

White Collar Defense and Investigations Alert



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DOJ Previews M&A-Focused Guidance on Voluntary Self-Disclosure of Corporate Misconduct

In recent remarks, Principal Associate Deputy Attorney General (PADAG) Marshall Miller of the Department of Justice (DOJ) revealed that Deputy Attorney General Lisa Monaco will soon announce new voluntary self-disclosure guidance specifically tailored to mergers and acquisitions (M&A).

The forthcoming M&A-related policies will be instituted “[a]s part of the Department’s ongoing effort to enhance consistency, transparency, and predictability in corporate enforcement,” and in response to feedback about self-disclosure from the private sector, PADAG Miller said during [a talk at the Global Investigations Review Annual Meeting](#) on September 21, 2023.

Notably, he explained that the DOJ’s efforts to incentivize corporate responsibility should not engender “unintended consequences,” such as deterring corporations with strong compliance programs from merging with or acquiring companies with histories of corporate misconduct. Emphasizing the DOJ’s ongoing focus on the quality of internal corporate compliance programs, PADAG Miller provided the encouraging message that companies should not be penalized for acquiring a company with previous internal compliance issues where the acquiring company engaged in “careful pre-acquisition diligence and timely post-acquisition integration to detect and remediate misconduct at the acquired company’s business.”

PADAG Miller noted that existing DOJ policies currently encourage voluntary disclosure of misconduct discovered during acquisitions. Specifically, he advised that the Criminal Division’s Corporate Enforcement Policy offers the incentive of a potential declination, which he described as a “safe harbor,” for reporting misconduct uncovered during due diligence pre- or post-acquisition to the DOJ. He also explained that the Criminal Division’s Evaluation of Corporate Compliance Programs underscored the high value of including compliance personnel in the M&A process.

As an example of the benefits of voluntary disclosure in the M&A context, PADAG Miller cited the voluntary self-disclosure by Safran S.A. of information about pre-acquisition payments to consultants that had been made by two companies Safran acquired. The companies knew that some of the payments would be used to bribe senior government officials in order to win contracts with the Chinese government. The self-disclosure, cooperation and remediation by Safran resulted in a declination of prosecution with disgorgement in December 2022.

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According to PADAG Miller, a similar approach will be extended across all relevant areas of the DOJ to continue to promote and standardize similar voluntary self-disclosures and to “highlight the critical importance of the compliance function having a prominent seat at the table in evaluating and de-risking M&A decisions.”

Practical Considerations

In anticipation of the expected voluntary disclosure policies relating to M&A previewed by PADAG Miller, companies should review internal policies and procedures to ensure, among other things, that:

- Compliance personnel are actively involved in the due diligence process.
- Due diligence includes reviews of the quality of target company compliance programs.
- Companies engage with target company compliance personnel and management to determine potential risk of corporate misconduct.

- Whistleblowing and reporting channels are rolled out to merged or acquired companies.
- Any ongoing misconduct reported by or identified at acquired or merged companies is remediated.
- Compliance programs of acquired companies are brought up to industry standards.
- Merged and acquired companies are integrated into compliance programs.
- A culture of compliance is encouraged within newly merged or acquired companies.

Companies should prepare to incorporate the new guidance into their M&A processes when it is released. But, for now, by initiating the compliance measures above, a company can lay the groundwork for a more positive resolution with the DOJ in the event potential misconduct is discovered and ultimately voluntarily disclosed.