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Regulatory and Enforcement Alert

DOJ Announces New Safe-Harbor Policy for M&A-Related Disclosures

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On October 4, 2023, Deputy Attorney General Lisa O. Monaco announced a new safe harbor policy for voluntary self-disclosures made in connection with mergers and acquisitions.

The Department-wide change purports to incentivize a company with effective compliance programs that lawfully acquires a company with ineffective compliance programs and a history of misconduct to timely disclose misconduct uncovered during the M&A process.

The new component of the DOJ's Voluntary Self-Disclosure ("VSD") policy will be applied Department-wide, but each part of the Department has been asked to tailor its application of the policy to fit their own enforcement regime and consider how the policy will be implemented in practice.

The policy gives an acquiring company the presumption of a declination, provided that the acquiring company does the following:

1. Promptly and voluntarily discloses criminal misconduct within the Safe Harbor period, a baseline of six months from the date of closing, which applies whether the misconduct was discovered pre-or post-acquisition;
2. Cooperates with the ensuing investigation; and
3. Engages in requisite, timely, and appropriate remediation, restitution, and disgorgement. Companies will have a baseline of one year from the date of closing to fully remediate the misconduct.

The Safe Harbor announcement builds upon existing guidance that had been adjusted most recently in January of this year, when the Department's Criminal Division announced changes to the overall Criminal Division VSD policy. As announced then, the Department will allow prosecutors to issue declinations even where so-called "aggravating circumstances" are present, if the company can demonstrate that (i) it self-disclosed "immediately" upon the company becoming aware of allegations of misconduct, even before the company completes an internal investigation, (ii) has an effective compliance program in place, and (iii) engages in "extraordinary" cooperation with the DOJ's investigation and extraordinary remediation.

As Deputy Attorney General Monaco acknowledged this week, the Safe Harbor addresses an uncertainty resulting from a potential fairness issue by allowing for more leeway in a specific context—acquisition—where the acquiring company may have little to no control over whether an effective compliance program was in place at the acquired

company, and naturally requires more time to determine whether the misconduct is reportable. The hallmark of the changes is greater specificity and predictability in these instances than the overarching policies created—a period certain for disclosure rather than "timely" or "immediate" disclosure (although the new policy still allows for some flexibility), and greater clarity with respect to how aggravating factors will be treated, with a promise that aggravating factors present at the acquired company will not be held against the acquiring entity.

It remains to be seen whether these changes will tip the scales in favor of disclosure with respect to acquired companies, particularly given that in many instances, the factors considered under the existing Principles of Federal Prosecution of Business Organizations may arguably counsel against prosecuting the acquirer in any event. These factors include the company's willingness to cooperate, the adequacy and effectiveness of the company's compliance program at the time of the offense and of a charging decision, the company's timely and voluntary self-disclosure of wrongdoing, and the company's remedial actions including efforts to implement or improve an existing adequate and effective corporate compliance program. Each of these factors, as traditionally understood, could be read as already providing needed protection to innocent acquirers.

The policy standardizes a policy that had been unevenly applied before. In 2008, the Department's FCPA Unit published an opinion in which the Department said it did not intend to take enforcement action against the energy company Halliburton for misconduct it self-disclosed and remediated post-acquisition within a certain timeframe. Although that opinion applied only to that transaction and did not have broader application, Department components have differed in their approaches to M&A transactions as part of their VSD Policies since that time, with some following the Halliburton example.

The new policy also subjects both the disclosure and remediation baseline requirements to a reasonableness analysis. On the one hand, depending on the specific facts, circumstances and complexity of a particular transaction, those deadlines could be extended by Department prosecutors. On the other hand, companies that detect misconduct threatening national security or involving ongoing or imminent harm cannot wait for a deadline to self-disclose.

The presence of aggravating factors at the acquired company will not impact the acquiring company's ability to receive a declination. Unless aggravating factors exist at the acquired company, that entity can also qualify for applicable VSD benefits, including potentially a declination. Any misconduct disclosed under the Safe Harbor Policy will also not be factored into future recidivist analysis for the acquiring company.

Last, the Safe Harbor Policy does not apply to misconduct that was otherwise required to be disclosed or already known to the public or to the Department. The policy also will not impact civil merger enforcement.

Deputy Attorney General Monaco also announced in her speech the addition of 25 corporate crime prosecutors in the National Security Division, including the first-ever Chief Counsel for Corporate Enforcement, and an increase by 40 percent to the number of prosecutors in the Criminal Division's Bank Integrity Unit, signaling the current

administration's continued focus on white collar crime and, more specifically, money laundering, Bank Secrecy Act and sanctions enforcement.

Takeaways

A number of things remain unclear after the announcement, including details of how the program will work in practice and the details of how it will be implemented by each DOJ component. For this reason, it remains unclear whether it will be advisable for a buyer to avail itself of the program in every circumstance, or whether the program will meaningfully tip the scales in favor of disclosure in most cases where wrongdoing is discovered in an acquired company. Nevertheless, acquiring companies will likely appreciate the clarity that comes with some quantification of just how soon it needs to report in order to voluntarily self-disclose and reap the benefits of the program in these circumstances. Likewise, such companies benefit from knowing that purchasing an imperfect company will not mean onboarding a new set of potential liabilities with respect to the DOJ's self-disclosure demands. Buyers should preserve the potential to take advantage of the benefits the program purports to provide by investing in (i) comprehensive pre-closing due diligence and (ii) the implementation of a robust compliance assessment and program as part of its immediate post-closing integration of a target.

Meanwhile, would-be disclosing companies should be mindful that a year—or less, depending on the timing of the closing relative to the discovery of a bad fact—is not an endless window. Even with the potential leeway provided by DOJ in the form of additional time, the policy may require uncomfortably speedy disclosure decisions, as was always possible under the VSD policy.

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