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NEWSLETTER

DOJ Releases Guidance for Business Organizations Regarding Voluntary Self-Disclosures in Export Control and Sanctions Investigations

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Government Contracts Issue Update

On October 2, 2016, the National Security Division of the Department of Justice (NSD) issued a guidance document (the Guidance) memorializing NSD's policy for corporate voluntary self-disclosures (VSD) of willful, criminal violations of U.S. export control and sanctions laws and regulations. What was once a streamlined process—disclosing potential violations to the relevant U.S. government agency and receiving an automatic 50 percent penalty reduction—now requires careful consideration, as the Guidance encourages companies to voluntarily self-disclose willful violations to NSD's Counterintelligence and Export Control Section (CES) in addition to disclosing to other responsible agencies if they want to obtain the mitigating benefit of such disclosure.

In this regard, instead of making the VSD only to the appropriate regulatory authority, and waiting for that authority to involve CES as needed, a company, under the Guidance, is now encouraged also to present the VSD directly to CES when the company becomes aware of potential willful violations. A company that discloses to the Directorate of Defense Trade Controls (DDTC), the Bureau of Industry Security (BIS), or the Office of Foreign Assets Control (OFAC), but does not disclose to CES, is at risk of not receiving credit for its VSD.

The Guidance establishes three requirements for a disclosure to be deemed voluntary. First, the disclosure must be made prior to the

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violation imminently coming to light by other means. Second, it must be timely made to CES and the appropriate regulatory agency after a violation is discovered. Third, the company must disclose all relevant facts, including facts about individuals involved in the violations.

The Guidance also outlines how companies can reduce penalties based on full cooperation and appropriate remediation. The Guidance recommends that prosecutors first determine whether the business met the threshold requirement in the September 9, 2015 Deputy Attorney General (DAG) Memo on Individual Accountability (the so-called "Yates Memo"), which mandates disclosure of all relevant facts relating to the individuals responsible for the misconduct. Then, the prosecutor should analyze the company's cooperation, taking into account the particular circumstances of the case. For example, a smaller company does not need to conduct as extensive an investigation as a larger company. Full cooperation includes, but is not limited to: disclosing all facts proactively; preserving and collecting information; providing details about internal investigations; and making witnesses and documents available. Businesses that do not meet all of the cooperation criteria can still receive partial cooperation credit, but only if they meet the DAG Memo on Individual Accountability's requirements.

Cooperation is also a prerequisite for receiving credit for remediation measures. Remediation requires implementation (or strengthening) of an effective compliance program and disciplining responsible employees. It also requires recognition and acceptance of responsibility for violations, and implementation of measures to ensure the company avoids repeat violations.

Additionally, the Guidance describes certain aggravating factors that could lead to higher penalties in spite of disclosure, cooperation, and remediation. Exporting certain items, such as those used to create weapons of mass destruction or those controlled for nuclear nonproliferation reasons, is an aggravating factor. Exporting to terrorist organizations or to hostile foreign powers are aggravating factors, too. Companies will also receive less credit when there are repeat violations, if upper management was knowingly involved, or if the company received substantial profits from the violations.

Examples of reduced penalties companies could receive include a non-prosecution agreement, reduced fines, reduced time of supervision, or no required monitors. The Guidance recommends that prosecutors determine which reduced penalties to provide based on a balancing of credits and aggravating circumstances. The hypotheticals in the Guidance show NSD anticipates narrowly tailored penalties based on all of the circumstances surrounding a company's disclosure, cooperation, and remediation.

Overall, the Guidance strongly suggests that NSD plans to exercise a more active role and earlier involvement in willful, criminal violations of export control and sanctions laws and regulations. Given the high stakes and penalties involved, businesses seeking to take advantage of credits for disclosure and cooperation must take into consideration the Guidance and ensure that CES is fully involved as soon as a potential willful violation is discovered. Companies that fail to follow the Guidance will be less likely to receive reduced penalties, even if they disclose and cooperate with other agencies. It will, therefore, be important to reevaluate and change current compliance policies and procedures to incorporate the CES component in the company's decision-

making and reporting process.

For more information, please contact a Wiley Rein attorney.