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Client Alert News Flash

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Department of Justice Revises Policy Regarding Voluntary Disclosures of Export Control and Sanctions Violations

The revised policy both clarifies and expands DOJ's prior disclosure guidance.

On December 13, 2019, the United States Department of Justice (DOJ) revised its policy regarding voluntary self-disclosures (VSDs) of potentially willful violations of the US government's primary export control and sanctions laws[1] (collectively, US Trade Controls) (VSD Policy). The VSD Policy both clarifies and meaningfully expands prior guidance issued in October 2016 (2016 Guidance) by DOJ's National Security Division (NSD), which first articulated a policy of encouraging VSDs for criminal violations of US Trade Controls. The 2016 Guidance established criteria with respect to self-disclosure, cooperation, remediation, and the presence of aggravating factors that, if met, could make the disclosing party eligible for certain benefits, including reduced penalties, an abbreviated period of supervised compliance, and the possibility of a non-prosecution agreement (NPA) or of avoiding an independent monitor. This 2016 Guidance was the subject of a previous *Client Alert*.

Most notably, the VSD Policy clarifies the benefits available to a company that self-discloses by establishing a presumption that a disclosing company will receive an NPA and will not pay a fine, absent aggravating factors. Yet, in stipulating that a company that discloses only to a regulatory agency (and not to DOJ) will not qualify for the benefits under the VSD, the policy may create new challenges for parties considering whether to self-disclose in exchange for leniency.

Overview

Building on the 2016 Guidance, the VSD Policy provides some critical clarifications regarding the required criteria to obtain the benefits of the policy.

First, in order for a disclosure to qualify as "voluntary," the disclosing party must report the criminal conduct to NSD's Counterintelligence and Export Control Section (CES):

- "[P]rior to an imminent threat of disclosure or government investigation"
- "[W]ithin a reasonably prompt time after becoming aware of the offense," with the disclosing party bearing the burden of showing the satisfaction of that timeline

  With a disclosure that reveals all relevant facts known at the time of the report, including the identification of all parties responsible for or otherwise involved in the underlying conduct

In addition, to achieve full cooperation credit, the disclosing party must:

- Provide timely updates to CES on the status of the party's investigation and findings (to include rolling disclosures, if appropriate)
- Notify CES of relevant evidence not in the party's possession
- Timely preserve, collect, and produce to CES relevant documents and information
- Agree to the de-confliction of witness interviews and other investigative steps
- Make relevant personnel available for interviews by DOJ

Importantly, the VSD Policy clarifies that eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protections. Further, the VSD Policy indicates that partial cooperation credit may be afforded if the disclosing party meets some, but falls short of satisfying all, criteria.

Finally, to achieve credit for timely and appropriate remediation, the disclosing party must:

- Undertake a review of the underlying causes of the criminal violations at issue (root cause analysis)
- Implement an effective compliance program
- Appropriately discipline personnel responsible for the relevant misconduct
- Successfully retain and prohibit the improper destruction of business records
- Demonstrate through appropriate action the acceptance of responsibility and implementation of measures reasonably designed to prevent recurrence

Key Changes

The VSD Policy is consistent with the 2016 Guidance insofar as it signals NSD's continued goal of encouraging self-disclosure and cooperation, and underscores DOJ's reliance on the business sector in carrying out national security objectives. However, it is distinguishable in several key ways.

- **Provides for Presumption of NPA**: Whereas the 2016 Guidance provided only that an NPA was a *possible* benefit of a qualifying VSD, the VSD Policy provides for a *presumption* that parties who voluntarily disclose a potential criminal violation, cooperate fully with CES, and timely and appropriately remediate will receive an NPA and will not be assessed a fine.[2] Notably, the VSD Policy clarifies that the presence of aggravating factors[3] may result in a different criminal resolution — such as a deferred prosecution agreement or guilty plea — but states that in such instances, CES will accord, or recommend to a sentencing court, a 50% penalty reduction, and will not require the appointment of a compliance monitor (provided the disclosing party has, at the time of resolution, implemented an effective compliance program).
- **Requires Root Cause Analysis**: Unlike the 2016 Guidance, the VSD Policy requires the disclosing party to undertake a root cause analysis aimed at identifying the specific causes of the violations at issue, and to provide these details in the VSD.

- **Is Available to Financial Institutions**: The disclosure benefits set forth in the 2016 Guidance were not available to financial institutions, which have unique stand-alone compliance and reporting obligations. By contrast, the VSD Policy allows financial institutions to qualify for the disclosure benefits, subject to the satisfaction of the disclosure, cooperation, and timeliness and remediation criteria.

Observations and Potential Impact

The VSD Policy reflects DOJ's recent emphasis on specifying the concrete and quantifiable benefits available to companies that voluntary self-disclose and cooperate. Notably, in November 2017, DOJ made permanent a revised version of its Pilot Program (the FCPA Corporate Enforcement Policy) aimed at encouraging companies to voluntarily disclose potential violations of the Foreign Corrupt Practices Act (FCPA). Similar to the FCPA Corporate Enforcement Policy, the VSD Policy's explicit presumption that a disclosing company will receive an NPA should be viewed positively by the business sector and may well result in an increase in VSDs (as reportedly occurred in connection with FCPA-related matters under the Pilot Program).

However, NSD's insistence that only disclosures to CES will qualify for the benefits of a VSD under the Policy will put some companies in the difficult position of trying to quickly determine whether certain conduct is "potentially willful" — a complicated analysis under most circumstances. As explained in Latham's *Client Alert* on the 2016 Guidance:

> *If companies believe that they will not receive credit in a criminal investigation unless they make a VSD to NSD, companies will obviously face greater pressure to disclose to NSD if there is any possibility that the government will later take the position that the conduct at issue was "willful." But determining whether or not misconduct is willful in export controls and sanctions cases is usually not an easy task. Indeed, quite commonly private parties and the government view conduct differently — debates over whether activity rises to the criminal level are often the most contentious and protracted elements of investigations and settlement negotiations. In light of the Guidance, some companies might decide to err on the side of caution and over-disclose to NSD, but taking such a step could substantially increase the costs and risks associated with the VSD process, while perhaps also heightening the possibility of a criminal investigation and disposition of the matter. As a result, the Guidance may have the reverse effect of actually deterring VSDs to both civil and criminal regulators, as companies may conclude that the benefit of a standalone VSD to the appropriate administrative agency is diminished if the VSD does not also count as mitigating a potential criminal penalty.*

Regardless, the VSD Policy, consistent with other recent DOJ and regulatory agency policy and guidance developments, underscores the US government's heightened scrutiny and enforcement of US Trade Controls, its willingness to reward companies that assist it in carrying out its national security objectives, and its view regarding the critical importance of sound Trade Controls compliance programs.

If you have questions about this *Client Alert* or require assistance managing compliance obligations related to US economic and trade sanctions, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

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Endnotes

1 The Arms Export Control Act, 22 U.S.C. § 2278, the International Emergency Economic Powers Act, 50 U.S.C. § 1705, and the regulations promulgated thereunder.

2 Even under an NPA, however, the company will be required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.

3 Aggravating factors may include, without limitation: (1) exports of items controlled for nuclear nonproliferation or missile technology reasons to a proliferator country; (2) exports of items known to be used in the construction of weapons of mass destruction; (3) exports to a Foreign Terrorist Organization or Specially Designated Global Terrorist; (4) exports of military items to a hostile foreign power; (5) repeated violations, including similar administrative or criminal violations in the past; and (6) knowing involvement of upper management in the criminal conduct.