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DOJ Revises Policy on Voluntary Self-Disclosures of Criminal Export Controls and Sanctions Violations by Businesses
司法部修订关于企业主动自行披露违反出口管制和制裁规定之刑事违法行为的政策

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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.

上周五（12 月 13 日），美国司法部（"司法部"）国家安全司（NSD）首席副司法部长 David Burns 宣布了一项新的司法部政策，新政策有关商业组织主动向 NSD 的反间谍和出口管制科（CES）披露潜在违反美国出口管制和制裁法律的刑事违法行为。CES 负责监督和协调司法部针对违反制裁和出口管制法律的行为展开的调查和起诉。

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.

此项名为"针对商业组织的出口管制和制裁执法政策"的新政策（"政策"）取代了司法部早前在 2016 年 10 月 2 日发布的适用于同类主动自行披露行为的初步政策（见之前的客户期刊）。与 2016 年政策相比，此次的新政策有许多关键的变化，其中之一是，新政策阐明，若企业主动披露违反出口管制和制裁法律的刑事违法行为，与司法部充分合作，并全面补救已查明的行为，则司法部现推定主动披露的企业将获得不起诉协议（"NPA"）并免于遭受刑事罚金（前提是不存在加重情节）。新政策也适用于金融机构，此前金融机构被 2016 年的初步政策排除在外。

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.

司法部宣布此次新政策的背景是对于 2016 年的初步政策为那些考虑主动向 CES 作出自行披露的企业提供的利益不足且不确定，从而导致初步政策的参与度有限这一事实达成的广泛共识。

Features of New Self-Disclosure Policy 新的主动自行披露政策的特点

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 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.

美国的出口管制和制裁法规由三个关键的监管部门实施：美国财政部海外资产控制办公室（OFAC）负责实施和执行美国的制裁规定（《美国联邦法规》第 31 卷第 501-598 部分和相关判例）；美国国务院国防贸易管制委员会（DDTC）负责实施和执行《国际武器贸易条例》（ITAR，《美国联邦法规》第 22 卷第 120-130 部分），管理国防物品的制造、出口和中间买卖；美国商务部工业和安全局（BIS）负责实施和执行《出口管理条例》（EAR，《美国联邦法规》第 15 卷第 730-774 部分），管理原产地为美国的敏感度较低的商品、软件、和技术的出口。[3]这三个监管部门均一直施行主动自行披露政策，对主动向主管部门披露潜在民事违法行为的实体，大幅减轻处罚，或者向其提供彻底免受民事执法的机会。[4]对于以上三种情形，主动披露机制均建立已久，并已在受监管行业中广泛使用。

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.

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[1] The Department of Energy's National Nuclear Security Administration also administers certain controls on the export of nuclear-related materials.
[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] 美国能源部国家核安全管理局也负责核相关材料出口管制的部分工作。
[4] 参见《美国联邦法规》第 31 卷第 501 部分附件 A（OFAC）；《美国联邦法规》第 22 卷第 127.12 节（DDTC）；《美国联邦法规》第 15 卷第 766 部分附录 1（BIS）。

尽管上述部门可以而且确实将涉嫌刑事行为的特别严重案件移交司法部，但这种移交情况相对较少。根据新公布的政策，司法部鼓励商业组织继续向这些部门主动披露违法行为，但明确指出，当公司选择仅向民事监管部门主动自行披露可能牵涉的刑事行为时，则将无法获得新的司法部政策就主动披露提供的利益。

Benefits of Disclosure 披露可获得的利益

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."[5] 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."[6]

司法部的新政策阐明，"当公司（1）主动自行向 CES 披露违反出口管制或制裁规定的违法行为，（2）充分合作，并且（3）及时适当地补救时……则推定该公司将获得不起诉协议，并且不会被罚款，前提是不存在加重情节。"[7]政策同时阐明，此类加重情节"包括出口特别敏感的物项或者向监管机构高度关注的最终用户实施出口；多次违法行为；牵涉高级管理人员；和利润巨大"。[8]

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."[9] 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.[10]

即使司法部认为某些主动披露的案件因存在加重情节而不符合不起诉协议的条件，新政策也阐明司法部将建议减少罚款。 尤其是，美国司法部将自己计算或建议法院采纳"比《美国法典》第 18 卷第 3571(d)节的替代罚款条款规定之金额低至少 50％的罚款"，即"处以罚款的金额等于总收益或总损失。"[11]在这种情况下，如果司法部认定公司已"实施了有效的合规制度"，则司法部也将不会要求指定监察专员。[12]

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."[13]

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[5] Policy at 2.
[6] *Id*.
[7] 见政策第 2 页。
[8] 同前。
[9] *Id*.
[10] *Id*.
[11] 同前。
[12] 同前。
[13] *Id.* at 2–3.

在上述任何一种情况下，即使司法部同意不寻求民事处罚，司法部仍将要求支付"因相关不当行为而产生的所有不当得利缴还、没收物和/或赔偿"。[14]

Key Definitions 关键定义

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."

作为新政策的一部分，司法部发布了"主动自行披露"，"充分合作"和"及时适当的补救"等关键概念的定义，这些概念对于确保获得新政策提供的利益十分必要。 司法部指出，"为了尽可能使司法部的主动披露政策标准化"，这些定义"与[反海外腐败法（FCPA）]公司执法政策中的定义极为相似"。

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."[15] 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."[16] 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."[17]

为了让司法部认定违反相关法律的刑事行为系"**被主动自行披露**"，企业必须"在'可能即将发生泄露风险或政府调查之前'向 CES 披露相关行为"，包括在"获知进行当中的非公开政府调查"之前。[18]公司还必须在发现相关行为后的合理时间内及时进行主动披露。司法部指出，当公司在合并或收购后"通过彻底及时的尽职调查，或在适当情况下，通过收购后的审计或合规整合工作"发现被收购的公司存在不当行为时，以及以其他方式满足了新政策的要求，则"在根据并满足本政策的其他要求的前提下，该公司推定获得不起诉协议。"[19]最后，公司必须"披露其在披露时已知的所有相关事实，包括就实质上参与相关不当行为或应对相关不当行为承担责任的任何个人的相关信息进行披露"。[20]

[14] 同前。见第 2-3 页。
[15] *Id.* 3 (quoting U.S.S.G. § 8C2.5(g)(1)).
[16] *Id.* at 3 n.7.
[17] *Id.* at 3.
[18] 同前。见第 3 页（引述《美国量刑指南》第 8C2.5(g)(1)节）。
[19] 同前。见第 3 页注 7。
[20] 同前。见第 3 页。

To achieve "**full cooperation**," the new Policy incorporates the Justice Manual's more general "Principles of Federal Prosecution of Business Organizations"[21] (sometimes known as the "Filip Factors"), but adds a specific list of actions for companies to take. These actions include:

为满足"**充分合作**"的条件，新政策将《司法手册》中范围更广泛的"联邦政府对商业组织提起公诉的原则"[22]（有时称为"Filip 因素"）纳入，但加入了企业可采取行动的具体清单。这些行动包括：

- 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");

  及时披露与不当行为相关的所有事实（包括"在公司内部调查中收集的所有相关事实；[和]对事实的具体来源进行归类（前提是这种归类不违反律师客户保密特权），而不是对事实进行一般叙述"）；

- Proactively disclosing relevant facts, rather than waiting to be asked;

  积极地披露相关事实，而不是被动等待请求；

- Timely preserving and collecting relevant information (including "facilitation of third-party production of documents" and provision of translations "where requested and appropriate");

  及时保留和收集相关信息（包括"促成第三方提供文件"以及"在收到请求和适当时"提供翻译）；

- De-conflicting witness interviews between the company's internal investigation and DOJ's investigation; and

  解决公司内部调查和司法部调查中证人访谈之间的安排冲突；和

- Making company employees available for DOJ interviews when requested (including "agents located overseas as well as former officers and employees").[23]

  在收到请求时安排员工接受司法部访谈（包括位于境外的代理人以及前高管及雇员）。[24]

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

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[21] *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.
[22] *参见*美国司法部《司法手册》第 9-28.000 条（2019），https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations。

[23] Policy at 3–5.
[24] 政策，第 3-5 页。

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.[25]

最后，新政策在定义"**及时及适当的补救**"时要求"对相关行为的起因进行详尽的分析"；实施遵循司法部建立的各项标准的有效合规体系；适当地给予参与不当行为的员工（包括"直接参与或失察以及在犯罪行为发生的领域具有监督权的员工"）纪律处分；适当地保留业务记录；以及采取司法部认为可以"证明公司认可不当行为的严重程度、接受相关责任及实施"补救措施以避免再次发生的其他措施。[26]

Key Changes from Prior Policy 相比之前政策的主要变化

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

新政策包含与 2016 年 10 月初版政策不同的一些重要变化。

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."[27]

首先，新政策现在更明确称，对于满足司法部"主动自行披露"、"充分合作"及"及时和适当补救"期望且不存在加重因素的公司，司法部会推定以不起诉协议的方式解决犯罪行为，且无民事处罚。该规定与 2016 年初版政策中关于下列内容的较宽松声明形成鲜明对比：在这三个重要方面符合司法部标准的公司，基于"对特定情形下具体情形的总体评估"，"*可能*满足大幅降低处罚的资格，包括[不起诉协议]、缩短监督合规期、减少罚没额及不要求设立监察员的可能性。"[28]

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

[25] *Id.* at 5–6.
[26] 同前，第 5-6 页。

[27] October 2016 Policy at 8–9 (emphasis added).
[28] 2016 年 10 月政策，第 8-9 页（加着重标志）。

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)."[29]

其次并与上述相关，对于司法部认为其行为的严重程度足以匹配暂缓起诉协议或认罪请求的符合资格的公司，新政策对其潜在罚金的减少有更明确的规定。2016 年初版政策更宽泛地解释称，参与公司可获得"[不起诉协议]、缩短监督合规期、减少罚没额及不要求设立监察员的可能性，"相比之下，新政策解释称，甚至在无资格获得不起诉协议的更严重情形下，公司也可预期支付"比在替代罚款条款下本应支付的金额少至少 50%的罚金，《美国法典》第 18 编第 3571(d)条"。[30]

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.

第三，新政策（包括较宽大的对待）目前适用于金融机构及其他商业组织，因为在 2016 年版政策中排除金融机构的情况在新政策中不复存在了。这是相对 2016 年版政策的一项重大变化，2016 年版主张：由于"金融机构通常在其适用的法规和监管体系下有独特的报告义务，"且经常被司法部除 NSD 以外的部门调查，故该政策不适用于它们。

Looking Ahead 展望将来

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.[31] 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."

尽管新政策给考虑向司法部进行主动自行披露违反出口管制或制裁法律的潜在刑事犯罪行为的公司提供了更明确的指引，但仍然有意对参与者保留某些在其他自行披露政策（包括《司法手册》中所述的关于自愿披露违反 FCPA 行为的 2019 年版政策）下本可获得的利益，例如拒绝起诉的推定（而非不起诉协议的推定）。[32]首席助理副司法部长 Burns 在宣布新政策时解释

[29] Policy at 2.

[30] 政策，第 2 页。

[31] *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.

[32] *参见*美国司法部《司法手册》第 9-47.000 条（2019）, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977。

道，“FCPA 政策的主要利益是拒绝起诉的推定，而非不起诉协议。鉴于违反本国出口管制和制裁法律给国家安全造成的威胁，我们确定，推定不起诉协议并不实施罚金是合适的政策。”

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.

尽管不起诉协议明显好于刑事认罪或暂缓起诉协议，但对于商业组织而言，不起诉协议远不如拒绝起诉有利，且不起诉协议可能包括可强制执行的、长达数年的合作协议及补救义务，并伴随有相关的财务和名誉风险和成本。 今后，被监管群体（尤其是现已有资格享受政策规定的金融机构）将密切关注司法部的修订版政策在实践中是否会提供充分的宽大政策，以鼓励在此领域向司法部进行自行报告。

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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.

科文顿具备就同时涉及贸易管制、国家安全及刑法领域的问题为客户提供咨询的深厚经验。我们将继续密切关注该领域的发展，并有充分能力帮助客户了解新政策。

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:

如果您对本客户期刊中讨论的材料有任何疑问，请联系我们国际贸易管制和白领辩护和调查业务组的下列成员：

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