

DOJ Announces New M&A Safe Harbor Policy to Provide Further Clarity - But is it Enough?

What You Need to Know

- The U.S. Department of Justice (DOJ) has announced a new M&A Safe Harbor Policy to encourage greater corporate compliance and more robust due diligence by promoting the voluntary disclosure of criminal misconduct uncovered in connection with merger and acquisition transactions. The policy does not apply to misconduct that was otherwise required to be disclosed or was already public or known to the DOJ, and does not impact civil merger enforcement actions.
- While the M&A Safe Harbor Policy does provide some clarity, there are many open-ended questions which will likely be answered as the policy is implemented by the DOJ over time.
- Companies involved in M&A transactions should ensure that their due diligence is comprehensive and focused on discovering criminal misconduct. Further, for businesses that have not recently undergone or contemplated an M&A transaction, the new policy serves as a reminder of the importance of reviewing all corporate compliance measures, protocols, and issues related to corporate governance.

On October 4, 2023, Deputy Attorney General Lisa O. Monaco [announced](#) a new M&A Safe Harbor Policy for voluntary self-disclosures made in connection with mergers and acquisitions. While all corporations engaging in M&A should pay close attention to the guidance issued in connection with this new safe harbor policy, entities operating in highly regulated industries such as the healthcare sector should take particular note of this policy given the protections it could provide.

The M&A Safe Harbor Policy expands on the Department of Justice's (DOJ) [Policy Memo](#) dated September 15, 2022, which stated that corporations must cooperate fully and early to get cooperation credit. Following years of differing approaches by varying departments of the DOJ, the M&A Safe Harbor Policy was announced "to ensure

consistency...be applied department wide" when it comes to disclosing criminal misconduct discovered in the M&A process.

Analysis of Key Takeaways

The following are four key takeaways from the M&A Safe Harbor Policy, as well as some related issues and concerns which require close consideration:


Next Steps

While the M&A Safe Harbor Policy does provide some clarity, there are many open-ended questions which will likely be answered as the policy is implemented by the DOJ over time. It also remains to be seen whether the M&A Safe Harbor Policy is enough to either achieve the DOJ's stated goal of increasing effective compliance efforts, or alternatively have a chilling effect on M&A transactions by deterring prospective purchasers.

That said, it is critical for companies involved in M&A transactions to take appropriate steps to ensure that their due diligence is comprehensive and focused on discovering criminal misconduct. Also, even if a business has not recently undergone or is not currently contemplating an M&A transaction, the DOJ's announcement should serve as a reminder of the importance of reviewing all corporate compliance measures and protocols, as well as issues related to corporate governance.

Our team can assist by addressing any specific concerns you may have before they become a larger issue. Please contact the authors of this Alert to discuss your circumstances, or with questions concerning the M&A Safe Harbor Policy and related due diligence or compliance issues.

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