

White Collar Defense and Investigations Alert



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US Authorities Hammer Home the Importance of Self-Disclosing Sanctions and Export Control Violations

On July 26, 2023, the U.S. Department of Justice's (DOJ's) National Security Division (NSD), the U.S. Department of Commerce's Bureau of Industry and Security (BIS), and the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) published a joint compliance note summarizing procedures for voluntarily disclosing potential violations of sanctions, export control and other national security laws, and emphasizing the significant mitigating impact a disclosure can have on civil or criminal liability.

The "Tri-Seal Compliance Note" (Compliance Note) also highlights the availability of significant monetary awards for whistleblowers who provide information about sanctions and export control violations to the Treasury Department's Financial Crimes Enforcement Network (FinCEN). We expect this strong financial incentive will lead to a marked increase in the number of whistleblower tips and referrals — both within organizations and to relevant government agencies.

The Compliance Note is the latest addition to the broader efforts by U.S. regulatory and law enforcement agencies in recent months to incentivize proactive disclosure of violations and increase potential penalties for companies that deliberately fail to disclose known violations.¹ The Compliance Note makes clear that organizations should carefully evaluate whether certain transactions or activities that appear to violate relevant U.S. national security laws are ripe for disclosure and whether those activities rise to the level of potential criminal liability.

With NSD hiring 25 new prosecutors to investigate and prosecute sanctions evasion, export control violations and similar crimes, and Congress providing significant additional resources to the enforcement offices at BIS and OFAC, and to FinCEN's whistleblower program, we expect an uptick in the detection of violations and enforcement actions, as well as increased coordination among the agencies in pursuing violations and actions.

I. Department of Justice, NSD

The Compliance Note highlights NSD's updated voluntary self-disclosure (VSD) policy, which NSD issued on March 1, 2023 (NSD Policy). The NSD Policy followed closely on the heels of the DOJ's February 22, 2023, national VSD policy governing more generally corporate criminal enforcement actions brought by U.S. Attorneys' Offices.

¹ See our March 3, 2023, client alert, "[DOJ Implements Voluntary Self-Disclosure Policy for US Attorneys' Offices](#)," for an overview of these broader efforts.

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Both establish strong incentives for companies and other organizations to voluntarily disclose potential criminal violations of U.S. sanctions and export control. The NSD Policy provides that where a company voluntarily discloses potential criminal violations, fully cooperates with NSD, and timely and appropriately remediates the violations, NSD will generally not seek a guilty plea.

The voluntary disclosure must occur promptly after the company identifies the potential violations and prior to an imminent threat of disclosure or government investigation. Regulatory voluntary disclosures, such as those to OFAC or BIS, will not qualify under the policy unless disclosure is also made to NSD.

As part of its analysis of the adequacy of the organization's remediation, NSD will consider whether the organization maintains an effective compliance program and whether it has imposed appropriate disciplinary measures on employees involved in the violations.

If a voluntary disclosure to NSD meets these criteria, the policy creates a presumption that the organization will receive a non-prosecution agreement or declination and will not face a monetary penalty. This presumption can be rebutted if aggravating factors are present, such as pervasive criminal conduct within the company, involvement or concealment by senior management, or repeated violations of national security laws. Under those circumstances, the NSD may seek a deferred prosecution agreement or a guilty plea.

The Compliance Note emphasizes that corporate compliance with U.S. national security laws is a key focus for the NSD, as demonstrated by the NSD's appointment of a chief counsel for corporate enforcement, alongside a significant increase in the number of prosecutors to investigate and prosecute criminal violations of U.S. sanctions and export controls.

II. Department of Commerce, BIS

BIS strongly encourages the submission of VSDs, and has described them as "an excellent indicator of a party's intent to comply with U.S. export control requirements and may provide BIS important information on other ongoing violations."

Guidance from BIS states that VSDs will be viewed as a mitigating factor in determining civil penalties if a company initiates the notification of a possible violation, notifies the relevant agency, and makes the disclosure before that agency or any other federal, state, or local government agency or official discovers the apparent violation (including via disclosures by other parties) or another substantially similar violation. On the other hand, a failure to disclose a "significant possible violation" may be considered an aggravating factor by BIS.

When determining any penalties, in addition to considering whether a potential violation was voluntarily self-disclosed, U.S. authorities also take into account whether a company has taken a cooperative posture, the degree of cooperation, any past misconduct, and the degree of remediation. If U.S. authorities believe that a company has been uncooperative during an investigation, they may refuse to give the company any "cooperation credit" during a negotiated settlement.

The Compliance Note follows two previous memoranda published by the Department of Commerce intended to strengthen its administrative enforcement program and clarify its policies regarding voluntary self-disclosures and disclosures concerning others. In both memoranda, BIS focuses on what it considers to be "significant" violations, rather than minor or technical infractions, and clarifies that entities that voluntarily disclose violations will receive significant credit for coming forward while deliberate non-disclosure will be considered an aggravating factor. In the earlier memoranda, BIS clarified that disclosures of other parties' potential violations also could be considered a mitigation factor with respect to any future violations involving the disclosing party.

III. Department of Treasury, OFAC

OFAC maintains similar policies to incentivize both individuals and entities to voluntarily self-disclose apparent violations of U.S. sanctions. These are outlined in OFAC's Economic Sanctions Enforcement Guidelines (Enforcement Guidelines).² The Compliance Note outlines the key elements of what OFAC considers to be a VSD and how OFAC factors a VSD into its enforcement analysis under the Enforcement Guidelines.

In relevant part, OFAC considers a VSD to be a mitigating factor both in assessing the most appropriate enforcement response to an apparent violation of U.S. sanctions and in calculating a civil monetary penalty where OFAC determines a penalty is warranted. Significantly, a qualifying VSD will reduce by 50% the baseline civil monetary penalty that a person may face for violating U.S. sanctions laws or regulations.

To receive VSD credit, a disclosure must occur prior to, or simultaneously with, OFAC's or another government institution's discovery of the conduct at issue. The disclosure must also include sufficient information to allow OFAC to understand the circumstances surrounding the apparent violation. OFAC assesses the timeliness and adequacy of a VSD on a case-by-case basis.

Various circumstances may prevent OFAC from according VSD credit in the enforcement context, including where (i) a third party is required to and does report the apparent violation to

² 31 C.F.R. Appendix A to Part 501.

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OFAC in a report of blocked property or rejected transaction report; (ii) the VSD includes false, misleading or materially incomplete information; or (iii) the disclosure is not self-initiated (e.g., the disclosure was prompted by a government agency or official, or it was made by an employee of the organization without senior management's approval).

IV. Whistleblower Incentives and Protections

The final section of the Compliance Note highlights the whistleblower framework established under the Anti-Money Laundering Act of 2020 and the Anti-Money Laundering Whistleblower Improvement Act, which Congress enacted in early 2023 (together, the Whistleblower Provisions). Those laws create strong financial incentives and legal protections for whistleblowers to report violations of U.S. anti-money laundering and sanctions laws and regulations.³ Notably, the Compliance Note makes clear that successful enforcement of certain U.S. export control violations may constitute a "related action" for which financial awards are

³ See our February 2023 article in *Financier Worldwide*, "[New Protections and Financial Incentives for Whistleblowers in the US.](#)"

also available under the Whistleblower Provisions. This broad reading of the Whistleblower Provisions likely means that tips and referrals to FinCEN that touch on sanctions or export control violations will also be sent to OFAC and BIS for review and investigation.

V. Conclusion

In addition to the significant benefits that companies may be able to obtain by self-disclosing potential violations, the three agencies assert that disclosures by "responsible companies" alert key national security agencies to activities that may pose a threat to the national security and foreign policy objectives of the United States.

The message from these agencies is clear, but the process of identifying, investigating, disclosing, and remediating potential violations of economic sanctions and export control laws often is not. Companies with robust compliance programs that can respond quickly and effectively to potential violations will be best positioned to navigate these self-disclosure programs and weather the increased enforcement activity we expect.

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