SQUIRE PATTON BOGGS

# Department of Justice Revises Policy on Self Disclosure of Export Control and Sanctions Violations

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## Introduction

The US Department of Justice's (DOJ) National Security Division (NSD) recently revised its policy on the cooperation credit available to companies that voluntarily self-disclose potentially willful violations of export control and sanctions laws (the 2019 NSD Guidance).[1] Throughout last year, various departments of the DOJ issued similar guidance documents that emphasized its commitment to rewarding proactive and cooperative behavior by subjects and targets of DOJ investigations. The 2019 NSD Guidance is the latest of such documents, providing transparency and additional incentives for companies that become aware of potentially willful violations of export control and sanctions laws. The 2019 NSD Guidance is intended to "reassure companies that, when they do report violations directly to DOJ, the benefits of their cooperation will be concrete and significant."[2] As further detailed below, whether and when to disclose potentially willful violations to DOJ will remain a fact-driven exercise, and only time will tell how DOJ's implementation of the 2019 NSD Guidance will impact companies' self-disclosure calculus. Nonetheless, the new guidance should be a part of any discussion regarding how to address potentially willful export control or sanctions violations and, given the appropriate circumstances, companies may find that the potential benefits of the voluntary self-disclosure policy are sufficient to warrant proactive outreach to NSD.

## The Revised Guidance

The 2019 NSD Guidance continues to require that a company (1) voluntarily self-disclose violations of export controls or sanctions laws to NSD; (2) fully cooperate with the ensuing investigation; and (3) timely and appropriately remediate. However, the revised policy departs from its 2016 predecessor in three critical ways, as described in the chart below.

| | 2016 Guidance | 2019 Guidance |
|---|---|---|
| Benefits of the Voluntary Self Disclosure (VSD) Program | The company *may be eligible for the possibility of* a non-prosecution agreement (NPA), a reduced period of supervised compliance, a reduced fine and forfeiture and no requirement for a monitor. | It is *presumed* that the company will receive a non-prosecution agreement, will not pay a fine and will not require appointment of a monitor. |
| Impact of Aggravating Circumstances[3] | Where aggravating factors are present, "a more stringent resolution will be required." | Where aggravating factors are present "to a substantial degree," the DOJ will accord or recommend a fine that is at least 50% less than the amount otherwise available by law, and NSD will not require the appointment of a monitor. |
| Inclusion of Financial Institutions | Excluded Financial Institutions (FIs) from the policy because of their "unique reporting requirements under their applicable statutory and regulatory regimes." | Specifies, "all business organizations, including FIs, can take advantage of the Policy."[4] |

[1] https://www.justice.gov/nsd/ces_vsd_policy_2019/download. This new policy, which supersedes its 2016 predecessor, will be incorporated into the *Justice Manual*. The 2019 NSD Guidance applies to willful violations of the US laws implementing the primary export control and sanctions regimes, including the Arms Export Control Act (AECA), 22 U.S.C. § 2778; the Export Control Reform Act (ECRA), 50 U.S.C. § 4801 et seq.; and the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1705.

[2] https://www.justice.gov/opa/pr/department-justice-revises-and-re-issues-export-control-and-sanctions-enforcement-policy.

[3] Potential aggravating circumstances include exports of items controlled for nuclear non-proliferation 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; and knowing involvement of upper management in the criminal conduct.

[4] https://www.justice.gov/opa/pr/department-justice-revises-and-re-issues-export-control-and-sanctions-enforcement-policy.

## Implications

Although the 2019 NSD Guidance provides enhanced incentives to those companies that can meet the disclosure, cooperation and remediation requirements set forth therein, additional considerations and ambiguities still remain for companies, and particularly FIs, considering whether (and at what point) to voluntarily report potentially willful violations of export control and sanctions laws to NSD.

### Some Uncertainty Remains

In a speech announcing the new policy, Principal Deputy Assistant Attorney General David Burns noted that the 2019 NSD Guidance was drafted to more closely resemble existing and analogous guidance from other DOJ components, including DOJ's VSD policy relating to violations of the Foreign Corrupt Practices Act (FCPA).[5] That policy includes a 50% fine reduction for qualifying VSD in the FCPA context. To that end, the 2019 NSD Guidance is subject to similar criticisms, particularly ambiguity and subjectivity.

The 2019 NSD Guidance defines the criteria for "voluntary self-disclosure," "full cooperation" and "timely and appropriate remediation." Although the definitions may serve as guideposts in the evaluation as to whether VSD is in the company's best interest, there is still a gray area. Most notably, although the NSD Guidance quotes the US Sentencing Guidelines section on self-reporting, cooperation and acceptance of responsibility,[6] determination of "timely disclosure" is largely a factual inquiry controlled by precedent and prior interpretations. Other elements, such as *proactive cooperation and disclosure of all relevant facts* carry great weight in the 2019 NSD Guidance, but are ambiguous, and their meanings are essentially left to prosecutorial discretion. Similarly, the 2019 NSD Guidance sets forth "aggravating factors" that may require a guilty plea or a deferred prosecution agreement as opposed to a non-prosecution agreement, but states in a footnote that the "aggravating factor" list is not exhaustive. When a company is deciding whether to avail itself of the 2019 NSD Guidance, great care should be taken as to how the government may interpret these terms in light of the company's conduct.

### National Security Division (NSD)

The benefits under the 2019 NSD Guidance are not available to those who report to regulators potential willful violations of sanctions and export laws without disclosing to NSD. In short, filing a VSD with OFAC or a Suspicious Activity Report with FinCEN or disclosing a potential violation to a FI's functional regulator is not enough. And if a company does self-disclose to NSD, it should be prepared to be investigated by its federal and state regulators, a US Attorney's Office, NSD, and possibly the Money Laundering and Asset Recovery Section of the DOJ.

### Willfulness and Timeliness

The providence of VSD under the 2019 NSD Guidance will continue to be a deeply factual question evaluated on a case-by-case basis. A key consideration will be the intersection of the "timeliness" requirement under the policy, and when it is determined that the violation is "potentially willful." According to NSD, an act is "willful" if done with the knowledge that it is illegal. The government has indicated in past cases that evidence of willfulness may include repeated violative transactions, high-volume violative transactions or the involvement of senior leadership, among other factors. Often, a potential issue appears to be only a minor regulatory concern until internal analysis later reveals that there may be criminal implications. Even if VSD is unnecessary in the early stages of an investigation, careful consideration will need to be given as to whether and at what point subsequent disclosure is warranted as an organization learns more about the conduct, actors and motives involved.

## Conclusion

DOJ believes that "[b]usiness organizations and their employees are at the forefront of the effort to combat export control and sanctions violations [and] play a vital role in protecting our national security."[7] However, a company's evaluation as to whether and when to self-disclose violations of the law continues to be a complex and challenging exercise. It remains to be seen whether the 2019 NSD Guidance provides sufficient additional incentives and clarity for companies, and in particular financial institutions, to take advantage of its promises.

[5] By way of example, Mr. Burns noted a key difference between the 2019 NSD Guidance and DOJ's policy on VSD of violations of the FCPA. Under the FCPA policy, the presumption is declination of prosecution for those who fully cooperate as required. However, Burns highlighted that a NPA is more appropriate in the context of violations of export control and sanctions laws because of the national security implications.

[6] U.S.S.G. § 8C2.5(g)(1) states that "[i]f the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct," five points shall be subtracted from the company's culpability score under the Sentencing Guidelines.

[7] https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-david-burns-delivers-remarks-announcing-new.

## Contacts

**Kevin P. McCart**
Partner, Washington DC
T +1 202 457 6457
E kevin.mccart@squirepb.com

**Claiborne (Clay) W. Porter**
Partner, Washington DC
T +1 202 457 6511
E claiborne.porter@squirepb.com

**Benjamin D. Wood**
Partner, Washington DC
T +1 202 457 6685
E benjamin.wood@squirepb.com

**Thomas E. Zeno**
Of Counsel, Cincinnati
T +1 513 361 1202
E thomas.zeno@squirepb.com

**Elizabeth Weil Shaw**
Associate, Denver
T +1 303 894 6129
E elizabeth.weilshaw@squirepb.com

**Rebecca A. Worthington**
Senior Associate, Washington DC
T +1 202 626 6654
E rebecca.worthington@squirepb.com







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