Client Alert

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DOJ Revisions to Export Control and Sanctions Voluntary Disclosure Policy

What Happened: In December 2019, the U.S. Department of Justice ("DOJ") announced that it had revised its 2016 policy on export control and sanctions in an effort to incentivize companies to voluntarily disclose potential violations and cooperate with investigations.

The revised policy builds upon DOJ guidance issued in October 2016. It provides definitions and clarifications of the benefits that a company can receive if it voluntarily discloses potential violations to the DOJ, fully cooperates with the prosecutors and appropriately remediates the underlying conduct. Most significantly, in the absence of aggravating factors, fully cooperating companies can expect to receive a non-prosecution agreement and not to be fined.

Background

The DOJ's previous guidance regarding voluntary self-disclosures ("VSD") in export control and sanctions investigations was issued in October 2016 and provided only for "a significantly reduced penalty, to include the possibility of a non-prosecution agreement," for any company that disclosed potential violations of export controls and sanctions. The 2016 guidance also explicitly stated that it did not apply to financial institutions because of their "unique reporting obligations under their applicable statutory and regulatory regimes."

Analysis

The new policy from the DOJ's National Security Division ("NSD") stipulates that "absent aggravating factors," a company that 1) voluntarily discloses export control or sanctions violations to the Counterintelligence and Export Control Section ("CES") of the NSD; 2) fully cooperates with any resulting DOJ investigation; and 3) promptly and appropriately remediates the issue can presume that it will receive a non-prosecution agreement and will not pay a fine.

John Demers, assistant attorney general for national security, said in a DOJ press release that "[t]he 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."

The guidance pertains to potential violations of the Arms Export Control Act, the Export Control Reform Act and the International Emergency Economic Powers Act. The revised policy also allows financial institutions to benefit from self-reporting trade violations, unlike the former 2016 policy.

Under the new policy, companies must take three steps to get credit from the DOJ for a voluntary disclosure. First, it must disclose the conduct to CES before any imminent threat of a government investigation or disclosure of the conduct by other sources. Second, the disclosure must be timely—"within a reasonably prompt time after becoming aware of the offense." And finally, the company must

provide as much relevant information as it knows at the time of the disclosure, to include identifying individuals involved in or responsible for the misconduct.

The DOJ considers several factors to assess whether a reporting company is entitled to credit for full cooperation. Such factors include timeliness of the disclosure; proactive cooperation with the DOJ (that is, offering up information relevant to the investigation even before being specifically asked); timely preservation, collection and production of relevant documents; and assisting the DOJ with making employees available for interviews.

Finally, the reporting company must demonstrate that it has effectively remediated the issues that led to the misconduct. Required actions include: identifying the root cause of the underlying conduct; implementing an effective compliance program; disciplining employees involved in the misconduct; and taking any other steps showing that the company has accepted responsibility for the misconduct and taken effective steps to remediate future risks.

In certain situations, however, aggravating factors may be present that the government determines involve greater risks to national security, in which case organizations may expect to face more severe resolution outcomes even if they voluntarily self-disclose. Such aggravating factors include the export of items known to be used in the construction of weapons of mass destruction; exports of military items to a hostile foreign power; and evidence of repeated violations or the knowing involvement of upper management in the criminal activity. In cases involving potential aggravating factors, the DOJ might determine that a different resolution is warranted when a company has voluntarily self-disclosed, cooperated and remediated, such as a deferred prosecution agreement or guilty plea. In such situations, prosecutors will recommend at least 50% off the fine and will not require the appointment of a monitor if the company has an effective compliance program at the time of resolution.

The policy also makes clear that if a company identifies potentially willful misconduct, but chooses to report only to a regulatory agency (such as the Treasury Department's Office of Foreign Assets Control or the Department of Commerce's Bureau of Industry and Security), the company will not qualify for the benefits of voluntary self-disclosure in any subsequent DOJ investigation (though on the other side of the coin, the company should still make any voluntary self-disclosures to regulatory agencies that it deems appropriate, even if it also self-discloses to the DOJ).

The revised guidance comes as the DOJ continues to standardize its voluntary disclosure policies across divisions. The policy revisions mirror changes that the DOJ's Criminal Division made to its voluntary disclosure policy for violations of the Foreign Corrupt Practices Act. Both divisions now expect companies to demonstrate the same three requirements — disclosure, full cooperation and remediation — to benefit from voluntary self-disclosure.

Conclusion

The revised policy should further encourage companies to implement strong export control and sanctions compliance programs to prevent and detect violations. When considering whether to self-disclose to the DOJ, companies should consider a number of factors, such as:

- the likelihood that the DOJ will discover the misconduct from another source (such as from a whistleblower or another regulator);
- when during the internal investigation the misconduct should be disclosed to the government;
- which agencies should receive the disclosure (and in what sequence); and

- whether any aggravating factors are present that might influence the plan or strategy for self-disclosure.

By taking these and other factors into account, companies that uncover misconduct can enhance their prospects of minimizing institutional liability to the extent possible. Doing so may help companies control the narrative in any conversations with the DOJ about disclosing misconduct, while having the security of knowing that full cooperation and remediation will lead to significantly less punitive and onerous outcomes.

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