

MEMORANDUM

FROM: Helena D. Sullivan, Barnes, Richardson & Colburn,
hsullivan@barnesrichardson.com

DATE: April 17, 2008

Bureau of Industry and Security Discusses Penalty Mitigation Principles

As the Department of Justice has begun to focus more of its resources on export compliance, exporters should be focusing on having an effective, evolving export compliance program. The Bureau of Industry and Security (BIS) has spoken publicly detailing the nine factors that BIS uses to determine whether an export compliance program is effective, and therefore when there is a violation, whether a mitigation of the administrative penalty is warranted.

Assistant Secretary for Export Enforcement Darryl Jackson in a keynote address at the BIS Export Control Forum in Newport Beach, California on March 17, 2008 mentioned nine principles:

- 1) whether the company has performed a meaningful risk analysis;
- 2) the existence of a formal written compliance program;
- 3) whether appropriate senior officials with a high level of responsibility are responsible for overseeing the compliance program;
- 4) whether adequate, ongoing training is provided to employees and records of such training are kept;
- 5) adequate screening of customers and transactions;
- 6) adequate recordkeeping;
- 7) the existence and operation of an internal system for reporting export violations;
- 8) periodic internal/external reviews or audits (and modifications reflecting the reviews and changes in the law and in business practice); and
- 9) whether remedial activity has been taken in response to export violations, including disciplining employees who engage in violative activity.

However, such mitigation will only be considered when the program was in place prior to the violation and steps have been taken to address the concerns raised by the violation. Assistant Secretary Jackson cautioned that the nine principles must not only be adhered to not only in theory but in practice. Exporters should keep these nine principles in mind when designing their export compliance programs and just as important, updating and modifying them to reflect legal and business changes.