

DOJ's revised self-disclosure policy for US trade sanctions and export control violations offers 'concrete and significant' benefits for corporations

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On December 13, 2019, the US Department of Justice (DOJ) released revisions to its Voluntary Self-Disclosure Policy for export control and sanctions violations.¹

The revised policy incentivizes companies to voluntarily disclose potential violations by establishing a formal *presumption* that self-reporting companies will receive a non-prosecution agreement and that they will not incur any monetary fines.

This presumption is a significant development from the DOJ's prior treatment of companies' self-disclosures of trade violations as merely one of various mitigating factors in the government's assessment of the potential violation.

Under the revised Voluntary Self-Disclosure Policy, the no-fine presumption for potential trade violations is available as long as DOJ does not identify "aggravating factors."

In issuing this policy, DOJ was seeking to bring its Voluntary Self-Disclosure Policy into conformity with similar guidance from other DOJ components, such as the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy.

Coherence among various DOJ policies may help achieve the DOJ's stated goal of encouraging corporations to adopt strong compliance programs to prevent and detect export control and sanctions violations.²

Effective the day it was announced, the policy will be incorporated into the Justice Manual. The policy extends to potentially willful violations of the Arms Export Control Act (AECA), the Export Control Reform Act (ECRA) and the International Emergency Economic Powers Act (IEEPA).

More specifically, under the revised Voluntary Self-Disclosure Policy, the no-fine presumption for potential trade violations is available as long as DOJ does not identify "aggravating factors," and where the company: (1) voluntarily discloses to DOJ's National Security Division (NSD), (2) fully cooperates with NSD, and (3) provides timely and appropriate remediation.

Even if aggravating circumstances do exist, however, a self-reporting company will still be afforded some benefit. DOJ will recommend a 50% fine reduction and forgo the imposition of a monitor if — despite the presence of aggravating factors — a company nevertheless satisfied the policy's three criteria.

According to the policy, some examples of aggravating factors include circumstances involving the export of particularly sensitive items, exports to end-users that are deemed particularly dangerous for US national security purposes, the knowing involvement of upper management in the potential violation, and repeat violations.³

The presence of such factors would render the self-reported violation ineligible for DOJ's new presumption, and force the Department back to pursuing a criminal resolution.

Although the revised Voluntary Self-Disclosure Policy has clear and significant benefits for companies with definitive criminal exposure, the benefit is less clear to companies which would otherwise view and report potential trade violations as potential civil violations only.

In other words, because the DOJ's new no-fine policy requires a company to disclose its violation directly to DOJ — as opposed to one of the regulatory agencies which deal primarily in civil penalties, such as the US Department of Treasury, Office of Foreign Assets Control (OFAC), or the US Department of Commerce, Bureau of Industry and Security (BIS) — it may raise the possibility that DOJ, on its own, may choose to pursue that conduct in a criminal matter.

Previously, if a company disclosed a potential violation to OFAC only, for example, and OFAC deemed that conduct worthy of potential criminal prosecution, OFAC could, in its discretion, refer the matter to DOJ. Now, companies are encouraged to start with DOJ at the outset, in order to benefit from the new DOJ presumption.

Moreover, while the *reporting company* may be more likely to get off the hook under the new presumption, the policy explicitly aims to increase DOJ's ability to prosecute *individuals* whose misconduct would be difficult to detect or prove without voluntary corporate disclosure.⁴ Thus, potential criminal exposure for employees and other individuals may increase.

The revised Voluntary Self-Disclosure Policy signals DOJ's interest in receiving further assistance from the private sector to hold individuals accountable for corporate violations, as well as to pursue prohibited transactions under the various sanctions and export control regimes under US law.

Prior guidance, issued in October 2016, included no such presumption nor any well-defined advantages for self-reporting companies.⁵ Under the new policy, companies making voluntary disclosures to the DOJ's NSD will know precisely what they can expect to get in return.

The DOJ wanted to assure companies that the benefits of voluntary self-disclosure would be "concrete and significant."

In the words of Assistant Attorney General John C. Demers, the Department wanted to assure companies that the benefits of voluntary self-disclosure would be "concrete and significant."⁶

Companies should now seriously consider self-reporting to DOJ, as well as civil agencies such as OFAC and BIS, when disclosing a potential violation of US trade sanctions and export control laws in cases where there is willfulness or the company otherwise believes that DOJ may have concurrent jurisdiction in addition to the regulatory agency.

While the revised Voluntary Self-Disclosure Policy was designed to provide "concrete and significant" benefits to companies, the possibility that the new policy may create certain other collateral consequences, such as an increase in individual prosecutions, remains to be seen.

NOTES

¹ See U.S. Dep't of Justice, Export Control and Sanctions Enforcement Policy for Business Organizations (<https://bit.ly/2NMZoxD>) (Dec. 13, 2019) (hereinafter "VSD Policy").

² See Press Release, U.S. Dep't of Justice, Department of Justice Revises and Re-Issues Export Control and Sanctions Enforcement Policy for Business Organizations (<https://bit.ly/3aoRgge>) (Dec. 13, 2019).

³ See VSD Policy at 6.

⁴ See *id.*

⁵ See, e.g., A&P Advisory (Oct. 26, 2016), Self-Disclosing Criminal Export Violations: The New Guidance. (<https://bit.ly/38nQw9e>)

⁶ See Press Release, U.S. Dep't of Justice, Department of Justice Revises and Re-Issues Export Control and Sanctions Enforcement Policy for Business Organizations (<https://bit.ly/2NNI7Fx>) (Dec. 13, 2019).

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