

# FCPA Update

A Global Anti-Corruption Newsletter



## Also in this issue:

6 China Issues New Regulations Implementing International Criminal Judicial Assistance Law

[Click here for an index of all FCPA Update articles](#)

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## DOJ Announces First Declination Under National Security Division's Self-Disclosure Policy

On May 21, 2024, the Department of Justice announced its first declination subject to the National Security Division's ("NSD") recently issued voluntary self-disclosure policy.<sup>1</sup> In this precedent-setting action, MilliporeSigma timely self-reported and remediated export control violations—and provided "exceptional cooperation" with the subsequent investigation—regarding an employee's fraudulent diversion of biochemical products to China.<sup>2</sup> The employee and a co-conspirator each pled guilty

[Continued on page 2](#)

1. U.S. Dep't of Justice, Nat'l Sec. Div., "NSD Enforcement Policy For Business Organizations" (Mar. 7, 2024), <https://www.justice.gov/nsd/media/1285121/dl?inline=>.
2. Letter from Daniel J. Marcet, Chief, U.S. Dep't of Justice, Nat'l Sec. Div., to Andrey Spektor, Counsel for Sigma-Aldrich, Inc., d/b/a MilliporeSigma (May 14, 2024), <https://www.justice.gov/opa/media/1352886/dl?inline=>.

**DOJ Announces First  
Declination Under  
National Security Division's  
Self-Disclosure Policy**

Continued from page 1

to one count of conspiracy to commit wire fraud. DOJ declined to prosecute or levy any penalties on MilliporeSigma.<sup>3</sup>

The MilliporeSigma declination provides an example of successful self-disclosure under NSD's new policy and highlights the U.S. government's increased focus on the intersection of national security and corporate compliance, including through enforcement actions by agencies like DOJ's NSD, the Commerce Department's Bureau of Industry and Security ("BIS"), and the Treasury Department's Office of Foreign Assets Control ("OFAC"). The declination also demonstrates how some of DOJ's time-worn tools and tactics used in enforcing the Foreign Corrupt Practices Act ("FCPA") are transposed into the "new FCPA" world of export controls and sanctions enforcement.

This declination offers an example of a path to a declination under NSD's self-disclosure policy, but also involved a relatively unique set of facts and circumstances. It remains to be seen whether this case will serve as a precedent for companies facing more complex situations and may not be able to self-disclose as quickly and fully as MilliporeSigma.<sup>4</sup>

**An Example of Successful Self-Disclosure**

The MilliporeSigma declination involved an employee who, with the help of an associate, engaged in the fraudulent procurement of company products and their export to China. The associate allegedly faked an affiliation with an academic research lab in Florida, and worked in concert with the MilliporeSigma employee to purchase pharmaceutical products at a hefty discount and illegally export them to China. The two individuals allegedly fabricated export documents and reaped millions in ill-gotten gains over seven years of exports. The scheme exploited a vulnerability in export controls: the misuse of academic institutions by outsiders to obscure the actual customer of controlled items.

The scheme continued until MilliporeSigma compliance personnel flagged the orders as suspicious. The Company disclosed these transactions to NSD one week later, well before counsel had completed an internal investigation. MilliporeSigma was credited for fully cooperating with NSD, including by proactively producing documents and identifying wrongdoers, which enabled NSD to secure felony guilty pleas for conspiracy to commit wire fraud against two individuals. Prosecutors stated that MilliporeSigma was "essential in obtaining this result."

Continued on page 3

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3. U.S. Dep't of Justice, "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>.
  4. Gaspard Le Dem, "Companies increasingly deterred by unclear US policies on voluntary disclosure, ex-DOJ prosecutor says," Global Investigations Review (June 20, 2024), <https://globalinvestigationsreview.com/just-sanctions/article/companies-increasingly-deterred-unclear-us-policies-voluntary-disclosure-ex-doj-prosecutor-says>.

DOJ Announces First  
Declination Under  
National Security Division's  
Self-Disclosure Policy  
*Continued from page 2*

Similar to DOJ's Corporate Enforcement Policy, the NSD policy requires a company seeking declination to self-disclose, fully cooperate with law enforcement, and timely and appropriately remediate the underlying issues. But the Corporate Enforcement Policy presumes declination if these three criteria are met, whereas the NSD policy creates a presumption of a non-prosecution agreement, not a declination, in such circumstances.<sup>5</sup> Under the NSD policy, the presumption of a non-prosecution agreement will only apply if the company has met these three criteria *and* aggravating circumstances are absent. Such circumstances include posing a "grave threat" to national security, exporting items that are either particularly sensitive or exported to end users of heightened concern, repeated violations, senior management involvement in the violation, and significant profit from the misconduct.

**“The [MilliporeSigma] declination also demonstrates how some of DOJ’s time-worn tools and tactics used in enforcing the Foreign Corrupt Practices Act ... are transposed into the “new FCPA” world of export controls and sanctions enforcement.”**

NSD found that MilliporeSigma satisfied all the requisite criteria to merit a declination. The Company (1) voluntarily self-disclosed potential criminal violations, (2) fully cooperated, and (3) timely and appropriately remediated. In addition, NSD found that the violations did not present a significant threat to national security; indeed the exports at issue may not have required an export license in some cases. NSD also found it significant that MilliporeSigma was victimized by the actions of the culpable individuals and did not profit “from the offenses for which it is potentially liable.” As a result, the Company did not have to pay disgorgement, forfeiture, or restitution.<sup>6</sup>

#### **Increased Focus on the Intersection of National Security and Corporate Crime**

The MilliporeSigma declination illustrates the government's focus on the intersection of national security and corporate crime, including through export controls enforcement. In early 2023, NSD appointed its first-ever chief counsel for

*Continued on page 4*

5. Kara Brockmeyer, *et al.*, “DOJ Announces a Revised FCPA Corporate Enforcement Policy” (Nov. 30, 2017), [https://www.debevoise.com/-/media/files/insights/publications/2017/11/20171130-doj\\_announces\\_revised\\_fcpa\\_policy.pdf?rev=663cd970aa3d4c97a20dbadf8d4606be&hash=29A9007CE14FAC1D18AEA9467626D528](https://www.debevoise.com/-/media/files/insights/publications/2017/11/20171130-doj_announces_revised_fcpa_policy.pdf?rev=663cd970aa3d4c97a20dbadf8d4606be&hash=29A9007CE14FAC1D18AEA9467626D528).

6. See *supra* n.3.

DOJ Announces First  
Declination Under  
National Security Division's  
Self-Disclosure Policy  
*Continued from page 3*

corporate enforcement. This increased attention on national security is taking place against the backdrop of an ever-growing number of geopolitical conflicts.

Together, DOJ, BIS, and OFAC have formed several task forces targeting the intersection of international trade and national security. These include DOJ's Task Force KleptoCapture, dedicated to enforcing sanctions, export restrictions and economic countermeasures in response to Russia's invasion of Ukraine; the joint DOJ-OFAC Russian Elites Proxies and Oligarchs (REPO) Task Force, focused on asset forfeiture and fostering cooperation between the United States and its allies; and the joint DOJ-BIS Disruptive Technology Strike Force, formed "to target illicit actors, strengthen supply chains and protect critical technological assets from being acquired or used by nation-state adversaries."<sup>7</sup>

Notwithstanding these interagency cooperation initiatives, companies should be aware that civil enforcement by BIS or OFAC may attract criminal scrutiny from NSD—similar to parallel criminal and civil proceedings initiated by DOJ and the Securities and Exchange Commission in the FCPA context. Although the Department of Commerce, Department of the Treasury, and the Department of Justice have released joint guidance for evaluating self-disclosure in the sanctions, export control, and national security context,<sup>8</sup> NSD will not credit a company's self-disclosure to BIS or OFAC, as self-disclosure to NSD.

### **Self-Disclosure Considerations**

As the MilliporeSigma declination demonstrates, NSD is focused on providing incentives to self-disclosure. At the same time, the process of, and expectations for, self-disclosure and cooperation are becoming increasingly extensive and burdensome. For example, NSD praised MilliporeSigma for self-disclosing the potential misconduct just one week after its discovery and well before completing an internal investigation.

A company presented with a more complicated set of facts—or in circumstances where much of the evidence may be located abroad and subject to local data protection laws, or when such swift action is simply not feasible given the corporate structure—may well ask itself whether it can ever attain the standard for a declination that NSD might expect. In addition, many—and likely most—potential violations of export controls or sanctions laws are likely to involve arguably ill-gotten gains, and therefore would trigger significant disgorgement, which may further complicate the self-disclosure calculus.

*Continued on page 5*

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7. U.S. Dep't of Justice, "Justice and Commerce Departments Announce Creation of Disruptive Technology Strike Force" (Feb. 13, 2023), <https://www.justice.gov/opa/pr/justice-and-commerce-departments-announce-creation-disruptive-technology-strike-force>.
  8. See U.S. Dep't 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), at 2-3, <https://www.justice.gov/opa/file/1307601/dl?inline>.



**DOJ Announces First  
Declination Under  
National Security Division's  
Self-Disclosure Policy**  
*Continued from page 4*

The relatively unique facts and circumstances of the MilliporeSigma matter make it difficult to draw broader conclusions about the scope of the NSD self-disclosure policy or how it is likely to operate in more typical circumstances. Of course, it represents only the opening salvo in NSD's efforts in this space, and time will tell whether NSD's declinations will be limited to MilliporeSigma-like cases or apply more broadly.

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*Continued on page 6*

## China Issues New Regulations Implementing International Criminal Judicial Assistance Law

On April 22, 2024, PRC authorities jointly promulgated the *Provisions on Several Issues Concerning the Implementation of People's Republic of China on International Criminal Judicial Assistance Law (Trial Implementation)* (the "Provisions").

The Provisions implement the International Criminal Judicial Assistance Law (the "ICJAL"),<sup>1</sup> originally enacted on October 26, 2018,<sup>2</sup> and provide detailed guidance on compliance with the ICJAL, which prohibits persons in China from engaging in certain activities relating to foreign criminal proceedings without approval from PRC authorities.

To implement state-to-state criminal judicial assistance, the Provisions create a new office and related procedures. Significantly, for foreign companies operating in China and for Chinese companies exposed to foreign investigations, the Provisions create: (i) a reporting obligation for persons or entities who receive requests from foreign authorities outside of the state-to-state legal assistance framework; and (ii) a mechanism for entities and individuals to seek approval to voluntarily provide evidence to a foreign country.

### The International Criminal Judicial Assistance Law

The ICJAL regulates judicial assistance between the PRC and foreign countries in connection with criminal proceedings. This includes, for example, service of documents, investigation, and collection of evidence; arrangement of witness testimony; seizure, freezing, return, and confiscation of illegal assets; and the transfer of convicted persons.<sup>3</sup> In particular, the ICJAL prohibits providing evidence (documents or testimony) to foreign authorities outside of state-to-state legal assistance treaties (e.g., MLATs) or similar procedures on the basis of reciprocity, unless such cooperation is approved by "PRC competent authorities."<sup>4</sup> As we noted

Continued on page 7

1. "国家监察委员会、最高人民法院、最高人民检察院、外交部、公安部、国家安全部、司法部印发《关于实施〈中华人民共和国国际刑事司法协助法〉若干问题的规定(试行)》的通知" (Notice of the National Supervisory Commission, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Foreign Affairs, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice on Issuing the Provisions on Several Issues Concerning the Implementation of People's Republic of China on International Criminal Judicial Assistance Law (Trial Implementation)) (Apr. 22, 2024), [https://www.moj.gov.cn/pub/sfbgwapp/zwgk/tzggApp/202405/t20240511\\_498682.html](https://www.moj.gov.cn/pub/sfbgwapp/zwgk/tzggApp/202405/t20240511_498682.html); unofficial translation available at [https://pkulaw.com/en\\_law/04c525b9b7be2874bdfb.html](https://pkulaw.com/en_law/04c525b9b7be2874bdfb.html).
2. 《中华人民共和国国际刑事司法协助法》(People's Republic of China International Criminal Judicial Assistance Law) (effective on Oct. 26, 2018), [http://www.npc.gov.cn/zgrdw/npc/xinwen/2018-10/26/content\\_2064576.htm](http://www.npc.gov.cn/zgrdw/npc/xinwen/2018-10/26/content_2064576.htm); unofficial translation available at [https://pkulaw.com/en\\_law/b1575aa60196e4bdfb.html](https://pkulaw.com/en_law/b1575aa60196e4bdfb.html); see also Kara Brockmeyer, et al., "The Year 2018 in Review: Continued Globalization of Anti-Corruption Enforcement," FCPA Update, Vol. 10, No. 6 (Jan. 2019), <https://www.debevoise.com/insights/publications/2019/01/fcpa-update-january-2019> ("Jan. 2019 FCPA Update").
3. Art. 2 of ICJAL.
4. Art. 4 of ICJAL.

China Issues New  
Regulations Implementing  
International Criminal  
Judicial Assistance Law  
Continued from page 6

when the ICJAL was enacted, the law could be read as a blocking statute, similar to those enacted by France<sup>5</sup> and other European countries.

Broader prohibitions relating to the transfer of data to “foreign judicial or law enforcement authorities” appear in China’s Data Security Law (“DSL”)<sup>6</sup> and Personal Information Protection Law (“PIPL”).<sup>7</sup> Although the ICJAL does not address penalties for noncompliance,<sup>8</sup> entities could be administratively punished under general provisions of other regulations. Moreover, the more recently enacted DSL and PIPL do contain penalty provisions. In the case of the PIPL, for example, penalties can amount to 5% of an entity’s annual revenue, and administrative remedies can include the revocation of a business license.<sup>9</sup>

### The Provisions

The Provisions address implementation of the ICJAL and relate only to criminal proceedings. Summarizing the ICJAL, the Provisions broadly define criminal proceedings to include investigations, trials, and post-trial measures, including:

- Serving a summons, notice, indictment, judgment, or any other criminal legal document upon an institution, organization, or individual in China;<sup>10</sup>
- Collecting and obtaining criminal evidentiary materials from an institution, organization, or individual in China;
- Contacting, arranging for, or requiring an institution, organization, or individual in China to testify abroad, assist in investigations, or participate in court trials by video, audio, or other remote means;

Continued on page 8

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5. Statute n° 68-678 of July 26, 1968, modified by Statute n° 80-538 of July 16, 1980.
  6. 《中华人民共和国数据安全法》(People’s Republic of China Data Security Law) (effective on Sept. 1, 2021), Art. 36, [http://www.npc.gov.cn/c2/c30834/202106/t20210610\\_311888.html](http://www.npc.gov.cn/c2/c30834/202106/t20210610_311888.html); unofficial translation available at [https://www.pkulaw.com/en\\_law/1dd3a2fb498ecb3ebdfb.html](https://www.pkulaw.com/en_law/1dd3a2fb498ecb3ebdfb.html) (“DSL”).
  7. 《中华人民共和国个人信息保护法》(People’s Republic of China Personal Information Protection Law) (effective on Nov. 1, 2021), Art. 41; [http://www.npc.gov.cn/npc/c2/c30834/202108/t20210820\\_313088.html](http://www.npc.gov.cn/npc/c2/c30834/202108/t20210820_313088.html); unofficial translation available at [https://www.pkulaw.com/en\\_law/d653ed619d0961c0bdfb.html](https://www.pkulaw.com/en_law/d653ed619d0961c0bdfb.html) (“PIPL”).
  8. See Brockmeyer et al., Jan. 2019 FCPA Update, *supra* n.2.
  9. See Art. 44-52, DSL (in addition to civil and criminal penalties, noncompliance with DSL may lead to administrative penalties including issuance of a warning letter, an order for the rectification of misconduct, fines against entities up to RMB 10 million and individuals up to RMB 1 million, suspension of business, or revocation of business licenses); Art. 66-71, PIPL (in addition to civil and criminal penalties, noncompliance with PIPL may lead to penalties including: (1) warnings, correction orders, confiscation of illegal profits, and orders to suspend or shutdown services; (2) a fine of up to RMB 1 million for relevant entities and RMB 10,000 to RMB 100,000 for in-charge and responsible individuals; (3) in serious cases, a fine up to RMB 50 million or 5% of the previous year’s turnover, as well as suspension or shutdown of business operations or revocation of business license for relevant entities, and a fine ranging from RMB 100,000 to RMB 1 million, plus additional restrictions for relevant individuals; and (4) publicly disclosed negative records in a credit report.
  10. As the special administrative regions of Hong Kong and Macau have separate legal systems, national PRC laws like the ICJAL do not automatically apply to those regions, except in circumstances described under the annex of the Hong Kong and Macau Basic laws.

**China Issues New  
Regulations Implementing  
International Criminal  
Judicial Assistance Law**

Continued from page 7

- Requiring an institution, organization, or individual in China to assist in taking measures such as placing under seal, impounding, or freezing property related to a case in China;
- Requiring an institution, organization, or individual in China to assist in the execution of a criminal judicial judgment made by a foreign country; and
- Other criminal proceedings prescribed by laws.<sup>11</sup>

Under the Provisions, a new “Working Mechanism” composed of a “foreign affairs liaison authority” and other “competent authorities” has been established to handle requests, and an “Office of the Working Mechanism” will be set up in the judicial administrative department of the State Council.<sup>12</sup> The Office of the Working Mechanism is charged with handling requests for judicial assistance from foreign countries, and the Provisions set forth procedures and timelines to be followed, and identifies Chinese authorities that should be tasked with gathering evidence depending on the circumstances.

**“Significantly, for foreign companies operating in China and for Chinese companies exposed to foreign investigations, the Provisions create: (i) a reporting obligation for persons or entities who receive requests from foreign authorities outside of the state-to-state legal assistance framework; and (ii) a mechanism for entities and individuals to seek approval to voluntarily provide evidence to a foreign country.”**

Generally speaking, a foreign country’s request should be assessed within 15, 30, or 45 days, depending on the urgency, and transferred to the appropriate Chinese authority for completion within a further 15, 30, or 45 days, depending on the urgency. The appropriate authority for handling a specific request will depend on the nature of the request. For example, a foreign country’s request for evidence in connection with an investigation should be sent to the relevant Chinese prosecutor’s office (the procuratorate), and a foreign country’s request for evidence in connection with a trial should be sent to judicial authorities (i.e., the relevant court).<sup>13</sup>

Continued on page 9

11. Art. 11 of the Provisions.

12. Art. 12 of the Provisions.

13. Art. 4, Paragraph (1) of the Provisions.



China Issues New  
Regulations Implementing  
International Criminal  
Judicial Assistance Law

Continued from page 8

In addition to procedures for handling state-to-state requests, the Provisions address instances in which individuals or entities within China directly receive requests from foreign countries. Specifically, Article 13 of the Provisions requires entities and individuals to report such a request to the Office of the Working Mechanism within 30 days after receipt. A report should explain the matter and attach copies of relevant legal documents and other supporting materials. The reporting party may request the Office of the Working Mechanism to keep the report confidential.<sup>14</sup> Upon receipt, the Office of the Working Mechanism shall consult with its members and, if the request involves criminal proceedings, may notify the foreign country through diplomatic channels about the need to request judicial assistance.<sup>15</sup> Like the ICJAL, the Provisions prescribe no penalty or other explicit consequences for failing to make such a report.

Perhaps of most relevance to entities operating internationally, the Provisions establish a mechanism for voluntary cooperation with foreign criminal proceedings. Under Article 14, entities and individuals within the territory of PRC seeking voluntarily to provide evidence to a foreign criminal proceeding “for the purpose of safeguarding its or his rights and interests or other purposes” may apply to the Office of the Working Mechanism. Such a written application should include: (1) the applicant’s identity, basic information about the case, scope and contents, and reasons for the evidence to be provided; (2) where applicable, “opinions from the relevant administrative or industry ‘competent authority;” (3) statements that the evidence complies with the provisions of laws on protection of state secrets, data security, and personal information protection, among others, as well as contractual confidentiality obligations; (4) “explanation of the purpose and use of the evidence, the measures on protection of confidentiality and security, etc.,” and (5) other necessary materials.<sup>16</sup>

The Office of the Working Mechanism must promptly review such applications and inform the applicant of its decision within 60 days. The application must describe the evidence, but it is unclear if or when the Office of the Working Mechanism will examine the evidence itself. Moreover, beyond specifying the application’s content, the Provisions do not specify what factors the Office of the Working Mechanism will consider in granting or denying requests to send evidence abroad. Finally, the 60-day period can be extended if the matters are complicated, which is undefined but likely will include the volume of evidence as a factor.

Continued on page 10

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14. Art. 13 of the Provisions.

15. *Id.*

16. Art. 14 of the Provisions.

China Issues New  
Regulations Implementing  
International Criminal  
Judicial Assistance Law  
*Continued from page 9*

### Monitoring the Implementation of the Provisions

In passing the ICJAL, China asserted its sovereignty over criminal procedure activities within Chinese territory. The Provisions make clear that any form of cooperation with foreign authorities must comply with other PRC laws, in particular data protection, data security, and state secrets laws. The Provisions also provide mechanisms for seeking judicial assistance.

Given that the Provisions are labeled as “Trial Implementation,” there may be additional amendments (though it also would not be uncommon for the current text to become the final version). Foreign companies conducting business in China and Chinese companies doing business abroad should monitor carefully the Provisions’ implementation. This includes both the timeliness and success of state-to-state cooperation, which could encourage states to gather evidence through that channel, as well as the Provisions’ application to individuals and entities. The Provisions’ actual functioning also will be relevant to parties dealing with the U.S. Department of Justice. Although DOJ acknowledges that foreign data privacy laws and blocking statutes “may complicate the method of production of documents located overseas,” it maintains that a company must establish the existence of any restrictions and “identify[] reasonable alternatives to provide the requested” information.<sup>17</sup>

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17. U.S. Dep’t of Justice, Memorandum from the Deputy Attorney General, “Further Revisions to Corporate Criminal Enforcement Policies Follow Discussions with Corporate Crime Advisory Group” (Sept. 15, 2022), [https://www.justice.gov/d9/pages/attachments/2022/09/15/2022.09.15\\_ccag\\_memo.pdf](https://www.justice.gov/d9/pages/attachments/2022/09/15/2022.09.15_ccag_memo.pdf).

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