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Deputy Assistant Attorney General Matthew S. Miner Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets

Good morning and thank you Marc Nichols for that gracious introduction, and thanks to both you and Jeannine D'Amico Lemker for co-hosting this important event.

It is truly a pleasure to be here with all of you as part of the ACI's 9th Global Forum on Anti-Corruption Compliance in High Risk Markets.

I've always admired ACI's mission and programs. Just last year, while still in private practice, I participated in the ACI's 34th International Conference on the Foreign Corrupt Practices Act (FCPA). While I wear a different hat today, it is wonderful to be back.

In fact, today is particularly meaningful for me, as this marks my first time at an event like this since joining the Department of Justice as a Deputy Assistant Attorney General in the Criminal Division.

In my current role, I am tasked with overseeing both the Fraud Section, which houses the FCPA Unit, as well as the Appellate Section.

And, of course, we recently marked a particularly important milestone for the Criminal Division, as our newest Assistant Attorney General (AAG), Brian Benczkowski, was confirmed and took the reins of our Division just a few short days ago.

Under Brian's leadership, we will continue the Division's commitment to the rule of law, along with our efforts to ensure fairness and consistency in our investigations and resolutions, particularly as it relates to corporate enforcement and compliance.

Before I move on to my substantive remarks, let me say a word about Principal Deputy Assistant Attorney General John Cronan, who did an amazing job managing the Division as our Acting AAG since last year, overseeing many key developments, including the largest healthcare fraud takedown in the Department's long history.

Today, I plan to focus on our efforts to investigate and stamp out global corruption, with a particular focus on implications for mergers and acquisitions.

As I think we can all agree, corruption is a virus that saps scarce resources and undermines public trust.

Corruption also harms law-abiding companies by tilting the playing field in favor of companies who are willing to break the rules to get ahead.

As our Attorney General and Deputy Attorney General have both made abundantly clear, fighting corruption and ensuring a level playing field for law-abiding companies remains a significant priority for the Department.

At the same time, we are striving to make sure that our robust approach to fighting corruption, and corporate enforcement generally, is done in a way that is also fair and just.

We at the Department fully recognize that even within otherwise good companies, ones with robust compliance programs and strong cultures of compliance, there can exist one or a few bad apples. Similarly, we understand that through acquisitions, otherwise law-abiding companies can sometimes inherit problems that are not of their own making.

These are some of the reasons why we continue to hold individual wrongdoers responsible for corporate criminal conduct, demonstrating our continued focus on individual accountability.

In this regard, we've announced guilty pleas by 10 individuals in foreign bribery cases so far this year.

In the sprawling and ever-growing investigation and prosecution of corruption at Venezuela's state-owned oil company, PDVSA, we have announced charges against five additional former foreign officials this year, and we announced the 12th guilty plea in the case just two weeks ago.

Moreover, criminal prosecutions of corporations continue where misconduct was particularly serious or pervasive, but at the same time, we are working to avoid imposing excessive corporate penalties that harm innocent shareholders, employees, and other stakeholders.

On the FCPA corporate front, we've resolved five corporate FCPA cases this year, resulting in $512 million in corporate U.S. criminal fines, penalties, and forfeiture.

Among these resolutions was the matter involving Societe Generale, the first ever coordinated resolution with French authorities. This case marks a continuation of our efforts to work more closely with our foreign counterparts, both in terms of investigations and as it relates to our resolutions.

And we are striving to give credit where credit is due.

For example, in the FCPA resolution with TLI, the U.S. nuclear transportation company, the company received more lenient treatment due to its significant cooperation and remediation.

On the individual prosecutions front, the Department has secured guilty pleas by the company's former co-President and the foreign official who received the bribes, and has indicted the other co-President.

While resolutions like these are important, we have also been making great strides in the way we are approaching FCPA and other corporate enforcement matters.

As you all know, last year we revised the Department's guidelines with regard to FCPA enforcement by making what was previously the FCPA self-disclosure pilot program permanent.

This change enshrines our approach to FCPA enforcement in the U.S. Attorneys Manual as the FCPA Corporate Enforcement Policy.

Since its roll out, Department leadership has spoken extensively on the Policy, so I'm not going to spend much time on it, except to point out how the Policy furthers our commitment to rewarding companies that try to do the right thing.

This means companies that promptly report misconduct, fully cooperate with the Department, 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.

The Policy also includes incentives for companies that fail to promptly self-disclose, but otherwise meet the Policy's cooperation and remediation terms.

While it is still early to gauge the full effectiveness of the Policy, we were pleased to reach the first corporate declination under the FCPA Policy earlier this year in declining prosecution against Dunn & Bradstreet.

In that case, the company engaged in responsible corporate conduct after discovering misconduct in connection with hiring practices by its acquired subsidiaries in China. Because the company satisfied the rigorous requirements of the Policy, the company received a declination and the Department gave the company credit for its disgorgement as part of a $9 million payment in a related SEC administrative proceeding.

Credit for disgorgement to the SEC points to another recent policy change under this Administration – this one involving a perceived practice of "piling on" by the various enforcement agencies in corporate settlements by imposing duplicative fines and other financial penalties.

Importantly, this new policy for greater coordination and to avoid "piling on" is now enshrined in the U.S. Attorneys Manual, and applies across the Department.

A perfect example of putting the anti-piling on policy into practice is the resolution I mentioned involving Societe Generale.

In that case, the Department credited 50 percent of the fine to French authorities in connection with the FCPA portion of the resolution.

Moreover, to better inform the public, companies and compliance professionals, we are making declination letters public for cases that are resolved under the FCPA Corporate Enforcement Policy, as we did in connection with the pilot program.

In the case of Dunn & Bradstreet, some of the factors that led to the declination include:

- the fact that the company identified the misconduct and promptly and voluntary self-disclosed the conduct to the Department;
- the thorough internal investigation undertaken by the company;
- its full cooperation in the matter, including identifying all individuals involved in or responsible for the misconduct, providing the Department all facts relating to that misconduct, making current and former employees available for interviews, and translating foreign language documents to English;
- enhancements to its compliance program and its internal accounting controls;
- full remediation, including terminating the employment of 11 individuals involved in the misconduct in China, including an officer of the China subsidiary and other senior employees of one subsidiary, and disciplining other employees by reducing bonuses, reducing salaries, lowering performance reviews, and formally reprimanding them;
- and disgorgement to the SEC.

As a result, the company avoided criminal sanctions.

From my experience as a defense attorney, I think it is fair to say this is a just resolution for the company.

I know firsthand the difficult decisions that management must make when they uncover misconduct.

Senior management and boards of directors have to weigh many factors when deciding how to respond to misconduct, and whether to self-report.

In the past, many of these decisions were made in a relative vacuum in the sense that no one could predict in any concrete way how the Department would respond. While the facts of every case will be different, and will be the primary drivers as to the outcome, we are doing what we can to give clarity in terms of how companies will be treated.

Because companies are rational actors, driven by market and financial factors, it was often an impediment to decision-making not to know what consequences a company might face if it chose to self-report and cooperate with the government.

The Department's new policies and revised approach to FCPA and corporate enforcement are purposely designed to speak to well-functioning, good corporate actors and inspire rationale decision-making in favor of greater reporting and cooperation. We hope to incentivize companies to invest in effective compliance programs and robust control systems to prevent misconduct and, in the event of a detected violation, to take full advantage of our enforcement approach.

By fostering a climate in which companies are fairly and predictably treated when they report misconduct, we hope to increase self-reporting and individual accountability — an outcome that is beneficial both for companies and the Department.

While we have made great strides in the past year and a half relating to the Department's approach to corporate enforcement, and the FCPA in particular, one area where we would like to do better is with regard to mergers and acquisitions, particularly when such activity relates to high-risk industries and market.

Currently, the DoJ/SEC Resource Guide to the FCPA, which was released in 2012, provides some guidance on this. In particular, the Guide recognizes that in the past the Department and SEC have declined to take action where companies voluntarily disclosed and remediated, and cooperated with the government.

The Guide also notes 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."

Furthermore, after laying out several M&A best practices, the Guide states that the "DOJ . . . will give meaningful credit to companies who undertake these actions, and, in appropriate circumstances, DOJ . . . may consequently decline to bring enforcement actions."

While these policies are sound, I know from experience that "may" decline is a significant sticking point for corporate management when deciding whether and how 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.

At the Department, we know that there are many benefits when law-abiding companies with robust compliance programs are the ones to enter high-risk markets or, in appropriate cases, take over otherwise problematic companies.

Not only can the acquiring company help to uncover wrongdoing, but more importantly the acquiring company is in a position to right the ship by applying strong compliance practices to the acquired company.

We want to encourage this sort of activity. We certainly don't 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. At bottom, it makes good economic sense and helps stamp out corruption when the Department adopts policies that foster greater corporate compliance.

When an acquiring company conducts robust due diligence that unearths wrongdoing, reports that conduct to the Department, and engages in remedial measures, including extending already robust compliance to the acquired company, it frees up resources for the Department that may have otherwise been expended investigating the acquired company.

These resources can then be directed to other cases, not only in the FCPA context, but also to other areas such as opioid enforcement, human trafficking, and crimes impacting vulnerable victims, like children and the elderly.

For these reasons, I want to make clear that we intend 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.

We believe this approach provides companies and their advisors greater certainty when deciding whether to go forward with a foreign acquisition or merger, as well as in determining how to approach wrongdoing discovered subsequent to a deal.

We are fully cognizant that in some instances an acquiring company has limited access to a target company's data and records, perhaps even more so when the target company is in a high risk jurisdiction.

In those instances, 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, accordingly for stepping up, being transparent, and reporting and remediating the problems they inherited.

Similarly, when an acquiring company encounters corruption issues during the due diligence process, we would encourage it to come to the Department for guidance through our FCPA Opinion Procedures before moving forward with an acquisition. Although it may take a little more time – and we can, to a degree, expedite our analysis based on timing needs – it sometimes makes sense to slow down to assess risks. In particular with high risk mergers and acquisitions, let me repeat the famous line from the English playwright, William Congreve: "Married in haste, we can repent at leisure."

On the Fraud Section's FCPA website, we currently post Opinion Procedure Releases going back to 1993. But not enough companies are taking advantage of this process. I've recently reviewed the list, and the most recent incident of use is from 2014. That shouldn't be the case. But for purposes of today, that release is illustrative of the value of engaging in the opinion process.

In that case, a multinational company headquartered in the U.S. sought an opinion on whether the Department would bring an enforcement action against it if it acquired a foreign consumer products company. The acquiring company conducted pre-acquisition due diligence on the target and uncovered evidence of apparent improper payments. The acquirer took pre-closing steps to remediate the target's anti-corruption issues, and anticipated fully integrating the target into its compliance and reporting structure within one year of closing.

While the opinion recognized that there was no U.S. nexus to the conduct, which would have precluded prosecution, in any event, the opinion also pointed to the fact that no contracts or assets acquired through bribery would remain in operation post-acquisition, and that no financial benefit would be derived from such contracts. Based on these facts, the opinion concluded that the Department would not take any action against the acquiring company.

In our view, the opinion process is a tremendous resource and we want to encourage greater use of it going forward.

Moreover, when a company relies on this procedure on the front end, but later uncovers wrongdoing post-acquisition, we want management and the company's advisors to feel comfortable disclosing it to the Department, knowing that they will be treated fairly under the principles of the FCPA Corporate Enforcement Policy.

This is not to say that wrongdoers will be getting a pass for corrupt behavior that occurred in the past in an acquired entity. Far from it. The Department continues to focus on individual accountability, and those responsible for past wrongdoing or the concealment of wrongdoing will continue to be investigated and prosecuted.

As advisors and compliance professionals, you are on the front lines of detecting and preventing corruption and other misconduct.

You are at tasked with advising your companies and your clients to ensure that businesses operate in compliance with the law. As such, you are often put in the position of evaluating risk in time-sensitive transactions.

In that role, one thing I hope you will take away from my comments and those of my colleagues is that the Department of Justice should be viewed as a partner, not just an adversary.

When business and industry work with the Department, rather than against it, our public institutions and our country are stronger for it.

With that, I am happy to take a few questions, as time allows.

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