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Editors:

Gwendolyn Jaramillo
Shrutih Tewarie

Authors:

Anna Annino
Shrutih Tewarie

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DOJ Issues Revised Export Control and Sanctions Enforcement Policy for Business Organizations Providing Clear Guidance on the Benefits of Self-Disclosing Violations

On December 13, 2019, the Department of Justice (DOJ) released a [new policy](#) on voluntary self-disclosures of export control and sanctions violations (the “New VSD Policy”). In contrast to the guidance released in October 2016 regarding voluntary self-disclosures in export controls and sanctions investigations (the “2016 Guidance”), the New VSD Policy applies to all organizations, including financial institutions. The key takeaways of the New VSD Policy are:

1. Under the New VSD Policy, absent aggravating factors, there is a presumption that a company which self-discloses an export controls or sanctions violation will receive a non-prosecution agreement and will not be fined. If there are aggravating factors, but the company still cooperates with the DOJ and voluntarily self-discloses, the DOJ will recommend a fine that is at least 50 percent lower than if there was no voluntary self-disclosure.
2. Only disclosures to the DOJ “count” for the purposes of the policy. Reporting to a regulatory agency – such as DDTC, BIS, or OFAC – will not suffice for a company to receive credit under the New VSD policy.
3. The new policy was drafted to closely resemble existing DOJ voluntary disclosure policies, including in particular the Criminal Division’s [Foreign Corrupt Practices Act \(FCPA\) Corporate Enforcement Policy](#).
4. The New VSD Policy in several instances emphasizes the importance of disclosure of facts relevant to which individuals were involved in the violations. This is consistent with the DOJ’s continued emphasis on prosecuting and holding individuals accountable for wrongdoing.

In contrast to the 2016 Guidance, which provided that the ultimate resolution of any violations depended on an evaluation of the totality of the circumstances in a particular case, the New VSD Policy provides companies increased clarity regarding the benefits of self-disclosure.

The “New NAFTA:” Compliance Consequences of the United States-Mexico-Canada Agreement (USMCA)

On September 30th, 2019, the United States, Mexico, and Canada reached an agreement to modify the 25-year-old North American Free Trade Agreement

(NAFTA). The new agreement, known as the United States-Mexico-Canada Agreement (USMCA) was passed by the House of Representatives on December 19, 2019. There are several key changes from NAFTA to USMCA that impact cross-border compliance, including:

1. *Intellectual Property.* New IP provisions require a minimum copyright term of the life of the author plus 70 years. Under NAFTA, the term was life plus 50 years. Agricultural chemicals now benefit from 10 years of data protection, up from 5 years.
2. *Digital Trade.* New provisions prohibit customs duties and other discriminatory measures from being applied to digital products distributed electronically (such as e-books, videos, music, software, and games).
3. *Increased De Minimis Levels.* *De minimis* refers to an amount under which imported goods are sales tax and duty free. Canada will raise its *de minimis* level from CAD \$20 to CAD \$40 for taxes. Canada will also provide for duty free shipments up to CAD \$150. Mexico will maintain a tax-free *de minimis* level of USD \$50, and also provide duty free shipments up to USD \$117. The *de minimis* level for the U.S. remains \$800.
4. *Financial Services.* New provisions include a prohibition on local data storage requirements when a financial regulator has the access to data that it needs to fulfill its regulatory and supervisory mandate; national treatment, (which ensures that U.S. financial service suppliers receive the same treatment as local suppliers); and most-favored-nation treatment (which ensures that U.S. financial service suppliers receive the same treatment as those from other countries).
5. *Labor.* New provisions prohibit the importation of goods produced by forced labor, address violence against workers exercising their labor rights, and help ensure that migrant workers are protected under labor laws. The Dispute Settlement chapter establishes a United States-Mexico Rapid Response Mechanism which monitors and expedites enforcement of labor rights to ensure effective implementation of Mexico's labor reform.
6. *Automobile Manufacturing.* In order to qualify for zero tariffs, a car or truck must contain 75

percent of components manufactured in Canada, Mexico or the United States, an increase from NAFTA's 62.5 percent. Cars and trucks must also contain 40-45 percent automobile content made by workers earning at least USD \$16 per hour and at least 70 percent of a vehicle producer's steel and aluminum purchases must originate in North America for the tariff exception to apply.

7. *Environment.* New provisions include prohibitions on harmful fisheries subsidies, such as those that benefit vessels or operators involved in illegal, unreported, and unregulated (IUU) fishing; obligations to enhance the effectiveness of customs inspections of shipments containing wild fauna and flora at ports of entry, and new requirements to ensure strong enforcement against IUU fishing.

For more information, see the [Department of State Press Release](#), the [USMCA Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement](#) and the [USMCA Issue-Specific Fact Sheets](#).

Senator Menendez Blocks Transfer of Firearms Export Control from State Department to Commerce

In February 2019, the Department of State first notified Congress of its intention to transfer responsibility for the export control of firearms and ammunitions from the United States Munitions List (USML) to the Commerce Control List (CCL), which is regulated by the Department of Commerce. This notification was made pursuant to the Arms Export Control Act (AECA), which mandates that "[t]he President may not remove any item from the Munitions List until 30 days after the date on which the President has provided notice of the proposed removal to the Committee on International Relations of the House of Representatives and to the Committee on Foreign Relations of the Senate." The AECA currently provides for the congressional review of certain munitions exports, which does not apply to items on the CCL. This action was then blocked by Senator Bob Menendez (D-NJ), Ranking Member of the Senate Foreign Relations Committee. In November, the Department of State issued a new notification of the proposed transfer. This notification, which is available [here](#), was set to expire by December 11, 2019, with the final rule

potentially published in late December or early January.

However, on December 13, 2019, Senator Menendez again [announced](#) that he will block the transfer of firearms export controls from the State Department to Commerce. In his [letter](#) to the Secretary of State, Senator Menendez expressed concerns that “[m]oving such firearms from the USML to the CCL would effectively eliminate congressional oversight of exports of these weapons by eliminating this congressional reporting requirement.” Senator Menendez also objected that the Department of Commerce regulations on 3-D or additive printing, which would apply to “ghost guns” and other 3-D printed weapons, “could easily be undone through a simple regulatory change in the future that would not even require congressional notification or review; a statutory authority to maintain such licensing, or better yet, an outright prohibition, may be required.”

Latest Iran Sanctions in Shipping and Aviation: Islamic Republic of Iran Shipping Lines (IRISL), E-Sail Shipping Company Ltd, and Mahan Air

On December 11, 2019, the State Department added the Islamic Republic of Iran Shipping Lines (IRISL), IRISL’s China-based subsidiary, E-Sail Shipping Company Ltd, and the Iranian airline Mahan Air to the Specially Designated Nationals and Blocked Persons List (SDN List). IRISL and Mahan Air were previously designated by the Department of the Treasury’s Office of Foreign Assets Control (OFAC). The State Department designation was pursuant to [Executive Order 13382](#) “Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters” and made in response to Iran’s continuing “to procure proliferation-sensitive items.” The State Department noted that there will be a brief wind-down period “[t]o allow exporters of humanitarian goods to Iran sufficient time to find alternate shipping methods.” These sanctions indicate that the Iranian aviation and shipping sectors remain a State Department area of focus. For more information, see the press release [here](#).

State Department Issues Advisory on the Export of Metals to Iran

On December 16, 2019, the State Department [issued an advisory](#) “to alert persons globally to the U.S. sanctions risks for parties involved in transfers or exports to Iran of

graphite electrodes and needle coke, which are essential materials for Iran’s steel industry.” The export of these metals creates a significant sanctions risk for entities such as producers and exporters of graphite electrodes and needle coke, port operators, shippers, shipping companies, and vessel operators and owners, even when the intended end-user is not in Iran’s steel sector. The advisory alert states that “the U.S. Government is taking strong action to deny the Government of Iran revenue derived from Iran’s steel sector, since such funds may be used to advance the Iranian regime’s malign behavior, including its proliferation programs, campaigns of regional aggression, and support for terrorist groups.” [Executive Order 13871](#) imposes sanctions on goods or services used in connection with the iron, steel, aluminum, or copper sectors of Iran, which could include exports of graphite electrodes or needle coke.

ANTICORRUPTION SPOTLIGHT:

Happy (Belated) International Anticorruption Day!

International Anticorruption Day was celebrated around the world on December 9, 2019. In a [press statement](#), the Secretary of State commented that in 2019, the State Department designated almost 40 public officials and their immediate family members due to their involvement in significant corruption, pursuant to Section 7031(c) of the Department of State, Foreign Operations and Related Programs Appropriations Act. The Secretary concluded by calling upon “all countries to address the scourge of corruption; effectively implement their international anticorruption commitments, including those under the UN Convention against Corruption; support civil society and journalists; and take measures to promote open and accountable governance.”

OFAC Sanctions 68 Entities for Corruption and Human Rights Violations

On International Anticorruption Day, the Department of the Treasury’s Office of Foreign Assets Control (OFAC) designated 68 entities on the SDN List pursuant to [EO 13818](#), which implements the Global Magnitsky Human Rights Accountability Act. The entities are related to corruption in Cambodia, Latvia, and Serbia and human rights abuse in Burma, Pakistan, Slovakia, Libya, the Democratic Republic of Congo, and South Sudan. For more information, see the press release [here](#).

Swedish Company Agrees to \$1 Billion Settlement in Largest Foreign Corrupt Practices Act (FCPA) Enforcement Action

On December 6, 2019, Telefonaktiebolaget LM Ericsson (Ericsson), a multinational Swedish telecommunications company agreed to pay more than \$1 billion to settle the U.S. government's investigation into its violations of the FCPA. The total amount – which is the largest net FCPA settlement amount paid to U.S. authorities in history – includes a criminal penalty of over \$520 million and a civil penalty of approximately \$540 million paid to the U.S. Securities and Exchange Commission (SEC).

The criminal conduct took place in Djibouti, China, Vietnam, Indonesia and Kuwait. According to the criminal information filed by the DOJ, from 2000 to 2016, Ericsson falsified records, bribed government officials, and failed to implement internal accounting controls. To carry out this scheme, the criminal information alleges that Ericsson employed consultants and third-party agents to make the bribe payments, and also created sham contracts and false invoices for their services. U.S. Attorney Geoffrey S. Berman of the Southern District of New York [commented](#) that the settlement “should communicate clearly to all corporate actors that doing business this way will not be tolerated.”

This month, take the time to ensure that your organization has an anticorruption plan in place, and that your plan is up to date. Foley Hoag's [White Collar Crime & Government Investigations](#) and [Trade Sanctions & Export Controls](#) practice groups can help you in preparing and implementing an effective anticorruption policy.

U.S. Trade Representative Proposes Duties on French Products in Response to France's Digital Services Tax

On December 6, 2019, the U.S. Trade Representative (USTR) determined that France's Digital Services Tax “is intended to, and by its structure and operation does, discriminate against U.S. digital companies, including due to the selection of services covered and the revenue thresholds.” In response, the USTR proposed an action of additional duties of up to 100 percent on certain products from France, included as Annex A of the [Federal Register Notice](#). This list includes cheeses, butter, yogurt, sparkling

wine, make-up, soap, handbags, porcelain, and enameled cast iron goods (think: Le Creuset cookware). The public hearing will take place on January 7, 2020.

South Sudan Officials Sanctioned for Undermining Peace Process; Visa Restrictions Announced

On December 16, 2019, OFAC sanctioned two Government of South Sudan officials, Minister of Cabinet Affairs Martin Elia Lomuro and Minister of Defense and Veterans Affairs Kuol Manyang Juuk, under [Executive Order 13664](#) “Blocking Property of Certain Persons with Respect to South Sudan.” This EO targets those responsible for or complicit in, or who have engaged in, actions or policies that threaten the peace, security, or stability of South Sudan. The Secretary of State commented that the sanctions “demonstrate continued U.S. commitment to promote accountability of those whose actions threaten implementation of the South Sudanese peace process. The United States stands ready to impose other measures against any who seek to expand the conflict and derail peace efforts in South Sudan.” For more information, see the press release [here](#).

On December 12, 2019, the Secretary of State [announced](#) that “[a]s the United States re-evaluates its bilateral relationship with the Government of South Sudan, the Department of State will implement visa restrictions under Immigration and Nationality Act Section 212(a)(3)(C) against those who undermine or impede the peace process in South Sudan.” These visa restrictions are targeted towards “[i]ndividuals who have directly or indirectly impeded peace including: violating a ceasefire or cessation of hostilities agreement; violating the UN arms embargo; engaging in corruption that fuels the conflict; suppressing freedoms of expression, association, peaceful assembly, or other abuses or violations; or by failing to abide by signed peace agreements.”

DOC Seeks Comments on Procedure for Entity List Entry Removal or Modification

The Department of Commerce (DOC) Bureau of Industry and Security (BIS) is currently seeking comments on a [proposed procedure](#) for editing the Entity List and the Unverified List. This information would be used to create a procedure for persons or organizations currently on the

Entity List (15 CFR part 744, Supp. No. 4) and Unverified List (15 CFR part 744, Supp. No. 6) to request removal or modification of an entry that affects them. Requests for removal from the Entity List would be reviewed by the Departments of Commerce, State, and Defense, Energy and/or Treasury. Requests for removal from the Unverified List would be reviewed by the Department of Commerce. Decisions for both the Entity List and the Unverified List, as communicated to the requesting entity by BIS, would be the final agency action on such a request. To ensure consideration, written comments must be submitted to the DOC by February 10, 2020.

Allianz Global Risks US Insurance Company Settles for Alleged Violations of the Cuban Assets Control Regulations (CACR)

On December 9, 2019, Allianz Global Risks US Insurance Company (AGR US), a U.S. insurance company and wholly owned subsidiary of Allianz SE, a German financial services provider, agreed to pay \$170,535 to settle its potential civil liability for 6,474 apparent violations of the Cuban Assets Control Regulations (CACR). Between August 20, 2010 and January 15, 2015, the Canadian branch of AGR (AGR CA) insured Canadian residents' vacation travel to Cuba. While AGR CA was not licensed to issue this type of policy, AGR CA had "fronting" arrangements with Canadian insurance companies to cover these insurance policies. The travel insurance included reimbursement for eligible emergency medical expenses and expenses resulting from trip cancellation, delay, or interruption due to specified categories of events. Although AGR US was aware that AGR CA was issuing these insurance policies, AGR US did not take steps to ensure OFAC compliance until 2014, when an internal investigation resulted in self-disclosure. Up to this point, AGR CA had processed 864 Cuba-related claims totaling CAD 532,200.35 (\$518,092) and had collected of CAD 30,599.61 (\$23,289). In their [announcement](#), the Department of the Treasury stated that "[t]his enforcement action draws particular attention to the importance of risk assessments in determining which financial products can be offered by persons subject to U.S. jurisdiction in the context of OFAC-administered sanctions programs."

OFAC Sanctions Guatemalan Mayor's Drug Trafficking Organization

On December 19, 2019 OFAC sanctioned Guatemalan mayor Erik Salvador Suñiga Rodriguez, known as "El Pocho," and his drug trafficking organization, known as "Los Pochos," as significant foreign narcotics traffickers pursuant to the Foreign Narcotics Kingpin Designation Act. In addition, OFAC designated Guatemalan individuals and businesses who supported or were associated with the mayor and his drug trafficking organization. The State Department notes that since June 2000, more than 2,200 entities and individuals have been sanctioned pursuant to the Kingpin Act for their role in international narcotics trafficking. The Kingpin Act blocks all property interests within the United States or owned or controlled by a U.S. person which are owned or controlled by designated individuals or entities. For more information, see the press release [here](#).

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