Alert

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DOJ Offers Incentives to Encourage Self-Reporting of Export and Sanctions Violations

The National Security Division of the U.S. Department of Justice (DOJ) has revised its guidance regarding Voluntary Self-Disclosures (VSD), originally published in October 2016, to further encourage companies to self-report potential criminal violations of the U.S. export control and economic sanctions laws.[1] This updated policy was announced on December 13, 2019 with immediate effect.

As described in the DOJ press release announcing the revised policy, the new guidance is intended to provide "concrete and significant" incentives for companies to voluntarily self-disclose violations to DOJ. Among the significant changes to the 2016 guidance, which is superseded by the present policy, follow.

Absent aggravating factors, there is a presumption that the self-disclosing company will receive a non-prosecution agreement and will not be assessed a fine.

If aggravating factors are present and suggest an enforcement action other than a non-prosecution agreement (such as a deferred prosecution agreement or guilty plea) then, as long as the company has fully cooperated with DOJ's investigation and remediated the shortcomings that led to the violation, DOJ will recommend a fine that is at least 50 percent lower than what would otherwise be available under the relevant statute and will not require the imposition of a monitor. Aggravating factors, as used in the guidance, include among other things the export of particularly sensitive items (e.g., items related to WMD or missile technology), exports to end users of concern (e.g., WMD proliferators, terrorist organizations, hostile powers, etc.), whether the company has had past violations, whether senior management was involved, whether significant profits were realized from the criminal activity, etc.

In order to take advantage of the VSD policy, the self-disclosure of potential criminal violations must be made to the Counterintelligence and Export Control Section within DOJ's National Security Division. It does not apply to disclosures made to any other part of the Department of Justice or any other section within the National Security Division. Moreover, disclosures made to other regulatory agencies such as the Directorate of Defense Trade Controls, Office of Foreign Assets Control or Bureau of Industry and Security, while still encouraged, will not qualify for the benefits provided in the DOJ policy unless also made to the Counterintelligence and Export Control Section at DOJ.

As with the prior guidance, a disclosure will only be considered voluntary if made before anyone else (such as an employee or business partner) discloses the activity to the government or before any government agency initiates an investigation. The disclosure must also be made reasonably soon after the company becomes aware of the violation and must include all relevant facts known to the company (i.e., who, what, when, where, and why).

The policy is intended to comport with guidance from other DOJ components, notably the FCPA Corporate Enforcement Policy, by attempting to standardize terms and definitions. Unlike the prior 2016 guidance, which only described the VSD process and indicated what the DOJ was looking for in a properly crafted self-disclosure, the revised policy provides significant and very real benefits. The revised policy also provides a benefit for financial institutions reporting trade violations.

Both the Criminal and now the National Security Division of the DOJ focus on the same issues when a company makes a VSD — disclosure, remediation, and full cooperation. Thus, we now

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have some conformity when a company is self-reporting to the DOJ and there is a level of certainty of the DOJ's expectation and the potential results. That being said, neither policy takes away a prosecutor's ability to exercise his or her discretion and a certain level of risk remains in deciding whether to make a VSD.

Companies that believe they may have violated U.S. export control or economic sanctions laws should seriously consider self-disclosing the potential violation. There will be a number of factors that a company needs to consider in making the determination whether to make a VSD to the DOJ, given that doing so could put employees at risk for criminal exposure. Thus, it will be important to conduct a thorough investigation of the underlying conduct to determine the nature of any violations and assess whether the actions rise to the level of criminal conduct. We would encourage anyone who thinks they may have been involved in a violation of these laws, whether criminal or otherwise, to contact counsel.

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[1] The key statutes covered by the guidance include the Arms Export Control Act, 22 U.S.C. § 2778, the Export Control Reform Act, 50 U.S.C. § 4801 *et seq.*, and the International Emergency Economic Powers Act, 50 U.S.C. § 1705. Thus, willful violations of the International Traffic in Arms Regulations (ITAR), the Export Administration Regulations (EAR), or any of the myriad economic sanctions regulations administered by the Office of Foreign Assets Control (e.g., the Cuban Assets Control Regulations, Iran Transactions and Sanctions Regulations, Venezuela Sanctions Regulations, etc.) would be covered by the guidance.