CLIENT ALERT

DOJ Again Presses "Benefits" of Self-Disclosure

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AUTHORS

William J. Stellmach | Timothy Heaphy | Soumya Dayananda | Andrew English
Sean Sandoloski | Deanna Drenga

If it seems that senior Department of Justice ("DOJ") officials are always touting the "benefits" of corporate self-disclosure of misconduct, it is because they are. Principal Associate Deputy Attorney General Marshall Miller is the latest official to do so, highlighting new incentives in remarks at the Global Investigations Review Annual Meeting.[1] Miller teased a soon-to-be announced policy on self-disclosure of issues identified during due diligence for mergers and acquisitions. But Miller also emphasized that DOJ will be a taking a stricter approach to enforcement of deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs")—remarks not so subtly intended to encourage self-disclosure in the hopes of receiving a declination. And he highlighted that DOJ is devoting additional resources to its National Security Division, presaging an increased emphasis on national security-related enforcement actions. In particular, Miller stressed that companies must invest sufficient resources dedicated to compliance with sanctions, export control laws, and related requirements.

Voluntary Self-Disclosure

DOJ continues to tout the purported benefits for companies of its voluntary self-disclosure policy. Miller's remarks highlighted one such case: Corsa Coal Corporation ("Corsa"), who recently received a declination from DOJ after self-disclosing misconduct involving bribes to secure approximately $143 million in coal contracts from an Egyptian state-owned entity. One reason for the declination was that Corsa provided information that led to the indictment of two former vice

[1] *Principal Associate Deputy Attorney General Marshall Miller Delivers Remarks at the Global Investigations Review Annual Meeting*, Department of Justice (September 21, 2023), available here.

presidents. It is also unclear whether Corsa would have received this resolution if they were in a better financial position: in its release announcing the declination, DOJ noted that the company had established an inability to pay an amount equal to its $32.7 million in ill-gained profits. As a result, Corsa only paid $1.2 million in disgorgement.[2]

Miller's speech also stressed the importance of robust compliance due diligence as part of M&A activity. He hinted, without giving much detail, that DOJ will soon be updating its policy regarding self-disclosure of issues identified during due diligence. The Criminal Division's Corporate Enforcement Policy already calls for a presumptive declination with disgorgement in exchange for voluntary self-disclosure, cooperation, and remediation of misconduct discovered in pre- or post-acquisition due diligence. So it remains to be seen what further incentives or adjustments the DOJ could make in this space. Expect another alert from us when we learn more.

Miller's speech was not all carrots, however. Miller highlighted the significant downside risks of entering into, and subsequently violating, a DPA or NPA. As an example, Miller discussed Telefonaktiebolaget LM Ericsson ("Ericsson"). In March 2023, Ericsson pleaded guilty to two FCPA charges following breaches of its 2019 DPA.[3] Miller noted that Ericsson failed to produce "highly relevant documents related to the bribery scheme" at the time of its 2019 resolution and also "failed to timely disclose additional evidence and allegations of other potential FCPA violations." As a result, Ericsson was forced to enter into a guilty plea and pay an additional $206 million in fines. Plus, the independent compliance monitorship imposed in its 2019 DPA was extended for another year. Unstated, but heavily implied in Miller's speech, was the fact that DOJ will be taking a strict view of DPA and NPA compliance to further incentivize voluntary self-disclosure.

Of course, as we have noted previously, the decision for a company to self-disclose is not always so cut-and-dried.[4] Although companies can potentially receive greater discounts and more favorable resolutions by voluntarily self-disclosing misconduct, any decision to self-disclose should be carefully considered. The Corporate Enforcement Policy expressly states that companies that self-disclose, fully cooperate, and completely remediate will *presumptively* receive a declination. There are no guarantees, and only DOJ determines what constitutes voluntary self-disclosure, full cooperation, and timely and appropriate remediation. Further, self-disclosure is not costless: self-disclosing companies are required to disgorge any illicit profits. Moreover, if a company does not self-disclose but timely and appropriately remediates, it can still receive

[2] Declination Letter Re: Corsa Coal Corporation, Department of Justice (March 8, 2023), available here.

[3] In 2019, as part of a DPA and a settlement with the SEC, Ericsson agreed to pay more than $1 billion to resolve investigations into FCPA violations for falsifying books and records and paying bribes. Ericsson's subsidiary, Ericsson Egypt Ltd., also pleaded guilty in connection with the misconduct. *See* Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case, DOJ press release (December 6, 2019), available here; Ericsson to Plead Guilty and Pay Over $206M Following Breach of 2019 FCPA Deferred Prosecution Agreement, DOJ press release, (March 2, 2023), available here.

[4] For previous Willkie client alerts discussing voluntary self-disclosure, see, for example, *DOJ's Latest Incentives for Self-Disclosure: An Offer You Can't Refuse?*, Willkie Farr & Gallagher LLP (January 31, 2023), available here; *U.S. Attorney's Offices Voluntary Self-Disclosure Policy: 93 Policies in One? Or No Policy At All?*, Willkie Farr & Gallagher LLP (February 28, 2023), available here.

discounted penalties provided that the company fully cooperates with DOJ's investigation. Companies must also weigh the benefits and detriments of self-disclosure when it comes to other regulatory bodies to which they answer: DOJ's policies do not extend to other federal agencies such as the SEC or CFTC. Accordingly, the decision of whether to self-disclose remains a fact-specific analysis.

Focus on National Security-Related Violations

In his remarks, Miller also noted that DOJ is placing an increased emphasis on addressing corporate crimes implicating national security issues. He stated that many of the "major" corporate criminal resolutions in the past few months raised national security concerns, with the charges varying from money laundering to sanctions evasion to terrorism.[5] DOJ has now dedicated additional resources to its National Security Division, including hiring twenty-five prosecutors in the unit, and expanded the Criminal Division's Bank Integrity Unit by adding prosecutors focused on national security-related financial misconduct.

Miller emphasized that companies must expend greater resources and pay closer attention to compliance with sanctions, export controls, and related laws. Miller strongly implied there would be even greater enforcement activity in this area, and reiterated Deputy Attorney General Lisa Monaco's past pronouncement that "from a compliance standpoint, 'sanctions are the new FCPA.'" Companies should take this opportunity to consider the sufficiency of their compliance measures and the controls they have implemented to allow their programs to adapt to changes in sanctions and export controls—before it's too late.

[5] As an example, Miller noted that in April 2023, DOJ reached a resolution with British American Tobacco ("BAT") and a subsidiary regarding their use of a third-party company to conduct illicit business in North Korea. BAT and its subsidiary agreed to pay $629 million in fines. *United States Obtains $629 Million Settlement with British American Tobacco to Resolve Illegal Sales to North Korea, Charges Facilitators in Illicit Tobacco Trade*, DOJ press release (April 25, 2023), available here. Additionally, he highlighted that Suez Rajan Ltd. recently pleaded guilty to conspiring to transport crude oil on behalf of Iran's Islamic Revolutionary Guard Corps in violation of the International Emergency Economic Powers Act (IEEPA), resulting in an approximately $2.5 million fine and the forfeiture of 980,000 barrels of crude oil. *Justice Department Announces First Criminal Resolution Involving the Illicit Sale and Transport of Iranian Oil in Violation of U.S. Sanctions*, DOJ press release, (September 8, 2023), available here.

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

Timothy Heaphy
202 303 1068
theaphy@willkie.com

Soumya Dayananda
202 303 1312
sdayananda @willkie.com

Andrew English
202 303 1186
aenglish@willkie.com

Sean Sandoloski
202 303 1047
ssandoloski@willkie.com

Deanna Drenga
212 728 3510
ddrenga@willkie.com