

THE TRUTH WILL COME OUT: U.S. GOVERNMENT ISSUES NEW TRI-SEAL COMPLIANCE NOTE ON SANCTIONS/EXPORT CONTROL VOLUNTARY DISCLOSURES AND WHISTLEBLOWER BOUNTIES

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 another [Tri-Seal Compliance Note](#) ("**Note**") regarding "The Voluntary Disclosure of Potential Violations" involving sanctions, export controls and other national security laws. The Note emphasizes the increasingly joined up approach of the criminal and administrative authorities, and underscores the carrot and stick, or perhaps stick and carrot, approach to encouraging voluntary self-disclosures ("**VSD**"). The Note compares and contrasts the VSD policies of the DOJ National Security Division ("**NSD**"), BIS and OFAC, while also reminding companies of the relatively new whistleblower bounty program which covers OFAC and export controls violations. The messaging is clear that if companies do not take the disclosure incentives, the government has dangled the prospect of significant financial awards to their employees to do so as whistleblowers.

NSD'S UPDATED VSD POLICY

As we advised in [February 2023](#), the DOJ Criminal Division previously announced the implementation of its new VSD Policy setting a nation-wide standard as to what qualifies as a VSD while seeking to incentivize companies to voluntarily submit potential misconduct by providing more transparency and predictability regarding the benefits and potential outcomes of disclosures. Following this lead, in March 2023, the NSD issued an updated [VSD Policy](#) covering potential

violations of export controls and sanctions laws, again defining what it will accept as a VSD, and incentivizing companies and other organizations to promptly self-disclose when they identify potential criminal violations. Under the NSD's VSD Policy, the NSD will not seek a guilty plea, and there will be a presumption that the company will receive a non-prosecution agreement and will not pay a fine when the company voluntarily self-discloses potentially criminal violations, fully cooperates, and timely and appropriately remediates violations. However, the presumption in favor of a non-prosecution agreement does not apply where there are aggravating factors present.

Companies must also "fully cooperate" with the NSD when making a disclosure. Notably, the NSD's VSD Policy and now the Note provide helpful examples of what is meant by full cooperation, including, among other things, timely preservation and collection of relevant documents and information, including concurrent authentication of records under Federal Rule of Evidence 902 and/or 803; deconfliction of witness interviews and other investigative steps that a company intends to take as part of its own internal investigation; and timely identification of opportunities for further investigation by NSD. These actions are potential examples of the "extraordinary" cooperation we [advised](#) on in connection with the DOJ's corporate enforcement guidance, but continue to put pressure on companies to "up" their cooperation.

How the VSD Policy will work in practice, and whether these further refinements as to what is accepted as "voluntary" and "cooperation" are a true invitation to cooperate or instead a gauntlet to run, remains to be seen. Companies should pay close attention to the specifics contained in the VSD Policy, as they may impact a company's risk management, escalation procedures and investigation strategy.

BIS UPDATED GUIDANCE FOR VSIDS

As we advised in [April 2023](#), the U.S. Department of Commerce's BIS issued a [VSD Memorandum](#) emphasizing the importance of compliance by U.S. businesses and universities, who are at the forefront of technological advances, in order to protect sensitive U.S. technologies and goods from being used by U.S. adversaries for malign purposes. The VSD Memorandum follows on other BIS initiatives to encourage reporting to the U.S. Government potential illicit activity, including [the June 2022](#) joint alert and [May 2023 supplement](#) by the Financial Crimes Enforcement Network ("FinCEN") and BIS regarding monitoring and reporting potential attempts to evade export controls on Russia and Belarus (see our briefing [here](#)).

The Note reemphasizes BIS's encouragement of disclosures by companies and other entities who believe that they have violated the Export Administration Regulations, or any order, license, or authorization issued thereunder, but also double down on the clear message from BIS's recent VSD Memorandum that a company's knowing decision not to make a VSD will be deemed an aggravating factor in any later investigation. Under BIS's VSD Policy, a disclosure that is timely and comprehensive and involves full cooperation of the disclosing party substantially reduces the applicable penalty under the BIS settlement guidelines.

OFAC'S VSD POLICY

OFAC similarly considers VSDs to be a mitigating factor in determining appropriate enforcement actions for sanctions violations. To qualify, a VSD must occur prior to, or simultaneous with, OFAC's or another agency's discovery of the violation or a substantially similar apparent violation. However, the Note reminds us that OFAC will not consider a disclosure as a VSD if another person had an obligation to report the matter, such as in a rejection or blocking report by a financial institution or the filing of a suspicious activity report, and such person in fact makes such report – even if it occurs after the attempted VSD to OFAC. This is in contrast to, for example, the NSD VSD Policy which will grant VSD credit even if they already have a non-public investigation pending on the issue, so long as the disclosing party is unaware of the investigation or the risk of an imminent investigation.

FINCEN'S ANTI-MONEY LAUNDERING ("AML") AND SANCTIONS WHISTLEBLOWER PROGRAM

The Note also calls out FinCEN's AML and Sanctions Whistleblower Program as an additional avenue to receive monetary rewards for disclosures about third parties. FinCEN's whistleblower program is designed to incentivize individuals in the United States and abroad to provide information to the government about violations of U.S. trade and economic sanctions, in addition to violations of the Bank Secrecy Act ("**BSA**"). As we wrote previously [here](#) and [here](#), the FinCEN whistleblower program provides awards if a submitted tip leads to an enforcement action resulting in a penalty exceeding \$1 million collected by the U.S. Government. Both U.S. and non-U.S. persons are eligible to submit a tip voluntarily. Whistleblowers do not need to be insiders. Any individual (or two or more individuals acting jointly) can provide information relating to a potential sanctions violation to either the U.S. Treasury Department or the Department of Justice. (Per the statute, rewards may also be available for those who provide information to their employers, but it remains to be seen how this will be implemented.) Rewards will only be available for individuals, and not for corporate entities or other organizations.

Although regulations for the FinCEN program have yet to be proposed, FinCEN's plan in the Presidents Unified Agenda references July 2023 as the target for their release with an opportunity for public comment (though no such proposal appeared last month). Notwithstanding the lack of implementing regulations, the program is up and running and it is understood that FinCEN is receiving a substantial number of tips, particularly with respect to sanctions violations.

We expect the proposed regulations will be modeled on other existing whistleblower rewards program, such as that instituted by the Securities and Exchange Commission ("**SEC**") in support of its own enforcement efforts. Since the beginning of that program in 2011, the SEC has paid more than \$1.5 billion in 328 awards. The program has expanded rapidly. In FY 2022 alone, the SEC awarded approximately \$230 million in 103 awards. We note that the FinCEN program is in its infancy with only a few staff in comparison with roughly 25 staff dedicated to administering the program at the SEC, the work of which is augmented by even larger teams of specialists in other parts of the SEC with supporting roles. Likely congressional interest in how the FinCEN program

performs is likely to generate increased awareness and expectations for it, as well as a steady stream of whistleblowers.

KEY TAKEAWAYS

The Note highlights the U.S. Government's continued strengthened focus on corporate compliance with national security laws and efforts to incentivize companies to voluntarily and timely self-disclose misconduct. For example, the Note emphasizes that the NSD recently hired a Chief Counsel for Corporate Enforcement and added twenty-five new prosecutors to help investigate and prosecute sanctions evasion, export control violations, and similar economic crimes. The Note reflects a coordinated regulatory expectation that companies voluntarily disclose any potential misconduct in an effort to identify threats and protect national security.

While the Note couches the FinCEN reward program as an additional way in which industry actors can help in the U.S. Government's mission, its placement in this announcement is a not-so-subtle reminder to companies that if they do not opt for a VSD, their employees can seek potential windfalls by turning them in.

Companies should continue to review their compliance government framework with an eye towards compliance with U.S. sanctions, export controls, and other national security laws to ensure timely escalation of potential issues to proper parties in order to avail company management adequate time to make an informed decision whether to make a VSD to the DOJ, BIS, and/or OFAC and help management understand just how significant cooperation will need to be.

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