ALERT MEMORANDUM

Merger Safe Harbor for Sherman Act Violations Punishes Innocent Acquirors

March 28, 2024

In March 2024, the U.S. Department of Justice ("DOJ") revised its Justice Manual to include a new safe harbor for acquiring companies that self-report criminal conduct by an acquired company identified in due diligence (the "Safe Harbor"). When the Safe Harbor applies, it provides a presumption that the DOJ will decline to criminally prosecute an acquiring company that self-reports criminal violations by an acquired company within 180 days after closing. However, the Safe Harbor imposes different and impractical requirements when the acquiring company reports a criminal Sherman Act violation that obligate the acquiror to report before closing and indefinitely delay closing while the DOJ investigates the reported conduct.

The Safe Harbor, at least as implemented by the DOJ Antitrust Division, does not accomplish the DOJ's stated goal of encouraging compliant acquiring companies to self-report and move forward with acquisitions of companies that have engaged in misconduct. The so-called Safe Harbor will instead have the opposite effect, exposing compliant companies that do not self-report to the risk of significant exposure after the transaction and arguments that they possibly no longer qualify for leniency, or forcing them to abandon procompetitive transactions altogether. This will leave compliant acquirors less competitive and non-compliant targets free to continue under their current leadership, contrary to DOJ policy.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or to the Cleary authors below.

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I. Background

In October 2023, Deputy Attorney General Lisa O. Monaco announced that the DOJ would implement a new Safe Harbor policy providing "presumption of a declination" for "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."[1] As Deputy Attorney General Monaco explained at the time, the "last thing the [DOJ] wants to do is discourage companies with effective compliance programs from lawfully acquiring companies with ineffective compliance programs and a history of misconduct."[2] Although the speech announced the DOJ's intent to introduce the Safe Harbor, details remained limited until earlier this month.

In March 2024, the DOJ revised its Justice Manual to incorporate the Safe Harbor concept announced by Deputy Attorney General Monaco. The Justice Manual explains that the DOJ will apply a presumption in favor of declining to prosecute an acquiring company that: (1) "voluntarily self-disclosed the misconduct in a timely manner, which generally means within 180 days of the closing date of the acquisition," although longer reporting times are acceptable at the DOJ's discretion,[3] (2) "timely and appropriately remediated misconduct uncovered as a result of due diligence conducted shortly before or shortly after a lawful, bona fide acquisition of another corporate entity,"[4] including a determination "that both parties to the transaction were not coconspirators in the misconduct,"[5] and (3) "paid any disgorgement, forfeiture, and/or restitution arising from the misconduct at issue."[6]

However, for potentially criminal Sherman Act violations, the DOJ imposed even more onerous requirements on the acquiring company in order to qualify for the Safe Harbor. In addition to the general requirements for all components of the DOJ, an acquiring company reporting Sherman Act violations to the DOJ Antitrust Division must also (1) "satisfy all relevant requirements of the Antitrust Division's leniency policy," (2) "voluntarily disclose the misconduct before the closing date of the acquisition," which differs from other violations that can be reported after closing, to both the DOJ Antitrust Division and the U.S. Federal Trade Commission, if the FTC is reviewing the transaction, and (3) agree with the DOJ or the FTC (as appropriate) to "suspend any review periods under the Hart-Scott-Rodino Act," or otherwise agree not to close, "until a conditional leniency letter is issued or the marker lapses."[7]

II. Key Implications

The Safe Harbor leaves compliant acquirors worse off than before when they buy companies that engaged in antitrust violations. For antitrust violations, the Safe Harbor does not permit parties to close until the DOJ Antitrust Division provides a conditional leniency letter or allows the leniency marker to expire. This requirement is likely to delay closing for some transactions for months or years without a predictable end date and for reasons largely outside of the parties' control. That is not tenable for M&A transactions, which have economic and legal reasons to expeditiously move forward toward closing. The requirement to delay closing will therefore leave the Safe Harbor an impractical option for the vast majority of purchasers.

A compliant acquiror that learns of a criminal Sherman Act violation in the course of due diligence is therefore

[1] U.S. Department of Justice, Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions (Oct. 4, 2023), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self.

[2] *Id.*

[3] Justice Manual §§ 9-28.900(A)(3)(a)(i), 9-28.900(B) (Mar. 2024).

[4] *Id.* § 9-28.900(A)(3)(a)(ii).

[5] *Id.* § 9-28.900(A)(3)(b).

[6] *Id.* § 9-28.900(A)(3)(a)(iii).

[7] *Id.* §§ 7-3.300, 9-28.900(A)(3)(c). The Justice Manual is unclear whether the requirement to delay closing applies to deals that are not reportable under the HSR Act.

left with fewer options than they had before the Safe Harbor. The acquiring company could choose to not self-report prior to closing, but risk facing significant potential liability and arguments that it would not qualify for leniency after closing. Alternatively, the buyer could call off the transaction. Either outcome discourages a compliant company from purchasing a company that potentially engaged in violations of law, which goes against Deputy Attorney General Monaco's admonition that the DOJ not prevent such transactions.

As formulated, the Safe Harbor will deprive acquirors and the DOJ of information that they could easily obtain post-closing. An acquiring company that is not involved in the reported conduct will have limited access to relevant information about the acquired company's misconduct prior to closing. Although after closing the acquiring company would ordinarily have access to the acquired company's books and records and employees, the Justice Manual prevents closing from occurring until the acquiring company perfects its leniency marker. This risks hamstringing any acquiring company actually interested in following through with the Safe Harbor, and it will deprive the DOJ of information that would have been available from a cooperative acquiror after closing.

An acquiring company that learns of misconduct after closing should still qualify under the DOJ Antitrust Division's leniency program. The Safe Harbor applies only to misconduct "learned while conducting due diligence in connection with [the acquiring company's] acquisition of the acquired entity."[8] The Safe Harbor should not prevent an acquiring company that only learns of misconduct after closing from seeking leniency under the DOJ Antitrust Division's leniency program.

Any acquiror that is considering making a leniency application for conduct discovered after closing should ensure that it did not receive information about the acquired company's misconduct during the diligence process. The Justice Manual warns that an acquiror that "present[s] false or misleading information to the [DOJ]. . . about the extent of their prior knowledge of the acquiree's misconduct . . . shall not qualify for a presumption of declination" and may be subject to a "separate criminal investigation into the false statements."[9]

The Safe Harbor may be limited to acquiring companies that are not engaged in the acquired company's misconduct, but acquiring companies can still self-report under the DOJ Antitrust Division's leniency program. The Safe Harbor does not displace the DOJ Antitrust Division's leniency program to the extent that a company identifies its own misconduct in the course of a deal. Before self-reporting, any company should work with experienced antitrust counsel to ensure that they can satisfy the requirements of the leniency program.

III. Conclusion

The Safe Harbor, as implemented by the DOJ Antitrust Division, will discourage compliant acquirors from reporting violations that they may have otherwise reported and encourage acquirors to abandon deals. That outcome is contrary to the stated policy of the DOJ in enacting the Safe Harbor and a direct result of the DOJ Antitrust Division's decision to deviate from other components of the DOJ that permit acquiring companies to qualify for the Safe Harbor after closing.

It is particularly important in the current enforcement environment that companies work with experienced antitrust counsel when evaluating antitrust risk in the context of an M&A transaction.

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[8] *Id.* § 9-28.900(B).

[9] *Id.*