovery, consisting of a request for production of documents. If requested by the respondent in the written submission, the Assistant Secretary shall hold a hearing on the renewal application. The hearing shall be on the record and ordinarily will consist only of oral argument. The only issue to be considered on BIS's request for renewal is whether the temporary denial order should be continued to prevent an imminent violation as defined herein.

(ii) Any person designated as a related person may not oppose the issuance or renewal of the temporary denial order, but may file an appeal in accordance with §766.23(c) of this part.

(iii) If no written opposition to BIS's renewal request is received within the specified time, the Assistant Secretary may issue the order renewing the temporary denial order without a hearing.

(4) A temporary denial order may be renewed more than once.

(e) Appeals

(1) Filing.

(i) A respondent may, at any time, file an appeal of the initial or renewed temporary denial order with the administrative law judge.

(ii) The filing of an appeal shall stay neither the effectiveness of the temporary denial order nor any application for renewal, nor will it operate to bar the Assistant Secretary's consideration of any renewal application.

(2) Grounds. A respondent may appeal on the grounds that the finding that the order is necessary in the public interest to prevent an imminent violation is unsupported.

(3) Appeal procedure. A full written statement in support of the appeal must be filed with the appeal together with appropriate evidence, and be simultaneously served on BIS, which shall have seven days from receipt to file a reply. Service on the administrative law judge shall be addressed to U.S. Coast Guard, ALJ Docketing Center, 40 S. Gay Street, Baltimore, Maryland, 21202-4022. Service on BIS shall be as set forth in §766.5(b) of this part. The administrative law judge normally will not hold hearings or entertain oral argument on appeals.

(4) Recommended Decision. Within 10 working days after an appeal is filed, the administrative law judge shall submit a recommended decision to the Under Secretary, and serve copies on the parties, recommending whether the issuance or the renewal of the temporary denial order should be affirmed, modified or vacated.

(5) Final decision. Within five working days after receipt of the recommended decision, the Under Secretary shall issue a written order accepting, rejecting or modifying the recommended decision. Because of the time constraints, the Under Secretary's review will ordinarily be limited to the written record for decision, including the transcript of any hearing. The issuance or renewal of the temporary denial order shall be affirmed only if there is reason to believe that the temporary denial order is required in the public interest to prevent an imminent violation of the EAA, the EAR, or any order, license or other authorization issued under the EAA.

(f) Delivery

A copy of any temporary denial order issued or renewed and any final decision on appeal shall be published in the *Federal Register* and shall be delivered to BIS and to the respondent, or any agent designated for this purpose, and to any related person in the same manner as provided in §766.5 of this part for filing for papers other than a charging letter.

§ 766.25 ADMINISTRATIVE ACTION DENYING EXPORT PRIVILEGES

(a) General

The Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the EAA, the EAR, or any order, license, or authorization issued thereunder; any regulation, license or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701-1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the

Internal Security Act of 1950 (50 U.S.C. 783(b)), or section 38 of the Arms Export Control Act (22 U.S.C. 2778).

(b) Procedure

Upon notification that a person has been convicted of a violation of one or more of the provisions specified in paragraph (a) of this section, the Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, will determine whether to deny such person export privileges, including but not limited to applying for, obtaining, or using any license, License Exception, or export control document; or participating in or benefitting in any way from any export or export-related transaction subject to the EAR. Before taking action to deny a person export privileges under this section, the Director of the Office of Exporter Services will provide the person written notice of the proposed action and an opportunity to comment through a written submission, unless exceptional circumstances exist. In reviewing the response, the Director of the Office of Exporter Services will consider any relevant or mitigating evidence why these privileges should not be denied. Upon final determination, the Director of the Office of Exporter Services will notify by letter each person denied export privileges under this section.

(c) Criteria

In determining whether and for how long to deny U.S. export privileges to a person previously convicted of one or more of the statutes set forth in paragraph (a) of this section, the Director of the Office of Exporter Services may take into consideration any relevant information, including, but not limited to, the seriousness of the offense involved in the criminal prosecution, the nature and duration of the criminal sanctions imposed, and whether the person has undertaken any corrective measures.

(d) Duration

Any denial of export privileges under this section shall not exceed 10 years from the date of the conviction of the person who is subject to the denial.

(e) Effect

Any person denied export privileges under this section will be considered a "person denied export privileges" for purposes of §736.2(b)(4) (General Prohibition 4 - Engage in actions prohibited by a denial order) and §764.2(k) of the EAR.

(f) Publication

The orders denying export privileges under this section are published in the *Federal Register* when issued, and, for the convenience of the public, information about those orders may be included in compilations maintained by BIS on a Web site and as a supplement to the unofficial edition of the EAR available by subscription from the Government Printing Office.

(g) Appeal

An appeal of an action under this section will be pursuant to part 756 of the EAR.

(h) Applicability to related person

The Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may take action in accordance with §766.23 of this part to make applicable to related persons an order that is being sought or that has been issued under this section.

SUPPLEMENT NO. 1 TO PART 766 - GUIDANCE ON CHARGING AND PENALTY DETERMINATIONS IN SETTLEMENT OF ADMINISTRATIVE ENFORCEMENT CASES

Introduction

This Supplement describes how BIS responds to violations of the Export Administration Regulations (EAR) and, specifically, how BIS makes penalty determinations in the settlement of civil administrative enforcement cases under part 764 of the EAR. This guidance does not apply to enforcement cases for antiboycott violations under part 760 of the EAR.

Because many administrative enforcement cases are resolved through settlement, the process of settling such cases is integral to the enforcement program. BIS carefully considers each settlement offer in light of the facts and circumstances of the case, relevant precedent, and BIS's objective to achieve in each case an appropriate level of penalty and deterrent effect. In settlement negotiations, BIS encourages parties to provide, and will give serious consideration to, information and evidence that parties believe are relevant to the application of this guidance to their cases, to whether a violation has in fact occurred, or to whether they have an affirmative defense to potential charges.

This guidance does not confer any right or impose any obligation regarding what penalties BIS may seek in litigating a case or what posture BIS may take toward settling a case. Parties do not have a right to a settlement offer, or particular settlement terms, from BIS, regardless of settlement postures BIS has taken in other cases.

I. Responding to Violations

The Office of Export Enforcement (OEE), among other responsibilities, investigates possible violations of the Export Administration Act of 1979, as amended, the EAR, or any order, license or authorization issued thereunder. When it appears that such a violation has occurred, OEE investigations may lead to a warning letter or a civil enforcement proceeding. A violation may also be referred to the Department of Justice for criminal prosecution. The type of enforcement action initiated by OEE will depend primarily on the nature of the violation.

A. *Issuing a warning letter*: Warning letters represent OEE's conclusion that an apparent violation has occurred. In the exercise of its discretion, OEE may determine in certain instances that issuing a warning letter, instead of bringing an administrative enforcement proceeding, will achieve the appropriate enforcement result. A warning letter will fully explain the apparent violation and urge compliance. OEE often issues warning letters for an apparent violation of a technical nature, where good faith efforts to comply with the law and cooperate with the investigation are present, or where the investigation commenced as a result of a voluntary self-disclosure satisfying the requirements of §764.5 of the EAR, provided that no aggravating factors exist.

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

B. *Pursuing an administrative enforcement case*: The issuance of a charging letter under §766.3 of the EAR initiates an administrative enforcement proceeding. Charging letters may be issued when there is reason to believe that a violation has occurred. Cases may be settled before or after the issuance of a charging letter. *See* §766.18 of the EAR. BIS prepares a proposed charging letter when a case is settled before issuance of an actual charging letter. *See*

§766.18(a). In some cases, BIS also sends a proposed charging letter to a party in the absence of a settlement agreement, thereby informing the party of the violations that BIS has reason to believe occurred and how BIS expects that those violations would be charged.

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

II. Types of Administrative Sanctions

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

A. *Civil penalty*: A monetary penalty may be assessed for each violation. The maximum amount of such a penalty per violation is stated in §764.3(a)(1), subject to adjustments under the Federal Civil Penalties Adjustment Act of 1990 (28 U.S.C. § 2461, note (2000)), which are codified at 15 CFR § 6.4.

B. *Denial of export privileges*: An order denying a party's export privileges may be issued, as described in §764.3(a)(2) of the EAR. Such a denial may extend to all export privileges, as set out in the standard terms for denial orders in Supplement No. 1 to part 764, or may be narrower in scope (*e.g.*, limited to exports of specified items or to specified destinations or customers).

C. *Exclusion from practice*: Under §764.3(a)(3) of the EAR, any person acting as an attorney, accountant, consultant, freight forwarder or other person who acts in a representative capacity in any matter before BIS may be excluded from practicing before BIS.

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

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

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

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

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

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

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

Related Violations: Frequently, a single export transaction can give rise to multiple violations. For example, an exporter who mis-classifies an item on the Commerce Control List may, as a result of that error, export the item without the required export license and file Electronic Export Information (EEI) to the Automated Export System (AES) 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 commits three violations: one violation of § 764.2(a) of the EAR for the unauthorized export and two violations of § 764.2(g) for the two false statements on the EEI filing to the AES. It is within the discretion of BIS to charge three separate violations and settle the case for a penalty that is less than would be appropriate for three unrelated violations under otherwise similar circumstances, or to charge fewer than three violations and pursue settlement in accordance with that charging decision. In exercising such discretion, BIS typically looks to factors such as whether the violations resulted from knowing or willful conduct, willful blindness to the requirements of the EAR, or gross negligence; whether they stemmed from the same underlying error or omission; and whether they resulted in distinguishable or separate harm.

Multiple Unrelated Violations: In cases involving multiple unrelated violations, BIS is more likely to seek a denial of export privileges, an exclusion from practice, and/or a greater monetary penalty than BIS would otherwise typically seek. For example, repeated unauthorized exports could warrant a denial order, even if a single export of the same item to the same destination under similar circumstances might warrant just a monetary penalty. BIS takes this approach because multiple violations may indicate serious compliance problems and a resulting risk of future violations. BIS may consider whether a party has taken effective steps to address compliance concerns in determining whether multiple violations warrant a denial or exclusion order in a particular case.

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

interest into account in determining settlement terms.

Related Criminal or Civil Violations: Where an administrative enforcement matter under the EAR involves conduct giving rise to related criminal or civil charges, BIS may take into account the related violations, and their resolution, in determining what administrative sanctions are appropriate under part 766. A criminal conviction indicates serious, willful misconduct and an accordingly high risk of future violations, absent effective administrative sanctions. However, entry of a guilty plea can be a sign that a party accepts responsibility for complying with the EAR and will take greater care to do so in the future. In appropriate cases where a party is receiving substantial criminal penalties, BIS may find that sufficient deterrence may be achieved by lesser administrative sanctions than would be appropriate in the absence of criminal penalties. Conversely, BIS might seek greater administrative sanctions in an otherwise similar case where a party is not subjected to criminal penalties. The presence of a related criminal or civil disposition may distinguish settlements among civil penalty cases that appear otherwise to be similar. As a result, the factors set forth for consideration in civil penalty settlements will often be applied differently in the context of a "global settlement" of both civil and criminal cases, or multiple civil cases, and may therefore be of limited utility as precedent for future cases, particularly those not involving a global settlement.

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

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

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

Mitigating Factors:

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

2. The party has an effective export compliance program and its overall export compliance efforts have been of high quality. In determining the presence of this factor, BIS

will take account of the extent to which a party complies with the principles set forth in BIS's Export Management Compliance Program (EMCP) Guidelines. Information about the EMCP Guidelines can be accessed through the BIS Web site at *www.bis.doc.gov*. In this context, BIS will also consider whether a party's export compliance program uncovered a problem, thereby preventing further violations, and whether the party has taken steps to address compliance concerns raised by the violation, including steps to prevent reoccurrence of the violation, that are reasonably calculated to be effective. (GREAT WEIGHT)

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

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

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

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

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

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

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

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

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

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

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

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

Aggravating Factors:

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

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

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

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

5. The quantity and/or value of the exports was high, such that a greater penalty may be necessary to serve as an adequate penalty for the violation or deterrence of future violations, or to make the penalty proportionate to those for otherwise comparable violations involving exports of lower quantity or value.

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

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

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

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

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

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

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

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

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

IV. How BIS Makes Suspension and Deferral Decisions

A. *Civil Penalties*: In appropriate cases, payment of a civil monetary penalty may be deferred or suspended. *See* §764.3(a)(1)(iii) of the EAR. In determining whether suspension or deferral is appropriate, BIS may consider, for example, whether the party has demonstrated a limited ability to pay a penalty that would be appropriate for such violations, so that suspended or deferred payment can be expected to have sufficient deterrent value, and whether, in light of all of the circumstances, such suspension or deferral is necessary to make the impact of the penalty consistent with the impact of BIS penalties on other parties who committed similar violations.

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

SUPPLEMENT NO. 2 TO PART 766 - GUIDANCE ON CHARGING AND PENALTY DETERMINATIONS IN SETTLEMENT OF ADMINISTRATIVE ENFORCEMENT CASES INVOLVING ANTIBOYCOTT MATTERS

(a) Introduction

(1) ***Scope***. This Supplement describes how the Office of Antiboycott Compliance (OAC) responds to violations of part 760 of the EAR "Restrictive Trade Practices or Boycotts" and to violations of part 762 "Recordkeeping" when the recordkeeping requirement pertains to part 760 (together referred to in this supplement as the "antiboycott provisions"). It also describes how BIS makes penalty determinations in the settlement of administrative enforcement cases brought under parts 764 and 766 of the EAR involving violations of the antiboycott provisions. This supplement does not apply to enforcement cases for violations of other provisions of the EAR.

(2) Policy Regarding Settlement. 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 the parties believe is relevant to the application of this guidance to their cases, to whether a violation has in fact occurred, and to whether they have a defense to potential charges.

(3) Limitation. BIS's policy and practice is to treat similarly situated cases similarly, taking into consideration that the facts and combination of mitigating and aggravating factors are different in each case. However, this guidance does not confer any right or impose any obligation regarding what posture or penalties BIS may seek in settling or litigating 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.

(b) Responding to Violations

OAC within BIS investigates possible violations of Section 8 of the Export Administration Act of 1979, as amended ("Foreign Boycotts"), the antiboycott provisions of EAR, or any order or authorization related thereto. When BIS has reason to believe that such a violation has occurred, BIS may issue a warning letter or initiate an administrative enforcement proceeding. A violation may also be referred to the Department of Justice for criminal prosecution.

(1) ***Issuing a warning letter.*** Warning letters represent BIS's belief that a violation has occurred. In the exercise of its discretion, BIS may determine in certain instances that issuing a warning letter, instead of bringing an administrative enforcement proceeding, will fulfill the appropriate enforcement objective. A warning letter will fully explain the violation.

(i) BIS may issue warning letters where:

(A) the investigation commenced as a result of a voluntary self-disclosure satisfying the requirements of § 764.8 of the EAR; or

(B) the party has not previously committed violations of the antiboycott provisions.

(ii) BIS may also consider the category of violation as discussed in paragraph (d)(2) of this supplement in determining whether to issue a

warning letter or initiate an enforcement proceeding. A violation covered by Category C (failure to report or late reporting of receipt of boycott requests) might warrant a warning letter rather than initiation of an enforcement proceeding.

(iii) BIS will not issue a warning letter if it concludes, based on available information, that a violation did not occur.

(iv) BIS may reopen its investigation of a matter should it receive additional evidence or if it appears that information previously provided to BIS during the course of its investigation was incorrect.

(2) ***Pursuing an administrative enforcement case.*** The issuance of a charging letter under § 766.3 of this part initiates an administrative proceeding.

(i) Charging letters may be issued when there is reason to believe that a violation has occurred. Cases may be settled before or after the issuance of a charging letter. *See* § 766.18 of this part.

(ii) Although not required to do so by law, BIS may send a proposed charging letter to a party to inform the party of the violations that BIS has reason to believe occurred and how BIS expects that those violations would be charged. Issuance of the proposed charging letter provides an opportunity for the party and BIS to consider settlement of the case prior to the initiation of formal enforcement proceedings.

(3) ***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.

(c) Types of administrative sanctions

Administrative enforcement cases generally are settled on terms that include one or more of three administrative sanctions:

(1) A monetary penalty may be assessed for each violation as provided in § 764.3(a)(1) of the EAR;

Note to paragraph (c)(1): *The maximum penalty is subject to adjustments under the Federal Civil Penalties Adjustment Act of 1990 (28 USC 2461, note (2000)), which are codified at 15 CFR § 6.4. For violations that occurred before March 9, 2006, the maximum monetary penalty per violation is $11,000. For violations occurring on or after March 9, 2006, the maximum monetary penalty per violation is $50,000.*

(2) An order denying a party's export privileges under the EAR may be issued, under § 764.3(a)(2) of the EAR; or

(3) Exclusion from practice under § 764.3(a)(3) of the EAR.

(d) How BIS determines what sanctions are appropriate in a settlement

(1) ***General Factors.*** BIS looks to the following general factors in determining what administrative sanctions are appropriate in each settlement.

(i) *Degree of seriousness.* In order to violate the antiboycott provisions of the EAR, a U.S. person does not need to have actual "knowledge" or a reason to know, as that term is defined in § 772.1 of the EAR, of relevant U.S. laws and regulations. Typically, in cases that do not involve knowing violations, BIS will seek a settlement for payment of a civil penalty (unless the matter is resolved with a warning letter). However, in cases involving knowing violations, conscious disregard of the antiboycott provisions, or other such serious violations (e.g., furnishing prohibited information in response to

a boycott questionnaire with knowledge that such furnishing is in violation of the EAR), BIS is more likely to seek a denial of export privileges or an exclusion from practice, and/or a greater monetary penalty as BIS considers such violations particularly egregious.

(ii) *Category of violations.* In connection with its activities described in paragraph (a)(1) of this supplement, BIS recognizes three categories of violations under the antiboycott provisions of the EAR. (*See* § 760.2, § 760.4 and § 760.5 of the EAR for examples of each type of violation other than recordkeeping). These categories reflect the relative seriousness of a violation, with Category A violations typically warranting the most stringent penalties, including up to the maximum monetary penalty, a denial order and/or an exclusion order. Through providing these categories in this penalty guidelines notice, BIS hopes to give parties a general sense of how it views the seriousness of various violations. This guidance, however, does not confer any right or impose any obligation as to what penalties BIS may impose based on its review of the specific facts of a case.

(A) The Category A violations and the sections of the EAR that set forth their elements are:

(*1*) Discriminating against U.S. persons on the basis of race, religion, sex, or national origin - § 760.2(b);

(*2*) Refusing to do business or agreeing to refuse to do business - § 760.2(a);

(*3*) Furnishing information about race, religion, sex, or national origin of U.S. persons including, but not limited to, providing information in connection with a boycott questionnaire about the religion of employees - § 760.2(c);

(*4*) Evading the provisions of part 760 - § 760.4;

(*5*) Furnishing information about business relationships with boycotted countries or blacklisted persons - § 760.2(d); and

(*6*) Implementing letters of credit - § 760.2(f).

(B) The Category B violations and the sections of the EAR that set forth their elements are:

(*1*) Furnishing information about associations with charitable or fraternal organizations which support a boycotted country - § 760.2(e); and

(*2*) Making recordkeeping violations - part 762.

(C) The Category C violation and the section of the EAR that sets forth its elements is: Failing to report timely receipt of boycott requests - § 760.5.

(iii) *Violations arising out of related transactions.* Frequently, a single transaction can give rise to multiple violations. Depending on the facts and circumstances, BIS may choose to impose a smaller or greater penalty per violation. In exercising its discretion, BIS typically looks to factors such as whether the violations resulted from conscious disregard of the requirements of the antiboycott provisions; whether they stemmed from the same underlying error or omission; and whether they resulted in distinguishable or separate harm. The three scenarios set forth below are illustrative of how BIS might view transactions that lead to multiple violations.

(A) *First scenario*. An exporter enters into a sales agreement with a company in a boycotting country. In the course of the negotiations, the company sends the exporter a

request for a signed statement certifying that the goods to be supplied do not originate in a boycotted country. The exporter provides the signed certification. Subsequently, the exporter fails to report the receipt of the request. The exporter has committed two violations of the antiboycott provisions, first, a violation of § 760.2(d) for furnishing information concerning the past or present business relationships with or in a boycotted country, and second, a violation of § 760.5 for failure to report the receipt of a request to engage in a restrictive trade practice or boycott. Although the supplier has committed two violations, BIS may impose a smaller mitigated penalty on a per violation basis than if the violations had stemmed from two separate transactions.

(B) *Second scenario.* An exporter receives a boycott request to provide a statement that the goods at issue in a sales transaction do not contain raw materials from a boycotted country and to include the signed statement along with the invoice. The goods are shipped in ten separate shipments. Each shipment includes a copy of the invoice and a copy of the signed boycott-related statement. Each signed statement is a certification that has been furnished in violation of § 760.2(d)'s bar on the furnishing of prohibited business information. Technically, the exporter has committed ten separate violations of § 760.2(d) and one violation of § 760.5 for failure to report receipt of the boycott request. Given that the violations arose from a single boycott request, however, BIS may treat the violations as related and impose a smaller penalty than it would if the furnishing had stemmed from ten separate requests.

(C) *Third scenario.* An exporter has an ongoing relationship with a company in a boycotting country. The company places three separate orders for goods on different dates with the exporter. In connection with each order, the company requests the exporter to provide a signed statement certifying that the goods to be supplied do not originate in a boycotted country. The exporter provides a signed certification with each order of goods that it ships to the company. BIS has the discretion to penalize the furnishing of each of these three items of information as a separate violation of § 760.2(d) of the EAR for furnishing information concerning past or present business relationships with or in a boycotted country.

(iv) *Multiple violations from unrelated transactions.* 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 in cases involving isolated incidents. For example, the repeated furnishing of prohibited boycott-related information about business relationships with or in boycotted countries during a long period of time could warrant a denial order, even if a single instance of furnishing such information might warrant only 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.

(v) *Timing of settlement.* Under § 766.18 of this part, 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 of this part. However, early settlement-for example, before a charging letter has been filed-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 of this part are fewer, insofar as BIS has already expended significant resources on discovery, motions practice, and trial preparation. Given the importance of allocating BIS resources to maximize enforcement of the

EAR, BIS has an interest in encouraging early settlement and will take this interest into account in determining settlement terms.

(vi) *Related criminal or civil violations.* Where an administrative enforcement matter under the antiboycott provisions involves conduct giving rise to related criminal charges, BIS may take into account the related violations and their resolution in determining what administrative sanctions are appropriate under part 766 of the EAR. 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 antiboycott provisions 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 to be otherwise 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 involving other agencies, and may therefore be of limited utility as precedent for future cases, particularly those not involving a global settlement.

(vii) *Familiarity with the Antiboycott Provisions.* Given the scope and detailed nature of the antiboycott provisions, BIS will consider whether a party is an experienced participant in the international business arena who may possess (or ought to possess) familiarity with the antiboycott laws. In this respect, the size of the party's business, the presence or absence of a legal division or corporate compliance program, and the extent of prior involvement in business with or in boycotted or boycotting countries, may be significant.

(2) ***Specific mitigating and aggravating factors.*** In addition to the general factors described in paragraph (d)(1) of this supplement, BIS also generally looks to the presence or absence of the specific mitigating and aggravating factors in this paragraph in determining what sanctions should apply in a given settlement. These factors describe circumstances that, in BIS's experience, are commonly relevant to penalty determinations in settled cases. However, this listing of factors is not exhaustive and BIS may consider other factors that may further indicate the blameworthiness of a party's conduct, the actual or potential harm associated with a violation, the likelihood of future violations, and/or other considerations relevant to determining what sanctions are appropriate. The assignment of mitigating or aggravating factors will depend upon the attendant circumstances of the party's conduct. 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 a party whose overall compliance efforts are of high quality should be given less weight than previous violation(s) not involving such mitigating factors. Some of the mitigating factors listed in this paragraph 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.

(i) *Specific mitigating factors.*

(A) *Voluntary self-disclosure.* (GREAT WEIGHT) The party has made a voluntary self-disclosure of the violation, satisfying the requirements of § 764.8 of the EAR.

(B) *Effective compliance program.* (GREAT WEIGHT)

(*1*) *General policy or program pertaining to Antiboycott Provisions.* BIS will consider whether a party's compliance efforts uncovered a problem, thereby preventing further violations, and whether the party has taken steps to address compliance concerns raised by the violation, including steps to prevent recurrence of the violation, that are reasonably calculated to be effective. The focus is on the party's demonstrated compliance with the antiboycott provisions. Whether a party has an effective export compliance program covering other provisions of the EAR is not relevant as a mitigating factor. In the case of a party that has done previous business with or in boycotted countries or boycotting countries, BIS will examine whether the party has an effective antiboycott compliance program and whether its overall antiboycott compliance efforts have been of high quality. BIS may deem it appropriate to review the party's internal business documents relating to antiboycott compliance (e.g., corporate compliance manuals, employee training materials).

(*2*) *Compliance with reporting and recordkeeping requirements*. In the case of a party that has received reportable boycott requests in the past, BIS may examine whether the party complied with the reporting and recordkeeping requirements of the antiboycott provisions.

(C) *Limited business with or in boycotted or boycotting countries.* The party has had little to no previous experience in conducting business with or in boycotted or boycotting countries. Prior to the current enforcement proceeding, the party had not engaged in business with or in such countries, or had only transacted such business on isolated occasions. BIS may examine the volume of business that the party has conducted with or in boycotted or boycotting countries as demonstrated by the size and dollar amount of transactions or the percentage of a party's overall business that such business constitutes.

(D) *History of compliance with the Antiboycott Provisions of the EAR.*

(*1*) BIS will consider it to be a mitigating factor if:

(*i*) The party has never been convicted of a criminal violation of the antiboycott provisions;

(*ii*) In the past 5 years, the party has not entered into a settlement or been found liable in a boycott-related administrative enforcement case with BIS or another U.S. government agency;

(*iii*) In the past 3 years, the party has not received a warning letter from BIS relating to the antiboycott provisions; or

(*iv*) In the past 5 years, the party has not otherwise violated the antiboycott provisions.

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

(E) *Exceptional cooperation with the investigation.* The party has provided exceptional cooperation to OAC during the course of the investigation.

(F) *Clarity of request to furnish prohibited information or take prohibited action.* The party

responded to a request to furnish information or take action that was ambiguously worded or vague.

(G) *Violations arising out of a party's "passive" refusal to do business in connection with an agreement.* The party has acquiesced in or abided by terms or conditions that constitute a prohibited refusal to do business (e.g., responded to a tender document that contains prohibited language by sending a bid). *See* "active" agreements to refuse to do business in paragraph (d)(2)(ii)(I) of this supplement.

(H) *Isolated occurrence of violation.* The violation was an isolated occurrence. (Compare to long duration or high frequency of violations as an aggravating factor in paragraph (d)(2)(ii)(F) of this supplement.)

(ii) *Specific Aggravating Factors.*

(A) *Concealment or obstruction.* The party made a deliberate effort to hide or conceal the violation. (GREAT WEIGHT)

(B) *Serious disregard for compliance responsibilities*. (GREAT WEIGHT] There is evidence that the party's conduct demonstrated a serious disregard for responsibilities associated with compliance with the antiboycott provisions (e.g.: knowing violation of party's own compliance policy or evidence that a party chose to treat potential penalties as a cost of doing business rather than develop a compliance policy).

(C) *History of compliance with the Antiboycott Provisions*.

(*1*) BIS will consider it to be an aggravating factor if:

(*i*) The party has been convicted of a criminal violation of the antiboycott provisions;

(*ii*) In the past 5 years, the party has entered into a settlement or been found liable in a boycott-related administrative enforcement case with BIS or another U.S. government agency;

(*iii*) In the past 3 years, the party has received a warning letter from BIS relating to the antiboycott provisions; or

(*iv*) In the past 5 years, the party has otherwise violated the antiboycott provisions.

(*2*) Where necessary to ensure effective enforcement, the prior involvement in violations of the antiboycott provisions 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.

(*3*) When an acquiring firm takes reasonable steps to uncover, correct, and disclose to BIS conduct that gave rise to violations that the acquired firm committed before being acquired, BIS typically will not take such violations into account in applying this factor in settling other violations by the acquiring firm.

(D) *Familiarity with the type of transaction at issue in the violation.* For example, in the case of a violation involving a letter of credit or related financial document, the party routinely pays, negotiates, confirms, or otherwise implements letters of credit or related financial documents in the course of its standard business practices.

(E) *Prior history of business with or in boycotted countries or boycotting countries.* The party has a prior history of conducting business with or in boycotted and boycotting countries. BIS may examine the volume of business that the party has conducted with or in boycotted and boycotting countries as reflected by the size and dollar amount of transactions or the percentage of a party's overall business that such business constitutes.

(F) *Long duration or high frequency of violations.* Violations that occur at frequent intervals or repeated violations occurring over an extended period of time may be treated more seriously than a single violation or related violations that are committed within a brief period of time, particularly if the violations are committed by a party with a history of business with or in boycotted and boycotting countries. (Compare to isolated occurrence of violation in paragraph (d)(2)(i)(H) of this supplement.)

(G) *Clarity of request to furnish prohibited information or take prohibited action.* The request to furnish information or take other prohibited action (e.g., enter into agreement to refuse to do business with a boycotted country or entity blacklisted by a boycotting country) is facially clear as to its intended purpose.

(H) *Violation relating to specific information concerning an individual entity or individual.* The party has furnished prohibited information about business relationships with specific companies or individuals.

(I) *Violations relating to "active" conduct concerning an agreement to refuse to do business.* The party has taken action that involves altering, editing, or enhancing prohibited terms or language in an agreement to refuse to do business, including a letter of credit, or drafting a clause or provision including prohibited terms or language in the course of negotiating an agreement to refuse to do business, including a letter of credit. *See* "passive" agreements to refuse to do business in paragraph (d)(2)(i)(G) of this supplement.

(e) Determination of Scope of Denial or Exclusion Order.

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 seriousness involved; 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 efforts to comply with the antiboycott provisions); and whether a civil monetary penalty can be expected to have a sufficient deterrent effect.

(f) How BIS Makes Suspension and Deferral Decisions.

(1) ***Civil Penalties.*** In appropriate cases, payment of a civil monetary penalty may be deferred or suspended. *See* § 764.3(a)(1)(iii) of the EAR. In determining whether suspension or deferral is appropriate, BIS may consider, for example, whether the party has demonstrated a limited ability to pay a penalty that would be appropriate for such violations, so that suspended or deferred payment can be expected to have sufficient deterrent value, and whether, in light of all 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.

(2) ***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 party, its employees, and other persons, as well as on the national interest in maintaining or promoting 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 violations of the antiboycott provisions are unlikely and if there are adequate measures (usually a substantial civil monetary penalty) to achieve the necessary deterrent effect.