

A New Port in a Storm: Comparing the M&A Safe-Harbor Policy With Leniency

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DOJ's [announcement](#) of a safe harbor for voluntary self-disclosure in the context of acquisitions is the latest policy change in support of its effort to incentivize compliance, empower compliance professionals, and make compliance a cost-savings center.

It also heightens the importance of diligence and post-acquisition investigation to unearth acquired misconduct within the policy's short, six-month window for self-disclosure.

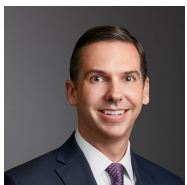
While the policies have important similarities, how the M&A policy will interact with the Antitrust Division's [leniency policy](#) raises more questions than answers because of certain differences in each policy's requirements and benefits:

M&A Voluntary Disclosure	Antitrust Division Leniency Policy
Requirements	
<u>Application</u> : Applies Department-wide to criminal conduct discovered in bona fide, arms-length M&A transactions.	<u>Application</u> : Applies to violations of Sections 1 and 3 of the Sherman Act.
<u>Timing</u> : Prompt disclosure, within a baseline of six months post-closing whether the conduct was discovered pre- or post-acquisition. Though	<u>Timing</u> : Prompt self-reporting upon discovery.

companies cannot wait to disclose threats “involving ongoing or imminent harm.”	
<u>Disclosure</u> : Does not apply to misconduct that was otherwise required to be disclosed or already public or known to the Department.	<u>Disclosure</u> : Only available to the first organization or individual to self-report. Type B leniency is available if the Division knows about the conduct but does not yet have evidence likely to result in a sustainable conviction against the applicant.
<u>Cooperation</u> : Acquiring companies must cooperate with the ensuing investigation.	<u>Cooperation</u> : Applicants must provide timely, truthful, continuing, and complete cooperation throughout the Antitrust Division’s investigation.
<u>Remediation</u> : Companies must engage in timely and appropriate remediation, restitution, and disgorgement. There is a baseline of one year from the date of closing to fully remediate the misconduct.	<u>Remediation</u> : Applicants must pay restitution, remediate the harm caused by the illegal activity, and improve their compliance program. Applicants must satisfy their compliance and remediation obligations and present concrete, reasonably achievable restitution plans to receive conditional leniency letter.
Benefits	
<u>Corporate charges</u> : Presumption of a declination.	<u>Corporate charges</u> : Successful applicants face no criminal charges.
<u>Individual liability</u> : No non-prosecution protection for employees.	<u>Individual liability</u> : In the Type-A context, non-prosecution protection is available for cooperating, current employees. In the Type-B context, non-prosecution protection is available at the Division’s discretion.
<u>Civil suits</u> : No effect.	<u>Civil suits</u> : Single damages and no joint and several liability under ACPERA.



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