

THE GLOBAL TRADE LAW JOURNAL

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Sanctions and Export Controls Voluntary Disclosures: Key Takeaways from Federal Tri-Seal Compliance Note

David Mortlock, Britt Mosman, Michael J. Gottlieb,
William J. Stellmach, and Joshua Nelson*

In this article, the authors offer five key takeaways from the joint Tri-Seal Compliance Note on sanctions and export controls issued recently by three federal departments.

The U.S. Departments of Commerce, Treasury, and Justice have issued a joint Tri-Seal Compliance Note (the Note) on sanctions and export controls enforcement, focusing on “Voluntary Self-Disclosure of Potential Violations.”¹ This Note provides guidance from the Department of Justice’s (DOJ) National Security Division (NSD), the Department of the Treasury’s Office of Foreign Assets Control (OFAC), and the Department of Commerce’s Bureau of Industry and Security (BIS) with respect to voluntary self-disclosures (VSDs) for businesses that may have violated U.S. sanctions, export controls, and other national security laws.

Beyond the guidance within the Tri-Seal Compliance Notes themselves, these updates underscore an enhanced level of cooperation and coordination among the bodies responsible for enforcing national security-related trade compliance laws. This mirrors the ongoing coordination between the DOJ and the U.S. Securities and Exchange Commission on Foreign Corrupt Practice Act guidance and enforcement. This cooperation takes place against the backdrop of increased focus on global trade across the board within the U.S. government, particularly in areas like Russian sanctions evasion and competition in the semiconductor and artificial intelligence industries.

This article offers five key takeaways from the Note for businesses operating in this space.

1. National Security Division Not Seeking Guilty Pleas for Voluntary Self-Disclosures

NSD has announced that it will generally not seek guilty pleas related to prompt and complete self-disclosure of potential criminal violations to NSD.² In order to take advantage of NSD's policy, the company initiating the VSD must (1) fully cooperate (including timely preservation and collection of relevant documents and information), and (2) timely and appropriately remediate the violation (including implementation of an effective and sufficiently resourced compliance and ethics program).

In general, NSD will not seek a guilty plea in these instances, and there will be a presumption of a non-prosecution agreement and no fine. This policy is applicable to other corporate criminal matters handled by NSD, including the Foreign Agents Registration Act (FARA), laws prohibiting material support to terrorists, and criminal violations in connection with Committee on Foreign Investment in the United States proceedings.

The presumption of non-prosecution agreements does not apply when so-called aggravating factors are present. Specifically, these include egregious or pervasive criminal misconduct within the company, concealment or involvement by upper management, repeated administrative and/or criminal violations of national security laws, the export of items that are particularly sensitive or to end users of heightened concern, and a significant profit to the company from the misconduct. In such situations, NSD has the discretion to seek other resolutions, like a deferred prosecution agreement or a guilty plea. It remains to be seen how NSD will define "egregious," which if defined broadly enough to include cases where the company acted willfully, recklessly, and/or with knowledge, would presumably encompass most cases before NSD given that criminal intent is generally a prerequisite for criminal enforcement.

2. National Security Division to Require Disciplinary Measures to Access Benefits of Disclosure

A notable requirement of NSD's self-disclosure policy is that disciplinary measures should be taken against personnel within a company who are responsible for the potential violations. In particular, companies should consider compensation clawbacks for employees who directly participated in or had oversight or supervisory

authority over the area where the criminal conduct occurred. This is an extension of NSD's requirement that companies are not unjustly enriched by potential violations of national security law—not only is the company prohibited from retaining unlawfully obtained gains, so are individuals within the company.

3. Department of Justice Increases Corporate Enforcement Personnel for Sanctions and Export Controls

The NSD has reportedly increased its personnel responsible for corporate compliance with national security laws in recent months. In addition, Ian C. Richardson has been named the first chief counsel for corporate enforcement, and Christian J. Nauvel has been named as deputy chief counsel for corporate enforcement.³

In addition, the NSD is hiring 25 attorneys to investigate and prosecute sanctions evasion, export control violations, and similar economic crimes. This adds significantly to the size of the office and increases NSD's ability to undertake investigations and quickly address self-disclosure by companies.

4. Bureau of Industry and Security Establishes 60-Day Fast Track System for Minor and Technical Infractions

In June 2023, BIS implemented a dual-track system to handle self-disclosures. Those that involve minor or technical infractions are resolved within 60 days of final submission with either a warning or a no action letter. If a violation is potentially more serious, the BIS Office of Export Enforcement (OEE) will undertake a longer investigation to determine whether enforcement action is warranted. In April 2023, Assistant Secretary for Export Enforcement Matthew Axelrod stated that the dual-track system had not increased the amount of VSDs, but had given the OEE more resources to effectively investigate more serious violations.⁴ Moreover, Axelrod encouraged companies to consider VSDs for more significant violations, highlighting the available penalty reductions, including the possibility of a fully suspended penalty.⁵

5. Bureau of Industry and Security Heightens Consideration of Compliance Policies and Practices

In the same April memorandum, BIS clarified its treatment of aggravating and mitigating factors under its enforcement guidelines.⁶

Deliberate nondisclosure of a significant possible violation will be considered an aggravating factor under the enforcement guidelines. Moreover, the existence, nature, and adequacy of a company's compliance program can be an aggravating factor when the program enables companies to "self-blind" and choose not to do an internal investigation. On the other hand, a high-quality compliance program is treated as a mitigating factor. Moreover, BIS can mitigate penalties if an entity submits a tip to the OEE when it becomes aware that another party is potentially violating the Export Administration Regulations and the tip leads to an enforcement action. A disclosing entity receives credit for tips if it faces an enforcement action itself in the future, no matter whether the action is related to its tip or not. In effect, companies are able to bank goodwill with BIS in the event of a future potential violation.

Conclusion

While these changes are meant to encourage companies to voluntarily report any violations of law, navigating the disclosure process remains complex. The increased cooperation and personnel in enforcement bolsters the capacity of the DOJ, BIS, and OFAC to engage in enforcement actions, but also to quickly address and provide confidence to entities that may have engaged in minor violations of sanctions or export control laws. When companies have no obligation to report violations of sanctions and export controls laws, they should consult counsel and consider the pros and cons of a disclosure, including the factors described above.

Notes

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1. Voluntary Self-Disclosure of Potential Violations, Dept. Commerce, Treasury, Justice (July 26, 2023), <https://ofac.treasury.gov/media/932036/download?inline>. Additionally, on March 2, 2023, the same inter-department group issued the Tri-Seal Compliance Note, Cracking Down on Third-Party Intermediaries Used to Evade Russia-Related Sanctions and Export Controls, <https://ofac.treasury.gov/media/931471/download?inline>.

2. NSD Enforcement Policy for Business Organizations, Department of Justice (Mar. 1, 2023), <https://www.justice.gov/media/1285121/dl?inline>.

3. <https://www.justice.gov/opa/pr/justice-departments-national-security-division-announces-key-corporate-enforcement#:~:text=The%20Justice%20Department%E2%80%99s%20National%20Security,Corporate%20Enforcement%2C%20and%20Christian%20J.>

4. Matthew Axelrod, Memorandum: Clarifying Our Policy Regarding Voluntary Self-Disclosures and Disclosures Concerning Others, Department of Commerce (Apr. 18, 2023), <https://www.bis.doc.gov/index.php/documents/enforcement/3262-vsd-policy-memo-04-18-2023/file>.

5. *Id.*

6. *Id.*; 15 C.F.R. § 766 Supplement No. 1 (describing BIS enforcement guidelines).