

LEGAL UPDATES

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DOJ Declines to Prosecute Private Equity Firm After Self-Disclosure Related to Acquired Company

Last year, the Department of Justice (DOJ) National Security Division (NSD) updated its Enforcement Policy for Business Organizations to include guidance related to voluntary self-disclosures in connection with acquisitions. Specifically, the M&A policy provides that there is a presumption that NSD will decline to prosecute an acquiror if it:

Completes a lawful, bona fide acquisition of another company;

Voluntarily and timely self-discloses to NSD potentially criminal violations of laws affecting U.S. national security committed by the acquired entity;

Fully cooperates with NSD's investigation; and

Timely and appropriately remediates the misconduct.

While a presumption of declination is not available to the acquired entity, NSD will credit the acquiror's timely voluntary self-disclosure to the acquired entity and will consider whether the acquired entity otherwise satisfies the above requirements to obtain the benefits of the M&A policy.

White Deer

While notable in its own right, we are mentioning the M&A policy again now because for the first time since it was created in March 2024, DOJ has declined to prosecute an acquiror for self-disclosing conduct discovered at an acquired entity. Last month, NSD announced that they declined to prosecute private equity firm White Deer Management LLC "after the firm discovered and voluntarily disclosed criminal violations of U.S. sanctions and export laws

committed by” an acquired portfolio company, Unicat Catalyst Technologies LLC.

Assistant Attorney General for National Security John A. Eisenberg announced that the decision to decline prosecution of White Deer and further extend a non-prosecution agreement to Unicat was because White Deer “uncovered the misconduct, stopped it, and quickly reported it to the government, leading to the successful prosecution of a senior executive.” According to Eisenberg, this decision “reflects the National Security Division’s strong commitment to rewarding responsible corporate leadership.”

As in each of these cases, the factual inquiry is intensive. According to the court documents and the DOJ press release:

“[F]rom approximately 2014 through 2021, Mani Erfan, Unicat’s former CEO, conspired with others, including at least one other Unicat employee, to cause Unicat to submit bids and make sales to customers in Iran, Venezuela, Syria, and Cuba in violation of U.S. economic sanctions. . . . To further the conspiracy, the conspirators made false statements in export documents and financial records about the true identities and locations of Unicat’s customers and falsely assured some Unicat employees that the company’s business with customers subject to U.S. economic sanctions was lawful. . . . Erfan and Unicat employees additionally falsified invoices to reduce the tariffs assessed on catalysts that Unicat imported from China.”

White Deer learned of the misconduct in June 2021 after it had acquired Unicat. During his visit to the United States, the new Unicat CEO learned that Unicat had a pending transaction with an Iranian customer and immediately ordered the deal’s cancellation. According to the press release:

“Over the next month, White Deer and Unicat’s new CEO retained counsel to investigate and learned that Unicat had engaged in a series of transactions with counterparties subject to different U.S. sanctions programs. Before the investigation was complete, but after determining that Unicat employees had engaged in potentially criminal violations of U.S. sanctions laws, White Deer and Unicat’s new management submitted a voluntary self-disclosure to NSD.”

When applying the requirements of the M&A policy, NSD found:

“White Deer’s acquisition of Unicat was a lawful bona fide acquisition, and that White Deer’s self-disclosure was timely under all of the relevant circumstances, including the COVID-19 pandemic and in the context of White Deer’s acquisition of Unicat and efforts to integrate the company’s operations into another acquired entity.

“White Deer and Unicat fully cooperated with the government’s subsequent investigation by proactively identifying, collecting, and disclosing relevant evidence to investigators, including

foreign language evidence and evidence located overseas, and providing detailed and timely responses to the government's requests for information and evidence.

"White Deer's and Unicat's cooperation materially assisted the government's investigation, leading to the successful prosecution of Unicat's former CEO.

"Unicat remediated the root cause of the misconduct in less than one year from the date of its discovery by terminating culpable employees, disciplining other employees involved in the misconduct, seeking reimbursement from Unicat's sellers, and designing and implementing a comprehensive and robust internal controls and compliance program that has proven effective in practice at identifying and preventing similar potential misconduct."

Key takeaways

1. The M&A policy allows for the acquiror to discover the misconduct through due diligence "either shortly before or shortly after the transaction." In this case, White Deer discovered it shortly after while it was integrating Unicat into another company's operations. Erfan's false statements about the identities and locations of customers likely made this discovery after the fact more reasonable.
2. The M&A policy generally requires the self-disclosure to be within 180 days of the transaction to be timely. Here, White Deer had reached a point in its investigation where it had found misconduct by Unicat employees and elected to self-disclose then, even though the investigation was not fully complete.
3. Unicat took tangible steps to remediate within one year after the discovery as required by the M&A policy.
4. The M&A policy provides concrete timelines that an acquiror can rely on to receive a declination from the DOJ.
5. While certainly not a substitute for adequate due diligence, the M&A policy provides a solid backstop for acquirors who uncover national security violations.
6. The White Deer matter underscores the advisability for investment firms to maintain robust internal processes and foster a culture of compliance within the firm. It also highlights the virtues of continued vigilance both in pre-transaction diligence and post-closing integration and operations.
7. Strategic acquirors and investment firms alike should revisit their processes and recordkeeping for their current and future acquisitions to implement a risk-based approach to the matters raised in the M&A policy and NSD guidance.

Contact us

If you have questions about the M&A policy or NSD guidance, please contact David Cline, Kip Randall, or your Husch Blackwell attorney.