



# Department of Justice

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[www.justice.gov](http://www.justice.gov)

NSD  
(202) 514-2007

## NSD ENFORCEMENT POLICY FOR BUSINESS ORGANIZATIONS<sup>1</sup>

### **Introduction**

The unlawful export of sensitive commodities, technologies, and services, as well as trading and engaging in transactions with sanctioned countries and designated individuals and entities, undermines the national security of the United States. Thwarting these unlawful efforts and holding those who violate our export controls and sanctions laws accountable is a top priority for the National Security Division (NSD) of the Department of Justice.

Business organizations and their employees are at the forefront of the effort to combat export control and sanctions violations. As the gatekeepers of U.S. export-controlled technologies and integral actors in the U.S. financial system, business organizations play a vital role in protecting our national security. NSD strongly encourages companies to voluntarily self-disclose all potentially criminal (*i.e.*, willful<sup>2</sup>) 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, the Export Control Reform Act (ECRA), 50 U.S.C. § 4819, and the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1705—directly to NSD.

This Policy sets forth the criteria that NSD, in partnership with U.S. Attorneys' Offices, uses in determining an appropriate resolution for organizations that make a voluntary self-disclosure (VSD) in export control and sanctions matters. Prosecutors will weigh and appropriately credit all timely VSDs on a case-by-case basis pursuant to this Policy and applicable Department guidance. VSDs covered by this Policy should be emailed to NSD at the following address: [NSDCES.ExportVSD@usdoj.gov](mailto:NSDCES.ExportVSD@usdoj.gov).

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<sup>1</sup> This Policy supersedes the Department's "Export Control and Sanctions Enforcement Policy for Business Organizations," dated December 13, 2019. This Policy 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.

<sup>2</sup> 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.

Violations of U.S. export control and sanctions laws harm our national security or have the potential to cause such harm, and this threat to national security informs how NSD arrives at an appropriate resolution with a business organization that violates such laws and distinguishes these cases from other types of corporate wrongdoing. Federal prosecutors must balance the goal of encouraging such disclosures and cooperation against the goal of deterring these very serious offenses.

Although this Policy is most applicable to self-disclosures of potential criminal violations of export control and sanctions laws, the principles of this Policy shall inform all other corporate criminal matters handled by NSD, including matters arising under the Foreign Agents Registration Act, laws prohibiting material support to terrorists, and criminal violations in connection with the Committee on Foreign Investment in the United States and other national security proceedings.

### **Benefits of the Policy**

With the above goals in mind, this Policy provides that when a company (1) **voluntarily self-discloses potentially criminal violations to NSD** (2) **fully cooperates**, and (3) **timely and appropriately remediates**, absent aggravating factors and consistent with the definitions below, NSD generally will not seek a guilty plea, and there is a presumption that the company will receive a non-prosecution agreement and will not pay a fine. Aggravating factors, as described below, include conduct that involves a grave threat to national security;<sup>3</sup> exports of items that are particularly sensitive or to end users that are of heightened concern; repeated violations; involvement of senior management; and significant profit. In cases where the principles of federal prosecution so warrant,<sup>4</sup> NSD has the discretion to issue a declination.

Companies that qualify for a non-prosecution agreement or declination, where appropriate, will not be permitted to retain any of the unlawfully obtained gain from the misconduct at issue. Companies will be required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue. Where another authority collects disgorgement, forfeiture, and/or restitution, the Department will apply, in appropriate circumstances, its policy on coordination of corporate resolution penalties, Justice Manual § 1-12.100.

If, due to aggravating factors, such as those described below, a different criminal resolution—*i.e.*, a deferred prosecution agreement or guilty plea—is warranted for a company that has voluntarily self-disclosed to NSD, fully cooperated, and timely and appropriately remediated, NSD:

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<sup>3</sup> By their nature, willful violations of sanctions, export control, and other laws within the purview of the National Security Division often pose serious risks to the national security. Such risks will need to be weighed accordingly in determining whether or not to seek a guilty plea, consistent with Deputy Attorney General's September 2022 Memorandum. *See* Memorandum from Deputy Attorney General Lisa O. Monaco, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussion with Corporate Crime Advisory Group," Sept. 15, 2022 ("September 2022 DAG Memo").

<sup>4</sup> *See* Justice Manual § 9-27.000. As a general matter, such circumstances include the nature and seriousness of the offense, law enforcement priorities, and the criminal history of the offender.

- Will accord, or recommend to a sentencing court, a fine that is, at least, 50% less than the amount that otherwise would be available under the alternative fine provision, 18 U.S.C. § 3571(d). In other words, the recommended fine will be capped at an amount equal to the gross gain or gross loss;<sup>5</sup>
- Will recommend full satisfaction of forfeiture obligations through payment of forfeiture in an amount no greater than that representing the value of proceeds received by the company, including in cases where an underlying forfeiture money judgment would include amounts exceeding such proceeds;
- In assessing the appropriate form of the resolution, will generally not require a corporate guilty plea absent the presence of particularly egregious or multiple aggravating factors;
- Will not require appointment of a monitor if a company has, at the time of resolution, demonstrated that it has implemented and tested an effective and well-designed compliance program and has taken appropriate steps to remediate the root cause of the misconduct.<sup>6</sup>

## **Definitions**

For purposes of this Policy, the following definitions apply:

### **1. Voluntary Self-Disclosure**

In evaluating self-disclosure, NSD will make a careful assessment of the circumstances of the disclosure, including the extent to which the disclosure permitted NSD to preserve and obtain evidence as part of its investigation. NSD encourages self-disclosure of potential wrongdoing at the earliest possible time, even when a company has not yet completed an internal investigation, if it chooses to conduct one. NSD will require the following for a company to receive credit for voluntary self-disclosure of wrongdoing:

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<sup>5</sup> The Fine Guidelines for corporate defendants, covered in the U.S. Sentencing Guidelines (U.S.S.G.) §§ 8C2.1 - 8C2.9, do not apply to charges for export control and sanctions violations. *See* U.S.S.G. § 8C2.1. Instead U.S.S.G. § 8C2.10 directs that the fine be determined pursuant to “the general statutory provisions governing sentencing.” *See* U.S.S.G. § 8C2.10 cmt. background. Prosecutors in these matters rely on the alternative fine provision in 18 U.S.C. § 3571(d) and on forfeiture. Under 18 U.S.C. § 3571(d), the fine would ordinarily be capped at an amount equal to twice the gross gain or gross loss. In addition, DDTC, BIS, and OFAC commonly impose administrative fines for export control and sanctions violations. Consistent with Department policy, federal prosecutors will endeavor to coordinate with and, in appropriate circumstances, will consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct. *See* Justice Manual § 1.12.100.

<sup>6</sup> Decisions about the imposition of a monitor will be made on a case-by-case basis and at the sole discretion of the Department, consistent with the September 2022 DAG Memo.

- The voluntary disclosure must be to NSD;<sup>7</sup>
- The company has no preexisting obligation to disclose misconduct to any Department component, or federal or state regulator, or foreign regulatory or law enforcement entity;
- The company discloses the conduct to NSD “prior to an imminent threat of disclosure or government investigation,” U.S.S.G. § 8C2.5(g)(1);<sup>8</sup>
- The company discloses the conduct to NSD “within a reasonably prompt time after becoming aware” of the potential violation, U.S.S.G. § 8C2.5(g)(1), with the burden on the company to demonstrate timeliness;<sup>9</sup> and
- The company discloses all relevant non-privileged facts known to it at the time of the disclosure, including all relevant facts and evidence about all individuals involved in or responsible for the misconduct at issue, including individuals inside and outside of the company regardless of their position.<sup>10</sup>

## 2. Full Cooperation

In addition to the provisions contained in the Principles of Federal Prosecution of Business Organizations, *see* Justice Manual § 9-28.000, the following actions will be required for a company to receive credit for full cooperation for purposes of this Policy:

- Timely disclosure of all non-privileged facts<sup>11</sup> relevant to the wrongdoing at issue,

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<sup>7</sup> Under this Policy, a voluntary self-disclosure must be made to NSD. Disclosures made only to regulatory agencies, such as DDTC, BIS, and OFAC (*i.e.*, not to NSD) will not qualify under this Policy. However, NSD will apply the provisions of this Policy where a company made a good faith disclosure to another office or component of the Department of Justice and the matter is partnered with or transferred to, and resolved with, NSD.

<sup>8</sup> If a company makes a disclosure before it becomes aware of an ongoing nonpublic government investigation, the company will be considered to have made a voluntary self-disclosure.

<sup>9</sup> When a company undertakes a merger or acquisition, uncovers misconduct by the merged or acquired entity through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct and otherwise takes action consistent with this Policy (including, among other requirements, the timely implementation of an effective compliance program at the merged or acquired entity), there will be a presumption of a non-prosecution agreement or, where circumstances so warrant, a declination in accordance with and subject to the other requirements of this Policy.

<sup>10</sup> NSD recognizes that a company may not be in a position to know all relevant facts at the time of a voluntary self-disclosure, especially where only preliminary investigative efforts have been possible. In such circumstances, a company should make clear that it is making its disclosure based upon a preliminary investigation or assessment of information, but it should nonetheless provide a fulsome disclosure of the relevant facts known to it at that time.

<sup>11</sup> As set forth in Justice Manual § 9-28.720, eligibility for cooperation credit is not predicated upon the waiver of the attorney-client privilege or work product protection. Nothing herein alters the Justice Manual policy, which remains in full force and effect.

including:

- All relevant facts gathered during a company's internal investigation, if the company conducts one;
  - Attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts;
  - Timely updates on a company's internal investigation, if the company chooses to do one, including but not limited to rolling disclosures of information;
  - Identification of all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority, including the company's officers, employees, customers, competitors, or agents and third parties, and all non-privileged information relating to the misconduct and involvement by those individuals.
- Proactive cooperation, rather than reactive; that is, the company must timely disclose all facts that are relevant to the investigation, even when not specifically asked to do so, and where the company is or should be aware of opportunities for NSD to obtain relevant evidence not in the company's possession and not otherwise known to the NSD, it must identify those opportunities to NSD;
  - Timely voluntary preservation, collection, authentication, and disclosure of relevant documents and information relating to their provenance, including (a) disclosure of overseas documents, the locations in which such documents were found, and the identities of their custodians and the individuals who authored and located the documents, (b) facilitation of third-party production of documents, and (c) where requested and appropriate, provision of translations of relevant documents in foreign languages;
    - Note: When a company claims that disclosure of overseas documents is prohibited due to data privacy, blocking statutes, or other reasons related to foreign law, the company bears the burden of establishing the existence of such a prohibition or restriction, demonstrating that the data does not exist on U.S. servers or systems, and identifying reasonable and legal alternatives to help NSD preserve and obtain the necessary facts, documents, and evidence for its investigations and prosecutions.
    - Note: Authentication of records sufficient to satisfy Rule 902 (and, where applicable, the subprovisions of Rule 803) of the Federal Rules of Evidence, pertaining to self-authentication of various categories of records, must be provided concurrently with the disclosure of relevant documents barring a concrete and specific explanation by the company as to why relevant certifications or attestations are unavailable as to specific records. Disclosure of documents while purporting to retain rights to object to their future admissibility is insufficient to merit consideration as cooperation under this Policy.

- When requested and appropriate, de-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation to prevent the company's investigation from conflicting or interfering with NSD's investigation;<sup>12</sup> and
- When requested, and subject to the individuals' Fifth Amendment rights, making company officers and employees who possess relevant information available for interviews, including, where appropriate and possible, officers, employees, and agents located overseas as well as former officers and employees, and, where possible, facilitating interviews of third parties.

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 credit if they provide all relevant non-privileged information related to individual accountability, but the benefits generally will be markedly less than for full cooperation as defined in this Policy, depending on the extent to which the cooperation is lacking.

### **3. Timely and Appropriate Remediation**

The following items will be required for a company to receive full credit for timely and appropriate remediation under this Policy:<sup>13</sup>

- Demonstration of thorough analysis of causes of underlying conduct (*i.e.*, a root cause analysis) and, where appropriate, remediation to address the root causes;
- Implementation of an effective compliance and ethics program that is sufficiently resourced; while the program may vary based on the size and resources of the organization, the evaluation will be based on:
  - The company's commitment to instilling corporate values that promote compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
  - The resources the company has dedicated to compliance;
  - The quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk;

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<sup>12</sup> Although NSD may, where appropriate, request that a company refrain from taking a specific action for a limited period of time for de-confliction purposes, NSD will not take any steps to affirmatively direct a company's internal investigation efforts.

<sup>13</sup> NSD will also coordinate with the appropriate regulatory agency in assessing a corporation's remediation efforts and compliance program.

- The authority and independence of the compliance function, including the access the compliance function has to senior leadership and governance bodies and the availability of compliance expertise to the board;
  - The effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment;
  - The reporting structure of any compliance personnel employed or contracted by the company;
  - The compensation and promotion of the personnel involved in compliance, and those who may be involved in violations of internal compliance policies, in view of their role, responsibilities, performance, and other appropriate factors; and
  - The testing of the compliance program to assure its effectiveness.
- Appropriate discipline, including compensation clawbacks, for employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred;
  - Appropriate retention of business records, and prohibition of the improper destruction or deletion of business records, including implementing appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations; and
  - Any additional steps that demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

### **Potential Aggravating Factors**

The following are examples of aggravating factors 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/or sanctions violations:

- Egregiousness or pervasiveness of criminal misconduct within the company;
- Concealment or involvement by upper management in the criminal conduct;
- Repeated violations of national security laws, including past administrative or criminal

violations;

- A significant profit to the company from the misconduct<sup>14</sup>;
- Sanctions or export offenses that are actively concealed by other serious criminal activity such as fraud, or corruption;
- Unlawful transactions or exports involving a Foreign Terrorist Organization or Specially Designated Global Terrorist;
- Exports of items controlled for nuclear nonproliferation or missile technology reasons to a proliferator country; items known to be used in the construction of weapons of mass destruction; or military items to a hostile foreign power.

Although a company will not qualify for a *presumption* of a non-prosecution agreement if aggravating circumstances are present, prosecutors may nonetheless determine that a non-prosecution agreement is an appropriate outcome after assessing the egregious and prevalence of the aggravating circumstances and the level and degree of the company's cooperation.

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<sup>14</sup> "Significant profit" means significant proportionally relative to the company's overall profits.