

# INTERNATIONAL GOVERNMENT CONTRACTOR

THOMSON  
WEST

News and Analysis on International Public Procurement and Export Controls

Vol. 5, No. 11

November 2008

## Analysis

¶ 92

### One Year Later: Review Of Export Enforcement

Two major developments in October 2007 strengthened the U.S. Government's ability to enforce its export controls and economic sanctions. On October 16, President Bush signed into law the International Emergency Economic Powers Enhancement Act (IEEPA Enhancement Act), P.L. 110-96, which significantly increased penalties for violations of export controls and economic sanctions implemented under the International Emergency Economic Powers Act (IEEPA), 50 USCA §§ 1701 et seq. The IEEPA Enhancement Act came on the heels of the Department of Justice's October 11 launch of its "export enforcement initiative," designed to combat the threat posed by illegal exports of restricted U.S. military and dual-use technology. This pair of initiatives signaled the Government's renewed concern about proliferation of materials and technologies that could pose a threat to U.S. national security.

In this article, we consider how these concerns are reflected in recent civil enforcement actions for violations of economic sanctions and the illegal export of dual-use items. We focus on enforcement actions under IEEPA by the departments of Commerce and the Treasury, examining how those departments have implemented the greater statutory penalties under the IEEPA Enhancement Act. Both departments have already used the increased penalties to extract civil settlements greater than they previously could have imposed. For example, the Bureau of Industry and Security (BIS) collected \$400,000 to settle charges of false statements in applications to export seismic testing equipment that could be used in nuclear applications. Commerce and Treasury also used the IEEPA Enhancement Act's passage as an opportunity to clarify their civil enforcement policies. On both the civil and criminal sides, export

enforcement actions have been consistent with the Government's stated goals of stemming weapons proliferation and illegal exports to Iran and China. Though discussed briefly, criminal sanctions are largely outside the scope of this article, as are the Department of State's enforcement actions under the International Traffic in Arms Regulations.

**The Export Enforcement Initiative**—On Oct. 11, 2007, DOJ announced that it was launching a national export enforcement initiative to "harness the counter-proliferation assets of U.S. law enforcement, licensing, and intelligence agencies to combat the growing national security threat posed by illegal exports of restricted U.S. military and dual-use technology to foreign nations and terrorist organizations." Press Release, Dep't of Justice, "Justice Department and Partner Agencies Launch National Counter-Proliferation Initiative," No. 07-806 (Oct. 11, 2007), available at [www.usdoj.gov/opa/pr/2007/October/07-nsd-806.html](http://www.usdoj.gov/opa/pr/2007/October/07-nsd-806.html). DOJ's partner agencies in this effort include its own Federal Bureau of Investigation's Counterintelligence Division, the Department of Homeland Security's U.S. Immigration and Customs Enforcement, the Office of Export Enforcement within BIS, Treasury's Office of Foreign Assets Control (OFAC), and the Directorate of Defense Trade Controls within the State Department's Bureau of Political-Military Affairs.

With the export enforcement initiative, DOJ and its partners seek to stem the illegal flow of restricted U.S. military items, equipment that can be used for commercial or military applications (dual-use equipment), and technological knowledge to certain foreign states and terrorist organizations. DOJ Press Release 07-806. The initiative focuses on preventing the illegal export of any equipment or technology that can be used in weapons of mass destruction by China or Iran. Those countries, DOJ reported, "pose particular U.S. export control concerns." *Id.*

In launching the export enforcement initiative, DOJ was building on success. U.S. law enforcement agencies, including BIS' Office of Export Enforcement, had already stepped up their efforts to prevent illegal export of critical dual-use and military equipment and technology. *Id.* During the first year of the initiative, more than 145 defendants faced criminal charges for illegal exports.

Nearly half of the cases involved the export of munitions or restricted technology to Iran or China. Press Release, Dep't of Justice, "More Than 145 Defendants Charged in National Export Enforcement Initiative During Past Fiscal Year," No. 08-958 (Oct. 28, 2008), available at [www.usdoj.gov/opa/pr/2008/October/08-nsd-958.html](http://www.usdoj.gov/opa/pr/2008/October/08-nsd-958.html).

**Increased Penalties under IEEPA**—*The IEEPA Enhancement Act*. A few days after DOJ announced the export enforcement initiative, Congress sought to address the threat of unauthorized military and dual-use exports, as well as other international transactions illegal under U.S. law, by increasing the penalties for violations of U.S. export control and sanctions laws. In the IEEPA Enhancement Act, Congress increased civil and criminal penalties for violations of the regulations imposed under IEEPA. Those regulations are administered by OFAC and BIS. See, e.g., S. Rep. No. 110-82 (2007). OFAC's economic and trade sanctions against Iran, Sudan and Burma, as well as those against terrorists, weapons proliferators and drug traffickers, are promulgated under IEEPA. BIS administers the Export Administration Regulations (EAR), 15 CFR pts. 730–74, which provide export controls for commercial and dual-use items.

The IEEPA Enhancement Act increased the maximum civil penalty for a violation of IEEPA from \$11,000 to \$250,000 or twice the value of the prohibited transaction, whichever was greater. The USA PATRIOT Improvement and Reauthorization Act of 2005, P.L. 109-177 (Patriot Act Reauthorization), had already increased the maximum civil penalty for an EAR violation occurring on or after March 9, 2006 to \$50,000. The maximum civil penalty for a violation of OFAC's economic sanctions occurring on or after the same date simultaneously was increased to \$50,000 by the Combating Terrorism Financing Act of 2005, P.L. 109-177. The IEEPA Enhancement Act, however, applied to all *enforcement actions* pending when it was enacted, regardless of when the *violations* occurred. Thus, for pending actions for violations occurring on or after March 9, 2006, the maximum civil penalty increased five-fold or more, but for pending actions for violations occurring prior to March 9, 2006, the maximum penalty increased about 25 times. In June 2008, OFAC published a final rule revising the penalty provisions for its IEEPA-based sanctions programs. See 73 Fed. Reg. 32650–56 (June 10, 2008). BIS has not issued such formal guidance, but has issued public statements about the new penalties.

Companies engaged in international operations, including the export or reexport of goods, services or technology, are well advised to examine how OFAC

and BIS implement their authority for higher maximum fines. Although DOJ's initiative focuses on criminal violations such as intentional smuggling, legitimate exporters should be cognizant of DOJ's actions because they signal the Government's ever-increasing interest in enforcing export control laws.

*New Enforcement Guidance*: Shortly after the IEEPA Enhancement Act became law, OFAC and BIS issued guidance to explain their application of the increased civil penalties. OFAC used the occasion to overhaul its enforcement regulations and issued more comprehensive guidance than BIS did.

**OFAC**: On Nov. 27, 2007, OFAC issued an interim policy on the new civil penalties. OFAC noted that the new maximum civil penalty—\$250,000 or twice the value of the prohibited transaction, whichever is higher—applies “to all violations with respect to which enforcement action is pending or commenced on or after” the day that the IEEPA Enhancement Act became law. “Enforcement Information for November 27, 2007: Civil Penalties—Interim Policy,” available at [www.treas.gov/offices/enforcement/ofac/civpen/penalties/interim\\_pol\\_11272007.pdf](http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/interim_pol_11272007.pdf). Nevertheless, OFAC stated that it would continue to apply its January 2003 enforcement guidelines until it issued new ones. “As a practical matter,” OFAC noted, “this means that prepenalty notices will generally be issued at the transaction amount (which, as called for by the Enforcement Guidelines, is the lesser of the transaction amount or the statutory cap).” OFAC would continue to apply the aggravating and mitigating factors set out in its January 2003 enforcement guidelines. See 68 Fed. Reg. 4422–29 (Jan. 29, 2003).

On September 8, OFAC published its new Economic Sanctions Enforcement Guidelines to implement the IEEPA Enhancement Act. See 73 Fed. Reg. 51933–41 (interim final rule, Sept. 8, 2008). The new guidelines took effect immediately upon publication of the interim final rule in the *Federal Register*. The new enforcement guidelines replaced the previous mitigating and aggravating factors with general factors that OFAC uses to determine the appropriate enforcement response to a violation. The amount of a civil penalty depends primarily on whether OFAC considers the violation “egregious” and whether the subject person or entity has made a voluntary self-disclosure.

- **General factors**: OFAC considers certain general factors in determining the appropriate enforcement response to a violation. The general factors include a subject's willfulness or recklessness in committing a violation, the subject's aware-

ness of the conduct at issue, the harm caused to sanctions program objectives, the subject's commercial sophistication and violations history, and the subject's OFAC compliance program. 73 Fed. Reg. at 51937–38.

- **Egregiousness:** OFAC calculates the base amount of a civil penalty by first determining whether the violation is “egregious.” This requires a careful analysis of the general factors, with particular emphasis on a subject's willfulness and awareness of the conduct at issue. An egregious violation qualifies for the statutory maximum penalty of the greater of \$250,000 or twice the transaction value. Accordingly, an egregious violation could result in a penalty that far exceeds \$250,000. *Id.* at 51939.
- **Discounts for voluntary self-disclosure and cooperation with OFAC:** After OFAC determines how to characterize the violation, i.e., egregious or non-egregious, it will consider whether to apply certain adjustments. For instance, if a voluntary self-disclosure has been made, OFAC will reduce the base penalty by at least 50 percent. Accordingly, the base penalty for a voluntarily self-disclosed egregious violation is one-half of the statutory maximum, and the base penalty for a non-egregious violation that is voluntarily self-disclosed is one-half the transaction value, capped at a maximum base amount of \$125,000 per violation. If the entity or individual does not make a voluntary disclosure but substantially cooperates with OFAC, the agency may reduce the base penalty amount by 25 to 40 percent. If the violation is the subject's first, the base penalty amount may be reduced by up to 25 percent. All told, these reductions could discount the base penalty by as much as 75 percent. *Id.* at 51939–40.

OFAC's new guidelines do not depart substantively from earlier guidance. However, they do clarify the use of the factors and the steps in OFAC's civil penalty analysis. OFAC's emphasis on voluntary disclosures and cooperation with investigations should inform a company's behavior if a potential violation is discovered. See “OFAC to Give 50 Percent Discount to Firms that Make Voluntary Self Disclosures,” 22 *Export Practitioner* 10, October 2008, at 29–30.

**BIS:** BIS has issued less formal guidance on implementing the IEEPA Enhancement Act's higher maximum fine. By press release, BIS issued a fact sheet stating that it will apply the new penalties according to its existing guidance in Supplement Nos. 1 and 2 to EAR

pt. 766. Attachment to Press Release, Dep't of Commerce, Bureau of Industry and Security, “BIS Welcomes the International Emergency Economic Powers Enhancement Act Provisions” (Nov. 1, 2007), available at [www.bis.doc.gov/news/2007/factsheet11012007.pdf](http://www.bis.doc.gov/news/2007/factsheet11012007.pdf). BIS explained that it will “generally not pursue” the higher penalties available under the IEEPA Enhancement Act in five circumstances: if a voluntary self-disclosure was submitted to BIS before Oct. 16, 2007 (the date the IEEPA Enhancement Act was signed into law); if BIS filed a charging letter with an administrative law judge (ALJ) before Oct. 16, 2007; if BIS approved or issued a settlement offer before Oct. 16, 2007 and settlement was reached before BIS filed a charging letter with an ALJ; if BIS issued a proposed charging letter before Oct. 16, 2007, and settlement was reached before BIS filed a charging letter with an ALJ; and if the parties executed a statute of limitations waiver before Oct. 16, 2007, and reached a settlement before BIS filed a charging letter with an ALJ.

In general, under its guidelines, BIS first sends a respondent a proposed charging letter outlining the violations that BIS has reason to believe occurred. BIS then attempts to reach a settlement with the respondent. If BIS and the respondent do not reach settlement, BIS files a formal charging letter with an ALJ. After that point, formal litigation occurs, but the parties often settle before trying the allegations before the ALJ. In its fact sheet, BIS also committed to following the charging and penalty practices that it implemented pursuant to the Patriot Act Reauthorization. BIS specifically re-committed to the following policies.

- If the case settles before BIS files a formal charging letter with an ALJ, BIS will only charge “the most serious violation per transaction.” Previously, BIS frequently charged up to three or four violations stemming from a single unlicensed export. For example, BIS charged the unlicensed export and added related charges such as acting with knowledge of an export violation, conspiracy, evasion and making a false statement to a BIS agent. BIS may still charge these later violations before filing a formal charging letter, however, if such charges are not “directly connected to a specific ... transaction.”
- If BIS and the respondent do not reach a settlement agreement after BIS sends the respondent a proposed charging letter, resulting in BIS filing a formal charging letter with an ALJ, BIS “reserve[s] its right to proceed with all available charges based on the facts presented.”

- BIS will draw “meaningful distinctions based upon the relative seriousness of an offense.”
- BIS may reduce penalties by up to 25 percent if the respondent had an effective export compliance program in place before the alleged violation occurred and upgrades the program in response to the alleged violation.
- BIS usually will reduce a penalty by at least 50 percent if the respondent included the violations in a valid voluntary self-disclosure.
- BIS will set a penalty based on “the totality of the circumstances” surrounding the alleged violations.

These policies include an incentive for exporters to reach settlements before BIS files formal charging letters. Many cases involve multiple transactions, and, accordingly, exporters will settle before formal charges are made to limit their financial exposure to a single charge per transaction.

Although the degree to which BIS and OFAC took formal action in response to the IEEPA Enhancement Act’s passage differs, their approaches to resolving alleged violations have similarities. OFAC used the passage of the IEEPA Enhancement Act to overhaul its enforcement guidance, and BIS did not. Nevertheless, both agencies now provide similar incentives to exporters. In particular, they give exporters incentives to maintain robust formal compliance programs, voluntarily disclose any inadvertent violations and cooperate with agency investigations into potential violations.

**Civil Settlements for Export Enforcement Violations in the Past Year**—To gauge how BIS has implemented its stated policies, it is instructive to examine the settlement agreements that BIS has published on its Web site since October 2007. BIS has published 15 settlement agreements for which a charging letter invoked the increased penalties by notifying the respondent that the maximum fine was \$250,000 per transaction or twice the value of a transaction. Except for one, these settlements demonstrate that BIS has followed its revised enforcement policies. (These cases may be accessed at [efoia.bis.doc.gov/exportcontrolviolations/tocexportviolations.htm](http://efoia.bis.doc.gov/exportcontrolviolations/tocexportviolations.htm).)

Because 14 of the 15 cases were settled before BIS filed a formal charging letter with an ALJ, BIS was committed to charging only the most serious violation for each transaction, instead of adding multiple administrative charges such as conspiracy, evasion, false statements and acting with knowledge of a violation, unless such violations arose independently of an export transaction. Thirteen cases reflect the policy that BIS will charge only one export violation per transaction. In one case,

however, BIS charged one count for each of the alleged unauthorized exports themselves, plus one count because the exporter did not file a shipper’s export declaration for each unauthorized export. Finally, in the case in which it filed a formal charging letter, BIS alleged only a single count of causing, aiding or abetting a violation, and thus this policy did not limit the number of counts charged.

To determine whether and how BIS imposed the enhanced penalties, we analyzed the settlement agreements to determine whether the settlement amount was greater than the amount that BIS could have received before the IEEPA Enhancement Act. Although the Patriot Act Reauthorization increased the maximum penalty from \$11,000 to \$50,000, it applied only to *violations* that occurred after March 9, 2006, whereas the IEEPA Enhancement Act applies to *enforcement actions* that were pending at or commenced after Oct. 16, 2007. The alleged conduct did not occur entirely after March 9, 2006, in any of the 15 cases, and only four cases alleged violations occurring both before and after March 9, 2006. In the remaining 11, all alleged violations occurred before March 9, 2006. Consequently, but for the passage of the IEEPA Enhancement Act, BIS could have recovered only \$11,000 per violation in almost all of these cases.

As may be expected, none of the settlement amounts approaches the new statutory maximum of \$250,000 or twice the transaction value per violation. However, in three cases that were settled before BIS filed a formal charging letter, the parties settled for substantially more than the previously available cap. These cases thus indicate that BIS applied the enhanced penalties authorized under the IEEPA Enhancement Act. Another five cases indicate that BIS may have applied enhanced penalties. BIS settled for substantially less than it could have recovered before the IEEPA Enhancement Act in the remaining six cases.

The three cases in which BIS applied enhanced penalties are:

- *Engineering Dynamics*. In this multi-agency action, BIS alleged one count of conspiracy to export engineering software to Iran, and OFAC alleged violations of the Iranian Transactions Regulations. The Government concluded that between March 1995 and February 2007, the firm knowingly imported and exported to and from Iran an engineering software program to help design offshore oil and gas structures. Had this violation been charged under the Patriot Act Reauthorization, the maximum amount would have been \$50,000. The

parties settled for more than twice that amount, \$132,791. Criminal charges were also brought against the company's two owners. They were fined \$250,000, ordered to forfeit \$218,583, and sentenced to five years probation. Press Release, Dept of Justice, "Fact Sheet: U.S. Export Enforcement Prosecutions During the Past Two Years," No. 08-959 (Oct. 28, 2008), available at [www.usdoj.gov/opa/pr/2008/October/08-nsd-959.html](http://www.usdoj.gov/opa/pr/2008/October/08-nsd-959.html).

- *Select Engineering*. BIS alleged one count of illegally exporting medical electrode sensor elements and snap connectors to Iran in 2005. Although this case could not have been charged under the Patriot Act Reauthorization, under BIS' prior practice, Select could have faced multiple administrative charges stemming from this one export, making the maximum available before the IEEPA Enhancement Act between \$11,000 and \$44,000 (assuming four charges per illegal export under BIS' practice prior to the Patriot Act Reauthorization). The parties settled for \$52,800.
- *David Rainville*. Rainville was an executive of Select Engineering when BIS investigated the above violation. BIS alleged that Rainville made a false or misleading statement to a BIS agent in that investigation. Assuming that this act did not support more than this one charge, and because it occurred before March 9, 2006, the previous maximum recoverable amount was \$11,000. The parties settled for \$35,200.

These cases demonstrate how BIS can apply its enhanced penalties to further U.S. foreign policy objectives, particularly if the violation involves an export to Iran.

The five cases indicating that BIS may have invoked its enhanced penalties are:

- *MTS Systems*. BIS alleged false material representations in two 2003 license applications. The applications concerned exports of potentially nuclear-related materials to India. One transaction was valued at \$525,000, and the other exceeded \$3 million. Before the IEEPA Enhancement Act, the maximum civil penalty would have been \$22,000. Criminal charges were also brought against the company. It pleaded guilty to two misdemeanor counts and was sentenced to two years probation. The parties settled for \$400,000. See DOJ Press Release 08-959.
- *Marysol Technologies*. BIS alleged nine counts of unauthorized export of laser components, including laser resonator modules, module cavities and

associated parts to China, India, Belarus and Russia between 2003 and April 2006. Because these violations could have been charged under the Patriot Act Reauthorization or incurred multiple administrative charges, the previous maximum amount would have been \$99,000 to about \$400,000. The parties settled for \$180,000.

- *America II Electronics*. BIS alleged four counts of illegal export transactions, worth \$13,430, of analog-to-digital converters to Russia in 2003 and 2004. These violations could not have been charged under the Patriot Act Reauthorization but could have incurred multiple administrative charges. The previous maximum amount would have ranged from \$44,000 to \$176,000. The parties settled for \$170,000.
- *Ingersoll Machine Tools*. BIS alleged seven violations occurring between 2003 and 2007. Four counts involved exporting technology for vertical fiber placement machines to Italian nationals, one count involved exporting the same technology to an Indian national and two counts involved exporting technology for five-axis power mills to Indian nationals. Because these violations could have been charged under the Patriot Act Reauthorization or incurred multiple administrative charges, the previous maximum amount would have ranged from \$77,000 to around \$350,000. The parties settled for \$126,000.
- *Brighton Equipment*. BIS alleged one count of illegally exporting controlled software to China. This violation could not have been charged under the Patriot Act Reauthorization but could have incurred multiple administrative charges, so the previous maximum amount would have ranged from \$11,000 to \$44,000. The parties settled for \$17,500.

These cases show how BIS can recover amounts comparable to what it could have recovered before the IEEPA Enhancement Act, even though it is now committed to not charging multiple administrative violations during settlement talks. The new maximum available fines give BIS more discretion to consider the totality of the circumstances in making settlement offers.

Finally, there were six cases in which BIS settled for substantially less than it could have recovered prior to the IEEPA Enhancement Act. In three of these cases, the companies voluntarily self-disclosed the violations, entitling them to reductions of at least 50 percent under BIS' Nov. 1, 2007 guidance.

- *Cabela's*. BIS alleged 152 violations occurring in 2004 and 2005. Half of the counts involved the unauthorized export of optical sighting devices for small arms to Argentina, Brazil, Canada, Chile, Mexico, Finland, India, Ireland, Malaysia, Malta, Pakistan, the Philippines, South Africa, Sweden and Taiwan. The other half involved the exporter's failure to file a shipper's export declaration for each transaction. This case therefore appears to be an exception to BIS' stated policy to charge only one violation per transaction. BIS alleged the total value of the 76 transactions was \$2,974. These violations could not have been charged under the Patriot Act Reauthorization, but could have incurred administrative charges in addition to the penalty for failure to file an export declaration. The previous maximum amount would have ranged from \$836,000 to about \$3.3 million. The parties settled for \$680,000. Cabela's also agreed to conduct an internal audit of its compliance program.
  - *Maxim Integrated Products*. BIS alleged 34 violations occurring between 2002 and 2005. Twenty-one counts involved the unauthorized reexport of integration circuits from the Philippines to Russia, Estonia and China; 10 counts involved the unauthorized export of integration circuits to China and the Ukraine; two counts involved the release to a Chinese national employee of technology for electronic component development; and one count involved the release to an Iranian national employee of telecommunications technology. These violations could not have been charged under the Patriot Act Reauthorization but could have incurred multiple administrative charges, so the previous maximum amount would have ranged from \$374,000 to about \$1.5 million. The parties settled for \$192,000. See "Maxim Pays Fine for Continuing Deemed Export Violations While License Was Pending," 22 Export Practitioner 11, November 2008, at 9.
  - *Nalco*. BIS alleged 13 counts of unauthorized exports of hardness test kits containing Triethanolamine (TEA) to the Bahamas, the Dominican Republic and Angola between 2003 and September 2006. TEA is an organic compound that can be used in the manufacture of chemical weapons. Three of the 13 shipments occurred after March 9, 2006. If these three violations had been charged under the Patriot Act Reauthorization and the remaining 10 charges had incurred multiple administrative charges, the previous settlement amount would have ranged from \$260,000 to \$590,000. BIS, though, did not count multiple administrative charges and therefore considered the maximum fine to be \$260,000. Nalco voluntarily self-disclosed the violations, entitling it to a reduction of at least 50 percent. The parties settled for \$115,000, 44 percent of BIS' stated maximum.
  - *Johnson Trading & Engineering*. BIS alleged nine violations occurring in 2003. Seven counts alleged exporting computer chips to China, one alleged acting with intent to evade the EAR and the last alleged acting with knowledge of a violation. These violations could not have been charged under the Patriot Act Reauthorization, but the first seven could have incurred multiple administrative charges, so the previous maximum amount would have ranged from \$99,000 to about \$330,000. The parties settled for \$90,000, but BIS suspended \$30,000 for five years. In addition, the respondent agreed to implement an internal compliance program and perform an internal audit. BIS also suspended for five years a five-year denial of the respondent's export privileges.
  - *Gusmer Europe, S.L.* BIS alleged 10 counts of illegally exporting specialty polymer products (EAR99 articles) to Cuba between 2004 and 2005. These violations could not have been charged under the Patriot Act Reauthorization but could have incurred multiple administrative charges, so the previous maximum amount would have ranged from \$110,000 to about \$440,000. BIS did not count multiple administrative violations and considered the maximum penalty to be \$110,000. Gusmer voluntarily self-disclosed the violations. The parties settled for \$40,000, 36 percent of the stated maximum.
  - *Underwater Surveys (Pty) Ltd.* BIS alleged six counts of illegally reexporting multibeam bathymetry echosounders to Denmark, Mozambique, the United Arab Emirates and the UK between 2003 and 2005. The transactions' total value exceeded \$800,000. BIS did not add multiple administrative charges, and therefore considered the maximum fine to be \$66,000. Underwater Surveys voluntarily self-disclosed the violations. The parties settled for \$29,700, 45 percent of BIS' stated maximum.
- Of note in this last set is the relatively modest settlement in *Johnson Trading & Engineering*. Because there were seven alleged illegal exports, the nonsuspended amount of the penalty—\$60,000—did not exceed the \$11,000

per violation maximum available even before the Patriot Act Reauthorization. This settlement shows exporters the value of settling before BIS files a formal charging letter. It also indicates that exporters can gain goodwill with BIS by committing to nonmonetary remedial solutions such as implementing internal control programs and audits of those programs.

As for OFAC, it provides summary information about its civil enforcement actions on its Web site. See [www.ustreas.gov/offices/enforcement/ofac/actions/index.shtml](http://www.ustreas.gov/offices/enforcement/ofac/actions/index.shtml) (follow links marked "release of Civil Penalties Information"). OFAC's summaries do not indicate whether OFAC considered the higher IEEPA penalties applicable under its interim enforcement policy. OFAC's new Economic Sanctions Enforcement Guidelines were issued in September 2008 and likely have not applied to any settlements thus far reported. Nevertheless, an examination of several large, recent civil settlements may provide insight into future enforcement actions.

- *Key Bank*. In an enforcement action reported in February, OFAC alleged that Key Bank National Association of Cleveland, Ohio, violated the Iranian Transactions Regulations by operating accounts for a person and an entity in Iran between 2002 and August 2004. Key Bank did not voluntarily disclose the matter to OFAC. It settled for \$200,000.
- *York International*. In an action reported in May, OFAC alleged that York International Corp. violated the Iranian Transactions Regulations, the Sudanese Sanctions Regulations and the Iraqi Sanctions Regulations. OFAC alleged that foreign nationals employed by a foreign branch of York sold air conditioning and refrigeration equipment to Iran and Sudan, and that York made improper payments to the Iraq government for licensed sales of such equipment to Iraq under the U.N.'s Oil-for-Food program. Johnson Controls, Inc. acquired York after these activities occurred and voluntarily disclosed the potential violations to OFAC. The matter was settled for \$669,507.
- *Engineering Dynamics*. Discussed above and reported in May, this multi-agency action involved alleged civil violations of both the EAR and OFAC's Iranian Transactions Regulations, as well as criminal charges. Engineering Dynamics voluntarily disclosed the matter to OFAC. The parties settled for \$132,791.
- *A.G. Edwards and Sons*. In an enforcement action reported in July, OFAC alleged that A.G. Edwards violated the Narcotics Trafficking Sanctions Regulations because it did not block investment accounts of, and processed transactions for, drug traffickers between March and May 2003. A.G. Edwards voluntarily disclosed the matter to OFAC and settled for \$122,358.

Both OFAC's and BIS' actions appear to be consistent with their revised enforcement guidance. Although both agencies state only generally that they consider "the totality of the circumstances" in settling a case, the published settlements evidence a trend in the types of circumstances in which the agencies seek higher penalties than they previously could have imposed. In particular, transactions involving the unauthorized export of materials related to weapons of mass destruction, such as nuclear and chemical weapons, attract higher penalties. Unauthorized exports to certain countries or their nationals apparently also attract stiffer fines. These countries include China, Iran, Russia and, to a lesser extent, India.

**Conclusion**—It may be impossible to determine what civil or criminal violations would have been discovered, investigated, charged and settled without the DOJ-led export enforcement initiative or the higher penalties now available under IEEPA. But it is easy to conclude that interagency coordination has increased the success of Government enforcement actions, that higher penalties are making companies more careful, and that the discounts for voluntary disclosures and compliance programs remain an inducement to take those measures. One thing is certain: the U.S. is increasingly vigilant in its efforts to stem the flow of unauthorized exports of military and sensitive commercial equipment and technology, especially to destinations such as Iran and China, and particularly if those exports can become part of a program to build weapons of mass destruction.



*This article was written for INTERNATIONAL GOVERNMENT CONTRACTOR by Kathleen C. Little, Adrienne L. Goins and Bryan T. Bunting, Vinson & Elkins L.L.P. Ms. Little is a partner in the firm's Export Controls and Economic Sanctions group, Ms. Goins is an associate in the firm's International Dispute Resolution group and Mr. Bunting is an associate in the firm's Export Controls and Economic Sanctions group.*