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DOJ Leverages the Private Sector To Achieve Enforcement Goals

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Key Points

- In the latest round of additions to the DOJ's programs to incentivize voluntary self-disclosure of wrongdoing by corporations, the DOJ has rolled out new policies that outline concrete incentives for self-disclosure and created a safe harbor for disclosure of wrongdoing unearthed during an acquisition.
- The M&A safe harbor may encourage companies with strong compliance programs to consider acquisitions of companies with weak programs or in risky jurisdictions.
- These new policies provide more clarity on the DOJ's position, reflecting a U.S. government focus on encouraging companies to design and implement strong, thorough corporate compliance programs, particularly where corporate crime intersects with national security.

Recent additions to self-disclosure policies signal the Department of Justice's (DOJ's) view that, in an increasingly global economy with an expanding number of actors, private companies have a key role to play in the detection and prevention of corporate crime.

The DOJ has prioritized white collar offenses involving national security, including sanctions evasion, export control violations, bribery and corruption, and money laundering. Over the past several months, every DOJ component with prosecutorial authority has announced new or updated policies encouraging voluntary self-disclosures by corporations.

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Voluntary Self-Disclosure

The DOJ encouraged companies to timely self-disclose wrongdoing in a September 2022 speech and memorandum from Deputy Attorney General (DAG) Lisa Monaco (Monaco Memo), which were subsequently formalized through policy announcements from the DOJ's Criminal Division and the U.S. Attorneys' Offices in early 2023.

Pursuant to these policies, companies that identify and voluntarily self-disclose misconduct will improve the terms of any resolution for the conduct that they disclose. Improvement can range from reduced fines to declination of prosecution.

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To qualify for favorable treatment, a voluntary self-disclosure must meet a number of criteria. The company must have:

- Had no preexisting obligation to disclose.
- Made the disclosure "within a reasonably prompt time" after becoming aware of the misconduct.
- Made the disclosure prior to an "imminent threat" of disclosure or government investigation, and prior to the misconduct being publicly disclosed or otherwise known to the government.
- Disclosed "all relevant, non-privileged facts" concerning the misconduct that are known to the company at the time.

Whether a disclosure is "reasonably prompt" will depend on the specific facts and circumstances of the case, but generally disclosures should occur shortly after

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misconduct is identified. The burden will be on the company to demonstrate that the disclosure was timely.

"All relevant facts" includes information about individuals. According to the Monaco Memo, "to be eligible for any cooperation credit, corporations must disclose to the [DOJ] all relevant, non-privileged facts about individual misconduct."

Where a company "fully" meets the requirements (voluntary, timely and complete disclosure), the DOJ may choose not to impose a criminal penalty. Instead, it may issue a declination or seek another type of resolution, such as a deferred prosecution agreement or nonprosecution agreement.

In any event, where the voluntary self-disclosure requirements are met, criminal penalties should be no greater than 50% of the low end of the U.S. Sentencing Guidelines fine range.

M&A Safe Harbor Policy

In remarks delivered on October 4, 2023, at the Society of Corporate Compliance and Ethics' 22nd Annual Compliance & Ethics Institute, DAG Monaco laid out a new safe harbor policy for merger-related discoveries intended "to incentivize the acquiring company to timely disclose misconduct uncovered during the M&A process."

Under the new policy, there is a presumption of declination of prosecution where an acquiring company (1) promptly and voluntarily discloses criminal misconduct within a designated safe harbor period (generally six months from deal closing); (2) cooperates with the DOJ's investigation; and (3) engages in appropriate remediation, restitution and disgorgement.

Specifically:

- The safe harbor policy will be instituted department-wide, with each division of the DOJ tailoring application of the policy to its area.
- To qualify, companies must report misconduct discovered at the acquired company within six months of the deal closing, regardless of whether the misconduct was discovered before or after acquisition.
- Companies will have 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, allowing for extended deadlines for both self-disclosure and remediation on a case-by-case basis.
- 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 factors "will not impact in any way" the acquiring company's ability to receive a declination.
- 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 of the acquiring company that the DOJ conducts at the time of disclosure or in the future.
- The policy is applicable only 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 does not affect civil merger enforcement.

The DOJ believes that the safe harbor will protect companies with strong compliance programs that want to acquire companies with weak programs or a history of misconduct. The DOJ also wants compliance professionals to be involved in due diligence to identify, report and remediate issues at target companies early on.

This policy also ties into the DOJ's focus on national security issues, as DAG Monaco alluded to in the pronouncement, noting that "companies are on the front line in responding to geopolitical risks." (See "Exits, Ring-Fencing and Other Risk Management Strategies for Multinationals Operating in Geopolitically Volatile Areas.") This policy may overcome reluctance for companies with a U.S. presence to acquire assets operating in riskier jurisdictions, given that the acquiring company can cleanse itself of successor liability for the pre-acquisition conduct of the target provided that any issues are identified, disclosed and remediated quickly.

Takeaways

Companies can take steps now to best position themselves in light of these new DOJ policies by:

- Implementing policies and procedures that strongly encourage internal reporting of employee misconduct.
- Promptly reviewing all reports of misconduct and quickly determining whether to self-disclose.
- Investigating misconduct and, if a self-disclosure is made, establishing a robust framework for sharing the results of their internal investigation with the DOJ and other authorities, as appropriate.

In the M&A context, 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.

According to DAG Monaco, these recent policy changes mark a "new era" of corporate enforcement, in which "corporate executives need to redouble time and attention to compliance programs, compensation programs, and diligence on acquisitions."