

International Trade Alert

November 16, 2016

Key Points

- New DOJ Guidance establishes a voluntary self-disclosure program for criminal violations of U.S. economic sanctions and export controls. Going forward, companies will need to disclose potentially willful violations to DOJ **in addition to** DDTC, BIS or OFAC in order to ensure that they will receive cooperation credit from the agency.
- The Guidance applies to business organizations and their employees who have engaged in “willful” violations of U.S. sanctions and export control laws. Although the Guidance does not apply to financial institutions, they may still benefit from disclosing potentially willful violations of U.S. sanctions and export controls to DOJ.
- Benefits of disclosure include eligibility for a significantly reduced penalty, possibility of a nonprosecution agreement (NPA), a reduced period of supervised compliance, reduced fine and forfeiture, and the ability to avoid an independent monitor.

DOJ Establishes Voluntary Self-Disclosure Program for Criminal Violations of U.S. Economic Sanctions and Export Controls

On October 2, 2016, the National Security Division (NSD) of the U.S. Department of Justice (DOJ) established a formal, voluntary self-disclosure program for criminal violations of U.S. economic sanctions and export controls and issued guidance relating to cooperation and remediation for companies facing potential criminal violations of U.S. export control and sanctions laws (“Guidance”).

What has the Guidance changed?

Prior to the Guidance, voluntary self-disclosures were initially filed with 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), depending on the type of violation. Each agency would assess the disclosure and, where appropriate, could refer the matter to DOJ for further investigation.

Going forward, in order for a company to ensure that it receives full credit for disclosing violations that may be criminal, it will also need to submit a disclosure to DOJ. The voluntary self-disclosures should be submitted to the NSD’s Counterintelligence and Export Control Section (CES), which will coordinate with the appropriate U.S. Attorney’s Office and the relevant regulatory agencies. Importantly, such disclosures should be submitted **in addition to** any voluntary self-disclosure submitted to DDTC, BIS or OFAC for violations of the International Traffic in Arms Regulations (ITAR), Export Administration Regulations (EAR) or U.S. sanctions regulations. The Guidance also memorializes DOJ policy on cases that involve

voluntary self-disclosures, cooperation and remediation, and builds on the DOJ's continued focus on individual liability in corporate cases.

Similar to the goals of the FCPA disclosure program, DOJ is attempting to incentivize companies to voluntarily self-report willful (i.e., potentially criminal) violations of export controls and economic sanctions, cooperate with DOJ and remediate the issues in order to receive benefits described in the Guidance. Although the Guidance attempts to make more transparent the factors it will consider when companies have disclosed criminal violations of economic sanctions and export controls and/or cooperated with DOJ investigations, DOJ reserves for itself significant discretion as to how to apply the factors to any given case.

Who is affected by the Guidance?

The Guidance applies to business organizations and their employees who have engaged in "willful" violations of U.S. sanctions and export control laws. If a company or its employees engages in potentially willful violations of U.S. sanctions or export control laws, the Guidance encourages voluntary self-disclosure, cooperation and timely remediation activities in order to be eligible for reduced criminal penalties, a nonprosecution agreement (NPA) or a deferred-prosecution agreement (DPA). Although the Guidance states that it does not apply to financial institutions, given their "unique reporting obligations under their applicable statutory and regulatory regimes," it also cautions that this does not suggest that financial institutions cannot benefit from disclosing potentially willful violations of U.S. sanctions and export controls; it encourages financial institutions to disclose such potential willful violations to DOJ.

How will DOJ assess voluntary self-disclosures and cooperation?

DOJ confirmed in the Guidance its often-stated position that disclosures must be self-initiated, timely and complete. Full cooperation, as part of a disclosure submitted to DOJ, now requires companies to meet the threshold requirements set out in the DAG Memorandum on Individual Accountability ("Yates Memo") (see [Akin Gump Litigation Alert](#) from September 17, 2015). DOJ provided within the Guidance a number of criteria through which it assesses the company's cooperation and remediation. If cooperation is present, then remediation credit is available if the company (a) implements an effective compliance program; (b) disciplines responsible employees; and (c) takes steps that demonstrate recognition of the seriousness of the conduct, demonstrate acceptance of responsibility and implement measures to identify future risks.

The Guidance also outlines a number of elements of an effective compliance program, including dedicating sufficient resources to the compliance function, appropriately compensating compliance personnel, training, performing effective risk assessments and auditing the compliance program to assess its effectiveness.

While cooperation and remediation are mitigating factors identified by DOJ, the Guidance also notes a number of aggravating factors. These include exports of items controlled for nuclear nonproliferation 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; repeated violations, including similar

administrative or criminal violations in the past; involvement of senior management; and significant profits from the criminal conduct.

DOJ is encouraging disclosure as part of the Guidance and notes the benefits of disclosure, cooperation and remediation, including eligibility for a significantly reduced penalty, the possibility of an NPA, a reduced period of supervised compliance, reduced fine and forfeiture, and the ability to avoid an independent monitor. Where a company does not voluntarily self-disclose the violation, but nonetheless fully cooperates and remediates, the company may be eligible for a DPA, a reduced fine and forfeiture, and an outside auditor as opposed to a monitor. The Guidance notes that a company that does not voluntarily disclose will “rarely qualify” for an NPA.

Contact Information

If you have any questions concerning this alert, please contact:

Jonathan C. Poling

jpoling@akingump.com

+1 202.887.4029

Washington, D.C.

Paul W. Butler

pbutler@akingump.com

+1 202.887.4069

Washington, D.C.

Charles F. Connolly

cconnolly@akingump.com

+1 202.887.4070

Washington, D.C.

Wynn H. Segall

wsegall@akingump.com

+1 202.887.4573

Washington, D.C.

Christian C. Davis

chdavis@akingump.com

+1 202.887.4529

Washington, D.C.

Johann Strauss

jstrauss@akingump.com

+1 202.887.4436

Washington, D.C.