

To: Our Clients and Friends

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Record \$9.4 Million DHL Export Settlement Questions the Benefit of Joint Agency Settlements

The Bureau of Industry and Security and the Office of Foreign Assets Control have entered a record-setting joint agreement with the global shipping company DHL settling thousands of alleged export control and economic sanctions violations involving Iran, Sudan and Syria. The agreement, which calls for DHL to pay \$9.4 million, audit its trade compliance and report on any other violations found, is noteworthy because of the settlement amount and questions it raises about settling with both agencies simultaneously.

The settlement amount is noteworthy because it is four times greater than any civil penalty on BIS's "Major Cases List" and far exceeds freight forwarder settlements to date. Such settlements often are in the \$50,000 range. Many are significantly less.

The settlement also raises questions about the desirability of joint settlement agreements with BIS and OFAC. Companies often face simultaneous BIS and OFAC enforcement actions. While there is some appeal to a joint settlement, the DHL case suggests that exporters might be confronted with unique uncertainties when two government agencies are involved.

1. Legal Standards Seem Inconsistent. U.S. export controls typically do not consider freight forwarders to be the exporter, but OFAC pursued DHL because it appeared to "have exported or attempted to export" multiple shipments. BIS, on the other hand, characterized DHL's involvement with those exports only as "aiding or abetting" someone else's export.
2. Penalty Policies Differ. BIS threatened DHL with \$250,000 per violation. Even though it could have done the same, OFAC started settlement negotiations at \$50,000 or significantly lower amounts per violation. In addition, the settlement doesn't say how much each agency gets, so one can't tell how good each offer was.
3. Agency Transparency Varies. OFAC's "Prepenalty Notice" was fairly explicit in how it calculated its proposed penalty. This is a helpful starting point for negotiations. In contrast, BIS's "Proposed Charging Letter" indicated nothing about the penalties it would actually seek.
4. No Guidance on Compliance. The alleged violation descriptions raise questions about what conduct is prohibited. For example, they don't describe the activities accounting for the bulk of the non-record keeping violations. In addition, the settlement doesn't explain why the record-keeping violations justified a \$9 million penalty even though, according to the settlement, around 90% of the underlying transactions were permissible. The settlement notes that there were approximately 40,000 record-keeping violations.

Agencies could encourage settlement by giving companies a better basis on which to evaluate and assess likely outcomes. This case suggests that, when these two agencies pursue an alleged wrongdoer jointly, they risk muddying the waters with respect to what is truly involved.

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