ALERTS

# Sanctions Update: OFAC Encourages Voluntary Self-Disclosure for Sanctions Violations

**August 2, 2023**

On July 26, 2023, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"), the U.S. Department of Justice ("DOJ") and U.S. Department of Commerce (collectively, the "Agencies") published a Tri-Seal Compliance Note, in which they encouraged private sector firms to self-disclose potential violations of sanctions, export controls and other national security laws and highlighted certain benefits available to firms that do so.[1] The Compliance Note by the Agencies emphasizes a trend in the federal government of encouraging private sector cooperation and voluntary disclosure of misconduct.[2]

Below is a brief summary of those aspects of the Compliance Note that focus on OFAC's voluntary self-disclosure ("VSD") policy, as well as some key takeaways to consider.

## OFAC's VSD Policy

OFAC, which administers and enforces economic and trade sanctions, has long encouraged VSDs for any potential violations of sanctions laws and has implemented a framework that describes the disclosure process and the potential associated penalty reduction for apparent violations brought to the attention of OFAC through VSDs.[3]

The Compliance Note reminds the private sector of the self-reporting procedures contained in OFAC's Enforcement Guidelines, which allow for offering leniency to firms that engage in a VSD of apparent violations of sanctions laws. Although OFAC actually considers many circumstances when determining whether to offer leniency, in light of OFAC's emphasis on the role of a VSD in that determination, it is important to consider the potential for mitigation credit when making the decision to self-report.

OFAC considers VSDs a mitigating factor for determining the level of appropriate enforcement action for any 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.[4] If OFAC determines that a civil monetary penalty is warranted, a VSD that qualifies under the program can result in a 50 percent reduction in the base amount of a proposed civil monetary penalty in non-egregious cases.[5]

To be treated as a mitigating factor, OFAC has certain requirements for VSDs:

- VSDs must be submitted "prior to, or simultaneous with, the discovery by OFAC or another government agency of the apparent violation"; and
- VSDs should also contain a report that sufficiently details the circumstances of the potential violation, or one should be provided promptly following the initial disclosure.[6]

Certain other factors will disqualify a disclosure from being treated as a VSD by OFAC:

- If a third party was required to and did notify OFAC of the same or a substantially similar apparent violation, such as through a disclosure of a blocked or rejected transaction;
- The VSD contains false or misleading information;
- The VSD was prompted by a "suggestion or order of a federal or state agency or official" and was not, therefore, self-initiated, such as a disclosure made in response to a subpoena or through the filing of a license application";
- For entities, the disclosure was made on behalf of the entity by an individual acting without authorization of the entity's senior management; or
- The VSD is materially incomplete.[7]

Like with all of its enforcement investigations, OFAC will consider the totality of the circumstances surrounding the potential violation, including the adequacy of the reporting company's sanctions compliance program and any corrective actions taken by the reporting company, in determining the proper response.[8] Notably, firms that do not receive VSD credit from OFAC may still be eligible for mitigation based on other factors, such as substantial cooperation with an investigation.[9] Aggravating factors that might weigh against OFAC granting leniency 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 if the violation harmed U.S. policy objectives.[10]

## Takeaways

A decision to self-disclose should not be taken lightly and should involve counsel familiar with the OFAC process and VSD program requirements. Below are some considerations to evaluate when determining whether a firm should self-report:

- Firms needs to appreciate the difference between civil and criminal sanctions violations. With respect to potential criminal sanctions violations, firms should also assess whether to submit a VSD to the DOJ's National Security Division, which has its own self-disclosure program and does not give credit for disclosures made to other agencies.[11]

- Firms should analyze their compliance programs and the work performed by service providers, such as administrators, to ensure that their customers/investors are properly screened. Not only will this prevent and potentially uncover violations of sanctions laws, but OFAC evaluates the effectiveness of an entity's compliance program when reviewing the conduct disclosed in a VSD.

- FinCEN, a bureau of the U.S. Department of the Treasury, employs a whistleblower program that, similar to the Securities and Exchange Commission, compensates whistleblowers for reporting violations of U.S. trade and economic sanctions, in addition to violations of the Bank Secrecy Act.[12] "Individuals who provide information to FinCEN or the DOJ may be eligible for awards totaling between 10 to 30 percent of the monetary sanctions collected in an enforcement action, if the information they provide ultimately leads to a successful enforcement action."[13] Firms should consider the fact that a whistleblower might report potential sanctions violations to the government before a firm has an opportunity to self-report, which may instigate a regulatory or other investigation and also prevent the firm from receiving any benefit associated with a VSD.

- Firms should consider that counterparties to a transaction might take advantage of OFAC's VSD program, and file a VSD before the firm has identified and reported apparent violations of sanctions laws, which would limit the firm's ability to obtain leniency on its own behalf from OFAC based on its own self-reporting.

*Schulte Roth & Zabel's lawyers are available to assist you or address any questions you may have regarding these developments. Please contact the Schulte Roth & Zabel lawyer with whom you usually work, or any of the following attorneys:*

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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] For example, DOJ's Criminal Division recently updated its Corporate Enforcement Policy regarding VSDs of corporate criminal matters, including FCPA violations. For more information, see Schulte Roth & Zabel LLP, *Client Alert: DOJ Highlights Self-Disclosure and Cooperation by Corporate Entities* (Jan. 24, 2023), available at https://www.srz.com/resources/doj-highlights-self-disclosure-and-cooperation-by-corporate.html#_ftn3. The U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") has also noted that it considers VSDs a mitigating factor in enforcement actions. FinCEN, Statement on Enforcement of the Bank Secrecy Act (Aug. 18, 2020), available at https://www.fincen.gov/sites/default/files/shared/FinCEN%20Enforcement%20Statement_FINAL%205

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

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

[5] Compliance Note, at 5.

[6] *Id.*

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

[8] Compliance Note, at 5.

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

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

[11] Compliance Note, at 2-3.

[12] *Id.* at 6.

[13] *Id.*

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