

Revised US Sanctions Enforcement Policy on Voluntary Self Disclosures – An Opportunity to Evaluate?

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Indian companies with global operations or those engaged in global trade have been at the receiving end of increased sanctions enforcement by the US administration. Violation of sanctions laws could mean severe penalties (both civil and criminal) for such companies. Recently, the National Security Division of the Department of Justice (DOJ) announced the revised 'Export Control and Sanctions Enforcement Policy for Business Organizations' (Policy) to encourage voluntary self-disclosure with respect to criminal violations of sanctions and primary export control laws.

The Policy expressly creates the presumption that a company will receive a non-prosecution agreement (NPA) and will not be required to pay a fine when the company: (a) voluntarily self-discloses export control or sanctions violations to the DOJ, (b) fully cooperates, and (c) quickly and appropriately remediates the underlying issues that led to the wilful violations.

This is significant because the Policy clearly demonstrates the behaviour expected from companies to be eligible for an NPA. It is also quite imperative, as a result, that companies invest appropriately in creating systems and processes required to detect and highlight these violations. Further, the DOJ expects companies to remediate the underlying issues. An effective remediation plan should include a thorough analysis of the causes of the misconduct, implementing an effective compliance program, disciplining the employees involved in the misconduct, retaining all business records and taking any other steps that would demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it and implementation of remedial measures to prevent recurrence.

However, the presumption mentioned above will not be taken in cases where aggravating factors are involved, which include: (a) export of items controlled for nuclear non-proliferation or reasons related to missile technology to a proliferator country, (b) export of items known to be used in the construction of weapons of mass destruction, (c) export to a foreign terrorist organization or specially designated global terrorist, (d) export of military items to a hostile foreign power, (e) repeated violations, including similar administrative or criminal violations in the past, and (f) knowing involvement of upper management in the criminal conduct. Nevertheless, in such cases, if the disclosure has been made in accordance with the Policy, certain benefits, including a concession in the fine, could be granted.

The US Department of Justice has revised the 'Export Control and Sanctions Enforcement Policy for Business Organizations' to incentivize companies to voluntarily self-disclose criminal violations of primary export control and sanctions laws. Indian companies should consider upgrading their compliance architecture to benefit from this change.

UPDATES

Here are some of the steps that an organization could take in order to benefit from the Policy:

- Evaluate systems and processes to assess if the organization is at all geared to detect such violations in the first instance (repeated violations will negate the chances of securing an NPA);
- Conduct appropriate training programs for management (especially senior management) and staff in relation to violations;
- Develop a prompt disclosure mechanism for any such violations. This would mean designing whistle-blower mechanisms to identify and escalate violations immediately. The internal triage of such allegations or complaints can clearly identify the underlying issues that resulted in the violations;
- Develop an internal capability to address each of the underlying issues immediately and if required, seek immediate help from external counsel to ensure that full cooperation by the organization is clearly demonstrated and documented.

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