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DOJ Announces Revised Voluntary Self-Disclosure Program for Willful Export Control and Sanctions Violations

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December 19, 2019 – On Friday, December 13, 2019, the U.S. Department of Justice (“DOJ”), National Security Division (“NSD”), announced a revised enforcement policy for the voluntarily self-disclosure of violations of U.S. export controls and sanctions laws. The policy aims to incentivize voluntary disclosures of willful and potentially criminal violations by rewarding cooperation with more lenient penalties and other “concrete and significant” benefits.

The revised Voluntary Self-Disclosure Policy applies to violations of U.S. export controls and sanctions regulations promulgated pursuant to the Arms Export Control Act, the Export Control Reform Act, and the International Emergency Economic Powers Act. The DOJ enforces criminal violations of U.S. export controls and sanctions provisions that involve knowing or willful violations of U.S. laws. The DOJ thus deals with more serious violations of U.S. export controls and sanctions laws than the U.S. Department of State, Directorate of Defense Trade Controls (“DDTC”), U.S. Department of Commerce, Bureau of Industry and Security (“BIS”) and the U.S. Department of the Treasury, Office of Foreign Assets Control (“OFAC”), which are responsible respectively for imposing penalties for civil violations, often, but not always, on a strict liability basis.

Under the Voluntary Self-Disclosure Policy, which became effective the day it was released, companies may receive significant benefits for disclosing criminal violations of U.S. export controls and sanctions laws if they:

- voluntarily self-disclose export control or sanctions violations to the NSD’s Counterintelligence and Export Control Section (“CES”);
- fully cooperate with any ensuing investigation by CES; and
- take corrective action to remediate the underlying causes of the violations in a timely and appropriate manner.

For a disclosure to be voluntary, the company must disclose to CES the potentially willful conduct at issue prior to an imminent threat of government investigation, within a reasonably prompt time after becoming aware of the offense, and must disclose all relevant facts known to it at the time of the disclosure, including the identities of any individuals who were involved in the violations. The self-disclosure must be to the DOJ; if a company uncovers willful misconduct and only reports the violations to either BIS or OFAC, the company is not eligible for the voluntary self-disclosure benefits for any violations that are determined to meet the criminal intent standard of knowing and willful conduct.

The new policy also requires businesses to implement robust compliance programs to receive remediation credit, in addition to analyzing the causes of the underlying conduct and disciplinary actions against the employees involved in violations.

The updated Voluntary Self-Disclosure Policy establishes a presumption that, when companies self-disclose a violation of U.S. export controls and sanction laws, the company will receive a non-prosecution agreement and will not pay a fine, unless aggravating factors exist that make the violation particularly egregious. Aggravating factors include:

- exports of items controlled for nuclear nonproliferation or missile technology reasons to a proliferator country;
- exports of items known to be used in the construction of weapons of mass destruction;
- exports to a Foreign Terrorist Organization or Specially Designated Global Terrorist;
- exports of military items to a hostile foreign power;
- repeated violations, including similar administrative or criminal violations in the past; and
- knowing involvement of upper management in the criminal conduct.

Even if aggravating factors exist, businesses will receive dramatically lessened criminal penalties if they voluntarily disclose violations. If a deferred prosecution agreement or guilty plea is required in light of the circumstances, the new policy directs the DOJ:

to recommend a fine that is at least 50 percent less than it would otherwise receive, which will be capped at an amount equal to gross gain or gross loss from the violation; and
to not require appointment of a compliance monitor if the company has implemented an effective compliance program.

The updated requirements for voluntary disclosure now mirror similar guidelines from the DOJ in providing voluntary self-disclosure benefits to businesses that disclose violations of the Foreign Corrupt Practices Act ("FCPA"), which were revised in November 2019. As in the NSD export controls and sanctions Voluntary Self-Disclosure Policy, the FCPA policy requires voluntary self-disclosure, cooperation, and remediation. According to DOJ, the dual revisions reflect "an effort to standardize, to the extent possible, DOJ voluntary disclosure policies," underscoring how these subject matters overlap.

While businesses receive substantial benefits under these policies, they are structured in such a way that preemptive and prompt action, as well as full cooperation and comprehensive remediation measures, are necessary to avoid significant criminal penalties for violations. The policy also is intended to encourage companies to bring problematic individual conduct to the attention of DOJ for potential prosecution in exchange for lenient treatment of the company consistent with policy revisions to the principles of federal prosecution of business organizations announced by then Deputy Attorney General Rod Rosenstein in late 2018. Accordingly, companies that discover potentially willful violations of U.S. export controls or sanctions laws should therefore carefully assess the value and potential risks of immediate action to voluntarily self-disclose pursuant to the updated policy.

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