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Client Alert Commentary

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US Department of Justice Guidance Seeks to Encourage Voluntary Self-Disclosure of Export Controls and Sanctions Violations

The Guidance parallels the DOJ approach under the FCPA, but does not specify the value of mitigation and may create contradictory incentives.

The National Security Division (NSD) of the US Department of Justice (DOJ) recently issued "Guidance Regarding Voluntary Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations" (the Guidance). The Guidance articulates NSD's policy for granting credit to companies that voluntarily self-disclose and/or cooperate with respect to potential criminal conduct under US sanctions or export control laws. The Guidance defines the key factors that NSD considers when assessing whether and to what extent a company should receive cooperation and mitigation credit. These circumstances include: (1) voluntary self-disclosure, (2) full cooperation, (3) timely and appropriate remediation and (4) the presence of any potential aggravating factors.

In issuing the Guidance, NSD has effectively confirmed its continuing and expanding commitment to criminal enforcement of export controls and sanctions laws. At the same time, NSD has articulated its expectations for business organizations that are faced with violations in these areas and are seeking to obtain cooperation credit from DOJ. While the Guidance provides some clarity concerning NSD's expectations, it also raises or leaves open several important questions.

Overview Of Guidance

The Guidance reiterates NSD's policy of prioritizing criminal prosecutions for willful violations of export control and sanctions laws. Recognizing that business organizations play an integral role in identifying and disclosing violations, the Guidance attempts to incentivize voluntary self-disclosures (VSDs) by providing "greater transparency on how NSD, in conjunction with US Attorneys' offices, evaluates cooperation during the course of an investigation."[1]

The Guidance is limited in scope to export controls and sanctions violations, and therefore is only applicable to willful violations of the Arms Export Control Act, 22 U.S.C. § 2278, the International Emergency Economic Powers Act, 50 U.S.C. § 1705, and regulations promulgated thereunder.[2] Notably, the Guidance does not apply to financial institutions, which have unique stand-alone compliance and reporting obligations.[3] For all other business entities, the Guidance sets forth the factors NSD considers in assessing credit in the context of resolving a criminal sanctions or export controls matter.

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Voluntary Self-Disclosure

The Guidance emphasizes that companies that voluntarily self-disclose potential criminal violations will receive significant credit in NSD's evaluation of an appropriate resolution. The Guidance recognizes that companies typically self-disclose violations of export controls and sanctions to the appropriate civil regulators — such as the Department of Treasury's Office of Foreign Assets Control (OFAC), the Department of Commerce's Bureau of Industry Security (BIS) and the Department of State's Directorate of Defense Trade Controls (DDTC). In addition to reporting violations to these authorities with administrative enforcement powers, however, the Guidance encourages companies that identify potential *willful* violations to self-disclose to NSD as well.

The Guidance adopts the US Sentencing Guidelines standards to define when a disclosure is "voluntary." Accordingly, a company must make the disclosure "within a reasonably prompt time after becoming aware of the offense," which must be before there is an "imminent threat of disclosure" of the underlying conduct to the government.[4] Disclosures that are required under a prior plea agreement, Non-Prosecution Agreement (NPA), Deferred Prosecution Agreement (DPA), or similar agreements, are not deemed voluntary. In situations where the government learns of the conduct from a whistleblower, the company's initial disclosure may still be voluntary, if made before the company becomes aware of the whistleblower.

Defining "Cooperation"

The Guidance indicates that prosecutors will evaluate the "scope, quantity, quality and timing of cooperation" in determining how much credit to give a company. As an initial matter, NSD recognizes that cooperation is context-specific, and what is appropriate can depend on the size of the company and the seriousness of the alleged offense. The Guidance also recognizes that cooperation is not an all-or-nothing proposition, as some companies may be eligible for "some" cooperation credit even if they do not meet all of the criteria for "full" cooperation.

In accordance with the Deputy Attorney General's September 9, 2015 Memorandum on Individual Accountability for Cooperate Wrongdoing (the Yates Memo), full cooperation requires disclosure of all relevant facts, including information concerning involvement by the company's officers, employees, or agents in the alleged misconduct. Cooperation must be "proactive" in that companies must provide relevant information even when not expressly asked to do so, including where the company has information on wrongdoing by third parties. Where not prohibited by foreign law, cooperation requires the production of relevant documents located abroad and making foreign employees available for interviews. Finally, full cooperation requires that the company identify additional sources of information for the government. The Guidance confirms, however, that companies are not required to waive the attorney-client or work-product privilege in order to obtain full cooperation credit.

Remediation Efforts

The Guidance states that companies can receive credit for appropriate and timely remediation, but only if they have cooperated with the government's investigation. Remediation requires the implementation of an effective compliance program, which NSD defines as one adequately staffed and empowered within an organization to foster a culture of compliance. Adequate compliance programs require sufficient resources — including appropriate compensation for personnel, independence from other company functions, a reporting structure that enables compliance issues to be elevated to senior management efficiently, and a robust risk assessment and auditing program. Particularly relevant to the export controls arena, the Guidance requires a technology control plan and export-controls training for relevant employees to be part of an effective compliance program.

The Guidance also judges remediation efforts on the basis of whether culpable individuals, including those with oversight responsibility for the relevant individuals, are appropriately disciplined. Companies should take into consideration the seriousness of the offense and ensure that remediation efforts are tailored towards preventing similar conduct in the future, as well as demonstrating acceptance of responsibility.

Aggravating Factors

Certain aggravating factors may, "if present to a substantial degree," reduce the credit available for a cooperating entity. These factors include unauthorized exports of especially sensitive items that are controlled for non-proliferation or missile technology reasons as well as items used in weapons of mass destruction. Unauthorized exports to terrorist organizations or hostile foreign powers are also considered aggravating circumstances, as are substantial profits from the criminal conduct, the knowing involvement of senior management, and/or repeated violations.

Cooperation Benefits

Under the Guidance, a company that voluntarily self-discloses, fully cooperates, and engages in timely and appropriate remediation will earn maximum credit. In situations where the company does not self-disclose, but subsequently cooperates and remediates, the Guidance indicates that the company may still be eligible to receive some credit, although the company is unlikely to qualify for an NPA.

While the Guidance does not explicitly quantify the relative value of self-disclosure, cooperation and remediation, the hypothetical examples in the Guidance suggest that making a VSD and cooperating fully are the most important factors in achieving a favorable resolution. The Guidance indicates that these factors could affect the type of resolution, the size of the financial penalty, the duration of the probation period and the extent of third-party oversight post-resolution.

Specifically, the factual hypotheticals in the Guidance indicate that voluntary disclosure and cooperation may lead to the following benefits:

- The opportunity to avoid an independent monitor and, in certain circumstances, avoidance of an independent consultant or auditor
- The ability to resolve the matter with an NPA rather than a DPA or a guilty plea
- The possibility to resolve the matter at the foreign subsidiary level
- The chance that any financial penalty would be limited to disgorgement and a reduced fine
- The opportunity to obtain a reduced period of supervision (for example, 18 months)

Observations and Open Questions

Does DOJ Give Credit for Voluntary Self-Disclosures to Other Agencies?

The Guidance leaves open the question of whether, in the context of a criminal investigation, DOJ will give a company credit for submitting a VSD if that disclosure was made to a civil enforcement agency but not to NSD. While the Guidance encourages entities to continue to submit VSDs to administrative regulatory agencies like OFAC, BIS and DDTC, the Guidance states that "when an organization, including its counsel, becomes aware that a violation may be willful, it should within a reasonably prompt time also

submit a VSD to CES."[5] Other language in the Guidance suggests the possibility that disclosure to NSD may be a pre-requisite to receiving credit.[6]

Requiring a company to submit a VSD to NSD in order to receive credit in a potential criminal investigation would be a significant departure from historical practice and places companies in a difficult position. Typically, companies disclose export controls and sanctions violations to the agencies responsible for administering the relevant regulatory scheme — and companies rely on those agencies, in turn, to determine whether to refer a matter to NSD for criminal investigation or enforcement.

If companies believe that they will not receive credit in a criminal investigation unless they make a VSD to NSD, companies will obviously face greater pressure to disclose to NSD if there is any possibility that the government will later take the position that the conduct at issue was "willful." But determining whether or not misconduct is willful in export controls and sanctions cases is usually not an easy task. Indeed, quite commonly private parties and the government view conduct differently — debates over whether activity rises to the criminal level are often the most contentious and protracted elements of investigations and settlement negotiations. In light of the Guidance, some companies might decide to err on the side of caution and over-disclose to NSD, but taking such a step could substantially increase the costs and risks associated with the VSD process, while perhaps also heightening the possibility of a criminal investigation and disposition of the matter. As a result, the Guidance may have the reverse effect of actually deterring VSDs to *both* civil and criminal regulators, as companies may conclude that the benefit of a standalone VSD to the appropriate administrative agency is diminished if the VSD does not also count as mitigating a potential criminal penalty.

Contrasts with DOJ's FCPA Pilot Program

The Guidance closely parallels the DOJ Criminal Division's FCPA Pilot Program in terms of how the Guidance defines the voluntariness of a disclosure, the definition of "full" cooperation, and what constitutes appropriate remediation. However, the Guidance differs from the FCPA Pilot Program in that the Guidance provides substantially less detail on what financial benefits a company can expect to receive by self-disclosing, cooperating and remediating.

The FCPA program provides up to a 50% penalty reduction off the bottom of the sentencing guidelines range for companies that voluntarily disclose, cooperate and remediate, and up to a 25% reduction if the company fully cooperated and remediated, but did not make a VSD.[7] The Guidance, by contrast, does not attempt to quantify the amount of savings a company can realize by self-disclosing, cooperating and remediating; nor does it provide any way for companies to ascertain the credit that the government assigns specifically to self-disclosure versus cooperation or remediation.

Conclusion

Closely tracking the Criminal Division's FCPA Pilot Program, the Guidance establishes detailed criteria for NSD to assess whether credit is merited in export controls or sanctions cases. Following the Yates Memo on corporate criminal liability, companies should be prepared to cooperate proactively with NSD, including by identifying and providing evidence that could implicate individual employees. While the Guidance enumerates the factors NSD will consider in assessing how much credit to grant a company in settlement discussions, the Guidance also injects some uncertainty as to whether NSD will credit in criminal resolutions disclosures made to other agencies. We expect that NSD will likely clarify its position on this point soon, either through explicit statements or through the application of the Guidance to specific cases.

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Endnotes

[1] Guidance at 3.

[2] This would seem to exclude violations under OFAC programs promulgated under different statutes, including the Trading with the Enemy Act and the Foreign Narcotics Kingpin Designation Act.

[3] Nevertheless, the Guidance reiterates that financial institutions should continue to self-report violations to DOJ and may be eligible for general cooperation credit under the Principles of Federal Prosecution of Business Organizations contained in the U.S. Attorney's Manual.

[4] Guidance at 5.

[5] Guidance at 3-4.

[6] Guidance at 4 ("Export control and sanctions violations can pose unique security threats, and it is essential that such violations are brought to DOJ's attention in a timely manner…"); Guidance at 5 (requirements for a VSD to be deemed voluntary include that "[t]he company discloses the conduct to CES and the appropriate regulatory agency 'within a reasonably prompt time after becoming aware of the offense.'")

[7] *See* FCPA Pilot Program at 8.