

may participate in preparations for the negotiation of a location-specific subsidiary arrangement with the IAEA and may observe the negotiations to the maximum extent practicable. The existence of a location-specific subsidiary arrangement does not in any way limit the right of the owner, operator, occupant, or agent in charge of the location to withhold consent to a request for complementary access.

(2) *Format and content.* The form and content of a location-specific subsidiary arrangement will be determined by the IAEA and the U.S. Government, in consultation with the location, on a case-by-case basis.

§ 784.6 Post complementary access activities.

Upon receiving the IAEA's final report on complementary access, BIS will forward a copy of the report to the location for its review, in accordance with § 784.3(k)(2) of the APR. Locations may submit comments concerning the IAEA's final report to BIS, and BIS will consider them, as appropriate, when preparing its comments to the IAEA on the final report. BIS also will send locations a post complementary access letter detailing the issues that require follow-up action (see, for example, the *Amended Report* requirements in § 783.2(d) of the APR).

PART 785—ENFORCEMENT

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§ 785.1 Scope and definitions.

(a) *Scope.* This part 785 describes the sanctions that apply to violations of the Act and the APR. It also establishes detailed administrative procedures for certain violations of the Act. Violations for which the statutory basis is the Act are set forth in § 785.2 of the APR. BIS investigates these violations, prepares charges, provides legal representation to the U.S. Government, negotiates settlements, and initiates and resolves proceedings. The administrative procedures applicable to these violations are described in §§ 785.3 through 785.19 of the APR.

(b) *Definitions.* The following are definitions of terms as used only in part 785 of the APR. For definitions of terms applicable to parts 781 through 786 of the APR, unless otherwise noted in this paragraph or elsewhere in the APR, see part 781 of the APR.

The Act. The U.S. Additional Protocol Implementation Act of 2006 (Public Law 109-401, 120 Stat. 2726 (December 18, 2006)).

Assistant Secretary for Export Enforcement. The Assistant Secretary for Export Enforcement, Bureau of Industry and Security, United States Department of Commerce.

Final decision. A decision or order assessing a civil penalty, or otherwise disposing of or dismissing a case, which is not subject to further administrative review, but which may be subject to collection proceedings or judicial review in an appropriate Federal court as authorized by law.

Office of Chief Counsel. The Office of Chief Counsel for Industry and Security, United States Department of Commerce.

Recommended decision. A decision of the administrative law judge in proceedings involving violations of part

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785 that is subject to review by the Secretary of Commerce, or a designated United States Government official.

Report. For the purposes of part 785 of the APR, the term “report” means any report required under parts 783 through 786 of the APR.

Respondent. Any person named as the subject of a letter of intent to charge, a Notice of Violation and Assessment (NOVA), or order.

Under Secretary, Bureau of Industry and Security. The Under Secretary, Bureau of Industry and Security, United States Department of Commerce.

§ 785.2 Violations of the Act subject to administrative and criminal enforcement proceedings.

(a) *Violations—(1) Refusal to permit entry or access.* No person may willfully fail or refuse to permit entry or access, or willfully disrupt, delay or otherwise impede complementary access, or an entry in connection with complementary access, authorized by the Act.

(2) *Failure to establish or maintain records.* No person may willfully fail or refuse to do any of the following:

(i) Establish or maintain any record required by the Act or the APR;

(ii) Submit any report, notice, or other information to the United States Government in accordance with the Act or the APR; or

(iii) Permit access to or copying of any record by the United States Government that is related to a person’s obligations under the Act or the APR.

(b) *Civil penalties—(1) Civil penalty for refusal to permit entry or access.* Any person that is determined to have willfully failed or refused to permit entry or access, or to have willfully disrupted, delayed or otherwise impeded an authorized complementary access, as set forth in paragraph (a)(1) of this section, shall pay a civil penalty in an amount not to exceed \$25,000 for each violation. Each day the violation continues constitutes a separate violation.

(2) *Civil penalty for failure to establish or maintain records.* Any person that is determined to have willfully failed or refused to establish or maintain any record, submit any report or other information required by the Act or the APR, or permit access to or copying of any record related to a person’s obliga-

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tions under the Act or the APR, as set forth in paragraph (a)(2) of this section, shall pay a civil penalty in an amount not to exceed \$25,000 for each violation.

(c) *Criminal penalty.* Any person that is determined to have violated the Act by willfully failing or refusing to permit entry or access authorized by the Act; by willfully disrupting, delaying or otherwise impeding complementary access authorized by the Act; or by willfully failing or refusing to establish or maintain any required record, submit any required report or other information, or permit access to or copying of any record related to a person’s obligations under the Act or the APR, as set forth in paragraph (a) of this section, shall, in addition to or in lieu of any civil penalty that may be imposed, be fined under Title 18 of the United States Code, be imprisoned for not more than five years, or both.

§ 785.3 Initiation of administrative proceedings.

(a) *Issuance of a Notice of Violation and Assessment (NOVA).* Prior to the initiation of an administrative proceeding through issuance of a NOVA, the Bureau of Industry and Security will issue a letter of intent to charge. The letter of intent to charge will advise a respondent that BIS has conducted an investigation. The letter will give the respondent a specified period of time to contact BIS to discuss settlement of the allegations set forth in the letter of intent to charge. If the respondent does not contact BIS in the time period specified in the letter of intent to charge, the Director of the Office of Export Enforcement, or such other Department of Commerce representative designated by the Assistant Secretary for Export Enforcement, may initiate an administrative enforcement proceeding under this § 785.3 by issuing a NOVA.

(b) *Content of a NOVA.* The NOVA shall constitute a formal complaint and will set forth the alleged violation(s) and the essential facts with respect to the alleged violation(s), reference the relevant statutory, regulatory or other provisions, and state the maximum amount of the civil penalty that could be assessed. The NOVA also will inform the respondent of the

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requirement to request a hearing pursuant to § 785.4 of the APR.

(c) *Service of a NOVA.* Service of the NOVA shall be made by certified mail or courier delivery with signed acknowledgment of receipt. The date of signed acknowledgment of receipt shall be the effective date of service of the NOVA. One copy of each paper shall be provided to each party in the delivery. BIS files the NOVA with the Administrative Law Judge (ALJ) at the same time that it is sent to the respondent. The ALJ, in turn, will place the case on its docket and will notify both the respondent and BIS of the docket information.

§ 785.4 Request for hearing and answer.

(a) *Deadline for answering the NOVA.* If the respondent wishes to contest the NOVA issued by BIS, the respondent must submit a written request for a hearing to BIS within 15 business days from the date of service of the NOVA. If the respondent requests a hearing, the respondent must answer the NOVA within 30 calendar days from the date of the request for hearing. The request for a hearing and the respondent's answer to the NOVA must be filed with the Administrative Law Judge (ALJ), along with a copy of the NOVA, and served on the Office of Chief Counsel, and any other address(es) specified in the NOVA, in accordance with § 785.6 of the APR.

(b) *Content of respondent's answer.* The respondent's answer must be responsive to the NOVA and must fully set forth the nature of the respondent's defense(s). The answer must specifically admit or deny each separate allegation in the NOVA; if the respondent is without knowledge, the answer will so state and this will serve as a denial. Failure to deny or controvert a particular allegation will be deemed to be an admission of that allegation. The answer must also set forth any additional or new matter that the respondent contends will support a defense or claim of mitigation. Any defense or partial defense not specifically set forth in the answer shall be deemed to be waived, and evidence supporting that defense or partial defense may be refused, except for good cause shown.

(c) *English required.* The request for hearing, the answer to the NOVA, and all other papers and documentary evidence must be submitted in English.

(d) *Waiver.* The failure of the respondent to file a request for a hearing and an answer within the times prescribed in paragraph (a) of this section constitutes a waiver of the respondent's right to appear and contest the allegations set forth in the NOVA. If no hearing is requested and no answer is provided, a final order will be signed by the Secretary of Commerce, or by a designated United States Government official, and will constitute final agency action in the case.

§ 785.5 Representation.

An individual respondent may appear, in person, or be represented by a duly authorized officer or employee. A partner may appear on behalf of a partnership, or a duly authorized officer or employee of a corporation may appear on behalf of the corporation. If a respondent is represented by counsel, counsel shall be a member in good standing of the bar of any State, Commonwealth or Territory of the United States, or of the District of Columbia, or be licensed to practice law in the country in which counsel resides, if not the United States. The U.S. Government will be represented by the Office of Chief Counsel. A respondent personally, or through counsel or other representative who has the power of attorney to represent the respondent, shall file a notice of appearance with the ALJ, or, in cases where settlement negotiations occur before any filing with the ALJ, with the Office of Chief Counsel.

§ 785.6 Filing and service of papers other than the Notice of Violation and Assessment (NOVA).

(a) *Filing.* All papers to be filed with the ALJ shall be addressed to "Additional Protocol Administrative Enforcement Proceedings," at the address set forth in the NOVA, or such other place as the ALJ may designate. Filing by United States certified mail, by express or equivalent parcel delivery service, via facsimile, or by hand delivery is acceptable. Filing from a foreign

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country shall be by airmail, via facsimile, or by express or equivalent parcel delivery service. A copy of each paper filed shall be simultaneously served on all parties.

(b) *Service.* Service shall be made by United States certified mail, by express or equivalent parcel delivery service, via facsimile, or by hand delivery of one copy of each paper to each party in the proceeding. Service on the government party in all proceedings shall be addressed to Office of Chief Counsel for Industry and Security, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Room H-3839, Washington, DC 20230, or sent via facsimile to (202) 482-0085. Service on a respondent shall be to the address to which the NOVA was sent, or to such other address as the respondent may provide. When a party has appeared by counsel or other representative, service on counsel or other representative shall constitute service on that party.

(c) *Date.* The date of filing or service is the day when the papers are deposited in the mail or are delivered in person, by delivery service, or by facsimile. Refusal by the person to be served, or by the person's agent or attorney, of service of a document or other paper will be considered effective service of the document or other paper as of the date of such refusal.

(d) *Certificate of service.* A certificate of service signed by the party making service, stating the date and manner of service, shall accompany every paper, other than the NOVA, filed and served on the parties.

(e) *Computation of time.* In computing any period of time prescribed or allowed by this part, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period is to be included in the computation unless it is a Saturday, a Sunday, or a legal holiday (as defined in Rule 6(a) of the Federal Rules of Civil Procedure). In such instance, the period runs until the end of the next day that is neither a Saturday, a Sunday, nor a legal holiday. Intermediate Saturdays, Sundays, and legal holidays are excluded from the computation when the period of time prescribed or al-

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lowed is 7 days or less—there is no cap on the period of time to which this exclusion applies, whenever the period of time prescribed or allowed by this part is computed in business days, rather than calendar days.

§785.7 Summary decision.

The ALJ may render a summary decision disposing of all or part of a proceeding on the motion of any party to the proceeding, provided that there is no genuine issue as to any material fact and the party is entitled to summary decision as a matter of law.

§785.8 Discovery.

(a) *General.* The parties are encouraged to engage in voluntary discovery regarding any matter, not privileged, which is relevant to the subject matter of the pending proceeding. The provisions of the Federal Rules of Civil Procedure relating to discovery apply to the extent consistent with this part and except as otherwise provided by the ALJ or by waiver or agreement of the parties. The ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. These orders may include limitations on the scope, method, time and place of discovery, and provisions for protecting the confidentiality of classified or otherwise sensitive information, including Confidential Business Information (CBI) as defined by the Act.

(b) *Interrogatories and requests for admission or production of documents.* A party may serve on any party interrogatories, requests for admission, or requests for production of documents for inspection and copying, and a party may apply to the ALJ for such enforcement or protective order as that party deems warranted with respect to such discovery. The service of a discovery request shall be made at least 30 calendar days before the scheduled date of the hearing unless the ALJ specifies a shorter time period. Copies of interrogatories, requests for admission and requests for production of documents and responses thereto shall be served on all parties and a copy of the certificate of service shall be filed with the ALJ at

least 5 business days before the scheduled date of the hearing. Matters of fact or law of which admission is requested shall be deemed admitted unless, within a period designated in the request (at least 10 business days after service, or within such additional time as the ALJ may allow), the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party to whom the request is directed cannot either admit or deny such matters.

(c) *Depositions.* Upon application of a party and for good cause shown, the ALJ may order the taking of the testimony of any person by deposition and the production of specified documents or materials by the person at the deposition. The application shall state the purpose of the deposition and set forth the facts sought to be established through the deposition.

(d) *Enforcement.* The ALJ may order a party to answer designated questions, to produce specified documents or things or to take any other action in response to a proper discovery request. If a party does not comply with such an order, the ALJ may make a determination or enter any order in the proceeding as the ALJ deems reasonable and appropriate. The ALJ may strike related charges or defenses in whole or in part or may take particular facts relating to the discovery request to which the party failed or refused to respond as being established for purposes of the proceeding in accordance with the contentions of the party seeking discovery. In addition, enforcement by any district court of the United States in which venue is proper may be sought as appropriate.

§ 785.9 Subpoenas.

(a) *Issuance.* Upon the application of any party, supported by a satisfactory showing that there is substantial reason to believe that the evidence would not otherwise be available, the ALJ may issue subpoenas to any person requiring the attendance and testimony of witnesses and the production of such books, records or other documentary or physical evidence for the purpose of the

hearing, as the ALJ deems relevant and material to the proceedings, and reasonable in scope. Witnesses shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contempt, challenge or refusal to obey a subpoena served upon any person pursuant to this paragraph, any district court of the United States, in which venue is proper, has jurisdiction to issue an order requiring any such person to comply with a subpoena. Any failure to obey an order of the court is punishable by the court as a contempt thereof.

(b) *Service.* Subpoenas issued by the ALJ may be served by any of the methods set forth in § 785.6(b) of the APR.

(c) *Timing.* Applications for subpoenas must be submitted at least 10 business days before the scheduled hearing or deposition, unless the ALJ determines, for good cause shown, that extraordinary circumstances warrant a shorter time.

§ 785.10 Matters protected against disclosure.

(a) *Protective measures.* The ALJ may limit discovery or introduction of evidence or issue such protective or other orders as in the ALJ's judgment may be needed to prevent undue disclosure of classified or sensitive documents or information. Where the ALJ determines that documents containing classified or sensitive matter must be made available to a party in order to avoid prejudice, the ALJ may direct the other party to prepare an unclassified and nonsensitive summary or extract of the documents. The ALJ may compare the extract or summary with the original to ensure that it is supported by the source document and that it omits only so much as must remain undisclosed. The summary or extract may be admitted as evidence in the record.

(b) *Arrangements for access.* If the ALJ determines that the summary procedure outlined in paragraph (a) of this section is unsatisfactory, and that classified or otherwise sensitive matter must form part of the record in order to avoid prejudice to a party, the ALJ may provide the parties with the opportunity to make arrangements that

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permit a party or a representative to have access to such matter without compromising sensitive information. Such arrangements may include obtaining security clearances or giving counsel for a party access to sensitive information and documents subject to assurances against further disclosure, including a protective order, if necessary.

§ 785.11 Prehearing conference.

(a) On the ALJ's own motion, or on request of a party, the ALJ may direct the parties to participate in a prehearing conference, either in person or by telephone, to consider:

- (1) Simplification of issues;
- (2) The necessity or desirability of amendments to pleadings;
- (3) Obtaining stipulations of fact and of documents to avoid unnecessary proof; or

(4) Such other matters as may expedite the disposition of the proceedings.

(b) The ALJ may order the conference proceedings to be recorded electronically or taken by a reporter, transcribed and filed with the ALJ.

(c) If a prehearing conference is impracticable, the ALJ may direct the parties to correspond with the ALJ to achieve the purposes of such a conference.

(d) The ALJ will prepare a summary of any actions agreed on or taken pursuant to this section. The summary will include any written stipulations or agreements made by the parties.

§ 785.12 Hearings.

(a) *Scheduling.* Upon receipt of a valid request for a hearing, the ALJ shall, by agreement with all the parties or upon notice to all parties of at least 30 calendar days from the date of receipt of a request for a hearing, schedule a hearing. All hearings will be held in Washington, DC, unless the ALJ determines, for good cause shown, that another location would better serve the interest of justice.

(b) *Hearing procedure.* Hearings will be conducted in a fair and impartial manner by the ALJ. All hearings will be closed, unless the ALJ for good cause shown determines otherwise. The rules of evidence prevailing in courts of law do not apply, and all evidentiary

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material deemed by the ALJ to be relevant and material to the proceeding and not unduly repetitious will be received and given appropriate weight, except that any evidence of settlement which would be excluded under Rule 408 of the Federal Rules of Evidence is not admissible. Witnesses will testify under oath or affirmation, and shall be subject to cross-examination.

(c) *Testimony and record.* (1) A verbatim record of the hearing and of any other oral proceedings will be taken by reporter or by electronic recording, and filed with the ALJ. If any party wishes to obtain a written copy of the transcript, that party shall pay the costs of transcription. The parties may share the costs if both want a transcript.

(2) Upon such terms as the ALJ deems just, the ALJ may direct that the testimony of any person be taken by deposition and may admit an affidavit or report as evidence, provided that any affidavits or reports have been filed and served on the parties sufficiently in advance of the hearing to permit a party to file and serve an objection thereto on the grounds that it is necessary that the affiant or declarant testify at the hearing and be subject to cross-examination.

(d) *Failure to appear.* If a party fails to appear in person or by counsel at a scheduled hearing, the hearing may nevertheless proceed. The party's failure to appear will not affect the validity of the hearing or any proceeding or action taken thereafter.

§ 785.13 Procedural stipulations.

Unless otherwise ordered and subject to § 785.14 of the APR, a written stipulation agreed to by all parties and filed with the ALJ will modify the procedures established by this part.

§ 785.14 Extension of time.

The parties may extend any applicable time limitation by stipulation filed with the ALJ before the time limitation expires, or the ALJ may, on the ALJ's own initiative or upon application by any party, either before or after the expiration of any applicable time limitation, extend the time, except that the requirement that a hearing be demanded within 15 calendar days, and the requirement that a final

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agency decision be made within 60 calendar days, may not be modified.

§ 785.15 Post-hearing submissions.

All parties shall have the opportunity to file post-hearing submissions that may include findings of fact and conclusions of law, supporting evidence and legal arguments, exceptions to the ALJ's rulings or to the admissibility of evidence, and orders and settlements.

§ 785.16 Decisions.

(a) *Recommended decision and order.* After considering the entire record in the case, the ALJ will issue a recommended decision based on a preponderance of the evidence. The decision will include findings of fact, conclusions of law, and a decision based thereon as to whether the respondent has violated the Act. If the ALJ finds that the evidence of record is insufficient to sustain a finding that a violation has occurred with respect to one or more allegations, the ALJ shall order dismissal of the allegation(s) in whole or in part, as appropriate. If the ALJ finds that one or more violations have been committed, the ALJ shall issue an order imposing administrative sanctions.

(b) *Factors considered in assessing penalties.* In determining the amount of a civil penalty, the ALJ shall take into account the nature, circumstances, extent and gravity of the violation(s), and, with respect to the respondent, the respondent's ability to pay the penalty, the effect of a civil penalty on the respondent's ability to continue to do business, the respondent's history of prior violations, and such other matters as justice may require.

(c) *Referral of recommended decision and order.* The ALJ shall immediately issue and serve the recommended decision (and order, if appropriate) to the Office of Chief Counsel, at the address in § 785.6(b) of the APR, and to the respondent, by courier delivery or overnight mail. The recommended decision and order will also be referred to the head of the designated executive agency for final decision and order.

(d) *Final decision and order.* The recommended decision and order shall become the final agency decision and order unless, within 60 calendar days,

the Secretary of Commerce, or a designated United States Government official, modifies or vacates it, or unless an appeal has been filed pursuant to paragraph (e) of this section.

(e) *Appeals.* The respondent may appeal the final agency decision within 30 calendar days after the date of certification. Petitions for appeal may be filed in the Court of Appeals for the District of Columbia Circuit or in the Court of Appeals for the district in which the violation occurred.

§ 785.17 Settlement.

(a) *Settlements before issuance of a NOVA.* When the parties have agreed to a settlement of the case prior to issuance of a NOVA, a settlement proposal consisting of a settlement agreement and order will be submitted to the Assistant Secretary for Export Enforcement for approval and signature. If the Assistant Secretary does not approve the proposal, he/she will notify the parties and the case will proceed as though no settlement proposal has been made. If the Assistant Secretary approves the proposal, he/she will issue an appropriate order, and no action will be required by the ALJ.

(b) *Settlements following issuance of a NOVA.* The parties may enter into settlement negotiations at any time during the time a case is pending before the ALJ. If necessary, the parties may extend applicable time limitations or otherwise request that the ALJ stay the proceedings while settlement negotiations continue. When the parties have agreed to a settlement of the case, the Office of Chief Counsel will recommend the settlement to the Assistant Secretary for Export Enforcement, forwarding a proposed settlement agreement and order, which the Assistant Secretary will approve and sign. If a NOVA has been filed, the Office of Chief Counsel will send a copy of the settlement proposal to the ALJ.

(c) *Settlement scope.* Any respondent who agrees to an order imposing any administrative sanction does so solely for the purpose of resolving the claims in the administrative enforcement proceeding brought under this Part. The

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government officials involved have neither the authority nor the responsibility for initiating, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and the Department of Justice.

(d) *Finality.* Cases that are settled may not be reopened or appealed, absent a showing of good cause. Appeals and requests to reopen settled cases must be submitted to the Assistant Secretary for Export Enforcement within 30 calendar days of the execution of a settlement agreement.

§ 785.18 Record for decision.

(a) *The record.* The transcript of hearings, exhibits, rulings, orders, all papers and requests filed in the proceedings, and, for purposes of any appeal under § 785.16 of the APR, the decision of the ALJ and such submissions as are provided for under § 785.16 of the APR will constitute the record and the exclusive basis for decision. When a case is settled, the record will consist of any and all of the foregoing, as well as the NOVA or draft NOVA, settlement agreement, and order.

(b) *Restricted access.* On the ALJ's own motion, or on the motion of any party, the ALJ may direct that there be a restricted access portion of the record for any material in the record to which public access is restricted by law or by the terms of a protective order entered in the proceedings. A party seeking to restrict access to any portion of the record is responsible, prior to the close of the proceeding, for submitting a version of the document(s) proposed for public availability that reflects the requested deletion. The restricted access portion of the record will be placed in a separate file and the file will be clearly marked to avoid improper disclosure and to identify it as a portion of the official record in the proceedings. The ALJ may act at any time to permit material that becomes declassified or unrestricted through passage of time to be transferred to the unrestricted access portion of the record.

(c) *Availability of documents—(1) Scope.* All NOVAs and draft NOVAs, answers, settlement agreements, decisions and orders disposing of a case will

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be displayed on the BIS Freedom of Information Act (FOIA) Web site, at <http://www.bis.doc.gov/foia>, which is maintained by the Office of Administration, Bureau of Industry and Security, U.S. Department of Commerce. The Office of Administration does not maintain a separate inspection facility. The complete record for decision, as defined in paragraphs (a) and (b) of this section will be made available on request.

(2) *Timing.* The record for decision will be available only after the final administrative disposition of a case. Parties may seek to restrict access to any portion of the record under paragraph (b) of this section.

§ 785.19 Payment of final assessment.

(a) *Time for payment.* Full payment of the civil penalty must be made within 30 days of the effective date of the order or within such longer period of time as may be specified in the order. Payment shall be made in the manner specified in the NOVA.

(b) *Enforcement of order.* The government party may, through the Attorney General, file suit in an appropriate district court if necessary to enforce compliance with a final order issued under the APR. This suit will include a claim for interest at current prevailing rates from the date of expiration of the 60-day period referred to in § 785.16(d), or the date of the final order, as appropriate.

(c) *Offsets.* The amount of any civil penalty imposed by a final order may be deducted from any sum(s) owed by the United States to a respondent.

§ 785.20 Reporting a violation.

If a person learns that a violation of the Additional Protocol, the Act, or the APR has occurred or may occur, that person may notify: Office of Export Enforcement, Bureau of Industry and Security, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Room H-4520, Washington, DC 20230; Tel: (202) 482-1208; Facsimile: (202) 482-0964.