The Self-Disclosure Calculus After Tri-Seal Compliance Note

By **Anne Borkovic, Ryan Fayhee and Blair Campion** (September 1, 2023)

Anne Borkovic

Ryan Fayhee

Blair Campion

On July 26, the U.S. Department of Commerce, the U.S. Department of Justice and the U.S. Department of the Treasury issued their second-ever tri-seal compliance note.[1]

The note describes expectations for companies voluntarily self-disclosing potential violations of sanctions, export control and other national security laws, urging voluntary self-disclosures without regard to whether there is an administrative or criminal violation.

This is an important note to review, incorporate into any disclosure decisions, and use to update internal analysis of potentially willful or significant violations.

Key Points

The note follows updated enforcement policies issued by the DOJ and the Commerce Department's Bureau of Industry and Security to further incentivize voluntary self-disclosures and reward whistleblowers earlier this year. It augments, but does not change, either policy or analysis.[2]

In sum, the note reinforces the prioritization of the enforcement of these matters, as well as the unprecedented multiagency coordination effort, all of which has been supported by additional significant resources.

Voluntary self-disclosures can significantly mitigate civil and criminal liability for companies, but they must be timely, accurate and complete, and backed by full cooperation and remediation of identified violations.

Importantly, the note makes clear that voluntary self-disclosures to the DOJ without aggravating factors are presumed to be resolved with a nonprosecution agreement.

However, voluntary self-disclosures to only the BIS and the Office of Foreign Assets Control that disclose criminal violations will not be afforded such a presumption.

This may incentivize companies to disclose potential violations to the DOJ even where the conduct at issue was not willful, but also carries risk because assessing criminal intent is far more challenging in these highly technical matters, in comparison to inherently problematic conduct involving, for example, foreign bribery and corruption.

Conducting internal investigations of potential violations is critical, and the strength of a company's compliance program and success in conducting internal investigations will be carefully considered by the DOJ, the BIS and OFAC.

Companies are well advised to review their disclosure processes and compliance programs

to ensure they align with the guidance and enforcement priorities discussed in the note.

Overview

The note focuses on the incentives available to companies that choose to voluntarily self-disclose violations, and how companies can ensure any disclosure conforms to published guidelines in order to receive full disclosure credit.

Credit for a voluntary self-disclosure can extend as far as a nonprosecution agreement or a 50% reduction in the base penalty amount for civil or criminal penalties, with the potential for further discretionary mitigation of monetary penalties.

A central theme of the note is that companies must timely and comprehensively disclose nonprivileged factual information concerning the potential violations, fully cooperate with the investigating agency, and appropriately remediate any violations in order to receive full credit for a voluntary self-disclosure.

The DOJ, the BIS and OFAC may also consider the existence and strength of a company's compliance program and whether disciplinary measures were taken in connection with the violations.

While there is significant overlap in how the individual agencies treat voluntary self-disclosures, each agency maintains distinct guidance, and companies must make separate disclosures to each regulator with jurisdiction over the potential violations in order to get the benefit of the disclosure.

That said, the DOJ program for managing voluntary self-disclosures is relatively new, and there is limited precedent to accurately predict how the agencies will manage this.

Conceptually, companies are generally not eligible for full voluntary self-disclosure credit where the disclosure was made after the commencement of a government investigation, or where the investigating agency has otherwise already learned of the violation.

The note additionally indicates that the Financial Crimes Enforcement Network maintains a whistleblower program that may offer monetary awards to persons who provide information to the government about violations of U.S. trade and economic sanctions.

FinCEN has not yet issued regulations or other guidance on the whistleblower program, but is expected to do so in late 2023.[3]

Interestingly, the U.S. Department of State's Directorate of Defense Trade Controls is not involved or referenced in the note. We are not aware of comments from the DDTC, but companies should continue to monitor for DDTC updates given the close nexus between violations being disclosed to the BIS, the DOJ and OFAC to those being disclosed to the DDTC regarding the International Traffic in Arms Regulations and the Arms Export Control Act.

DOJ

The DOJ's National Security Division issued an updated voluntary self-disclosure policy[4] covering potential criminal violations of export control and sanctions laws in March, and has hired or intends to hire at least 25 new prosecutors to enforce such laws.

The updated policy is designed to incentivize businesses to report violations, noting such a disclosure may reduce or avoid altogether the potential for criminal fines and penalties.

It applies to U.S. export controls and sanctions, but also to other corporate criminal violations of U.S. national security laws within the National Security Division's authority.

The note emphasizes that there is a presumption that a company will receive a nonprosecution agreement and will not pay a fine when it voluntarily discloses potential criminal violations, fully cooperates, and timely and appropriately remediates the violations.

However, there is no such presumption when there are aggravating factors, such as egregious or pervasive criminal misconduct, deception, repeated offenses, the export of particularly sensitive items or to end users of heightened concern, or a significant profit to the company.

Moreover, this presumption is not available where disclosures were made to the BIS or OFAC only.

Companies may have previously been reluctant to share with the DOJ their disclosures to the BIS or OFAC to avoid conceding that an activity was willful.

Now, that reluctance may soften given the note's emphasis on a nonprosecution agreement where a disclosure is made, the fact that nondisclosure can be considered an aggravating factor under BIS enforcement policy, and the DOJ signaling a more aggressive enforcement posture and resources.

BIS

To more timely assess voluntary self-disclosures, the BIS implemented a dual-track process. Minor or technical infractions are now reviewed on a fast-track basis, typically within 60 days of receipt of a final voluntary self-disclosure. More serious potential violations are on a second track with more intensive analysis.

The implementation of the dual-track system appears to be in response to the influx of voluntary self-disclosures related to Russia, Belarus and China in the past year.

Deputy Assistant Secretary of Commerce for Export Administration Matt Borman recently stated that "[w]e spend 100 percent of our time on Russia sanctions, another 100 percent on China and the other 100 percent on everything else"[5] — highlighting the agency's continued focus on Russia and China.

The note emphasizes that this dual-track triage system is also driven by the desire for the Office of Export Enforcement within the BIS to use "its finite resources more effectively."

The BIS reiterated that companies "deserve, and will get, significant credit for coming forward voluntarily." The BIS emphasized that it will consider the effectiveness of a company's compliance program. It also referenced its April 18 policy memo,[6] which introduced the position that deliberate nondisclosure of a significant violation of the Export Administration Regulations is an aggravating factor.

The BIS now further treats investigative leads submitted to the Office of Export Enforcement concerning another company's potential violation as a mitigating factor if it leads to an enforcement action and the disclosing entity faces its own enforcement action, even if these

actions are unrelated.

In other words, deliberate nondisclosure is an aggravating factor, but informing the BIS of other companies' unrelated violations can be a mitigating factor.

The note builds on this prior guidance by further explaining that companies that conduct an internal investigation and address compliance gaps could get mitigation credit if the BIS later brings an enforcement action, even in the absence of a voluntary self-disclosure about their own conduct.

OFAC

Finally, OFAC's portion of the note reiterates that voluntary self-disclosures are an important mitigating factor under OFAC's enforcement guidelines, and a qualifying voluntary self-disclosure can result in a 50% reduction in the base amount of a proposed civil penalty. Voluntary self-disclosures must be accurate, comprehensive and self-initiated.

OFAC also reinforced its policy that voluntary self-disclosures will not qualify as a mitigating factor when (1) a third party only notifies OFAC in instances in which blocked property was reported, (2) the disclosure contains false or misleading information, (3) the disclosure is not self-initiated, or (4) the disclosure is materially incomplete.

OFAC's policy makes clear that it will consider the totality of the circumstances involving the apparent violation described in a voluntary self-disclosure, as well as the circumstances underlying the company's decision to disclose.

Conclusion

In sum, the note emphasizes the ways in which the DOJ, the BIS and OFAC are trying to incentivize companies to voluntarily disclose potential violations of U.S. export controls, sanctions and related national security laws.

Whether to disclose such violations is a risk-based decision for companies to make, except for violations of Title 22 of the Code of Federal Regulations, Section 126.1, which is not addressed by the note.

However, the calculus as to whether to disclose even minor, technical violations is shifting toward favoring disclosure in many circumstances.

The note may also cause companies to reevaluate whether to disclose to the DOJ, and simultaneously to the BIS and OFAC, for conduct that could arguably be considered willful.

As always, and as emphasized throughout the agencies' guidance, disclosures must be complete and truthful, and cooperation with the BIS, the DOJ and OFAC remains paramount.

Anne Borkovic and Ryan Fayhee are partners, and Blair Campion is an associate, at Akin Gump Strauss Hauer & Feld LLP.

Akin partners Tyler Grove and Jonathan Poling, and associate Cameron Peek, contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] https://ofac.treasury.gov/media/932036/download?inline.

[2] Akin's summaries of the key considerations in those updated enforcement policies are accessible here: https://www.akingump.com/en/insights/alerts/doj-focuses-on-corporate-crime-involving-sanctions-evasion-export-controls-violations-and-similar-economic-crimes, and https://www.akingump.com/en/insights/alerts/new-bis-enforcement-policy-further-encourages-disclosures-and-whistleblowers.

[3] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=1506-AB57.

[4] https://www.akingump.com/en/insights/alerts/doj-focuses-on-corporate-crime-involving-sanctions-evasion-export-controls-violations-and-similar-economic-crimes.

[5] https://www.nytimes.com/2023/07/12/magazine/semiconductor-chips-us-china.html.

[6] https://www.bis.doc.gov/index.php/documents/enforcement/3262-vsd-policy-memo-04-18-2023/file.