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DOJ Revises Policy on Voluntary Self-Disclosures of Criminal Export Controls and Sanctions Violations by Businesses

December 17, 2019

International Trade Controls, White Collar Defense and Investigations

On Friday, December 13, Principal Deputy Attorney General David Burns of the Justice Department's ("DOJ's" or "the Department's") National Security Division ("NSD"), announced a new DOJ policy for business organizations that voluntarily disclose potential criminal violations of the U.S. export controls and sanctions laws to NSD's Counterintelligence and Export Control Section ("CES"). CES supervises and coordinates the investigation and prosecution across the Department of violations of the sanctions and export controls laws.

The new policy, entitled "Export Control and Sanctions Enforcement Policy for Business Organizations" (the "Policy"), supersedes the Department's earlier initial policy, discussed in a prior client alert, governing such self-disclosures released on October 2, 2016. Among other key changes from the 2016 policy, the new Policy explains that for companies that voluntarily disclose criminal violations of the export controls and sanctions laws, fully cooperate with DOJ, and fully remediate the identified conduct, DOJ now adopts a presumption that the disclosing company will receive a non-prosecution agreement ("NPA") and avoid criminal fines (absent aggravating factors). The new Policy also applies to financial institutions, which had been excluded from the initial 2016 policy.

DOJ announced the new Policy against the backdrop of a widespread understanding that the initial 2016 policy afforded companies considering self-disclosure to CES narrow and uncertain benefits, with limited resulting participation.

Features of New Self-Disclosure Policy

U.S. export controls and sanctions regulations are administered by three key regulators: the Department of the Treasury's Office of Foreign Assets Control ("OFAC") administers and enforces U.S. sanctions (31 C.F.R. Parts 501–598 and related authorities); the Department of State's Directorate of Defense Trade Controls ("DDTC") administers and enforces the International Traffic in Arms Regulations (the "ITAR," 22 C.F.R. Parts 120–130), governing the manufacture, export, and brokering of defense articles; and the Department of Commerce's Bureau of Industry and Security ("BIS") administers and enforces the Export Administration Regulations (the "EAR," 15 C.F.R. Parts 730–774), governing the export of less-sensitive U.S.-origin goods, software, and technology.[1] All three regulators maintain voluntary self-disclosure policies that afford entities that voluntarily disclose potential civil

[1] The Department of Energy's National Nuclear Security Administration also administers certain controls on the export of nuclear-related materials.

violations to the agency significantly reduced penalties, or the opportunity to avoid civil enforcement altogether.[2] In all three cases, the voluntary disclosure mechanisms are long established and widely used by regulated industry.

Although these agencies can and do refer particularly serious cases to DOJ where criminal conduct may have occurred, such referrals are relatively rare. Under the newly announced Policy, DOJ encourages business organizations to continue voluntarily disclosing violations to these agencies, but makes clear that when a company opts to self-disclose potentially criminal conduct only to the civil regulator, the benefits of voluntary disclosure under the new DOJ Policy will be unavailable.

Benefits of Disclosure

DOJ's new Policy explains that "when a company (1) voluntarily self-discloses export control or sanctions violations to CES, (2) fully cooperates, and (3) timely and appropriately remediates, . . . there is a presumption that the company will receive a non-prosecution agreement and will not pay a fine, absent aggravating factors."[3] The Policy explains that such aggravating factors "include exports of items that are particularly sensitive or to end users that are of heightened concern; repeated violations; involvement of senior management; and significant profit."[4]

Even for voluntarily disclosed cases that do not, in DOJ's judgment, merit a non-prosecution agreement due to aggravating factors, the new Policy explains that DOJ will recommend reduced fines. In particular, DOJ will itself calculate, or will recommend to a court, "a fine that is, at least, 50% less than the amount that otherwise would be available under the alternative fine provision, 18 U.S.C. § 3571(d)," meaning a "fine at an amount equal to the gross gain or gross loss."[5] In such cases, if DOJ assesses that the company has "implemented an effective compliance program," DOJ also will not require the appointment of a monitor.[6]

In either situation, even when DOJ agrees not to seek civil penalties, DOJ still will require payment of "all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue."[7]

Key Definitions

As part of the new Policy, DOJ has published definitions of the key concepts of "voluntary self-disclosure," "full cooperation," and "timely and appropriate remediation," all of which are necessary to securing the benefits of the new Policy. DOJ notes that "in an effort to standardize, to the extent possible, DOJ voluntary disclosure policies," these definitions "closely mirror those provided in the [Foreign Corrupt Practices Act ("FCPA")] Corporate Enforcement Policy."

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[2] *See* 31 C.F.R. Part 501, app. A (OFAC); 22 C.F.R. § 127.12 (DDTC); 15 C.F.R. Part 766, supp. 1 (BIS).

[3] Policy at 2.

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] *Id.* at 2–3.

For DOJ to consider criminal violations of the relevant laws "**voluntarily self-disclosed**," the company must "disclose[] the conduct to CES 'prior to an imminent threat of disclosure or government investigation,'" including before becoming "aware of an ongoing nonpublic government investigation."[8] The company also must do so reasonably promptly after learning of the conduct. DOJ notes that when a company discovers misconduct in an acquired company following a merger or acquisition "through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts," and otherwise satisfies the elements of the new Policy, "there will be a presumption of a non-prosecution agreement in accordance with and subject to the other requirements of this Policy."[9] Finally, the company must "disclose[] all relevant facts known to it at the time of the disclosure, including as to any individuals substantially involved in or responsible for the misconduct at issue."[10]

To achieve "**full cooperation**," the new Policy incorporates the Justice Manual's more general "Principles of Federal Prosecution of Business Organizations"[11] (sometimes known as the "Filip Factors"), but adds a specific list of actions for companies to take. These actions include:

- Timely disclosing all relevant facts relevant to the wrongdoing (including "all relevant facts gathered during a company's internal investigation; [and] attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts");
- Proactively disclosing relevant facts, rather than waiting to be asked;
- Timely preserving and collecting relevant information (including "facilitation of third-party production of documents" and provision of translations "where requested and appropriate");
- De-conflicting witness interviews between the company's internal investigation and DOJ's investigation; and
- Making company employees available for DOJ interviews when requested (including "agents located overseas as well as former officers and employees").[12]

Finally, the new Policy defines "**timely and appropriate remediation**" to require "thorough analysis of causes of [the] underlying conduct"; implementing an effective compliance program featuring various DOJ-established criteria; appropriately disciplining employees involved in the conduct, including "through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred"; appropriately retaining business records; and taking other steps DOJ deems to "demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it, and implementation" of remedial measures to prevent recurrences.[13]

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[8] *Id.* 3 (quoting U.S.S.G. § 8C2.5(g)(1)).

[9] *Id.* at 3 n.7.

[10] *Id.* at 3.

[11] *See* U.S. Dep't of Justice, Justice Manual § 9-28.000 (2019), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.

[12] Policy at 3–5.

[13] *Id.* at 5–6.

Key Changes from Prior Policy

The new Policy contains certain key departures from the initial October 2016 policy.

First, the new Policy now more clearly states that for companies that satisfy DOJ's expectations for "voluntary self-disclosure," "full cooperation," and "timely and appropriate remediation," and which do not present aggravating factors, DOJ will presumptively resolve criminal conduct with an NPA and without civil penalties. This guidance stands in contrast to the looser statement in the initial 2016 policy that a company satisfying DOJ's criteria in these three key areas "*may* be eligible for a significantly reduced penalty, to include the possibility of [an NPA], a reduced period of supervised compliance, a reduced fine and forfeiture, and no requirement for a monitor," depending on "an evaluation of the totality of the circumstances in a particular case."[14]

Second and relatedly, the new Policy is more explicit about the reduction in potential fines for a qualifying company whose conduct DOJ deems sufficiently serious to merit a deferred-prosecution agreement or guilty plea. Whereas the initial 2016 policy explained more generally that participating companies might receive "the possibility of [an NPA], a reduced period of supervised compliance, a reduced fine and forfeiture, and no requirement for a monitor," the new Policy explains that even in more serious cases for which no NPA is merited, companies may expect to pay "a fine that is, at least, 50% less than the amount that otherwise would be available under the alternative fine provision, 18 U.S.C. § 3571(d)."[15]

Third, the new Policy, including the availability of more lenient treatment, now applies to financial institutions as well as other business organizations, as the carve-out of financial institutions in the 2016 policy is not present in the new Policy. This is a significant change from the 2016 policy, which reasoned that because "financial institutions often have unique reporting obligations under their applicable statutory and regulatory regimes," and are often investigated by other DOJ components in addition to NSD, the policy would not apply to them.

Looking Ahead

Although the new Policy presents clearer direction to companies considering a voluntary self-disclosure to DOJ concerning potential criminal violations of export controls or sanctions laws, it continues to intentionally withhold certain benefits — such as the presumption of a declination, rather than a non-prosecution agreement — to participants that are available under other self-disclosure policies, including the 2019 policy set forth in the Justice Manual governing voluntarily disclosed violations of the FCPA.[16] As Principal Deputy Assistant Attorney General Burns explained in announcing the new Policy, "the primary benefit of the FCPA policy is a presumption of a declination, rather than an NPA. Given the threats to national security posed by violations of our export control and sanctions laws, we determined that a presumption of an NPA without a fine was appropriate."

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[14] October 2016 Policy at 8–9 (emphasis added).

[15] Policy at 2.

[16] *See* U.S. Dep't of Justice, Justice Manual § 9-47.000 (2019), https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977.

Although clearly preferable to criminal pleas or deferred-prosecution agreements, non-prosecution agreements are meaningfully less favorable to business organizations than declinations, and may incorporate enforceable multi-year cooperation agreements and remedial obligations, carrying with them associated financial and reputational risks and costs. Going forward, the regulated community — particularly financial institutions, which are now eligible for the Policy — will be watching closely to determine whether DOJ's revised Policy will, in practice, offer sufficient leniency to incentivize self-reporting to DOJ in this area.

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Covington has deep experience advising clients at the intersection of international trade controls, national security, and the criminal law. We will continue to monitor developments in this area, and are well-positioned to assist clients in navigating the new Policy.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Trade Controls and White Collar Defense and Investigations practice groups:

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