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DOJ's New Policy Incentivizes Voluntary Self-Disclosure of Criminal Export Controls and Sanctions Violations.

Contents

The Department of Justice ("**DOJ**") recently issued new guidance (the "**Guidance**") on its policy incentivizing companies to voluntarily self-disclose potential criminal violations of the export controls and economic sanctions restrictions under the Arms Export Control Act and the International Emergency Economic Powers Act.[1] On October 2, 2016, DOJ's National Security Division ("**NSD**") quietly issued the Guidance on its website, with little fanfare or press attention, that illustrates how companies making voluntary self-disclosures may receive reduced penalties for criminal export controls or sanctions violations.

The Export Control Section ("**CES**") of the NSD is responsible for investigating and prosecuting criminal violations of the various export controls and sanctions laws. In the new Guidance, DOJ offers incentives to companies that self-report sanctions violations, take measures to prevent future violations, and cooperate with prosecutors. Notably, the Guidance does not apply to financial institutions because of their unique reporting obligations.[2] DOJ's Asset Forfeiture and Money Laundering Section ("**AFMLS**") will continue to spearhead investigations for criminal violations of export controls and economic sanctions involving

[1] *Guidance Regarding Voluntary Self-Disclosures, Cooperation and Remediation in Export Control and Sanctions Investigations Involving Business Organizations,* National Security Division, U.S. Department of Justice (Oct. 2, 2016).

[2] "Because financial institutions often have unique reporting obligations under their applicable statutory and regulatory regimes, this Guidance does not apply to financial institutions. Multiple DOJ components, including NSD and the Asset Forfeiture and Money Laundering Section of the Criminal Division (AFMLS), often work together and alongside the responsible U.S. Attorney's Office as well as federal and state regulatory agencies in the investigation and prosecution of export control, sanctions, and other criminal violations by financial institutions. Nevertheless, financial institutions are encouraged to make voluntary disclosures to DOJ and may benefit from such disclosures under DOJ policy applicable to all business organizations. *See, e.g.,* USAM § 9-28.900 ("[P]rosecutors may consider a corporation's timely and voluntary disclosure, both as an independent factor and in evaluating the company's overall cooperation and the adequacy of the corporation's compliance program and its management's commitment to the compliance program."). Financial institutions should continue to submit voluntary self-disclosures to AFMLS or the relevant U.S. Attorney's Office. In cases involving potential violations of export controls or sanctions, AFMLS or the U.S. Attorney's Office will then consult with NSD and AFMLS consistent with the U.S. Attorneys' Manual." Guidance, at 2 n.3.

financial institutions, but will coordinate with NSD, the U.S. Attorney's Office, and other state and regulatory agencies. Even though the Guidance does not apply to financial institutions, it stresses that financial institutions are encouraged to make voluntary disclosures to DOJ, and, by doing so, may benefit from the disclosures under DOJ policy applicable to all business organizations.

NSD's program is similar to the Fraud Section's Foreign Corrupt Practices Act ("**FCPA**") pilot program announced in April of this year offering reduced penalties and other incentives for companies that voluntarily self-disclose bribery offenses. Like the FCPA pilot program, the Guidance outlines (1) the requirements for companies seeking credit from DOJ for voluntary self-disclosure, (2) potential aggravating factors that could limit the credit companies can receive for voluntary self-disclosure, and (3) the potential benefits available to companies that comply with the requirements.

1 What changes does the new Guidance set forth?

DOJ does not intend the new Guidance to alter the standard practice under which companies submit voluntary self-disclosures to the appropriate regulatory agencies, including the Treasury Department's Office of Foreign Assets Control ("**OFAC**"), the Commerce Department's Bureau of Industry and Security ("**BIS**"), or the State Department's Directorate of Defense Trade Controls ("**DDTC**"). Typically, these agencies would conduct an investigation and only refer a matter to NSD if it is determined that the misconduct was "willful."

In the past, DOJ credit was based on the original disclosure to the appropriate agency and on continued cooperation with DOJ once the matter had been referred. Under the new Guidance, a company must make a separate voluntary self-disclosure to CES at the outset to receive DOJ cooperation credit. A voluntary self-disclosure to the agency that originally investigates the potential violation does not qualify as a voluntary self-disclosure under the Guidance. A company, therefore, must voluntarily self-disclose to CES within a "reasonably prompt time" after determining that conduct disclosed to another agency "may have been willful."

2 What does DOJ require for a company to receive voluntary self-disclosure credit?

To be eligible for DOJ credit for self-disclosure, a company must (1) voluntarily self-disclose the potentially willful misconduct, (2) cooperate with DOJ throughout the investigation, and (3) take appropriate remedial measures. The Guidance notes that prosecutors should evaluate a disclosing company's cooperation and internal investigation based on the company's relative size and sophistication and the misconduct alleged. Companies must also demonstrate that they have implemented an effective internal compliance regime, but this too can be proportionate to the size and resources of the company.

2.1 Voluntary Self-Disclosure

A company's disclosure must be voluntary, meaning made "prior to an imminent threat of disclosure or government investigation." The disclosure must be made to both CES and the appropriate regulatory agency "within a reasonably prompt time after becoming aware of the offense." The Guidance does not, however, require simultaneous disclosures; disclosure to CES must be made promptly "after becoming aware…that the violations may have been willful." The company is required to disclose "all relevant facts known to it," including which individuals were involved in the misconduct.

2.2 Cooperation

DOJ lists various requirements for a company's behavior to constitute "cooperation." The company's cooperation must be "proactive" – it should preserve, collect, and disclose relevant facts and documents, including those related to conduct by third parties and individuals. Likewise, the company must provide DOJ with timely updates and make current and former employees and officers available for interviews. The company must also disclose all relevant facts gathered during its independent investigation and identify sources for those facts, when doing so does not violate attorney-client privilege.

2.3 Remedial Measures

The company must take "timely and appropriate" remedial measures to reduce the recurrence of misconduct. Requirements for remedial credit include the implementation of an effective compliance program (based on the size and resources of the company), appropriate discipline of employees and a system that provides for the possible disciplining of others, and additional steps to demonstrate "recognition of the seriousness of the corporation's criminal conduct, [and] acceptance of responsibility for it."

The Guidance notes that a company cannot fail to cooperate and then expect DOJ credit for remediation. Moreover, a company must first be eligible for cooperation credit prior to consideration for remedial credit.

3 What are the benefits and risks associated with the new voluntary self-disclosure program?

3.1 The Benefits of Self-Disclosure (according to DOJ)

Voluntary self-disclosure could lead to a significantly reduced penalty for companies that fully cooperate with the DOJ and undertake remedial measures. The resolution for companies that comply with the new Guidance could include a non-prosecution agreement ("**NPA**") or a deferred prosecution agreement ("**DPA**"), a reduced period of supervised compliance, a reduced fine, and/or no requirement for a monitor.

The resolution will depend on the totality of circumstances and the specific facts underlying a violation. It is possible for a company that did not voluntarily self-disclose to receive some credit, if, when it is notified of potential violations, it cooperates fully and works to remediate the practices that led to the violations.

3.2 Potential Risks of Self-Disclosure under the Program

The DOJ's requirement that voluntary self-disclosure be made to CES when a company believes "that the violations may have been willful" places companies in the delicate position of characterizing their conduct to the DOJ as potentially criminal, whereas voluntary self-disclosure to other authorities, including OFAC and BIS, does not carry that connotation. It is, therefore, essential that companies separately analyze whether to voluntarily self-disclose potential violations to CES, because the self-disclosure to CES may increase the likelihood that violations will be viewed by DOJ as potentially criminal.

3.3 DOJ's List of Potential Aggravating Circumstances

The Guidance identifies several factors that could result in a more stringent penalty for companies:

> exports of items controlled for nuclear non-proliferation or missile technology reasons to a proliferator country;

> exports of items known to be used in the construction of weapons of mass destruction;

> exports to a terrorist organization;

> exports of military items to a hostile foreign power;

> repeated violations, including similar administrative or criminal violations in the past;

> knowing involvement of upper management in the criminal conduct; and

> significant profits from the criminal conduct, including disproportionate profits or margins, whether intended or realized, compared to lawfully exported products and services.

Even in situations where one or more potentially aggravating circumstances is present, the Guidance advises that a company would still find itself in a better position by voluntarily self-disclosing.

4 How does the Guidance compare with DOJ's policy priorities announced in the Yates Memo?

The new Guidance reflects the policy priorities announced by Deputy Attorney General Sally Yates in her September 2015 memorandum on "Individual Accountability for Corporate Wrongdoing" (widely known as "**the Yates Memo**"), and the subsequent amendments to the United States Attorneys' Manual

("**USAM**") to advise prosecutors on how to implement the policies set forth in the Yates Memo.

Together, these policy changes clarified DOJ's requirements for cooperation credit. Previously, cooperation credit had been incremental – companies could receive cooperation credit for some cooperation, even if they did not fully cooperate and provide all the information DOJ sought. Under the Yates Memo and the USAM as revised, there is a threshold requirement that companies must meet to receive DOJ cooperation credit. Companies are to provide complete information regarding the wrongdoing of individuals. The new Guidance, which advises companies to disclose "on a timely basis…all facts relevant to the wrongdoing at issue, including all facts related to involvement in the criminal activity by the corporation's officers, employees, or agents," is in line with the policy outlined in the Yates Memo and the USAM.

The USAM revisions also include a new section on "Voluntary Disclosures." Prosecutors may consider voluntary disclosures in evaluating a company's cooperation, "both as an independent factor and in evaluating the company's overall cooperation and the adequacy of the corporation's compliance program and its management's commitment to the compliance program." The USAM advises, however, that "prosecution may be appropriate notwithstanding a corporation's voluntary disclosure. Such a determination should be based on a consideration of all the factors set forth in these Principles." The new Guidance closely follows this section on voluntary disclosure and states that even in light of a corporation's voluntary self-disclosure, a resolution will be based on a totality of the circumstances, taking into account specific facts and potentially aggravating circumstances.

5 Takeaways

The Guidance, while limited to companies that are not financial institutions, is an important confirmation that DOJ's focus on voluntary self-disclosure in the Yates Memo and its amendments to the USAM applies equally to criminal export controls and sanctions violations. It is also an important reminder to companies of their obligation to voluntarily self-report potentially willful violations to CES, in addition to making parallel self-disclosures to relevant regulatory agencies. The emphasis on parallel self-reporting, however, increases the stakes for companies. Companies must carefully weigh the benefits of reporting conduct to CES (and thereby labelling their conduct potentially criminal), against the risk that self-reporting could increase the likelihood of a criminal investigation when another agency might otherwise handle the violation as a civil matter.

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