

Locke Lord QuickStudy: Joint Compliance Note Issued by ?Departments of Justice, ?Commerce and Treasury on Voluntary ??Self-Disclosure of ?Potential Violations?

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On July 26, 2023, the U.S. Department of Justice (“DOJ”), 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 [joint compliance note](#) (“Compliance Note”) focusing on the voluntary self-disclosure (“VSD”) policies that apply to U.S. sanctions, export controls, and other national security laws, as well as recent updates that have been made to these policies. The Compliance Note highlights the significance of VSDs, not only in helping companies regarding amelioration of penalties, but in notifying national security agencies about activities that could potentially jeopardize the national security and foreign policy objectives of the U.S. government.

DOJ

The DOJ’s National Security Division (“NSD”) issued an [updated VSD policy](#) covering potential criminal violations of export control and sanctions laws on March 1, 2023. The objective behind the VSD policy is to encourage companies to actively adopt effective compliance programs and undertake internal investigations to uncover potential misconduct that, if left undiscovered and undisclosed, might result in criminal penalties. The Compliance Note specifies that if a company willingly self-reports potential criminal violations, demonstrates complete cooperation, and promptly and effectively remedies the violations, then the NSD will generally not pursue a guilty plea. For a company to benefit from disclosure under the NSD VSD policy, it must promptly and appropriately address any violations. As part of its analysis, NSD evaluates whether the company has an effective and well-resourced compliance program and will consider whether the company has taken appropriate disciplinary actions, including compensation clawbacks, against employees involved in or overseeing the area where the criminal conduct occurred. In exchange for such cooperation, the company may be granted a non-prosecution agreement and exempted from paying fines. The NSD retains the authority to pursue alternative courses of action, like deferred prosecution agreements or guilty pleas, in cases where specific aggregating factors are present. These factors may include severe or widespread criminal misconduct within the company or the export of highly sensitive items to end uses of heightened concern. The principles of NSD’s policy may be applied to corporate criminal matters, including cases related to support to terrorists or potential criminal violations linked to the Committee on Foreign Investment in the United States (“CIFUS”).

BIS

The BIS encourages companies to disclose any potential violations of the Export Administration Regulations (“EAR”) or related orders, licenses or authorizations. Timely and comprehensive disclosures, coupled with full cooperation, can significantly reduce civil penalties. Minor or technical violations are rapidly resolved through the BIS’ “fast-track” process which could result in a warning or no-action letter issued within 60 days of submission. More serious violations, however, may be referred to the BIS Office of Export Enforcement (“OEE”) which will conduct a thorough investigation to determine if enforcement action is necessary. Nonetheless, companies voluntarily coming forward will still receive substantial credit for VSD and cooperation. In April 2023, the OEE issued a [memorandum](#) regarding the BIS policy on VSDs. Deliberate non-disclosure of significant potential EAR violations is considered an aggravating factor in BIS penalty guidelines. Conversely, if a company reports another party potentially violating the EAR, and it leads to an enforcement action, the reporting entity will receive mitigating credit under penalty guidelines, even if they face an unrelated enforcement action in the future. The effectiveness of a company’s compliance program, including its ability to identify and rectify compliance gaps, is also considered in the settlement guidelines.

OFAC

OFAC also has programs to encourage voluntary disclosures of potential sanctions violations. When determining enforcement action, OFAC measures VSDs as a mitigating factor. In cases where a civil monetary penalty is appropriate, a qualifying VSD can lead to a 50% reduction in the proposed penalty’s base amount. During the review of an apparent violation reported through a VSD, OFAC takes into account various factors, such as the overall content of the violations, the compliance program’s existence, nature, and adequacy at the time of the violations, as well as the corrective actions taken in response. Whether a notification of an apparent violation to another agency qualifies as a VSD to OFAC depends on the specific circumstances of each case. Certain situations will not qualify as VSDs, including if the disclosure contains false or misleading information, if it is materially incomplete (consider alongside supplemental information), or if a third party is obligated to notify OFAC but fails to do so due to the transaction being blocked or rejected (regardless of the third party’s awareness). OFAC requires VSD’s to be accompanied, or soon followed by a sufficiently detailed report that offers a comprehensive understanding of the apparent violations’ circumstances.

FinCEN

Under certain circumstances, individuals can also receive monetary rewards for making a VSD. The U.S. Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”) runs a whistleblower program that encourages people within the U.S. and abroad to provide information to the government about violations related to U.S. trade and economic sanctions and the Bank Secrecy Act. If the information provided by a whistleblower leads to a successful enforcement action, they may be eligible for awards ranging from 10% to 30% of the monetary sanctions collection. Additionally, FinCEN may reward whistleblowers whose information contributes to the successful enforcement of a “related action,” including those under the Export Control Reform Act. Whistleblowers have the choice to either disclose their identity or remain anonymous while submitting information. There are confidentiality protections for whistleblowers, as well as safeguards against retaliation by their employers.

Conclusion

This paper is intended as a guide only and is not a substitute for specific legal or tax advice. Please reach out to the authors for any specific questions. We expect to continue to monitor the topics addressed in this paper and provide future client updates when useful.

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