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DOJ announces additional guidance on voluntary self-disclosure in M&A context

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At the September 21, 2023 Conference of the Global Investigations Review, Principal Associate Deputy Attorney General Marshall Miller announced actions by the Department of Justice ("DOJ") to further incentivize companies engaged in M&A to prioritize compliance. Miller affirmed that "acquiring companies should be rewarded — rather than penalized — when they engage in careful pre-acquisition diligence and post-acquisition integration to detect and remediate misconduct at the acquired company's business."[1]

Companies involved in M&A should focus on the role of their compliance group in reviewing compliance programs at target companies pre- and post-diligence, and should take advantage of the "safe harbor."

He noted that in practice, "... [Main Justice's] Criminal Division has declined to take enforcement action against companies that have promptly and voluntarily self-disclosed misconduct uncovered in the mergers and acquisitions context and then remediated and cooperated with the Justice Department in prosecuting culpable individuals," and that the DOJ "will be looking to apply that same approach Department-wide."[2]

Miller explained that this "extension will highlight the critical importance of the compliance function having a prominent seat at the table in evaluating and de-risking M&A decisions."[3] Thus, companies involved in M&A should focus on the role of their compliance group in reviewing compliance programs at target companies pre- and post-diligence, and should take advantage of the "safe harbor" of a declination to detect, remediate and (as necessary) report misconduct relating to acquired companies.

In line with efforts to avoid deterring M&A activity, as expressed by DOJ officials in the past, Marshall specifically indicated that the DOJ "... will not treat as a recidivist any company with a proven track record of compliance that acquires a company with a history of compliance problems ...."[4]

As we have noted in prior blogposts and alert memos,[5] in January 2023, the DOJ updated its Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy to specifically address "M&A Due Diligence and Remediation" by instituting a presumption of a declination to prosecute misconduct when an acquiring company detects and voluntarily self-discloses an acquiree's misconduct during the M&A process.[6]

Moreover, the DOJ clarified that even if aggravating circumstances existed such that declination would not normally be available, an acquiring company that voluntarily self-discloses misconduct could still receive a declination.[7] And in March 2023, the DOJ updated its guidance in the Evaluation of Corporate Compliance Programs, noting with regard to "Mergers and Acquisitions" that pre- and post-M&A due diligence and integration must appropriately scrutinize targets, effectively enforce internal controls, and remediate misconduct at all levels of the organization.[8]

Recent DOJ settlements provide a roadmap to the Department's current approach in the M&A context, with declinations in recent years reflecting DOJ's endorsement of appropriate risk-based M&A due diligence and remediation where misconduct is identified.

In particular, the DOJ has recommended:

- Completing pre-acquisition due diligence that identifies misconduct or the risk of misconduct;

- Integrating the compliance function into the merger, acquisition and integration processes — a theme that was covered again in Miller's speech;
- Monitoring and remediating misconduct or misconduct risks identified during due diligence;
- Implementing compliance policies and procedures at newly acquired entities;
- Conducting post-acquisition audits at newly acquired entities.[9]

The prospect of additional guidance in light of the newly announced Voluntary Self-Disclosure Policy complements guidance from a 2008 Opinion Procedure Release that allowed an acquiror unable to complete pre-acquisition diligence to avoid an enforcement action based on any pre-acquisition FCPA violation by the acquiree, so long as the acquiror conducted post-acquisition due diligence and training, disclosed any prior or ongoing misconduct, and remediated the misconduct.[10]

The DOJ has been keen to highlight some of its key priorities — encouraging timely voluntary self-disclosure and focusing on the role of individuals in corporate misconduct.

Moreover, recent DOJ settlements provide a roadmap to the Department's current approach in the M&A context, with declinations in recent years reflecting DOJ's endorsement of appropriate risk-based M&A due diligence and remediation where misconduct is identified.[11] For example, in March 2022, the DOJ declined to prosecute acquiror Marsh & McLennan Companies Inc. for FCPA violations due to bribery committed by acquiree Jardine Lloyd Thompson Group plc ("JLT"), because of JLT's voluntary self-disclosure, cooperation and remediation, including disgorgement of $29,081,951.[12]

Similarly, in December 2022, the DOJ declined to prosecute acquiror Safran S.A. for violations of the FCPA due to bribery committed by acquirees Monogram and EVAC, and highlighted Safran's voluntary self-disclosure, full cooperation and remediation.[13] Safran also agreed to disgorge $17,159,753, consistent with the Corporate Enforcement Policy.[14]

A similar approach is reflected in recent SEC settlements as well. In March 2023, the SEC reached a settlement with acquiror Flutter Entertainment plc, where acquiree The Stars Group had retained Russia-based third-party consultants without adequate due diligence or written contracts, and inaccurately recorded payments as lobbying fees in violation of the FCPA.[15] Flutter Entertainment settled the matter and agreed to pay $4,000,000 in sanctions as successor-in-interest to The Stars Group.[16]

The Cease-and-Desist Order highlighted Flutter Entertainment's remedial measures post-acquisition, including the enhancement of internal accounting controls, global compliance organization, and its policies and procedures regarding due diligence, use of third parties, and maintenance of adequate records.[17]

Given its commitment to greater transparency and guidance to corporations seeking to navigate their M&A risk exposure, the DOJ has been keen to highlight some of its key priorities — encouraging timely voluntary self-disclosure and focusing on the role of individuals in corporate misconduct. Additional DOJ guidance on these topics is expected soon, as Miller previewed further guidelines on "voluntary self-disclosure in the M&A space" from Deputy Attorney General Lisa Monaco "in the near future."[18]

Notes

[1] "Principal Associate Deputy Attorney General Marshall Miller Delivers Live Keynote Address at Global Investigations Review" (Sept. 21, 2023), https://bit.ly/3tQBfOA. Other Corporate Enforcement and Compliance topics addressed by Miller included deterrence and punishment of recidivist behavior, compensation clawback and incentive programs (in line with the recent DOJ Pilot Program) and the increasing overlap between corporate crime and national security risks.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See* "U.S. Department of Justice Announces Revisions to Corporate Criminal Enforcement Policy" (Jan. 24, 2023), https://bit.ly/406RVNL; "U.S. Attorney's Offices Issue Nationwide Corporate Voluntary Self-Disclosure Policy" (Feb. 27, 2023), https://bit.ly/3QvqCt6.

[6] *See* 9-47.120 Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (January 2023), https://bit.ly/40a8gkC.

[7] *Id.*

[8] *See* U.S. Dep't of Justice, "Criminal Division Evaluation of Corporate Compliance Program" (March 2023), https://bit.ly/3Qprboc.

[9] *Id.*

[10] *See* U.S. Dep't of Justice, Foreign Corrupt Practices Act Review, "Opinion Procedure Release" N. 8-02 (2008), https://bit.ly/3FsjxDz. In that letter, DOJ provided guidance to the buyer in the context of an M&A transaction specifying post-closing risk-based due diligence, including preparing and sharing with authorities a detailed work plan within 10 days of closing; (ii) the immediate commencement of the post-closing due diligence with reports beginning 90 days after the closing and concluding them within 180 days based on risks; (iii) remediation of uncovered issues within one year post-closing; (iv) implementation of the integrity program on the target; and (v) anti-corruption training for target's employees within 90 days after the closing.

[11] For example, in the past couple years, the DOJ and SEC have pursued enforcement actions in the M&A context against Flutter Entertainment plc, Safran S.A., Jardine Lloyd Thompson Group Holdings Ltd., Amec Foster Wheeler Energy Ltd., Alcon PTE Ltd. (DOJ), TechnipFMC plc (SEC), Technip USA Inc. (DOJ), Technip FMC plc (DOJ).

[12] *See* U.S. Dep't of Justice, Re: Jardine Lloyd Thompson Group Holdings Ltd., (March 18, 2022), https://stanford.io/3MgSSgz (DOJ Declination Letter to JLT).

[13] *See* U.S. Dep't of Justice, Re: Safran S.A., (December 21, 2022), https://stanford.io/3s7pcvE (DOJ Declination Letter to Safran).

[14] *Id.*

[15] *See In re Flutter Entertainment plc*, Release No. 97044 (March 6, 2023), https://stanford.io/471m7Mq (SEC Cease-and-Desist Order to Flutter).

[16] *Id.*

[17] *Id.*

[18] "Principal Associate Deputy Attorney General Marshall Miller Delivers Live Keynote Address at Global Investigations Review" (Sept. 21, 2023), https://bit.ly/3tQBfOA.

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