LAW360

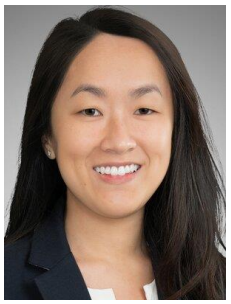
Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

DOJ's Superseding Policy Muddies Trade Crime Disclosures

By **Steven Fagell, Eric Sandberg-Zakian and Shanelle Van** (April 27, 2026, 4:29 PM EDT)


Steve Fagell


Eric Sandberg-Zakian


Shanelle Van

On March 10, the U.S. Department of Justice issued its first agencywide corporate enforcement and voluntary self-disclosure policy, or CEP, for criminal matters.

The CEP replaces voluntary self-disclosure policies issued by DOJ components — including the National Security Division's 2024 Enforcement Policy for Business Organizations — with the goal of standardizing the department's approach to resolving self-disclosed corporate crimes. Alignment with other DOJ components would be a notable change for the NSD, which has long viewed sanctions and export control offenses as uniquely serious and thus has offered less leniency to companies that voluntarily self-disclose than have other DOJ components.

Accordingly, despite the CEP's emphasis on consistent treatment of voluntary self-disclosures, uncertainty remains as to whether the NSD will now routinely offer declinations to companies that satisfy the CEP's requirements, or whether the NSD will continue treating most trade control offenses as too serious to merit the declinations theoretically available under the policy.

NSD's New Criteria for Evaluating Voluntary Self-Disclosures

The CEP applies to all corporate crimes prosecuted by the department other than certain antitrust offenses, including voluntarily self-disclosed violations of the trade controls laws for which the NSD is responsible. These laws include a range of economic sanctions, and export control statutes and regulations issued pursuant to those statutes by the U.S. Department of Commerce, U.S. Department of State, and the U.S. Department of the Treasury.

Resolutions under the CEP will need to be approved by the assistant attorney general for the NSD or the relevant U.S. attorney, in coordination with the Office of the Deputy Attorney General.

Under the new policy, the DOJ will decline to prosecute a company for criminal conduct when:

> 1. The company voluntarily self-disclosed the misconduct to an appropriate Department criminal component[;]

2. The company fully cooperated with the Department's investigation;

3. The company timely and appropriately remediated the misconduct; and

4. There are no aggravating circumstances related to the nature and seriousness of the offense, egregiousness or pervasiveness of the misconduct within the company, severity of harm caused by the misconduct, or corporate recidivism.

This offer of a declination for a voluntary self-disclosure, full cooperation and timely remediation in the absence of aggravating factors essentially accords with the leniency offered by now-superseded policies previously issued by the Criminal Division and several other DOJ components. However, the CEP appears to offer more leniency than the NSD-specific policy it replaces.

The 2024 NSD policy offered a presumptive nonprosecution agreement, rather than a presumptive declination, to a company meeting the requirements of the policy, with the decision of whether to issue a declination left to the NSD's discretion.

Although the 2024 NSD policy established provisions specific to mergers and acquisitions, offering presumptive declinations to companies that voluntarily self-disclosed violations by entities they had recently acquired, it made clear that the acquired entity at which the violation occurred was not presumptively entitled to a declination.

While the differences between the 2024 NSD policy and the CEP may seem insignificant enough to allow for an easy pivot from presumptive nonprosecution agreements to presumptive declinations, that shift may prove difficult for the NSD.

The NSD first issued a corporate enforcement policy in 2016, then revised it in 2019, 2023 and 2024. When first issued, the NSD's policy was notable primarily for how little leniency it offered as compared to other DOJ components' policies. Each revision made the policy more lenient, but the NSD consistently offered less leniency than other DOJ components.

The 2024 NSD policy explained this stiffer stance:

> Violations of U.S. export control and sanctions laws harm our national security or have the potential to cause such harm, and this threat to national security informs how NSD arrives at an appropriate resolution with a business organization that violates such laws and distinguishes these cases from other types of corporate wrongdoing.

The question now is whether and how the CEP might alter the balance that the NSD struck in its division-specific policy. On paper, at least, the department has committed the NSD to rewarding self-disclosure, cooperation and remediation with a presumptive declination, rather than merely a presumptive NPA.

More fundamentally, the CEP reflects a continuing trend at the department of providing powerful incentives, now intended to be applied consistently across the DOJ, to encourage voluntary self-disclosures.

In practice, however, it remains to be seen how substantially the CEP will change voluntary self-disclosure outcomes at the NSD.

Uncertain What Will Change at the NSD

Although the CEP is intended to standardize outcomes across the department, the CEP's declination carrot still allows for considerable discretion. Notably, under the CEP, "aggravating circumstances related to the nature and seriousness of the offense" may render self-disclosure undeserving of a declination, and the CEP does not explain how those circumstances will be evaluated.

Although the DOJ has a long history of assessing nature and seriousness in corporate resolutions, the department is short on detailed guidance for how that assessment will be conducted. In practice, the assessment is highly fact-specific.

Likewise, different versions of the NSD policy provided a high-level list of "examples of aggravating factors that represent elevated threats to national security and that, if present to a substantial degree, could result in a more stringent resolution for an organization," but did not explain how the NSD analyzed aggravating factors or what the NSD meant by "a substantial degree." And with the CEP replacing the NSD's policy, even that high-level list of examples now exists only in an obsolete document.

Moreover, while the CEP values consistency across DOJ components, it does not express a view that the types of offenses each component handles are equally serious. It follows, then, that different DOJ components may be more or less likely to find aggravating factors weighing against a declination. A DOJ component responsible for prosecuting offenses typically viewed as particularly serious — such as the national security crimes that the NSD prosecutes — may in practice be less likely to provide voluntarily self-disclosing companies with declinations.

Companies considering whether to voluntarily self-disclose trade control crimes will thus wonder how the NSD will evaluate the nature and seriousness of a trade controls offense. Will the division treat the vast majority of trade controls crimes as particularly serious simply because they implicate national security? Or will the division consider a particular voluntarily self-disclosed trade controls crime in relation to other trade controls offenses, with certain cases eligible for declinations and others not eligible depending on the degree of national security harm and other aggravating factors?

Unfortunately, the NSD's past cases under its previous policy shed little light on these questions. Over the decade in which various iterations of the NSD policy were in effect, the NSD reached four public resolutions under the policy.

In two instances, the NSD went beyond the baseline leniency promised by the policy and issued discretionary declinations — to biochemical company Sigma-Aldrich Inc., doing business as MilliporeSigma, in 2024 and space technology nonprofit Universities Space Research Associationin in 2025.

But those cases were unique. The two recipients of those declinations were most fairly classified as victims of fraud perpetrated by their own employees, with the employees causing the organizations to commit export controls violations along the way. Neither organization obtained any unlawful gains from their violations, while the national security stakes were relatively low.

The other two instances involved more typical corporate trade controls offenses and resulted in the NSD giving companies the presumptive results available under the policy in effect at the time. In 2021, the

NSD entered into a nonprosecution agreement with the software company SAP SE, which admitted to making several million dollars in profit by providing U.S.-controlled software and services to Iran.

In 2025, the NSD provided a declination to private equity firm White Deer Management LLC and a nonprosecution agreement to White Deer's recently acquired portfolio company, Unicat Catalyst Technologies LLC, which admitted to unlawful sales of chemical catalysts used in oil refining and steel production to customers in Iran, Venezuela and Cuba.

In all four cases, the NSD seems to have determined that any aggravating factors were not severe enough to warrant departing from the presumptive results under the policy and imposing a harsher resolution. But it is difficult to draw any lessons from those determinations.

The MilliporeSigma and Universities Space Research Association cases were anomalous, with the voluntarily self-disclosing companies more victims than perpetrators. The SAP and White Deer cases presented the NSD with more straightforward corporate trade controls crimes, but the NSD did not explain its analysis of aggravating factors in those cases.

Moreover, there is a risk that the NSD will take a less sympathetic approach to evaluating aggravating circumstances in the context of a departmentwide policy applicable to a wide range of crimes than it took to evaluating aggravating factors for purposes of its own policy, which was applicable only to national security offenses.

In the absence of informative data points, companies weighing whether to voluntarily self-disclose will be looking to the NSD for signals that the division and DOJ leadership will take an approach to aggravating circumstances that makes declinations obtainable in typical, for-profit corporate trade controls cases.

The NSD, for its part, will have to consider whether and how to communicate to industry about its planned implementation of the CEP. Will the division comment on its expected approach to the aggravating-circumstances analysis in an attempt to give companies further clarity and drive self-disclosures in the near term? Or will the division wait to resolve voluntarily self-disclosed offenses and give guidance only through precedent, which will necessarily require companies to wait and see over the longer term?

Uncertain Role of U.S. Attorney's Offices

As the NSD's approach to aggravating circumstances takes shape, companies also will have to decide where in the department to make voluntary self-disclosures.

NSD guidance published just weeks after the CEP was issued reiterated that the NSD is responsible for "enforcement of all criminal laws affecting, involving or relating to the national security" and encouraged companies "to voluntarily self-disclose to NSD any potential criminal violations of U.S. law relating to matters conducted, handled, or supervised by the NSD [Assistant Attorney General]."

In the same guidance, however, the NSD acknowledged that the CEP tenet that a "[g]ood faith disclosure to one component where the matter is later brought to another appropriate component for investigation will also qualify" for a declination, and no aspect of the guidance suggests the NSD would be resistant to working with a U.S. attorney's office to which a company has voluntarily self-disclosed.

In fact, the CEP itself contemplates U.S. attorney's offices playing a decision-making role in at least some corporate voluntary self-disclosures, stating that resolutions "must be approved by the Assistant Attorney General for the relevant Division and/or the United States Attorney for the relevant district." The CEP's statement that an assistant attorney general or U.S. attorney must approve a resolution raises a question as to the intended authority for U.S. attorney's offices in the resolution of national security investigations.

Given the text of the CEP and the NSD's guidance, companies will need to consider whether and how to engage with the cognizant U.S. attorney's office in a trade controls matter that the company intends to voluntarily self-disclose.

For those companies that make a voluntary self-disclosure only to a U.S. attorney's office, presumably the CEP would ensure that voluntary self-disclosure credit still would be available regardless of whether the U.S. attorney's office plays a lead or co-lead role in the case or refers it entirely to the NSD, but this question is also one that, at least for now, remains unanswered.

Whether Companies Will Make More Trade Control Voluntary Self-Disclosures to DOJ

As with all new voluntary self-disclosure policies from the DOJ, there is a chicken-and-egg issue — here, the NSD cannot issue declinations unless companies first voluntarily self-disclose, and yet companies may be reluctant to self-disclose until they see the NSD issuing declinations in typical corporate trade control cases.

Given the history of the NSD's voluntary self-disclosure policies, the division's messaging around the CEP in the coming months will likely be a critical determinant for years to come of whether the CEP drives an increase in voluntary self-disclosures of corporate trade control offenses.

Steven E. Fagell is a partner and co-chair of the white collar defense and investigations practice at Covington & Burling LLP.

Eric Sandberg-Zakian is a partner and chair of the trade controls enforcement practice at the firm.

Shanelle Van is an associate at the firm.