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## S&C Alerts

### **Foreign Corrupt Practices Act Alert: Deputy Assistant Attorney General Matthew Miner Announces that FCPA Corporate Enforcement Policy Will Apply to Mergers and Acquisitions**

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PRACTICES & CAPABILITIES

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FCPA & Anti-Corruption

JULY 26, 2018

During a speech delivered on July 25, 2018 at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets, Deputy Assistant Attorney General Matthew Miner, who oversees the U.S. Department of Justice's ("DOJ") Fraud Section (which includes the DOJ's Foreign Corrupt Practices Act ("FCPA") Unit), announced that successor companies that identify potential FCPA violations in connection with a merger or acquisition and disclose that conduct to the DOJ will be treated in conformance with the DOJ's FCPA Corporate Enforcement Policy (the "Policy"). The Policy, which went into effect in November 2017, created a presumption that the DOJ would decline to prosecute a company for potential FCPA violations when the company has satisfied the Policy's standards for voluntary self-disclosure, cooperation, and remediation (although the company still is responsible for paying any applicable disgorgement, forfeiture, and/or restitution), absent certain aggravating factors. (The Policy also provides that the presumption can be overcome in certain circumstances, including when the company is a recidivist or the misconduct was especially serious, e.g., where bribes were made by company executives; but even in those circumstances, companies are still eligible for a potential reduction from the fine range provided by the *United States Sentencing Guidelines*.)

Miner stated in his speech that the purpose of the approach announced Wednesday is to provide companies and their counsel a greater level of certainty in deciding whether or not to proceed with a merger or acquisition, as well as in deciding how to address any potential FCPA violations identified during the course of due diligence in connection with a merger or acquisition. Prior guidance (set out in the DOJ and Securities and Exchange Commission's ("SEC") 2012 FCPA Resource Guide) stated that companies that conduct thorough FCPA due diligence in connection with a merger or acquisition, take certain remedial steps, and disclose diligence findings of a potential FCPA violation, will receive "meaningful credit" from the DOJ and SEC, and those authorities "in appropriate circumstances . . . may consequently decline to bring enforcement actions." Miner explained that this guidance does not provide companies with sufficient certainty to enable them to make informed decisions about the reporting of violations and whether to proceed with a transaction, noting that there was a significant difference between a theoretical outcome and one that was concrete and presumptively available. Miner also noted that the DOJ is cognizant that companies sometimes face challenges in conducting comprehensive due diligence prior to a merger or

acquisition, and, therefore, companies that identify potential FCPA violations after the close of an acquisition also will be treated in accordance with the Policy. Miner encouraged companies that have identified potential FCPA concerns to take advantage of the DOJ's FCPA Opinion Procedures program—through which companies can seek the DOJ's view on whether prospective, non-hypothetical conduct would be viewed by the DOJ as legally compliant—in advance of moving forward with a merger or acquisition, noting that no company has made use of this program since 2014.

During the speech, Miner also (i) stated the DOJ continues to focus on individual accountability, highlighting that the DOJ had achieved 10 guilty pleas from individuals in foreign bribery cases in 2018; (ii) emphasized the DOJ's continued efforts to coordinate with non-U.S. authorities in corruption cases, including in connection with the recently resolved Société Générale enforcement action, as well as the DOJ's efforts to avoid duplicative fines in such cases; and (iii) noted that it was still too early to evaluate whether the Policy has been effective, but discussed the first declination issued pursuant to the Policy, in which the DOJ declined to prosecute Dunn & Bradstreet as a result of the company's satisfaction of the Policy's standards and payment of \$9 million in disgorgement to the SEC.

The approach to successor companies announced by Miner on Wednesday provides additional clarity on the options available to a potential acquiror in a merger or acquisition that identifies through due diligence conduct that may violate the FCPA. The speech does not represent a significant departure from prior DOJ practice with respect to FCPA liability in connection with mergers and acquisition, which has long been that a company generally is responsible for the FCPA-related liability of a company it merges with or acquires, but can reduce the prospect of an enforcement action if the company voluntarily discloses and remediates the misconduct and cooperates with authorities. The announcement, along with the DOJ's recommendation that companies use the Opinion Procedure program, marks a continuation of the DOJ's recent efforts—including the prior announcement of the Policy and memorialization of the Policy in the U.S. Attorneys Manual—to provide corporations with greater levels of certainty, predictability, and concrete guidance to encourage compliance and to enable companies to make informed decisions with respect to FCPA risk. Miner acknowledged the potential timing considerations relevant to these options, which can be relatively prolonged and therefore not necessarily commercially viable for a merger or corporate acquisition, but noted that the DOJ could “to a degree” expedite its analysis to address timing concerns. Companies considering the Opinion Release process should be mindful that it is complex and time-consuming.

The speech also highlights the DOJ's focus on the need for companies involved in mergers and acquisitions to conduct appropriate due diligence on anti-bribery compliance matters and the prudence of carefully evaluating the results of those inquiries and the implications for the acquiror and the resulting enterprise post-closing. Companies contemplating mergers or corporate acquisitions would be well advised to consult with counsel experienced in these matters to assist with those efforts.

