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DOJ Provides Important Guidance Regarding FCPA Issues in M&A Context

In a recent [speech](#), a senior Department of Justice official highlighted two tools that companies involved in mergers and acquisitions can use to mitigate FCPA enforcement risk when they encounter potential corruption issues at target entities. This announcement marks the latest step in the DOJ's multi-year effort to promote fairness and predictability by "codifying" enforcement practices and incentivizing self-reporting, an initiative that included the adoption of the DOJ's [FCPA Corporate Enforcement Policy](#) in December.

First, Deputy Assistant Attorney General Matthew Miner clarified that the FCPA Corporate Enforcement Policy applies when an acquiror unearths FCPA violations in connection with an acquisition. As summarized in our [prior memorandum](#), the Policy establishes a presumption that the DOJ will decline prosecution of companies that voluntarily and promptly self-disclose FCPA misconduct, make proactive efforts to cooperate, adopt remediation programs, and disgorge ill-gotten profits.

Second, DAAG Miner invited acquirors that encounter FCPA issues during the pre-acquisition due diligence process to seek guidance via the DOJ's [FCPA Opinion Procedure](#), a long-standing but seldom-used program through which the DOJ provides advance FCPA guidance to parties. Acknowledging that the opinion program has lain dormant since 2014, DAAG Miner suggested that the DOJ can, "to a degree," expedite its analysis based on transactional timing needs.

These DOJ policies can, in appropriate cases, offer companies useful tools to manage potential FCPA risks arising from contemplated or completed mergers or acquisitions. However, given the rapid timelines under which such transactions typically proceed, as well as confidentiality or other objections that target companies may raise, we expect that the solicitation of pre-acquisition opinions will remain the exception, although this process may be more useful when issues are discovered between signing and closing. The availability of the FCPA Corporate Enforcement Policy to an acquiror underscores the continued importance of careful pre-acquisition due diligence, thoughtful post-transaction compliance integration, consideration of self-reporting if appropriate, and prompt remediation of identified corruption issues. To that end, the DOJ's assurance that the Policy applies in full to such situations is a welcome clarification of the DOJ's approach in this area.

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