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August 1, 2023 | Number 3136

US Sanctions and Export Control Agencies Issue “Joint Compliance Note” on Voluntary Self-Disclosure Policies

Companies that promptly self-disclose and remediate potential violations of administrative or criminal law may significantly mitigate liability.

On July 26, 2023, the US Departments of Justice (DOJ), Commerce, and the Treasury jointly published a [Tri-Seal Compliance Note](#) on Voluntary Self-Disclosure of Potential Violations. The Compliance Note reviews the agencies’ voluntary self-disclosure (VSD) policies for violations of US sanctions, export controls, and other national security-related laws. The departments encourage VSDs by reducing penalties in certain circumstances, and sometimes enhancing penalties for companies that do not voluntarily disclose substantial violations of US sanctions or export control laws.

The Compliance Note reinforces the enhanced commitment to incentivize private sector compliance through disclosure of potential civil and criminal violations. For example, the DOJ recently published guidelines on corporate disclosures of potential violations from both the National Security Division (NSD), whose policy is discussed further below, and the Criminal Division (addressed in the Latham Client Alert dated [February 6, 2023](#)). While the Compliance Note does not announce new VSD policies, it serves as a reminder of the agencies’ increasing cooperation in civil and criminal enforcement of US sanctions and export controls, particularly for cases involving adversary countries and sensitive technologies. See Latham Client Alert dated [March 20, 2023](#) on the first-ever Tri-Seal Compliance Note, and Latham Client Alert dated [February 27, 2023](#) on the Disruptive Technology Strike Force.

US Department of Justice’s National Security Division’s VSD Policies

NSD encourages parties to voluntarily disclose potential criminal violations of export control and sanctions laws. Effective [March 1, 2023](#), when a company voluntarily self-discloses a potential violation, fully cooperates, and timely and appropriately remediates the violation, NSD will generally not seek a guilty plea and there will be a presumption that the company will receive a non-prosecution agreement and will not pay a fine — provided there are no aggravating factors. In particular, NSD expects:

- **Voluntary and Timely Disclosure:** Disclosure of all relevant non-privileged information to NSD within a “reasonably prompt time” after learning of the violation, absent another legal obligation to disclose and prior to an imminent threat of disclosure or government investigation. Note that disclosure to another regulatory agency does not satisfy NSD’s policies. In addition, the disclosing

company bears the burden of establishing timeliness, which can include historic conduct discovered after a merger or acquisition, depending on the facts.

- **Cooperation:** Full and proactive cooperation, including by timely preserving and collecting relevant documents and information, disclosing all relevant facts (even when not specifically asked to do so), authenticating records, making employees available for interview, and ensuring internal investigative steps do not conflict with NSD's investigation.
- **Timely and Appropriate Remediation:** An effective and sufficiently resourced compliance and ethics program. NSD will also examine whether the disclosing company has imposed appropriate disciplinary measures, including compensation clawbacks. NSD advises that it will consult with the appropriate regulatory agency on the effectiveness of a company's compliance enhancements.
- **No Aggravating Factors:** No egregious or pervasive criminal misconduct, upper management concealment or involvement, repeated administrative or criminal violations of national security laws, exports of particularly sensitive items to end users of heightened concern, significant profits to the company derived from misconduct, or other aggravating factors.

US Department of Commerce's VSD Policies

The Compliance Note explains that the Department of Commerce's Bureau of Industry and Security (BIS) strongly encourages voluntary disclosures of potential violations of the Export Administration Regulations (EAR). BIS' [policies](#) incentivize VSDs of potential violations by reducing civil penalties for VSDs that are timely, comprehensive, and involve full cooperation by the reporting entity.

Since June 2022, BIS has used a two-track system to streamline VSD reviews. One track is dedicated to minor or technical infractions that are resolved with a warning or no-action letter within 60 days of the final submission by a party of a VSD. The second track is for more serious violations, which have a longer timeline yet still offer "significant credit" for VSDs. The revised procedures were announced in a [June 30, 2022 memo](#) from Matthew Axelrod, Assistant Secretary for Export Enforcement, who co-leads the Disruptive Technology Strike Force. Axelrod explained that this framework would allow the Office of Export Enforcement (OEE) within BIS to dedicate resources to the most significant matters (whether disclosed or not) and ensure the most serious violations are concluded with resolutions appropriately reflecting the national security harm.

Most recently, BIS has further incentivized VSDs in an [April 18, 2023 memo](#) by establishing a policy of treating deliberate non-disclosure of a significant possible violation as an aggravating factor — and reiterating that disclosure yields "concrete and identifiable benefits." The memo also explains that BIS will consider disclosures of another party's suspected violations of the EAR to be a mitigating factor in any future enforcement action involving the reporting party: "[W]hen a company becomes aware that some other company's conduct may have violated the EAR, discloses such conduct to OEE, and that tip results in enforcement action — then we will consider that a mitigating factor if a future enforcement action, even for unrelated conduct, is ever brought against the disclosing party."

US Department of the Treasury's Office of Foreign Assets Control's VSD Policies

The US Department of the Treasury's Office of Foreign Assets Control (OFAC) encourages companies to submit VSDs of apparent sanctions violations by:

- Considering VSDs to be a mitigating factor when determining enforcement action.
- Potentially reducing the civil penalty by up to 50%.

Companies do not qualify for these benefits if any of the below are true of the VSD:

- It occurred after OFAC or another government agency discovered the apparent violation or a substantially similar violation.
- It is false or misleading or materially incomplete.
- It is not self-initiated, or if a third party is obligated to and does notify OFAC of the apparent violation, such as when a transaction is blocked or rejected by that third party.

Conclusion

The Tri-Seal Compliance Note reinforces the strong interest by NSD, BIS, and OFAC in company disclosures of apparent violations of sanctions and export controls. Companies should understand the potential benefits, risks, and requirements associated with each agency's VSD policies. We are well positioned to advise in these areas.

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