Export Compliance Daily

Shift in BIS Enforcement Policies Could Lead to More Voluntary Disclosures, Former Agent Says

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The Bureau of Industry and Security's upcoming shift in its administrative enforcement policies could signal a more aggressive posture toward cracking down on illegal exports and may change how companies voluntarily disclose violations, a former BIS agent said. But some lawyers say the policies could represent a minor shift, and it may be too early to tell how they will affect compliance decisions.

Doreen Edelman, a trade lawyer with Lowenstein Sandler, said she views the shift as part of BIS's broader effort to bolster enforcement surrounding illegal technology transfers, especially for exports to China and Russia. "I wouldn't characterize it as a change, but I think a recommitment," Edelman said in an interview. "They're adding more enforcers. They're beefing up their programs and their end-user and end-use checks around the world. They're giving everyone a shot of adrenaline."

BIS previewed the enforcement policy shift last week, about two months after the administration asked Congress for an additional $21 million toward export enforcement efforts (see 2203030047). Matthew Axelrod, BIS's top enforcement official, said the agency is considering limiting the use of no-admit/no-deny settlements, increasing penalty amounts for export violations and publicizing formal charging letters before cases are resolved (see 2205160062), which he said could be a better incentive for compliance and increase deterrence.

They could also lead to more voluntary self-disclosures, said Donald Pearce, a senior adviser with Torres Trade Advisory and former Office of Export Enforcement agent. He said in an interview that companies are likely to be "most upset" about charging letters being made immediately public and may more frequently choose to voluntarily disclose a potential violation, which usually leads to only a warning letter.

"The number of times where I had a voluntary self-disclosure that led to an administrative charge were few and far between," said Pearce, who served as OEE's acting unit chief for liaison and interdiction before retiring from the agency in 2020.

"But if we catch you with your hand in the cookie jar, now we're going to talk about it before we've even figured out if it was allowed to be there or not. And that would, I think, put significant pressure on companies to make hard and timely decisions about whether or not they want to voluntarily self-disclose."

Pearce said companies are wary of being associated with any type of BIS enforcement notice, even if penalties are never assessed. He pointed to BIS's addition of two subsidiaries of China's WuXi Biologics on the Unverified List in February (see

2202080017). Even though the UVL is the "Commerce Department equivalent of getting a parking ticket," Pearce said, WuXi's stock plummeted by 25% the following day.

"People saw 'BIS' and 'list' and immediately thought 'Entity List,'" Pearce said. "I think if you see the same thing happening with a U.S. publicly traded company being charged, they're not going to read what they're being charged for. They're not going to do any serious introspection about whether or not this is something that's going to be settled."

Edelman said there's a chance the increased enforcement posture convinces more companies to file a voluntary self-disclosure, which usually helps "at keeping the company out of the news." A more likely result, she said, is that compliance officers use Axelrod's comments to show their senior management that "this is not a joke, that the government takes this seriously, and here's yet another example of it."

Edelman also hopes Commerce doesn't "shoot itself in the foot" and dissuade voluntary disclosures by announcing that it will always publish charging letters immediately. But she doesn't think that's likely. "I think [Commerce is] always going to keep their discretion," Edelman said. "They're not getting rid of the pre-charging letter discussions, so there's still going to be flexibility."

Ryan Fayhee, a Hughes Hubbard trade lawyer, said it's too early to tell whether the potential policy changes will sway disclosure decisions.

"There will be a little bit of question and analysis around whether the risk of being publicly charged without having resolved the matter should have an impact and be factored in around whether to do a VSD in the first place," said Fayhee, who worked as DOJ's lead export control and sanctions prosecutor. "But I don't know that there's a huge impact."

Fayhee said he is more interested in monitoring how Axelrod -- whose previous work at DOJ didn't center specifically around export control matters -- weighs which factors are most important when resolving cases.

"Matt's going to have a lot of discretion in resolving voluntary disclosures," Fayhee said in an interview. "It's really, I think, beneficial to the agency to have somebody with a fresh set of eyes examining how OEE does business."

Pearce said Axelrod's comments and the subsequent shift in enforcement policies will likely be applauded by BIS agents, who may gain a few new effective negotiating tools to convince companies to disclose violations. "This is the typical, 'there's a new sheriff in town' move," Pearce said of Axelrod, who was confirmed by the Senate in December (see 2112200007 and 2110080045). "It is a bit more aggressive than you would normally see."