



U.S. Department of Justice
National Security Division

Washington, D.C. 20530

October 2, 2016

**GUIDANCE REGARDING VOLUNTARY SELF-DISCLOSURES, COOPERATION,
AND REMEDIATION IN EXPORT CONTROL AND SANCTIONS INVESTIGATIONS
INVOLVING BUSINESS ORGANIZATIONS¹**

Introduction

Foreign governments and other non-state adversaries of the United States are engaged in an aggressive campaign to acquire superior technologies and commodities that are developed, manufactured, and controlled in, and by, the United States. Such acquisitions – when conducted in contravention of U.S. law and policy – undermine the comparative and competitive advantages of U.S. industries and warfighters and, consequently, the national and economic security of the United States.

Thwarting these unlawful efforts is a top priority for the National Security Division (NSD) of the Department of Justice (DOJ). Working in partnership with U.S. Attorneys' Offices, law enforcement and regulatory agencies, other U.S. government stakeholders, and our foreign government counterparts, NSD utilizes an "all-tools" approach to prevent and combat the unlawful export of commodities, technologies, and services, as well as to block trade and transactions with sanctioned countries and designated individuals and entities.

In particular, NSD has made it a priority to pursue willful export control and sanctions violations by corporate entities and their employees. Working with the U.S. Attorneys' Offices, NSD aggressively directs and supports investigations of corporate criminal misconduct through grand jury subpoenas, search warrants, witness interviews, and other mechanisms to obtain evidence from multinational corporations operating in U.S. markets or utilizing the U.S. financial system. Where appropriate, NSD pursues international assistance to obtain the necessary evidence to build criminal cases. Where such investigations reveal willful violations of U.S. export controls and sanctions, NSD and U.S. Attorneys' Offices seek to hold corporate entities criminally liable and prosecute culpable employees individually.

¹ This Guidance does not create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, organization, party, or witness in any administrative, civil, or criminal matter.

Consequently, business organizations and their employees are at the forefront of our enforcement efforts. As the gatekeepers of our export-controlled technologies, business organizations play a vital role in protecting our national security. However, when NSD learns of willful violations of U.S. export controls and sanctions, NSD is committed to using all of its tools to protect our national security and deter similar criminal misconduct.

This Guidance memorializes the policy of NSD to encourage business organizations to voluntarily self-disclose criminal violations of the statutes implementing the U.S. government's primary export control and sanctions regimes – the Arms Export Control Act (AECA), 22 U.S.C. § 2778, and the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1705.² This Guidance applies only to export control and sanctions violations. It sets forth the criteria that NSD, through the Counterintelligence and Export Control Section (CES) and in partnership with the U.S. Attorneys' Offices, uses in exercising its prosecutorial discretion in this area and in determining the possible benefits that could be afforded to an organization that makes a voluntary self-disclosure (VSD), as defined below.³ This Guidance also implements in export control and sanctions cases the memorandum of the Deputy Attorney General dated September 9, 2015, promoting greater accountability for individual corporate defendants (DAG Memo on Individual Accountability), as well as the November 2015 revisions to the Principles of Federal Prosecution of Business Organizations set forth in the U.S. Attorneys' Manual (USAM Principles). *See* USAM 9-28.000 and USAM 9-28.900.

² U.S. sanctions regimes and the Department of Commerce's Export Administration Regulations are currently enforced through IEEPA.

³ Because financial institutions often have unique reporting obligations under their applicable statutory and regulatory regimes, this Guidance does not apply to financial institutions. Multiple DOJ components, including NSD and the Asset Forfeiture and Money Laundering Section of the Criminal Division (AFMLS), often work together and alongside the responsible U.S. Attorney's Office as well as federal and state regulatory agencies in the investigation and prosecution of export control, sanctions, and other criminal violations by financial institutions. Nevertheless, financial institutions are encouraged to make voluntary disclosures to DOJ and may benefit from such disclosures under DOJ policy applicable to all business organizations. *See, e.g.*, USAM § 9-28.900 (“[P]rosecutors may consider a corporation's timely and voluntary disclosure, both as an independent factor and in evaluating the company's overall cooperation and the adequacy of the corporation's compliance program and its management's commitment to the compliance program.”). Financial institutions should continue to submit VSDs to AFMLS or the relevant U.S. Attorney's Office. In cases involving potential violations of export controls or sanctions, AFMLS or the U.S. Attorney's Office will then consult with NSD and AFMLS consistent with the U.S. Attorneys' Manual.

Almost all criminal violations of U.S. export controls and sanctions harm the national security or have the potential to cause such harm.⁴ This threat to national security informs how NSD and U.S. Attorneys' Offices arrive at an appropriate resolution with a business organization and distinguishes these cases from other types of corporate wrongdoing. In determining what credit to give an organization that voluntarily self-discloses illegal export control or sanctions conduct, fully cooperates, and remediates flaws in its controls and compliance program, federal prosecutors must balance the goal of encouraging such disclosures and cooperation with the goal of deterring these very serious offenses. If successful, this Guidance will serve to further deter individuals and companies from engaging in export control and sanctions violations in the first place, encourage companies to implement strong export control and sanctions compliance programs to prevent and detect such violations, and, consistent with the DAG Memo on Individual Accountability, increase the ability of NSD and U.S. Attorneys' Offices to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove.

This Guidance aims to provide greater transparency about what is required from companies seeking credit for voluntarily self-disclosing potential criminal conduct, fully cooperating with an investigation, and remediating. Accordingly, the Guidance first explains what constitutes a VSD, full cooperation, and timely and appropriate remediation. Second, the Guidance provides examples of aggravating factors that, if present to a substantial degree, could limit the credit an organization might otherwise receive, though the company would still find itself in a better position than if it had not submitted a VSD, cooperated, and remediated. Third, the Guidance explains the possible credit that may be afforded to a business organization that complies with the mandates set out below, including the disclosure of all relevant facts about the individuals involved in the wrongdoing. Finally, the Guidance provides sample scenarios that demonstrate the application of this policy.

Ordinarily, when an organization voluntarily self-discloses violations of U.S. export controls and sanctions, it presents its VSD to the appropriate regulatory agency under the procedures set forth in the agency's regulations. It is not the purpose of this Guidance to alter that practice. Business entities should continue to submit VSDs to the Department of State, Directorate of Defense Trade Controls (DDTC) for violations of the International Traffic in Arms Regulations (ITAR); to the Department of Commerce, Bureau of Industry Security (BIS) for violations of the Export Administration Regulations (EAR); and to the Department of the Treasury, Office of Foreign Assets Control (OFAC), for violations of U.S. sanctions regulations. However, as discussed further below, when an organization, including its counsel, becomes

⁴ Only a few sanctions regimes are not based on national security concerns.

aware that the violations may have been willful,⁵ it should within a reasonably prompt time also submit a VSD to CES.⁶

This Guidance does not supplant the USAM Principles. Prosecutors must consider the ten factors set forth in the USAM when determining how to resolve criminal investigations of organizations. However, this Guidance does set forth the way that NSD and U.S. Attorneys' Offices will evaluate credit for companies that voluntarily self-disclose, fully cooperate, and remediate in export control and sanctions cases.

Nothing in this Guidance is intended to suggest that the government can require business organizations to voluntarily self-disclose, cooperate, or remediate. Companies remain free to reject these options.

Definitions

For purposes of this Guidance regarding export control and sanctions violations, the following definitions apply.

1. Voluntary Self-Disclosure

Export control and sanctions violations can pose unique national security threats, and it is essential that such violations are brought to DOJ's attention in a timely manner to enable disruption or remediation.⁷

⁵ In export control and sanctions cases, NSD uses the definition of willfulness set forth in *Bryan v. United States*, 524 U.S. 184 (1998). Under *Bryan*, an act is willful if done with the knowledge that it is illegal. The government, however, is not required to show the defendant was aware of the specific law, rule, or regulation that its conduct may have violated.

⁶ VSDs covered by this Guidance should be emailed to CES at the following address: NSDCES.ExportVSD@usdoj.gov. VSDs can also be mailed to the Deputy Chief for Export Control and Sanctions, Counterintelligence and Export Control Section, 600 E Street, NW, Washington, D.C. 20530. The current Deputy Chief is Jay I. Bratt, jay.bratt2@usdoj.gov. After reviewing the submission, CES will promptly contact and coordinate with the appropriate U.S. Attorney's Office and the relevant regulatory agency. Because venue may lie in multiple districts, VSDs should be made to CES rather than to any single U.S. Attorney's Office. If a VSD is made to a U.S. Attorney's Office in the first instance, that U.S. Attorney's Office should notify CES promptly.

⁷ NSD will not consider a self-disclosure to be voluntary where it is required by a plea agreement, DPA, NPA, or any other similar agreement. A disclosure made parallel to or simultaneous with a disclosure under 22 C.F.R. § 126.1(e) will be considered voluntary under this Guidance.

The following actions are required for a company's disclosure to be deemed voluntary:

- The company discloses the conduct “prior to an imminent threat of disclosure or government investigation,” U.S.S.G. § 8C2.5(g)(1);⁸
- The company discloses the conduct to CES and the appropriate regulatory agency “within a reasonably prompt time after becoming aware of the offense,” U.S.S.G. § 8C2.5(g)(1), with the burden on the company to demonstrate timeliness; and
- The company discloses all relevant facts known to it, including all relevant facts about the individuals involved in any export control or sanctions violation.

2. Full Cooperation

Cooperation comes in many forms. Once the threshold requirements of the DAG Memo on Individual Accountability have been met, prosecutors should assess the scope, quantity, quality, and timing of cooperation based on the circumstances of each case when determining how much credit to give a company. For example, NSD does not expect a small company to conduct as expansive an investigation in as short a period of time as a Fortune 100 company.⁹ Nor do we generally expect a company to investigate matters unrelated in time or subject to the matter under investigation. An appropriately tailored investigation is expected; the company may, of course, for its own business reasons seek to conduct a broader investigation.

In addition to the USAM Principles, full cooperation requires the following actions:¹⁰

- As set forth in the DAG Memo on Individual Accountability, disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including all facts related to

⁸ If a whistleblower has informed the government of export control or sanctions violations, but the company remains unaware of this fact and discloses before the company becomes aware of the government's investigation, the company will be considered to have made a voluntary self-disclosure.

⁹ Where a company of any size asserts that its financial condition impairs its ability to cooperate more fully, for example, the company bears the burden of providing factual support for such an assertion.

¹⁰ If a company claims that it is impossible to meet one of these requirements, for example because of conflicting foreign law, prosecutors should closely evaluate the legitimacy of such a claim and should take the impediment into consideration in assessing whether the company has fully cooperated. The company bears the burden of establishing why it cannot meet one of these requirements.

- involvement in the criminal activity by the corporation's officers, employees, or agents;
- Proactive cooperation, rather than reactive; that is, the company must disclose facts that are relevant to the investigation, even when not specifically asked to do so, and must identify opportunities for the government to obtain relevant evidence not in the company's possession and not otherwise known to the government;
 - Preservation, collection, and disclosure of relevant documents and information relating to their provenance;
 - Provision of timely updates on the company's internal investigation, including but not limited to rolling disclosures of information;
 - Where requested, de-confliction of an internal investigation with the government investigation;
 - Provision of all facts relevant to potential criminal conduct by all third-party companies (including their officers or employees) and third-party individuals;
 - Upon request, making available for interviews those company officers and employees who possess relevant information; this includes, where appropriate and possible, officers and employees located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights);
 - Disclosure of all relevant facts gathered during the company's independent investigation, rather than a general narrative, including attribution of facts to specific sources where such attribution does not violate the attorney-client privilege;
 - Disclosure of overseas documents, the location in which such documents and records were found, and who found the documents (except where such disclosure is impossible due to foreign law, including but not limited to foreign data privacy laws);¹¹
 - Unless legally prohibited, facilitation of the third-party production of documents and witnesses from foreign jurisdictions; and
 - Where requested and appropriate, provision of translations of relevant documents in foreign languages.

As set forth in USAM 9-28.720, eligibility for cooperation credit is not predicated upon the waiver of the attorney-client privilege or work product protection. Nothing in this Guidance or the DAG Memo on Individual Accountability alters the USAM policy. Furthermore, not all companies will satisfy all the components of full cooperation, whether because they decide to cooperate only later in an investigation or they timely decide to cooperate but fail to meet all of the criteria listed above. In general, such companies should be eligible for some cooperation

¹¹ Where a company claims that disclosure is prohibited, the burden is on the company to establish the prohibition. Moreover, a company should work diligently to identify all available legal bases to provide such documents.

credit if they meet the criteria specified in the DAG Memo on Individual Accountability, but the benefits generally will be markedly less than for full cooperation as defined in this Guidance, depending on the extent to which the cooperation is lacking.

3. Timely and Appropriate Remediation

Encouraging appropriate and timely remediation is important to reducing corporate recidivism and detecting and deterring individual wrongdoing. In evaluating remediation efforts, NSD will first determine whether a company is eligible for cooperation credit; in other words, a company cannot fail to cooperate and then expect to receive credit for remediation despite that lack of cooperation. The following items generally will be required for a company to receive credit for timely and appropriate remediation (beyond the credit available under the Sentencing Guidelines):¹²

- Implementation of an effective compliance program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization, but will include:
 - Establishment of a culture of compliance, including an awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
 - Dedication of sufficient resources to the compliance function;
 - Ensuring that compliance personnel have the qualifications and experience to understand and identify transactions that pose a potential risk;
 - Institution of a compliance function that is independent;
 - Performing an effective risk assessment and tailoring the compliance program based on that assessment;
 - Implementation of a technology control plan and required regular training of employees to ensure export-controlled materials are appropriately handled;
 - Appropriate compensation and promotion of a company's compliance personnel, compared to other employees;
 - Auditing of the compliance program to ensure its effectiveness; and
 - A reporting structure of compliance personnel within the company that facilitates the identification of compliance problems to senior company officials and maximizes timely remediation.
- Appropriate discipline of employees, including those identified by the corporation as responsible for the criminal conduct, and a system that provides for the possibility of disciplining others with oversight of the responsible individuals and considers how

¹² NSD will also coordinate with the appropriate regulatory agency in assessing a corporation's remediation efforts and compliance program.

- compensation is affected by both disciplinary infractions and failure to supervise adequately.
- Any additional steps that demonstrate recognition of the seriousness of the corporation's criminal conduct, acceptance of responsibility for it, and the implementation of measures to preclude a repetition of such misconduct, including measures to identify future risks.

Potential Aggravating Circumstances

The following are examples of aggravating circumstances that represent elevated threats to the national security and that, if present to a substantial degree, could result in a more stringent resolution for an organization that has engaged in criminal export control and sanctions violations:¹³

- 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 terrorist organization;
- Exports of military items to a hostile foreign power;
- Repeated violations, including similar administrative or criminal violations in the past;
- Knowing involvement of upper management in the criminal conduct; and
- Significant profits from the criminal conduct, including disproportionate profits or margins, whether intended or realized, compared to lawfully exported products and services.

Benefits to Business Organizations

Where a company voluntarily self-discloses criminal violations of export controls and sanctions, fully cooperates, and appropriately remediates in accordance with the standards set forth above, the company may be eligible for a significantly reduced penalty, to include the possibility of a non-prosecution agreement (NPA), a reduced period of supervised compliance, a reduced fine and forfeiture,¹⁴ and no requirement for a monitor. The ultimate resolution will

¹³ This list is not exhaustive.

¹⁴ Because the fine guidelines in Chapter 8 of the U.S. Sentencing Guidelines (U.S.S.G.) do not apply in export control and sanctions prosecutions (*see* U.S.S.G. § 8C2.1), prosecutors in these matters rely on the alternative fine provision in 18 U.S.C. § 3571(d) and on forfeiture. In addition, DDTC, BIS, and OFAC commonly impose administrative fines for export control and sanctions violations. It is possible for the criminal fine imposed by the Department of Justice to be reduced by an amount paid to one of the regulators or vice versa. At a minimum, however,

depend on an evaluation of the totality of the circumstances in a particular case. For example, when one or more aggravating circumstances are present, a more stringent resolution will be required. Nevertheless, the company would still find itself in a better position than if it had not submitted a VSD, cooperated, and remediated.

Where an organization does not voluntarily self-disclose, but, after learning of violations from the government's investigation, cooperates fully and appropriately remediates the practices that led to the violations, the company still may be eligible to receive some credit, to include the possibility of a deferred prosecution agreement (DPA), a reduced fine and forfeiture, and an outside auditor as opposed to a monitor. A company that does not voluntarily disclose its export control and sanctions violations will rarely qualify for an NPA.

Hypothetical Examples

These examples are intended to assist federal prosecutors in exercising their discretion in prosecuting export control and sanctions cases, and organizations and their counsel in evaluating how to proceed in these matters. Each case, of course, will be unique. The following hypothetical examples are merely intended to illustrate possible applications of this Guidance.¹⁵

Example 1

Alert customs officers notice a bulky package within a container on a ship at a U.S. port bound to leave on a lengthy voyage overseas. The package contains ITAR-controlled commodities manufactured by a U.S. defense contractor that were destined for an embargoed country. The customs officers refer the case to the local U.S. Attorney's Office and CES, which begin a grand jury investigation of the U.S. company. The U.S. company complies with the grand jury subpoenas and does not engage in conduct to obstruct the investigation. As the investigation progresses, the company's cooperation improves, and it produces some evidence from overseas that would not otherwise have been available to the prosecutors. The prosecutors ultimately uncover a long-running scheme to violate AECA, one that netted the company substantial profits. However, due to the complexity of the investigation and its length, the statute of limitations expires as to the most culpable individuals. The company eventually does make improvements to its compliance program.

even in cases in which the company is receiving a significant reduction in potential penalties, it should not be permitted to retain any of the unlawfully obtained gain.

¹⁵ These examples are not meant to suggest how the relevant regulatory agency may resolve a matter or how cases that involve other criminal violations may be resolved.

Under these circumstances, the company likely would be required to enter a guilty plea to a felony offense. The conduct here was serious, the gain to the corporation was great, and the cooperation was minimal. There may be some reduction in the financial penalty, but not as great as would have occurred had the company made a VSD and/or fully cooperated. The government also likely would seek a monitor or, at a minimum, an outside auditor.

Example 2

A U.S. corporation has a subsidiary overseas that engaged in a scheme to divert critical dual-use commodities to a sanctioned nuclear entity in knowing violation of U.S. export control laws. A whistleblower within the company learns of the scheme and alerts senior management. Counsel for the company makes a VSD to BIS and CES, in which it identifies the responsible individuals, whom it also has fired. The foreign subsidiary is in a country with which the U.S. does not have a mutual legal assistance treaty. Nevertheless, the U.S. parent corporation produces all relevant documents and electronic files. In addition, it brings witnesses to the United States to testify in the grand jury, with assurances that they will also be available for trial. The parent corporation also revamps its compliance program and institutes extensive training for its foreign employees on U.S. export controls and sanctions.

Under these circumstances, because of the seriousness of the conduct and the increased threat to U.S. national security it created, the foreign subsidiary likely would be required to plead guilty to violating U.S. export controls and sanctions, serve a full term of supervision, and pay a substantial fine in addition to forfeiting its profits. The parent corporation likely would be offered an NPA and an 18-month period of supervision, along with a reduced fine, but would not be required to have a monitor or auditor.

Example 3

In the course of a regularly conducted compliance audit, a corporation that is headquartered in Europe discovers that one of its divisions had been acquiring export-controlled dual-use commodities from the United States and sending them to a sanctioned country. The conduct took place over approximately 15 months and involved a dozen illegal shipments worth about \$500,000. A vice-president for sales was responsible for devising the illegal scheme, and she was assisted by three subordinates who also knew of the illegality of their conduct. Senior management was unaware of these activities, although there were warning signs. This is the first time the company has faced prosecution for export control violations.

Immediately upon learning of the criminal conduct, the parent corporation makes a VSD to BIS, OFAC, and CES. It fires the responsible employees, and it disciplines management officials whose apparent negligence contributed to the creation of an environment in which the

wrongdoers felt they could engage in the illegal activities. The company also revamps its compliance program and hires a compliance director who will now report directly to the board of directors. It further provides full cooperation with the government's investigation of the individuals, identifying those individuals, producing all relevant documents, and obtaining authorization from a European court to turn over materials that might be subject to European privacy laws. It also makes employees available for interviews.

Under these circumstances, prosecutors would strongly consider offering the European parent corporation an NPA and an 18-month period of supervision. There would also be favorable consideration in calculating any monetary payment, which primarily would go to the regulators. In light of the robust compliance program, it is unlikely that a monitor or an outside auditor would be required.

Example 4

This example assumes the same facts as Example 3, except that the violations extended over several years and numbered in the hundreds. In this situation, prosecutors likely would require the company to enter into a DPA, which requires the public filing of an Information and acceptance of responsibility for the criminal conduct. The company likely would receive a reduced fine and period of supervision. Again, given the quality of the compliance program, it is unlikely that a monitor or an outside auditor would be required.