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DOJ Revises FCPA Corporate Enforcement Policy
美国司法部修正《反海外腐败法》之公司执法政策

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In March 2019, the U.S. Department of Justice introduced several changes to the Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy ("the Policy"). The Policy, originally incorporated into the Justice Manual in November 2017, outlines the Department's position on mitigation credit that companies may receive for voluntary self-disclosure, full cooperation, and timely and appropriate remediation in FCPA matters. Since 2018, the Criminal Division of DOJ has been using the Policy as guidance outside of the FCPA context.

2019 年 3 月，美国司法部对《反海外腐败法》（"FCPA"）之公司执法政策（"政策"）作出几项修正。公司执法政策于 2017 年 11 月被纳入《司法手册》，其对司法部因公司基于自愿自行披露、充分合作和及时适当整改《反海外腐败法》所涉及情况所可能获得的减轻处罚的立场进行概述。自 2018 年以来，美国司法部刑事司将该政策视为《美国反海外腐败法》法案之外的指引。

Most of the changes to the Policy formalize previously announced guidance or reflect recent Department practices. Two of the changes to the Department's written position on remediation and cooperation are particularly notable:

该政策的主要修正表现在正式确立司法部之前公布的指导方针，拟或对司法部的近期执法实践予以体现。值得引起注意的是，司法部对整改和合作方面所持的书面立场存在以下两处变化。

- First, in order to be eligible to receive full credit for timely and appropriate remediation, companies are required to implement "appropriate guidance and controls" on employees' use of personal communications and ephemeral messaging systems. This revision walks back the Department's previous position that full remediation credit required a prohibition on the use of "software that generates but does not appropriately retain business records or communications."

  一、为获得及时和适当整改的所有奖励点数，公司须对员工个人通讯和及时短信系统采取"适当的指导和控制"措施。该修正再次重申司法部的立场，即获得所有整改奖励点数的条件为禁止使用 "可产生业务记录或通讯但却无法对其进行适当保留记录的软件"。

- Second, the revised Policy establishes a presumption of a declination for a company in a merger or acquisition transaction where the company voluntarily discloses misconduct uncovered in pre-acquisition due diligence or post-acquisition integration, as long as the company meets certain other requirements outlined in the Policy. This revision formalizes a practice DOJ announced in July 2018.

二、对于在合并或收购交易中自愿披露收购前尽职调查或收购后整合中所发现的不当行为的公司，若其满足政策中所列举的某些要求，修正后的政策将赋予一项减轻推定。此修正的意义在于司法部将 2018 年 7 月发布的执法实践予以制度化。

In addition, the Policy reflects a previously announced position on the disclosure of individual involvement in misconduct. As Deputy Attorney General Rod Rosenstein announced in November 2018, companies are only required to identify individuals "substantially involved in or responsible for the misconduct," instead of "all individuals involved in or responsible for the misconduct," in order to receive cooperation credit. In recent comments, Deputy Assistant Attorney General Matthew Miner further clarified that in order to get some cooperation credit, companies needed only to provide evidence on individuals "substantially involved," but that in order to get full cooperation credit, the Department would expect more.

此外，该政策反映了司法部之前公布的对于披露个人参与不当行为的立场。正如副司法部长 Rod Rosenstein 在 2018 年 11 月宣布的那样，为获得合作奖励，公司只需提供"实质参与或对不当行为实质负责" 的人员信息，而非"所有参与或对不当行为负责的全部人员"。副助理司法部长 Matthew Miner 在最近的评论中再次进一步澄清：公司只需提供关于"实质参与"的个人方面的证据，便可获得一定合作奖励点数。但若期望获得全部的合作奖励点数，司法部需从公司处所获得的则不仅限于此。

The Policy also clarifies that de-confliction requests by the Department must be "appropriate." De-confliction requests arise when the DOJ asks a company to defer an investigative step—typically, interviewing employees—until after the government has an opportunity to do so. Both in public comments and in our interactions with DOJ, we have raised concerns that de-confliction requests can put company directors and officers in a challenging position, in which their ability to conduct an investigation and take remedial action expeditiously (which may be necessary to discharge their fiduciary duties) can be in tension with a desire to accede to DOJ's request. Under the revised Policy, de-confliction is one factor that the Department may consider in "appropriate cases" in determining the extent of cooperation credit. Furthermore, the Policy confirms that the Department will not take any steps to "affirmatively direct a company's internal investigation efforts."

政策同时澄清，司法部所提出的消除冲突之请求必须"适当"。当司法部要求公司推迟调查进程 - 通常为与员工进行访谈 - 直至政府有机会进行访谈时，会出现消除冲突之请求。无论是在公开评论还是我们与司法部的沟通之中，我们对此都提出了这样的顾虑，即消除冲突之请求可能会导致公司董事和高管被置于被质疑挑战的地位，在这种情况下，他们进行调查并迅速采取整改措施（这可能是履行其诚信责任所必需的）的能力与同意司法部请求的愿望产生矛盾。根据修正后的政策，消除冲突会是司法部在决定合作奖励点数时在"适当情形"中可能考虑的一个因素。此外，该政策确认司法部不会采取任何步骤以"明确指导公司内部调查工作"。

Finally, the Policy reaffirms that eligibility for self-disclosure credit is not predicated upon the waiver of attorney-client privilege or work product protection.

最后，该政策重申，自愿披露奖励资格不取决于公司是否放弃律师-客户特权或工作成果保护。

We explore the details of the notable changes to the Policy below.

下文将进一步深入探讨政策的主要变化。

Ephemeral Messaging 即时通讯

The Policy revisions with respect to ephemeral messaging platforms come on the heels of a flurry of questions and concerns from companies after the announcement of the 2017 Policy. Under the 2017 Policy, to receive credit for "appropriate remediation," companies were required to "prohibit[] the improper destruction or deletion of business records, including prohibiting employees from using software that generates but does not appropriately retain business records or communications." As we noted in our 2018 Year in Review, despite this strict language, DOJ officials later indicated that the Department did not necessarily expect companies to impose outright prohibitions on the use of such messaging applications. Instead, companies should take a "risk-based approach" and be able to explain to DOJ what steps they have taken with respect to the use of messaging applications, and why. The recent Policy revisions appear to formalize the Department's endorsement of a risk-based approach to ephemeral messaging platforms.

自 2017 年司法部公布相关政策后，因众多公司纷纷提出了一系列问题及顾虑，该政策对即时短信平台政策作出了修改。据 2017 年的政策，为了获得"适当整改"的奖励，公司必须"禁止 [ ] 不当的销毁或删除业务记录，包括禁止员工使用能形成但无法对业务记录或通讯进行适当保留的软件"。正如我们在《2018 年回顾》中所指出的那样，尽管政策中作出如此严格的规定，司法部官员随后表示，司法部并未要求公司彻底禁止使用此类通讯软件。与之相反，公司应对其采取"风险评估的方式"，并能向司法部解释对于及时通讯软件的使用，公司都采取了什么样的措施及理由。最新修正的政策似乎在某种意义上正式认可司法部就即时通讯平台所主张的基于风险评估的方式。

Under the revised Policy, companies that wish to preserve their ability to obtain full remediation credit must implement "appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms." The Policy does not provide any detail on what constitutes "appropriate guidance and controls." While companies may take some comfort in the removal of a blanket prohibition of ephemeral communication applications, in practice, prosecutors applying the Policy will have considerable discretion in determining whether a company has put in place guidance and controls that are "appropriate."

根据修正后的政策，期望保持获得全面整改点数奖励资格的公司必须对"个人通讯和即时短信平台的使用进行适当指导和控制"。该政策未提供任何具体可以满足"适当指导和控制"的细则。尽管公司可能会因取消全面禁止使用即时通讯软件而感到欣慰，但在实践中，适用该政策的检察官对于判定一家公司是否已实施"适当地"指导和控制方面具有一定的自由裁量权。

Given the shift to a risk-based approach for ephemeral messaging platforms, we think companies should consider undertaking a holistic communications risk assessment to enable the development of tailored policies and controls. Critically, the legal considerations for such a risk assessment are not limited to preserving arguments for remediation credit under the Policy; in certain cases, gaps in data retention policies and practices could expose companies to scrutiny for inadequate internal accounting controls, spoliation of evidence, or, in extreme cases, obstruction of justice. As part of a communications risk assessment, companies could take the opportunity to critically assess the strengths and weaknesses of the organization's broader data retention and information governance policies and procedures.

在即时短信系统平台方面，考虑到政策基于风险评估的倾向，我们认为公司应考虑进行全面的通讯风险评估，从而制定出适用的政策与控制措施。尤为重要的是，进行此类风险评估的法律意义在于不仅为满足政策规定的整改点数奖励，而且为此保留法律论据；在某些情况下，公司在数据保存政策和实践方面所存在的差距，可能会使公司因内部会计控制不充分、证据篡改或在极端情

况下妨碍司法的而面临审查。作为通讯风险评估的一部分，公司可借此机会全面对本公司数据保存和信息管理政策及程序的优劣进行批判性评估。

Transactional Due Diligence and Integration 交易尽职调查和整合

The expansion of the Policy to cover transactional compliance due diligence and integration represents the DOJ's most significant policy statement on mergers or acquisitions activities since the publication of the FCPA Resource Guide in 2012. The Resource Guide stated that DOJ "may" decline to bring enforcement actions against successor companies that undertake certain M&A best practices and voluntarily disclose misconduct. The revised Policy provides greater certainty for companies by establishing a "presumption of declination" when companies (i) uncover misconduct through thorough and timely due diligence or through post-acquisition audits or compliance integration efforts, (ii) voluntarily disclose the misconduct, and (iii) otherwise take action consistent with the Policy, such as timely implementing an effective compliance program at the merged or acquired entity. Importantly, a footnote in the Policy makes clear that "[i]n appropriate cases, an acquiring company that discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity."

该政策范围扩大至涵盖交易合规尽职调查和整合，为美国司法部自 2012 年《美国 <反海外腐败法> 信息指引》发布以来，关于合并或收购活动的最重要的政策指引。《信息指引》指出，司法部"可能"不会对采取某些并购的最佳实践并自愿披露不当行为的存续企业开展执法行动。修正后的政策通过以下情况确立"减轻推定"，为企业行为提供更大的确定性：当公司 (1) 通过彻底地、及时地尽职调查或通过收购后的审计和合规性整合工作发现不当行为，(2) 自愿披露不当行为，以及(3)采取其它与政策一致的行动，例如在被合并或收购的实体及时实施有效的合规项目。值得一提的是，该政策的一个脚注明确指出，"在适当的情况下，披露不当行为的收购公司可能获得被减轻责任的资格，即使被收购的实体存在责任加重的情形"。

As Deputy Assistant Attorney General Matthew Miner made clear when this policy change was first announced in July 2018, DOJ's goal is to not discourage "law-abiding companies with robust compliance programs" from acquiring non-compliant companies. DOJ explained in September 2018 that these principles will apply in the merger and acquisition context when other types of wrongdoing—not just FCPA violations—are uncovered. As we previously noted, while not game-changing, this policy change clarified that acquiring entities may receive the benefit of disclosure even in situations where the selling or acquired company was aware of the improper conduct prior to the transaction.

正如副助理司法部长 Matthew Miner 在 2018 年 7 月首次宣布这项政策变化时所明确表示的那样，美国司法部的目标是不去阻碍"拥有强大合规项目的守法公司"收购不合规的公司。2018 年 9 月，美国司法部解释道，政策的这些原则将适用于合并和收购所发现的其它类型的不法行为（而非局限于违反《反海外腐败法》的行为）的情形。如我们此前指出，尽管此举不会实质改变规则，但这一政策变化表明，即使在交易前出售或被收购公司知道存在着不当行为的情况下，收购实体也可能因披露而获益。

Since Deputy Assistant Attorney General Miner's announcement, commentators have welcomed the increased clarity on DOJ's position with respect to corruption issues identified in the course of M&A transactions, an area that can be fraught with risk. However, DOJ's position may not significantly alter the risk calculus for companies assessing whether to voluntarily disclose corruption issues identified in the course of M&A transactions. Although the prospect of a declination or substantial fine reduction will naturally be appealing to an acquirer that identifies

potential FCPA issues, there are a number of countervailing considerations that should be evaluated in assessing whether to make a voluntary disclosure to DOJ.

自副助理司法部长 Miner 宣布声明至始，评论者对美国司法部在可能充满风险的并购交易过程中发现的腐败问题上所持的日益明朗的立场表示欢迎。然而，美国司法部的立场可能不会显著改变企业评估是否自愿披露并购交易过程中所发现的腐败问题的风险衡量。尽管减轻或大幅降低罚款的前景对发现可能存在《反海外腐败法》问题的收购者自然而然地具有吸引力，但在评估是否向美国司法部主动披露信息时，仍需考虑一些值得权衡的因素。

- First, though the Policy offers increased certainty with respect to the availability of a declination, DOJ has continued to reserve some discretion for itself under the "aggravating circumstances" exception, which may be invoked on the basis of a relatively broad list of factors, including involvement by executive management in the misconduct, a significant profit arising from the misconduct, the pervasiveness of the misconduct within the company, and criminal recidivism. It is not clear from the face of the Policy what "appropriate cases" involving aggravating circumstances would qualify for a declination.

  首先，尽管该政策增加了减轻罚款可能性的确定性，但在"情形严重"的例外情形下，美国司法部仍保留一定的自由裁量权。"情形严重"的例外情形可能基于一系列相对广泛的因素，包括高管参与不当行为、不当行为带来巨额利润、公司内部存在不当行为的普遍性，以及屡犯行为。从政策的表面而言，尚不清楚哪些涉及情形严重的"适当情况"具备减轻罚款的资格。

- Second, a disclosure to DOJ may result in a referral to the SEC or enforcement authorities in other jurisdictions, which are not bound by the Policy and may take action even where DOJ declines to prosecute.

  其次，向美国司法部进行信息披露可能会导致司法部将案件移交至美国证券交易委员会或其它具有司法管辖权的执法机构，因该政策对这些机构不具有约束力，即便司法部决定不予起诉，这些机构仍可能对其采取执法行动。

- Third, declinations under the Policy are likely to be accompanied by disgorgement. Nearly all of the declinations issued under the Pilot Program and the 2017 Policy have involved disgorgement, either to the SEC or to DOJ. Notably, any financial penalties incurred by an acquirer may be in addition to financial losses resulting from the over-valuation of a target company that derived a portion of its profits from corrupt conduct.

  再次，政策赋予的减轻罚款仍可能与没收违法所得的处罚并存。根据"试点项目"和 2017 政策，几乎所有的减轻罚款都涉及向美国证券交易委员会或美国司法部的上缴违法所得。值得关注的是，收购方所遭受的任何财务处罚，都可能是对部分利润来自腐败行为的目标公司过高估值所造成的财务损失之外的另一大损失。

- Finally, the Policy's focus on the "acquiring entity" leaves some ambiguity as to whether a target company that continues to exist following an acquisition will benefit from a declination under the Policy along with the acquirer. There have been a number of instances in which DOJ declined to pursue an enforcement action against an acquirer that uncovered and remediated misconduct, but nonetheless pursued an action against the acquired entity. Indeed, the Resource Guide indicates that DOJ and SEC have only taken action against successor companies in limited circumstances and that they have more

often pursued actions against acquired entities.[1] Although it is undoubtedly a preferable result from an acquirer's standpoint for an action to be brought against the acquired entity rather than the acquirer itself, an action against an acquired business may nonetheless result in a substantial loss of value in the investment or otherwise impact the acquirer's business.

最后，该政策关注"收购实体"本身，但收购后存续的目标公司是否会与收购方一并基于该政策下的减轻罚款受益，则并不明确。美国司法部曾多次决定对发现并纠正不当行为的收购方不采取执法行动，但却仍对被收购实体继续采取执法行动。实际上，《信息指引》指出，美国司法部和证券交易委员会仅在有限的情况下对存续公司采取执法行动，但它们对被收购实体采取执法行动的做法更为常见[1]。虽然从收购方的立场而言，对被收购实体本身而非对收购方采取执法行动无疑是一个更好的结果，但对被收购实体采取执法行动可能会导致投资值大幅受损，或对收购人的业务造成其它方面的影响。

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Anti-corruption/FCPA practice group:
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[1] Resource Guide at 28–30.
《信息指引》第 28 至 30 页。