

M&A Could Stall With Justice Dept.-Sought Disclosures, Attorneys Say

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News Story

- DOJ encourages companies to disclose potential corruption in high-risk foreign M&A targets
- Voluntary disclosure could stall M&A deals and add increased scrutiny to a merger, attorneys say

By Victoria Graham

(Bloomberg Law) --

U.S. companies in the midst of high-risk foreign dealmaking could delay or jeopardize time-sensitive transactions if they do as the Justice Department asks and disclose potential bribery or corruption at their target companies, attorneys told Bloomberg Law.

Companies acquiring foreign firms that may have engaged in corruption and bribery schemes should notify the department, Matthew Miner, deputy assistant attorney general of the DOJ's Criminal Division, said July 25. He said the acquiring firms should use a formal procedure seeking DOJ's opinion on whether the government would seek a formal investigation about possible Foreign Corrupt Practices Act violations. Companies are required to disclose non-hypothetical details about the conduct under this process.

The last time a company took advantage of an opinion procedure was in 2014. Miner's request that companies use it, without further assurances, is a tough ask, said Kevin Muhlendorf, partner at Wiley Rein LLP in Washington and former assistant chief in the fraud section of DOJ's criminal division.

"I think people are going to be naturally cautious in disclosing in a rapidly evolving situation, like M&A due diligence, things that could slow down the deal or require them to do more in exchange for the DOJ's approval on a deal," he told Bloomberg Law.

Adding Clarity

Miner's remarks at the American Conference Institute's global anticorruption conference clarified the department's relatively new FCPA policy that encourages companies to self-report bribery schemes to receive discounted fines or even forgo prosecution altogether.

Miner, in his first public remarks since joining the DOJ, said the policy's perks also apply to U.S. companies that engage in high-risk foreign mergers as long as they report their acquired firm's illegal activities as soon as they are known.

An acquiring U.S. firm might stumble on a corruption scheme while conducting due diligence required to complete its merger. In those situations, Miner said the acquirer should disclose the target company's conduct and seek a DOJ opinion.

"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," Miner said.

Time Crunch

In the high-stakes environment of foreign acquisitions, companies seek to be as efficient as possible, which means seeking a DOJ opinion could lengthen the acquisition process, James Gatta and Derek Cohen, white collar crime defense attorneys at Goodwin Procter LLP, told Bloomberg Law in a joint email.

It would be a valuable tool if DOJ enforcers can hasten the response as Miner said they would, and companies would be more inclined to use it, Gatta and Cohen said.

Muhlendorf said he expects that the DOJ would move quickly, especially the first time a company involved in a foreign merger comes to it with a question about possible illegal bribery.

"I think the first one that the DOJ will process will be done expeditiously to make a point," he said. "It's not a hollow promise. The DOJ will try."

If companies take the DOJ up on its offer and don't receive a response for months, that would truly hinder corporate cooperation, Muhlendorf added.

Case by Case

A company can't predict a specific case outcome because each opinion sought from the DOJ is evaluated on a case-by-case basis, said Matthew Alexander, a partner in Mayer Brown LLP's global anticorruption, FCPA, and white collar crime and defense compliance practice group.

Still, he applauded DOJ's outreach to companies engaged in foreign M&A. "It's a positive step toward the goal to get more clarity and certainty to businesses and to the market," he told Bloomberg Law.

Companies disclosing information could potentially incite a full-blown FCPA investigation. A company that seeks a DOJ opinion and then chooses to close the deal without government sign-off would significantly increase its risk of harsher penalties and shareholder suits, Gatta and Cohen said.

"Companies will always struggle with whether to disclose," Muhlendorf said. "The government has been better on giving guidance, but DOJ still has a lot of necessary discretion."

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