

Export Control Compliance Amid Stricter Russia Restrictions

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In Feb. 24 remarks delivered just two months after assuming leadership of the enforcement function at the U.S. Department of Commerce's Bureau of Industry and Security, Matthew Axelrod, the assistant secretary of commerce for export enforcement, announced that the BIS is undertaking significant policy reviews of its enforcement approach.

These reviews may result in more pressure to admit violations as part of administrative settlements, higher penalties for low-value export violations that harm national security, and more civil enforcement cases in situations where the U.S. Department of Justice is also investigating a matter.

Noteworthy in their own right, these policy reviews take on added significance given the recent — and possibly ongoing — creation of historic, sweeping export controls targeting Russia in response to its invasion of Ukraine. Commerce Department officials have made clear that enforcement will be a key tool for securing compliance with the new rules and deterring violations.

In a March 2 speech, Axelrod noted that the BIS is already reviewing historical data to identify significant computer chip exporters to Russia for educational outreach and verification of their compliance with the new rules. In separate comments on March 9, Secretary of Commerce Gina Raimondo likewise promised aggressive enforcement of the new Russia-related export controls, with particular attention to any Chinese semiconductor manufacturers that skirt the restrictions.

For industry, these developments signal new attention to Russia-related export control enforcement, even for historically nonsensitive exports. They underscore the importance of tailoring compliance programs to the new requirements, identifying red flags signaling heightened compliance risk and carefully considering voluntary disclosures of past violations to minimize enforcement exposure.

Review of BIS Enforcement Policies

Speaking to the Silverado Policy Accelerator on Feb. 24, Axelrod announced two new export enforcement policy reviews to deter violations of U.S. export controls.[1]



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To strengthen the BIS enforcement program, Axelrod explained that the BIS is reviewing three topics. First, the BIS is reviewing how often to use so-called no-admit, no-deny resolutions, as compared to seeking agreement to a statement of facts specifically describing alleged violations as part of a settlement.

Second, the BIS is reviewing whether export control "penalty amounts are properly calibrated to reflect the national security harm." Noting that penalties are often related to the value of the underlying transaction, Axelrod observed that approach may understate the true harm of a violation and that sometimes even an inexpensive component "allows the missile to function."

Third, the BIS is reviewing whether it should continue to stand down administratively when cases end in a criminal resolution with the Justice Department, or if instead the BIS should more often pursue parallel administrative penalties in such cases.

Axelrod also announced a review of the BIS voluntary self-disclosure program, under which exporters may disclose apparent export control violations to the BIS in the hope of receiving more favorable treatment in the enforcement process. He observed that companies earn a big benefit in the enforcement process from voluntarily disclosing export control violations, noting that last year, the BIS received 400 voluntary self-disclosures, and of those, "only three had some sort of administrative sanction as a result, and none of them went criminal."

While practitioners know that resolving a BIS disclosure often extends past the year in which the disclosure was submitted, the very low number of enforcement actions in such cases remains noteworthy, even as a trailing indicator.

Axelrod explained that the BIS is reviewing how to focus its resources and attention on the subset of voluntary self-disclosures that require more detailed follow-up and investigation, and how to streamline and more quickly resolve less serious cases involving minor technical violations.

These Biden administration policy reviews follow a longer-term effort throughout 2020 to recruit more federal prosecutors to the BIS' Office of Chief Counsel. Today, approximately half of the BIS' 10-member counsel's office reportedly consists of former federal prosecutors, strengthening the agency's relationship with the Justice Department and improving its ability to pursue "more robust enforcement," as described by former acting Under Secretary of Commerce Cordell Hull.[2]

Together, these policy reviews, combined with the increased prosecutorial experience at the BIS, indicate the continuation or acceleration of an overall enforcement approach that is more aggressive, but now also more focused on violations that the BIS perceives as harming U.S. national security interests, even when low-value or nonsophisticated items are involved. In such cases, the respondents may expect the BIS to seek more stringent resolutions with higher penalties.

Investigative Scrutiny to Accompany Complex New Russia Restrictions

On Feb. 24, as part of the Biden administration's multifaceted response to Russia's invasion of Ukraine, the BIS announced significant, complex and extraterritorial export controls targeting Russia.[3]

These measures expand the range of items that require U.S. government authorization before they may be exported to, reexported to, or transferred within Russia; further restrict the supply of U.S. items to

Russian military end users or for military end uses; and expand extraterritorial U.S. jurisdiction over a greater range of non-U.S. items made using certain U.S. tools, software or technology when destined for Russia or certain Russian parties.

In the succeeding days, the BIS extended many of these export controls to Belarus; further restricted the availability to Russia and Belarus of even nonsensitive encryption-related items, including many common electronics and software products;^[4] and restricted the export of luxury items to Russia and Belarus, among other measures.^[5] The situation is fluid, and additional U.S. export controls — or revisions to these rules — are possible.

Following the initial imposition of these new export controls, Axelrod signaled at a March 2 white collar crime conference that the BIS will prioritize investigation of companies suspected of exporting computer chips to Russia.^[6]

As reported in various sources,^[7] Axelrod suggested that the BIS is already evaluating compliance with the new measures, that the BIS is reviewing historical export data to identify past exporters of U.S. computer chips to Russia, and that the agency is conducting proactive outreach to those past exporters to ensure compliance with the rules, with the possibility of enforcement or export control restrictions against those who violate them.

The Commerce Department also is reportedly hiring additional investigators to support compliance with the new measures in Europe and Asia.^[8]

Speaking at the White House on March 9, Raimondo struck a similar note, reportedly observing that vigorous U.S. enforcement of the new Russia-related export controls would be necessary to deter violations.^[9]

In those remarks and in a separate interview on March 8, Raimondo focused in particular on Chinese semiconductor manufacturers, noting that Chinese companies violating the U.S. export controls against Russia could essentially be shut down via restrictions that would "prevent them from using our equipment and our software."^[10]

Raimondo and Axelrod's remarks make clear that the BIS is prepared to harness its enforcement and designation tools in support of the new Russia restrictions, and that the agency will closely evaluate the activity of non-U.S. actors as part of that effort.

Moreover, heightened scrutiny of Russia-related trade will not be confined to BIS investigations. The Department of Justice announced on March 2 the creation of Task Force KleptoCapture, an interagency law enforcement task force dedicated to enforce the sweeping sanctions, export restrictions and economic countermeasures that the U.S. has imposed against Russia.^[11]

The task force will reportedly draw on the expertise of national security prosecutors and investigators experienced with export controls and sanctions to identify and prosecute violations, demonstrating the governmentwide focus on this effort, and underscoring that the BIS is likely to find broader support throughout the Biden administration by taking a more aggressive approach to Russia-related enforcement.

Key Considerations for Industry

It appears the BIS has determined that the breadth, complexity and extraterritoriality of the new Russia-related BIS export controls — many of which require the cooperation of non-U.S. companies — are only likely to work well if supported by the deterrence of an aggressive enforcement approach. Such an approach appears to be consistent with the priorities Axelrod set forth in the ongoing policy reviews, and with Raimondo's comments on China.

To that end, businesses engaged in export activity — particularly activity involving Russia or involving countries positioned to continue doing business with Russia, such as China — should keep three key considerations in mind.

1. Review your compliance approach, even if export controls weren't previously a focus.

Asked in the Silverado interview what advice he would give industry, Axelrod noted that sometimes smaller companies "don't think that items that they're exporting would be the types of items that we would care about," but in fact, even nonsensitive, so-called EAR99 items — low-technology consumer goods without an export commodity control number — can raise significant national security concerns in certain contexts.

Given this focus, exporters should undertake careful customer due diligence and consider not only an item's destination, but also its intended end user and end use, especially for customers in higher-risk jurisdictions like Russia, Belarus or China.

2. Remain attentive to red flags.

In the same remarks, Axelrod suggested that exporters review the compliance terms in their customer contracts to ensure foreign counterparties are "representing that they are in compliance with U.S. export laws." He observed that a party's refusal to include such clauses "seems like a red flag."

This comment may be noteworthy, as it appears to supplement the BIS' long-standing lists of red flags,[12] the existence of which may inform the BIS' decision to pursue enforcement or seek penalties for export control violations.[13]

3. Investigate thoroughly and consider a voluntary disclosure where merited.

As Axelrod's remarks reflect, thoroughly investigating and voluntarily disclosing apparent export control violations to the BIS continues to earn significant leniency, with the vast majority of disclosed cases resulting in no enforcement action.

If it succeeds, the ongoing BIS policy review, apparently designed to spur quicker action in and resolution of nonserious cases, may further incentivize disclosures and reduce uncertainty. Even for more serious cases that result in enforcement, long-standing BIS enforcement policy likewise offers significant leniency — including penalties amounting to just a small fraction of the potential fine — for voluntarily disclosed cases.[14]

In contrast, cases involving potential national security threats and no voluntary disclosure may present greater risk of civil or criminal enforcement under the BIS' expected revised approach, further underscoring the importance of investigating thoroughly and considering a voluntary disclosure where appropriate.

As the Biden administration makes its mark on export-controls policy, and implements a dynamic and unprecedented export-controls and sanctions program targeting Russia, exporters both in and outside the U.S. should stay current on the latest developments, and keep these points in mind to avoid violations and minimize exposure when violations occur.

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[5] U.S. Prohibits Exports of U.S. Dollar Banknotes to Russia and Luxury Goods to Russia and Belarus, and Imports of Additional Types of Russian-Origin Products Into the United States, Covington & Burling LLP (Mar. 14, 2022), <https://covcommunicate.com/71/4972/uploads/u.s.-prohibits-exports-of-u.s.-dollar-banknotes-to-russia-and-luxury-goods-to-russia-and-belarus--and-imports-of-additional-types-of-russian-origin-products-into-the-united-states.pdf>.

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[8] Anna Swanson, U.S. Casts a Global Net to Stop Shipments to Russia, N.Y. Times, Mar. 16, 2022, <https://www.nytimes.com/2022/03/16/business/economy/us-exports-russia-ukraine.html>.

[9] Jenny Leonard, U.S.'s Raimondo Warns Chinese Firms on Evading Russia Sanctions, Bloomberg, Mar. 10, 2022, <https://www.bloomberg.com/news/articles/2022-03-10/raimondo-warns-chinese-firms-on-end-runs-around-russia-sanctions>.

[10] Ana Swanson, Chinese companies that aid Russia could face U.S. repercussions, commerce secretary warns, N.Y. Times, Mar. 8, 2022, <https://www.nytimes.com/2022/03/08/technology/chinese-companies-russia-semiconductors.html>.

[11] Attorney General Merrick B. Garland Announces Launch of Task Force KleptoCapture, U.S. Dep't of Justice (Mar. 2, 2022), <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-launch-task-force-kleptocapture>.

[12] See Supp. No. 3 to 15 C.F.R. Part 732 (2014); Red Flag Indicators, Bureau of Industry and Security, U.S. Dep't of Commerce, <https://www.bis.doc.gov/index.php/all-articles/23-compliance-a-training/51-red-flag-indicators> (last visited Mar. 18, 2022).

[13] See Supp. No. 1 to 15 C.F.R. Part 766 (2016).

[14] Id.