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White Collar Defense and Investigations Alert

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the next page or call your regular Skadden contact.

One Manhattan West
New York, NY 10001
212.735.3000

22 Bishopsgate
London EC2N 4BQ
44.20.7519.7000

1440 New York Ave., N.W.
Washington, D.C. 20005
202.371.7000

DOJ Announces Safe Harbor Policy for Voluntary Self-Disclosures Related to Mergers & Acquisitions

In the U.S. Department of Justice's (DOJ's) latest effort to promote voluntary self-disclosure of corporate misconduct by companies, Deputy Attorney General (DAG) Lisa Monaco has announced guidance regarding a new safe harbor policy related to mergers and acquisitions (M&A).

In remarks delivered at the Society of Corporate Compliance and Ethics' 22nd Annual Compliance & Ethics Institute on October 4, 2023, DAG Monaco again emphasized the importance of companies investing in and prioritizing strong compliance programs. Consistent with its recent initiatives to encourage companies to self-report misconduct, DAG Monaco laid out the Department's new safe harbor policy, saying the department intends it "to incentivize the acquiring company to timely disclose misconduct uncovered during the M&A process."

Generally speaking, according to DAG Monaco, the new policy would result in a presumption of declination of prosecution where acquiring companies (1) promptly and voluntarily disclosed criminal misconduct within a designated safe harbor period (six months from closing of an acquisition); (2) cooperated with the DOJ's investigation; and (3) engaged in appropriate remediation, restitution and disgorgement.

Specifically, DAG Monaco explained:

- The safe harbor policy will be instituted department-wide, with each component of the DOJ tailoring their application of the policy to fit its specific enforcement mandates and determining implementation of the policy in practice.
- To qualify for the safe harbor, companies must report misconduct discovered at the acquired company within six months of the date of the deal closing, regardless of whether the misconduct was discovered before or after acquisition.
- Companies will also have a period of one year from the date of closing to fully remediate the conduct at issue.
- The DOJ will apply a "reasonableness analysis" to these baseline time frames which takes into account the specific circumstances of a particular transaction, allowing the potential for extended deadlines for both self-disclosure and remediation under the policy on a case-by-case basis.

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- Companies that discover misconduct related to national security or involving "ongoing or imminent harm" cannot wait until the deadline to self-report.
- Acquiring companies will not be penalized for aggravating factors present at the acquired company; such aggravating factors "will not impact in any way" the ability of the acquiring company to receive a declination of prosecution.
- If aggravating factors do not exist at the acquired company, it will also be eligible for the benefits of voluntary self-disclosure, including a possible declination.
- Misconduct that is self-disclosed under the policy will not be factored into any recidivist analysis conducted by the DOJ of the acquiring company at the time of disclosure or in the future.
- The policy is only applicable to misconduct discovered as part of "bona fide, arms-length M&A transactions" and will not apply to conduct that is already public, known to the DOJ or otherwise required to be disclosed by the company. The policy also does not affect civil merger enforcement.

The new guidance is another incentive that the DOJ has provided to encourage and reward self-disclosure and remediation of corporate misconduct. Companies that wish to avoid successor liability should incorporate compliance personnel in M&A deals, conduct effective due diligence, and timely disclose and remediate any misconduct that they identify.

For a fuller discussion of measures companies can take in the M&A process to satisfy the DOJ's criteria, see our September 28, 2023, client alert, "DOJ Previews M&A-Focused Guidance on Voluntary Self-Disclosure of Corporate Misconduct."

Contacts

Maria Cruz Melendez
Partner / New York
212.735.2320
maria.cruzmelendez@skadden.com

Alessio Evangelista
Partner / Washington, D.C.
202.371.7170
alessio.evangelista@skadden.com

Eytan J. Fisch
Partner / Washington, D.C.
202.371.7314
eytan.fisch@skadden.com

Steven R. Glaser
Partner / New York
212.735.2465
steven.glaser@skadden.com

Andrew M. Good
Partner / London
44.20.7519.7247
andrew.good@skadden.com

Ryan D. Junck
Partner / London
44.20.7519.7006
ryan.junck@skadden.com

David Meister
Partner / New York
212.735.2100
david.meister@skadden.com