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October 9, 2023 | Number 3173

## DOJ Announces Safe Harbor Policy for Voluntary Self-Disclosure of Criminal Misconduct Uncovered in M&A

*The policy expands upon DOJ's efforts to encourage self-reporting of criminal violations discovered during M&A and other transactions.*

On October 4, 2023, US Deputy Attorney General Lisa Monaco [announced](#) a new Department of Justice (DOJ or Department) Mergers & Acquisitions Safe Harbor policy (Safe Harbor), which encourages acquiring companies in M&A transactions to voluntarily self-disclose criminal misconduct they discover through the acquisition of a target. Acquiring companies that qualify will be entitled to the presumption of a criminal declination. The Safe Harbor creates opportunities for buyers to address challenging issues that they might inherit through an M&A deal, while also creating new pressures on buyers to thoroughly diligence target companies' practices.

In making the announcement, Deputy Attorney General Monaco reiterated DOJ's focus on corporate enforcement and national security. She identified additional resources DOJ is devoting to each area and promised there will be more to come as DOJ seeks to "extend consistent, transparent application of our corporate enforcement policies across the Department, beyond the criminal context to other enforcement resolutions — from breaches of affirmative civil case settlements to violations of CFIUS mitigation agreements or orders."<sup>1</sup>

### Safe Harbor

#### 10 Key Takeaways

1. To qualify, companies must disclose criminal misconduct discovered at the acquired entity **within six months from the date of closing**.
2. The six-month deadline applies whether the misconduct was discovered prior to or after the acquisition.
3. Companies have a baseline of **one year from the date of closing to fully remediate** the misconduct, including restitution and disgorgement where appropriate.
4. These deadlines are subject to a reasonableness analysis, based on the complexity of the deal.

5. Companies that detect misconduct that threatens national security or involves ongoing or imminent harm cannot wait for the deadline to self-report.
6. The presence of aggravating factors at the acquired company will have no impact on the acquiring company's ability to receive a declination of prosecution.
7. Unless aggravating factors exist at the acquired company, that entity can also qualify for applicable voluntary self-disclosure benefits, including potentially a declination.
8. Violations disclosed will not be factored into future recidivist analysis for the acquiring company.
9. The Safe Harbor only applies to criminal conduct discovered in connection with bona fide, arms-length M&A transactions.
10. The Safe Harbor does not apply to misconduct that was otherwise required to be disclosed or already public or known to DOJ, and it does not impact civil merger enforcement.

## Background

DOJ's corporate leniency programs have historically focused on self-disclosure of criminal antitrust violations (e.g., price fixing, bid rigging, and market allocation) and violations of the Foreign Corrupt Practices Act (FCPA).<sup>2</sup> The new Safe Harbor goes beyond antitrust and FCPA to apply to all matters Department-wide. This approach is consistent with a broader DOJ trend that has recently focused on incentivizing corporate self-disclosure throughout the Criminal Division.

For example, on September 15, 2022, Deputy Attorney General Monaco announced revised DOJ policies on criminal enforcement for corporate misconduct ("the Monaco Memo").<sup>3</sup> The Monaco Memo explained that DOJ would adopt broader policies similar to the self-disclosure programs already in place for the Antitrust Division and FCPA enforcement.<sup>4</sup> This resulted in revisions to DOJ's Corporate Enforcement Policy (CEP), which were announced by Assistant Attorney General Kenneth Polite on January 17, 2023. Under the current CEP, DOJ will not seek a guilty plea if a company timely discloses misconduct, cooperates with the government's investigation, and remediates the violations. Even if aggravating circumstances are present, companies may qualify for declination — or qualify for significant fine reductions — if they meet other criteria regarding disclosure and cooperation.<sup>5</sup> The CEP also operates against the backdrop of DOJ's repeated emphasis on the importance of individual accountability and enhanced corporate compliance culture.

As part of this larger trend, even before the issuance of the Safe Harbor, DOJ made sure to highlight the importance of prompt self-disclosure in the M&A context. The Monaco Memo, for example, identified the M&A process specifically, noting that DOJ would not treat acquiring companies as recidivists if they identified misconduct in the course of diligence and promptly addressed those compliance issues post-acquisition.

## Key Questions

The Safe Harbor raises several unanswered questions for transactional parties about their enforcement risk and how the policy will be implemented in practice:

**Will self-disclosing companies obtain benefits that outweigh the risks?** Without clearer guidance from DOJ, acquirers may have difficulty predicting with confidence how the leniency will work, potentially exposing the reporting company to additional risk that the program itself does not mitigate. For example,

complying fully with the leniency program could be so onerous that the company risks not fully satisfying DOJ's demands to qualify ultimately for the non-prosecution benefit. In particular, where the cooperation of executives or employees facing risk of criminal prosecution is needed, companies may face challenges meeting prosecutors' cooperation demands. Further, the acquiring company may be saddled with a company knowing its executives and employees face criminal charges, burdening the acquiring company with the associated legal and financial burdens and reputational challenges. Companies should also note that DOJ will make the determination as to whether their disgorgement and restitution obligations have been satisfied.<sup>6</sup>

**How should companies weigh the other risks from self-disclosure?** Companies should account for threats and risks outside the control of DOJ that will likely flow from self-disclosure. For example, although the Antitrust Division's leniency program incentivizes companies to self-report collusive conduct by providing immunity from criminal antitrust liability, the program does not shield them from civil liability in private lawsuits that almost always follow criminal investigations. This risk has been cited as a reason why many companies have elected not to self-report.<sup>7</sup> The Safe Harbor will not be binding on any other enforcement or regulatory authority. For this reason, if the conduct uncovered could be prosecuted by foreign, state, or local enforcers or regulators, companies should consider whether it would be preferable (or possible) to seek a global resolution in multiple jurisdictions. A diligence review may cause the target company and/or its employees to take action to address risk independently, because they will not qualify for guaranteed protection under the Safe Harbor.

**How might the Safe Harbor impact due diligence in M&A?** Due diligence in the M&A process for compliance issues is limited and typically does not include a full investigation of the target, although it often includes pertinent diligence on potential violations of the FCPA, sanctions laws, and anti-money laundering rules. The Safe Harbor could now raise the stakes for acquirers to unearth potential compliance issues before the acquirer takes the keys to the company and assumes its liability risks, since the risks of not self-reporting misconduct under the Safe Harbor are likely to be exacerbated. DOJ has hinted that it will likely inflict tougher penalties on companies for not utilizing the Safe Harbor if a company learns about criminal misconduct shortly after completing a merger. Deputy Attorney General Monaco stated, "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."<sup>8</sup> Finally, the Safe Harbor may chill some sellers from entering the deal process altogether, or cause them to abandon it, based on the diligence burden or concerns about the consequences they would face based on the disclosure.

**How will the Safe Harbor operate alongside existing leniency programs?** As a DOJ-wide program, the Safe Harbor could have a superseding effect on section-specific leniency policies as it is implemented. The Antitrust Division's leniency program has been active for decades, operating without any apparent significant influence from other areas of DOJ. In recent years, however, the Antitrust Division has revised its leniency program to narrow certain of its protections to bring them more closely in line with wider DOJ policies to prioritize prosecution of individuals and push for earlier and more robust cooperation.<sup>9</sup> Following this development, we should expect further alignment with DOJ-wide policies such as the Safe Harbor.

## Practical Guidance

Amid such questions, we recommend that buyers and sellers take note of the following:

- **Pre- and post-acquisition due diligence may require additional speed and care.** The Safe Harbor offers not just the proverbial carrot of non-prosecution, but the stick of potentially harsher

treatment if misconduct is later discovered. For this reason, acquirers should take stock of their diligence practices and ensure that they are conducting the analysis necessary to uncover misconduct (if any) by a potential target early on in the deal process.

- **Diligence should canvass a broad array of risk that is appropriate to the business at issue and matches the breadth of DOJ's criminal enforcement program.** Because the Safe Harbor is a DOJ-wide policy, it covers all potential federal criminal violations in addition to antitrust and FCPA. Acquirers should structure their diligence accordingly.
- **Parties may wish to allow for additional time for pre-acquisition diligence.** When conduct is likely to require significant investigation, or where an investigation may be hampered by the location of documents and potential lack of cooperation by individuals, the parties may want to take additional time before closure. While DOJ has noted that the six-month clock post-acquisition has some flexibility, that flexibility is subject to its discretion.
- **Purchase agreements should address early disclosure, cooperation requirements, and post-closing liabilities.** With the clock ticking post-closure, parties will need to deploy heightened investigative and compliance measures, and should address such investments in advance. Additionally, parties should address the question of who shoulders the potential costs, including the costs of internal investigations, cooperation, compliance and restitution, disgorgement, reputational risk, and other liability.
- **When to self-report.** If companies are unsure whether the uncovered conduct is illegal, they will have to weigh the risks of self-reporting (which will necessarily include increased focus by enforcers) against taking internal steps to mitigate and correct associated behaviors on a go-forward basis.

The Safe Harbor offers incentives for acquiring companies to voluntarily disclose a target's misconduct. However, companies should carefully consider whether to self-report, especially considering the many unanswered questions on the policy and its implementation across the DOJ.

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## Endnotes

- <sup>1</sup> DOJ also announced that it was adding 25 new corporate crime prosecutors in the National Security Division (NSD), appointing the first NSD Chief Counsel for Corporate Enforcement, and increasing by 40% the number of prosecutors in the Criminal Division's Bank Integrity Unit. See Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions (Sept. 15, 2022), *available at* <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self>.
- <sup>2</sup> The Antitrust Division's leniency program offers protection from prosecution based on the timing of the company's self-disclosure. Individuals who are current or former executives or employees of a self-disclosing company can, in certain circumstances, also qualify for immunity alongside the company. Such individual immunity grants as part of corporate leniency have been limited to the Antitrust Division's leniency program, and originate from the government's need to secure the cooperation of those individuals to build cases against other antitrust cartel conspirators. See Antitrust Div., U.S. Dep't of Just., *Frequently Asked Questions About the Antitrust Division's Leniency Program* (updated Jan. 2023).
- <sup>3</sup> Lisa O. Monaco, Deputy Attorney General of the US Department of Justice, Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), *available at* <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>.
- <sup>4</sup> Latham & Watkins Client Alert: [US Deputy Attorney General Monaco Announces Revised Policies on Corporate Crime](#).
- <sup>5</sup> If a criminal resolution is warranted, and declination is not appropriate, companies that voluntarily self-disclose, fully cooperate, and timely and appropriately remediate can receive up to a 75% reduction off the low end of the criminal fine range. Companies that do not voluntarily self-disclose can still obtain up to a 50% reduction if they later fully cooperate and timely and appropriately remediate. For more information, please see the Latham & Watkins Client Alert: [DOJ's Updated Corporate Enforcement Policy Aims to Incentivize Compliance](#).
- <sup>6</sup> Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions (Sept. 15, 2022), *available at* <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self>.
- <sup>7</sup> See Latham & Watkins Client Alert: [US DOJ Weighs Reform Options for Antitrust Leniency Law Set to Expire](#).
- <sup>8</sup> Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions (Sept. 15, 2022), *available at* <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self>.
- <sup>9</sup> Press Release, Department of Justice Antitrust Division, Antitrust Division Updates Its Leniency Policy and Issues Revised Plain Language Answers to Frequently Asked Questions (Apr. 4, 2022), <https://www.justice.gov/opa/pr/antitrust-division-updates-its-leniency-policy-and-issues-revised-plain-language-answers>.