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DOJ: New Safe Harbor Offers Way Out of Prosecution for M&A-Related Misconduct, With Caveats

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Companies that self-disclose criminal misconduct related to mergers and acquisitions now have an escape hatch from criminal prosecution under a U.S. Department of Justice (DOJ) policy announced Oct. 4.[1]

To qualify for the new safe harbor, companies are required to voluntarily self-disclose to DOJ any criminal wrongdoing they uncover at an acquired entity within six months of the closing date—"whether the misconduct was discovered pre- or post-acquisition," Deputy Attorney General Lisa Monaco said at the Compliance and Ethics Institute sponsored by the Society of Corporate Compliance and Ethics. Companies have one year from the closing date to remediate the misconduct.

"The carrot is a promise of declination—no criminal charges against the company," said attorney Matthew Krueger, with Foley & Lardner LLP. The safe harbor is offered to the company—the acquiring company and the acquired company, unless aggravating factors exist. "There are caveats," such as the entity fully cooperating, which DOJ views as "disclosure of all facts and all responsible individuals," he explained. In other words, people from the acquired company who are responsible for the wrongdoing "may still face criminal exposure by virtue of this policy. This fits with the department's overall goal of holding individuals accountable by giving more incentives to disclose culpable individuals," which Monaco reiterated in a 2021 memo.[2]