

Department of Energy proposes rulemaking to clarify civil penalties for Part 810 export violations

10 October 2019

On 3 October 2019, the Department of Energy (DOE) published a notice of proposed rulemaking regarding the imposition of civil penalties for violations of the Part 810 regulations (10 CFR Part 810), which control the export of certain unclassified nuclear technologies and assistance. The Part 810 regulations had not previously included provisions for civil monetary penalties, and it was previously unclear whether DOE had authority to impose such penalties.

The proposed rule would implement Section 3116(b) of the 2019 John S. McCain National Defense Authorization Act (2019 NDAA), which clarified DOE's authority to impose civil penalties for violations of Section 57(b) of the Atomic Energy Act of 1954 (AEA). Notably, the proposed rule allows for the imposition of a daily civil penalty for continuing violations. The deadline to submit comments on the proposed rule is 4 November 2019.

The proposed rule would make the following clarifications:

- **Regulatory purpose:** It would state that the purpose of 10 CFR § 810.1 includes imposing civil penalties and creating civil enforcement procedures.
- **Enforcement procedures:** The proposed rule would create procedures to implement DOE's civil penalty authority under 10 CFR § 810.15. It would require the Deputy Administrator for Defense Nuclear Nonproliferation to provide the violator with written notice of the date, facts, and nature of each alleged violation, the statutory and regulatory provisions relied upon in making the determination, and the proposed penalty. A violator would then have an opportunity to reply to this notice with relevant explanations, answers to questions posed, and/or mitigating circumstances. Failure to reply within 30 calendar days would constitute a waiver of this right, unless an extension is granted by the Deputy Administrator for Defense Nuclear Nonproliferation. The proposed rule would also provide the opportunity for an administrative hearing by DOE and a final decision on an alleged violation by the Under Secretary for Nuclear Security.
- **Factors in calculating civil penalties:** The proposed rule would incorporate a contextual assessment to calculate civil penalties under the revised 10 CFR § 810.15(c)(5). This calculation would account for mitigating and aggravating factors such as the nature, gravity, and economic significance of the violations, a violator's history of non-compliance

and present culpability, a violator's ability to pay, potential effects on a violator's business, whether there was self-disclosure, and other factors "as justice may require."

- **Penalties imposed for each violation:** The proposed rule states that civil penalties are to be imposed per violation, but notes that if a violation is continuing, then each day from the commencement of the violation to its suspension would constitute a separate violation for purposes of computing the civil penalty. It is unclear from the proposed rule how penalties for continuing violations would be implemented in practice. The U.S. Nuclear Regulatory Commission (NRC) has a similar provision in its regulations, but in practice generally does not apply penalties for continuing violations to Part 110 export controls.
- **Inflation-adjusted maximum statutory penalties:** The proposed rule would also clarify the maximum civil penalties when accounting for inflation. Congress identified the maximum base penalty (before inflation) to be US\$100,000 per violation, consistent with Section 234(a) of the AEA. Yet there is a sizeable difference between proposed maximum penalties based on how inflation is calculated. One proposed approach would result in a maximum penalty of nearly US\$266,000 per violation by using the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and the Federal Civil Penalties Inflation Adjustment Act of 1990 (codified in 28 USC § 2461). An alternative approach would result in a maximum of US\$102,522 by using Office of Management and Budget (OMB) Memorandum M-19-04. In proposing the second alternative, DOE acknowledges the possibility that Congress desired a lower statutory penalty than the first proposal would create. DOE is seeking comments on these alternatives.
- **Voluntary self-disclosure not addressed:** The proposed rule notably does not address in detail the process, requirements, or mitigation factors related to voluntary self-disclosures. Other trade control agencies such as the Bureau of Industry and Security (BIS) at the Commerce Department, the Office of Foreign Assets Control (OFAC) at the Treasury Department, and the Directorate of Defense and Trade Controls (DDTC) at the State Department, each have specific regulations and guidelines pertaining to voluntary self-disclosures.

Despite addressing many topics related to civil enforcement, plenty of questions remain about the rulemaking. These include processes for self-disclosure, mitigation of penalties, and how reliance on non-binding technical assistance determinations by the agency impact the enforcement process. It is also unclear how this rulemaking will change DOE's approach to enforcing Part 810 (e.g., through inspections or audits), or if it will lead the agency to clarify the scope of its regulations further.

As noted above, the deadline to submit comments on the proposed rule is 4 November 2019. Please reach out to the attorneys listed in this notice if you have any questions.

Contacts



Ajay Kuntamukkala
Partner, Washington, D.C.
T +1 202 637 5552
ajay.kuntamukkala@hoganlovells.com



Amy Roma
Partner, Washington, D.C.
T +1 202 637 6831
amy.roma@hoganlovells.com



Daniel Stenger
Partner, Washington, D.C.
T +1 202 637 5691
daniel.stenger@hoganlovells.com



Sachin Desai
Senior Associate, Washington, D.C.
T +1 202 637 3671
desai.sachin@hoganlovells.com



Anne Fisher
Senior Associate, Washington, D.C.
T +1 202 637 6569
anne.fisher@hoganlovells.com



Patrick de Lapérouse
Associate, Washington, D.C.
T +1 202 637 6836
patrick.delaperouse@hoganlovells.com

Rob Matsick
Law Clerk, Washington, D.C.
T +1 202 637 8209
rob.matsick@hoganlovells.com

www.hoganlovells.com

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