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DOJ National Security Division's First Corporate Declination Under New Guidelines

Application of Voluntary Self-Disclosure Guidelines Reflects Potential Implications for Future Corporate Prosecutions

SUMMARY

On May 22, 2024, the National Security Division (NSD) of the U.S. Department of Justice announced its first declination to prosecute a corporation under its newly released voluntary self-disclosure enforcement policy for corporations.¹ The DOJ declined to prosecute MilliporeSigma, a subsidiary of multinational science and technology company Merck KGaA,² based on the company's voluntary disclosures under the National Security Division Enforcement Policy for Business Organizations (NSD Enforcement Policy)³ and after weighing the factors set forth in the Department's Principles of Federal Prosecution of Business Organizations.⁴

On the same day as the declination announcement, the DOJ also obtained guilty pleas from two individuals—Pen Yu and Gregory Muñoz of Florida—to one count each of wire fraud conspiracy.⁵ According to publicly filed documents, the defendants fraudulently procured deeply discounted products from a Massachusetts-based biochemical company doing business as MilliporeSigma and then exported them to China using falsified export documents. Muñoz, a MilliporeSigma employee, conspired with Yu, who falsely posed as a Florida university laboratory worker, to obtain controlled biomedical materials at significantly discounted prices and send those materials into China.⁶ Such discounts were not intended to be available to the general public but were instead restricted to certain MilliporeSigma customers, including academic institutions. By fabricating Yu's affiliation with a Florida university, the conspirators obtained over \$4.9 million in discounts and other benefits relating to the materials that they subsequently exported to China. This declination provides the first opportunity to analyze how the DOJ will evaluate

various factors in making corporate prosecution decisions under the new NSD Enforcement Policy and other DOJ policies.

VOLUNTARY SELF-DISCLOSURE ENFORCEMENT POLICY: BACKGROUND

The declination decision comes amid numerous recent efforts by DOJ to step up its corporate national security enforcement efforts. The DOJ released its initial version of NSD Enforcement Policy, along with a clarifying Tri-Seal Compliance Note, in 2023.⁷ It released an updated but substantially similar version of the NSD Enforcement Policy in March 2024.⁸ This update included additional guidance addressing mergers and acquisitions and, in particular, acquiring firms' voluntary self-disclosure of wrongdoing by acquired firms.⁹ At the time of the initial policy announcement in 2023, the DOJ announced the appointment of two new officials to lead the national security corporate enforcement program and its intent to add over 25 new prosecutors "to investigate and prosecute sanctions evasion, export control violations, and similar economic crimes."¹⁰

The NSD Enforcement Policy aims to encourage corporations to voluntarily self-disclose violations and cooperate with the DOJ by providing significant mitigation for violations of sanctions, export controls, and other national securities laws. It provides that when a company "(1) voluntarily self-discloses to NSD potentially criminal violations arising out of or relating to the enforcement of export control or sanctions laws, (2) fully cooperates, and (3) timely and appropriately remediates," absent aggravating factors, the NSD generally will not seek a guilty plea and will apply a presumption that the company will receive a non-prosecution agreement without imposition of a fine.¹¹ Specific aggravating factors are detailed in the policy document.¹² In reflecting on the policy, Deputy Attorney General Lisa Monaco has noted that "the throughline for our enforcement framework is rooted in the time-honored understanding that people – and corporations – respond to incentives."¹³

THE DECLINATION CASE: BACKGROUND AND DECISION-MAKING FACTORS

In announcing and explaining its declination decision, the DOJ focused on several notable factors:

Prompt Self-Disclosure

- In both its declination letter and related press release, the DOJ highlighted MilliporeSigma's prompt investigation and reporting of relevant wrongdoing.¹⁴ Within a week of compliance personnel at the company identifying certain orders as suspicious, MilliporeSigma retained outside counsel to investigate and voluntarily disclosed the misconduct. In fact, MilliporeSigma made its self-disclosure to the DOJ long before it completed its internal investigation or obtained a full understanding of the scheme and its scope. In the declination decision press release, DAG Monaco emphasized this point, noting, "[w]hen a business uncovers criminal wrongdoing within its ranks, the company is far better off reporting the violation than waiting for the Justice Department to discover it."¹⁵

"Exceptional and Proactive" Cooperation

- The DOJ also took special note of MilliporeSigma's extensive cooperation, which enabled the DOJ to successfully prosecute and secure guilty pleas from the two main coconspirators.

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Specific aspects of MilliporeSigma's cooperation cited by the DOJ include the company's (1) disclosure of all known relevant facts about the misconduct and the individuals involved, (2) identification of evidence that supported probable cause to search for further evidence of the crimes in areas not under MilliporeSigma's control, (3) agreement to fully cooperate and disclose information in any ongoing investigations and prosecutions by the government, (4) making officers, employees, and agents available for interviews and testimony, and (5) consent to the DOJ's public disclosure of the facts and circumstances of the matter.¹⁶

Limited National Security Threat

- In its consideration of the nature and seriousness of the offense, the DOJ evaluated the scale of the potential national security threat. It determined that the controlled substances sent to China did not pose a significant threat to national security in the amounts and concentrations sold and that most of the shipped substances did not require a license to be exported.¹⁷

Timely & Appropriate Remediation

- The DOJ noted that when MilliporeSigma discovered the wrongdoing, it terminated the employee who engaged in the scheme and made efforts to improve its internal controls and compliance program.¹⁸

MilliporeSigma Itself was Victimized by the Scheme

- A further mitigating consideration cited by the DOJ was the fact that the co-conspirators used deception to obtain these substances from MilliporeSigma at a significantly discounted price. In this way, MilliporeSigma itself was a victim of the scheme, under which the co-conspirators obtained goods at prices otherwise unavailable to them and received other benefits, such as free overnight shipping.¹⁹

OBSERVATIONS AND IMPLICATIONS

Overall, the DOJ's press release and declination letter underscore the Department's continued emphasis on the timeliness of a company's disclosures and proactive cooperation as factors that will significantly affect the outcome of corporate national security investigations. Although it is too early to assess whether NSD will rely more on a "carrots" approach (mitigation through cooperation) or "sticks" approach (more severe outcomes based on aggravating factors) in future corporate national security enforcement cases, the MilliporeSigma case demonstrates that cooperating companies can sometimes avoid prosecution altogether, despite the commission of crimes by one or more of their employees.

It is also noteworthy that the DOJ here did not charge the individual defendants with any traditional national security offenses (e.g., export control offenses, sanctions violations, or failure to register as a foreign agent) but, rather, obtained guilty pleas to wire fraud conspiracy. This suggests that NSD will take an expansive view of the types of cases that are subject to the NSD Enforcement Policy, applying it broadly to fact patterns that implicate national security interests but do not necessarily involve violations of national security laws. The MilliporeSigma prosecution also suggests that the DOJ may be aggressive or expansive in its use of non-national security offenses when investigating or prosecuting conduct that potentially advances the interests of national security threat countries like China.

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Finally, it is significant that the crime here involved only one seemingly low-level employee of MilliporeSigma acting with co-conspirators outside the organization. In future cases subject to the NSD Enforcement Policy, certain aggravating factors not present in this case—including significant profits to the company resulting from the misconduct, involvement by upper level management, and pervasive criminal wrongdoing among employees—could contribute to a “more stringent resolution” for an organization following voluntary self-disclosure.²⁰ It is unclear, for example, how the DOJ would handle a similar criminal scheme that involved more employees and/or yielded a significant financial gain to the company. Nevertheless, this declination suggests that the DOJ is willing to reward a company’s proactive and good-faith efforts to disclose and cooperate in the national security realm.

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ENDNOTES

- 1 Press Release, Department of Justice, Ringleader and Company Insider Plead Guilty to Defrauding Biochemical Company and Diverting Products to China Using Falsified Export Documents (May 22, 2024), available at <https://www.justice.gov/opa/pr/ringleader-and-company-insider-plead-guilty-defrauding-biochemical-company-and-diverting>.
- 2 *Id.*
- 3 See U.S. Department of Justice, Updated NSD Enforcement Policy for Business Organizations (Mar. 7, 2024), available at <https://www.justice.gov/nsd/media/1285121/dl?inline=>.
- 4 U.S. Department of Justice, Justice Manual §9-28.300 (2024), available at <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>.
- 5 Press Release, *supra* note 1.
- 6 Press Release, *supra* note 1; Declination Letter from the Department of Justice, National Security Division to Counsel for MilliporeSigma & Sigma-Aldrich, Inc. (May 14, 2024), available at <https://www.justice.gov/opa/media/1352886/dl?inline=>.
- 7 See Department of Justice, NSD Enforcement Policy for Business Organizations (Mar. 1, 2023), available at <https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2024/03/nsd-vsd-policy-3123.pdf>; U.S. Department of Justice, Department of Commerce, Department of the Treasury, and Department of Justice Tri-Seal Compliance Note: Voluntary Self-Disclosure of Potential Violations (July 26, 2023), available at <https://www.justice.gov/opa/file/1307601/dl?inline=>. See also S&C Client Memorandum: “DOJ, BIS and OFAC Release Guidance on Voluntary Self-Disclosures” (July 31, 2023), available at https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-sanctions-export-controls-guidance.pdf.
- 8 See Updated NSD Enforcement Policy, *supra* note 3.
- 9 *Id.* at 8–12.
- 10 Press Release, U.S. Department of Justice, Justice Department’s National Security Division Announces Key Corporate Enforcement Appointments (Sept. 11, 2023), available at <https://www.justice.gov/opa/pr/justice-departments-national-security-division-announces-key-corporate-enforcement>.
- 11 Updated Enforcement Policy, *supra* note 3, at 2.
- 12 *Id.* at 8.
- 13 Deputy Attorney General Lisa Monaco, Keynote Remarks at the American Bar Association’s 39th National Institute on White Collar Crime (Mar. 7, 2024), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations>.
- 14 Press Release, *supra* note 1; Declination Letter, *supra* note 6.
- 15 Press Release, *supra* note 1.
- 16 Declination Letter, *supra* note 6.
- 17 *Id.*
- 18 *Id.*
- 19 *Id.*
- 20 Updated Enforcement Policy, *supra* note 3, at 8.

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