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Client Alert

Export and Economic Sanctions Penalties Increase *Again*

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On October 16, 2007, President Bush signed into law an amendment to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (IEEPA), that increases the civil penalties authorized by Section 206 of IEEPA by five times more than those enacted just over a year ago. Criminal penalties have been increased as well. Many of the economic sanctions regulations implemented by the Department of the Treasury's Office of Foreign Assets Control (OFAC), as well as the Export Administration Regulations (EAR) administered by the Bureau of Industry and Security (BIS) at the Department of Commerce, rely on IEEPA for their underlying statutory authority. Violations of these regulations are subject to the increased penalties.

Patriot Act Reauthorization Increased Penalties in 2006

Since its enactment in 1977, IEEPA provided penalties of \$10,000 for civil violations. For criminal, or willful, violations the penalties were set at \$50,000 and imprisonment for not more than 10 years. Criminal penalties available through alternative penalty provisions were the greater of \$250,000 for individuals and \$500,000 for companies, or twice the gain or loss from the transaction. 18 U.S.C. § 3571. With only a minor increase for inflation, the civil penalties remained at this level until the reauthorization of the USA PATRIOT Act in 2006 (Pub. L. 109-177).

Section 402 of the Patriot Act reauthorization increased the basic civil penalty for violations of IEEPA regulations to \$50,000 per violation. Criminal fines remained the same, but the maximum term of imprisonment was raised from 10 to 20 years. These Patriot Act penalties became effective on March 9, 2006.

New Civil and Criminal Penalties for IEEPA Violations

Under IEEPA Section 206, as amended, the civil penalties authorized for violations of regulations promulgated under IEEPA now include fines not to exceed the greater of \$250,000 or twice the value of the trans-

action forming the basis for the fine. A violation may also include committing, attempting or causing a violation as well as conspiracy to commit a violation.

For criminal penalties, the maximum term of imprisonment remains at 20 years. However, IEEPA Section 206 has been amended to provide for a maximum fine of \$1 million for committing, attempting, aiding or abetting a violation, or conspiring to commit a violation. This criminal penalty is also subject to the alternative fines provision, which provides for a fine of twice the gain or loss from the transaction. 18 U.S.C. § 3571.

Civil Penalties Apply to Pending Matters

The increase in civil penalties for EAR and sanctions violations applies to any enforcement action that is pending or commenced on the date of enactment. Criminal penalties, however, apply only to enforcement actions that have been commenced as of the date of enactment. There is a constitutional issue with respect to *ex post facto* criminal penalties. Evidently, Congress has decided that the same issues do not exist in the context of civil penalties.

The retroactive application of civil penalties raises troubling issues with respect to BIS and OFAC enforcement matters initiated by companies that made voluntary disclosures with the expectation that the maximum fines imposed would be in a certain range. They may have a legitimate basis to expect a result based on the penalties in effect at the time they made their disclosures. The prospect of dramatically higher fines will affect how they weigh the factors involved in making voluntary disclosures, and may discourage voluntary disclosures in the future.

Focus Now Shifts to Agency Enforcement Policies

BIS and OFAC will now have to decide how to use their newly increased penalty authority. They will need to update their enforcement policy statements or make formal amendments to their enforcement guidelines. Among the issues they will need to consider are:

Adjustment of mitigation percentages. In recent years, BIS and OFAC have generally refrained from exercising the full extent of their penalty authority except in egregious cases. They have focused instead on encouraging systemic compliance with their regulations and their enforcement guidelines give substantial weight to factors such as the adoption of internal controls, screening transactions and other compliance measures. For example, BIS policy has been to reduce a fine by 50% for voluntary disclosures. OFAC guidelines provide for mitigation of up to 75% in certain circumstances. The increased statutory penalty means that companies will face large fines even with maximum mitigation.

Inadvertent Violations. The regulations under which each agency operates provide for enforcement on a strict liability basis. Knowledge is not a required element of an offense and any prohibited act can be penalized to the full extent. Under the new law, a clerical misstep or error in an electronic screening filter could still result in a substantial fine.

Double counting. A single export transaction can result in multiple violations, such as failure to obtain a license as well as failure to file a correct Shippers Export Declaration. Even at \$11,000 per violation, double counting could sharply increase the size of potential penalties and improve BIS's leverage in settlement discussions. Under the IEEPA amendment, the practice of double counting could send penalties into the stratosphere.

Relative Seriousness of Violations. Agencies will need to consider whether the maximum civil penalty is ever appropriate for certain types of violations under various IEEPA based regulations. Clearly, selling aircraft parts to Iran or five-axis numerical control equipment to China without a license are far more serious violations than processing a letter of credit with a shipping certificate containing prohibited boycott language or making an AES filing with an incorrect Schedule B number.

Prospects for Even Higher Penalties on the Horizon

For transactions in which the maximum punishment is appropriate, the new penalties will have a dramatic impact. The Senate Report accompanying the new law (S. Rep. No. 110-82) cites the case of a bank that processed 42 transactions totaling \$55 million involving Iran, Sudan and Cuba in violation of the respective sanctions regulations. Previously, the maximum civil penalty for 42 IEEPA violations would have been \$462,000, or \$2.1 million if the violations occurred after March 9, 2006. Under the new law, the civil penalty could be as much as \$10.5 million, or \$110 million under the alternative fines provision. (The Cuban Assets Control Regulations authorized by the Trading With the Enemy Act (TWEA) provide for maximum civil penalties of \$65,000 per violation. TWEA penalties are not affected by the IEEPA amendment.)

Congressional attention to punitive sanctions and deterrence measures is by no means over. The Senate Committee on Banking, Housing and Urban Affairs also noted in its report that the EAR currently relies on IEEPA as its statutory authority because Congress has failed to reauthorize the Export Administration Act (EAA) and that reliance on IEEPA was not a substitute for an updated and renewed EAA, which it referred to as an "important objective." In recent years, bills to reauthorize the EAA have included civil fines of up to \$500,000 and criminal fines of up to the greater of \$5 million or ten times the value of the export (see, e.g., H.R. 4572, 109th Cong. (2005)). If these past bills provide guidance, the penalties in the EAA, if it is ever reauthorized, may outstrip those in this IEEPA amendment.

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