

### 15 CFR Part 766

Administrative practice and procedure, Confidential business information, Exports, Foreign trade.

For the reasons discussed in the preamble, this proposed rule would amend Parts 764 and 766 of the EAR as follows:

1. The authority citation for 15 CFR part 764 is amended to read as follows:

**Authority:** 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR., 2001 Comp., p. 783; Notice of August 7, 2003 (68 FR 47833, August 11, 2003).

### PART 764—[AMENDED]

2. Section 764.5, paragraph (e) is revised to read as follows:

#### **§ 764.5 Voluntary self-disclosure.**

\* \* \* \* \*

(e) *Criteria.* Supplement No. 1 to part 766 describes how BIS typically exercises its discretion regarding whether to pursue an administrative enforcement case under part 766 and what administrative sanctions to seek in settling such a case.

3. The authority citation for 15 CFR part 766 continues to read as follows:

**Authority:** 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR., 2001 Comp., p. 783; Notice of August 7, 2003 (68 FR 47833, August 11, 2003).

### PART 766—[AMENDED]

4. Section 766.3, paragraph (a) is revised to read as follows:

#### **§ 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. Supplement No. 1 to this part describes how BIS typically exercises its discretion regarding the issuance of charging letters, other than in antiboycott matters under part 760. 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.

5. Section 766.18 is amended by adding paragraph (f) to read as follows:

#### **§ 766.18 Settlement.**

\* \* \* \* \*

(f) Supplement No. 1 to this part describes how BIS typically exercises its discretion regarding the terms under which it is willing to settle particular cases, other than antiboycott matters under Part 760.

6. Part 766 is amended by adding Supplement No. 1 to read as follows:

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 is 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 to first-time offenders for an apparent violation based on technicalities; where good faith efforts to comply with the law and cooperate with the investigation are present; where the investigation commenced as a result of a voluntary self-disclosure satisfying the requirements of § 764.5; and where no aggravating factors exist. 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 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. 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 section 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 section 764.3(a)(1), subject to adjustments under the Federal Civil Penalties