

To Report Or Not To Report Others' Export Control Violations

By **Megan Lew** (October 15, 2024)

In May 2022, shortly after Matthew S. Axelrod was appointed as the assistant secretary for export enforcement at the U.S. Department of Commerce's Bureau of Industry and Security, he announced that the BIS would undertake changes to its enforcement program that would "increase prevention, increase transparency, and incentivize compliance and deterrence."^[1]



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In just over two years, Axelrod's suite of reforms to the BIS' enforcement tools has been formalized through amendments to the Export Administration Regulations, or EAR, regarding voluntary self-disclosures and the BIS' guidance on charging and penalty determinations in the settlement of administrative enforcement cases.^[2]

One of the changes formally adopted on Sept. 16 allows the BIS to grant cooperation credit to a company that had previously reported violations of the EAR committed by others and that resulted in an enforcement action.^[3] Such cooperation credit would be available if the reporting company faces a potential enforcement action from the BIS in the future.

The BIS hopes that this change will "provide an incentive for companies to disclose the wrongful conduct of others."^[4]

While the prospect of future cooperation credit may appear, at first blush, to be valuable to a company with information about others' misconduct, companies should carefully weigh the pros and cons of making such reports before doing so. This article describes considerations to take into account when deciding whether to report EAR violations committed by others.

Changes to the Penalty Guidelines

The BIS penalty guidelines are found in Title 15 of the Code of Federal Regulations, Part 766, Supplement No. 1. The penalty guidelines describe how the BIS' Office of Export Enforcement, or OEE, "responds to apparent violations of the [EAR] and, specifically, how OEE makes penalty determinations in the settlement of civil administrative enforcement cases."^[5]

The OEE considers several factors, as described in the penalty guidelines, to determine the appropriate monetary penalty, if warranted in a particular case. The penalty guidelines list several aggravating and mitigating factors for the OEE to consider.

One of the mitigating factors is "[e]xceptional [c]ooperation with OEE."^[6] Several of the considerations under exceptional cooperation focus on the conduct of the violating person, the respondent, in the instant investigation. For example, this factor considers whether the respondent provided the OEE "with all relevant information regarding the apparent violation at issue in a timely, comprehensive and responsive manner," among other considerations.^[7]

Exceptional cooperation also considers the respondent's conduct in connection with prior OEE investigations:

- "Did the Respondent provide substantial assistance in another OEE investigation of another person who may have violated the EAR?"[8]
- "Has the Respondent previously made substantial voluntary efforts to provide information (such as providing tips that led to enforcement actions against other parties) to Federal law enforcement authorities in support of the enforcement of U.S. export control regulations?"[9]

The final rule added the following consideration: "Has the Respondent previously disclosed information regarding the conduct of others that led to enforcement action by OEE?"[10]

Notably, even before the final rule became effective, the BIS always welcomed reports of violations of the EAR — including those that had occurred or may occur in the future — from any person.[11]

Pros of Reporting Misconduct

A company may decide to submit a report of others' misconduct for a variety of reasons.

- A company may want to even the playing field if it learns that a competitor has been unlawfully exporting products.
- As a good corporate citizen, a company may want to stop illegal exports that conflict with U.S. national security priorities, as manifested through the EAR's licensing requirements.
- It may be beneficial for companies to have a rainy day fund that includes future cooperation credit with BIS, especially for those that engage in significant exports of items subject to the EAR. Companies that rely on BIS licenses may be further incentivized to submit a report, given that it is not uncommon for employees to commit a technical or inadvertent violation of the EAR.

Cons of Reporting Misconduct

The pros described above must be weighed against the cons that could arise with submitting a report about EAR violations committed by others.

- Preparing the report may divert resources from the business. A company may decide to hire outside counsel to prepare the report and employees may have to assist with the preparation of that report.
- Under the penalty guidelines, cooperation credit will be given for submitting reports as well as providing substantial assistance in an investigation of another person. While "substantial assistance" is not defined in the guidelines, the BIS may expect the reporting company to answer follow-up questions or allow employees with firsthand knowledge of the violations to be interviewed. This could further distract company management. In addition, these interactions with BIS could lead the agency to ask questions about the reporting company's own business and export practices.

- Under the penalty guidelines, reports of misconduct will be granted cooperation credit if they lead to an enforcement action. As a result, it is possible that no cooperation credit would be granted if BIS was already aware of the misconduct through its own investigation or other means, such as a voluntary self-disclosure. Even if the reporting company lacked knowledge of the self-disclosure or an ongoing investigation, the BIS potentially could withhold cooperation credit.
- There is a risk that the reporting company may never realize the benefit of future cooperation credit. If the reporting company does not engage in exports and has no future plans to do so, the promise of future cooperation credit from BIS would have no value. In addition, future administrations may prioritize other enforcement incentives and amend the penalty guidelines to disallow cooperation credit for companies that submit reports about others' misconduct.

Takeaways

Earlier this year, Axelrod stated that the BIS received "more disclosures about misconduct by others than ever before"[12] after an April 2023 policy memorandum highlighted the available cooperation credit for companies that provide information about others' EAR violations.[13]

Nonetheless, whether a company decides to submit a report about others' misconduct under the EAR is an individual decision that must be based on the circumstances of the company, including the resources available for preparing and submitting a report and the value that the company attaches to any potential future cooperation credit.

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[1] Matthew S. Axelrod, Assistant Secretary for Export Enforcement, Remarks to the Society for International Affairs 2022 Spring Virtual Advanced Conference on Export Controls & International Politics (May 16, 2022), available at <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/2992-2022-05-16-remarks-as-axelrod-to-sia/file>.

[2] 89 Fed. Reg. 75477 (Sept. 16, 2024) (codified at 15 C.F.R. pts. 764, 766).

[3] *Id.* at 75481.

[4] *Id.*

[5] 15 C.F.R. §766 (Supp. 1) (2024).

[6] *Id.* at §III.H.

[7] *Id.*

[8] Id.

[9] Id.

[10] 89 Fed. Reg. at 75488; see also id. at 75481.

[11] 15 C.F.R. §764.4(a) (2024).

[12] Matthew S. Axelrod, Assistant Secretary for Export Enforcement, Speech at NYU School of Law's Program on Corporate Compliance and Enforcement (Jan. 16, 2024), available at <https://www.bis.gov/speeches/remarks-prepared-delivery-assistant-secretary-export-enforcement-matthew-s-axelrod-nyu>.

[13] Memorandum from Matthew S. Axelrod re: Clarifying Our Policy Regarding Voluntary Self-Disclosures and Disclosures Concerning Others (Apr. 18, 2023), available at <https://www.bis.doc.gov/index.php/documents/enforcement/3262-vsd-policy-memo-04-18-2023/file>.