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DOJ releases updated export control and sanctions enforcement policy for business organizations

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On 13 December 2019 the U.S. Department of Justice's (DOJ) National Security Division (NSD) announced the release of its long-anticipated and updated Export Control and Sanctions Enforcement Policy for Business Organizations (the Enforcement Policy). The Enforcement Policy sets forth the criteria to be used by DOJ – through NSD's Counterintelligence and Export Control Section (CES), in partnership with U.S. Attorney's Offices nationwide – to determine "an appropriate resolution" for an organization that makes a voluntary self-disclosure (VSD), directly to NSD, for "potentially willful violations" of United States export control and sanctions law. The Enforcement Policy reflects a clear effort by NSD to increase its cooperation with the private sector by providing more clearly defined benefits for companies that make voluntary self-disclosures and by more closely aligning the NSD guidance with recent guidance issued throughout DOJ.

Summary

In particular, the Enforcement Policy expressly "encourages companies to voluntarily self-disclose" to NSD "all potentially willful violations of the statutes implementing the U.S. government's primary export control and sanctions regimes – the Arms Export Control Act (AECA), 22 U.S.C. § 2778, the Export Control Reform Act (ECRA), 50 U.S.C. § 4801 *et seq.*, and the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1705." In a 13 December speech announcing the new Enforcement Policy, Principal Deputy Assistant Attorney General David Burns explained the Enforcement Policy reflects "significant revisions" to the now-superseded 2 October 2016 "Guidance Regarding Voluntary Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations," and aims to "provide more clarity concerning the benefits of reporting and the consequences of not reporting."

When filing any VSD, including those with other agencies such as the U.S. Treasury Department's Office of Foreign Assets Control (OFAC), the U.S. Department of State's Directorate of Defense Trade Controls (DDTC), and the U.S. Department of Commerce's Bureau of Industry and Security (BIS), companies should assess the VSD under this Enforcement Policy as they may have already been doing under the 2016 DOJ policy. As a company reviews and evaluates the mitigating and aggravating factors under each respective agency's voluntary disclosure program, the company should consider the important differences in requirements and expectations of each agency,

noting in particular that companies will not receive the benefits of the Enforcement Policy without filing a VSD directly with DOJ.

Selected points

Potential benefits to companies under NSD's Enforcement Policy

The Enforcement Policy makes clear that, under DOJ policy, where a company has: a) voluntarily self-disclosed export control or sanctions violations to CES, b) fully cooperated, and c) timely and appropriately remediated, and where aggravating factors are not present, "there is a presumption that the company will receive a non-prosecution agreement and will not pay a fine."

If the organization has met these criteria but there exist aggravating factors, a deferred prosecution agreement or guilty plea instead may be warranted, in which case DOJ:

- Will recommend a fine at least 50 percent lower than an amount that would be available under the alternative fine provision, 18 U.S.C. § 3571(d) – that is, "cap the recommended fine at an amount equal to the gross gain or gross loss."
- Will not require the appointment of a monitor if the organization has, at the time of the resolution, "implemented an effective compliance program."

Under any resolution, however, a company will be "required to pay all disgorgement, forfeiture, and/or restitution" that resulted from the relevant misconduct.

Definitions and other requirements under NSD's Enforcement Policy

The Enforcement Policy contains a lengthy "Definitions" section, further clarifying its requirements.

Voluntary self-disclosure

DOJ notes that in order to qualify as a voluntary disclosure, the company's disclosure must satisfy three requirements. First, the company must disclose the conduct to CES before an "imminent threat of disclosure or government investigation," as defined by U.S.S.G. § 8C2.5(g)(1). Second, the disclosure must occur within a reasonably prompt time after the company has become aware of the offense. Notably, the company bears the burden of demonstrating timeliness. Third, the company is mandated to provide all of the relevant facts it knows at the time of the disclosure, including the names of individuals substantially involved in the misconduct.

DOJ's policy also signals its focus on enforcing the regime regardless of other agencies' enforcement, as it explains in the policy that a company which self-reports to a regulatory agency only, while failing to report directly to DOJ, will not receive the benefits of the VSD under this policy in a DOJ investigation. The summary of the policy on the DOJ website makes this clear: "The VSD Policy clarifies that disclosures of potentially willful conduct made to regulatory agencies, and not to DOJ, will not qualify for the benefits provided in the VSD Policy."

Full cooperation

To receive the benefits of full cooperation under the Enforcement Policy, the company must meet several requirements which include the following:

- Disclosure of, in a timely manner, all facts relevant to the wrongdoing at issue which include relevant facts gathered during a company internal investigation; attribution of facts to specific sources if it does not violate attorney-client privilege; timely updates regarding the company's internal investigation; and all facts that relate to company's employees' or third-party

companies' involvement in criminal activity. Importantly, a timely disclosure will consist of all information known at the time of disclosure – the investigation need not be final at the time of disclosure, and companies should inform DOJ that the VSD is based on preliminary information.[1] The policy makes clear that companies can provide further information if an investigation is ongoing or certain facts are not yet known.

- Proactive cooperation with DOJ. Notably, this DOJ requirement mandates the company to disclose all facts relevant to the investigation even when not asked to do so specifically, including identification of relevant evidence it does not possess.
- Timely preservation, collection, and disclosure of relevant documents and information related to their provenance, such as disclosure of overseas documents and facilitation of third-party production of documents. Again, the company bears the burden of demonstrating that overseas documents cannot be provided due to any blocking statutes or data privacy issues.
- De-confliction of witness interviews and investigative steps taken by the company and DOJ when requested and appropriate. The term "de-confliction" refers to the government's requests to companies to defer certain investigative steps they may plan to take as part of their internal investigation so that the government may conduct those steps as part of its own investigation.
- Make former and current company employees available for DOJ interviews, including those located overseas, who possess relevant information, as well as the provision of third-party witnesses when possible.

The company must also cooperate consistent with the Principles of Federal Prosecution of Business Organizations as set forth in Justice Manual § 9-28.000.

Timely and appropriate remediation

The policy requires the company to timely and appropriately remediate the root cause of the misconduct to receive full credit under the policy. The factors for determining compliance with this requirement include:

- Analysis of the underlying conduct's causes and, when appropriate, remediation of those root causes.
- Implementation of an effective compliance program, the characteristics of which may include company compliance culture; resources dedicated to compliance; the quality of the personnel involved in compliance; authority and independence of the compliance function; effectiveness of the company's risk assessment; compensation of compliance personnel; auditing of the compliance program; and the compliance personnel's reporting structure.
- Appropriate discipline of employees identified as responsible for the misconduct.
- Appropriate retention of business records and the prohibition of improper destruction of those records.

DOJ's policy also includes a catch-all factor for any additional steps the company may take to show its recognition of the seriousness of the company's misconduct.

[1] This requirement is notably consistent with DOJ's recently revised Foreign Corrupt Practices Act Corporate Enforcement Policy, which makes clear that DOJ encourages companies to make prompt self-disclosures, even where based on preliminary findings, and that companies can avail themselves of the benefits of filing a VSD without having completed a full investigation of relevant facts. *See* U.S. Dep't of Justice, Justice Manual § 9-47.120 (20 November 2019), *available at* https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977.

Potential aggravating factors

The Enforcement Policy contains a (non-exhaustive) list of aggravating factors associated with heightened threats to national security that could result in a more stringent resolution of a company's criminal export control violation, even if the policy's requirements are otherwise satisfied. DOJ's list of aggravating factors focus on the export of certain items, such as those known to be used in constructing weapons of mass destruction, or exports to Foreign Terrorist Organizations or Specially Designated Global Terrorists, among other factors.

Non-U.S. laws and legal considerations

The policy continues to address points made by all agencies, DOJ, OFAC, BIS, and DDTC that while compliance with non-U.S. laws is relevant, parties must do all they can to comply with U.S. laws and regulations, both with respect to substantive compliance and the conduct of the investigation. The policy states in part:

> When a company claims that disclosure of overseas documents is prohibited due to data privacy, blocking statutes, or other reasons related to foreign law, the company bears the burden of establishing the prohibition. Moreover, a company should work diligently to identify all available legal bases to provide such documents.

Mergers and acquisitions

In its discussion of timely filings of VSDs, the policy addresses mergers and acquisitions. In part, the policy states in a footnote:

> When a company undertakes a merger or acquisition, uncovers misconduct by the merged or acquired entity through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct and otherwise takes action consistent with this Policy (including, among other requirements, the timely implementation of an effective compliance program at the merged or acquired entity), there will be a presumption of a non-prosecution agreement in accordance with and subject to the other requirements of this Policy.

This policy echoes the statements made by regulatory agencies of the importance of pre- and post-merger and acquisition due diligence, corrective actions, and remediation, as applicable.

NSD's Enforcement Policy in context

Updates from the 2016 DOJ policy

Although much of the prior 2016 DOJ policy remains in the updated 2019 policy, several notable changes exist. For one, the 2019 version includes a new requirement for timely remediation – specifically, an analysis of the root cause of the misconduct at issue. DOJ's new policy also specifically designates exports to a "Foreign Terrorist Organization" or "Specially Designated Global Terrorist" as aggravating factors, whereas the 2016 policy broadly noted "[e]xports to a terrorist organization" to be an aggravating factor. Absent from the 2019 policy's list of non-exhaustive aggravating factors is "significant profits from the criminal conduct… compared to lawfully exported products and services." The 2019 version also omits example scenarios of voluntary self-disclosure under the policy and possible resolutions with DOJ, which the 2016 policy did contain. And, of particular relevance to financial institutions, the new Enforcement Policy no longer includes the carve-out for such business that had existed in the 2016 policy – meaning financial institutions are also potential beneficiaries of the new policy.

Only the latest in DOJ guidance

In updating the Enforcement Policy, NSD has sought to more closely align it with the recent series of new and updated DOJ guidance and policy documents. For instance, in 2018, then-Deputy Attorney General Rod Rosenstein issued a memorandum entitled "Policy on Coordination of Corporate Resolution Penalties," directing DOJ attorneys to "consider the totality of fines, penalties, and/or forfeiture imposed by all [DOJ] components as well as other law enforcement agencies and regulators in an effort to achieve an equitable result" – in other words, to help prevent undue piling on by multiple enforcement authorities. Thereafter, in October 2018, Assistant Attorney General Brian A. Benczkowski issued a memorandum entitled "Selection of Monitors in Criminal Division Matters," providing clarity as to the criteria to be considered when determining whether a corporate compliance monitor is warranted. This spring, DOJ issued a guidance document entitled, "Evaluation of Corporate Compliance Programs," which built on prior compliance guidance while emphasizing the importance of implementing corporate compliance programs that are not merely well-designed but also effective and adaptable.

NSD's Enforcement Policy also comes on the heels of tweaks to DOJ's Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy. Despite significant alignment between that guidance and the new NSD policy, key differences remain – including the presumption of declination in the FCPA context rather than a NPA. Principal Deputy Assistant Attorney General Burns described the rationale for this distinction: "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."

Global companies assessing the impact of the new NSD Enforcement Policy should also be mindful of other guidance documents, such as "The Elements of an Effective Export Compliance Program," published by BIS, and OFAC's May 2019 "A Framework for OFAC Compliance Commitments," in which OFAC outlines five components it considers to be essential for an effective sanctions compliance program. NSD will also coordinate with the appropriate regulatory agency in assessing a corporation's remediation efforts and compliance program. See other Hogan Lovells alerts on DOJ, OFAC, DDTC, and BIS compliance programs.

NSD's new Enforcement Policy is broadly consistent with these other policy and guidance documents. Taken together, these documents highlight the importance for companies to continue to refine their corporate compliance programs, provide guidance as to how DOJ prosecutors (and other enforcement officials) will assess and credit such compliance efforts, and – when significant issues do come to light – clarify the requirements and potential benefits to a company considering making a voluntary self-disclosure to the government.

Conclusion

The Enforcement Policy represents a clear message to the private sector that NSD wants to engage directly with companies early on in their investigations when they identify evidence of potentially willful conduct. Whether the policy will succeed in increasing the frequency of export controls and sanctions disclosures to NSD to more closely align it with the level of disclosures under the FCPA's Corporate Disclosure Program remains to be seen. Nevertheless, given the enhanced transparency of the benefits that companies who self-report potentially willful conduct can expect to receive, it will be important for companies to assess the potential risks and benefits of self-reporting from the very outset of investigations where willful conduct is suspected.

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