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FCPA RISKS IN M&A TRANSACTIONS

In 2019, the DOJ updated its FCPA Corporate Enforcement Policy to clarify that there will be a presumption of declination where a company uncovers misconduct in connection with a merger or acquisition, and voluntarily self-discloses the misconduct and otherwise takes action consistent with the Policy. The authors discuss this “tactical shift” by the DOJ.

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The U.S. Department of Justice (“DOJ”) provided updated guidance in 2019 for companies considering acquisitions involving potential violations of the Foreign Corrupt Practices Act (“FCPA”).¹ DOJ’s updates to the FCPA Corporate Enforcement Policy (the “Policy”) provide increased incentives for purchasers to disclose any potential FCPA violations to the government that they identify in their due diligence of the target. In return for a voluntary self-disclosure, DOJ has made it clear that there will be the presumption of a declination for the acquiring entity, protecting it from the successor liability it would otherwise inherit. The revised Policy, first updated in March and later confirmed by Deputy Assistant Attorney General Matthew Miner in remarks in September 2019, represents somewhat of a tactical shift by DOJ in its approach to FCPA enforcement in connection with M&A transactions. The promise of a presumption of a declination could succeed in helping risk-averse companies get comfortable with higher-risk transactions and, from DOJ’s perspective, getting the government more information sooner. How the changes to the Policy will actually play out is still unknown, though Landec Corporation’s recent disclosure to DOJ and the Securities and Exchange Commission of pre-

acquisition misconduct related to its 2018 purchase of Yucatan Foods is a case to watch.²

CHANGES TO THE FCPA CORPORATE ENFORCEMENT POLICY

In March 2019, DOJ updated its Policy to clarify that there will be the presumption of a declination for an acquiring company that self-reports potential FCPA violations uncovered in due diligence, a change intended to give purchasers the confidence to go after acquisitions in higher-risk markets.³ A major objective of DOJ’s anti-corruption efforts has been and continues to be to leverage good corporate actors with robust compliance programs. As Deputy Assistant Attorney General Miner commented in 2018:

At the Department, we know that there are many benefits when law-abiding companies

¹ 15 U.S.C. §§ 78dd-1 et seq.

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² Dylan Tokar, *Food Company Reports Bribery, Environmental Issues to U.S. Authorities*, WALL ST. J. (Jan. 7, 2020, 5:28 PM), <https://www.wsj.com/articles/food-company-reports-bribery-environmental-issues-to-u-s-authorities-11578436099>.

³ U.S. Dep’t of Justice, U.S. Attorneys’ Manual § 9-47.120 (2019).