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## DOJ Commentary Underscores the Importance of Pre-Acquisition Diligence

On July 25, 2018, during remarks at a conference, the U.S. DOJ Deputy Assistant Attorney General for the Criminal Division (“DAAG”) underscored the importance of pre-acquisition Foreign Corrupt Practices Act (FCPA) diligence.<sup>1</sup> The remarks reinforced FCPA enforcement as a DOJ priority, and provided a disclosure road map for buyers who uncover FCPA-related misconduct both pre- and post-acquisition. These statements were consistent with the DOJ’s continuing efforts to provide clearer guidance and more consistent outcomes in FCPA enforcement.

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The DOJ remains committed to “fighting corruption and ensuring a level playing field for law-abiding companies” in a way that is “fair and just.” According to the DOJ official, even companies with robust compliance programs may uncover misconduct at the hands of a “few bad apples.” In the transaction context, law-abiding companies may inherit historical misconduct that their compliance program had no opportunity to discover and remediate.

Consistent with the DOJ’s efforts to create greater certainty in FCPA enforcement, this commentary sought to provide a disclosure road map for acquiring companies. The DAAG suggested that buyers that uncover FCPA misconduct pre-acquisition should consider immediately seeking guidance from the DOJ using the FCPA Opinion Procedures. Under the current FCPA Opinion Procedures, the DOJ technically has 30 days to respond to a request, although in practice the process takes much longer. The DAAG noted that the DOJ can, “to a degree, expedite [the] analysis based on timing needs[,]” but went on to say that “it sometimes makes sense to slow down to assess risks.” Notably, however, the DOJ has not issued an advisory opinion since 2014.

According to the DAAG, for misconduct identified post-acquisition, buyers that follow the steps outlined in the DOJ’s FCPA Policy will be rewarded for “stepping up, being transparent, and reporting and remediating the problems inherited.” Accordingly, post-close, successor entities that uncover historical misconduct should be mindful of the FCPA Policy’s incentives for self-disclosure, full cooperation, and timely and appropriate remediation. Companies that comply with the policy can be rewarded with significantly discounted financial penalties, up to and including a complete declination from the DOJ.

The DAAG added that where an entity receives a declination, individual wrongdoers will not receive a free “pass for corrupt behavior.” That is, even where the DOJ declines to take action against an acquired entity, the DOJ will nevertheless investigate and prosecute where appropriate individuals are responsible for carrying out or concealing the historical wrongdoing. The DAAG’s comments track with the DOJ’s ongoing focus on individual accountability. For example, this year alone, the DOJ has already announced ten individual guilty pleas in foreign bribery cases.

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<sup>1</sup> Press Release, *Deputy Assistant Attorney General Matthew S. Miner Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets* (July 25, 2018) <https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th>.

By establishing a clear enforcement framework in the mergers and acquisitions context, the DOJ is simultaneously encouraging U.S. foreign investment in high-risk jurisdictions. Indeed, the DAAG noted that incentivizing high-risk acquisitions by law-abiding companies helps the DOJ “stamp out corruption.” Law-abiding companies that conduct robust diligence, self-disclose and remediate the misconduct, and cooperate with the DOJ, free up DOJ resources.

The DAAG’s commentary also emphasizes the importance of both pre- and post-acquisition diligence. The DOJ continues to see FCPA enforcement as a collaborative process where the DOJ is viewed as a “partner, not just an adversary.” In order to make the most of a non-adversarial DOJ, companies must conduct meaningful pre- and post-acquisition diligence. If misconduct is identified, the buyer should begin remediation and weigh the options for interacting with the DOJ.

Ropes & Gray will continue to monitor the DOJ’s activities in the mergers and acquisitions space. Please reach out to any of the authors if you have more specific questions.