Client Alert

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DOJ Provides Additional Incentives for Voluntary Self-Disclosures of Criminal Export Controls and Sanctions Violations

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Key Points

- On December 13, 2019, the Department of Justice (DOJ) revised and re-issued its "Export Controls and Sanctions Policy for Business Organizations" (the "Revised Policy") to "provide greater clarity for companies faced with a voluntary disclosure decision, and . . . encourage more organizations to report to [DOJ]."[1]
- The revised policy makes several important changes to DOJ's previous guidance issued on October 2, 2016. These changes are designed to encourage companies to take advantage of the self-disclosure process by more clearly defining the benefits of disclosure and the entities to whom these benefits may apply. The new policy also clarifies that disclosures involving potentially willful violations must be submitted to DOJ—not just regulatory agencies—in order to obtain the benefits under the policy.
- It is unclear whether this will drive a meaningful increase in the number of voluntary disclosures to DOJ for export controls and sanctions violations as there are a number of additional factors a company must consider when deciding whether and to which agency to disclose.

What Does This Policy Change?

- More Concrete Definition of Benefits. The Department's original policy, issued on October 2, 2016 (see alert here), provided that voluntary disclosure to DOJ would make companies eligible for reduced penalties, but did not provide specifics with respect to the associated criteria for obtaining the reductions or the potential amounts of such reductions. In contrast, as discussed below, the Revised Policy establishes concrete criteria that, if met, create a presumption for resolving a matter with a non-prosecution agreement (NPA) and no fine, absent aggravating factors.
- Requirement that Disclosure be Made by the Company Directly to DOJ. Under the Revised Policy, a company must voluntarily disclose to the Counterintelligence and Export Control Section (CES) of DOJ's National Security Division all potentially willful misconduct relating to export controls and sanctions in order to qualify for any benefits of the Revised Policy. This is an important clarification as the 2016 policy

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did not specifically address how DOJ would credit companies that only submitted disclosures of potentially willful conduct to a regulatory agency (e.g., the State Department's Directorate of Defense Trade Controls (DDTC), the Commerce Department's Bureau of Industry and Security (BIS) and/or the Treasury Department's Office of Foreign Assets Control (OFAC)). This clarification appears designed to further incentivize companies to self-disclose to DOJ in a way that the original policy did not.

Given that these regulatory agencies already have the ability to refer potentially criminal conduct to DOJ and that BIS, for example, is itself a law enforcement agency, the requirement to disclose potentially criminal conduct directly to CES places the burden on disclosing companies to determine whether the conduct at issue is potentially criminal. This is so even where a regulatory agency has not yet identified a violation—a key distinguishing factor from Foreign Corrupt Practices Act (FCPA) cases.

- Change in Definitions to Align with Other DOJ Policies. In an effort to make department policies more consistent, DOJ also revised the definitions to align certain terminology—for example, "voluntariness," "full cooperation," and "timely and appropriate remediation"—with existing DOJ guidance and voluntary disclosure policies relevant to other areas of law, such as the FCPA Corporate Enforcement Policy.
- Financial Institutions Can Take Advantage of Revised Policy. The original 2016 policy specifically provided that financial institutions could not take advantage of this voluntary disclosure policy and were advised to submit voluntary disclosures relating to export controls or sanctions violations to what is now called the Money Laundering and Asset Recovery Section of the Criminal Division and/or the relevant U.S. Attorney's Office. Going forward, all business organizations, including financial institutions, are eligible for the benefits offered by the Revised Policy.
- Benefits of Revised Policy Apply to Successor Liability. The Revised Policy provides that if a successor company uncovers, through timely due diligence or post-acquisition audits, willful export controls or sanctions violations by the company it acquired, or with which it merged, and voluntarily self-discloses the violations to DOJ and takes action consistent with the Revised Policy (including the timely implementation of an effective compliance program at the merged or acquired entity), the successor company will benefit from a presumption of an NPA. With this policy, DOJ has focused on steps that companies should take when considering mergers and acquisition, emphasizing once again the importance of thorough due diligence, corrective actions and remediation, and ensuring the acquired entity maintains policies and procedures designed to promote compliance with export controls and sanctions.

What Benefits Does the Revised Policy Provide For Disclosing Companies?

The Revised Policy provides additional guidance and clarifies the benefits for companies that make voluntary disclosures of potentially willful criminal violations of U.S. export controls and sanctions laws to CES.

- Presumption of NPA in Absence of Aggravating Factors. The Revised Policy creates the presumption that, absent aggravating factors, a company will receive an NPA and will not pay a fine if it (1) voluntarily discloses potentially willful violations to CES; (2) fully cooperates; and (3) timely and appropriately remediates. The

Revised Policy provides further guidance on the interpretation of each of these factors that clients should review and consider.

- Significant Reduction in Penalties May be Provided Even Where Aggravating Factors are Present. Even when aggravating factors counsel toward a more serious criminal resolution—such as a deferred prosecution or guilty plea—if the company satisfies all other criteria, DOJ will recommend a fine that is at least 50 percent less than the amount provided for under the alternative fines provision in Title 18 (essentially capping the fines at no more than the gross gain or loss) and will not require a monitor if the company has implemented an effective compliance program at the time of the resolution of the matter. At a minimum, however, the company will not be permitted to retain any of the unlawfully obtained gain. Further, consistent with DOJ policy, CES will endeavor to coordinate with and consider the amount of fines, penalties and/or forfeiture paid to other federal, state, local or foreign enforcement authorities that are seeking to resolve a case with the company based on the same misconduct.

Factors Companies Should Consider When Deciding to Disclose to CES or Other Agencies

Companies should keep in mind that the considerations for disclosure are very fact specific and should be carefully assessed because they will differ for each case and for each client.

Companies should also consider the appropriate time in an internal investigation to disclose to DOJ, and to other regulatory agencies.

Companies may also further consider (1) whether the submission of a regulatory and/or DOJ disclosure triggers the need for a public disclosure, and (2) the effect of a disclosed violation under their financing and other material agreements. For instance, financing agreements typically include covenants and representations that the company has been, and remains, in compliance in all material respects with sanctions laws. A breach of these covenants or representations may trigger the agreement's default provisions. Devising a communication plan, including public disclosure and/or for notifying lenders and contractual counterparties of these issues at the same time the company is preparing the voluntary self-disclosure may also be advisable.

[1] Press Release, Dep't of Justice, New Export Controls and Sanctions Enforcement Policy for Business Organizations, (Dec. 13, 2019) (https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-david-burns-delivers-remarks-announcing-new).

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