

NSD's Revised Enforcement Policy for Business Organizations Incentivizes Voluntary Self-Disclosures in M&A Context

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Companies engaged in mergers & acquisitions activities should take note of the revised voluntary self-disclosure policy ([VSD Policy](#)) of the National Security Division (NSD) of the US Department of Justice, released on March 7, 2024, which affords prosecutorial leniency to acquirors who promptly disclose to NSD the criminal misconduct of acquired entities.

The VSD Policy expands upon a substantially similar [prior version](#) by adding a specific M&A Policy comprising various incentives to voluntarily disclose violations of national security laws and regulations – including export control and sanctions (trade controls) – discovered during the course of due diligence conducted in connection with corporate transactions. Notably, trade controls carry successor liability, meaning that an acquiror will assume liability for violations (both criminal and civil) in which the acquired entity engaged prior to the transaction. Against the backdrop of rising national security threats, NSD has increasingly prioritized trade controls enforcement. These efforts have been complemented by civil enforcement actions carried out by US government agencies that administer the underlying regulations, including the US Department of the Treasury's Office of Foreign Assets Control and the US Department of Commerce's Bureau of Industry and Security.

To qualify for the M&A Policy protections, an acquiror must meet **all** of the following criteria:

- Complete a lawful, bona fide acquisition of another company (**as described in the M&A Policy**).
- Voluntarily and timely (**generally no later than 180 days following the transaction's completion or, as appropriate, at the "earliest reasonable opportunity"**) self-disclose to NSD criminal misconduct committed by the acquired entity.
- Fully cooperate with NSD's investigation.
- Promptly (**generally within one year after the transaction's completion**) and sufficiently remediate the subject misconduct.

The M&A Policy provides that when an acquiror makes a qualifying voluntary self-disclosure, NSD generally will not seek a guilty plea from the acquiror. Further, the acquiror will benefit from the presumption that it will qualify for a declination of prosecution (rather than merely a nonprosecution agreement). In addition, the acquiror is assured that it will not be required to pay a criminal fine or forfeit assets, and that the disclosed misconduct will not negatively affect the acquiror's record of recidivism in future matters involving the acquiror. Importantly, the presence of aggravating factors at the acquired entity generally will not prevent the acquiror from eligibility for the M&A Policy's protections, provided those factors do not continue to affect either of the transaction parties following a qualifying disclosure.

Although the foregoing protections are available only to the acquiror, the M&A Policy provides that if the acquired entity remains legally distinct following the transaction, then NSD will credit the acquiror's qualifying self-disclosure to the acquired entity and may consider whether other mitigation credit also is merited. If the acquiror's self-disclosure does not qualify for the M&A Policy's protections, then NSD nonetheless may consider whether that self-disclosure is eligible to receive mitigation credit pursuant to other provisions of the VSD Policy, which generally encourages prompt disclosure to and full cooperation with NSD.

NSD's attention to trade controls enforcement underscores the need for careful pretransactional due diligence aimed at uncovering

historical and/or ongoing instances of criminal misconduct. Importantly, acquirors seeking to avail themselves of the M&A Policy's protections must meet the specific conditions set forth therein, or otherwise risk forfeiting prosecutorial leniency and potentially significant mitigation credit.

Cooley closely monitors enforcement-related and other regulatory developments. Please feel free to contact a member of our team with any questions.

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