

**US AGENCIES' VOLUNTARY SELF-
DISCLOSURE POLICIES EXPLAINED**

WHITE PAPER



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INTRODUCTION Self-disclosing potential violations by companies can provide significant mitigation of civil or criminal liability, which may extend so far as a non-prosecution agreement or a reduction of 50 percent in the base penalty amount for civil or criminal penalties.

Disclosures also provide an opportunity for companies to alert key national security agencies about the activities that may pose a threat to the national security and foreign policy objectives of the United States.

On 26 July 2023, the **US Department of Commerce**, **Department of the Treasury**, and **Department of Justice**, published a Tri-Seal Compliance Note on recent updates that have been made to voluntary self-disclosure (VSD) policies that apply to U.S. sanctions, export controls, and other national security laws.

This paper analyzes the existing policies in place introduced by these three major US Government Agencies.

US DEPARTMENT OF JUSTICE'S VOLUNTARY SELF-DISCLOSURE (VSD) POLICY



On 1 March 2023, the Department of Justice's National Security Division (NSD) published an updated VSD policy covering potential criminal violations of export control and sanctions laws.

VSD Policy provides that when a company **voluntarily self-discloses** potentially criminal violations to NSD, **fully cooperates**, and **timely and appropriately remediates**, absent aggravating factors and consistent with the definitions below, NSD generally will not seek a guilty plea, and the company may receive a non-prosecution agreement and will not pay a fine.

Definition of Voluntary Self-Disclosure

To be qualified as a VSD, the company must disclose the conduct to NSD:

- prior to an imminent threat of disclosure or government investigation;
- within a reasonably prompt time after becoming aware of the potential violation;
- 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.

Definition of Full Cooperation

Full cooperation for purposes of this policy pre-supposes:

- Timely disclosure of all non-privileged facts relevant to the wrongdoing, including all relevant facts gathered during a company's internal investigation; attribution of facts to specific sources; timely updates on a company's internal investigation; identification of all individuals involved in or responsible for the misconduct at issue;
- Proactive cooperation, that is, timely disclosure all facts that are relevant to the investigation, even when not specifically asked to do so;
- Timely voluntary preservation, collection, authentication, and disclosure of relevant documents and information relating to their provenance, including disclosure of overseas documents, facilitation of third-party production of documents, and provision of translations of relevant documents in foreign languages;
- 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;
- Making company officers and employees who possess relevant information available for interviews.

Definition of Timely and Appropriate Remediation

Timely and appropriate remediation under this Policy means:

- Demonstration of thorough analysis of causes of underlying conduct and remediation to address the root causes;
- Implementation of an effective compliance and ethics program that is sufficiently resourced;
- Appropriate discipline, including compensation clawbacks, for employees 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;
- Implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

Definition of Potential Aggravating Factors

Examples of aggravating factors in this policy include:

- Egregious or pervasive criminal misconduct within the company;
- Concealment or involvement by upper management;
- Repeated administrative and/or criminal violations of national security laws,
- The export of items that are particularly sensitive or to end users of heightened concern,
- A significant profit to the company from the misconduct.

Where such aggravating factors are present, NSD has the discretion to seek a different resolution, such as a deferred prosecution agreement or guilty plea.

US DEPARTMENT OF COMMERCE'S VOLUNTARY SELF-DISCLOSURE (VSD) POLICY



The US Department of Commerce's Bureau of Industry and Security (BIS) encourages the submission of Voluntary Self Disclosures (VSDs) by parties who believe they may have violated the Export Administration Regulations (EAR).

Under the existing [BIS settlement guidelines](#), a VSD that is **timely, comprehensive**, and involves **full cooperation** substantially reduces the applicable civil penalty under the base penalty matrix. It may also entitle the filer to additional mitigation, including the possibility of a fully suspended penalty in certain cases.

If a company voluntarily discloses a violation, and the violation is considered **non-egregious**, the base penalty amount is one-half of the transaction value and capped at a maximum base penalty amount of USD 125,000 per violation. In some non-egregious cases, full suspension of the penalty may even be possible.

In an **egregious** case, if the apparent violation is disclosed through a voluntary self-disclosure, the base penalty amount shall be an amount up to one-half of the statutory maximum penalty applicable to the violation.

Voluntary Self-Disclosure?	Egregious Case?	
	No	Yes
Yes	One-Half of the Transaction Value (capped at \$125,000 per violation)	Up to One-Half of the Applicable Statutory Maximum
No	Applicable Schedule Amount (capped at \$250,000 per violation)	Up to the Applicable Statutory Maximum

On 18 April 2023, the Assistant Secretary for Export Enforcement issued a [memorandum](#) regarding the BIS policy on voluntary self-disclosures and disclosures concerning others, according to which a **deliberate non-disclosure** of a significant possible violation of the EAR will be considered an aggravating factor under BIS penalty guidelines.

US DEPARTMENT OF TREASURY'S VOLUNTARY SELF-DISCLOSURE (VSD) POLICY



The US Department of Treasury defines VSD as a "**self-initiated** notification to OFAC of an apparent violation by a Subject Person that has committed, or otherwise participated in, an apparent violation of a statute, Executive order, or regulation administered or enforced by OFAC, **prior to or at the same time** that OFAC, or any other federal, state, or local government agency or official, discovers the apparent violation or another substantially similar apparent violation."

Notification to OFAC of an apparent violation is not considered a voluntary self-disclosure if:

- a third party is required to and does notify OFAC of the apparent violation or a substantially similar apparent violation because a transaction was blocked or rejected by that third party;
- the disclosure includes false or misleading information;
- the disclosure is materially incomplete;
- the disclosure is not self-initiated;
- when the Subject Person is an entity, the disclosure is made by an individual in a Subject Person entity without the authorization of the entity's senior management.

VSD must include, or be followed within a reasonable period of time by, **a report of sufficient detail** to afford a complete understanding of an apparent violation's circumstances, and should also be followed by responsiveness to any follow-up inquiries by OFAC.

In a **non-egregious** case, if the apparent violation is disclosed through a voluntary self-disclosure by the Subject Person, the base amount of the proposed civil penalty in the Pre-Penalty Notice shall be one-half of the transaction value, capped at a maximum base amount of USD 178,290 per violation, except where the statutory maximum penalty applicable to the apparent violation is less than USD 356,579, in which case the base amount of the proposed civil penalty in the Pre-Penalty Notice shall be capped at one-half the statutory maximum penalty applicable to the apparent violation.

In an **egregious** case, if the apparent violation is disclosed through a voluntary self-disclosure by a Subject Person, the base amount of the proposed civil penalty in the Pre-Penalty Notice shall be one-half of the applicable statutory maximum penalty applicable to the violation.

Voluntary Self-Disclosure?	Egregious Case?	
	No	Yes
Yes	One-Half of the Transaction Value (capped at lesser of \$178,290 or one-half of the applicable statutory maximum per violation)	One-Half of Applicable Statutory Maximum
No	Applicable Schedule Amount (capped at lesser of \$356,579 or the applicable statutory maximum per violation)	Applicable Statutory Maximum

Useful Links:

[Department of Commerce, Department of the Treasury, and Department of Justice Tri-Seal Compliance Note: Voluntary Self-Disclosure of Potential Violations \(26 July 2023\)](#)

[US Department of Justice: NSD Enforcement Policy For Business Organizations \(1 March 2023\)](#)

[Supplement No. 1 to Part 766—Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases](#)

[Appendix A to Part 501—Economic Sanctions Enforcement Guidelines](#)

[US Department of Commerce: Memorandum for all Export Enforcement Employees \(18 April 2023\)](#)

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