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FCPA Successor Liability

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In its continuing efforts to encourage companies to self-report Foreign Corrupt Practices Act (FCPA) violations, the Department of Justice (DOJ) announced [July 25, 2018] that it intends to apply the principles of its FCPA Corporate Enforcement Policy to successor companies that uncover wrongdoing in connection with mergers and acquisitions. Accordingly, successor companies that voluntarily disclose such wrongdoing to the DOJ, cooperate with a government investigation of the conduct, and enact effective remedial measures will be positioned to benefit from the principles of the policy, including being presumed eligible for a declination of prosecution. The announcement made clear that the FCPA Corporate Enforcement Policy will apply to companies that uncover corrupt conduct through due diligence in advance of an acquisition as well as to companies that learn of such conduct subsequent to an acquisition. This extension of the policy to mergers and acquisitions was announced on July 25, 2018, by Deputy Assistant Attorney General (DAAG) Matthew S. Miner of the Criminal Division of the Department of Justice, at the American Conference Institute's Eighth Global Forum on Anti-Corruption Compliance in High-Risk Markets, held in Washington, D.C.

Recent DOJ Policy Announcements and the FCPA Corporate Enforcement Policy

This announcement is the latest in a series of policy revisions and announcements regarding corporate enforcement by the DOJ. In November 2017, Deputy Attorney General (DAG) Rod J. Rosenstein announced the FCPA Corporate Enforcement Policy, which is incorporated into the United States Attorneys Manual (USAM) and provides guidance to federal prosecutors regarding corporate resolutions in FCPA cases. Significantly, the FCPA policy provides that the DOJ will presumptively decline prosecution of a company, even in cases where a violation of the FCPA has occurred, if that company makes a reasonably prompt voluntary disclosure of the misconduct and fulfills other significant requirements. The policy requires that such companies: fully cooperate with the DOJ's investigation (including by providing all relevant facts about all individuals involved in the misconduct, attempting to providing evidence of the wrongdoing to the government, and de-conflicting any corporate internal investigation with the government's investigation); remediate the conditions that gave rise to the corrupt activities, including by disciplining (or in appropriate cases, terminating) involved employees and remediating flaws in the company's existing compliance programs; and disgorge any profits that resulted from the FCPA violation. In cases where aggravating factors—such as the pervasiveness of the misconduct within a company, the involvement of executive management in the wrongdoing, or a company's criminal recidivism—require a criminal resolution, the policy provides that a company

will still qualify for a 50-percent reduction from the low end of the applicable United States Sentencing Guidelines fine range if all the requirements of the policy are otherwise met. In cases where a company does not voluntarily disclose the misconduct but meets the cooperation, remediation and disgorgement requirements, it will be entitled to a 25-percent reduction from the low end of the applicable Guidelines fine range. In announcing the policy, DAG Rosenstein stated that its incentive system is designed to "motivate[] and reward[] companies that want to do the right thing and voluntarily disclose misconduct."

In March 2018, DOJ leadership, including then-Acting Assistant Attorney General of the Criminal Division John P. Cronan, announced that the Criminal Division would consider the FCPA Corporate Enforcement Policy as "nonbinding guidance" in all corporate criminal cases, not just those involving violations of the FCPA. Even if not formally binding on individual United States Attorneys' offices, this announcement by senior DOJ leadership signaled a continued effort toward consistency with respect to decision making by federal prosecutors in corporate cases, as well as an effort to incentivize disclosure and cooperation by companies.

In May 2018, DAG Rosenstein made another significant policy announcement, also codified in the USAM, encouraging coordination among DOJ components and between the DOJ and other regulators—including federal, state and foreign law enforcement entities and regulatory agencies—when imposing multiple penalties for the same misconduct. This policy seeks to discourage what is often referred to as "piling on," which Mr. Rosenstein characterized as "unfair, duplicative penalties" by different regulators. Such "piling on" can occur when, for example, a particular course of conduct is pursued by not only the DOJ but state and local law enforcement agencies and/or regulatory agencies such as the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC) or the Office of Foreign Assets Control (OFAC), and where an investigation involves conduct outside the United States, foreign regulators, such as the Financial Conduct Authority in the United Kingdom (FCA). In announcing this policy, DAG Rosenstein noted that it, like the FCPA Corporate Enforcement Policy, was "another step towards greater transparency and consistency in corporate enforcement" designed to "encourage companies to report suspected wrongdoing to law enforcement and to resolve [criminal] liability expeditiously."

Application of the FCPA Corporate Enforcement Policy in Mergers and Acquisitions

According to DAAG Miner, the application of the FCPA policy to successor entities in mergers and acquisitions represents another step in the DOJ's effort to "foster a climate in which companies are fairly and predictably treated when they report misconduct . . . to increase self-reporting and individual accountability." The policy extension is directed at encouraging "law-abiding companies with robust compliance programs" taking over "problematic companies" to "right the ship by applying strong compliance practices to the acquired company." The DOJ, Mr. Miner stated, does not "want the specter of enforcement to be a risk factor that impedes such activity by good actors, and instead cedes the field to non-compliant companies. 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 . . . that may have otherwise been expended investigating the acquired company."

Moreover, DAAG Miner emphasized that the FCPA policy will be applied to acquiring companies that uncover corrupt activities subsequent to the acquisition as well as those that detect misconduct during the due diligence process prior to the acquisition. With respect to the latter, Mr. Miner stated that the DOJ encourages acquiring companies to seek the DOJ's guidance through the FCPA Opinion Procedures before moving forward with an acquisition. "When a company relies on this procedure on the front end but later uncovers wrongdoing post-acquisition," Mr. Miner stated, the DOJ "want[s] management and the company's advisors to feel comfortable disclosing it to the Department, knowing that they will be treated fairly under the principles of the FCPA Corporate Enforcement Policy." While emphasizing that the DOJ remains focused on individual accountability and that wrongdoers will not be getting a "pass for corrupt behavior that occurred in the past in an acquired entity," Mr. Miner stated that the DOJ seeks to be viewed as a "partner" to companies uncovering corrupt activity, and "not just an adversary."

Takeaways

The DOJ's announcement that it intends to apply the FCPA Corporate Enforcement Policy to successor entities in mergers and acquisitions marks a continuation of its recent efforts to incentivize disclosure and cooperation while continuing to focus on individual accountability for wrongdoing. Successor entities, acquiring companies and investors in mergers and acquisitions should be particularly mindful of these policies when considering such transactions both before, during and following any acquisition. Robust due diligence and investigation of any potential FCPA violations should be a vital part of any acquisition.

While the statements of DOJ leadership have consistently emphasized a desire for clarity and predictability regarding the benefits of disclosure and cooperation—and the FCPA Policy's presumption of declination and commitment to recommending significant reductions to a company's penalties exposure underscore such claims—uncertainty still remains. The criteria the DOJ will use to assess whether a company's disclosure is reasonably prompt so as to trigger the presumption of declination is unclear, particularly in the case of an acquiring company that learns of past corrupt dealings following an acquisition. In addition, how the DOJ will manage requests for a pre-transaction opinion regarding the applicability of the FCPA is particularly uncertain. As DAAG Miner noted in his remarks yesterday, companies have not made use of this process often (the most recent incident of use of the FCPA Opinion Procedures is from 2014), and although Mr. Miner stated that the DOJ might "expedite" its analysis based on timing needs, if more companies take the DOJ up on its invitation, a backlog of opinion requests might necessarily result in slowing deals by responsible actors in the market, a result contrary to some of the DOJ's stated goals.