

DOJ Launches 'Safe Harbor' Self-Reporting Policy For M&A

By **Al Barbarino**

Law360 (October 4, 2023, 8:03 PM EDT) -- The U.S. Department of Justice launched a new policy Wednesday that says the agency won't prosecute companies that self-report potential violations occurring within an acquisition target's business — if it's done within six months of a deal's closing.

In a speech before the Society of Corporate Compliance and Ethics, U.S. Deputy Attorney General Lisa Monaco said the DOJ will provide a "safe harbor" to companies who disclose the misconduct within that six-month period, and then give the acquirer one year after the close to fix the issues.

The six-month threshold applies whether the misconduct was discovered pre- or post-acquisition, Monaco said.

"Going forward, acquiring companies that promptly and voluntarily disclose criminal misconduct within the safe harbor period, and that cooperate with the ensuing investigation, and engage in requisite, timely and appropriate remediation, restitution, and disgorgement — they will receive the presumption of a declination," Monaco said.

A declination refers to a case that would have been prosecuted or resolved criminally had it not been for the company's voluntary disclosure, full cooperation, remediation and, potentially, payment of certain fines.

"I am instructing that this safe harbor policy be applied departmentwide ... each part of the department will tailor its application of this policy to fit their specific enforcement regime, and will consider how this policy will be implemented in practice," Monaco said.

After the six-month period, companies "will then have a baseline of one year from the date of closing to fully remediate the misconduct," Monaco said. Unless "aggravating factors exist" at the acquired company, they can also qualify for voluntary self-disclosure benefits, "including potentially a declination," she said.

Misconduct disclosed under the policy will not be factored into future recidivist analysis for the acquiring company, she added.

The policy will help deal makers avoid regulatory scrutiny and potential federal charges, an extension of ongoing DOJ policies that aim to reward corporations for honesty.

Marshall Miller, the DOJ's principal associate deputy attorney general, had previewed the M&A policy in a Sept. 21 speech, noting at the time that companies shouldn't be penalized when they've made efforts to detect and remediate misconduct within target businesses.

Regarding the six-month and one-year self-reporting timeframes, Monaco did note that the deadlines could be extended "depending on the specific facts, circumstances, and complexity of a particular transaction."

"And of course, companies that detect misconduct threatening national security or involving ongoing or imminent harm can't wait for a deadline to self-disclose," she said.

The policy piggybacks on a similar initiative in February from the DOJ's Criminal Division, which offers discounts on fines and nonguilty plea resolutions to companies that self-report misconduct in what the agency deems to be a timely manner.

Monaco noted that the department is especially focused on the areas of cybersecurity, tech and national security. "Over the past two years, we have engaged in corporate enforcement actions to protect national security in unprecedented numbers and unexpected industries," she said.

To keep up, the DOJ is adding more than 25 new corporate crime prosecutors in its National Security Division and increasing the number of prosecutors in its criminal division's Bank Integrity Unit by 40%.

The policies follow a September 2022 memo from Monaco that highlighted the DOJ's intentions to reform its handling of corporate crime prosecutions, including by rewarding self-reporting.

Justin Weitz, a partner at Morgan Lewis & Bockius LLP in Washington, D.C., and former federal prosecutor, told Law360 Wednesday that the new policy is consistent with the message the DOJ has been trying to get across in recent years about encouraging self-disclosure.

"What this does is it makes clear to those companies that didn't even own the [newly acquired] company in the first place and weren't even responsible for the misconduct, that if you come in and cooperate and disclose, you will get significant benefits," Weitz said.

--Additional reporting by Sarah Jarvis, Stewart Bishop and Phillip Bantz. Editing by John C. Davenport.