Webcast: Navigating DOJ's M&A Safe Harbor: Policy, Practice, and Strategic Implications

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CLE

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Agenda

Mergers & Acquisitions Overview

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The M&A Process: An Overview

M&A Process From Start to Finish in Five Steps

1. Assess Proposed Transaction and Other Party
2. Preliminary Discussions and Early-Stage Documents
3. **Due Diligence and Negotiation of Definitive Agreements**
4. Execute Definitive Agreements and Announce Transaction
5. Signing to Closing and Post-Closing

Illustrative Timeline of M&A Process

~2 months	~2-4 weeks		~4 weeks	~4 weeks
Auction Process	**Negotiations and Diligence**	**Signing**	**Approval and Consents**	**Closing**
• Review Confidential Information Memorandum and other available materials • Sign confidentiality agreements • Potentially several rounds of bids	• Negotiate acquisition agreement • Negotiate employment terms for key employees and rollover • Negotiate ancillary agreements • Completion of due diligence	• Sign acquisition agreement • Execute rollover agreements • Execute employment agreements • Potentially announce transaction	• Make HSR filings • Obtain other third-party consents and other regulatory approvals, as applicable • Set up new bank accounts	• Pay consideration to Target stockholders • Execute ancillary or other closing documentation, as applicable

The M&A Process: Due Diligence

The Role of Due Diligence in an M&A Transaction

- Due diligence review (commercial, financial, tax/accounting, legal, etc.) is key to identifying risks so that proper allocation of risks can be negotiated as part of the transaction documentation.
- Risk allocation can take many forms and is highly facts and circumstances dependent:
  - ➢ Valuation/purchase price adjustment
  - ➢ Closing conditions and pre-closing covenants tied to mitigation of identified risk
  - ➢ Post-closing remedies, such as indemnification
- Generally, when a company merges with or acquires another company, the successor company assumes the predecessor company's **historical** liabilities, including civil and criminal liabilities.
  - ➢ Buyer is effectively acquiring all historical risk, whether known or unknown (subject to specifically negotiated risk allocation provisions).
- In addition, acquiror is effectively assuming all **ongoing** liabilities.

Historical Liability

- Target previously violated the law and acquiror inherits that liability as new owner/successor to target

Ongoing Liability

- Target is engaged in ongoing illegal activity (e.g., FCPA or export control violations) and acquiror participates in or fails to identify/end that illegal activity post acquisition

The M&A Process: Due Diligence

The Role of Due Diligence in an M&A Transaction

- So what happens if due diligence identifies an actual or potential material compliance risk prior to signing (e.g., a criminal FCPA violation)?
- Inherent tension between Buyer and Seller/Target objectives can make these very challenging negotiations
  - ➢ Buyer: minimize acquired risk (legal, economic and reputational); appropriately price the risk into the transaction valuation
  - ➢ Seller: maximize transaction valuation and deal certainty
- What happens if material compliance risk only first identified post-closing?
- DOJ M&A Safe Harbor provides acquirors an additional tool to mitigate such risks.

Prior DOJ Approach to Enforcement in the M&A Context

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Prior DOJ Approach to Violations Identified in the M&A Context

Prior FCPA Prosecutions

- Before the M&A Safe Harbor Policy, DOJ's approach to acquiring companies that identified criminal violations was limited to general expectations outlined in public-facing DOJ documents (e.g., the FCPA Resource Guide and speeches by DOJ officials).
- However, there was no formal policy detailing the effect of such disclosures, disclosure deadlines, or remediation obligations .
  - DOJ considered successor liability, voluntary disclosure, and role of acquiror in misconduct.
  - Acquiror that voluntarily self-disclosed violations and timely remediated post-acquisition generally received declination.
  - Acquired company, if DOJ had jurisdiction, generally prosecuted.
- Several DOJ prosecutions undertaken pursuant to the Foreign Corrupt Practices Act ("FCPA") in the context of violations discovered during or after an M&A acquisition illustrate the varied ways in which DOJ dealt with such cases.

DOJ Opinion Procedure Releases: Insights for Acquirors in the M&A Context

Uncertainty in Identifying Misconduct Pre-Closing

- Prior Opinion Procedure Releases ("Releases") reflect that acquirors often lacked full visibility into a target's books, records, and third-party relationships during diligence, presenting challenges to discovering misconduct.
- 2008 "**Halliburton Release**": DOJ stated it did not intend to take enforcement against energy company Halliburton for self-disclosed and remediated post acquisition misconduct; outlined several steps that Halliburton would need to complete to avoid enforcement (e.g., retain external legal counsel and forensic accountants to conduct due diligence and remediate identified issues; conduct thorough examination of the target company's records).

Case-Specific and Unpredictable DOJ Outcomes

- While there were general expectations regarding voluntary disclosures in the M&A context (e.g., from the FCPA Resource Guide and DOJ speeches), there was no formal policy detailing the effect of such disclosures, disclosure deadlines, or remediation obligations.

Practical Challenges in Remediation and Disclosure

- Releases emphasize the practical hurdles of rapidly investigating suspected misconduct after signing or closing, especially where target had weak controls or incomplete records.
- Releases demonstrate difficulty for acquirors of deciding if, when, and how to disclose issues to DOJ .

Continuity of DOJ Priorities and the Foundation for the M&A Safe Harbor

- Safe Harbor now formalizes the same pillars which DOJ outlines in these Releases, including timely investigation, voluntary disclosure and cooperation, and remediation/integration of compliance programs.

Prior DOJ Approach to Violations Identified in the M&A Context: Case Examples

Wyeth LLC Acquisition

- In August 2012, Pfizer H.C.P. Corporation, an indirect, wholly owned subsidiary of Pfizer Inc. ("Pfizer"), **entered into a deferred prosecution agreement ("DPA")** with DOJ and consented to paying a $15,000,000 penalty to resolve an investigation into FCPA violations .
  - The misconduct had been committed by Wyeth LLC ("Wyeth") and its subsidiaries, a company Pfizer had acquired in 2009.
    - The misconduct had **mainly occurred before Pfizer's acquisition**, though some of it **continued after the transaction closed.**
- In the 18 months after the acquisition, Pfizer, in consultation with DOJ, **conducted a diligence review and investigation** of Wyeth and implemented its existing internal controls into Wyeth's business operations.

Prior DOJ Approach to Violations Identified in the M&A Context: Case Examples

Wyeth LLC Acquisition (Continued)

- DOJ highlighted that it "considered these extensive efforts…in its determination **not to pursue a criminal resolution** for the **pre-acquisition improper conduct** of Wyeth subsidiaries."
- Additionally, DOJ drew attention to related actions such as "**timely voluntary disclosure** by…Pfizer"; a "thorough and wide-reaching **self-investigation** of the underlying and related conduct"; "the **significant cooperation** provided"; and "**early and extensive remedial efforts**" in addition to ongoing **improvements to "compliance procedures,"** in explaining the outcome that the company secured.
  - DOJ specifically noted that Pfizer "received a **reduction in its penalty** as a result of" its "**cooperation** in the ongoing investigation of **other companies and individuals.**"

Prior DOJ Approach to Violations Identified in the M&A Context: Case Examples

Lifecore Biomedical Inc. Acquisition of Yucatan Foods L.P.

Lifecore's Acquisition and Subsequent Misconduct Discovered

- Lifecore Biomedical ("Lifecore") acquired Yucatan Foods L.P. in December 2018 and, during post-acquisition integration, discovered that Yucatan employees had engaged in a bribery scheme between May 2018 and August 2019.
- The scheme involved paying bribes to Mexican government officials to secure a wastewater discharge permit and paying for fraudulent manifests to mask wastewater disposal via a municipal water company.

Lifecore's Disclosure

- Once Lifecore discovered the misconduct in October 2019, it retained outside counsel to launch an internal investigation.
- Lifecore voluntarily self-disclosed to DOJ "within three months of first discovering the possibility of misconduct and hours after an internal investigation confirmed that misconduct had occurred."

DOJ Declination as a Practical Guidepost for the M&A Safe Harbor Policy

- DOJ declined to prosecute, crediting Lifecore's timely voluntary self-disclosure of potential misconduct and remediation efforts.
- Lifecore agreed to disgorge $406,505 (remaining amount of costs avoided after Lifecore remediated the misconduct by building a wastewater treatment plant and paying Mexican regulators the duties owed).
- While the declination letter did not reference the M&A Safe Harbor Policy (which was publicly announced after Lifecore disclosed), the end result was consistent with the Policy and effectively previewed how DOJ would apply it going forward.

DOJ M&A Safe Harbor Policy

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DOJ M&A Safe Harbor Policy: Initial Announcement

October 2023 Policy Announcement

- As part of remarks given on October 4, 2023, Deputy Attorney General Lisa O. Monaco announced the M&A Safe Harbor Policy and outlined its contours.
- DAG Monaco explained that a key takeaway was that DOJ would be "placing an enhanced premium on timely compliance-related due diligence and integration. Compliance must have a prominent seat at the deal table if an acquiring company wishes to effectively de-risk a transaction."
- DAG Monaco noted that "[b]y contrast, if your company does not perform effective due diligence or self-disclose misconduct at an acquired entity, it will be subject to full successor liability for that misconduct under the law."

DOJ M&A Safe Harbor Policy: Formalization

March 2024 Justice Manual Update

- In March 2024, DOJ updated Section 9-28.900 of the Justice Manual, requiring that all DOJ components that prosecute corporate crime have a policy on voluntary self-disclosure that includes, in part, that they "will apply a **presumption in favor of declining prosecution** of a corporation that **voluntarily self-disclosed**, **fully cooperated**, and **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."
  - The Justice Manual notes that "a 'voluntary self-disclosure' occurs only when a company discloses misconduct…promptly and voluntarily (i.e., where it has no preexisting obligation to disclose, such as pursuant to regulation, contract, or prior…resolution), and when it does so prior to an imminent threat of disclosure or government investigation."
  - The Justice Manual emphasizes that voluntary self-disclosure of misconduct is "separate and distinct" from cooperation with an investigation, with each being independent factors in charging and resolution decisions.

DOJ Policy Formalization: What Actually Changed?

Formalization and Clarification of Past Practices

- Clarity on deadlines for disclosure/remediation
  - Disclosure: within six months of closing, regardless of when misconduct discovered
  - Remediation: within 12 months of closing
- Formalization of past practice of a presumption of declination for VSD by acquiror in timely manner.

Addition of New Policies

- Presumption of declination
  - Applies to acquiring company even if aggravating factors exist at acquired company
  - Acquired entity can also qualify for applicable voluntary self-disclosure benefits, unless aggravating factors exist, including potential declination
- Requires disgorgement of ill-gotten gains by acquired and/or acquiring company.

DOJ M&A Safe Harbor Policy: Key Guidance

Justice Manual M&A Safe Harbor Policy Guidance

- The Justice Manual includes certain standards and processes that prosecutors must consider in determining whether an acquiror qualifies for the safe harbor and a presumption in favor of declination:
  - Whether an **acquiror acted in a "timely manner,"** generally meaning that the acquiror **voluntarily self-disclosed** misconduct "**within 180 days of the closing date of the acquisition**" and **fully remediated** misconduct **"within 1 year of the closing date,"** though these **deadlines can be extended or reduced** given a reasonable basis supported by specific circumstances.
  - Whether the acquiror "**paid any disgorgement, forfeiture, and/or restitution** arising from the misconduct" in line with a relevant DOJ component's voluntary self-disclosure policy.
  - Whether an acquiror's voluntary self-disclosure relates to **misconduct it became aware of "while conducting due diligence** in connection with its acquisition of" an entity.
  - Whether the acquisition "served **a bona fide business purpose** (i.e., was not engineered to circumvent accountability for misconduct) and that both parties to the transaction were not co-conspirators in the misconduct."

Illustrative Case: White Deer Acquisition of Unicat

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White Deer Acquisition of Unicat: Factual Background

The Acquisition and Discovery of Misconduct

- In 2020, soon after acquiring Texas-based Unicat Catalyst Technologies LLC (Unicat), private equity firm White Deer Management LLC (White Deer) uncovered extensive pre-acquisition sanctions and export-control violations.
- Misconduct included illicit sales to customers in Iran, Syria, Venezuela, and Cuba; falsified invoices to reduce tariffs; and false statements in export documentation.
- Illicit revenue totaled ≈ $3.3M; unpaid tariffs/duties ≈ $1.6M.

Hidden Misconduct by Prior Management

- Violations were concealed from White Deer during the acquisition.
- Senior Unicat leadership, including the CEO, was directly involved in orchestrating and hiding the conduct.

White Deer Response

Immediate Post-Discovery Action

- Cancelled a pending shipment to a sanctioned customer based in Iran as soon as misconduct surfaced.
- Retained outside counsel to rapidly begin an internal investigation.

Proactive, Multi-Agency Self-Disclosure

- Within ~1 month of discovery, White Deer voluntarily self-disclosed to DOJ (NSD), OFAC, and BIS.
- Disclosure occurred ~10 months post-acquisition.

Cooperation & Remediation

- Provided extensive, proactive cooperation: disclosing all relevant facts, relevant electronic records of overseas data, personal-device messages.
- Removed and disciplined involved personnel; deployed compliance and internal controls designed to preempt analogous future issues.

DOJ Application of Safe Harbor Policy

First-Ever M&A Safe-Harbor Declination

- DOJ issued a declination for White Deer - the first application of the M&A Voluntary Self-Disclosure Policy.

Factors Leading to Safe-Harbor Protection

- Acquisition was bona fide and compliant;
- No pre-existing legal duty to report misconduct;
- Disclosure considered "timely," despite longer than the usual six-month expectation;
- White Deer's cooperation and remediation were described as "exceptional and proactive"; and
- Misconduct was redressed within a year of White Deer becoming aware of it.

Multi-Agency Related Enforcement Outcomes

- In a DOJ-coordinated resolution with OFAC and BIS, Unicat entered a Non-Prosecution Agreement (NPA) and forfeited ~ $3.3 million to DOJ, and agreed to pay ~$3.8 in administrative penalties to OFAC and $391,183 in administrative penalties to BIS. Penalties were credited against one another.
- Former CEO pleaded guilty for conspiring to violate sanctions and conspiring to commit money laundering.

Takeaways

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Key Takeaways

Acquirors Have Clearer Guidance to Mitigate Criminal Risks

- Early detection and **timely voluntary self-disclosure** of acquired misconduct is essential to qualify for the safe harbor.
- **Proactive and extensive cooperation**, coupled with **prompt and effective remediation**, can lead to declinations for acquirors even when aggravating factors exist.
- Acquirors should ensure **robust, continuous diligence** throughout the M&A process.

Varied Potential Outcomes

- **Declination**, **NPA**, **plea agreement**, and **administrative settlements** covering both companies and individuals.
- National-security-related violations may trigger parallel, multi-agency scrutiny and penalties.

May 2025 Corporate Enforcement Policy ("CEP")

- The CEP provides a presumption of declination when companies: (1) voluntarily self-disclose misconduct; (2) fully cooperate with DOJ's investigation; (3) timely and appropriately remediate; and (4) absent certain aggravating factors.
- **Safe Harbor is a part of the CEP**: a footnote specifies that the Safe Harbor Policy applies to pre- or post- M&A misconduct, a "subset of circumstances addressed by" the CEP.
  - ➢ Effectively a structured, timeline-based application of the CEP, ensuring acquirors can access declination benefits when they meet DOJ's disclosure and integration requirements.

Conclusion

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Upcoming January Programs

2025/2026 White Collar Webcast Series

Date and Time	Program	Registration Link
Thursday, January 8, 2025 **9:00 AM – 10:00 AM PT** **12:00 PM – 1:00 PM ET**	**Congressional Investigations in the 119th Congress** Presenters: Michael Bopp (Moderator), Barry Berke, Laura Plack	Event Details
Monday, January 12, 2025 **9:00 AM – 10:00 AM PT** **12:00 PM – 1:00 PM ET**	**Consumer Protection Enforcement: DOJ, FTC, and State AGs at the Crossroads** Presenters: Gustav Eyler (Moderator), Svetlana Gans, Diana Feinstein, Debra Wong Yang, Ryan Bergsieker	Event Details