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Newsletter

Corporate Governance and Regulatory Compliance Practice Group

Significant implications of the "Safe Harbor" policy of the U.S. Department of Justice for merger and acquisitions involving Mexican companies

In October 2023, the U.S. Department of Justice (DOJ) announced a new policy aimed at encouraging voluntary self-reporting of misconduct discovered during the due diligence process in mergers and acquisitions (M&A). This policy, known as "Safe Harbor", is an incentive for companies that participate in such transactions which motivates them to identify in detail, through the Due Diligence process, the possible legal risk generated by acts of corruption, as well as to detect violations and areas for improvement in the integrity culture of the company to be acquired or merged. The above, in order to correct such violations and, with the assistance of an expert legal advisor in the field, potentially to self disclose them, ensuring that the acquiring company has full knowledge of the risks of the acquired company and is not seriously affected by such contingencies later on.

The essence of the Safe Harbor Policy is to incentivize the acquiring company to disclose in a timely manner (within six months from the date of closing) the misconduct discovered during the transaction process and voluntarily report it to the DOJ within the due diligence period, and to cooperate and correct unlawful conduct discovered during the process. By doing so, these companies can legitimize themselves, cooperate fully with the DOJ, remedy the detected misconduct (within one year of the closing of the transaction).

For Mexican companies within the extraterritorial scope of the U.S. Foreign Corrupt Practices Act[1] (FCPA), it is crucial to understand the potential risks of the acquisition, as well as to know the requirements of the Safe Harbor Policy, in order to assess the benefits of taking advantage of the policy and the risks of not doing so.

Therefore, in the due diligence process, the anti-corruption compliance should be at the core of the transaction, with the involvement of experienced legal advisors who know what, how and where to look for and find irregularities. Failure to be aware of potential misconduct early on in order to be able to quantify and integrate it into the transaction procedures can result, at best, in a financial burden for the acquirer, or, in the worst-case scenario, affect business continuity.

Any Mexican company seeking to be acquired must have a duly implemented compliance program and interconnected processes before starting the due diligence process, in order to avoid misconduct and as a means of protecting its shareholders. Failure to do so could result in an unfavorable valuation of the company during the negotiation process, or in being investigated by the DOJ.

In Mexico, the criminal and administrative liability of the acquiring companies can be mitigated if they demonstrate due control within their organizations. To do so, companies must implement and maintain effective integrity programs and control mechanisms, to reduce their liability.

[1] The U.S. FCPA has an extraterritorial scope, which means that in addition to companies listed on a U.S. stock exchange or those that are required to file reports with the Securities Exchange Commission, Mexican companies that use (i) American dollars; (ii) the U.S. banking system; or (iii) do business while in the U.S. territory, must comply with its anti-corruption provisions. In the context of M&A, this implies that Mexican companies in these cases must pay special attention to regulatory compliance to avoid potential legal consequences in relation to the FCPA.

The DOJ's Safe Harbor Policy highlights the importance of compliance within companies to mitigate legal risks and strengthen their regulatory compliance programs in transactions. As Lisa O. Monaco mentioned:

> "Compliance must have a prominent seat at the deal table if an acquiring company wishes to effectively de-risk a transaction".

We will be happy to discuss any additional questions or clarification you may require in connection with this matter.

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