Alert

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COZEN O'CONNOR

Buyer Beware: DOJ Announces New Safe Harbor Policy Encouraging Voluntary Self-Disclosure of Misconduct Discovered During Mergers & Acquisitions

In its most recent installment of revamped white-collar criminal enforcement and compliance policies, the Department of Justice (DOJ) unveiled on Wednesday a new "Mergers & Acquisitions Safe Harbor Policy." Deputy Attorney General (DAG) Lisa Monaco announced that acquiring companies that promptly and voluntarily disclose and remediate criminal misconduct discovered during the merger and acquisition process will receive a presumption of a declination.

In her speech at the Society of Corporate Compliance and Ethics' 22nd Annual Compliance & Ethics Institute, DAG Monaco touted the new policy as a way to "incentivize the acquiring company to timely disclose misconduct uncovered during the M&A process." To obtain a presumption of a declination, the acquiring company must disclose the misconduct discovered at the acquired company within *six months* from the date of closing, whether the misconduct was discovered pre- or post-acquisition. The acquiring company must also fully remediate the misconduct within *one year* of the date of closing. DAG Monaco acknowledged that no transaction is the same, noting that these deadlines can be extended by prosecutors, subject to a reasonableness standard.

DAG Monaco also explained that aggravating factors (*e.g.*, executive involvement, significant profit, egregiousness of the misconduct) will be treated differently in the context of mergers and acquisitions. Where aggravating factors are present at the acquired company, they will not affect the acquiring company's ability to receive a declination. On the other hand, where aggravating factors are not present at the acquired company, the acquired company itself can also qualify for voluntary self-disclosure benefits, including a possible declination.

Finally, any misconduct disclosed under the policy will not be a factor in any future recidivism analysis for the acquiring company.

The policy incentivizes the acquiring company and its counsel to do comprehensive due diligence during and after an acquisition, as appropriate, to identify any possible issues for which disclosure and remediation would be appropriate.

According to DAG Monaco, the DOJ's goal is simple. She explained: "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."

Such a concrete declination policy puts companies in entirely new territory. Historically, whether a company obtained a declination was a fact-intensive analysis. While facts remain important, particularly for purposes of the aggravating factors consideration, the new policy gives companies predictability and guidance previously lacking from DOJ policy.

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