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DOJ Revises Policy on Disclosures of Export Control and Sanctions Violations

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In its latest effort to provide companies with greater clarity about U.S. enforcement policies, the Department of Justice (DOJ) announced revisions to the National Security Division's (NSD) policy on voluntary disclosures of export control and sanctions violations. The policy changes, adopted on December 13, revise previous guidance on the topic and formalize it as a part of the DOJ's Justice Manual and apply to potentially willful violations of the Arms Export Control Act (AECA), Export Control Reform Act (ECRA), and International Emergency Economic Powers Act (IEEPA) voluntarily disclosed to the NSD. Companies that satisfy the requirements of the policy will be entitled to a presumption of non-prosecution absent aggravating circumstances.

The Latest Government Effort to Encourage Voluntary Disclosure and Cooperation

As Alston & Bird has recently highlighted, the U.S. has issued a number of guidance documents in the past year that have in some instances broken new ground and in many instances aligned policy with common practice. The overall tenor of these documents has been to provide increased guidance to companies on the government's expectations for compliance and cooperation with government investigations and to clearly identify the benefits of meeting those expectations.

For example, in April 2016, the government announced the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy, a pilot program aimed at promoting voluntary disclosures. Companies that choose to avail themselves of the program are now entitled to a presumption of declination for matters that are voluntarily disclosed if the company fully cooperates with the government's investigation, absent certain aggravating factors. Even where aggravating factors exist, the FCPA Corporate Enforcement Policy identified concrete benefits to voluntary disclosure, including a 50 percent reduction from the low end of the U.S. Sentencing

Guidelines fine range in most instances. The government has continued to extend and revise that program in recent years to make it easier for companies to avail themselves of the safe harbor.

The new NSD policy follows the lead of the FCPA Corporate Enforcement Policy in encouraging companies to voluntarily disclose to the DOJ potentially criminal violations of the export control and sanctions laws. Indeed, satisfaction of the requirements to qualify under the policy – voluntary disclosure to the DOJ as well as the regulatory agencies, full cooperation with the government's investigation, and appropriate remediation – mirrors that in the FCPA Corporate Enforcement Policy and creates a presumption that a company will receive a non-prosecution agreement absent aggravating factors.

Clear Guidance on Disclosures to Qualify for Voluntary Treatment

The NSD revisions for the first time give clear guidance on how a disclosure should be made by a company seeking the benefits of the policy. Specifically, a disclosure is deemed to be voluntary under the policy only if it is disclosed directly to the NSD's Counterintelligence and Export Control Section (CES). Although it is likely that the DOJ will continue to grant voluntary disclosure credit for a disclosure made to any appropriate criminal prosecuting unit or office, given the policy's specificity, companies that wish to disclose a potentially criminal export control or sanctions matter will likely want to disclose it to the CES out of an abundance of caution.

The policy also closes a potential loophole in the traditional voluntary disclosure process. Specifically, the DOJ makes clear that a voluntary disclosure to a regulatory agency, such as the U.S. Office of Foreign Assets Control (OFAC), will not qualify for the benefits under the policy. Although voluntary disclosure credit with the DOJ for regulatory disclosures that turn criminal has been something of a gray area historically, companies that identify a potential criminal export control or sanctions problem will now have to think carefully about whether and when to also disclose to the NSD. This may pose a challenge in the early stages of an investigation when the willfulness of the potential misconduct may not yet be clear. Even when criminal disclosure is not warranted at the outset of a matter, companies and their counsel will need to carefully consider whether a subsequent disclosure to the NSD is appropriate as an investigation develops and the company uncovers evidence of potential willfulness.

Significant Benefits to Companies, Even When Aggravating Factors Exist

The policy revisions now promise specific, tangible benefits to companies that meet the new requirements. Specifically, a company that makes a voluntary disclosure to the DOJ, provides full cooperation with the government's investigation and takes appropriate remedial measures is entitled to a presumption of a non-prosecution agreement in the absence of aggravating factors. This presumption gives greater clarity to companies about the benefits of disclosure to the DOJ and may help to eliminate certain perceptions of inconsistency in the DOJ's imposition of criminal penalties in past export control and sanctions resolutions.

In determining whether aggravating factors exist that may overcome this presumption, the policy explains that the DOJ will look for the existence of factors that "represent elevated threats to national security" and are "present to a substantial degree." Identified factors 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 foreign terrorist organization or specially designated global terrorist;
- Exports of military items to a hostile foreign power;
- Repeated violations, including similar administrative or criminal violations in the past; and
- Knowing involvement of upper management in the criminal conduct.

Even when aggravating factors exist, however, a company may still benefit from the policy. In such circumstances, the policy states that the DOJ will not recommend imposition of a monitor and will recommend at least a 50 percent reduction in the fine available under the alternative fine provision. The alternative fine provision permits the imposition of a criminal fine in the amount of twice the amount of gain or loss associated with the offense and has been the basis for multiple criminal sanctions resolutions against financial institutions in excess of $1 billion in recent years.

A Welcome Effort to Provide Insight into DOJ Decision-Making

The U.S. has made significant strides in recent in years in providing greater transparency into civil and criminal enforcement processes and decisions. The revised NSD policy represents an expansion of these efforts into the areas of export control and sanctions enforcement. The guidance is a welcome change from historically opaque prosecutorial decision-making in these areas and should be taken into account by any company that begins an investigation into potential violations of these laws.

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