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Locke Lord QuickStudy: BIS Issues Key Updates to the ?Voluntary Self-Disclosure Process ?and Penalty Guidelines

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On September 12, 2024, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") issued a final rule that requires reporting entities to make significant changes to Voluntary Self-Disclosures ("VSD"); the BIS also updated its penalty guidelines. These updates align with BIS's broader agenda to modernize enforcement mechanisms and increase transparency for businesses navigating export control regulations. BIS concurrently appointed its first-ever Chief of Corporate Enforcement, who will serve as the primary interface between BIS's special agents, the Department of Commerce's Office of Chief Counsel for BIS, and the Department of Justice with the goal to coordinate significant corporate investigations, further reflecting BIS's commitment to hold export violators accountable.

Revised Voluntary Self-Disclosure Process

The VSD process has long served as a mechanism for businesses to self-report potential violations of the Export Administration Regulations ("EAR"). BIS incentivizes voluntary disclosure with the potential for reduced penalties and mitigated enforcement actions. However, the new updates to § 764.5 of the EAR introduce refinements aimed at streamlining the disclosure process and encouraging timelier self-reporting.

Key changes include:

- Digital Filing Requirements: All VSD submissions must now be filed through the BIS's secure online portal. This transition to a fully digital system enhances data security and expedites the review process.
- Timeliness Standard: Under the updated guidelines, BIS will place greater emphasis on the timing of VSD submissions. Companies are expected to disclose potential violations "as soon as possible" after discovering them. Delays in reporting may result in a diminished penalty mitigation, as BIS has elevated the significance of timeliness.
- Initial Notification and Full Disclosure: The initial notification of a VSD must now be followed by a full disclosure of relevant facts within 60 days. While this aligns with prior practices, the new rule emphasizes that extensions will only be granted under extraordinary circumstances, underscoring the agency's goal of efficiency.

Enhanced Penalty Guidelines

The penalty guidelines accompanying VSDs have also been modified, reflecting a shift in how BIS will assess and impose penalties for violations of the EAR. The updated guidelines under Supplement No. 1 to Part 766 of the EAR aim to introduce more structured penalty assessments, providing greater predictability while imposing more stringent consequences for willful or egregious violations.

Key updates include:

- Penalty Mitigation for VSDs: The level of penalty mitigation for voluntary disclosures will now be more explicitly linked to the completeness, timeliness, and cooperation of the disclosing party. A timely, full, and cooperative disclosure may result in the removal of most or all civil penalties, while partial or delayed disclosures could see a reduced mitigation factor.
- Distinction Between “Willful” and “Non-Willful” Violations: The new penalty guidelines provide clearer distinctions between penalties for willful violations, which can result in more severe consequences, versus non-willful violations where mitigation remains available. Willful violations, especially those that involve concealment, intentional misrepresentation, or repeated offenses, will suffer heightened penalties.
- Aggravating and Mitigating Factors: BIS has revised its approach to assessing factors that may aggravate or mitigate penalties. Aggravating factors now include intentional misconduct, harm to U.S. national security, and attempts to conceal violations. Mitigating factors remain similar to prior guidelines, including a history of compliance, prompt corrective actions, and full cooperation with BIS investigations.

Implications for Compliance Programs

These updates trigger the need to update international trade compliance programs, particularly those dealing with export controls. Companies should:

- Strengthen Internal Monitoring Systems: With BIS focusing on timely disclosures, internal systems should enable exporters to swiftly identify and report potential violations. Early detection, followed by prompt disclosure, is essential to maximizing penalty mitigation.
- Enhance Training and Awareness: Export management and compliance teams should be well-versed in the updated VSD process and penalty guidelines. This includes training to identify potential EAR violations and understanding how to digitally file disclosures digitally.
- Review Past Disclosures: Companies that have made prior disclosures should reassess their internal procedures to ensure continued alignment with the new standards. In particular, evaluate whether disclosures could have been timelier under the new guidelines may help improve future reporting practices.

What Lies Ahead

These updates represent BIS’s efforts to modernize and step-up its enforcement to encourage greater industry-wide compliance. Companies should assess their compliance programs to avoid being the target of BIS enforcement. The clearer guidelines offer both opportunities for penalty mitigation through voluntary disclosure and the potential for more severe penalties in cases of non-compliance.

We see significant areas for improvement in training – many companies have employees who are unaware of BIS licensing requirements, and even more cases where goods and technology are mis-classified resulting in unlicensed shipments of restricted materials.

For companies navigating the regulatory landscape, staying informed about these changes and integrating them into internal policies will be critical. With enforcement becoming more streamlined and transparent, the margin for error is shrinking, but so too is the uncertainty surrounding penalty assessments.

Conclusion

This paper is intended as a guide only and is not a substitute for specific legal or ?tax advice. ????Please ???reach out to the authors for any specific questions. We expect ?to continue to monitor the ????topics ???addressed in this paper and provide future ?client updates when useful.?

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