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U.S. Increases Civil Penalties for Export Controls and Economic Sanctions Violations

The U.S. government has announced significant increases to the maximum civil penalties for U.S. export controls and sanctions violations. The increases are required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the FCPA Act). Details of the penalty increases are described below and available in the Federal Register, Vol. 81, No. 109, 110, and 127. Additionally, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) has published [updated guidance on how it will settle export controls enforcement cases](#).

I. Maximum Civil Penalties Increased

The U.S. Department of State's Directorate of Defense Controls (DTC), BIS, and U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) are each implementing adjustments to the maximum civil monetary penalties that the agencies may assess for export controls- and sanctions-related violations. The increased maximums will apply to any civil penalty assessed after July 7, 2016, in the case of BIS, and after Aug. 1, 2016, for DTC and OFAC, even if the underlying violation took place before these dates. Importantly, the increases do not interfere with U.S. government agencies' authority to consider mitigating factors and assess penalties below the maximums.

A. Maximum Penalty Increases for International Traffic in Arms Regulations (ITAR) Defense Export Violations

Effective Aug. 1, 2016, DTC will adjust penalties for civil violations of the Arms Export Control Act (AECA), the statutory authority for ITAR. As detailed in the chart below, one set of penalty increases will apply to civil violations of Section 2778 of the AECA, which covers virtually all provisions of the ITAR. However, separate maximum penalty increases will apply to civil violations of AECA Section 2779a (covering ITAR Part 130, which mandates reporting of commission payments relating to sales of defense articles and services) and Section 2780 (prohibiting transactions with certain countries subject to U.S. arms embargoes under ITAR Section 126.1).

B. Maximum Penalty Increases for EAR Dual-Use Export Violations

BIS' maximum penalty increase for civil violations of the International Emergency Economic Powers Act (IEEPA), the current statutory authority for the Export Administration Regulations (EAR), was implemented July 7, 2016.

C. Maximum Penalty Increases for OFAC Economic Sanctions Violations

Effective Aug. 1, 2016, OFAC will increase penalty maximums for violations of the Trading With the Enemy Act (TWEA) and IEEPA, which together provide the authority for most of the U.S. sanctions regulations implemented by OFAC, as well as the Antiterrorism and Effective Death Penalty Act (AEDPA), the Foreign Narcotics Kingpin Designations Act (FNKDA), and the Clean Diamond Trade Act (CDTA).

The new maximum penalties apply as follows:

Agency		Violation	Previous Maximum Penalty	New Maximum Penalty	Effective Date
DTC	Defense Exports	22 U.S.C. 2778 (most ITAR violations)	\$500,000	\$1,094,010	Aug. 1, 2016
DTC		22 U.S.C. 2779a (ITAR commission reporting)	\$500,000	\$795,445	Aug. 1, 2016
DTC		22 U.S.C. 2780 (arms embargoes)	\$500,000	\$946,805	Aug. 1, 2016
BIS	Dual-Use Exports	IEEPA	Greater of \$250,000 or twice amount of underlying transaction	Greater of \$284,582 or twice amount of underlying transaction	July 7, 2016
OFAC	Economic Sanctions	TWEA	\$65,000	\$83,864	Aug. 1, 2016
OFAC		IEEPA	Greater of \$250,000 or twice amount of underlying transaction	Greater of \$284,582 or twice amount of underlying transaction	Aug. 1, 2016
OFAC		AEDPA	Greater of \$55,000 or twice amount fin. inst. must retain possession of	Greater of \$75,122 or twice amount fin. inst. must retain possession of	Aug. 1, 2016
OFAC		FNKDA	\$1,075,000	\$1,414,020	Aug. 1, 2016
OFAC		CDTA	\$10,000	\$12,856	Aug. 1, 2016

II. BIS Guidance on Settlement of Violations

Meanwhile, on June 22, 2016, BIS published updates to the factors that it will consider when deciding whether and how to settle allegations of violations of the EAR.

The purpose of the updated guidance is to make BIS' civil penalty determinations more predictable and transparent, as well as to align those determinations more closely with those of OFAC. The most significant update will establish base penalty amounts for egregious and nonegregious cases, which can be adjusted based on aggravating factors or reduced based on mitigating factors, mirroring OFAC's guidance. Importantly, BIS has specified that voluntarily self-disclosing will reduce the base penalty by 50 percent. The existing guidance simply states that Voluntary Self-Disclosures (VSDs) are

given “great weight” as a mitigating factor. Historically, BIS has informally observed mitigation of 50 percent for voluntary disclosure, but now that will be memorialized in the regulations.

According to the new guidance, base penalties for EAR violations will be set according to the following table:

Voluntary Self-Disclosure?	Egregious Case?	
	No	Yes
Yes	50 percent of transaction value (capped at \$125,000 per violation)	Up to 50 percent of the applicable statutory maximum (\$284,582 per violation)
No	Applicable schedule amount (capped at \$250,000)	Up to the applicable statutory maximum (\$284,582 per violation)

For comparison, the OFAC base penalties for economic sanctions are as follows:

Voluntary Self-Disclosure?	Egregious Case?	
	No	Yes
Yes	50 percent of transaction value (capped at \$125,000 per violation)	50 percent of the applicable statutory maximum (\$284,582 per violation)
No	Applicable schedule amount (capped at \$250,000)	Applicable statutory maximum (\$284,582 per violation)

In addition to setting base penalties, the new guidance also makes minor revisions to various provisions of current BIS guidance on aggravating and mitigating factors, no action letters, and calculation of transaction value, among others.

III. Effects of the New Penalties and Guidance

The significant penalty increases underscore the U.S. government’s priority of enforcing export and sanctions violations and highlights the importance of implementing effective trade compliance programs for U.S. companies.

Importantly, the enforcement agencies have discretion to assess penalties below the maximums (or to assess no penalties at all), depending upon mitigating factors including whether a company voluntarily discloses a violation and the overall strength of the company’s compliance program.

With that in mind, international businesses should implement robust trade compliance programs. Those with existing programs should consider conducting periodic risk assessments and enhancements to make sure their programs are sufficiently risk-based and effective at both preventing and detecting violations.

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