Key Takeaways From Agencies' Tri-Seal Compliance Note

By **Betty Santangelo, John Nowak and Melissa Goldstein** (August 25, 2023)

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On July 26, the U.S. Department of the Treasury's Office of Foreign Assets Control, the U.S. Department of Justice and the U.S. Department of Commerce published a tri-seal compliance note that encourages private sector firms to self-disclose potential violations of sanctions, export controls, and other national security laws.

The note also outlines each agency's policies for offering leniency to firms that make a qualifying voluntary self-disclosure.[1]

Although the agencies consider many factors when determining whether to mitigate penalties, in light of the compliance note's emphasis on the role of a voluntary self-disclosure in that determination, it is important for firms to consider the potential for mitigation credit when making the decision to self-report.

OFAC's Voluntary Self-Disclosure Policy

OFAC, which administers and enforces economic and trade sanctions, has long encouraged disclosure of any apparent violations of sanctions laws and has implemented guidelines for submission and evaluation of voluntary self-disclosures.[2]

OFAC considers voluntary self-disclosures a mitigating factor in determining the level of appropriate enforcement action for a potential violation, which can range from a "no action" determination or issuance of a cautionary letter, to imposition of a civil monetary penalty or referral of the matter for criminal prosecution.[3]

To be treated as a mitigating factor by OFAC, voluntary self-disclosures must be submitted "prior to, or simultaneous with, the discovery by OFAC or another government agency of the apparent violation," and must contain a report that sufficiently details the circumstances of the potential violation; alternatively, a report should be provided promptly following the initial disclosure.[4]

If OFAC determines that a civil monetary penalty is warranted, a voluntary self-disclosure that qualifies under the program can result in a 50% reduction in the base amount of the civil monetary penalty.[5]

Certain factors will disqualify a disclosure from being treated as a voluntary self-disclosure by OFAC, including where:

- A third party was required to, and did, notify OFAC of the same or a substantially similar apparent violation, e.g., through a disclosure of a blocked or rejected transaction;

- The voluntary self-disclosure contains false or misleading information;

- The voluntary self-disclosure was prompted by a "suggestion or order of a federal or state agency or official" and was not, therefore, self-initiated, e.g., a disclosure was made in response to a subpoena or through the filing of a license application;

- The voluntary self-disclosure is materially incomplete; or

- For entities, the disclosure was made on behalf of the entity by an individual acting without the authorization of the entity's senior management.[6]

As with all enforcement investigations, OFAC considers the totality of the circumstances surrounding a potential violation in determining the proper response, including the adequacy of the reporting firm's sanctions compliance program and any corrective actions taken.[7]

Notably, firms that do not receive voluntary self-disclosure credit from OFAC may still be eligible for mitigation based on other factors, such as substantial cooperation with an investigation.[8]

Other factors that OFAC might weigh when considering the appropriate administrative action include, among others, whether the violation was willful or deliberate; whether there was an attempt to conceal the violation; whether the firm's management was involved; the extent of economic benefit conferred on a sanctioned person or country; or whether the violation harmed U.S. policy objectives.[9]

DOJ Policy

The compliance note also highlights the voluntary self-disclosure policy of the DOJ's National Security Division, which was updated earlier this year.[10]

If a potential violation could give rise to criminal liability, firms should assess whether to submit a voluntary self-disclosure to the NSD because the NSD will not give credit for disclosures submitted to other agencies.[11]

For criminal liability to attach, conduct must evidence a willful violation of sanctions or national security laws, meaning the violator acted "with the knowledge that it [was] illegal."[12]

When firms submit a qualifying voluntary self-disclosure, the NSD will generally offer a nonprosecution agreement without seeking fines or a guilty plea.[13]

Under the NSD's guidelines, voluntary self-disclosures must be submitted "prior to an imminent threat of disclosure or government investigation," the disclosing firm must not have been otherwise obligated to notify the government about the conduct, and the firm

must cooperate fully with the NSD.[14]

The NSD will also consider whether the disclosing party had a sufficient compliance program in place and whether appropriate remedial steps were taken following the violations.[15]

The presumption of nonprosecution will not apply if there are aggravating factors, including egregious or pervasive criminal misconduct, concealment, involvement by upper management, repeated violations of sanctions or other national security laws, export of particularly sensitive items, or significant profit from the misconduct.[16]

The NSD's recent policy update tracks the DOJ's commitment to encouraging self-disclosures of criminal corporate misconduct.[17] Accordingly, the NSD's policy generally aligns with the DOJ's recent update to its corporate enforcement policy, which applies to all corporate criminal matters handled by the DOJ's Criminal Division, including violations of the Foreign Corrupt Practices Act.[18]

Commerce Policy

The Commerce Department's Bureau of Industry and Security, which regulates exports of sensitive goods and technology with national security implications, employs a similar voluntary self-disclosure program.

Under BIS regulations, voluntary self-disclosures must be submitted before the BIS or another government agency learns of the potential violation, they must contain comprehensive information about the potential violation, and the disclosing party must cooperate fully with the BIS.[19]

If the BIS takes enforcement action as a result of the voluntary self-disclosure, the disclosing party may receive a 50% reduction in the base civil monetary penalty.[20]

Firms may also receive credit for disclosing violations committed by other parties.[21]

Of note, the BIS uses a two-track system for voluntary self-disclosures, expediting determinations on disclosures for minor infractions, but allowing for deeper inquiry for potential violations of a more serious nature.[22]

The BIS also considers the decision not to file a voluntary self-disclosure to be an aggravating factor in penalty determinations for violations of BIS regulations.[23]

FinCEN's Whistleblower Program

The compliance note also highlights that the Financial Crimes Enforcement Network, a bureau of the Treasury Department, employs a whistleblower program, similar to the U.S. Securities and Exchange Commission.[24]

FinCEN's expanded whistleblower program became effective Jan. 1, 2021, following the passage of the Anti-Money Laundering Act, and was further amended by the Anti-Money Laundering Whistleblower Improvement Act in late 2022.

The program compensates whistleblowers for reporting violations of the Bank Secrecy Act, as well as U.S. trade and economic sanctions laws, such as the International Emergency Economic Powers Act, the Foreign Narcotics Kingpin Designation Act and certain provisions of the Trading With the Enemy Act.[25]

Under the program, "[i]ndividuals who provide information to FinCEN or the Department of Justice may be eligible for awards totaling between 10 to 30 percent of the monetary sanctions collected in [successful] enforcement action[s]"[26] that result in monetary sanctions exceeding $1 million.[27]

FinCEN has not yet proposed implementing regulations, although it has started receiving whistleblower tips.[28]

With respect to voluntary self-disclosures, FinCEN has previously noted that it considers voluntary self-disclosures to be a mitigating factor in enforcement actions, though its policy has not been formalized.[29]

Takeaways

A decision to self-disclose should not be taken lightly, and firms should consider the various voluntary self-disclosure program requirements of each federal agency in their decision making. Below are some considerations for determining whether to self-report.

With respect to potential criminal sanctions violations, firms need to appreciate the difference between civil and criminal liability and assess whether to also submit a voluntary self-disclosure to the NSD, which does not give credit for disclosures made to other agencies.[30]

It is also important to consider that OFAC or the BIS may refer a matter to the NSD for criminal prosecution, even if the firm does not disclose it to NSD directly.

Firms may also have dual-reporting obligations for civil violations. OFAC, for example, will only consider giving credit for voluntary self-disclosures submitted to other agencies on a case-by-case basis.[31]

Filing a voluntary self-disclosure with more than one agency may expose firms to parallel enforcement actions, as was the case earlier this year with Microsoft Corp., which paid $3.3 million in combined civil penalties to OFAC and the BIS after submitting voluntary self-disclosures to both agencies.[32]

Notably, Microsoft could have faced a maximum penalty of over $400 million, and significantly benefited from its disclosures, cooperation and the remedial actions it undertook.[33]

Firms should analyze their compliance programs and the work performed by service providers, such as administrators, to ensure that all relevant policies and procedures adequately mitigate the firm's risk of violating anti-money laundering, sanctions, export control, anti-corruption and national security laws.

A firm's customers, investors, agents and transactions should be properly screened pursuant to such policies and procedures.

Not only will this prevent and potentially uncover violations, but the agencies, including FinCEN, all evaluate the effectiveness of a firm's compliance program when reviewing conduct included in a voluntary self-disclosure or contemplating an enforcement action.

Firms should also consider the fact that a whistleblower might report potential sanctions

violations to FinCEN or another government agency before the firm has an opportunity to self-report, causing that agency to initiate a regulatory or other investigation, thereby preventing the firm from receiving the benefit associated with a voluntary self-disclosure.

Similarly, firms should consider that counterparties to a transaction might file a voluntary self-disclosure before the firm has identified and reported apparent violations of laws, which would limit the firm's ability to obtain leniency based on its own self-reporting.

When counterparties are involved in potential violations, filing a preliminary disclosure — that is later supplemented following a full investigation — may preserve a firm's ability to receive credit for its disclosure.

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[1] U.S. Dep't of Com., U.S. Dep't of the Treasury & U.S. Dep't of Justice, Tri-Seal Compliance Note: Voluntary Self-Disclosure of Potential Violations (Jul. 26, 2023), available at https://ofac.treasury.gov/media/932036/download?inline ("Compliance Note").

[2] OFAC FAQ 13 (Dec. 4, 2020), https://ofac.treasury.gov/faqs/13.

[3] Appendix A to 31 C.F.R. Part 501 II.

[4] Compliance Note, at 5.

[5] Id.

[6] Appendix A to 31 C.F.R. Part 501 I; see also Compliance Note, at 5.

[7] Compliance Note, at 5; OFAC, A Framework for OFAC Compliance Commitments (May 2, 2019), https://ofac.treasury.gov/media/16331/download?inline.

[8] Appendix A to 31 C.F.R. Part 501 I

[9] Appendix A to 31 C.F.R. Part 501 III.

[10] Compliance Note, at 2.

[11] Id.

[12] U.S. Dep't of Justice, NSD Enforcement Policy for Business Organizations, at 1 n.2 (Mar. 1, 2023), https://www.justice.gov/media/1285121/dl?inline ("NSD Enforcement Policy").

[13] Id. at 2.

[14] U.S.S.G. § 8C2.5(g)(1); NSD Enforcement Policy, at 3-4.

[15] Compliance Note, at 3.

[16] Compliance Note, at 2.

[17] On September 15, 2022, Deputy Attorney General Lisa Monaco issued a memorandum on corporate criminal enforcement policies that directed all DOJ components that prosecute corporate crime ensure they have written policies to incentivize voluntary self-disclosure, and to publicly share such policies. DOJ, Memorandum, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 7 (Sept. 15, 2022), https://www.justice.gov/opa/speech/file/1535301/download.

[18] DOJ, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, JM 9-47.120, https://www.justice.gov/opa/speech/file/1562851/download. For more information, see Schulte Roth & Zabel LLP, Client Alert: DOJ Highlights Self-Disclosure and Cooperation by Corporate Entities (Jan. 24, 2023), https://www.srz.com/resources/doj-highlights-self-disclosure-and-cooperation-by-corporate.html#_ftn3.

[19] Compliance Note, at 3.

[20] 15 CFR Supplement-No.-1-to-Part-766 IV.B.2.

[21] Compliance Note, at 4.

[22] Id.

[23] Matthew S. Axelrod, Asst. Sec. for Export Enforcement, U.S. Dep't of Comm., Memorandum for All Export Enforcement Employees, at 2-3 (Apr. 18, 2023), https://www.bis.doc.gov/index.php/documents/enforcement/3262-vsd-policy-memo-04-18-2023/file.

[24] Compliance Note, at 6.

[25] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 5536-38 (Anti-Money Laundering Whistleblower Improvement), https://www.congress.gov/bill/117th-congress/house-bill/2617/text.

[26] Compliance Note, at 6.

[27] 31 U.S.C. §5323(a)(1).

[28] Oversight of the Financial Crimes Enforcement Network (FinCEN) and the Office of

Terrorism and Financial Intelligence (TFI), 118 Cong. (Apr. 27, 2023) (statement of Himamauli Das, Acting Director, FinCEN), https://www.congress.gov/118/meeting/house/115822/witnesses/HHRG-118-BA10-Wstate-DasH-20230427.pdf.

[29] FinCEN, Statement on Enforcement of the Bank Secrecy Act (Aug. 18, 2020), https://www.fincen.gov/sites/default/files/shared/FinCEN%20Enforcement%20Statement_FINAL%20508.pdf.

[30] Compliance Note, at 2-3.

[31] Appendix A to 31 C.F.R. Part 501 I.

[32] Press Release, U.S. Dep't of Treasury & U.S. Dep't of Commerce, Microsoft to Pay Over $3.3M in Total Combined Civil Penalties to BIS and OFAC to Resolve Alleged and Apparent Violations of U.S. Export Controls and Sanctions (Apr. 6, 2023), https://home.treasury.gov/news/press-releases/jy1394.

[33] See OFAC, Enforcement Release: April 6, 2023, OFAC Settles with Microsoft Corporation for $2,980,265.86 Related to Apparent Violations of Multiple OFAC Sanctions Programs (Apr. 6, 2023), https://ofac.treasury.gov/media/931591/download?inline.