

# Important New Guidance for Companies Considering Voluntary Disclosures of Export Control and Sanctions Violations

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On December 13, 2019, the U.S. Department of Justice's National Security Division (NSD) issued important new policy guidance regarding voluntary disclosures of export control and sanctions laws violations. Among other things, the latest policy – which is effective immediately – makes clear that companies will not receive mitigation credit for potentially willful violations of these laws unless they make voluntary disclosures and otherwise cooperate with both the federal agency concerned and the NSD. Companies conducting internal investigations and considering whether a voluntary self-disclosure may be warranted should carefully review this latest policy and factor it into their decision-making.

The new policy applies to voluntary disclosures of “potentially willful violations” of the Arms Export Control Act and International Traffic in Arms Regulations (ITAR), the Export Control Reform Act and Export Administration Regulations (EAR), and the International Emergency Economic Powers Act (IEEPA) and economic sanctions issued pursuant to that statute by the U.S. Treasury Department's Office of Foreign Assets Control (OFAC). “Potentially willful violations” are defined as those resulting from an act that was done with knowledge that it was illegal. Adopting the standard articulated in the 1998 Supreme Court case of *Bryan v. United States*, the policy emphasizes that in identifying willful acts, NSD is “not required to show that the defendant was aware of the specific law, rule, or regulation that its conduct may have violated.”

To receive mitigation credit under the policy, a company must disclose the underlying conduct to both the administrative agency concerned (i.e., Commerce, State, and/or OFAC) and NSD's Counterintelligence and Export Control Section (CES) before there is “an imminent threat of disclosure or government investigation.” Further, the company must file its voluntary disclosure “within a reasonably prompt time after becoming aware” of the violation. Finally, the company must disclose all relevant facts known to it at the time of the disclosure and that it becomes aware of thereafter, including “as to any individuals substantially involved in or responsible for the misconduct at issue.” This last point continues the Department of Justice's emphasis on individual accountability for corporate wrong-doing as articulated in the Yates Memo of 2015 and the 2018 Justice Manual.

Overall, the latest NSD policy guidance underscores the importance of acting promptly and holistically to address potential export control and sanctions violations. Where there is any indication that the underlying conduct was willful, companies should act immediately and coordinate the disclosure process carefully and consider filing with both the NSD and the relevant administrative agency. Moreover, the policy's emphasis on "proactive cooperation," individual accountability, and "timely and appropriate remediation" should completely dispel any notion that voluntary disclosures are a case of "file and forget it."

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