

## [Securities Regulation Daily Wrap Up, ENFORCEMENT—DOJ official discusses FCPA Corporate Enforcement Policy, \(Jul. 25, 2018\)](#)

Securities Regulation Daily Wrap Up

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Deputy Assistant Attorney General Matthew S. Miner provided insights regarding the Department of Justice's current approach to enforcement of the Foreign Corrupt Practices Act (FCPA). In particular, Miner discussed the DOJ's approach to self-disclosure and cooperation under the current administration, while also highlighting some areas involving mergers and where the Department could potentially improve its efforts. Miner's [remarks](#) came before the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets.

**FCPA Policy.** Miner noted that last year the DOJ revised its guidelines regarding FCPA enforcement by making its FCPA self-disclosure pilot program permanent. Now enshrined in the U.S. Attorneys Manual as the "[FCPA Corporate Enforcement Policy](#)," this policy provides that companies that promptly report misconduct, fully cooperate with the DOJ, and enact effective remedial measures after misconduct is detected will be presumed eligible for a declination of prosecution, subject to disgorgement of ill-gotten gains. In reaching the first corporate declination under the FCPA Policy earlier this year, the DOJ declined prosecution against Dunn & Bradstreet because the company engaged in responsible corporate conduct after discovering misconduct in connection with hiring practices by its acquired subsidiaries in China. The DOJ also gave the company credit for its disgorgement as part of a \$9 million payment in a related SEC administrative proceeding.

Miner said that the credit for disgorgement to the SEC points to another recent policy change under the Trump Administration, a change that seeks to avoid a perceived practice of "piling on" by the various enforcement agencies in corporate settlements by imposing duplicative fines and other financial penalties. Miner said that a perfect example of this policy, which applies across the Department, is the matter involving [LIBOR manipulation by Societe Generale](#). In the first ever coordinated resolution with French authorities, the DOJ credited 50 percent of the fine to French regulators in connection with the FCPA portion of the resolution.

In an effort to better inform the public, companies, and compliance professionals, Miner said that the Department has also been making declination letters public for cases that are resolved under the FCPA Corporate Enforcement Policy. In the case of Dunn & Bradstreet, some of the factors that led to the declination of prosecution included the following:

- The company identified the misconduct and promptly and voluntarily self-disclosed the conduct to the Department.
- The company undertook a thorough internal investigation.
- The company fully cooperated in the matter, including identifying all individuals involved in or responsible for the misconduct.
- The company engaged in full remediation, including terminating the employment of 11 individuals involved in the misconduct in China.
- The company made disgorgement to the SEC.

**M&A enforcement.** Miner said that one area in which the DOJ would like to do better, however, involves mergers and acquisitions, particularly activity related to high-risk industries and markets. Miner observed that the DOJ/SEC [Resource Guide to the FCPA](#), which was released in 2012, provides some guidance by recognizing that in the past the DOJ and SEC have declined to take action where companies voluntarily disclosed and remediated and cooperated with the government. Miner also noted, however, that the guide's language that the DOJ that "may" decline to bring enforcement actions against companies that follow certain best practices still

provides a significant sticking point for corporate management when deciding whether to proceed with a potential merger or acquisition. "There is a big difference between a theoretical outcome and one that is concrete and presumptively available," Miner stated.

Miner acknowledged that there are many benefits when law-abiding companies with robust compliance programs enter high-risk markets or, in appropriate cases, take over otherwise problematic companies. The acquiring company can not only help to uncover wrongdoing, but also be able to "right the ship" by applying strong compliance practices to the target company. Accordingly, Miner said that the DOJ intends to apply the principles contained in the FCPA Corporate Enforcement Policy to successor companies that uncover wrongdoing in connection with mergers and acquisitions and thereafter disclose that wrongdoing and provide cooperation, consistent with the terms of the policy.

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