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DOJ Extends FCPA Corporate Enforcement Policy to Mergers and Acquisitions

by Paul Monnin and Jake Ware

In a July 25, 2018 speech, Deputy Assistant Attorney General Matthew Miner of the Justice Department's Criminal Division announced the extension of the department's Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy to acquiring/successor corporations in M&A transactions. The policy, announced in November 2017 (and memorialized at Section 9-47.120 of the *U.S. Attorneys' Manual*), provides for a presumption against prosecution if a company self-discloses corrupt activity, fully cooperates with the government, and remediates through, among other things, termination of culpable personnel and the adoption of compliance improvements. Miner stated that "this approach provides companies and their advisors greater certainty when deciding whether to go forward with a foreign acquisition or merger, as well as in determining how to approach wrongdoing discovered subsequent to a deal."

The policy originated from a DOJ pilot program aimed at encouraging corporate accountability by incentivizing companies to self-disclose misconduct, cooperate with the DOJ, and remediate flaws in their compliance programs. To qualify for amnesty under the policy, however, the self-reporting company must still disgorge its ill-gotten gains. And a criminal resolution may nonetheless be warranted if aggravating factors exist, including senior executive involvement, pervasive wrongdoing, significant profits, or criminal recidivism. In the event of a criminal resolution, the policy provides that the company—if it has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated—can obtain a 50% reduction of the fine set by the U.S. Sentencing Guidelines (except in the case of a second or successive violation). Additionally, the DOJ will generally not require the appointment of a monitor if the company has, at the time of resolution, implemented an effective compliance program. If a company is forced to disclose, but later fully cooperates and timely and appropriately remediates, the company can obtain up to a 25% criminal fine reduction.

According to Miner, the DOJ will now formally extend the policy to acquiring companies that uncover corruption issues during due diligence, as well as those that uncover foreign corruption post-acquisition. If an acquiring company uncovers corruption issues during the due diligence process, Miner encouraged the company to seek DOJ guidance through the FCPA Opinion Procedure before moving forward, particularly with high-risk transactions. Whether companies will in fact make use of the DOJ no-action procedures in anything other than the highest risk international transactions is doubtful, although Miner reminded his audience of the literary admonition: "Married in haste, we can repent at leisure." If an acquiring company uncovers and then discloses corruption issues after an acquisition, Miner said they should be rewarded "for stepping up, being transparent, and reporting and remediating the problems they inherited."

In sum, "When an acquiring company conducts robust due diligence that unearths wrongdoing, reports that conduct to the Department, and engages in remedial measures, including extending already robust compliance to the acquired company, it frees up resources for the Department that may have otherwise been expended investigating the acquired company."

Because evidence of international corruption is frequently uncovered in due diligence related to the acquisition of foreign subsidiaries or, equally if not more likely, in post-acquisition integration efforts, the policy's extension to international M&A activity is an important expansion of potential corporate clemency.

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