
SEPTEMBER 27, 2023

DOJ Previews New Guidance on Voluntary Self-Disclosures in Mergers and Acquisitions While Signaling Continued Focus on Corporate National Security Crimes

On September 21, 2023, Principal Deputy Attorney General Marshall Miller (“Miller”) delivered a major speech at the Global Investigations Review Annual Meeting that underscored the Department of Justice’s (“DOJ”) increased focus on corporate national security matters.¹ In the speech, Miller made two significant announcements: (1) DOJ will be issuing new guidance on voluntary self-disclosures (“VSDs”) in the context of M&A transactions in which diligence identifies potential misconduct by the acquired company and (2) DOJ will increase its focus on companies that violate existing agreements with the government, including national security agreements that result from transactions reviewed by the Committee on Foreign Investment in the United States (“CFIUS”).

Miller noted that while “in the past a company’s compliance team might have mitigated national security risks through sanctions-screening software and attention to a couple of sanctioned countries, *today a new level of diligence and attention is required.*”² He explained that DOJ’s focus on national security-related economic crimes extends beyond sanctions, with recent cases ranging from “sanctions violations to money laundering to terrorism crimes” that are “splayed out across every walk of corporate life” and “across industries, from construction and shipping to agriculture and telecommunications.”³ The speech builds on the recent announcement by the National Security Division of the appointment of a Chief and Deputy Chief Counsel for Corporate Enforcement and signals that this is a DOJ-wide priority.⁴ Miller emphasized that “companies in the private sector are

¹ See DOJ, *Principal Associate Deputy Attorney General Marshall Miller Delivers Remarks at the Global Investigations Review Annual Meeting* (Sep. 21, 2023), available [here](#) (“Miller Speech”).

² *Id.* (emphasis added).

³ *Id.* He stated that the number of number of major corporate criminal resolutions that implicate national security has doubled from 2022 to 2023, and DOJ would be dedicating resources to this area.

⁴ *Id.* We discussed that announcement in a prior Client Alert. See Paul, Weiss, *Recent DOJ Announcement Signals Continued Surge of Resources to Combat Corporate National Security Crime* (Sep. 14, 2023), available [here](#).

on the front lines of national security challenges like never before” and their “corporate compliance programs [need to] become increasingly sophisticated to keep up.”⁵

There are a number of practical steps that companies may consider taking based on themes emphasized in Miller’s speech.

- **When engaged in M&A deals, it is important for companies to conduct thorough pre- and post-diligence and consider making timely voluntary disclosures to DOJ regarding any misconduct they identify.** Over the past year, DOJ has issued new guidance encouraging VSDs.⁶ Miller made clear that DOJ does *not* seek to prevent “companies with good compliance programs from acquiring companies with histories of misconduct” and that acquiring companies “should not be penalized when they engage in careful pre-acquisition diligence and timely post-acquisition integration to detect and remediate misconduct at the acquired company’s business.”⁷ He noted that the Criminal Division’s Corporate Enforcement Policy already offers declination, in effect a safe harbor, for disclosure of misconduct “that is uncovered during pre- or post-acquisition due diligence.”⁸ But, significantly, Miller announced that DOJ is “working toward an *extension of this approach across the Department*” and that the Deputy Attorney General would “address voluntary self-disclosure in the M&A space in the near future.”⁹ This DOJ-wide policy (which will include antitrust, sanctions and other violations) will offer strong incentives for an acquiring company to file a VSD where it identifies misconduct in the diligence process. The forthcoming guidance may provide additional details on DOJ’s policy, including the timeframe in which to make a qualifying VSD, whether the acquired company will benefit from a VSD by the acquirer, and whether the DOJ will seek disgorgement of any unlawfully obtained funds.¹⁰ Companies, including private equity firms, that frequently engage in acquisitions should give consideration to this development and review their compliance programs, including policies and procedures regarding acquisition due diligence and post-acquisition compliance assessment and integration.
- **It is important for companies to adequately resource and ensure compliance with commitments made to DOJ.** Miller emphasized that any company that violates an agreement with DOJ could expect to pay a “steep price.” As an example, he cited the high-profile case against Ericsson, which entered into a deferred prosecution agreement in 2019 to resolve a bribery scheme, but, after failing to fulfill the terms of the agreement, was required by DOJ to plead guilty to the original charges, pay additional fines and agree to an extended monitorship.¹¹ In a significant announcement, Miller noted that DOJ is extending this approach “beyond the criminal context to breaches of other resolution agreements,” including “violations of CFIUS mitigation agreements or orders.”¹² There has recently been increased scrutiny of companies’ compliance with

⁵ Miller Speech.

⁶ In September 2022, the Deputy Attorney General directed all DOJ components to issue a VSD policy. See Deputy Attorney General, DOJ, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group* (Sep. 15, 2022), available [here](#). Following that, various DOJ components issued new or updated VSD guidance, including uniform guidance across U.S. Attorney’s Offices. We previously discussed this in a prior Client Alert. Paul, Weiss, *United States Attorney’s Offices Announce Voluntary Self-Disclosure Policy for Corporate Prosecutions* (Feb. 24, 2023), available [here](#).

⁷ *Id.*

⁸ *Id.* See Criminal Division, DOJ, *Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy* (updated Jan. 2023), available [here](#). As an example, he cited DOJ’s declination in the Safran investigation in 2022, where it voluntarily disclosed misconduct by two companies it acquired (as well as cooperating with the investigation and remediating the issues). See Criminal Division, DOJ, *Re: Safran S.A.*, available [here](#).

⁹ Miller Speech.

¹⁰ For instance, in a 2008 matter where Halliburton was acquiring a company with potential misconduct, DOJ took the position that the acquiring company must ensure that “any pre-acquisition unlawful conduct by Target [is] disclosed to the Department within 180 days of the closing.” See DOJ, *Foreign Corrupt Practices Act Review; Opinion Procedure Release* (June 13, 2008), available [here](#).

¹¹ *Id.* We previously discussed the Ericsson case and DOJ’s growing focus on enforcing violations of deferred prosecutions. See Paul, Weiss, *FCPA Enforcement and Anti-Corruption Developments; 2021 Year in Review* (Jan. 19, 2022), at 11, available [here](#).

¹² Miller Speech.

their CFIUS commitments, and the Committee is increasing its focus on enforcement.¹³ Companies with agreements with DOJ, whether civil or criminal, should engage in ongoing efforts to comply with those agreements. Moreover, companies should carefully consider the interplay between disclosures made to the government in the CFIUS context and in other contexts (e.g., other civil or criminal enforcement matters), because a disclosure in one context could be used by the government in another proceeding or enforcement action.¹⁴

- **Companies should consider whether their compensation programs incentivize ethical behavior, including through “clawback” provisions.** Miller stated that when DOJ “evaluate[s] the strength of a compliance program, a key consideration will be whether the company’s compensation system effectively incentivizes good behavior and deters wrongdoing.”¹⁵ The Criminal Division’s “Pilot Program Regarding Compensation Incentives and Clawbacks,” announced in March 2023, noted that companies engaged in a resolution with the Criminal Division (1) may be able to reduce a fine by the amount that they are able to “claw back” from employees who engaged in misconduct and those with supervisory responsibility and (2) will be required to build in compliance-based incentives in its compensation and bonus system.¹⁶ Miller underscored that DOJ expects companies to develop and review these policies “long before a company discovers misconduct.”¹⁷

More broadly, the speech underscores the continued need for all companies to prioritize national security issues in their compliance programs. Companies with exposure to Russia, China and other “autocratic” regimes need to be particularly cautious, as these are priority areas for the DOJ (and the broader U.S. government’s national security apparatus).¹⁸

* * *

¹³ On September 14, Treasury Assistant Secretary Paul Rosen announced that CFIUS has “issued two civil monetary penalties [this year],” has “several more pending at various stages,” and is “on track to have more civil monetary penalties issued this year than we have in our entire history.” Rosen indicated that, in 2024, CFIUS would issue new regulations that would update “the Committee’s penalty and enforcement authorities” and “sharpen and enhance the Committee’s tools in the non-notified space.” Department of Treasury, *Remarks by Assistant Secretary for Investment Security Paul Rosen at the Second Annual CFIUS Conference* (Sep. 14, 2023), available [here](#). We have previously discussed CFIUS’s growing focus on enforcement. See Paul, Weiss, *Treasury Department Issues First-Ever CFIUS Enforcement and Penalty Guidelines* (Nov. 22, 2022), available [here](#).

¹⁴ Generally, CFIUS cannot make public any “information or documentary material” filed with the committee, but there are exceptions, including where that “information [is] relevant to any administrative or judicial action or proceeding.” 50 U.S.C. 4565(c).

¹⁵ Miller Speech.

¹⁶ See Criminal Division, DOJ, *The Criminal Division’s Pilot Program Regarding Compensation Incentives and Clawbacks* (March 3, 2023), available [here](#).

¹⁷ Miller Speech.

¹⁸ See Paul, Weiss, *Recent DOJ Announcement Signals Continued Surge of Resources to Combat Corporate National Security Crime* (Sep. 14, 2023), available [here](#).

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Jessica S. Carey
+1-212-373-3566
jcarey@paulweiss.com

John P. Carlin
+1-202-223-7372
jcarlin@paulweiss.com

David Fein
+44-20-7367-1608
dfein@paulweiss.com

Michael E. Gertzman
+1-212-373-3281
mgertzman@paulweiss.com

Roberto J. Gonzalez
+1-202-223-7316
rgonzalez@paulweiss.com

Brad S. Karp
+1-212-373-3316
bkarp@paulweiss.com

Mark F. Mendelsohn
+1-202-223-7377
mmendelsohn@paulweiss.com

Peter Carey
+1-202-223-7485
pcarey@paulweiss.com

Richard S. Elliott
+1-202-223-7324
relliott@paulweiss.com

Peter Jaffe
+1-202-223-7326
pjaffe@paulweiss.com

David K. Kessler
+1-212-373-3614
dkessler@paulweiss.com

Nathan Mitchell
+1-202-223-7422
nmitchell@paulweiss.com

Associate Samuel Kleiner contributed to this Client Memorandum.