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New DOJ Guidance for Companies Considering Voluntarily Self-Disclosing Potentially Criminal Export Control and Sanctions Violations

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The U.S. Department of Justice (DOJ), National Security Division (NSD), recently published updated[1] policy guidance, effective immediately, for companies considering whether to voluntarily self-disclose potentially criminal violations of U.S. export control and sanctions statutes.[2] The policy, dated Dec. 13, 2019, discusses the criteria used in determining how cases will be resolved when a company makes such a voluntary self-disclosure to the Counterintelligence and Export Control Section of DOJ's NSD.[3] The policy states that the national security impact of such criminal violations distinguishes such cases from others because the NSD, working with U.S. Attorneys' Offices, must balance dual goals of encouraging such disclosures with deterrence.

The new guidance articulates benefits under the policy. A company (1) voluntarily disclosing, (2) fully cooperating, and (3) timely and appropriately remediating will receive a presumption that it will neither be prosecuted nor criminally fined as long as there are no aggravating factors. The policy lists examples of aggravating factors, including the sensitivity of the export, the identity of the end user as a terrorist or hostile foreign power, the number of violations, the participation of senior management, and significant profit.

If there are such aggravating factors, and a deferred prosecution agreement, guilty plea, or other criminal resolution is appropriate, then the NSD will offer such companies the benefits of not requiring appointment of a monitor[4] and recommend a reduced criminal fine to the sentencing court. The recommended fine would be at least 50 percent less than the amount available under the alternative fine provision (twice the illicit gain or loss) on which prosecutors rely in export control and sanction violation cases. In other words, the NSD would be recommending a fine capped at the gain or loss in the illegal transactions.

The updated policy provides guidance on when a disclosure is voluntary, what is considered full cooperation, and what is considered timely and appropriate remediation. It reiterates guidance from the previous policy, such as stating a company needs to disclose potentially willful violations to the NSD to obtain the benefits of a voluntary self-disclosure under this policy (disclosures to regulatory agencies do not qualify). It also states how a cornerstone of timely and appropriate remediation is implementing an effective compliance program.

Notably, the new policy also states the following:

- **Companies in M&A transactions may receive benefits.** The policy clarifies that when a company uncovers violations in an entity that it has acquired or with which it merged through timely due diligence, it will benefit from a presumption of non-prosecution, provided that it takes the actions outlined in the policy. In "appropriate instances," a company might also receive such a presumption even if it uncovers the violation in post-acquisition integration/auditing.

- **No Retention of Unlawfully Obtained Gains.** The earlier policy stated that a company should not be permitted to retain any unlawfully obtained gain, even when it is eligible for reduced penalties. This policy clarifies that even when a company receives a non-prosecution agreement, it will not be allowed to retain any of the ill-gotten gains from the violations.

This updated DOJ NSD policy is an important resource for any business that has identified potentially willful violations of U.S. export controls or sanctions, or is looking to enhance its corporate compliance program. The DOJ and Office of Foreign Assets Control (OFAC) issued compliance guidelines earlier in 2019 that are also valuable resources for companies. See Dinsmore's previous alert on The DOJ's "Evaluation of Corporate Compliance Programs," released on April 30, 2019. OFAC's "A Framework for OFAC Compliance Commitments" was released on May 2, 2019.

For more information, please contact Ivan W. Bilaniuk or your Dinsmore attorney. Dinsmore can assist with evaluating how this updated policy guidance affects your business or your corporate compliance program with its combination of international trade compliance attorneys and white-collar crime attorneys, who include former federal prosecutors.

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[1] This DOJ policy guidance, titled "Export Control and Sanctions Enforcement Policy for Business Organizations" supersedes DOJ's previous policy guidance published in October 2016.

[2] The primary U.S. export control and sanctions statutes are the Arms Export Control Act (AECA), the Export Control Reform Act (ECRA), and the International Emergency Economic Powers Act (IEEPA).

[3] The policy guidance expressly states that it is not intended to alter the practice of companies to voluntarily self-disclose violations of U.S. export controls and sanctions to the appropriate agency pursuant to the relevant agency's regulations:

- The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, for violations of the International Traffic in Arms Regulations (ITAR);
- The Bureau of Industry Security (BIS), U.S. Department of Commerce, for violations of the Export Administration Regulations (EAR); and
- The Office of Foreign Assets Control (OFAC), U.S. Department of the Treasury, for violations of U.S. sanctions regulations.

When a company becomes aware that its violations may have been willful, or done with the knowledge that they are illegal, however, then this policy guidance encourages an additional disclosure to the NSD. This policy uses the definition of willfulness in *Bryan v. United States*, 524 U.S. 184 (1998).

[4] Appointment of a monitor requires a company having to hire, at its own expense, an independent consultant or law firm for a given number of years, whose responsibility would be to assess a company's compliance and verify that the company is complying with the terms of its settlement with the U.S. government. The monitor would issue periodic reports to the company and DOJ.

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