

February 25, 2016

Ms. Hillary Hess
Director
Regulatory Policy Division
Room 2099B
Bureau of Industry and Security
U.S. Department of Commerce
14th Street & Pennsylvania Ave., N.W.
Washington, D.C. 20230

Re: Revisions Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, Revision of Supplement No. 1 to Part 766 of the Export Administration Regulations (*Federal Register* Notice of December 28, 2015; RIN 0694-AG73)

Dear Ms. Hess:

The Semiconductor Industry Association (SIA) is the voice of the U.S. semiconductor industry, one of America's top export industries and a key driver of America's economic strength, national security, and global competitiveness. Semiconductors – microchips that control all modern electronics – enable the systems and products we use to work, communicate, travel, entertain, harness energy, treat illness, and make new scientific discoveries. The semiconductor industry directly employs nearly a quarter of a million people in the U.S. In 2015, U.S. semiconductor company sales totaled \$166 billion, and semiconductors make the global trillion dollar electronics industry possible. SIA seeks to strengthen U.S. leadership of semiconductor manufacturing, design, and research by working with Congress, the Administration and other key industry stakeholders to encourage policies and regulations that fuel innovation, propel business and drive international competition.

SIA is pleased to submit the following public comments in response to the request for public comments issued by the Commerce Department's Bureau of Industry and Security ("BIS") on proposed revisions to guidance on charging and penalty determinations in settlement of administrative enforcement cases based on violations of the Export Administration Regulations (EAR).¹

The Proposed Guidance indicates that the base penalty depends on whether the violation is egregious or non-egregious. Should the Rule be adopted, an exporter would have the ability to

¹ "Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, Revisions of Supplement No. 1 to Part 766 of the Export Administration Regulations," 80 Fed. Reg. 80,710 (Dec. 28, 2015) ("Proposed Guidance").

assess whether a violation or set of violations will be considered egregious based on past Office of Export Enforcement (OEE) behavior for similar violations. This enhanced visibility would reduce uncertainty and would be an important benefit to exporters.

The Proposed Guidance indicates that transaction value will be critical in determining the base penalty amount in non-egregious cases – either directly (if a voluntary self-disclosure was made) or indirectly (if a voluntary self-disclosure was not made). Where a violation is related to a transaction that has been reported into the Automated Export System (“AES”), BIS should rely upon that value as the transaction value unless there is evidence indicating that the reported AES value was erroneous or otherwise flawed.

In cases involving exports or deemed exports of technology, the value of the export transaction is difficult to decipher. It is unclear how BIS will determine transaction value of technology exports. While BIS notes that it may employ “the economic benefit derived by the Respondent” in such situations,² such a standard is extremely subjective and open to wide-ranging results. SIA urges BIS to provide more definitive guidance on how it will determine the transaction value of technology exports.

Cumulative mitigating factors are possible but the order in which they are captured and applied in the mathematical formula is not clear. In addition, and to further complicate the equation, there is a cumulative mitigation cap at 75%. BIS should not determine violations to be egregious on the basis of charging multiple violations on a single export. The consideration of not including past violations of an acquired entity where an acquirer takes reasonable action to discover, correct and disclose violations is a welcomed addition.

Among the factors BIS indicates it may consider in evaluating apparent willfulness or recklessness is Prior Notice – i.e., whether the Respondent was on notice or “should . . . reasonably have been on notice” that the conduct at issue constituted a violation of U.S. law.³ It would be inappropriate for BIS to determine that a company acted with willfulness or recklessness because it “should reasonably have been on notice” that its conduct violated U.S. law. SIA recognizes that the EAR is a strict liability statute and that a violation of the EAR remains such even if the entity committing the violation was unaware that it was violating the law. However, ignorance should not be equated with willfulness or recklessness. Only if a company actually was on notice and clearly understood that its conduct violated U.S. law should BIS determine that willfulness or recklessness was involved.

BIS indicates that a warning letter,

*represents OEE’s enforcement response to the apparent violation, unless OEE later learns of additional information concerning the same or similar apparent violations.*⁴

² Id. at 80,713.

³ Proposed Guidance at 80,715.

⁴ Proposed Guidance at 80,714.

BIS also indicates that a warning letter “does not constitute a final agency determination as to whether a violation has occurred.”⁵ Such a situation necessarily places an exporter in a state of “limbo” uncertain as to whether in fact a violation was committed and therefore uncertain as to how to proceed in future similar situations. SIA urges BIS to eliminate this uncertainty by ensuring that a warning letter provide guidance as to whether BIS believes a violation occurred, and, if so, limiting the warning to the substance of the violation.

SIA appreciates the opportunity to comment on the Proposed Revisions and looks forward to continuing its cooperation with the U.S. Government on export control reform. Please feel free to contact the undersigned or Joe Pasetti, Director of Government Affairs at SIA, if you have questions regarding these comments.

Sincerely,



Cynthia Johnson
Co-Chair, SIA Export Control Committee



Mario R. Palacios
Co-Chair, SIA Export Control Committee

⁵ Id.