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Antitrust Group Client Alert: Foreign Investors Active in the U.S. – Stricter Enforcement of Criminal Laws Against Senior Management and Ways to Stay Clean for Investors

I. YATES MEMORANDUM – STRICTER ENFORCEMENT POLICY

Increased Prosecution of Company Executives. Company boards and management should take note of the U.S. Department of Justice’s increasing focus on the prosecution of individual executives and employees for unlawful corporate conduct. As a result of the DOJ’s new policy, described in a memorandum from Deputy Attorney General Sally Yates (the “Yates Memorandum”),¹ company senior management faces increased exposure to U.S. criminal prosecution and civil claims for antitrust violations, corruption, market manipulation, and corporate fraud. As the Deputy Attorney General of the Department of Justice has stated, “it is our obligation at the Justice Department to ensure that we are holding lawbreakers accountable regardless of whether they commit their crimes on the street corner or in the boardroom. In the white-collar context, that means pursuing not just corporate entities, *but also the individuals through which these corporations act.*”² Company executives need to be cognizant of the risk that individual employees may be prosecuted for misconduct that they “condoned, directed or participated in.”³

¹ Memorandum from Deputy Attorney General Sally Quillian Yates to the Assistant Attorney General, Antitrust Division, et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter Yates Memo], *available at* <http://www.justice.gov/dag/file/769036/download>.

² Sally Quillian Yates, Deputy Attorney General, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015) (emphasis added), *available at* <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.

³ Brent Snyder, Deputy Assistant Attorney General, Department of Justice, Antitrust Division, Remarks at the Yale Global Antitrust Enforcement Conference: Individual Accountability for Antitrust Crimes (Feb. 19, 2016) [hereinafter Snyder Remarks], transcript available at

Full Disclosure on Individuals. The Yates Memorandum also makes clear that corporations will not be eligible for any cooperation credit in criminal or civil investigations unless they provide the DOJ with all relevant facts relating to all individuals involved in the corporate misconduct, regardless of the level of seniority.⁴

Extradition Powers. U.S. prosecutors are using their extradition powers to bring culpable foreign nationals to the U.S. to face prosecution and serve jail time. In 2014, Romano Piscioti, an Italian national, was extradited from Germany on a charge of participating in a conspiracy to rig bids, fix prices, and allocate markets for marine hose in the U.S. and elsewhere. Mr. Piscioti pled guilty and was sentenced to serve two years in U.S. prison for his participation in the conspiracy. As Brent Snyder, the DOJ Antitrust Division's Deputy Assistant Attorney General for criminal antitrust enforcement recently noted, "[t]he Antitrust Division is not only successfully prosecuting more individuals, at higher levels within their firms, but is also obtaining longer prison sentences."⁵

II. EXPOSURE FOR INVESTORS

Transaction Reviews Can Trigger Criminal Prosecution. The renewed emphasis on holding individual executives accountable for corporate misconduct also has significant implications for mergers and acquisitions involving companies doing business in the U.S. Company management should be aware that the U.S. antitrust review process gives regulators extensive access to internal company documents and information. It is not uncommon for regulators to detect corporate misconduct in the course of their antitrust review. If the regulators find evidence of anticompetitive conduct, this could derail the deal and trigger both criminal investigations of the companies as well as follow on private class actions.

In a recent example, Chicken of the Sea International and Bumble Bee Foods announced plans to merge in 2014. The U.S. DOJ's investigation of the transaction reportedly revealed a price-fixing scheme involving the merging parties. As a result, the companies were forced to abandon the deal in December 2015. Not only did their proposed merger fail, but these companies are now facing criminal prosecution in the

<http://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust>. ("We are also undertaking a more comprehensive review of the organizational structure of culpable companies to ensure that we are identifying and investigating all senior executives who potentially condoned, directed, or participated in the criminal conduct.").

⁴ See Yates Memo at 3.

⁵ Snyder Remarks, *supra* note 3.

U.S. and defending numerous private class actions seeking treble damages for their cartel activities.

Commercial Agreements. Even without a corporate presence in the U.S., senior management of market participants with significant business in the U.S. – including through an agent, distribution, or cooperation agreement – cannot simply escape the grip of U.S. prosecution if their commercial conduct violates U.S. antitrust laws.

III. PRACTICAL SOLUTIONS TO MITIGATE EXPOSURE

Implications for M&A Due Diligence. The increased law enforcement underscores the need for corporate management to undertake thorough and sophisticated due diligence and risk assessments when contemplating potential acquisitions of companies that do business in the U.S. Failure to identify corporate misconduct or potential compliance gaps opens the door to potential future prosecutions, which can undermine the core value of the business being acquired.

Effective due diligence should go beyond the traditional areas and involve a risk assessment of the target and the markets the target participates in. This can mean an evaluation of (i) market structures (concentrated markets, structural and commercial links between competitors, role of trade associations, etc.), (ii) market dynamics (stable market shares, bidding markets, cost- and price pressures, degree of innovation, etc.), (iii) products, as well as (iv) “criminal history” of the markets, ongoing investigations and current compliance practices.

When risk areas are detected, due diligence reviews should include interviews with senior management. While such interviews should be cooperative and take place in the context of the transaction, outside counsel familiar with the relevant regulatory laws should participate in such interviews.

While targeted compliance guarantees in the relevant agreements (SPAs, Joint Venture Agreements, commercial agreements, etc.) cannot fully avoid the risk of criminal enforcement, documenting such responsibilities will prove valuable if any civil litigation results.

After the Deal Closes or Joint Venture is Approved. It is important to maintain a close look at the acquired or partner company’s operations and compliance practices, including regular compliance trainings and audits, to ensure that there is no unlawful conduct taking place.

Problem Detected. In the event that corporate misconduct is detected, company management must promptly put an end to the conduct and consider the benefits and risks of self-disclosure to the relevant authority and applying for immunity in the case of cartel conduct. In the U.S., as well as many other jurisdictions around the world, a corporation and cooperating employees can avoid criminal conviction, prison terms, and fines by being the first to come forward with information regarding its participation in a criminal antitrust violation and fully cooperating with the Antitrust Division. While there is no leniency program in the U.S. for corruption, there are “tangible benefits”⁶ for companies that voluntarily disclose Foreign Corrupt Practices Act violations and cooperate with the DOJ’s investigation.

IV. CONCLUSION

Given the significant implications of the increasing enforcement of criminal law when engaging in business in the U.S., company management should approach such transactions with the expectation of conducting heightened due diligence and procuring sophisticated guidance. It is not only the corporation, but also individuals in corporate management, who bear the risks.

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⁶ Alice Fisher, Assistant Attorney General, Department of Justice, Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), *available at* <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/10-16-06AAGFCPSpeech.pdf>.

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