



**A New Risk Calculus: U.S.
Department of Commerce Raises
Stakes for Failing to Voluntarily
Self-Disclose Potential Export
Controls Violations**

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Key Takeaways

- On April 18, 2023, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") Assistant Secretary for Export Enforcement, Matthew Axelrod, published a [memorandum](#) marking a shift in policy regarding voluntary self-disclosures ("VSDs") under the BIS enforcement guidelines (the "Axelrod Memorandum").
- Currently, the submission of a VSD is a mitigating factor when determining appropriate penalties for U.S. export controls violations (leading to potential penalty reductions or suspensions) and the failure to submit a VSD is not treated as an aggravating factor.
- The Axelrod Memorandum intends to change the risk calculus and to further incentivize the submission of VSDs; deliberate non-disclosure of "significant" possible violations of U.S. export controls will now be considered an aggravating factor and lead to increased enforcement penalties.
- As provided in the Axelrod Memorandum, choosing to submit a VSD brings "concrete benefits," and choosing not to submit a VSD risks incurring "concrete costs."

Background/Current State of Play

Under the current [BIS settlement guidelines](#), parties that submit a VSD regarding a potential violation of U.S. export controls under the Export Administration Regulations ("EAR") that is "timely" and "comprehensive," and who fully cooperate with BIS to investigate such potential violations, are eligible for a substantial reduction in the applicable civil penalty under BIS's base penalty matrix. Parties are also eligible for the full suspension of the applicable civil penalty in certain cases. Further, the submission of a VSD is a factor for consideration when BIS is determining the necessary remedial compliance actions to be incorporated into the final administrative penalty. In contrast, the BIS settlement guidelines provide that the failure to submit a VSD does not constitute concealment, and it is not counted as an aggravating factor that could raise the cost of the potential civil penalty.

Highlights from the Axelrod Memorandum

Failure to submit a VSD for "significant" possible violations of U.S. export controls will now be considered an aggravating factor under the existing BIS settlement guidelines.

The Axelrod Memorandum seeks to further incentivize the submission of VSDs by clarifying that deliberate non-disclosure of significant possible violations risks incurring "concrete" costs. The announcement is not being heralded as a change to the BIS settlement guidelines, but as a clarification of how BIS will apply the existing guidelines.

Although the BIS settlement guidelines provide that the failure to submit a VSD concerning an apparent violation of U.S. export laws does not constitute concealment, the BIS settlement guidelines also provide that another factor used to determine the appropriate civil penalty amount is “the existence, nature, and adequacy of [a company’s] export compliance program at the time of the apparent violation.” Further, the guidelines provide that BIS should consider whether a company took steps to address any compliance concerns raised by the apparent violation, including the submission of a VSD. Because the foregoing factor is a “General Factor,” it can be either mitigating or aggravating; going forward, BIS will choose to apply it as an aggravating factor when a significant potential violation has been uncovered but has not been voluntarily disclosed to BIS. Although “significant possible violation” is not formally defined in the Axelrod Memorandum, it is described as “types of violations that reflect potential national security harm.”

The “Exceptional Cooperation” factor in the BIS settlement guidelines can be demonstrated through making voluntary disclosures about the conduct of others.

The Axelrod Memorandum also makes clear that there are concrete benefits to reporting against others. Tips on possible U.S. export control violations leading to enforcement actions will be considered a mitigating factor as “exceptional cooperation” with BIS for any future enforcement action against the disclosing party (whether or not the future conduct is related to the subject of the disclosure). In addition, the Axelrod Memorandum reminds companies that disclosures related to potential third-party violations of U.S. export controls and/or sanctions may entitle disclosing parties to financial rewards from the U.S. Department of Treasury’s Financial Crimes Enforcement Network (“FinCEN”) if disclosures lead to successful enforcement of such violations or “related actions.”

Multiple minor technical violations can be reported on a single VSD.

In June 2022, BIS implemented a dual-track system to review and resolve VSDs. Under the dual-track system, VSDs are separated into two categories, those that involve a minor or technical infraction, and those that present a more serious issue. VSDs that involve a minor or technical infraction typically are now resolved on a “fast-track” basis within 60 days with the issuance of a warning or no-action letter as the resolution. The Axelrod Memorandum clarifies that if multiple minor technical violations are identified close in time, they can be submitted in one overarching VSD.

Conclusion

Although brief, the Axelrod Memorandum changes the calculus for companies evaluating whether a VSD is appropriate with respect to potential violations of U.S. export controls – companies that identify significant potential violations of the EAR now are further incentivized to voluntarily disclose such violations to BIS. The Axelrod Memorandum also fits within the broader context of new and recent actions by the U.S. Department of Justice to strengthen criminal enforcement activities and incentivize disclosures. Although companies must always balance the advantages and disadvantages of making a VSD, the tone from Biden Administration officials is clear, and companies are again encouraged to ensure that they have a robust and effective compliance program in place to identify and prevent potential violations of export controls.

As always, Dechert is available to advise on compliance measures with respect to sanctions and export controls.

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