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DOJ Issues New Guidance on Reduced Penalties for Voluntary Disclosure of Export Control and Sanctions Violations

The Department of Justice ("DOJ") has issued new guidance regarding the availability of reduced penalties for voluntary self-disclosure, full cooperation, and timely remediation of export control and trade sanctions violations. Along with the Foreign Corrupt Practices Act ("FCPA") "pilot program" and the Yates Memorandum, this guidance continues the DOJ's recent trend of incentivizing self-disclosure of corporate crime and raising the bar for cooperation credit.

The guidance provides that qualifying entities will be eligible for non-prosecution agreements ("NPAs"), reduced monetary penalties, and the absence of a corporate monitor. To be eligible for such benefits, however, corporations must comply with the DOJ's stringent definitions of "voluntary disclosure," "full cooperation," and "timely and appropriate remediation," which include specific requirements regarding the timing and content of the disclosure, placing the burden for making disclosures of wilful violations to the DOJ on the reporting companies, the identification and production of documents and witnesses from outside the United States, and the implementation of an effective compliance program.

On October 2, 2016, the DOJ's National Security Division ("NSD") issued a memorandum providing "Guidance Regarding Voluntary Self-disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations" (the "Guidance"). The stated purpose of the Guidance is to encourage corporations to voluntarily self-disclose any practices that may constitute criminal violations of statutes implementing U.S. export control and sanctions regimes. The requirements for voluntary self-disclosure, cooperation, and remediation set forth in the Guidance are largely identical to those provided for the DOJ FCPA pilot program issued in April 2016.

The Guidance governs self-disclosure of potential criminal violations of the Arms Export Control Act ("AECA") and the International Emergency Economic Powers Act ("IEEPA"). The AECA, which is administered by the U.S. Department of State

Directorate of Defense Trade Controls ("DDTC") under the International Traffic in Arms Regulations ("ITAR"), addresses the regulation of the export of defense articles and defense services on the United States Munitions List. The IEEPA criminalizes wilful violations of trade sanctions regimes and the unlicensed export of dual-use commodities. Trade sanctions regimes are administered by the Treasury Department's Office of Foreign Assets Control ("OFAC"), which has the power to restrict trade with sanctioned countries and entities in accordance with legislation and various Executive Orders. The IEEPA also authorizes the Export Administration Regulations ("EAR"), governing the export of "dual-use" commodities (items with both civilian and military applications) and administered by the Commerce Department Bureau of Industry and Security ("BIS").

While not specifically mentioned in the Guidance, perhaps by oversight, it is likely that DOJ would apply the same principles to self-disclosure with respect to violations under the Trading with the Enemy Act ("TWEA") under which Cuba sanctions are imposed and enforced. The Guidance only applies to potential criminal violations of these statutes investigated by the DOJ, as opposed to administrative enforcement actions undertaken by the relevant regulatory agencies. In addition, the Guidance specifically does not apply to sanctions violations committed by financial institutions.

The Guidance outlines specific requirements for voluntary self-disclosure, full cooperation, and remediation. As an initial matter, for a company's disclosure to be deemed "voluntary," the disclosure must be made prior to an imminent threat of disclosure or government investigation and take place within a "reasonably prompt time" after discovery of the offending conduct. The disclosure must also include complete information on all known relevant facts, including all relevant facts about the individuals involved in the misconduct.

Once the company has made a sufficient voluntary self-disclosure of its misconduct, it must also provide "full cooperation" with any resulting government investigation. As a threshold requirement, the company must comply with the September 2015 Memorandum of the Deputy Attorney General on Individual Accountability for Corporate Wrongdoing (the "Yates Memo"). These requirements include identifying all individuals involved in or responsible for the misconduct at issue.

In addition to the requirements under the Yates Memo and related United States Attorney's Manual ("USAM") principles, the Guidance sets forth a number of additional actions that a company must take to receive full cooperation credit. Specifically, the Guidance states that a company must: (i) proactively disclose relevant facts even when not asked to do so; (ii) diligently preserve, collect, and disclose relevant documents; (iii) disclose all relevant facts gathered during the company's internal investigation (which must not conflict with the government's investigation) and provide timely updates thereof; (iv) make available any officers and employees with relevant information; (v) provide all facts relevant to potential criminal conduct by third parties and facilitate the production of third-party documents and witnesses; and (vi) disclose overseas documents and facilitate the production of foreign witnesses. In producing foreign documents, the company bears the burden of demonstrating that such production is restricted by foreign law, and must "diligently" identify any available means (including obtaining authorization from a foreign court) to produce such documents. If a company meets the threshold cooperation requirements under the Yates Memo and the USAM Principles but fails to fulfil these requirements, it may be eligible for some cooperation credit, though the benefits will be "markedly less" than for full cooperation.

Once a company is deemed to be eligible for cooperation credit, the DOJ will then evaluate whether the company has engaged in timely and appropriate remediation. In evaluating remediation efforts, the DOJ requires the implementation of an effective compliance program, which must include adopting an independent and effective compliance function, implementing risk assessment and technology control plans, providing employee training, and adopting measures to identify and preclude repetitions of such misconduct. The DOJ will examine whether the company has established a "culture of compliance" and will require "appropriate compensation and promotion" of compliance personnel. Additionally, the company must appropriately discipline employees determined to be responsible for the criminal conduct, and establish a system that provides for the possibility of disciplining others who had oversight of the responsible individuals.

When a company meets all of these requirements, it will be eligible for benefits such as reduced penalty and/or forfeiture, the possibility of an NPA, a reduced period of supervised compliance, and no requirement for a monitor. Additionally, where a company does not voluntarily self-disclose but, after learning of violations from a government investigation, fully cooperates and takes appropriate remedial measures, it may be eligible to receive some credit, such as the possibility of a DPA (but generally not an NPA), a reduced fine and forfeiture, and an outside auditor as opposed to a monitor.

It should be noted, however, that even when a company qualifies for cooperation and remediation credit, there are certain aggravating circumstances that could result in a harsher resolution. Such circumstances include those presenting a particular threat to national security, such as exporting items known to be used in constructing weapons of mass destruction, exporting goods to terrorist organizations, repeated sanctions or export violations, and knowing involvement of upper management in the criminal conduct.

The principles set forth in the Guidance are largely unique to the United States. As a point of comparison, the United Kingdom does not have an equivalent set of guidelines in relation to voluntary self-disclosure, cooperation and remediation in the context of export control and sanctions violations. The U.K. Serious Fraud Office ("SFO"), which is responsible for prosecuting offenses of bribery and corruption, has issued some guidance addressing the nature of cooperation that prosecutors may consider before deciding whether to enter into a DPA. The SFO guidance includes similar themes as the DOJ's guidance, such as promptly reporting the wrongdoing and establishing a proactive corporate compliance program. However, the SFO's guidance is less prescriptive than that of the DOJ, and it also emphasizes that a DPA is subject to other discretionary principles.

While the Guidance states that it is not intended to alter any self-disclosure policies utilized by the regulatory agencies that administer export control and sanctions regimes, the Guidance does provide that an organization that reports relevant violations to any regulatory agency should also disclose such violations to the Counterintelligence and Export Control Section ("CES") of the NSD if those violations were wilful, and therefore potentially criminal. This is a substantial departure from past practice, in which voluntary disclosures were made to the relevant export control agency (OFAC, DDTC or BIS) and the agencies maintained the discretion to refer appropriate cases for criminal prosecution based on their authority granted by the export control laws, policy decisions, and experience. Under the strict language of the Guidance, to qualify for full self-disclosure and mitigation credit, the organization must itself make the wilful violation determination and submit the conduct to CES for its scrutiny and review.

Prior to the Guidance, voluntarily disclosed violations were rarely referred to DOJ except in cases of particularly egregious misconduct, misleading disclosures, or wilful individual misconduct. Accordingly, companies could voluntarily disclose to the agencies, while making their arguments as to why the violations were not wilful and should not be referred for criminal prosecution, thereby preserving their penalty mitigation for disclosure and cooperation with the agencies. Now, under the new Guidance, if a company discloses to an agency, in order to preserve mitigation credit in a possible DOJ investigation, it must also disclose to CES. Putting the burden on the reporting company to initiate the disclosure to DOJ both negates the agency's opportunity to exercise its discretion to find no wilful violation occurred and, despite the qualifying language that could be included, risks implying that the company believes there was wilful conduct. The bottom line is that in any case involving potential violations of the U.S. government's export control and sanctions regimes, a company will need to weigh even more carefully whether it will be in a better position by voluntarily self-disclosing any misconduct, knowing that it may be dealing with both criminal and administrative enforcement authorities from the moment it does so.

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