



The Bottom Line

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DEPARTMENT OF JUSTICE REVISES EXPORT CONTROL SANCTIONS POLICY

Summary

On December 13, 2019, the Department of Justice (DOJ) issued a revised Voluntary Self-Disclosure (VSD) policy which rewards cooperating companies with a presumption in favor of a non-prosecution agreement and significant reduction in penalties. This policy builds on the changes also made to the Foreign Corrupt Policy Act (FCPA) to encourage business organizations to voluntarily disclose violations as early and thoroughly as possible.

Background

The laws which regulate export control as we know it today were written in the late 1970s. The Arms Export Control Act, established on June 30, 1976, gave the President the authority to control the import and export of defense articles and defense services. The International Emergency Economic Powers Act (IEEPA), enacted October 28, 1977, authorized the President to regulate international commerce after declaring a national emergency in response to any unusual and extraordinary threat to the United States. The Export Administration Act (EAA) of 1979 provided legal authority to the President to control U.S. exports for reasons of national security, foreign policy, and/or short supply, and formally established the Export Administration Regulations (EAR). On November 7, 2012, the Bureau of Industry and Security (BIS) published a proposed rule that set forth some changes to the EAR. One change introduced the option of voluntary self-disclosures in connection with the Office of Export Enforcement's conduct of investigations. On September 9, 2015, Deputy Attorney General Sally Q. Yates issued a memorandum entitled "Individual Accountability for Corporate Wrongdoing" to guide department attorneys when handling corporate matters. This memo directly influenced subsequent DOJ guidance regarding the processing of VSD's. The 2016 guidance establishes three requirements for a disclosure to be deemed voluntary. First, the disclosure must be made prior to the violation imminently coming to light by other means. Second, it must be made timely to the Counterintelligence and Export Control Section of the DOJ's National Security Division and the appropriate regulatory agency after a violation is discovered. Third, the company must disclose all relevant facts, including the facts about individuals involved in the violations.

Current Status

The new guidance established new parameters for disclosure with the emphasis on cooperation and speed rather than complete, detailed information. It is now the Department's stated policy that when a company (1) voluntarily self-discloses export control or sanctions violations to CES, (2) fully cooperates, and (3) timely and appropriately remediates, there is a presumption that the company will receive a non-prosecution agreement and will not pay a fine, absent aggravating factors. Aggravating factors include exports of items that are particularly sensitive or are being sent to end users that are of heightened concern; repeated violations; involvement of senior management; and significant profit. If aggravating factors do exist in the violation, the department will accord, or recommend to a sentencing court, a fine that is at least 50% less than the amount that otherwise would be available under the alternative fine provision and will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.

Impact

The new guidance stresses that almost all criminal violations of U.S. export control and sanctions laws harm national security, or have the potential to cause such harm. This threat to national security informs how the Department arrives at an appropriate resolution with a business organization and distinguishes these cases from other types of corporate wrongdoing. Federal prosecutors must balance the goal of encouraging such disclosures and cooperation against the goal of deterring these very serious offenses. It is the belief of the DOJ that this Policy will serve to further deter export control and sanctions violations in the first place; encourage companies to implement strong export control and sanctions compliance programs to prevent and detect such violations; and increase the ability of the Department to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove.

RESOURCES:

[DOJ Revises and Re-Issues Enforcement Policy](#) (U.S. DOJ)
[Export Control and Sanctions Enforcement Policy](#) (U.S. DOJ)