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DOJ Clarifies Expanded Scope of FCPA Corporate Enforcement Policy In Effort to Further "Partner" With Business.

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On September 27, 2018, Matthew Miner, a Deputy Assistant Attorney General in the U.S. Department of Justice's ("**DOJ**") Criminal Division, delivered a speech in which he clarified the DOJ's enforcement policies, underscored the success that existing enforcement policies have enjoyed, and emphasized that companies and their lawyers should view the DOJ "as partners, not adversaries."[1] In his role, Miner oversees the Criminal Division's Appellate and Fraud Sections, the latter of which includes the Foreign Corrupt Practices Act ("**FCPA**"), Health Care Fraud, and Securities and Financial Fraud Units.

In particular, Miner's speech: (1) announced that the DOJ's FCPA Corporate Enforcement Policy will apply to all potential wrongdoing uncovered during M&A deals, not just FCPA violations, thus seeking to incentivize companies to voluntarily self-disclose, cooperate with the DOJ, and remediate such violations; (2) highlighted that the DOJ may grant declinations under its FCPA Corporate Enforcement Policy even where "aggravating circumstances" exist; and (3) emphasized continued cooperation with foreign authorities.

A. Corporate Enforcement Policy Applies to All Wrongdoing Uncovered in the M&A Context, Not Just FCPA Violations

In November 2017, the DOJ adopted its FCPA Corporate Enforcement Policy. Under this Policy, absent aggravating circumstances, there exists a presumption that the DOJ will decline to prosecute violations of the FCPA if companies voluntarily self-disclose, fully cooperate, and timely and appropriately remediate.

In July 2018, the DOJ made clear that the Corporate Enforcement Policy applies with equal force to companies that discover wrongdoing in the M&A context. Specifically, the DOJ affirmed that it will "apply the principles contained in the FCPA Corporate Enforcement Policy to successor companies that uncover

[1] A copy of DAAG Miner's remarks are available at: https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division

wrongdoing in connection with mergers and acquisitions and thereafter disclose that wrongdoing and provide cooperation . . . ." [2]

In his speech, Miner announced that the DOJ "will also look to these principles in the context of mergers and acquisitions that uncover other types of potential wrongdoing, not just FCPA violations." Recognizing that there is often limited access to a target company's data and records during due diligence and that corporate deals move quickly, Miner explained that the DOJ wants to encourage companies that unearth wrongdoing, either pre- or post-acquisition, "to take the steps outlined in the FCPA Policy, and when they do, we want to reward them for stepping up, being transparent, and reporting and remediating the problems they inherited." This is consistent with the DOJ's announcement in March 2018 that the FCPA Policy would be considered "nonbinding guidance" in all Criminal Division corporate criminal cases, not just those involving violations of the FCPA.

B. Declination Under FCPA Corporate Enforcement Policy Possible Even With Aggravating Circumstances

There have been three declinations under the FCPA Corporate Enforcement Policy since it was implemented last November. In two of the three cases, Miner stated that the declinations were granted despite "aggravating circumstances" – the involvement of senior executives in the improper conduct. Miner emphasized that these cases make clear that the existence of aggravating circumstances "by no means preclude a declination" under the Policy. Accordingly, Miner encouraged companies to consider these cases when deciding whether to voluntarily self-disclose wrongdoing "and recognize the significant benefits they can achieve through good corporate behavior under the Policy."

Miner noted, however, that the culpable individuals were prosecuted, despite the declinations granted to the companies, which "demonstrate[s] [the DOJ's] clear commitment to holding individuals accountable for transnational corruption."

C. New Coordination Policy Grants Credit to Companies That Face Multi-Jurisdictional Investigations and Liability

Miner noted that the DOJ is continuing to see "a significant rise in global enforcement and cooperation with foreign authorities." He pointed to the DOJ's implementation of its Coordination Policy, also referred to as its "Anti-Piling On Policy," in May of this year as a result of this global trend. The past year has witnessed historic examples of such cooperation, with coordinated FCPA resolutions being reached with authorities in France and Singapore for the first

[2] We published a Client Alert about the expansion of the DOJ's policy announced in July 2018, available at: http://content.linklaters.com/pdfs/mkt/newyork/Alert%20U.S.%20DOJ%20Announces%20Application%20of%20FCPA%20Policy%20to%20Post-Merger%20Successor%20Entities.pdf

time. Notably, of the eight corporate resolutions that the DOJ's FCPA Unit has announced this year, half were coordinated with foreign authorities.

At the same time, there are examples of the "Anti-Piling On Policy" at work as well. For instance, the decision to grant one of the three FCPA declinations under the Corporate Enforcement Policy was due in part to the fact that the company in question was already under investigation by the UK's Serious Fraud Office ("**SFO**") and had agreed to accept responsibility with the SFO.

D. Conclusion

The enforcement trends highlighted in Miner's speech are encouraging, including his announcement that the FCPA Corporate Enforcement Policy applies to M&A deals that unearth misconduct beyond just FCPA violations; his noting that declinations under the FCPA Policy may be granted even in the face of "aggravating circumstances;" and his reiteration of a commitment by the DOJ to avoid "piling on" companies that face investigations and potential liabilities in multiple jurisdictions.

Although Miner's speech repeatedly emphasized that the DOJ wishes to incentivize self-disclosure and create "a culture of openness and cooperation" by appropriately rewarding companies, companies should continue to tread carefully when dealing with the DOJ. The decision whether to self-disclose misconduct remains a complex and difficult one that must be carefully weighed based on the facts and circumstances of each case. While companies should take note of the DOJ's stated policy positions in making such a determination, those policy positions should be just one factor among many that companies consider.

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