DOJ's Safe Harbor Policy May Quietly Favor M&A Enforcement

By **Daniel Oakes and James Attridge** (March 25, 2024)

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In a March 2024 update to the Justice Manual, the U.S. Department of Justice finally codified the mergers and acquisition safe harbor[1] and, in doing so, essentially read the Antitrust Division out of the policy. The safe harbor was intended to give acquirers new incentives to expand due diligence efforts and self-disclose criminal violations.

At the time it was announced in October,[2] there were significant questions about the intersection of this new safe harbor policy and the Antitrust Division's leniency policy.[3]

As implemented, the policy imposes additional, unique and burdensome requirements on the reporting of antitrust crimes specifically, and the safe harbor policy applied to antitrust now appears to favor merger enforcement, rather than criminal enforcement, as originally intended.

Yet, despite its significance, this change has received little attention or even mention.

Policy and Implications

In October 2023, the DOJ unveiled a department-wide safe harbor policy to incentivize voluntary self-disclosure of illegal conduct found during the diligence process of M&A transactions.

Broadly speaking, this policy allows acquiring companies that identify criminal misconduct in the course of a transaction to promptly disclose it, fully cooperate and remediate the harm in exchange for a presumption of a declination of prosecution for both the acquirer and even the troublesome target under the right circumstances.[4]

As Deputy Attorney General Lisa Monaco recently explained at the American Bar Association white collar conference in San Francisco, "[i]n these situations, the acquiror hasn't done anything wrong — and we want it to report the acquiree's misconduct."[5] All well and good.

Questions arose, however, from all sides. Some were concerned about the new policy's implications for antitrust assessments of mergers and acquisitions.

In the view of Sen. Elizabeth Warren, D-Mass, for instance, the safe harbor "encourages more mergers and makes it easier for companies that have engaged in illegal activity to get bought up — reducing competition, and eliminating penalties for bad behavior," she wrote in an October letter to Monaco and Attorney General Merrick Garland.[6]

Thus, Warren maintained, the department's aim of promoting compliance because it "did not want to discourage acquisitions that result in reformed and improved compliance structures"[7] contradicted the Biden administration's policy in favor of promoting competition and vigorous antitrust enforcement.

On the other hand, as we pointed out,[8] there were questions about the intersection and interplay of the new safe harbor policy and the Antitrust Division's leniency policy.

Generally speaking, however, many of these could be resolved. The leniency policy has stricter requirements and results in much greater benefits to successful applicants.

Specifically, while the safe harbor considers disclosures within 180 days of closing to be timely — whether the violation was found pre- or post-closing — the leniency policy requires prompt self-reporting from the moment the conduct is identified.

Moreover, the leniency policy provides additional carrots that the safe harbor doesn't: potential nonprosecution for executives and, through the Antitrust Criminal Penalty Enhancement and Reform Act, single rather than triple damages in follow-on civil suits.

Now, the department has finally codified the safe harbor in the Justice Manual.[9] In doing so, it has essentially read the Antitrust Division's criminal enforcement out of the policy entirely.

As applied to the reporting of antitrust violations to the division, the M&A safe harbor's broader requirements have been replaced by requirements so strict and burdensome they'll seldom apply, all for the lower benefits of the safe harbor that pale in comparison to the leniency's well-known rewards.

Under the codified policy, an acquirer seeking safe harbor for an antitrust crime must not only meet the general requirements of the policy,[10] but also must also:

- Satisfy all relevant requirements of the Antitrust Division's leniency policy;
- Voluntarily disclose the misconduct before the closing date of the acquisition; and
- Suspend any review periods under the Hart-Scott-Rodino Act.[11]

Antitrust conspiracies tend to occur in secret. As a result, acquirers are far more likely to discover wrongdoing post-acquisition, when they have ownership and full access to the target.

This is likely why the M&A safe harbor policy deems disclosures within 180 days post-close timely for all department components — except for the Antitrust Division.[12]

By contrast, disclosure to the Antitrust Division must first meet the leniency policy's requirement of prompt disclosure upon discovery[13] — as former DOJ official Richard Powers said recently, "think weeks not months."[14]

But now, that disclosure must also occur before the acquisition closes. Practically, acquirers will typically lack the ability to discover and promptly disclose collusion preclose. Perhaps one exception to this rule is if the merging parties are conspirators and documents in the acquirer's possession revealed the conduct.

But the safe harbor policy now excludes transaction parties that were "coconspirators in the misconduct."[15]

Beyond practical difficulties and expanded prerequisites, asking acquirers to agree to suspend the Antitrust Division's or the Federal Trade Commission's review period until — or for some period after — a conditional leniency letter issues or a leniency marker lapses[16]

— assume months or years, not weeks — may amount to a deal killer.

Most transactions are simply not able to withstand such indefinite delays. In that time, myriad complications and uncertainties may undermine the original rationale for the merger, unravel a deal's financing or otherwise unwind the transaction.

Thus, there may be few parties who are both able and willing to meet the safe harbor's requirements in the context of an acquirer's antitrust violation.

But perhaps that's the goal.

In announcing the codified safe harbor policy, Monaco explained the "policy does not limit the Department's robust antitrust enforcement efforts."[17] Rather, it "complements them by ensuring that misconduct doesn't get swept under the rug."[18]

But when it comes to the Antitrust Division's criminal prosecutors, as we've argued above, misconduct isn't likely to surface in a manner that will fulfill the safe harbor's new requirements.

Rather, Monaco's remarks seem geared toward prioritizing the surfacing of misconduct to those conducting the antitrust review of mergers and acquisitions "before the acquisition closes."[19]

Indeed, the codified safe harbor policy requires prosecutors — throughout the department — to "consult with the Antitrust [Division] ... to ensure that the potential declination would not interfere or be inconsistent with any civil or administrative process related to the acquisition"[20] because the safe harbor should not "be construed to limit any civil and administrative authorities for reviewing the legality of a corporate transaction, including under antitrust or other competition laws... [or to render] judgment on the legality of the transaction itself."[21]

The bottom line result is a policy initially created as a tool for criminal prosecutors to incentivize compliance, so that "timely corporate self-reporting [could] facilitate the prosecution of individuals responsible for the misconduct,"[22] has now become a policy ensuring that corporate compliance complements[23] robust civil antitrust review of mergers and acquisitions.

Conclusion

While the DOJ's new M&A safe harbor offers enticing incentives for acquiring companies to expand their due diligence efforts and self-disclose criminal violations, the Justice Manual's articulation of the policy seems to practically eliminate its use in the antitrust context.

The new safe harbor policy imposes additional requirements for the reporting of antitrust violations that would present significant burdens for merging parties, including agreement to an indefinite delay in merger review that would threaten many transactions, regardless of the competitive merits of the deal.

It is fair to question whether the safe harbor policy would ever have a use in the context of criminal antitrust offenses, and even whether the current policy disincentivizes preclosing due diligence.

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[1] Deputy Attorney General Lisa Monaco, Remarks at the Society of Corporate Compliance and Ethics' 22nd Annual Compliance & Ethics Institute (Oct. 4, 2023), available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self.

[2] Jimmy Attridge, A New Port in a Storm: Comparing the M&A Safe-Harbor Policy With Leniency (Oct. 24, 2023), available at https://viewpoints.axinn.com/post/102iqtj/a-new-port-in-a-storm-comparing-the-ma-safe-harbor-policy-with-leniency.

[3] See Dep't of Justice, Justice Manual § 7-3.300 (Antitrust Division Leniency Policy and Procedures).

[4] See Justice Manual § 9-28.900.

[5] Deputy Attorney General Lisa Monaco, Remarks at the American Bar Association's 39th National Institute on White Collar Crime (March 7, 2024), available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations.

[6] Elizabeth Warren, Letter to the Attorney General Garland and Deputy Attorney General Monaco (Oct. 5, 2023), available at https://www.warren.senate.gov/imo/media/doc/Letter%20to%20DOJ%20re%20Safe%20Harbor_Final%20105023.pdf.

[7] Deputy Attorney General Lisa Monaco, Remarks at the New York University Program on Corporate Compliance and Enforcement (Sept. 15, 2022), available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement.

[8] See A New Port in a Storm, supra, note 2.

[9] See Justice Manual § 9-28.900.

[10] Parties seeking to self-disclose under the Safe Harbor policy "must voluntarily self-disclosed the misconduct in a timely manner, which generally means within 180 days of the closing date of the acquisition; (ii) fully remediated the misconduct in a timely manner, which generally means within 1 year of the closing date; and (iii) paid any disgorgement, forfeiture, and/or restitution arising from the misconduct at issue, in accordance with the applicable voluntary self-disclosure policy." Justice Manual § 9-28.900(A)(3).

[11] Justice Manual § 9-28.900(A)(3)(c).

[12] Id. § 9-28.900(A)(3)(a).

[13] Id. § 7-3.300.

[14] Richard A. Powers, DOJ Continues to Modernize its Criminal Antitrust Enforcement Strategy (Mar. 13, 2024), available at https://wp.nyu.edu/compliance_enforcement/2024/03/13/doj-continues-to-modernize-its-criminal-antitrust-enforcement-strategy/#more-31850.

[15] Justice Manual § 9-28.900(A)(3)(b).

[16] Id. §§ 9-28.900(A)(3)(c), 7-3.300.

[17] Monaco Remarks at the 2024 Institute on White Collar Crime, supra note 5.

[18] Id.

[19] Justice Manual § 9-28.900(A)(3)(c)(ii).

[20] Id. § 9-28.900(A)(3)(b)(ii)

[21] Id. § 9-28.900(B).

[22] Id. § 7-3.300 (Antitrust Division Leniency Policy and Procedures).

[23] Monaco Remarks at the 2024 Institute on White Collar Crime, supra note 5.