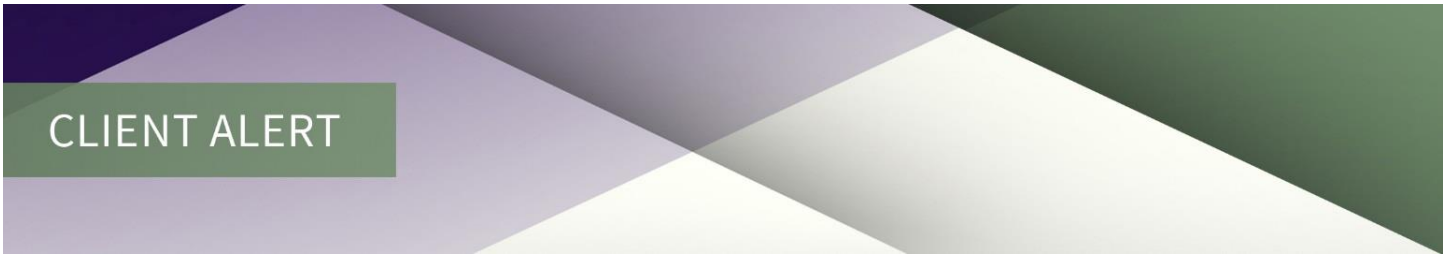

New Policy, Same "Incentives": DOJ Unveils M&A Safe Harbor Policy

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In another push for companies to self-disclose misconduct, the Department of Justice ("DOJ" or the "Department") unveiled its latest policy, aimed at incentivizing voluntary disclosures in connection with mergers and acquisitions.

On October 4, 2023, Deputy Attorney General Lisa O. Monaco announced the new Mergers & Acquisitions Safe Harbor Policy ("Safe Harbor Policy") at the Society of Corporate Compliance and Ethics' 22nd Annual Compliance & Ethics Institute.[1] This policy, previewed last week by another senior DOJ official—Principal Associate Deputy Attorney General Marshall Miller[2]—is largely similar to aspects of the DOJ Criminal Division's existing Corporate Enforcement and Voluntary Self-Disclosure Policy ("VSD Policy"), although the new policy applies Department-wide and contains more specifics than prior policies.[3] Monaco also discussed potential new remedies in corporate criminal resolutions, such as the divestiture of lines of business, and again touted the March 2023 Pilot Program Regarding Compensation Incentives and Clawbacks as well as the recent increased resources for the National Security Division of DOJ.

1 *Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions*, Department of Justice (October 4, 2023), available here.

2 *See Principal Associate Deputy Attorney General Marshall Miller Delivers Remarks at the Global Investigations Review Annual Meeting*, Department of Justice (September 21, 2023), available here.

3 *See* DOJ's Latest Incentives for Self-Disclosure: An Offer You Can't Refuse?, Willkie Farr & Gallagher LLP (January 31, 2023), available here.

Mergers & Acquisitions Safe Harbor Policy

Prior to Monaco's announcement, the DOJ Criminal Division's existing VSD Policy already contained a section addressing mergers and acquisitions that allowed companies that identified wrongdoing through pre-merger or pre-acquisition due diligence (and in certain instances post-acquisition audits or compliance integration) to presumptively receive a declination provided that they (1) voluntarily disclosed the misconduct, (2) cooperated with DOJ's investigation, and (3) "appropriately remediated" in a "timely" manner. The VSD Policy, however, only applies to the Criminal Division. Other components of DOJ, such as the Antitrust Division, the Consumer Protection Branch, the National Security Division, and the Tax Division, have their own policies that treat self-disclosure in the M&A context somewhat differently.

The new Safe Harbor Policy retains the VSD Policy's framework of a presumptive declination in exchange for disclosure, cooperation, and remediation, but will apply it Department-wide to create more "consistency." Another key difference is that the Safe Harbor Policy provides clearer guidance and more rigid deadlines for companies voluntarily self-disclosing. To be eligible for a declination under the new Safe Harbor Policy, the acquiring company has six months from the transaction's closing date to disclose the discovered misconduct, regardless of when the misconduct is discovered.[4] Moreover, the acquiring company must "fully remediate" the misconduct within one year of closing. Both deadlines are subject to a "reasonableness analysis," essentially granting DOJ prosecutors the ability to extend them at their sole discretion. Companies that report within the safe harbor period, fully cooperate with the investigation, and remediate the misconduct, including paying restitution and/or disgorgement, will "receive the presumption of a declination." The Safe Harbor Policy also clarifies that if the *acquired* company had "aggravating factors"—for example, criminal recidivism or involvement of senior management—those will not prohibit the *acquiring* company from receiving a declination. In other words, if the acquired company had a past history of issues, that is not counted as an aggravating factor that weighs against a declination for the disclosing acquiring company. Likewise, if the acquiring company later runs into its own issues, the conduct of the acquired company will not cause the acquiring company to be considered a recidivist.

Despite the new policy, the decision to self-disclose still requires a fact-specific analysis. As we have highlighted in previous alerts, companies that qualify still only *presumptively* receive a declination, and DOJ has sole discretion to define what terms like "fully remediate" and "fully cooperate" mean.[5] Moreover, to receive the declination, companies are expected to disgorge profits DOJ says arose from the misconduct and/or pay restitution, penalties that are often millions of dollars. Although this new policy is intended to ensure consistency across the Department, different parts of the Department may tweak the policy, meaning companies will need to review the specific applicable policy prior to any decision to self-disclose.

[4] Disclosures of criminal conduct after six months would be considered under the Criminal Division's Corporate Enforcement and Voluntary Self-Disclosure Policy, the United States Attorneys' Offices Voluntary Self-Disclosure Policy, or the other Divisions' policies, as applicable.

[5] For previous Willkie alerts discussing voluntary self-disclosure, see, for example, DOJ Again Presses "Benefits" of Self-Disclosure, Willkie Farr & Gallagher LLP (October 2, 2023), available here; U.S. Attorney's Offices Voluntary Self-Disclosure Policy: 93 Policies in One? Or No Policy At All?, Willkie Farr & Gallagher LLP (February 28, 2023), available here; DOJ's Latest Incentives for Self-Disclosure: An Offer You Can't Refuse?, Willkie Farr & Gallagher LLP (January 31, 2023), available here.

Lastly, the Safe Harbor Policy does not affect the incentives still offered to companies that fully cooperate and remediate but do not self-disclose.[6] Companies should therefore continue to weigh the pros and cons of self-disclosure on a case-by-case basis.

New Remedies in Corporate Criminal Resolutions

Monaco's speech also emphasized DOJ's recent creativity in developing "new tools and remedies to punish and deter," including divestiture and specific performance. As an example of a resolution requiring divestiture, Monaco cited the Antitrust Division's deferred prosecution agreements with two pharmaceutical companies, Teva Pharmaceuticals USA, Inc. and Glenmark Pharmaceuticals Inc., USA, in which the companies were required to divest from a cholesterol medicine in addition to paying a monetary penalty.[7] She stated this was the first time DOJ required divestiture as part of a corporate criminal resolution. With respect to specific performance, Monaco cited the Suez Rajan Ltd sanctions resolution, where the company was required to transport contraband Iranian crude oil to the United States where it was seized.[8] Monaco's message was clear: DOJ will be creative in using all available tools to punish.

Compensation Incentives and Clawbacks

Like Miller, Monaco also highlighted the "rewards" available to companies under DOJ's Pilot Program Regarding Compensation Incentives and Clawbacks, which was rolled out earlier this year. Under this program, criminal resolutions (1) require companies to include compliance-promoting criteria within their compensation and bonus systems, and (2) consider companies' efforts to withhold or claw back bonuses from employees engaged in misconduct. Specifically, where a company claws back or withholds compensation from an employee engaged in misconduct, DOJ will deduct that amount from the overall penalty it imposes. Moreover, companies that attempt to claw back money but are unsuccessful may still receive a credit up to 25% of the amount the company sought, so long as their efforts were made in good faith. What constitutes a "good faith" effort, however, is decided by DOJ.

Monaco highlighted the recent resolution with Albemarle, where the company received a claw back credit of $763,453 for withholding bonuses in that amount, resulting in what DOJ characterized as approximately $1.5 million in savings. However, the pilot program does not provide credits for costs incurred in litigating such compensation disputes,

6 Companies that do not self-disclose but that fully cooperate with DOJ's investigation and fully remediate can still receive significant discounts on any penalties imposed by DOJ, albeit somewhat less than what a company that voluntarily discloses can receive.

7 *Major Generic Drug Companies to Pay Over Quarter of a Billion Dollars to Resolve Price-Fixing Charges and Divest Key Drug at the Center of Their Conspiracy*, DOJ press release (August 21, 2023), available here.

8 Suez Rajan Ltd. pleaded guilty to conspiring to transport crude oil on behalf of Iran's Islamic Revolutionary Guard Corps in violation of the International Emergency Economic Powers Act (IEEPA), resulting in an approximately $2.5 million fine and the forfeiture of 980,000 barrels of crude oil. *Justice Department Announces First Criminal Resolution, Involving the Illicit Sale and Transport of Iranian Oil in Violation of U.S. Sanctions,* DOJ press release (September 8, 2023), available here; Plea Agreement Re: Suez Rajan Ltd., Department of Justice (March 16, 2023), available here.

and, in the case of Albemarle, the amount saved was small compared to the overall penalty and forfeiture imposed: over $218 million.

Re-Emphasized Focus on National Security-Related Violations

Lastly, Monaco highlighted DOJ's focus on addressing corporate crimes impacting national security issues, reiterating the examples provided in Miller's recent speech on the same topic. Like Miller, Monaco highlighted that DOJ is increasing hiring within the National Security Division, promoting the first Chief Counsel for Corporate Enforcement, and adding attorneys in the Criminal Division's Bank Integrity Unit. Criminal enforcement of sanctions and export controls therefore appear to be a focus of DOJ, and companies would be wise to review and enhance their compliance programs accordingly.

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