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## U.S. Senate Staff Report Calls for “High Probability” Export Controls Enforcement and Compliance — Key Takeaways and How to Respond

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On Dec. 18, the majority staff of the U.S. Senate’s Permanent Subcommittee on Investigations (PSI) issued a report calling for the application of the “high probability” standard in U.S. export controls corporate enforcement and compliance. In doing so, the report cites two articles co-authored by Michael Huneke, the co-chair of our Sanctions, Export Controls and Anti-Money Laundering practice.

The full report is available [here](#).

The key takeaways for corporate export control compliance teams are:

- **The report recommends that the the Bureau of Industry and Security (BIS) further leverage the “high probability” standard to bring more corporate enforcement cases with higher penalties.**
  - The report noted that the BIS acknowledged that the Export Administration Regulations’ definition of “knowing” included “an awareness of a high probability of [the] existence or future occurrence” and that, as a result, enforcement actions could be based on less than a company’s “positive knowledge of a violation,” citing a June 13, briefing by the BIS with committee staff.
  - The report calls on the BIS to charge companies with “knowing” violations of U.S. export controls “when they fail to sufficiently investigate red flags or other strong indicia of potential diversion and violations occur.”
    - Concurrently with the report, the PSI chair wrote to the secretary of commerce requesting that she open an investigation into one of the companies that testified before the PSI previously.
  - The BIS, it should be noted, has already adopted a “high probability” approach to enforcement:
    - On July 10, the BIS issued [guidance](#) emphasizing the standard; and
    - On Aug. 15, the BIS reached its first-ever corporate [settlement](#) citing the “high probability” standard (and imposing a \$5.8 million penalty).
  - In discussing the meaning of the “high probability” standard, the staff report cites an article by Michael Huneke co-wrote with Brent Carlson of the Berkeley Research Group, [“How Not to Stand Out Like a Sore Thumb \(Part 2\): A Fresh Look at the ‘High Probability’ Definition of Knowledge Applied to Export Controls and Sanctions Enforcement.”](#)

- **The report's recommendations, once further implemented by the BIS, will help compliance teams demonstrate the value proposition for investments in export control compliance programs.**
  - The report notes that "BIS officials reiterated to the Subcommittee in briefing that more significant penalties for export violations were needed, are in process, and would be forthcoming."
  - The report recommends further that the "BIS should accelerate plans to impose higher fines on companies who violate export controls."
    - In doing so, the report cites to the U.S. government's characterizations of export controls as the "new" Foreign Corrupt Practices Act (FCPA) and how, in that context, a single company's 2008 settlement of FCPA-related investigations for a combined \$800 million changed the value proposition for companies considering investments in FCPA compliance.
    - In discussing the history of the FCPA, the report cites an article by Michael Huneke co-authored, "[Converging Practices for Bribery, Export Controls and Sanctions.](#)"
  - The report also recommends that "BIS should require periodic, routine reviews of semiconductor companies' export control plans by outside entities."

With the incoming U.S. Congress widely expected to be even more focused on export controls enforcement, especially related to exports to or through China, companies should carefully review the majority report and begin considering now what proactive enhancements to their export controls compliance programs they can make to ensure (1) their compliance programs take into account the risks (and opportunities) presented by the "high probability" standard and (2) their compliance programs receive sufficient investment not in terms of current enforcement levels but in terms of the accelerated and elevated enforcement levels that Congress is pressuring BIS to show (and that BIS has previewed are already underway).

Please contact Michael Huneke and our team for more insights into the "high probability" standard — its meaning, application, and how to enhance compliance programs to take the standard into account.

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**Michael H. Huneke**

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