

CLIENT ALERT

DOJ National Security Division Issues First Declination Under New Enforcement Policy in Export Controls Case

May 28, 2024

AUTHORS

William J. Stellmach | **David Mortlock** | **Britt Mosman** | **Andrew English**
Sean Sandoloski

For more than two years, senior leadership at the Department of Justice (“DOJ” or the “Department”) has underscored a steady theme in speeches, policy statements, and broader messaging regarding the priority of investigating and prosecuting criminal violations of U.S. sanctions and export controls laws, including by creating a dedicated team of prosecutors focused on these types of cases. In a faint echo of that drumbeat, on May 22 the Department announced it had declined to prosecute Sigma-Aldrich Inc., a subsidiary of Merck KGaA doing business as MilliporeSigma, for violations of the Arms Export Control Act, the Export Control Reform Act, and other federal export controls statutes.¹

That decision is noteworthy because it seemingly goes against the tide of DOJ’s very public statements regarding vigorous prosecution. The declination, the first under the National Security Division Enforcement Policy for Business Organizations (“Enforcement Policy”), cites several familiar factors as weighing against a prosecution, including a voluntary self-disclosure,

¹ Declination Letter to Sigma-Aldrich, Inc., d/b/a MilliporeSigma, at 1 (May 14, 2024), <https://www.justice.gov/opa/media/1352886/dl?inline>; Press Release, Dep’t of Just., Ringleader and Company Insider Plead Guilty to Defrauding Biochemical Company and Diverting Products to China Using Falsified Export Documents (May 22, 2024), <https://www.justice.gov/opa/pr/ringleader-and-company-insider-plead-guilty-defrauding-biochemical-company-and-diverting>.

DOJ National Security Division Issues First Declination Under New Enforcement Policy in Export Controls Case

full cooperation, and timely remediation.² But while the Department cited the declination as evidence that “[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,”³ the specifics of the MilliporeSigma matter reflect a fact pattern distinct from the typical case where a company has allegedly violated federal law.

As discussed below, the company here derived no benefit from the alleged export controls violations and was in fact the victim of a fraud. Moreover, the alleged export controls violations involved the export of products to China, not Russia, which DOJ deemed “did not present a significant threat to national security” (and in most instances, did not even require an export license).⁴ Accordingly, companies that identify evidence of possible violations of export controls, sanctions, or other federal laws should continue to evaluate on a case-by-case basis whether voluntary self-disclosure to the Department is the appropriate decision.

I. *The Department’s Stated Focus on Criminal Sanctions and Export Controls Violations*

For over two years, the Department has repeatedly emphasized that it is keenly focused on (1) prosecuting violations of U.S. sanctions and export controls laws and (2) encouraging companies to self-disclose violations of U.S. law. Back in April 2022, Deputy Attorney General Lisa Monaco declared that “sanctions [are] the new FCPA [Foreign Corrupt Practices Act],”⁵ a phrase since repeated by her and other DOJ officials meant to emphasize that the Department is seeking to bring significant enforcement actions in this area.⁶ Moreover, the Department launched an effort to hire more than 25 prosecutors into the DOJ National Security Division (“NSD”), who report to NSD’s first-ever Chief Counsel for Corporate Enforcement, and added six prosecutors in the Criminal Division’s Bank Integrity Unit focused on violations in this area of law.⁷

With respect to self-disclosure, in March 2024, the NSD published the updated Enforcement Policy, part of a larger push by the Department to increase voluntary disclosures by companies.⁸ The policy “strongly encourages companies to voluntarily

² Declination Letter to Sigma-Aldrich, Inc., d/b/a MilliporeSigma, at 1–2.

³ Press Release, Dep’t of Just., Ringleader and Company Insider Plead Guilty to Defrauding Biochemical Company and Diverting Products to China Using Falsified Export Documents.

⁴ Declination Letter to Sigma-Aldrich, Inc., d/b/a MilliporeSigma, at 2.

⁵ Dylan Tokar, *Sanctions Turn Into New Priority for Justice Department*, Wall St. J. (Apr. 27, 2022), <https://www.wsj.com/articles/sanctions-turn-into-new-priority-for-justice-department-11651097156>.

⁶ *E.g.*, Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime, Dep’t of Just. (Mar. 2, 2023), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national>; Principal Associate Deputy Attorney General Marshall Miller Delivers Remarks at the Global Investigations Review Annual Meeting, Dep’t of Just. (Sept. 21, 2023), <https://www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-remarks-global>.

⁷ Principal Associate Deputy Attorney General Marshall Miller Delivers Remarks at the Global Investigations Review Annual Meeting.

⁸ For more discussion of that push by the Department see, for example, *DOJ Again Presses ‘Benefits’ of Self-Disclosure* (Oct. 2, 2023),

https://www.willkie.com/-/media/files/publications/2023/10/doj_again_presses_benefits_of_self_disclosure.pdf;

DOJ’s Latest Incentives for Self-Disclosure: An Offer You Can’t Refuse? (Jan. 31, 2023),

<https://www.willkie.com/-/media/files/publications/2023/dojlatestincentivesforselldisclosureanofferyoucan.pdf>.

DOJ National Security Division Issues First Declination Under New Enforcement Policy in Export Controls Case

self-disclose directly to NSD all potentially criminal (i.e., willful) violations of the U.S. government's primary export control and sanctions regimes."⁹ Under the policy, a company that "(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" receives a "presumption" from NSD that the company will receive a non-prosecution agreement and will not pay a fine.¹⁰ This presumption is not a guarantee, and can be rejected by NSD if, among other reasons, NSD determines there are "aggravating factors" such as the involvement of senior management, prior violations of national security laws, significant profit from the misconduct, and/or the criminal misconduct was pervasive throughout the company.¹¹ NSD also has the discretion, as it did in the case of MilliporeSigma, to grant a declination.¹² Even in the case of a non-prosecution agreement or declination, however, the self-disclosing company is still required to pay what NSD deems is appropriate disgorgement, forfeiture, and/or restitution.¹³

II. *Declination for MilliporeSigma*

Given this backdrop, it is unsurprising that the Department has held up MilliporeSigma as an example of the benefits of self-disclosure. However, based upon the information in the DOJ's declination letter and press release, the facts were singularly favorable for MilliporeSigma: A MilliporeSigma salesperson falsely represented that his co-conspirator was affiliated with a research lab at a large university.¹⁴ Through this deception, the MilliporeSigma employee sold millions of dollars of biochemical materials to his co-conspirator at a significant discount, with the co-conspirator then repackaging and shipping the materials to China.¹⁵

Significantly, the letter states that "although MilliporeSigma obtained some revenue from sales to the conspirators, MilliporeSigma was victimized by the conspirators' scheme to fraudulently obtain significantly discounted products and free overnight shipping, which fraud was, under all of the circumstances, the most serious readily provable offense committed by the conspirators."¹⁶ Tellingly, the Department stated that MilliporeSigma "did not unlawfully obtain any gains from the offenses for which it is potentially liable."¹⁷ This was certainly the reason MilliporeSigma did not have to pay any disgorgement, forfeiture, or restitution, and it also seems it was a significant factor in the Department granting a declination.

⁹ NSD Enforcement Policy for Business Organizations, Dep't of Just., at 1 (Mar. 7, 2024), <https://www.justice.gov/nsd/media/1285121/dl?inline=1> (emphasis in original).

¹⁰ *Id.* at 2.

¹¹ *Id.* at 2–3, 8.

¹² *Id.* at 3.

¹³ *Id.*

¹⁴ Declination Letter to Sigma-Aldrich, Inc., d/b/a MilliporeSigma, at 1; Press Release, Dep't of Just., Ringleader and Company Insider Plead Guilty to Defrauding Biochemical Company and Diverting Products to China Using Falsified Export Documents.

¹⁵ Press Release, Dep't of Just., Ringleader and Company Insider Plead Guilty to Defrauding Biochemical Company and Diverting Products to China Using Falsified Export Documents.

¹⁶ Declination Letter to Sigma-Aldrich, Inc., d/b/a MilliporeSigma, at 2 (emphasis added).

¹⁷ *Id.*

DOJ National Security Division Issues First Declination Under New Enforcement Policy in Export Controls Case

Moreover, the misconduct appears to have been limited to the single MilliporeSigma salesperson, who was bribed by his co-conspirator to participate in the criminal conduct, and who MilliporeSigma fired.¹⁸

The Department also credited MilliporeSigma's rapid disclosure to the DOJ, which occurred a week after outside counsel was engaged to conduct an investigation, as well as MilliporeSigma's "exceptional and proactive cooperation, including . . . disclosing all known relevant facts . . . and identifying evidence establishing probable cause to search for evidence of the crimes in locations not under MilliporeSigma's control."¹⁹ The announcement regarding the MilliporeSigma declination was accompanied by an announcement that the MilliporeSigma salesperson responsible for the misconduct and his co-conspirator had both pled guilty to one count of wire fraud conspiracy for their roles in the scheme to fraudulently procure deeply discounted products from MilliporeSigma and export them to China using falsified export documents.²⁰

III. *Takeaways*

Although the Department has highlighted this matter as proof of the "benefits" of self-disclosure to the DOJ, and companies now have an example of how to resolve potential criminal matters with the Department on the right facts, companies considering self-disclosure should continue to undertake their own analysis as to potential benefits and costs. The misconduct here was unusual in several respects, particularly the fact that the company itself was a victim of fraud and derived no gain from the alleged export violations, which were also deemed not to have significantly harmed national security. The outcome of self-disclosure depends significantly on the specific facts of each case, and companies considering self-disclosure should, with the assistance of outside counsel, carefully evaluate the potential benefits and harms of disclosing misconduct directly to the DOJ, in addition to civil agencies.

¹⁸ *Id.*; Press Release, Dep't of Just., Ringleader and Company Insider Plead Guilty to Defrauding Biochemical Company and Diverting Products to China Using Falsified Export Documents.

¹⁹ Declination Letter to Sigma-Aldrich, Inc., d/b/a MilliporeSigma, at 1–2.

²⁰ Press Release, Dep't of Just., Ringleader and Company Insider Plead Guilty to Defrauding Biochemical Company and Diverting Products to China Using Falsified Export Documents.

DOJ National Security Division Issues First Declination Under New Enforcement Policy in Export Controls Case

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

William J. Stellmach

202 303 1130

wstellmach@willkie.com

David Mortlock

202 303 1136

dmortlock@willkie.com

Britt Mosman

202 303 1057

bmosman@willkie.com

Andrew English

202 303 1186

aenglish@willkie.com

Sean Sandoloski

202 303 1047

ssandoloski@willkie.com

Copyright © 2024 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in Brussels, Chicago, Dallas, Frankfurt, Houston, London, Los Angeles, Milan, Munich, New York, Palo Alto, Paris, Rome, San Francisco and Washington. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.