Debevoise & Plimpton

FCPA Update
December 2018
Volume 10
Number 5

FCPA Update

A Global Anti-Corruption Newsletter

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Mitigating Anti-Corruption Risk in M&A Transactions: Successor Liability and Beyond

Although anti-corruption risk can kill deals, that need not be the case. For sure, companies often prefer not to buy corruption problems. But at least for some, that understandable preference may run only to *unknown* corruption problems and those not properly *valued* in determining a transaction's price.

Amidst the aggressive enforcement of anti-corruption laws in the United States and elsewhere, related regulatory risks can run backwards and forwards from a transaction. An acquirer may face successor liability for a target's pre-closing misdeeds, even if unknown to the acquiring company before closing. Likewise, an acquiring company may face regulatory exposure for future potential violations, including for misconduct that continues from before closing.

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In arguably the worst case scenario, at least from a commercial perspective, failure to detect a corruption problem before signing may result in an acquirer overpaying for a target. Not surprisingly, a business's true value may suffer considerably when suddenly operated in compliance with applicable laws, contrary to historic practices. Where identifying misconduct before signing, an acquirer also can attempt to shift some or all financial responsibility to the seller and pursue other strategies to limit future risks.

From remarks by Deputy Assistant Attorney General Matthew Miner on July 25, 2018, acquirers can take some comfort that DOJ expressly is not looking to deter companies from acquiring other companies with past corruption issues. DA AG Miner stated that DOJ is aware of the "many benefits [when] law-abiding companies with robust compliance programs . . . enter high-risk markets . . . or take over otherwise problematic companies."[1] He added that DOJ wishes "to encourage this sort of activity" and 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."[2]

At the same time, DOJ is not offering a free pass or any broad assurance of leniency in the transactional context. DA AG Miner explained that DOJ will apply its Corporate Enforcement Policy[3] (the "Policy") to successor companies that uncover wrongdoing in connection with mergers and acquisitions and thereafter disclose the wrongdoing and cooperate.[4] This signals DOJ's intention to offer such acquirers a declination with disgorgement, if complying with the Policy, absent aggravating factors.[5] However, that form of resolution is far less attractive to a successor company than a true declination (*i.e.*, not charging a company or seeking any settlement), along the lines suggested by DOJ and the SEC in their 2012 *Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "*Resource Guide*").[6]

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1. U.S. Dep't of Justice, "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) ("July 2018 Miner Remarks"), *available at* www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th.
2. *Id.*
3. U.S. Dep't of Justice, Justice Manual § 9-47.120, "FCPA Corporate Enforcement Policy," *available at* www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977.
4. July 2018 Miner Remarks.
5. In subsequent remarks, DA AG Miner noted that DOJ had issued three declinations under the Policy, two of which involved senior executives engaging in the improper conduct. According to Miner, these cases "make clear that although aggravating circumstances can overcome the presumption for a declination, such circumstances by no means preclude a declination." U.S. Dep't of Justice, "Deputy Assistant Attorney General Matthew S. Miner of the Justice Department's Criminal Division Delivers Remarks at the 5th Annual GIR New York Live Event" (Sept. 27, 2018) ("September 2018 Miner Remarks"), *available at* www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division.
6. U.S. Dep't of Justice & U.S. Securities & Exch. Comm., *Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 28 (Nov. 2012) (the "Resource Guide"), *available at* www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

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For these reasons, particularly when a target company operates in jurisdictions posing high corruption risk, anti-corruption due diligence is an important component of prudent transaction planning. The level of potential corruption risk and the findings of related due diligence can have a cascading impact on a transaction. This includes consideration of the optimal level of due diligence; contractual terms ranging from representations and warranties to indemnity provisions; and ultimately the price.

This article discusses corruption-related risks of mergers and acquisitions, including potential liability for pre-transaction misconduct, ongoing misconduct, or misconduct with respect to the transaction. After describing those risks and recent illustrative enforcement actions, the article provides a primer on mitigating such risks, including through pre-transaction risk assessment and due diligence, contractual protections, and post-transaction compliance measures, which should include remediation of any issues identified in diligence or afterwards.

"The level of potential corruption risk and the findings of related due diligence can have a cascading effect on a transaction. This includes consideration of the optimal level of due diligence; contractual terms ranging from representations and warranties to indemnity provisions; and ultimately the price."

I. Corruption Risks Associated with M&A Transactions

Corruption risks in the M&A context generally fall into three categories: (1) pre-acquisition conduct by the target that may result in successor liability (distinct from the predecessor's liability); (2) conduct by the target that continues or recurs post-closing; and (3) conduct related to the transaction itself.

A. Pre-Acquisition Conduct and Successor Liability

1. Prior Guidance Regarding Successor Liability

Successor liability arises when an acquirer inherits direct liability for an acquired entity's pre-acquisition conduct. DOJ and the SEC most directly addressed successor liability in the *Resource Guide*:

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> As a general legal matter, when a company merges with or acquires another company, the successor company assumes the predecessor company's liabilities. . . . Whether successor liability applies to a particular corporate transaction depends on the facts and the applicable state, federal, and foreign law. Successor liability does not, however, create liability where none existed before. For example, if an issuer were to acquire a foreign company that was not previously subject to the FCPA's jurisdiction, the mere acquisition of that foreign company would not retroactively create FCPA liability for the acquiring issuer.[7]

DOJ and the SEC emphasized that they often have decided not to take enforcement action against companies that voluntarily disclosed and remediated wrongdoing uncovered in transactional diligence, and "have only taken action against successor companies in limited circumstances, generally in cases involving egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition."[8]

As noted above, the *Resource Guide* also expressly accepted the obvious legal conclusion that, if a company was not previously subject to the FCPA, the acquisition of that company by an entity that itself is subject to the FCPA does not retroactively create FCPA liability for pre-acquisition conduct.[9] More recently, in Opinion Release 14-02, DOJ reiterated this principle, but in a manner that detracted from the admirable clarity of its articulation in the *Resource Guide*.

In the Opinion Release, regarding a specific contemplated transaction, DOJ stated that because "none of the potentially improper [conduct discovered in due diligence] was subject to the jurisdiction of the United States," DOJ did not intend to take any enforcement action.[10] DOJ also took note of the representation by the requesting company that "no contracts of other assets [of the target] were determined to have been acquired through bribery . . . ."[11] If the pre-acquisition conduct was not subject to the FCPA, that representation should have been irrelevant. By citing the representation, DOJ seemed to suggest that receiving benefits from preexisting

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7. *Id.* at 28.
8. *Id.*
9. Although FCPA liability for pre-existing conduct is not created by an acquisition, liability for past corrupt practices may exist under local law.
10. U.S. Dep't of Justice, Opinion Release 14-02 (Nov. 7, 2014), *available at* www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/11/14/14-02.pdf.
11. *Id.*

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corrupt contracts could give rise to liability for an acquirer even where the acquired entity was not previously subject to the FCPA (*i.e.*, the so-called tainted-contract theory of liability).[12]

While some uncertainty persists about what conduct falls within the FCPA's reach, especially after Second Circuit's recent decision in *United States v. Hoskins*,[13] the acquisition of a non-U.S. company doing business entirely in its home jurisdiction rarely should raise true successor liability issues.

Of particular significance, as noted above, the *Resource Guide* explained how U.S. authorities, except in limited circumstances, have declined to charge successor companies for their predecessors' pre-closing violations of the FCPA. This type of traditional declination is meaningful, in that authorities technically have a lawful basis to charge a successor company but nevertheless may choose not to. A declination under the Policy is far less attractive, involving a public resolution, recitation of adverse facts, and payment of disgorgement.

2. Illustrative Enforcement Actions

Most cases implicating the doctrine of successor liability involve mergers of two international companies – and often are captioned with the names of both the predecessor and successor.

For example, Pfizer's August 2012 settlement with DOJ and the SEC encompassed FCPA violations by its subsidiary Wyeth that primarily predated Pfizer's acquisition of Wyeth in 2009. Although the conduct in question extended past the acquisition, Pfizer promptly conducted post-closing due diligence and, once the conduct was identified, took steps to halt and remediate the wrongdoing and voluntarily disclose it to the authorities.[14] Pfizer and Wyeth agreed to pay over $45 million to the SEC in disgorgement of profits, and Pfizer paid an additional $15 million penalty to DOJ. Wyeth's subsidiaries had bribed government doctors in China, Indonesia, and Pakistan with cash, cell phones, and travel incentives in exchange for recommending the company's products, and had made an improper payment to a Saudi Arabian customs official to release a shipment. In the settlement, Pfizer received credit for its diligent, prompt post-closing remediation, compliance enhancements, and self-disclosure.

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12. Sean Hecker, Andrew M. Levine, Bruce E. Yannett, Philip Rohlik, and Steven S. Michaels, "Opinion Release 14-02: Revisiting Successor Liability" FCPA Update, Vol. 6, No. 4 (Nov. 2014), *available at* www.debevoise.com/~/media/files/insights/publications/2014/11/fcpa_update_nov_2014.pdf.

13. No. 16-1010-cr, 2018 WL 4038192 (2d Cir. Aug. 24, 2018). *See also* Kara Brockmeyer, Colby A. Smith, Bruce E. Yannett, Philip Rohlik, Jil Simon, and Anne M. Croslow, "Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery" FCPA Update, Vol. 10, No. 1 (Aug. 2018), *available at* www.debevoise.com/insights/publications/2018/08/20180830-fcpa-update-august-2018.

14. U.S. Dep't of Justice, "Pfizer H.C.P. Corp. Agrees to Pay $15 Million Penalty to Resolve Foreign Bribery Investigation" (Aug. 7, 2012), *available at* www.justice.gov/opa/pr/pfizer-hcp-corp-agrees-pay-15-million-penalty-resolve-foreign-bribery-investigation; U.S. Sec. & Exch. Comm., "SEC Charges Pfizer with FCPA Violations" (Aug. 7, 2012), *available at* www.sec.gov/news/press-release/2012-2012-152htm.

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More recently, Cadbury Limited and Mondelez International settled with the SEC in January 2017 for $13 million for violating the internal controls and books-and-records provisions of the FCPA.[15] Mondelez had acquired Cadbury and its subsidiaries, including Cadbury India Limited, in February 2010. Also in 2010, Cadbury India paid an agent to obtain licenses and approvals for a proposed plant from Indian government officials, and did not conduct appropriate due diligence or adequately monitor the agent. The SEC order found that Cadbury India's books and records "did not accurately and fairly reflect the nature of the services" provided by the agent and that Cadbury "did not devise and maintain an adequate system of internal accounting controls sufficient to provide reasonable assurances . . . to detect and prevent payments that may be used for improper or unauthorized purposes."[16]

Another noteworthy example is the case of Watts Water Technologies. In 2011, Watts Water resolved with the SEC pre- and post-closing violations of the FCPA carried out by one of its subsidiaries in China.[17] The subsidiary had made corrupt payments to influence design institutes to recommend its water valve products to state-owned customers and to create design specifications that favored its products.[18] Although Watts acquired the subsidiary in 2005, the SEC stated that it "failed to implement adequate internal controls to address the potential FCPA problems" and "failed to conduct adequate FCPA training for its employees for its employees in China until July 2009."[19]

The subsidiary's improper payments were facilitated by a sales incentive policy created prior to acquisition that stated that "all sales-related expenses, including travel, meals, entertainment, and payment of 'consulting fees' to design institutes, would be borne by the [subsidiary's] employees out of their commissions, which were equal to 7% to 7.5% of the contract price."[20] The policy also stated that the sales personnel could utilize their commissions to pay the design institutes up to 3% of the total contract amount. The following year, Watts Water sued the law firm it had hired to conduct due diligence for the acquisition, claiming that the firm failed to inform it about the sales policy, and, if it had known, it would not have purchased the subsidiary.[21]

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15. *In the Matter of Cadbury Limited and Mondelez International, Inc.*, Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing Cease-and-Desist Orders and a Civil Penalty, Securities Exchange Act Release No. 79753 (Jan. 6, 2017), *available at* www.sec.gov/litigation/admin/2017/34-79753.pdf.
16. *Id.*
17. *In the Matter of Watts Water Technologies, Inc. and Leesen Chang*, Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing Cease-and-Desist Orders and a Civil Penalty, Securities Exchange Act Release No. 79753 (Jan. 6, 2017), *available at* www.sec.gov/litigation/admin/2011/34-65555.pdf.
18. *Id.*
19. *Id.*
20. *Id.*
21. Aruna Viswanatha & Nate Raymond, "Watts Water Sues Law Firm Over FCPA Inquiry" (Reuters, June 14, 2012), *available at* www.reuters.com/article/fcpa-malpractice/watts-water-sues-law-firm-over-fcpa-inquiry-idUSL1E8HEGJX20120614.

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3. Guidance on Protecting Against Successor Liability

To protect against potential successor liability for pre-transaction misconduct by an acquired entity, the SEC and DOJ have long encouraged due diligence, remediation, and integration as part of an effective compliance program, as well as potentially self-reporting to authorities. Guidance from the enforcement agencies on this subject has taken several forms.

"To protect against potential successor liability for pre-transaction misconduct by an acquired entity, the SEC and DOJ have long encouraged due diligence, remediation, and integration . . . as well as potentially self-reporting to authorities."

In 2008, DOJ issued Opinion Release 08-02, commonly known as the "Halliburton Opinion."[22] Halliburton had sought an opinion in the context of a transaction in which its ability to conduct due diligence was limited by English law and contractual arrangements.[23] DOJ opined that it did not intend to take any action relating to pre-acquisition conduct by the target based on undertakings by Halliburton to implement a compliance program at the target, train the target's employees, and remediate past activities (including by terminating or renegotiating relevant contracts) pursuant to a strict timetable. Subsequent enforcement actions involving potential successor liability have replaced the specific timetable of Opinion Release 08-02 with the requirement that the relevant steps be taken "as soon as practicable" post-acquisition.[24]

The SEC and DOJ summarized their guidance in the *Resource Guide*, encouraging companies to "conduct pre-acquisition due diligence and improve compliance programs and internal controls after acquisition." The *Resource Guide* added that "a successor company's voluntary disclosure, appropriate due diligence, and implementation of an effective compliance program may also decrease the likelihood of an enforcement action regarding an acquired company's post-acquisition conduct when pre-acquisition due diligence is not possible."[25] By repeatedly citing Opinion

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22. U.S. Dep't of Justice, Opinion Procedure Release No. 08-02 (June 13, 2008), *available at* www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0802.pdf.
23. *Id.*
24. *See* Hecker, et al, *supra* n.12.
25. Resource Guide at 30.

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Release 08-02, the *Resource Guide* made clear that the Halliburton approach also remained viable, even if a rigid timetable would not always be expected or feasible.[26]

The result of the guidance described above has been at least a perception of something close to a "safe harbor" for acquirers that follow it. For example, in 2016, the SEC opted not to take enforcement action against Harris Corporation in the case of Jun Ping Zhang.[27] Harris Corporation acquired the Chinese company for which Zhang had worked at the time his misconduct took place.[28] Although Harris was able to conduct only limited due diligence pre-acquisition, the SEC praised its "immediate and significant [post-acquisition] steps . . . [including] self-policing that led to the discovery of Ping's misconduct . . . prompt-self-reporting, thorough remediation, and exemplary cooperation with the SEC's investigation."[29] The government declined to bring any enforcement action against or any require disgorgement from Harris Corporation.

4. Deputy Assistant Attorney General Miner's Speech

DA AG Miner's comments reflect DOJ's expectation that companies conduct thorough anti-corruption due diligence on targets of a merger or acquisition, ideally pre-closely and, if not, promptly thereafter. Because an acquiring company may have limited access to the target's data before closing, however, the Policy's presumptions also apply if the successor uncovers wrongdoing post-acquisition.[30]

DA AG Miner expanded on these pronouncements in a speech at the 5th Annual Global Investigations Review conference on September 27, 2018.[31] With respect to wrongdoing uncovered during mergers and acquisitions, Miner said that DOJ will look to the Policy for "other types of potential wrongdoing, not just FCPA violations." Recognizing that "corporate deals often move quickly," Miner explained that "if an acquiring company unearths wrongdoing subsequent to the acquisition, we want to encourage its leadership 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." He acknowledged the benefits to DOJ of encouraging acquirers to self-report: "When an acquiring company conducts robust due diligence that unearths wrongdoing, reports that conduct to the Department, and

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26. *Id.* at 30-32 & n. 198.
27. U.S. Sec. & Exch. Comm., "SEC Charges Former Information Technology Executive with FCPA Violations; Former Employer Not Charged Due to Cooperation with SEC" (Admin. Proceeding File No. 3-17535, Sept. 12, 2016), *available at* www.sec.gov/litigation/admin/2016/34-78825.pdf.
28. *Id.*
29. *Id.*
30. July 2018 Miner Remarks.
31. September 2018 Miner Remarks.

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engages in remedial measures . . . it frees up resources for the Department that may have otherwise been expended investigating the acquired company."[32]

When asked whether a company needed to self-report within a set time post-acquisition to benefit from the Policy, Miner clarified that there was no "fixed time period."[33] He also stated that the acquiring company could provide legitimate reasons for why it took a certain amount of time to report to DOJ, but "if you delay on coming forward then that's a different matter."[34]

Relatedly, Miner has encouraged companies to contact DOJ through its FCPA Opinion Procedure for guidance if they encounter corruption issues during the diligence process, a step not many companies have taken.[35] Indeed, the last Opinion Procedure Release was issued more than four years ago, in November 2014. Given the very tight timelines associated with most transactions, it remains to be seen whether DOJ would be able to respond rapidly enough to make this a viable option.

While recognizing the intended positive effect of DA AG Miner's recent speeches, the announcement that DOJ intends to apply the Policy to successor companies in mergers and acquisitions seems unlikely to change materially how companies think about such transactions. This is especially so given prior assurances in the *Resource Guide*. If anything, as formalized in the Justice Manual, the Policy seems naturally to apply to successor companies that self-report, cooperate, and remediate. It is therefore unclear whether DA AG Miner's announcement will amount to much more than a formalization of preexisting practice. As the Policy indicated – and past enforcement activity has demonstrated – DOJ now expects to obtain disgorgement when it declines under the Policy to bring charges.

B. Conduct that Continues Post-Acquisition

The possibility that DA AG Miner's recent comments signal that the Policy will be applied to post-acquisition conduct highlights the most significant category of corruption risk in M&A transactions: pre-existing conduct that continues post-acquisition. When such conduct occurs, the acquirer is more clearly responsible and less able to protect itself against liability by means of due diligence, contractual protections, or post-closing remediation.

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32. *Id.*
33. Kelly Swanson, "DOJ official clarifies when companies can secure declination, expands M&A leniency," Global Investigations Review (Sept. 27, 2018).
34. *Id.*
35. U.S. Dep't of Justice, Opinion Procedure Releases, *available at* www.justice.gov/criminal-fraud/opinion-procedure-releases.

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For example, in 2011, Johnson & Johnson agreed to resolve criminal charges related to FCPA violations by paying a $21.4 million penalty to DOJ and $48.6 million in disgorgement and prejudgment interest to the SEC.[36] The misconduct had been carried out by DePuy, Inc., a wholly-owned subsidiary that Johnson & Johnson had acquired in November 1998. According to the SEC, from at least 1998 until early 2006, DePuy's employees and agents paid bribes to public doctors in Greece who selected DePuy's implants for their patients, paid bribes to doctors and public hospital administrators in Poland to award them tenders, paid bribes to public doctors in Romania to prescribe Johnson & Johnson pharmaceutical products, and paid kickbacks to Iraq to obtain contracts under the United Nations Oil-for-Food Programme.[37] A criminal information was filed in connection with the DPA, and DOJ praised Johnson & Johnson's "timely voluntary disclosure," "thorough and wide-ranging self-investigation," "extraordinary cooperation," and "extensive remedial efforts."[38] DOJ also noted that due to these factors, Johnson & Johnson had received a reduction in its criminal fine under the U.S. Sentencing Guidelines.

"[T]he announcement that DOJ intends to apply the [Corporate Enforcement] Policy to successor companies in mergers and acquisitions seems unlikely to change materially how companies think about such transactions."

Similarly, Johnson Controls settled with the SEC in July 2016 for over $14 million regarding claims that a wholly-owned Chinese subsidiary had used "sham vendors" to make improper payments in China to employees of government-owned shipyards, ship-owners, and others, to obtain and retain business.[39] Johnson Controls had acquired the subsidiary in 2005 as part of its acquisition of York International. The SEC stated that, "[d]espite JCI's efforts to remediate China Marine," the conduct

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36. U.S. Dep't of Justice, "Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations" (Apr. 8, 2011), *available at* www.justice.gov/opa/pr/johnson-johnson-agrees-pay-214-million-criminal-penalty-resolve-foreign-corrupt-practices-act; U.S. Sec. & Exch. Comm., "SEC Charges Johnson & Johnson With Foreign Bribery" (Apr. 7, 2011), *available at* www.sec.gov/news/press/2011/2011-87.htm.
37. *U.S. Sec. & Exch. Comm. v. Johnson & Johnson*, Complaint (D.D.C. Apr. 8, 2011), *available at* www.sec.gov/litigation/complaints/2011/comp21922.pdf.
38. U.S. Dep't of Justice, "Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations," *supra* n.36.
39. U.S. Sec. & Exch. Comm., "Global HVAC Provider Settles FCPA Charges" (Admin. Proceeding File No. 3-17337, July 11, 2016), *available at* www.sec.gov/litigation/admin/2016/34-78287-s.pdf.

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continued from 2007 to 2013.[40] Although Johnson Controls limited the use of agents post-acquisition, its "internal controls over vendor payments were less rigorous," and China Marine operated with very little oversight.[41] Shortly before the SEC settlement, DOJ publicly issued a declination letter, stating that it would not take any action in light of Johnson Controls' voluntary self-disclosure, full cooperation, enhancements to its compliance program and internal accounting controls, full remediation, and disgorgement of profits to the SEC.[42]

More recently, Zimmer Biomet agreed in January 2017 to pay more than $30 million to resolve parallel SEC and DOJ investigations involving charges that even after Zimmer Holdings acquired Biomet in 2015, the acquired business continued to "interact and improperly record transactions with a known prohibited distributor" in Brazil and "used a third-party customs broker to pay bribes to Mexican customs officials" on behalf of Biomet.[43] Zimmer Biomet's 2017 settlement arose from DOJ's determination that Biomet had breached its obligations under its 2012 DPA, and that Zimmer, as the acquirer, had inherited these obligations.[44] According to DOJ, despite being aware of prior corruption-related misconduct in Brazil and Mexico, Biomet "knowingly failed to implement and maintain an adequate system of internal accounting controls designed to detect and prevent bribery by its agents and business partners."[45] DOJ also stated that Biomet failed to conduct appropriate due diligence on the Brazilian distributor and third party associates in Mexico.

Since the issuance of the Policy, U.S. enforcement agencies have continued to hold companies accountable for failures of post-acquisition integration. In March 2018, Canada-based Kinross Gold Corporation settled with the SEC for just under $1 million for FCPA violations by two of its African subsidiaries.[46] The SEC's order stated that Kinross Gold acquired the subsidiaries in 2010 and "acknowledged that [one company] lacked an anti-corruption compliance program and associated internal accounting controls."[47] Despite multiple internal audits that flagged widespread

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40. *Id.*
41. *Id.*
42. U.S. Dep't of Justice, Letter re: Johnson Controls, Inc. (June 21, 2016), *available at* www.justice.gov/criminal-fraud/file/874566/download.
43. U.S. Sec. & Exch. Comm., "Biomet Charged With Repeating FCPA Violations" (Jan. 12, 2017), *available at* www.sec.gov/news/pressrelease/2017-8.html.
44. Status Report ¶ 3, *U.S. v. Biomet, Inc.*, No. 12-cr-00080-RBW (D.D.C. June 6, 2016).
45. *U.S. v. Zimmer Biomet Holdings, Inc.*, Superseding Information, Cr. No. 12-CR-00080 (D.D.C. Jan. 12, 2017), *available at* www.justice.gov/opa/press-release/file/925171/download.
46. U.S. Sec. & Exch. Comm., "Kinross Gold Charged With FCPA Violations" (Mar. 26, 2018), *available at* www.sec.gov/news/press-release/2018-47.
47. *In the Matter of Kinross Gold Corporation*, Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act Release No. 82946 (Mar. 26, 2018), *available at* www.sec.gov/litigation/admin/2018/34-82946.pdf.

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deficiencies, Kinross Gold took three years to implement appropriate accounting controls.[48] From September 2010 through at least 2014, employees "paid vendors and consultants, often in connection with government interactions, without reasonable assurances that transactions were consistent with their stated purpose or the prohibition against making improper payments to government officials."[49] Kinross also awarded a logistics contract to a company preferred by government officials in Mauritania. Kinross Gold stated that DOJ had issued a declination.[50]

Also this year, Beam Suntory Inc. agreed to pay more than $8 million to resolve SEC claims of FCPA violations by the company's Indian subsidiary, which had been acquired in 2006.[51] According to the SEC, Beam's Indian subsidiary used third-party sales promoters and distributors to make illicit payments to government employees from 2006 through 2012.[52] The subsidiary reimbursed the third parties for these payments through the use of "fabricated or inflated invoices" which were then consolidated into Beam's books and records. The order also found that Beam "failed to maintain a sufficient system of internal accounting controls."[53] The SEC press release and corresponding order did not reference any parallel action by DOJ.

C. Conduct in Connection with the Transaction

The final category of risk relates to the acquirer's own behavior in sourcing or completing the transaction.

For example, Och-Ziff's 2016 deferred prosecution agreement related to payments to an African intermediary in order to source various investment deals in sub-Sarahan Africa.[54] Completing a cross-border transaction almost always involves obtaining regulatory approvals with respect to compliance with competition law, foreign investment law, or otherwise. This requires contact with foreign government officials and thereby increases the risk of corrupt activity.

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48. *Id*. at 4.
49. *Id*. at 2.
50. Joel Schectman, "Kinross Gold Settles U.S. Charges Related to Bribe Prevention in Africa" (Mar. 26, 2018), available at www.reuters.com/article/us-kinross-sec/kinross-gold-settles-u-s-charges-related-to-bribe-prevention-in-africa-idUSKBN1H22DW.
51. U.S. Sec. & Exch. Comm., "SEC Charges Beam Suntory Inc. With FCPA Violations" (July 2, 2018), *available at* www.sec.gov/enforce/34-83575-s.
52. *In the Matter of Beam Inc., n/k/a Beam Suntory Inc.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act Release No. 83575 (July 2, 2018), *available at* www.sec.gov/litigation/admin/2018/34-83575.pdf.
53. *Id*. at 2.
54. *U.S. v. Och-Ziff Capital Management Group LLC*, Deferred Prosecution Agreement, Cr. No. 16-516 (E.D.N.Y. Sept. 29, 2016), *available at* www.justice.gov/opa/file/899306/download.

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II. Addressing Anti-Corruption Risks

A. Varieties of M&A Transactions

Corruption-related risks may be addressed in two phases of an M&A transaction: (i) pre-acquisition, by focusing on risk assessment, due diligence, contractual protections, and (in some circumstances) pre-closing remediation; and (ii) post-acquisition, by focusing on supplemental due diligence and post-closing remediation and integration. Each transaction is different, of course, and the nature and scope of these steps in each phase will differ based on business realities, resources, and other factors.

How and when to deal with risk is largely dependent on the size, timing, and purpose of a transaction. The value of a transaction and its inherent risk profile typically influence the resources an acquirer devotes to pre- and post-acquisition procedures addressing anti-corruption risk. Similarly, where an investment results in a non-controlling stake, an acquirer may be limited in what anti-corruption steps can be taken post-acquisition, which highlights the importance of obtaining relevant contractual protections in such situations. While a minority investment may result in less legal risk to the investor under the FCPA and other extraterritorial anti-corruption laws, the risk that an enforcement action will impair the value of the investment remains acute. An accurate assessment of anti-corruption risk is important for determining to what extent those potential liabilities undercut the attractiveness of a contemplated transaction.

As DA AG Miner noted in his recent comments,[55] the timing of a transaction is often influenced by business realities beyond the control of a potential acquirer. The scope of due diligence may be limited by applicable law, including securities laws where the target is listed on an exchange. While friendly strategic transactions, including mergers, often involve significant pre-acquisition due diligence and remediation, other types of transactions may move too quickly or may be subject to other limitations on the ability to assess and protect against corruption risk. Where multiple potential acquirers seek to bid for a target, negotiations may center on price and result in a "race to the bottom," in which the bidder least interested in due diligence effectively sets the schedule and access for every other bidder.[56]

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55. July 2018 Miner Remarks.

56. Alternatively, but less common, a target's desire to attract or keep additional bidders in order to maintain competitive negotiations on price can increase the scope of due diligence.

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Finally, companies have different purposes in M&A transactions, which may include:

- Entering a foreign market;
- Expanding existing market share;
- Expanding into different but related product markets (or exploiting existing synergies);
- Acquiring technologies or intellectual property with the potential for current or future synergies; or
- Seeking investment returns.

Transactions undertaken for the first two purposes lend themselves more easily to integration, expanding what can be done in the post-acquisition phase. Transactions undertaken for the latter two purposes may involve sound business reasons for continuing to operate the target as a separate company, often retaining local management and resulting in a different post-acquisition calculus. The third purpose – expanding into different but related product markets – may land somewhere in between. As a result, the purpose of the transaction and the envisioned post-completion relationship between the acquirer and target should be taken into account throughout the transaction.

"Failure to conduct thorough due diligence, in addition to exposing the acquirer to legal risk, may prove to be enormously costly."

These considerations also play into how extensive anti-corruption procedures can be with regard to a particular acquisition. The procedures described in Opinion Release 14-02 and below are most applicable to control deals and significant minority acquisitions (*e.g.*, 49/51 joint ventures). Smaller minority acquisitions should include, to the extent possible, a requirement that the target adopt an effective anti-corruption compliance program[57] and sufficient due diligence and other procedures to appropriately price and protect the value of the investment.

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57. U.S. Sentencing Guidelines at § 8B2.1(a)(2) ("Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct").

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B. Pre-Acquisition Phase

1. Risk Assessment

Anti-corruption risk should form part of the initial assessment of any potential M&A transaction. Among other things, an initial risk assessment informs the scope of due diligence and negotiating position with respect to compliance-related provisions in transaction documents.

A basic tool in measuring the corruption risk associated with relevant jurisdictions is Transparency International's Corruption Perceptions Index ("CPI").[58] While useful, the CPI is based on perceptions and therefore susceptible to overstating or misunderstanding actual corruption risks. The nature of the ranking also can suggest that some jurisdictions are materially safer than others when, in fact, the differences in their scores are minor. Additionally, given that the CPI ranks corruption perception by country, it can often miss significant regional differences *within* countries (for example, in many countries, more remote areas tend to be associated with greater corruption, while the opposite might be true in others).

It is therefore necessary to supplement the CPI with an overview of basic knowledge about the target: its size, ownership structure, industry, locations of operations, and the types of corrupt business practices prevalent in those locations. For example, in many jurisdictions, a publicly traded company is likely to have better corporate governance than a private entity. Conversely, companies in certain industries likely have more elaborate contacts with foreign officials and generally face greater anti-corruption risk.

2. Due Diligence

Anti-corruption due diligence is also a key component of the M&A process. Issues uncovered during due diligence not only impact the transaction's price, but also highlight areas that the acquirer must consider and remediate in order to reduce the future risk of liability. The scope of due diligence may need to be negotiated with the target, and right-sizing due diligence depends on the particulars of the transaction, including the purpose of the transaction, the risks presented, and the ability to conduct additional due diligence in subsequent phases or post-closing.

For example, anti-corruption due diligence may include:

- A background check on the target and potentially its owners or key members of management;

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58. Transparency International, Corruption Perceptions Index, *available at* www.transparency.org/research/cpi/overview.

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- A review and evaluation of the target's existing compliance program (if any), both on paper and (to the extent possible) in practice;
- An assessment of touchpoints with "foreign officials" (recognizing how the U.S. enforcement agencies broadly define that term);
- A review of any payments or other benefits of any kind offered or provided to "foreign officials;"
- An analysis of third-party relationships – such as sales agents, distributors, and consultants – especially with regard to interactions with "foreign officials;" and
- A review of any known or alleged corruption-related issues.

The thoroughness of diligence will depend on the time available and size of the investment, among other factors. Procedures can include a basic (to more bespoke) questionnaire, management discussions (of varying number and depth), on-the-ground interviews, and possibly testing by a forensic accounting firm of a sampling of potentially relevant transactions to assess their legitimacy and support.

Even where there is little time for or availability of due diligence, basic due diligence ideally should provide enough information to determine the importance and scope of contractual representations, warranties, and other terms; identify areas for pre-closing and post-closing remediation, if possible; define the basic scope of post-acquisition diligence; and inform negotiations related to price and indemnities.

In assessing due diligence findings in the international M&A context, it is important to determine whether the target is already subject to the FCPA and other enforced anti-corruption laws. If so, it is more likely to have a compliance program and more likely to be receptive to broader diligence (the absence of either, without a good explanation, may be a red flag). If the target is subject to the FCPA, that circumstance also may inform any decision to self-report potential violations that are uncovered in diligence. In transactions potentially subject to U.S. jurisdiction, there also should be consideration of whether to communicate with U.S. regulators about the allocation of responsibility for past matters to the sellers.

If the target operates in a high-risk jurisdiction and is not subject to the FCPA, then the acquirer should be prepared to encounter corruption-related issues – or at least allegations of such misconduct – during diligence. Indeed, the absence of any such indication of improper conduct, while operating in a high-risk area, could be a red flag in itself. Moreover, even where a target is not subject to the FCPA, a lender financing a given transaction may impose such anti-corruption compliance obligations, complicating the due diligence and related analysis.

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Failure to conduct thorough due diligence, in addition to exposing the acquirer to legal risk, may prove to be enormously costly. For example, in 2007, eLandia acquired Latin Node Inc., and only discovered post-acquisition that Latin Node had been making improper payments to government officials in Honduras and Yemen. Although eLandia disclosed the wrongdoing to DOJ and cooperated, Latin Node ultimately pled guilty to FCPA violations – and eLandia shut down Latin Node and wrote off its investment.[59]

3. Contracting

Transaction documentation often is heavily negotiated. It is rare that a purchaser will have sufficient bargaining power to obtain all the rights listed below. To the extent possible, however, the deal documents should include:

- Anti-corruption representations and warranties on behalf of the sellers and the target, preferably referring to the FCPA, the UK Bribery Act, and local law and/or the relevant statutory prohibitions. The less thorough the due diligence, the more thorough these clauses arguably should be (though certainly not a replacement for reliable due diligence);

"[Q]uestions remain – including under what circumstances today DOJ will exercise its discretion and decline to take any action, in contrast to a public declination with disgorgement."

- For non-control deals, anti-corruption covenants as to future behavior, as well as information and audit rights. Additional safeguards to considerer for non-control deals could include veto rights over key decisions and rights to appoint executives in charge of certain core functions (*e.g.*, the general counsel or chief financial officer);
- For non-control deals, undertakings to develop and implement a compliance program and rights to undertake a post-completion compliance audit;

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59. U.S. Dep't of Justice, "Latin Node Inc. Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million Criminal Fine" (Apr. 7, 2009), *available at* www.justice.gov/opa/pr/latin-node-inc-pleads-guilty-foreign-corrupt-practices-act-violation-and-agrees-pay-2-million.

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- Provisions relating to pre-closing rights, should any corrupt activity be found, such as termination rights;
- Exceptions from confidentiality clauses permitting self-reporting (if possible);
- Indemnity provisions (if possible); and
- Exit or put rights in the event of post-closing discovery of serious corruption issues (if possible).

The case of Abbott Laboratories and Alere illustrates the importance of both robust due diligence and well-defined contractual protections, including termination rights. In February 2016, Abbott announced a $5.8 billion acquisition of Alere. The following month, Alere disclosed that it had received subpoenas from DOJ and the SEC relating to potential FCPA violations. Although due diligence was ongoing, Abbott expressed concerns about the FCPA inquiry and delays in Alere's public filings, and sought to terminate its acquisition agreement. Alere refused, leading to contentious litigation before the parties ultimately agreed to proceed with the transaction – for $5.3 billion, a reduction of $500 million from the originally-agreed purchase price.

4. Pre-Closing Remediation

Occasionally, as in the situation addressed by Opinion Release 14-02, issues are discovered during due diligence, and it is possible to remediate these issues prior to closing, or even to carve out parts of the acquisition tainted by corruption. Pre-closing remediation can decrease dramatically the likelihood that known misconduct recurs after a transaction closes, after which the buyer is even more clearly exposed.

C. Post-Transaction Steps

As DA AG Miner recognized in his recent speech, deal dynamics often limit the time and ability for acquirers to address corruption risks pre-closing. It is sometimes easier for acquirers in control deals to complete anti-corruption procedures post-closing, though attention should be paid in contracting to whether the seller will have any ongoing obligations, including with respect to the cost of such steps.

The implementation of a robust compliance program at the target is an important step post-closing, and DOJ highlighted certain elements it deems essential to such a program in Opinion Release 14-02. In particular, DOJ encouraged companies engaging in mergers and acquisitions to "implement the acquiring company's code of conduct and anti-corruption policies as quickly as practicable," to "conduct FCPA and other relevant training for the acquired entity's directors and employees,

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as well as third-party agents and partners," and to "conduct an FCPA-specific audit of the acquired entity as quickly as practicable."[60] In the Watts Water, Johnson Controls, Kinross Gold, and Beam Suntory, Inc. settlements, DOJ criticized acquirers or new entities for failing to implement some of these components.

In non-control deals, especially where due diligence is limited, the acquirer has less leverage with respect to the implementation of a compliance program, but nevertheless should attempt to obtain undertakings from the target to engage in certain compliance-related steps. Similarly, where the acquirer is only buying part of a company rather than the entire business, the acquisition might not include legal and compliance personnel and resources. In such circumstances, the acquirer should be prepared to hire new personnel and invest in compliance resources promptly post-closing. Without adequate personnel and resources, the acquirer will be unable to take any of the other steps described above.

Depending on the extent of pre-acquisition due diligence, acquirers also should consider undertaking a post-acquisition compliance review as soon as practicable. Notably, the situation described in Opinion Release 14-02 included particularly thorough due diligence and did not include an undertaking for a post-acquisition audit,[61] suggesting that there is some discretion in whether and how extensive such review should be. In determining the extent of such a review, acquirers also should consider whether the target previously was subject to GAAP, IFRS, or similar audits, and how soon the target will be integrated into acquirer's own audit program. Acquirers should document their decision-making as to the timing of such a review or audit.

Perhaps most importantly, an acquirer should rapidly take steps to remediate any wrongdoing uncovered in pre- or post-closing diligence. In doing so, an acquirer must consider whether to self-report such issues to the relevant enforcement agencies, which always is a fact-based determination warranting careful consideration and consultation with counsel.

Conclusion

Comments by DA AG Matthew Miner have once again focused attention on corruption risks in M&A transactions, especially pre-acquisition measures necessary to address such risks. The Corporate Enforcement Policy and DA AG Miner's remarks helpfully seek to provide greater certainty and transparency in DOJ's charging decisions. However, questions remain – including under what

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60. U.S. Dep't of Justice, Opinion Release 14-02, *supra* n. 10.

61. *Id.*

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circumstances today DOJ will exercise its discretion and decline to take any action, in contrast to a public declination with disgorgement.

While transactions between issuers or domestic concerns certainly carry the risk of inherited liability, investors in local companies in developing jurisdictions face other problems. Additional clarity or written guidance regarding how to address and remediate pre-acquisition misconduct, discovered in due diligence or a post-acquisition audit, is still needed. Such clarity should incentivize companies to improve business practices in high-risk jurisdictions. For example, when will self-reporting lead to expensive internal investigations and enforcement actions against the acquired company or a public "declination with disgorgement?" Will self-reporting lead to a longer grace period for self-reporting situations where conduct continues in spite of remediation and the integration of the target into the acquirer's compliance program? Answers to these questions could incentivize investment, while silence on them does the opposite.

Understanding corruption risk at a target is ultimately a commercial proposition. Even apart from legal risks under the FCPA and other laws, corrupt conduct might help a company win a contract, but rarely makes for truly profitable business. It can be challenging to extinguish past practices post-acquisition, and exceedingly difficult to do so without knowing the particular nature and scope of such practices. Moreover, in different ways, recent events in Brazil, China, Malaysia, and elsewhere also demonstrate that investments built on corruption find themselves on weak foundations as economies develop.

The success of the FCPA in this millennium has rested on its aggressive enforcement and the threat of significant fines. The challenge for DOJ, which recent comments by officials such as DA AG Miner address partially but not completely, is maintaining that credible threat of enforcement without discouraging investment in difficult markets by companies trying in good faith to do the right thing.

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DOJ Revises Yates Memo to Provide More Flexibility in Corporate Investigations

On November 29, 2018, Deputy Attorney General Rod J. Rosenstein announced revisions to the principles of individual accountability articulated in the Yates Memo and later incorporated into the Corporate Enforcement Policy.[1] In contrast to the Yates Memo's formulation, this updated policy gives prosecutors more flexibility in assessing cooperation credit in corporate investigations.

Speaking before the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act, DAG Rosenstein outlined changes to the enforcement policy issued in 2015 in a memorandum by then-Deputy Attorney General Sally Yates on "Individual Accountability for Corporate Wrongdoing," commonly referred to as the "Yates Memo."[2] At this same conference a year ago, DAG Rosenstein announced DOJ's Corporate Enforcement Policy, which refined the pilot program and made it permanent.[3] Like the Corporate Enforcement Policy, the changes to the Yates Memo are better viewed as a refinement of existing policy rather than a wholesale change. Reflecting a more practical approach, the new policy no longer requires companies to identify all individuals involved to get cooperation credit, but only those "substantially involved in or responsible for" the misconduct.[4]

The policies stated in the Yates Memo appear to have been, at least in part, a reaction to the treatment of corporate leadership in the wake of the 2008 financial crisis that many perceived as too lenient.[5] Under the Yates Memo, to be eligible for any cooperation credit, a company had to identify all culpable individuals and provide all relevant factual information about their misconduct, regardless of their position or status at the company.

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1. U.S. Dep't of Justice, "Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act" (Nov. 29, 2018), *available at* www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0 (hereinafter "Rosenstein Speech").
2. U.S. Dep't of Justice, Deputy Attorney General Sally Q. Yates, Memorandum on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), *available at* www.justice.gov/archives/dag/file/769036/download (hereinafter "Yates Memo").
3. *See* Debevoise & Plimpton LLP Client Update, "DOJ Announces a Revised FCPA Corporate Enforcement Policy" (Nov. 30, 2017), *available at* www.debevoise.com/~/media/files/insights/publications/2017/11/20171130%20doj_announces_revised_fcpa_policy.pdf.
4. Justice Manual 9-28.700 – The Value of Cooperation.
5. *See* Debevoise & Plimpton LLP Client Update, "The 'Yates Memorandum': Has DOJ Really Changed Its Approach to White Collar Criminal Investigations and Individual Prosecutions?" (Sept. 15, 2015), *available at* www.debevoise.com/insights/publications/2015/09/the-yates-memorandum-has-doj-really-changed.

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Although the Yates Memo placed an emphasis on identifying and holding accountable *any* culpable individual, for a company under DOJ scrutiny, this raised the specter of a long and costly internal investigation in an effort to identify every employee with potential culpability. As the DAG noted in his speech, the misconduct at issue in many large corporate investigations may involve the routine activities of many employees at various levels. Identifying every employee who played any role in the conduct is not only inefficient and time-consuming, but also not useful for DOJ, since employees who played minor roles are unlikely to be criminally prosecuted. This is particularly true in FCPA investigations, where many of the lower-level employees at far-flung subsidiaries may be beyond the reach of U.S. enforcement authorities.[6]

The revised policy makes clear that DOJ should not delay investigations "merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted."[7] Instead, companies seeking cooperation credit are required to identify only those individuals who are "substantially involved in or responsible for" the misconduct. The revised policy further provides that if, despite good faith efforts, companies are unable to identify all relevant individuals or provide complete factual information about their conduct, they may still be eligible for cooperation credit.

For companies, this raises the welcome prospect that DOJ will not insist on investigating every last employee's low-level conduct, but will instead allow the company to focus on identifying the main wrongdoers. This may encourage more targeted, less costly investigations, and the potential for early resolution where wrongdoing can be attributed to a limited class of "bad actors." Indeed, the DAG encouraged companies that want to cooperate in exchange for credit to have "full and frank discussions" with prosecutors regarding how to gather the relevant facts.[8]

However, the new policy does not provide clear guidance as to what misconduct qualifies as "substantial involvement." Companies also should be aware that DOJ may now scrutinize high-ranking individuals even more carefully, while also providing some flexibility about how far down the chain companies must go. Finally, the revised policy explicitly states that "absent extraordinary circumstances" (which are not defined), a corporate resolution should not protect individuals from criminal liability.[9]

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6. *See United States v. Hoskins*, 902 F.3d 68, 97 (2d Cir. 2018); Kara Brockmeyer, Colby A. Smith, Bruce E. Yannett, Philip Rohlik, Jil Simon, and Anne M. Croslow, "Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery" FCPA Update, Vol. 10, No. 1 (Aug. 2018), *available at* www.debevoise.com/insights/publications/2018/08/20180830-fcpa-update-august-2018.
7. Rosenstein Speech.
8. *Id.*
9. Justice Manual 9-28.210 – Focus on Individual Wrongdoers.

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The revised policy allows prosecutors in civil cases to exercise even more discretion, including to provide cooperation credit in more instances, negotiate civil releases for certain individuals, and consider an individual's ability to pay. Although companies hoping to receive any cooperation credit must disclose misconduct by "members of senior management or the board of directors," and those hoping to receive the maximum credit must identify all individuals who are substantially involved, the policy clearly weighs in favor of greater speed and efficiency of civil investigations over identifying every culpable individual.

"For companies, this [change in policy] raises the welcome prospect that DOJ will not insist on investigating every last employee's low-level conduct, but will instead allow the company to focus on identifying the main wrongdoers."

Another noteworthy change is the greater discretion that DOJ attorneys have when negotiating civil settlements. DOJ now permits its attorneys to negotiate civil releases in corporate settlement agreements for individuals in certain circumstances, subject to departmental approval. This is a departure from the Yates Memo, which allowed settlements to provide individuals with protection from civil liability only in "extraordinary circumstances."

Lastly, DOJ's new policy allows greater consideration of an individual's ability to pay in connection with DOJ's determination of whether to pursue a civil case. DAG Rosenstein contended that this shift would spare DOJ attorneys from litigating cases unlikely to yield any benefit.[10] Rosenstein argued that these "common sense reforms" would provide DOJ attorneys with the discretion to more efficiently achieve their mission.[11]

While DAG Rosenstein's announced policy represents a more practical approach than the one adopted by the Yates memorandum, it still presents challenges for companies, particularly in the FCPA space. For example, the policy does not provide much guidance on how companies can comply with DOJ's demand for the

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10. Rosenstein Speech.
11. *Id.*

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production of information on individuals "substantially involved in or responsible for" misconduct with strict data privacy laws like GDPR that have come into force in Europe and elsewhere, stating only that the "burden of explaining the restrictions" is on the company.[12] It remains to be seen how willing DOJ will be to give credit where companies cannot provide requested information on foreign employees due to increasingly strict foreign data privacy laws. It will also be interesting to see how the Second Circuit's decision in *Hoskins* rejecting the use of conspiracy theory may impact on which individuals prosecutors want information.

Overall, the changes in enforcement policy described by DAG Rosenstein appear positive. They should result in narrower, more targeted, and more efficient investigations led by DOJ attorneys with greater discretion to manage each investigation's scope, as the facts and circumstances require. The new policy also should empower companies to conduct internal investigations focused on determining root cause and key culpability, and may encourage companies to come in earlier if they have assurance that DOJ will not send them back to "boil the ocean" and identify every last culpable individual. Nevertlehess, the lack of clear guidance on what constitutes "substantial involvement" on the part of potentially culpable individuals, and the challenges in applying DOJ policies to foreign corporations and employees still leaves open the potential for investigations that pit companies against their own executives in an effort to be seen as "cooperative" by DOJ.

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12. The Justice Manual states: "[T]here may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is legally prohibited from disclosing it to the government. Under such circumstances, the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor." JM 9-28.700.

FCPA Update

FCPA Update is a publication of
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