

Impact of the New \$250,000 per Violation Maximum Penalty on Settlements of Export Enforcement Cases



Since October, 2007, the maximum civil penalty for export control violations increased from \$50,000 to \$250,000 (or twice the value of the transaction, whichever is higher). This was a huge increase, and compounded a prior elevation of fines from \$11,000. The new fines also applied retroactively, although they were not applied to many violations for which voluntary disclosures were filed or enforcement actions were pending or commenced by the date of enactment of the law (October 16, 2007). Many exporters have been left asking “what fine levels apply to me?” when faced with a disclosure or enforcement action.

The intent of the higher penalty amount was to enhance the power of the Bureau of Industry and Security (BIS) of the US Department of Commerce and the Office of Foreign Assets Control (OFAC) of the US Department of Treasury to pursue violations of export control laws and regulations and encourage better compliance by the exporters. Obviously, exporters now have a lot more to lose from non-compliance: BIS and OFAC could fine them a quarter of a million dollars (or more) for each count of a violation, and a single export transaction can generate multiple counts (e.g. exporting a controlled commodity without a license, and acting with knowledge of a violation by doing so).

In practice, BIS has never yet used its maximum civil penalty authority. According to its list of 29 cases closed under the \$250,000 maximum penalty (updated through September 2009), the settlement of most cases resulted in imposition of penalties less than 20 percent of the maximum. In some cases a significant part of the penalties was suspended on the condition of compliance with the terms of the settlement, and in a few cases the penalties were suspended completely, or no monetary penalties were imposed at all. The higher amounts, reaching in one case \$200,000 per violation, were assessed where aggravating circumstances existed, such as false statements and conspiracy to commit violations. However, even in cases where such aggravating circumstances were present, some settlements resulted in no or fairly low penalties.

Some have questioned whether in these circumstances, companies that believe they committed one or more violation have a sufficient incentive to file voluntary self-disclosures of such violations to BIS and OFAC. BIS and OFAC officials have attempted to address these concerns by stating that in cases where a voluntary disclosure is filed they automatically begin consideration of the penalty at no more than 50 percent of the maximum, and many voluntary disclosure cases will result in no fines at all.

Assessing the true impact of the new penalties on voluntary disclosure cases has been difficult. In voluntary disclosure cases, BIS applies the old \$50,000 (and in some cases \$11,000) maximum penalty to enforcement actions pending on the date of enactment of the new penalties. It is difficult, however, to decipher which cases are old penalty cases and which are new: in all Proposed Charging Letters issued after October 16, 2007, BIS states that \$250,000 is the maximum statutory penalty – even in cases where BIS chose to apply the lower maxima because the case was already pending in October 2007. Thus, the only source for cases closed under the \$250,000 maximum is a special list on BIS’s Web site and this list is usually a few months behind current cases.



To date, the BIS list of cases closed under the \$250,000 maximum contains only one voluntary disclosure, and one partial voluntary disclosure case. In the case of partial voluntary disclosure, BIS imposed a \$50,000 civil penalty for three violations. In the single confirmed case of a full voluntary disclosure, BIS imposed an \$85,000 civil penalty for three violations (\$28.3K per violation), or about 11 percent of the maximum.

Overall, the actual penalty amounts BIS imposes in its enforcement actions have increased over the past several years. If before the \$250,000 maximum penalties, vast majority of cases resulted in fines well under \$10,000 per count of a violation, under the new maximum penalty fines over \$10,000 predominate. However, the outcomes of enforcement cases vary widely. This shows that BIS evaluates many different aggravating and mitigating factors in deciding the amount of penalties it will impose in every particular case. A review of the enforcement action reveals that under the new maximum penalties, presenting your case to BIS in the comprehensive, accurate way, and persuading BIS that your company merits a high level of mitigation continues to play a critical role in achieving favorable settlement outcomes.

Should you have any questions, please contact the Arent Fox attorney with whom you work or a member of Arent Fox's International Trade Practice Group.