Voluntary Self-Disclosure at Commerce's Bureau of Industry and Security (BIS)

It has long been BIS's policy to encourage companies to disclose potential violations of the export regulations to the Office of Export Enforcement (OEE). Self-disclosure allows BIS to conserve investigative and prosecutorial resources and encourages prevention and deterrence that might not otherwise occur. Accordingly, as indicated in the Export Administration Regulations (EAR), OEE gives great weight to voluntary self-disclosures (VSDs) when determining what administrative sanction, if any, will be pursued for violations.[1]

VSD Procedures

Credit will only be given to VSDs that meet the minimum legal requirements set out in the EAR, such as:

1. The individual making the disclosure must do so with the full knowledge and authorization of the firm's senior management.

2. It must be received by OEE for review prior to the time that OEE, or any other agency of the United States Government, has learned the same or substantially similar information from another source and has commenced an investigation or inquiry in connection with that information.

3. Self-disclosures should be both timely and thorough. However, a firm should not wait until it completes a thorough review of its past export practices before alerting OEE to possible violations, but should make an initial notification to OEE as soon as possible after violations are discovered. Any delay increases the risk of outside discovery and disclosure, thereby precluding the possibility of VSD credit. For VSDs, time is not on your side.

4. After initial notification, BIS recommends that full disclosures be based on a thorough review going back at least five years. Being thorough is important since the EAR make it clear that undisclosed violations will not be given VSD credit.

5. The VSD should include a narrative account with supporting documentation that sufficiently describes the suspected violations, and the VSD must be accompanied by a certification that all of the representations made in connection with the VSD are true and correct to the best of the submitter's knowledge and belief. The more complete, the shorter will be the time necessary to investigate and confirm.

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[1] See EAR, 15 C.F.R. § 764.5 (2005) ("BIS strongly encourages disclosure to OEE if you believe that you may have violated the EAR, or any order, license or authorization issued thereunder. Voluntary self-disclosure is a mitigating factor in determining what administrative sanctions, if any, will be sought by OEE").

6. The EAR were recently amended to require that the information relating to a voluntary self-disclosure be provided only to the Director of the Office of Export Enforcement, rather than to the various field offices.[2] This allows for the centralized tracking of VSD submissions for trend analysis, coordination, and timeliness. Industry has recognized that the processing time for VSD cases has diminished and it is our intent to continue that trend.

7. After receiving a VSD, OEE will conduct a preliminary review and subsequently determine whether it should:

- inform the disclosing party that no action will be taken,
- issue a warning letter or a charging letter, or
- refer the case to the Department of Justice for criminal prosecution.

8. In deciding what action to take in a particular case, OEE will take the VSD into account, together with other mitigating and aggravating factors. Some of the other factors that OEE will consider include:

- the relation of the violation to the purpose of the regulation or law that was violated,
- whether the transaction would have been authorized by BIS if an application for authorization had been submitted,
- the quantity and value of the export,
- the level of intent and knowledge underlying the violation,
- the degree of cooperation provided to the investigation, and
- the existence or creation of an effective export compliance program.

9. If OEE determines that a violation disclosed in a VSD warrants administrative sanction, the extent of the sanction that will be pursued will be determined by the totality of the circumstances surrounding the violation. Every case is different. Facts that will be considered would include:

- the types of items shipped,
- the destination for the exports,

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[2] As of April 29, 2005, the OEE field offices were removed from the list of locations at which to make voluntary disclosures. All such disclosures will now have to be made to OEE headquarters. The rule also revised the title of the headquarters official as well as the headquarters address, telephone number, and facsimile number to use when making such disclosures. Disclosures should be made to Director, Office of Export Enforcement, 1401 Constitution Ave., N.W., Room H4514, Washington, D.C. 20230, Tel: (202) 482-5036 and fax: (202) 482-5889. See 15 C.F.R. § 764.5(c)(7).

- the level of exporter knowledge and intent,
- the quality of export compliance programs,
- the degree of cooperation after disclosure,
- the number of shipments, or
- the potential impact of a fine.

These facts are all important and will be considered, together with other relevant facts. However, the EAR states that VSDs which meet all the applicable regulatory requirements will be afforded "great weight" relative to other mitigating factors in the determination of an appropriate penalty.

10. The Administrative Case Review Board (ACRB) is responsible for deciding the appropriate level of sanction in cases where OEE has decided to pursue an administrative case. The ACRB is an internal BIS committee that advises the Assistant Secretary for Export Enforcement at important stages of administrative cases. A primary goal of the ACRB is to ensure that all positions taken by OEE in administrative enforcement cases are consistent, fair, and in line with overall BIS program and enforcement goals.[3]

11. In order to ensure consistency of resolution, the ACRB determines appropriate sanction levels based on careful analysis of prior cases. This analysis is admittedly difficult for the private practitioner to duplicate due to the fact that statutory confidentiality protections limit the information that BIS is able to make public about prior settlements. For example, in some rare instances, a "primary culprit" may settle a case for a lesser penalty than a mere facilitator, based on mitigating factors.

12. While it is logistically impossible for the ACRB to meet with all respondents, respondents may request in-person meetings with ACRB members. In all cases, the ACRB members review and consider the significant written submissions filed by respondents and may request further information or clarification through the Office of Chief Counsel for Industry and Security (OCC).[4]

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[3] For further information about the ACRB, see BIS's Website at http://www.bis.doc.gov/Enforcement/CaseReviewBoardFAQs.html#1.

[4] The OCC attorney assigned to the case is the proper conduit through which to communicate any mitigating factors, settlement proposals, or other relevant information that should be considered. These factors will be reflected in the attorney's legal advice to OEE and in discussions with the ACRB. In certain circumstances, ACRB members may consider significant written communications submitted by respondents and their attorneys to the OCC attorney and may choose to participate in meetings with respondents or their counsel, particularly where the BIS official and the OCC attorney responsible for the case feel that such involvement will be helpful in resolving a difficult issue.

VSD Practice

Beyond the regulatory requirements for VSDs in the EAR, BIS applies several internal policies in practice to ensure that the goals of the VSD process are met. This section describes some of those policies.

1. BIS affords "great weight" to voluntary disclosures in the settlement phase of administrative cases by beginning the penalty calculation at 50% of the maximum fine. In cases where no VSD has been submitted, the ACRB will not generally approve of any penalty below 50% of the maximum.

2. BIS makes efforts to process VSD cases more quickly than its other cases.

3. BIS will recognize a VSD in press releases and settlement documents that are publicly released.[5] This policy has been referenced in the 2005 edition of BIS's publication Don't Let This Happen to You, which is available on the BIS website.[6]

Despite its advantages, the VSD is not a free pass. There are other important policy considerations that must be taken into account when deciding how to treat VSDs. Balanced against the need to provide an incentive to disclose unlawful activity is a recognition that there must also be a strong incentive to follow the law. An automatic pass or warning letter for those who submit VSDs would send the wrong message to inadvertent violators who fail to maintain an adequate compliance program or willful violators who might choose to illegally export, counting on their after-the-fact VSD filing as exculpation: a "get out of jail free" card, if you will.[7] The VSD process cannot be used for that purpose and accordingly, where appropriate, a sanction, administrative or criminal, may be imposed.

Data Analysis

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[5] Press releases can be reviewed at: http://www.bxa.doc.gov/news/index.htm. Settlement documents can be reviewed at BIS's Electronic FOIA Reading Room at: http://efoia.bis.doc.gov.

[6] See http://www.bis.doc.gov.

[7] Such a willful violation would most likely result in criminal charges for which the penalty per violation could be $250,000 or 10 years in jail or both and, for corporations, up to $500,000. 50 U.S.C. § 1705 (2005); 18 U.S.C. § 3571. When the EAA is in effect, the penalties per violation can be calculated as five times the value of the export or, for corporations, up to $1,000,000. 50 U.S.C. app. § 2410(b).

In recent years, administrative and criminal penalties imposed for illegal exports of dual-use items have increased both in the aggregate and per violation, largely because more cases have been brought, but also because of the recognized need for deterrence where our national security is threatened by illegal exports.[8] More cases are being brought, all provable violations are being charged, at least initially, and higher penalties have been sought in settlement negotiations. Accordingly, civil penalties may be quite high when multiple shipments are involved, even when mitigating factors are fully taken into account. Even if maximum credit is given for self-disclosure and other mitigating factors are taken into account, the resulting administrative sanction may appear to be quite high. The raw number may be surprising unless one understands the sanctions that the company could have faced without self-disclosure.

All of the above being said and despite the increase in administrative penalties overall, many VSDs have resulted in a warning letter or fines much less than 50% of the maximum. While large fines do occur, they are still less than what is possible and what would have happened if no VSD were received.

In FY 2004 and in FY 2005, of the 207 cases closed criminally and civilly, only 27 were the result of VSDs – all of which were civil resolutions only. No criminal resolutions were the result of voluntary self-disclosures during this time period. In all but 3 of these cases, VSDs resulted in fines that were 50% or less of the maximum fine possible.

In one case, the maximum fine could have been $2.45 million. The case settled for $400,000 because the company was given full credit for its VSD, among other mitigating factors. While still a high fine, it reflects the significant value BIS placed on the company's voluntary self-disclosure.

In the three cases involving self-disclosure in which fines were not 50% or less of the maximum fine, there were significant aggravating factors. One case involved serious national security-controlled items to China, another involved a serious pattern of noncompliance and past warning letters, and the third involved only a partial VSD.

In FY 2004, there were 75 VSDs received and of the 47 processed to date, only 5 have resulted in charging letters. In FY 2005, 145 VSDs have been submitted and only 1 has resulted in a charging letter.

***A word about warning letters*:** OEE issues warning letters to document and provide notice that an export violation has occurred, even though OEE has decided not to bring an enforcement

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[8] In fiscal year 2004, Export Enforcement cases resulted in the criminal conviction of 33 individuals and businesses, resulting in fines totaling almost $3 million. During the same time period, there were 69 administrative cases, resulting in civil penalties totaling over $6 million. In fiscal year 2005, there were 31 criminal convictions of individuals and businesses, with criminal fines over $ 7.7 million. Additionally, there were 74 administrative settlements and civil penalties of over $ 6.8 million.

action. Most often, this occurs where the violation was purely technical, occurred despite good faith efforts at compliance, or when the statute of limitations has lapsed. OEE averages two to three warning letters per week and has sent over 118 warning letters in 2005.

Advice to Exporters

Beyond the substantial benefits to be gained from self-disclosing and the very real probability of higher penalties, it may be helpful for a company considering self-disclosure to consider the risks of not disclosing a known violation.

1. *The risk of discovery*: Our best cases have resulted from inside information from a disgruntled, conscientious, or patriotic employee. Others have come from trade competitors who lost a contract. Moreover, investigative techniques continue to grow in effectiveness due to increasing inter-agency and international cooperation.

2. *The costs of a full BIS investigation:* A non-cooperative company should expect search warrants entailing seizure of files and computer hard-drives, subpoenas for documents which will require expenses associated with searching and copying company files, subpoenas to employees and officers who may need their own lawyers whose expenses may or may not be covered by the company and subpoenas to vendors and customers which may jeopardize existing business relationships. Legal practitioners have told us that the cost of defending one company that violates the export law is five to ten times more than the cost of establishing strong compliance programs in several companies to avoid violations. Finally, there are the costs associated with damage to a company's reputation.

3. *Temporary Denial Orders (TDO):* TDO's preclude export licenses during the pendency of an investigation, but also prevent others from doing export business with the denied party, effectively cutting the denied party off from the export business. These denial orders may become permanent upon resolution of the case. Government contracts, including those with foreign governments, may also be at risk.

Conclusion

BIS has listened to input from all sources and has adapted its policies and procedures in response. The creation of the ACRB and its recent modification, making all four members permanent, as well as publication of BIS's Penalty Guidance, and public acknowledgment of voluntary self-disclosures, demonstrate BIS's commitment and effort to making the administrative case review process accessible, transparent, and fair.

We plan to continue our efforts to encourage voluntary self-disclosure by publishing the true facts regarding VSDs and correcting misconceptions. Self-disclosure is the strategically appropriate course of action to avoid a far worse outcome. More importantly, it is the opportunity for your company or client to do its part to ensure and strengthen this country's national security.

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