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Recent "Tri-Seal Compliance Note" Underscores Importance of Sanctions and Export Controls Voluntary Self-Disclosures

Client Alert

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On July 26, 2023, the U.S. Department of Justice National Security Division (NSD), Department of Commerce Bureau of Industry and Security (BIS), and Department of Treasury Office of Foreign Assets Control (OFAC) issued a Joint Compliance Note (JCN) regarding the voluntary self-disclosure (VSD) of potential violations of export control and sanctions laws. As the Note reminds companies and other organizations, businesses "play a critical role in identifying threats from malicious actors and helping to protect our national security" To that end, self-disclosure plays a critical role in preventing breaches and abuses. Further, by self-disclosing, companies can significantly reduce their criminal and civil exposure.

Here are the key takeaways from each of the three agencies:

The Department of Justice's National Security Division (NSD)

NSD highlighted its updated VSD policy, issued in March 2023, relating to potential criminal violations of export control and sanctions laws. NSD noted that in cases where a company: (1) voluntarily self-discloses potential criminal violations; (2) offers full cooperation; and (3) timely and appropriately remediates the violation(s), NSD will generally not seek a guilty plea. Instead, there will be a presumption that the company will receive a non-prosecution agreement and the company will not be fined. However, the presumption favoring a non-prosecution agreement does not apply if there exist aggravating factors, including:

- Egregious or pervasive criminal misconduct within the company,
- Concealment or involvement by upper management,

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- 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, and
- A significant profit to the company from the misconduct.

If such factors are present, NSD retains the discretion to seek an alternate resolution, such as a guilty plea or deferred prosecution agreement.

To avail itself of the above policy, a potential violator must voluntarily disclose “within a reasonably prompt time after becoming aware of the potential violation, absent any other legal obligation to disclose, and prior to an imminent threat of disclosure or government investigation.” Further, disclosures made only to regulatory agencies, e.g., OFAC or BIS, do not qualify. In addition, the disclosure to NSD must include all relevant facts known at the time and the company “must cooperate fully with NSD when making its disclosure.”

Interestingly, NSD indicated that to “further strengthen[] its focus on corporate compliance with national security laws[,]” it has hired a Chief Counsel for Corporate Enforcement and added “twenty-five new prosecutors to help investigate and prosecute sanctions evasion, export control violations, and similar economic crimes.”

The Department of Commerce’s Bureau of Industry and Security (BIS):

BIS explained that it strongly encourages disclosures by companies that believe they may have violated the Export Administration Regulations (EAR), or any order or license issued thereunder, noting that the VSD policy can be found in Section 764.5 of the EAR. As BIS notes, a timely and comprehensive disclosure, involving the full cooperation of the disclosing party, substantially reduces the applicable civil penalty under BIS settlement guidelines.

BIS also pointed to the April 18, 2023, Assistant Secretary for Export Enforcement Memorandum regarding the BIS policy on VSDs concerning others. The memorandum clarifies the risk calculus on disclosures in two ways:

First, a deliberate nondisclosure of a significant possible violation of the EAR will be considered an aggravating factor under BIS penalty guidelines. Second, if an entity becomes aware that another party is potentially violating the EAR and submits a tip to the Office of Export Enforcement (OEE), OEE will consider that a mitigating factor under the penalty guidelines if the information leads to an enforcement action and if the disclosing entity faces an enforcement action (even if unrelated) in the future.

The Department of the Treasury’s Office of Foreign Assets Control (OFAC):

Finally, OFAC explained that, in accordance with its own enforcement guidelines (Appendix A to 31 CFR Part 501), VSDs are considered a mitigating factor when assessing the appropriate action in response to a violation. Indeed, in cases where a civil penalty is levied, a qualifying VSD can result in a 50%

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reduction in the base amount of such penalty. In reviewing the underlying conduct disclosed: “OFAC considers the totality of the circumstances surrounding the apparent violation, including, among other factors, the existence, nature, and adequacy of the subject’s compliance program at the time of the apparent violation and the corrective actions taken in response to an apparent violation.” Further, qualifying VSDs must occur prior to, or simultaneously with, the discovery by OFAC (or another agency) of the apparent violation (or a substantially similar apparent violation). Moreover, OFAC explained that it requires VSDs to include, or to be followed-up by within a reasonable period of time, a detailed report setting forth a complete description of the facts and circumstances regarding the apparent violation(s).

From an organizational compliance perspective, the goal of this Note is clear: to align the cost-benefit analyses of companies determining whether to disclose potential violations with national security priorities. Companies should not only heed the substantive advice contained in the three agencies’ policy statements but also note the emphasis on enforcement priorities that this unified guidance signals.

Members of Butzel’s Aerospace and Defense Industry Team have significant experience counseling companies on export control issues, including internal investigations and voluntary disclosures.

Please feel free to contact the author of this client alert or your Butzel attorney for more information.

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