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Export Control and Sanctions Enforcement Alert

DOJ Revises and Re-Issues Export Control and Sanctions Enforcement Policy for Business Organizations

By **Ronald C. Machen**, **David S. Cohen**, **Ronald I. Meltzer**, **David M. Horn**, **Cadene Russell Brooks**, **Zachary Goldman**, **Alina Lindblom and Marissa W. Medine**

On December 13, 2019, the National Security Division (NSD) of the U.S. Department of Justice (DOJ) issued a revised policy regarding voluntary disclosure of export control and sanctions violations by business organizations (NSD VSD Policy). Although the NSD VSD Policy does not alter the existing procedures for voluntary self-disclosure to regulatory agencies, it encourages business organizations to voluntarily self-disclose to NSD "all potentially willful violations of the statutes implementing the U.S. government's primary export control and sanctions regimes." *Export Control and Sanctions Enforcement Policy for Business Organizations*, DEP'T OF JUSTICE (Dec. 13, 2019). There is limited guidance, however, regarding what constitutes a "potentially willful" violation. And, importantly, the NSD VSD Policy states that if a company "chooses to self-report only to a regulatory agency and not to DOJ, the company will not qualify for the benefits of a VSD under this Policy in any subsequent DOJ investigation." *Id.* This new policy increases the strategic complexity for a company considering voluntary self-disclosure to NSD, a regulatory agency, or both.

I. REGULATORY STANDARDS

There are three primary export control and sanctions regimes: the Arms Export Control Act (AECA), 22 U.S.C. § 2778, the Export Control Reform Act (ECRA), 50 U.S.C. § 4801 *et seq*., and the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq*. As outlined below, each regime provides separate procedures for voluntary self-disclosure.

Arms Export Control Act (AECA)

The AECA controls the export and temporary import of defense articles and services—authority which has been delegated to the U.S. Department of State Directorate of Defense Trade Controls (DDTC). The implementing regulation for the AECA is the International Traffic in Arms Regulations (ITAR). The ITAR provides that "[t]he Department strongly encourages the disclosure of information to the [DDTC] by persons . . . that believe they may have violated any export control provision of the Arms Export Control Act, or any regulation, order, license, or other authorization issued under the authority of the Arms Export Control Act." 22 C.F.R. § 127.12(a). Voluntary disclosure to the DDTC "may" be considered as a mitigating factor in the determination of administrative penalties, while failure to report "will" be an adverse factor. *Id.*

The timing of a voluntary disclosure under the ITAR is important, because the provision applies only when a company provides information to the DDTC prior to either the State Department or "any other agency, bureau, or department of the United States Government" learning the information from another source. *Id.* § 127.12(b)(2). The ITAR directs companies to notify DDTC "immediately after a violation is discovered," but provides companies an additional 60 days to conduct a review prior to making a full disclosure. *Id.* § 127.12(c).

Export Control Reform Act (ECRA)

The ECRA controls the export of so-called "dual-use" items—goods, software, and technology. The implementing regulation for the ECRA is the Export Administration Regulations (EAR), which is administered by the U.S. Department of Commerce Bureau of Industry and Security (BIS). The EAR includes a voluntary self-disclosure policy: "BIS strongly encourages disclosure to OEE [Office of Export Enforcement] if you believe that you may have violated the EAR, or any order, license or authorization issued thereunder." 15 CFR § 764.5. Voluntary disclosure to OEE "is" a mitigating factor in the determination of administrative penalties, and Supplement No. 1 to Part 766 of the BIS Enforcement Guidelines provides additional guidance on how voluntary self-disclosure affects the agency's determination of administrative penalties.

As with the AECA, the EAR's voluntary self-disclosure provision applies only when a company provides information to OEE prior to either OEE or "any other agency of the United States Government" learning the information from another source. *Id.* § 764.5(b)(3). Similarly, the EAR directs companies to notify OEE "as soon as possible after violations are discovered," but provides an additional 180 days for "a thorough review of all export-related transactions where violations are suspected." *Id.* §§ 764.5(c)(1)-(2).

International Emergency Economic Powers Act (IEEPA)

Finally, IEEPA provides the President with the authority to implement sanctions to protect U.S. national security and foreign policy interests. The various U.S. sanctions regimes have been implemented primarily by Executive Orders, which are administered and enforced by the U.S. Treasury Department's Office of Foreign Assets Control (OFAC). OFAC has published guidance on its enforcement of all economic sanctions program, including guidance on voluntary self-disclosure. *See* 31 C.F.R. Pt. 501, App. A. OFAC defines voluntary self-disclosure as "notification to OFAC of an apparent violation by a Subject Person that has committed, or otherwise participated in, an apparent violation" of the sanctions program. *Id.* at I(I).

Unlike the ITAR and EAR voluntary self-disclosure provisions, the OFAC provision expressly contemplates, in two different ways, the possibility of simultaneous disclosure. First, OFAC considers a voluntary self-disclosure to be one made "prior to *or at the same time* that OFAC, or any other federal, state, or local government agency or official" learns of the apparent violation. *Id.* (emphasis added). Second, OFAC may consider a company's voluntary self-disclosure to another agency as a voluntary self-disclosure for OFAC's purposes as well. Like the ITAR and EAR, the OFAC regulations permit companies to provide an initial notification followed "within a reasonable period of time" by more comprehensive disclosure. Appendix A to Part 501 also provides additional guidance on how voluntary self-disclosure affects the agency's determination of administrative penalties. *See id.* at V(B).

II. RECENT DOJ GUIDANCE

The NSD VSD Policy closely mirrors DOJ's Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy, but also diverges significantly with respect to some key attributes of the policy, including the benefits conferred when a company voluntarily self-discloses misconduct to the NSD.

DOJ first announced the FCPA Corporate Enforcement Policy in November 2017. It was designed to encourage companies to voluntarily self-disclose misconduct and to provide greater transparency concerning the credit a company could receive for self-reporting violations of the FCPA and cooperating with DOJ. In 2018, Acting Assistant Attorney General John Cronan announced that the Corporate Enforcement Policy would serve as non-binding guidance for all white-collar corporate investigations and would not solely apply within the FCPA context.

Under the Corporate Enforcement Policy, DOJ will consider voluntary self-disclosure when evaluating whether a company can receive cooperation credit. 9-47.120 – FCPA Corporate Enforcement Policy. The Corporate Enforcement Policy established a presumption that DOJ will decline to prosecute, absent aggravating circumstances, if a company meets the following factors: (1) "voluntary self-disclosure," (2) "full cooperation," and (3) "timely and appropriate remediation." *Id*. The NSD VSD Policy's definition of "voluntary self-disclosure" is nearly identical to the definition in the Corporate Enforcement Policy.[i]

With respect to voluntary self-disclosure, the DOJ has articulated factors and standards to determine whether a disclosure is truly voluntary. To qualify for the Corporate Enforcement Policy's voluntary self-disclosure credit, the disclosure must (1) occur "prior to an imminent threat of disclosure or government investigation"; (2) be communicated to the DOJ "within a reasonably prompt time after becoming aware of the offense"; and (3) include "all relevant facts known to it at the time of the disclosure, including as to any individuals substantially involved in or responsible for the misconduct at issue." 9-47.120 – FCPA Corporate Enforcement Policy.

While the NSD VSD Policy closely mirrors the Corporate Enforcement Policy, the NSD VSD Policy also contains a significant area of divergence. Specifically, DOJ will offer companies a declination of prosecution in an FCPA matter if no aggravating factors exist, so long as a company has voluntarily self-disclosed its misconduct, fully cooperated with DOJ, and implemented timely and appropriate remediation. *Id.* Notably, however, a non-prosecution agreement (along with disgorgement of ill-gotten gains, forfeiture, and restitution) are the most favorable resolutions available to corporations under the NSD VSD Policy. *Export Control and Sanctions Enforcement Policy for Business Organizations*, Dep't of Justice (Dec. 13, 2019). NSD believes that a declination would generally not be appropriate in light of the potential harm to U.S. national security interests posed by violations of export control and sanctions laws. Press Release, U.S. Department of Justice, Department of Justice Revises and Re-Issues Export Control and Sanctions Enforcement Policy for Business Organizations (Dec. 13, 2019); Remarks by Principal Deputy Assistant Attorney General David Burns Announcing New Export Controls and Sanctions Enforcement Policy for Business Organizations (Dec. 13, 2019).

If a criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, DOJ will recommend a 50% fine reduction under the Corporate Enforcement Policy, whereas companies can receive a fine reduction of *at least* 50 % under the NSD VSD Policy.[ii] 9-47.120 – FCPA Corporate Enforcement Policy. Under both policies, DOJ will decline to impose a monitor if there is an effective compliance program in place at the time of the resolution. Moreover, as described above, other regulatory authorities such as OFAC, BIS, and DDTC may separately bring enforcement actions for civil violations of law and NSD will—pursuant to the NSD VSD Policy—"endeavor to coordinate" with other federal, state, local, or foreign government authorities where they are seeking resolution of a case arising from the same conduct.

III. "POTENTIALLY WILLFUL VIOLATIONS"

The NSD VSD Policy builds on this foundation, and "encourages companies to voluntarily self-disclose all potentially willful violations" of the relevant statutes: the AECA, ECRA, and IEEPA. It also provides, crucially, that "when a company identifies potentially willful conduct but chooses to self-report only to a regulatory agency and not to DOJ, the company will not qualify for the benefits of a VSD . . . in any subsequent DOJ investigation."

When the NSD VSD policy was released, Assistant Attorney General for National Security John C. Demers commented, "We need the private sector to come forward and work with DOJ. The revised VSD Policy should reassure companies that, when they do report violations directly to DOJ, the benefits of their cooperation will be concrete and significant." *Department of Justice Revises and Re-Issues Export Control and Sanctions Enforcement Policy for Business Organizations*, Dep't of Justice (Dec. 13, 2019).This approach appears to signal NSD's greater insistence to lead the decision-making process about whether to prosecute violations, as opposed to waiting for agencies to refer matters that they deem sufficiently serious. Accordingly, when a company develops its NSD disclosure strategy, the company should carefully assess whether the conduct at issue is potentially willful.

Willfulness Standard in AECA, ECRA, and IEEPA Prosecutions

What constitutes a "willful" violation, let alone a "potentially willful" one, however is not clear, exacerbating the challenges companies are likely to face in the event they discover conduct that may violate one of the statues covered by the NSD VSD Policy. The NSD VSD Policy states that "[i]n export control and sanctions cases, NSD uses the definition of willfulness set forth in *Bryan v. United States*, 524 U.S. 184 (1998)." *Export Control and Sanctions Enforcement Policy for Business Organizations*, DEP'T OF JUSTICE (Dec. 13, 2019). As described by the NSD VSD Policy, *Bryan* provides that "an act is willful if done with the knowledge that it is illegal." *Id.*

In *Bryan*, the Court addressed "willfulness" in context of a statute prohibiting unlicensed firearms dealing. As the Court observed, "[t]he evidence was unquestionably adequate to prove that . . . [the defendant] knew that his conduct was unlawful" but there was "no evidence that he was aware of the federal law that prohibits dealing in firearms without a federal license." 524 U.S. at 189*.* Ruling against the defendant, who had argued that "willfulness" required a more particularized understanding of why his conduct was illegal, the Court determined that the government did not need to "show the defendant was aware of the specific law, rule, or regulation that its conduct may have violated." *Export Control and Sanctions Enforcement Policy for Business Organizations*, DEP'T OF JUSTICE (Dec. 13, 2019). Rather, under *Bryan*, "an act is willful if done with the knowledge that it is illegal." *Id.*

Courts have not, however, developed a distinct rubric for evaluating willfulness in AECA, ECRA, or IEEPA prosecutions. Nor have they identified any single dispositive factor or behavior that constitutes a willful violation of those statues. In each of these settings, courts have applied the *Bryan* standard by focusing on the totality of the circumstances. That said, certain features seem to recur in findings of willful conduct.

Features of Willful Conduct

Attempts to conceal some aspect of a transaction often signal willfulness. Deception might be evident in communications during the course of business. *See United States v. Homa Int'l Trading Corp.*, 387 F.3d 144, 146 (2d Cir. 2004) (IEEPA defendant used "code words to reference money transfers"). Or deception probative of willfulness could occur within a defendant's own materials. *See United States v. Bishop*, 740 F.3d 927, 929 (4th Cir. 2014) (AECA defendant packed ammunition in a box labeled "weights"). Willfulness can even be evident in an entirely separate business or legal context. *See United States v. Mousavi*, 604 F.3d 1084, 1094 (9th Cir. 2010) (IEEPA defendant "concealed his income from [a Kuwaiti company] on his tax returns").

Evasion and concealment are not the only characteristics of willful conduct. Courts have also cited expertise in the field, *see Mousavi*, 604 F.3d at 1088 (describing an IEEPA defendant as a "sophisticated and politically connected businessman"), and actual knowledge of the applicable law, *United States v. Reyes*, 270 F.3d 1158, 1169 (7th Cir. 2001) (AECA defendant "explicitly acknowledge[d] the illegality of shipping to Iran without a license"), as evidence of willfulness.

Willful Blindness

Courts have also construed *Bryan* to allow conviction based on a theory of willful blindness—that is, there may be criminal liability if one "was subjectively aware of a high probability of the existence of illegal conduct" and "purposely contrived to avoid learning of the illegal conduct." *United States v. Elashyi*, 554 F.3d 480, 504 (5th Cir. 2008). In *Elashyi*, for example, the Fifth Circuit affirmed the IEEPA conviction of "a company president who deliberately stuck his head in the sand" regarding prohibited transactions. *Id.*

IV. IMPLICATIONS

Given the high stakes inherent in voluntarily disclosing what NSD may view as criminal conduct, companies that have identified possible violations of the export control or sanctions laws need to carefully assess the conduct giving rise to the potential violation and decide whether and to what extent to report to the government. First, companies must evaluate whether there was any "potentially willful" violation of the sanctions or export control laws. To do so, they must develop and carefully analyze relevant facts for any evidence of concealment, deception, or deliberate ignorance. Where companies have assessed that there is no potential willfulness, they might consider disclosing only to the relevant regulatory agency rather than to NSD. Next, and especially where they will be making multiple disclosures, companies must carefully strategize their sequence of disclosure. Disclosure to a regulatory agency may not result in credit if the agency has already learned of the underlying activity. Therefore, companies will need to assess the likelihood that NSD will independently discover and/or pursue a violation, as well as whether they should make more than one disclosure in light of the risks and benefits of making disclosures to the relevant regulatory agencies. Ultimately, NSD VSD Policy amplifies both the potential benefits and the potential pitfalls of a voluntary disclosure. We stand ready to assist companies as they think through whether to make a voluntary disclosure and, if so, to whom.

[i] On December 13, 2019, Principal Deputy Assistant Attorney General David Burns announced the release of the NSD VSD Policy. Burns explained that DOJ intended to conform language in the NSD VSD Policy to that used in other voluntary self-disclosure policies, in particular the Criminal Division's Corporate Enforcement Policy, because various divisions within DOJ should use similar language to describe similar concepts. According to Burns, "voluntariness" of a self-disclosure should not have one meaning when dealing with the Criminal Division, and another when interfacing with NSD. DOJ's Criminal Division and the NSD coordinated on the 2019 revisions to the Corporate Enforcement Policy in anticipation of the new NSD VSD Policy.

[ii] DOJ calculates FCPA and export control and sanctions fines using different statutory schemes. To calculate a fine under the Corporate Enforcement Policy, DOJ will apply the Fine Guidelines in the U.S. Sentencing Guidelines (U.S.S.G.) §§ 8C2.1 - 8C2.9. However, the Guidelines do not apply to charges for export control and sanctions violations. *See* U.S.S.G. § 8C2.1. Instead U.S.S.G. § 8C2.10 directs that the fine be determined pursuant to "the general statutory provisions governing sentencing." *See* U.S.S.G. § 8C2.10 cmt. background. In these matters, prosecutors instead rely on the alternative fine provision in 18 U.S.C. § 3571(d) and on forfeiture. Under 18 U.S.C. § 3571(d), the fine would ordinarily be capped at an amount equal to twice the gross gain or gross loss.

For more information on this or other export control and sanctions enforcement matters, contact:

Ronald C. Machen	+1 202 663 6881	ronald.machen@wilmerhale.com
David S. Cohen	+1 202 663 6205	david.cohen@wilmerhale.com
Ronald I. Meltzer	+1 202 663 6389	ronald.meltzer@wilmerhale.com
David M. Horn	+1 202 663 6749	david.horn@wilmerhale.com
Cadene Russell Brooks	+1 202 663 6115	cadene.brooks@wilmerhale.com
Zachary Goldman	+1 212 295 6309	zachary.goldman@wilmerhale.com
Alina Lindblom	+1 202 663 6226	alina.lindblom@wilmerhale.com
Marissa W. Medine	+1 212 295 6819	marissa.medine@wilmerhale.com

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