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Practice Update

The Art of Coming Clean: Agencies Provide Guidance on Voluntary Self-Disclosures of Export Controls and Sanctions Violations

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On June 26, 2023, the Departments of Justice, Commerce, and Treasury issued a Tri-Seal Compliance Note that summarizes agency policy memoranda and existing regulations on voluntary self-disclosures (VSDs) of export controls and sanctions violations.[1]

The Note also applies to VSDs filed with the Department of Justice for criminal violations arising under the Foreign Agents Registration Act, Committee on Foreign Investment in the United States regulations, and other corporate criminal matters handled by the agency's National Security Division.[2]

Among other things, the Note states that companies are eligible for mitigating credit when they

- promptly submit a VSD after becoming aware of a potential violation;
- submit the VSD prior to discovery of the potential violation by the government;
- disclose a violation involving potential criminal conduct to both the Department of Justice National Security Division and cognizant regulatory agencies;

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- provide all relevant non-privileged facts known at the time of a submitting a VSD;
- fully cooperate with government requests related to a VSD[3]; and
- timely implement appropriate remediation of violations.

Agencies may refuse to provide mitigating credit where a VSD

- is materially incomplete;
- includes false or misleading information; or
- is not self-initiated, including when a disclosure is nested in a license application, is made in response to a subpoena or other order, is made at the suggestion of a government agency or official, or is made without authorization of an entity's senior management.

The Note further identifies the following factors that agencies may consider when deciding whether to impose penalties:

- the existence, nature, and adequacy of a company's compliance program;
- the presence of egregious or pervasive criminal misconduct within the company, concealment or involvement by upper management, or repeated administrative and/or criminal violations of national security laws;
- the export of items that are particularly sensitive or to end users of heightened concern;
- a significant profit to a company from the misconduct; and
- deliberate nondisclosure of a significant potential violation of Department Commerce export controls (this may also be considered an aggravating factor by other agencies).

Most of the requirements and factors summarized in the Note are nothing new. However, the Note

reiterates a recently announced Department of Commerce whistleblower policy that offers the possibility of mitigating credit to an entity that reports a violation by another party if the information leads to an enforcement action and the disclosing entity later faces an enforcement action. [4] This enforcement policy and others described in the Note are designed to incentivize organizations to report violations.

Companies should take heed of the Tri-Seal Note because the government — as evidenced by the recent addition of 25 new prosecutors to the Department of Justice's National Security Division — has strengthened its focus upon corporate compliance and views sanctions evasion and unlawful exports of sensitive commodities, technologies, and services as a serious threat to the national security and the foreign policy of the United States.

Violations are subject to significant civil and criminal fines that can exceed $1 million and may result in lengthy prison terms, debarment from export licensing and government contracts, and other adverse consequences. Self-disclosing potential violations can provide significant mitigation of these potential penalties and may even lead to non-prosecution agreements for criminal offenses. However, as indicated by the Note, coming clean is not always a straightforward process.

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Contact Matthew Goldstein or Matthew Moedritzer at Akerman's Washington, D.C., office for questions about this alert or for more information on assistance with VSDs and export controls and sanctions compliance. Goldstein and Moedritzer focus their practice on international trade and national security laws. They consult on exports from the United States, reexports from abroad, arms brokering, foreign direct investment, and other activities regulated by the Department of Commerce

Bureau of Industry and Security, Department of State Directorate of Defense Trade Controls, the Department of Treasury Office of Foreign Assets Control, and the Committee on Foreign Investment in the United States.

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[1] See "Publication of Tri-Seal Compliance Note: Voluntary Self-Disclosure of Potential Violations" (July 26, 2023), available at https://ofac.treasury.gov/recent-actions/20230726.

[2] The Department of State also maintains procedures at 22 CFR § 127.12 for voluntarily reporting violations of the International Traffic in Arms Regulations that are similar in many respects to the VSD procedures followed by the Departments of Commerce and Treasury.

[3] Full cooperation means, among other things, timely preservation and collection of relevant documents and information.

[4] In addition to the benefits from disclosures about third parties offered by the Department of Commerce, the Financial Crimes Enforcement Network (FinCEN) offers monetary rewards for reporting sanctions violations in certain circumstances. As explained in the Note, "individuals who provide information to FinCEN or the Department of Justice may be eligible for awards totaling between 10 to 30 percent of the monetary sanctions collected in an enforcement action, if the information they provide ultimately leads to a successful enforcement action."

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legal counsel. Prior results do not guarantee a similar outcome.