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Antitrust Division's Implementation of the Department of Justice's Safe Harbor Declination Policy – A Policy in Search of a Fact Pattern

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I. Introduction

The Antitrust Division of the Department of Justice quietly made a change to its Leniency Policy and Procedures (the "Leniency Policy") that could impact companies acquiring businesses or companies that they discover may have engaged in criminal antitrust violations.[1] Although the updated Leniency Policy was posted to the Antitrust Division's Leniency Program webpage in early March,[2] and corresponding changes have been made to the Department of Justice ("DOJ") Justice Manual Section on Voluntary Self-Disclosures,[3] the Antitrust Division has not announced the change and has not issued guidance related to the changes.

The update to the Leniency Policy is the Antitrust Division's implementation of the Mergers & Acquisitions Safe Harbor Policy (the "Safe Harbor Policy") announced by Deputy Attorney General Lisa Monaco last October, which provides for declination of prosecution against acquiring companies. The Antitrust Division's implementation of the Safe Harbor Policy appears to apply to situations where—during due diligence on a transaction target—the acquiror discovers a potential criminal Sherman Act violation by the target. Under the revised policy, for the acquiror to obtain declination from prosecution for the conduct in such cases, the acquiror would need to disclose the potential

[1] U.S. Dep't of Just., Just. Manual § 7-3.300 (2024) (the "Leniency Policy").

[2] *Id.*

[3] U.S. Dep't of Just., Just. Manual § 9-28.900(A)(3)(c) (2024).

violation to the Antitrust Division before closing the transaction and must agree not to close until after the leniency process runs its course.

The update does not appear to apply to situations where the acquiror discovers the conduct post-close, or where there is a pending leniency application by a target that pre-dates the transaction. Accordingly, the update would seem to apply only to narrow and fairly unusual circumstances and likely is not the preferred route for dealing with potential criminal liability. However, the changes and the parallel provisions of the Safe Harbor Policy in the DOJ Justice Manual nevertheless raise a number of practical questions for merging parties seeking to navigate the risk of potential criminal Sherman Act violations.

II. Antitrust Division Leniency Policy

The Antitrust Division's Leniency Policy provides protection from prosecution under the Sherman Act to organizations or individuals who self-report participation in a criminal conspiracy. To encourage reporting, only the first organization or individual who self-reports particular conduct is eligible for the program.[4]

The first company or person to self-report obtains a "marker" for the conduct, essentially reserving its place in line for leniency.[5] The original marker typically has an initial (and extendable) expiration date to encourage swift cooperation, typically around thirty to forty-five days.[6] The applicant then proceeds either to "perfect" the marker—providing evidence to show a criminal violation by producing documents and making witnesses available for interview—or to return the marker if upon further investigation it determines there is no violation.[7] Upon perfecting the marker, the applicant obtains a conditional leniency letter, which is conditional on the applicant cooperating with the Antitrust Division's investigation into and prosecution of its co-conspirators.[8]

There are two types of corporate leniency: Type A and Type B.[9] Type A is available before the Antitrust Division has opened an investigation into the applicant and if the Antitrust Division has not received any information about the illegal activity prior to the self-reporting.[10] Additionally, if granted, Type A leniency applies to the applicant's current directors, officers, and employees.[11] Type B is available

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[4] U.S. Dep't of Just., Frequently Asked Questions ¶ 3 ("FAQs") (Jan. 3, 2023), https://www.justice.gov/atr/page/file/1490311/dl?inline.

[5] *Id*. ¶¶ 3, 4.

[6] *Id*. ¶ 9.

[7] *Id*. ¶¶ 1, 4, 7.

[8] *Id*. ¶¶ 4, 7, 51, 61, 68.

[9] *Id*. ¶ 19.

[10] *Id.* ¶ 20.

[11] U.S. Dep't of Just., Just. Manual § 7-3.310 (2024).

even after the Antitrust Division has opened an investigation or received information, but protection is not guaranteed to current directors, officers, or employees.[12]

Historically, the Leniency Policy has not provided specific guidance or rules on applying for leniency in the context of criminal conduct by one party to a merger or acquisition while a transaction is pending. The Leniency Policy does require that the conduct be reported "promptly" upon "discovery" by an "authoritative representative of the applicant for legal matters."[13] Antitrust Division guidance suggests that the promptness requirement is meant to encourage companies to voluntarily self-report as quickly as possible to obtain a marker, rather than wait to see if the conduct comes to light some other way.[14]

III. DOJ Safe Harbor Policy

On October 4, 2023, Deputy Attorney General Lisa Monaco announced a new Safe Harbor Policy for voluntary self-disclosures to be applied across all divisions of the DOJ: "acquiring companies that promptly and voluntarily disclose criminal misconduct within the Safe Harbor period [by the acquired entity], and that cooperate with the ensuing investigation, and engage in requisite, timely and appropriate remediation, restitution, and disgorgement . . . will receive the presumption of a declination."[15] The Safe Harbor Policy is a general one that applies to all corporate crimes prosecuted by the DOJ. Monaco explained the reasoning behind the new Safe Harbor Policy:

> The last thing the Department wants to do is discourage companies with effective compliance programs from lawfully acquiring companies with ineffective compliance programs and a history of misconduct. Instead, we want to incentivize the acquiring company to timely disclose misconduct uncovered during the M&A process.[16]

The DOJ announced a "baseline" or default period for the acquiror to self-report the conduct of six months from the date of closing, regardless of whether the conduct is discovered pre- or post-acquisition.[17] In other words, closing a transaction did not impose any bar on an acquiror availing itself of the safe harbor even if the conduct was discovered pre-close. From the date of closing, companies will also have a baseline period of one year to remedy the misconduct—effectively, an

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[12] *Id*. § 7-3.320 (2024).

[13] U.S. Dep't of Just., Frequently Asked Questions ¶¶ 21, 22 (Jan. 3, 2023), https://www.justice.gov/atr/page/file/1490311/dl?inline.

[14] *Id*. ¶ 22.

[15] *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.

[16] *Id*.

[17] *Id*.

additional six months after reporting the conduct to remedy it.[18] Monaco noted that these baselines could be extended, as reasonably necessary, depending on the context of the transaction.[19] This new Safe Harbor Policy seeks to place "an enhanced premium on timely compliance-related *due diligence and integration*."[20]

IV. Change to Antitrust Division Leniency Policy

As implemented in the DOJ Justice Manual and the Antitrust Division's Leniency Policy, the application of this safe harbor to criminal conduct under the Sherman Act is narrower than the Safe Harbor Policy Deputy Attorney General Monaco announced last October, undoubtedly in part because the Leniency Policy already covered circumstances before and after the transaction. The updated Leniency Policy states in relevant part:

> Pursuant to JM § 9-28.900(A)(3)(c) [the Justice Manual section on voluntary self-reporting], when an acquiror discloses illegal activity by the acquired entity, the prosecution team should apply a presumption of declination to the acquiror only if the parties (i) satisfy all relevant requirements of the Antitrust Division's leniency policy; (ii) voluntarily disclose the misconduct to the Antitrust Division (and the Federal Trade Commission, if the Commission is reviewing the transaction) before the merger or acquisition closes; and (iii) enter into an agreement, to the satisfaction of the Antitrust Division (and, when relevant, Federal Trade Commission), that (a) suspends any review period until a conditional leniency letter is issued or the marker lapses, and/or (b) otherwise commits to not close the merger or acquisition for a specified period of time, in the discretion of the Antitrust Division (and, when relevant Federal Trade Commission), after a conditional leniency letter is issued or the leniency marker expires.[21]

Notably, the updated Leniency Policy includes at least two important differences from the broader Safe Harbor Policy. It requires the acquiror to (i) disclose the alleged conduct before closing the transaction (as opposed to within six months of closing); and (ii) hold open the transaction while the applicant navigates the marker process (which can take many months) and for some unspecified period after a conditional leniency letter issues or the marker is allowed to lapse.

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[18] *Id*.

[19] *Id*.

[20] *Id*. (emphasis added)

[21] U.S. Dep't of Just., Just. Manual § 7-3.300 (2024).

V. Practical Implications of the Updated Leniency Policy and Recommendations

When evaluating the effectiveness of the changes either in the context of the existing Leniency Policy or the newly announced policies of the Safe Harbor Policy, it is important to remember a few things:

- Declination outlined in the Safe Harbor Policy is different from leniency itself. For example, declination from prosecution does not provide ACPERA benefits, nor does it apply to a company's employees.
- The updates to the Leniency Policy do not appear to reflect a narrowing of the availability of leniency. The target is free to apply for leniency before closing under the existing policy. The acquiror is free to apply for leniency after closing under those same terms.
- The key change to the updated Leniency Policy is that declination is available to an acquiror if it discovers and reports the target's conduct pre-closing.

The declination approach outlined in the Leniency Policy would apply only in the rare circumstance where an acquiring company—in the midst of a transaction—learns of potentially criminal conduct by the target. Typically, the information about the target company available to acquirors in data rooms does not extend to historical emails, let alone messaging applications which are often necessary to identify criminal violations. It is of course possible that an inadvertent disclosure takes place in transition planning (particularly if the pre-closing period is long) or through self-disclosure by the target in response to specific due diligence requests. Most significantly, acquirors are unlikely to be able to negotiate the sort of access that would be required for a thorough antitrust compliance investigation.

Even if a criminal antitrust violation becomes known to the acquiror, the acquiror has no criminal exposure at that time and would not be eligible for leniency. If it chose to take advantage of the declination policy, it would be saddled with numerous obligations, some of which would likely be fatal to most deals. In short, the Antitrust Division's declination option appears to suffer from several infirmities:

- It is unlikely to arise in practice given the limits of pre-closing due diligence;
- It fails to incentivize acquirors to investigate target misconduct at a time they can do so (i.e., post-closing);
- It addresses a non-existent liability (the acquiror's liability pre-closing); and
- It would impose conditions that may be fatal to closing the deal.

And as discussed below, the acquiror likely has better options to deal with the target's criminal exposure even if it learns of it.

The Antitrust Division should consider revising the Leniency Policy and FAQs further to provide clarity, create a more constructive role for the declination policy, and better implement the incentives that the Department's Safe Harbor Policy is trying to foster.

a) The Leniency Policy Already Provides an Acquiror the Tools to Self-Report (At Least Indirectly)

It is worth considering who would actually avail themselves of the declination approach contained in the updated Leniency Policy. In transactions, the acquiror often has very little access (if any) to the target's current business communications. This makes it nearly impossible for the acquiror to investigate any potentially criminal conduct by the target. Yet, to be eligible for declination under the updated Leniency Policy, the acquiror would need to report the conduct prior to closing the transaction. In practice, it seems highly unlikely any acquiror would be in a position to do so.

If it does stumble upon a criminal antitrust violation of the target, in most circumstances the acquiror will likely have four options: (1) terminate the acquisition because the criminal antitrust violation violates one of the target's covenants, (2) apply for a declination under the new policy, (3) inform the target that the acquiror will terminate the acquisition agreement unless the target applies for leniency, or (4) close the transaction and immediately apply for leniency. Depending on the significance of the criminal violation relative to the size of the transaction, the first option is going to be frequently used. The fourth option (applying for leniency after closing the transaction) may raise questions about the promptness of the reporting depending on the facts, and so will carry risk.

In the event that the acquiror wants to continue to move forward with the transaction after learning of the criminal violation, forcing the target to apply for leniency would seem to be the best option in most cases. It has the advantages of leniency over declination, does not impose the express conditions on the transactions that the declination would impose, and the acquiror will step into the shoes of the target when it closes the transaction. The only two exceptions that the authors have been able to identify where declination may be considered is where leniency is not available: (1) the target does not qualify for leniency, for instance for failure to promptly notify itself or (2) there is some question about whether the acquiror would inherit leniency with the acquisition.[22] Again, there is a good chance that the acquiror will walk away from the transaction if that is the case.

b) Increase Real Incentives for Acquirors to Investigate and Self-Report Violations

The Department's Safe Harbor Policy allows for declinations for self-reported criminal violations during *post-close* "due diligence," without defining what that is.[23] The updated Leniency Policy, on other hand, would not allow declination unless the acquiror reports the conduct prior to close of the

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[22] As to the latter, such a scenario may or may not exist. The FAQs do not address the situation when a leniency applicant sells a part of the business that is implicated by a leniency application.

[23] U.S. Dep't of Just., Just. Manual § 9-28.900(A)(3) (2024). "Due diligence" is not defined in the Justice Manual or the Leniency Policy.

transaction. As noted above, the circumstances in which this would arise are likely few and far between. It is unclear why the Antitrust Division did not seek to adopt the six-month grace period from the Safe Harbor Policy to allow for a reasonable investigation into the alleged conduct before self-reporting. Maybe it saw the declination policy as something to plug the gap of a situation that is not explicitly addressed in the Leniency Policy, and that leniency was more than sufficient to incentivize the acquiror after closing. However, a six-month period is a reasonable amount of time to conduct an inquiry and creating some additional incentive for acquirors to invest in compliance reviews and investigations (at a time when business integration will be top of mind) would be in conformity with the policy statements by Deputy Attorney General Monaco about promoting the acquisition of less compliant companies by more compliant companies and incentivizing self-reporting.

In the context of the existing leniency program, an important possible carrot to acquiring entities so that they dedicate the necessary resources to a conduct a thorough antitrust investigation would be to waive one or both of the conditions for leniency (no coercion by the applicant and prompt reporting). Since those conditions reflect only on the behavior of the target company and not the acquiror at this point, a declination program for six months post-closing would be fully consistent with the policies articulated by the DOJ. In addition, it would create a powerful incentive to acquiring entities to thoroughly investigate and self-report. For example, compliance professionals within the acquiror could state to business leaders that they have six months to investigate and get things in order with the expectation that they will receive either leniency or a declination for everything found at the target. After six months, the conduct of the target could prevent the acquiror from getting protection from prosecution. This would provide powerful incentive for acquirors to utilize this policy.

c) Remove Disincentives to Apply for Declination

While there are a number of obstacles to the declination program being a viable enforcement tool, so long as it remains confined to the pre-closing time period, the conditions to closing render it infeasible. The marker process often takes months, especially if the applicant self-reports to the Antitrust Division before doing an internal investigation. Following the *Stolt-Nielsen* litigation, the Antitrust Division's practice has typically been to complete most of the meaningful witness interviews and document review prior to issuing a conditional leniency letter. The requirement that merging parties finish this process before the transaction can close will introduce substantial delays in closing affected transactions and is unnecessary for managing the Hart-Scott-Rodino Act review. Further, by conditioning declination on reporting the conduct pre-close, a merging party seeking declination is effectively granting the Antitrust Division full discretion as to when the transaction can close. This is unlikely to incentivize an acquiror to seek declination over other options, as discussed above.

The DOJ Justice Manual declination policy also states that prior to declining a prosecution, the prosecution team must determine that "both parties to the transaction were not co-conspirators in the misconduct." The likely effect of this Department policy is that it preserves the leniency race between the two entities pre-close and declination would go unused. It may be that this is both consistent with

the Safe Harbor Policy and the Division's broader leniency program policies. However, the oddity is that if the acquirer discovers the behavior post-close, it would be free to apply for leniency of both businesses. It would seem that this would have the possible further negative incentive to defer antitrust compliance diligence to the post-close period.

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