KOBRE & KIM | DISPUTES AND INVESTIGATIONS

Ana Frischtak
São Paulo
ana.frischtak@kobrekim.com

Daniel S. Lee
Seoul
daniel.lee@kobrekim.com

Evelyn Baltodano Sheehan
Miami
evelyn.sheehan@kobrekim.com

Michael Keilty
New York
michael.keilty@kobrekim.com

Nicholas Surmacz
London
nicholas.surmacz@kobrekim.co.uk

NOVEMBER 22, 2023

New U.S. DOJ "Safe Harbor" Provisions May Not Be So Safe for Non-U.S. Companies

A new U.S. Department of Justice policy promises companies leniency if they report misconduct within six months of a merger or acquisition. This may at first appear to be "good news," but it is further evidence of the DOJ's increasing aggressiveness, including against non-U.S. companies. We explain how companies can navigate this prudently.

The U.S. Department of Justice (DOJ) unveiled a new policy that promises companies lenient treatment if they report potential criminal misconduct within six months of either side of a merger or acquisition.

However, the latest policy announcement contains several important caveats, and non-U.S. companies should maintain vigilance as the DOJ continues to aggressively expand its prosecution of individuals and companies outside American borders.

What are the Changes?

In the new policy announced in October 2023, companies that disclose potential wrongdoing at a company they acquire within six months before or after the deal closing date – and thereafter fully cooperates and addresses the issues within a year – can expect leniency from the DOJ. All divisions of the DOJ will implement this new leniency program, but it would only apply to "criminal conduct discovered in bona fide, arm's-length M&A transactions," the deputy attorney general said.

This comes after clarifications of leniency programs in early 2023 that encouraged speedy self-disclosure of potential corruption, and ties in with updated guidelines last year that expanded the reach of U.S. prosecutors to investigate non-U.S. companies.

What Does this Mean?

While this recent announcement appears to be "good news" for companies that acquire entities with potential criminal liability, it is further evidence of the DOJ's aggressiveness, as the announcement implicitly acknowledges that the DOJ will not hesitate to bring criminal actions against companies that did not even take part in any wrongdoing. Indeed, the DOJ's policy of seeking criminal fines and charges against acquiring companies often penalizes them a second time, as they likely first fell victim to the wrongdoer during the due diligence process (when agreeing to purchase the company).

This content provides information on legal issues and developments of interest to our clients and friends and should not be construed as legal advice on any matter, specific facts or circumstances. The distribution of our content is not intended to create, and receipt of it does not constitute, an attorney-client relationship.

© 2025 Kobre & Kim LLP. All Rights Reserved. Prior Results DO NOT Guarantee A Similar Outcome.

Further, this new leniency announcement is part of a wider effort by the DOJ to identify new companies, individuals and industries to target in its enforcement actions through leniency programs. The DOJ hopes the evidence obtained through the program can be used to seek criminal charges and penalties against others. Importantly, even if a company participates in the program and qualifies for leniency, there is no guarantee that this will automatically drive better outcomes for the company.

For example, under the DOJ's definition of cooperation, companies must comply with rounds of invasive information demands and interviews of key personnel in exchange for "cooperation credit." This can result in enforcement proceedings, significant financial penalties and collateral exposure, including potential civil liability and further investigations and enforcement activity by regulators outside the United States.

In some circumstances, a more effective approach could potentially include:

1. **Testing the Regulator's Reach:** It may be possible to challenge the legal basis of an enforcement action. This is especially pertinent for non-U.S. targets, where the DOJ's reach is more tenuous: for example, prosecutors must follow certain procedures to obtain overseas evidence. Even if a company intends to be fully cooperative, noting a jurisdictional issue can be a good negotiating tool to narrow the scope of a subpoena, for example.
2. **Seizing Control of the Narrative:** While conventional wisdom may favor playing one's cards close to the vest, it can sometimes be advantageous to shape the DOJ's views of a situation early in the process. This might involve proactively setting the facts supporting a counter-narrative to regulators from the early stages.
3. **Going On the Offensive:** Companies can also look for opportunities to take regulators head-on by challenging the enforcement process using techniques involving strategic cross-border filings, information demands and cost-shifting applications.

By deploying counteroffensive measures with a team of globally-based former U.S. government lawyers, companies can more effectively coordinate a united response and drive more successful outcomes.

About Kobre & Kim

Kobre & Kim is a conflict-free global law firm focused on disputes and investigations, often involving fraud and misconduct.

Our team of independent advocates in cross-border government enforcement investigations and actions:

- Includes roughly a dozen former U.S. government lawyers based globally;
- Has served as lead counsel in prominent enforcement actions including those involving market manipulation, bribery and corruption, antitrust and competition, economic sanctions, asset forfeiture, money laundering, extradition, fraud and other misconduct; and
- Are able to either advocate directly or to work cooperatively with local counsel, in jurisdictions in the U.S., UK, EMEA, Asia, Latin America and key offshore financial centers.

This content provides information on legal issues and developments of interest to our clients and friends and should not be construed as legal advice on any matter, specific facts or circumstances. The distribution of our content is not intended to create, and receipt of it does not constitute, an attorney-client relationship.

© 2025 Kobre & Kim LLP. All Rights Reserved. Prior Results DO NOT Guarantee A Similar Outcome.