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DOJ Announces New Safe Harbor Policy for M&A Transactions

The Department of Justice (DOJ) has offered yet another carrot in the hopes of incentivizing corporations to make voluntary self-disclosures of corporate misconduct, this time in the area of Mergers & Acquisitions.

In public remarks delivered earlier this month, Deputy Attorney General (DAG) Lisa Monaco announced that the DOJ has adopted a new Mergers & Acquisitions Safe Harbor Policy (the Policy) in an effort to promote and elevate corporate compliance. Under the Policy, where an acquiring company: 1) timely and voluntarily discloses criminal misconduct of a business it acquires within six months of closing; 2) cooperates with any necessary investigation; and 3) timely remediates the problem and makes the required restitution and disgorgement, the acquiring company will receive the presumption of a declination of criminal prosecution.

The Policy is meant to "put a premium" on timely pre- and post-acquisition due diligence and integration, and encourage companies with effective compliance programs that wish to acquire companies with ineffective compliance programs and/or a history of misconduct to do so with the benefit of a potential Safe Harbor. An acquirer availing itself of the Safe Harbor and disclosing the criminal conduct to DOJ, in almost real time, allows the DOJ the opportunity to reward companies that come forward while stopping criminal activity that might have gone on undetected.

Key Takeaways

Specifically, the Policy includes the following:

- As a baseline, companies must disclose criminal misconduct discovered at the acquired entity within six months from the date of closing, regardless of whether the misconduct was discovered pre- or post-acquisition, and companies will then have one year from the date of closing to fully remediate the misconduct. However, these baseline timeframes are subject to a "reasonableness analysis" and may be extended by the DOJ depending on the facts and circumstances.
- The Policy applies only to criminal misconduct discovered in bona fide, arm's length M&A transactions – not to misconduct that was otherwise required to be disclosed or already known to the public or the DOJ. The Policy also does not affect civil merger enforcement.
- Acquiring companies will not be penalized for aggravating factors present at the acquired company, and any such aggravating factors will not impact in any way the ability of the acquiring company to receive a declination of prosecution. Additionally, if aggravating factors do not exist at the acquired company, it will also be eligible for the benefits of voluntary self-disclosure, including potentially a declination.
- Misconduct disclosed under the Policy will not be factored into future recidivist analysis for the acquiring company at the time of the disclosure or in the future.
- The Policy will be instituted Department-wide, with each component of the DOJ tailoring its application of the Policy to fit its specific enforcement regime, and determining how the Policy will be implemented in practice.

Conclusion

While the carrot qualities of the Policy are clear, the question arises: what happens to acquirers who do not find or disclose such misconduct? Indeed, DAG Monaco emphasized: "if your company does not perform effective due diligence or self-disclose misconduct at an acquired entity, it will be subject to full successor liability for that misconduct under the law." Such a statement is a stark departure from DOJ's historical position that successor liability was reserved for "limited circumstances, generally in cases involving egregious and sustained violations." As the DOJ heads in this direction, companies that wish to avoid successor liability should consider incorporating compliance personnel early, often, and substantively in M&A deals, as conducting thorough and effective due diligence is a first step in uncovering criminal misconduct that may need to be disclosed and remediated in a timely manner under the Policy. From there, and particularly when conducting post-acquisition diligence, companies will need to be mindful of the relatively small window of time they have to decide whether they want the carrot, or risk waiting for the stick.

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