

Department of Justice Revises Export Control and Sanctions Enforcement Policy for Business Organizations

Key Notes:

- The revised Voluntary Self-Disclosure Policy builds on the guidance DOJ's National Security Division (NSD) issued in October 2016.
- This revised policy signals DOJ's continued emphasis on corporate voluntary self-disclosure, rewarding cooperating companies with a presumption in favor of a non-prosecution agreement and significant reductions in penalties.
- The policy was effective on December 13, 2019, and applies only to export control and sanctions matters brought by the NSD's Counterintelligence and Export Control Section.

On December 13, 2019, the U.S. Department of Justice (DOJ) released a [revised policy](#) for companies regarding voluntary self-disclosures of export control and sanctions violations. The revised policy was effective on the date of its release and will be formally incorporated into the [Justice Manual](#). In releasing the revised Voluntary Self-Disclosure Policy (VSD Policy), Assistant Attorney General for National Security John C. Demers stated, "Protecting our nation's sensitive technologies and preventing transactions with sanctioned entities are DOJ priorities, but we cannot succeed alone ... We need the private sector to come forward and work with DOJ. The revised VSD Policy should reassure companies that, when they do report violations directly to DOJ, the benefits of their cooperation will be concrete and significant."

U.S. Export Control and Sanctions Regulations

Export control and sanctions regulations covering the shipment of goods outside of the United States are generally administered by three federal government agencies:

1. The Department of the Treasury's Office of Foreign Assets Control (OFAC) implements various U.S. economic sanctions and trade embargoes (31 C.F.R. Parts 501-598 and related presidential executive orders);
2. The Department of State's Directorate of Defense Trade Controls (DDTC) implements the International Traffic in Arms Regulations (ITAR) covering defense articles and services (22 C.F.R. Parts 120-130); and
3. The Department of Commerce's Bureau of Industry and Security (BIS) implements the Export Administration Regulations (EAR) covering the export of "dual-use" articles that have both commercial and potential defense applications (15 C.F.R. Parts 730-774).

Each of these agencies has voluntary self-disclosure regulations that allow companies to disclose potential civil export control violations. Providing such self-disclosure typically allows for reduced penalties when the violations were inadvertent, limited in nature, not significant, and the affected company has shown that necessary "corrective actions" have been taken to reduce the likelihood of future violations. In more serious cases including willful and knowing violations, the investigation and any resulting

enforcement action can also be referred to DOJ for criminal prosecution.

DOJ's Revised VSD Policy

DOJ encourages companies to voluntarily self-disclose all potentially willful violations of export control and sanctions regulations to the relevant agency(ies), as well as directly to DOJ. DOJ notes that a "willful" violation is deemed to be when a person or company undertakes an export transaction with the knowledge that it is illegal. The VSD Policy, as revised, continues to set forth criteria that DOJ uses in determining an appropriate resolution for a company that makes a voluntary self-disclosure in export controls and/or sanctions matters.

DOJ notes that the benefits of its revised VSD Policy are that "when a company (1) voluntarily self-discloses export control or sanctions violations ..., (2) fully cooperates, and (3) timely and appropriately remediates, ... there is a presumption that the company will receive a non-prosecution agreement and will not pay a fine, absent aggravating factors." Aggravating factors typically involve incidents and exports that "represent elevated threats to the national security and that, if present to a substantial degree, could result in a more stringent resolution for an organization that has engaged in criminal export control and/or sanctions violations."

The VSD Policy is intended to further deter export control and sanctions violations, encourage companies to implement strong compliance programs to prevent and detect such violations, and increase the ability of the DOJ to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove.

Key Changes to VSD Policy

DOJ's revised VSD Policy includes three key changes from DOJ's prior guidance.

1. The VSD Policy clarifies that, absent aggravating factors, there is a presumption that the company will receive a non-prosecution agreement and will not be

assessed a fine. If aggravating circumstances warrant an enforcement action other than a non-prosecution agreement, but the company satisfies all other criteria set forth in the policy, DOJ will recommend a fine that is at least 50 percent lower than what would otherwise be available under the alternative fine provision and will not require the imposition of a monitor.

2. The VSD Policy clarifies that disclosures of potentially willful conduct made to regulatory agencies, but not also to DOJ, will not qualify for the benefits provided in the VSD Policy. Thus, in order to be considered a voluntary self-disclosure to DOJ, a company must make the disclosure to the NSD's Counterintelligence and Export Control Section "within a reasonably prompt time after becoming aware of the offense" and while demonstrating timeliness. Further, the company must disclose all relevant facts known at the time of disclosure, including any individuals substantially involved in or responsible for the misconduct.

After the initial disclosure, the company must continue to fully cooperate with DOJ by: (i) making a full disclosure on a timely basis, including attribution of facts to specific sources; (ii) proactively disclosing facts discovered during the internal investigation; (iii) ensuring the preservation, collection and disclosure of relevant documents; and, (iv) making available for DOJ interviews relevant company officers and employees.

In order to receive full credit for timely and appropriate remediation, a company must first demonstrate a thorough analysis of causes of underlying conduct (i.e., a root cause analysis) and any actions taken to address the cause. The company must show the implementation of (or revisions and updates to) a compliance program, as well as disclose appropriate discipline of employees involved in the misconduct. DOJ will also consider any additional steps taken to demonstrate the company's recognition of the seriousness of the misconduct and its acceptance of responsibility for the violation.

3. The VSD Policy was drafted to more closely resemble existing guidance from other DOJ components in an effort to standardize DOJ voluntary disclosure policies. Specifically, the definitions of "Voluntary Self-Disclosure," "Full Cooperation," and "Timely and Appropriate Remediation" closely mirror those provided in the [FCPA Corporate Enforcement Policy](#).

For additional guidance, see also Thompson Hine International Trade Update of July 15, 2019, "[U.S. Government Agencies Stress the Importance of Corporate Compliance Programs Through the Issuance of Guidance Documents](#)" and Thompson Hine White Collar/FCPA Update of December 4, 2018, "[Yates Memo Revised to Provide DOJ Greater Flexibility in Corporate Investigations](#)."

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