

DOJ, Commerce, and Treasury Issue Advisory on Voluntary Self-Disclosure Policies for Sanctions and Export Control Violations

August 1, 2023

On July 26, 2023, the U.S. Department of Justice’s National Security Division (“NSD”), the U.S. Department of Commerce’s Bureau of Industry and Security (“BIS”), and the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”) issued a Tri-Seal Compliance Note (the “Note”) summarizing voluntary self-disclosure (“VSD”) policies applicable to U.S. sanctions, export controls, and other national security laws.¹ The Note reiterates that the U.S. government is focused on investigating and prosecuting violations of sanctions and export controls laws. Companies can also expect coordination by the agencies to continue when it comes to conducting investigations and taking enforcement actions.

The Note follows a speech by Deputy Attorney General Lisa Monaco on March 2, 2023, announcing that NSD would start issuing joint advisories with the Commerce and Treasury Departments, similar to the guidance on the Foreign Corrupt Practices Act (“FCPA”) that the U.S. Department of Justice (“DOJ”) publishes jointly with the U.S. Securities and Exchange Commission.²

In the same speech, Deputy Attorney General Monaco emphasized DOJ’s focus on corporate crime with national security implications, invoking an expression she’s used previously that “sanctions are the new FCPA,”³ referencing DOJ’s intention to model sanctions enforcement on its approach to enforcing the foreign bribery law. Consistent with that objective, she also announced that DOJ would dedicate additional resources to NSD.⁴

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

NEW YORK

Abena Mainoo
+1 212 225 2785
amainoo@cghs.com

Andrew Saba
+1 212 225 2716
asaba@cghs.com

WASHINGTON

David Last
+1 202 974 1650
dlast@cghs.com

Chase Kaniecki
+1 202 974 1792
ckaniecki@cghs.com

Samuel Chang
+1 202 974 1816
sachang@cghs.com

William Dawley
+1 202 974 1771
wdawley@cghs.com

¹Dep’t of Just. et al., “Department of Commerce, Department of the Treasury, and Department of Justice Tri-Seal Compliance Note: Voluntary Self-Disclosure of Potential Violations” (July 26, 2023), <https://ofac.treasury.gov/media/932036/download?inline> (“Tri-Compliance Note”).

²Speech, “Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime” (Mar. 2, 2023), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national> (“Deputy Attorney General Monaco Speech”). The recently published Note is the second joint advisory issued by DOJ and the Commerce and Treasury Departments. The first advisory, published on March 2, 2023, discussed the use of third-party intermediaries to attempt to evade Russia-related sanctions and export controls, including common red flags that may indicate such efforts and best practices for mitigating related risks. See Dep’t of Just. et al., “Department of Commerce, Department of the Treasury, and Department of Justice Tri-Seal Compliance Note: Cracking Down on Third-Party Intermediaries Used to Evade Russia-Related Sanctions and Export Controls” (Mar. 2, 2023), <https://www.justice.gov/media/1277536/dl?inline>.

³ Deputy Attorney General Monaco Speech.

⁴ *Id.*



The Note discusses each agency's VSD policies, as summarized below.

	<u>NSD</u>	<u>BIS</u>	<u>OFAC</u>
Subject of Disclosure	Potential criminal violations of the Arms Export Control Act, the Export Control Reform Act, and the International Emergency Economic Powers Act ⁵	Possible violations of the Export Administration Regulations ("EAR"), or any order, license or authorization issued thereunder ⁶	Actual or possible violations of U.S. economic sanctions laws, including the International Emergency Economic Powers Act, the Trading with the Enemy Act, the Foreign Narcotics Kingpin Designation Act ⁷
Timing of Disclosure	"[W]ithin a reasonably prompt time after becoming aware" of potential violations and before "an imminent threat of disclosure or government investigation" ⁸	"[A]s soon as possible" after discovery and before the government "has learned the same or substantially similar information from another source and has commenced an investigation or inquiry in connection with that information" ⁹	"[P]rior to, or simultaneous with, the discovery by OFAC or another government agency of the apparent violation or a substantially similar apparent violation" ¹⁰
Scope of Disclosure	Disclosure must include "all relevant non-privileged facts" known to the company at the time ¹¹	Initial notification should "describe the general nature and extent of the violations" ¹²	Disclosure must include, or be followed in a reasonable period by, a sufficiently detailed report providing "a complete understanding of the circumstances of the apparent violation(s)" ¹³
Effect of Disclosure	VSD, together with full cooperation and timely and appropriate remediation, in the absence of aggravating factors, will result in NSD generally not seeking a guilty plea and a presumption that the company will receive a non-prosecution agreement and will not pay a fine ¹⁴	VSD is considered a mitigating factor that substantially reduces the applicable civil penalty and may provide additional mitigation ¹⁵ On the other hand, deliberate non-disclosure of a significant possible violation of the EAR will be considered an aggravating factor ¹⁶	VSD is considered as a mitigating factor (as part of assessment of cooperation) in determining appropriate enforcement action and, where a civil penalty is imposed, a qualifying disclosure can result in a 50 percent reduction in the base amount of a proposed civil penalty ¹⁷
Disclosures to Other Agencies	Disclosures made only to regulatory agencies do not qualify ¹⁸		OFAC will determine on a case-by-case basis if disclosure to another agency will qualify ¹⁹

⁵ Dep't of Just., "NSD Enforcement Policy for Business Organizations," at 1 (Mar. 1, 2023), <https://www.justice.gov/media/1285121/dl?inline=> ("NSD Enforcement Policy").

⁶ 15 CFR § 764.5.

⁷ 31 CFR § 501, App. A.

⁸ NSD Enforcement Policy at

⁹ 4. 15 CFR § 764.5.

¹⁰ 31 CFR § 501, App. A.

¹¹ NSD Enforcement Policy at 4.

¹² 15 CFR § 764.5.

¹³ 31 CFR § 501, App. A.

¹⁴ NSD Enforcement Policy at 2-3.

¹⁵ 15 CFR § 764.5.

¹⁶ Memorandum from Matthew S. Axelrod, Assistant Secretary for Export Enforcement, to All Export Enforcement Employees, "Re: Clarifying Our Policy Regarding Voluntary Self-Disclosures and Disclosures Concerning Others," at 2-3 (Apr. 18, 2023), <https://www.bis.doc.gov/index.php/documents/enforcement/3262-vsd-policy-memo-04-18-2023/file> ("Axelrod Memo").

¹⁷ 31 CFR § 501, App. A.

¹⁸ NSD Enforcement Policy at

¹⁹ 4. Tri-Compliance Note at 5.

While based largely on existing guidance and authorities, the Note highlights the role of private-industry “gatekeepers” in sanctions and export control compliance, and U.S. authorities’ increasing emphasis on disclosures in conjunction with potential enforcement. NSD has hired a Chief Counsel for Corporate Enforcement and added 25 new prosecutors to work on investigating and prosecuting sanctions, export controls, and similar economic crimes,²⁰ actions that Deputy Attorney General Monaco had previewed in March, along with the issuance of an updated VSD policy relating to criminal export control and sanctions violations. In June 2022, the Office of Export Enforcement of BIS implemented a dual-track system to expedite resolution of minor or technical violations of the EAR and assign specific personnel to investigate potentially more serious violations.²¹ In April 2023, BIS published a memorandum outlining a notable new policy that disclosure of another party’s potential violation of the EAR, if it results in enforcement action, may be considered a mitigating factor in any future enforcement action (even if unrelated) against the disclosing party.²² Similarly, the Note also draws attention to the Financial Crimes Enforcement Network’s Anti-Money Laundering and Sanctions Whistleblower Program, which authorizes monetary awards to individuals for reporting violations of U.S. trade and economic sanctions, as well as the Bank Secrecy Act.²³

The VSD and whistleblower programs provide incentives for companies to self-disclose (and individuals to report) potential violations, underlining the importance of well-resourced and effective compliance programs. In particular, it will be critical for companies to consider early on the nuances and relevant scope of a relevant agency’s VSD policy, including whether to self-disclose to criminal authorities (and not only to regulatory agencies).

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²⁰ *Id.* at 3.

²¹ *Id.* at 4.

²² Axelrod Memo at 3.

²³ Tri-Compliance Note at 6.