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DOJ Announces Safe Harbor for Self-Disclosures in M&A Context

On October 4, 2023, the U.S. Department of Justice ("DOJ") announced its Mergers & Acquisitions Safe Harbor Policy (the "Safe Harbor"), a new department-wide policy aimed at promoting voluntary self-disclosures of criminal misconduct in the M&A context.[1] Speaking before the Society of Corporate Compliance and Ethics, Deputy Attorney General Lisa Monaco stated that acquirers who self-report criminal misconduct at an acquired company within six months of a deal closing will receive the presumption of a declination, *i.e.,* a formal decision not to prosecute, in connection with such violations. It does not matter whether the misconduct was discovered during pre-acquisition diligence, or after closing, as long as it is disclosed in the six-month window.

To be eligible for the benefit of the Safe Harbor, acquirers must also cooperate with any ensuing investigation and fully remediate the relevant issues within one year of closing. Acquirers benefitting from the Safe Harbor may still be subject to disgorgement of ill-gotten gains and restitution damages, though they can avoid criminal charges, fines, and penalties. As stated in the new policy announcement, the DOJ may be willing to extend this six-month window for disclosure and remediation at its discretion. The acquired company at which the misconduct occurred could still be prosecuted (subject to a jurisdictional analysis), but the DOJ indicated that it may also give these companies the benefits of voluntary self-disclosure, including potentially a declination, provided there are no aggravating circumstances, such as particularly egregious facts or involvement by senior management. The presence of any such aggravating factors at the acquired company will not impact the acquirer's entitlement to the Safe Harbor.

The Safe Harbor is intended to help ensure, in the words of Deputy Attorney General Monaco, that "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." The policy will apply across the DOJ, with divisions expected to tailor the program to fits their needs. Notably, self-disclosure under the Safe Harbor will not impact potential civil exposure for acquirers, including potential merger-related enforcement by the U.S. Securities and Exchange Commission.

What Does This Mean for Acquirers?

While not a complete sea change in DOJ policy,[2] the new Safe Harbor provides some welcome clarity for companies looking to make acquisitions, especially in jurisdictions and industries that present a high risk for violations

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[1] Deputy Attorney General Lisa O. Monaco, Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosure, Society of Corporate Compliance and Ethics (Oct. 4, 2023), *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self.

[2] See U.S. Dept. of Justice, FCPA Op. Release 08-02 (June 13, 2008), *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0802.pdf (stating in formal Opinion Procedure Release that DOJ would not bring an enforcement action against Halliburton if it promptly disclosed and remediated violations of the Foreign Corrupt Practices Act at a newly acquired subsidiary, and took other steps to cooperate with the DOJ).

of the Foreign Corrupt Practices Act ("FCPA"), trade regulations, U.S. sanctions, and other target company misconduct. However, the Safe Harbor only provides comfort for acquirers that can identify and act on relevant misconduct before authorities find it themselves, whether through whistleblowers, media reports, subpoena power, or other means. Acquisitive companies would thus be well-served to invest in robust pre-acquisition diligence and post-closing risk assessment procedures. In this regard, the DOJ's new policy seems to acknowledge—through its six-month "grace period"—that acquirers may sometimes find it difficult, if not impossible, to conduct the most detailed and comprehensive diligence procedures prior to closing. This can occur, for example, in an auction or hostile takeover situation where the diligence window is unusually short and/or sellers are otherwise motivated to press quickly through signing and closing based on factors outside the acquirer's control. In these cases, acquirers should plan to conduct as much diligence as they reasonably can before closing, and then "hit the ground running" with a detailed risk assessment (and, where applicable, investigations) promptly once they have acquired the target company, when access to management, company data, communications, books, records and other materials all become available for close review and scrutiny.

In announcing its policy, the DOJ stated that acquirers who do not perform effective due diligence or self-disclose misconduct at a target company "will be subject to full successor liability for that misconduct under the law." It is unclear how, in a typical case, the DOJ would charge an acquirer for the pre-acquisition misconduct of an acquired company. Indeed, it is hornbook law that such liabilities do not typically flow to a purchaser if the acquired company continues to exist as a standalone entity post-acquisition.[3] What is clear, however, is that acquirers can face direct legal exposure for *ongoing* violations that continue after closing. Thus, the Safe Harbor—and specifically the six-month window—presents a very useful tool to help avoid criminal charges and costly fines and penalties.

Conclusion

The Safe Harbor provides that acquirers who timely identify and disclose findings of misconduct, and remediate wrongdoing, will enjoy the presumption of a declination. This should lend a helpful measure of certainty (even if not a silver bullet against prosecution) to companies considering acquisitions, particularly in high risk jurisdictions, and will create further incentives to conduct a deep dive at target companies, both through pre-acquisition diligence and in prompt, post-closing risk assessments.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to contact authors Helene Banks (partner) at 212.701.3439 or hbanks@cahill.com; Brock Bosson (partner) at 212.701.3136 or bbosson@cahill.com; Brian Markley (partner) at 212.701.3230 or bmarkley@cahill.com; Jennifer Potts (counsel) at 212.701.3390 or jpotts@cahill.com; or Lauren Rackow (counsel) at 212.701.3723 or lrackow@cahill.com; or email publications@cahill.com.

[3] Even without exposure to successor liability for pre-acquisition violations of a target, acquirers still face potential reputational harm and a reduced return on investment if their newly acquired subsidiaries and portfolio companies are the subject of DOJ enforcement actions.