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US Department of Justice Announces New Mergers and Acquisitions Safe Harbor Policy

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On October 4, 2023, Deputy Attorney General Lisa Monaco announced that the US Department of Justice (DOJ) adopted a new safe harbor policy for voluntary self-disclosures made in connection with mergers and acquisitions (M&A). Under the new policy, acquiring companies that (a) promptly and voluntarily disclose criminal misconduct; (b) cooperate with the DOJ's ensuing investigation; and (c) engage in "timely and appropriate remediation, restitution, and disgorgement," will receive the presumption of a declination (i.e., a decision by DOJ not to prosecute the alleged misconduct). Details follow.

1. **Timeframe** – To qualify for a safe harbor under the new policy, companies must disclose misconduct discovered (either pre- or post-acquisition) within six months of closing. Companies will then have one year from the date of closing to remediate the misconduct. Both timeframes are subject to a reasonable analysis and may vary based on the facts and circumstances of the case.
2. **Aggravating factors** – The presence of aggravating factors at the target company, such as senior management involvement and pervasiveness of the misconduct, will not impact the buyer's ability to receive a declination, only the target's.
3. **Recidivist analysis** – Disclosures made under this safe harbor policy will not impact any future recidivist analysis for the buyer should the buyer seek any other safe harbor through voluntary disclosures.
4. **Application** – The policy only applies to criminal misconduct discovered in bona fide, arms-length M&A transactions and not to misconduct otherwise disclosed, public or known to the DOJ. It also does not apply to the DOJ's civil merger enforcement.
5. **Implementation** – The safe harbor policy will be implemented across the DOJ, with the understanding that each division "will tailor its application … to fit their specific enforcement regime[.]"

Monaco emphasized that the purpose of this new safe harbor policy is to place "an enhanced premium on timely compliance-related due diligence and integration," noting that "[o]ur goal is simple: good companies – those that invest in strong compliance programs – will not be penalized for lawfully acquiring companies when they do their due diligence and discover and self-disclose misconduct."

Takeaways

This announcement builds on the DOJ's recent slew of updates to its corporate criminal enforcement policies, including the revised Voluntary Self-Disclosure Policy announced in February of this year and the Criminal Division's Pilot Program on Compensation Incentives and Clawbacks announced in March. It is, as Monaco put it, a new tool for the department to identify criminal wrongdoing while also providing assurance to buyers that they will not be prosecuted merely due to their acquisition of an unscrupulous company. This safe harbor policy differs from the DOJ's existing antitrust leniency program, which only provides leniency to the first company to self-report.

Companies engaged in M&A transactions should ensure proper due diligence and timely post-closing integrations to identify any criminal wrongdoing in a timely fashion. Companies might also consider having outside counsel conduct a high-level antitrust audit to quickly identify areas of latent antitrust risk where additional internal investigation might be warranted. Finally, companies should ensure strong compliance programs are in place, including antitrust compliance programs, and immediately apply those programs to the acquired company's business activities. The safe harbor is a narrow one, with a limited timeframe for identification and remediation. Without strong, pre-existing programs, it will be difficult for companies to avail themselves of the safe harbor.

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