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Caveat Emptor: Five Steps to Avoid FCPA Successor Liability in M&A

Anti-corruption due diligence has become increasingly common in the M&A context. But when such pre-acquisition diligence identifies possible improper payments to foreign government officials or other red flags, what is the best way for acquirers to minimize potential liability should they decide to move forward with the acquisition? A recent Opinion Procedure Release issued by the US Department of Justice ("DOJ" or the "Department") reiterates five key steps the Department recommends that acquirers should take to mitigate or avoid post-acquisition successor liability.

On November 7, 2014, the DOJ issued its second Opinion Procedure Release of the year ("Release #14-02" or the "Release"), which relates to issues of successor liability in the M&A context. The DOJ's opinion procedure is a mechanism whereby entities that are subject to jurisdiction under the US Foreign Corrupt Practices Act ("FCPA") submit information to the DOJ to obtain an opinion as to whether specific, future conduct conforms to the Department's FCPA enforcement policy. In this case, the requestor, a multinational company headquartered in the United States, identified apparent improper payments at the target companies—albeit without any US connection—as well as significant accounting and recordkeeping issues in the course of its pre-acquisition diligence. Consistent with the 2012 FCPA Guidance jointly issued by the DOJ and the US Securities and Exchange Commission ("SEC") (the "FCPA Guidance"), the DOJ indicated that it did not intend to take any enforcement action with respect to the pre-acquisition misconduct identified by the requestor as the conduct was not a US crime because the targets were not subject to US jurisdiction at the time the conduct occurred.

In addition to confirming that an acquisition of companies not subject to FCPA jurisdiction by a company that is subject to such jurisdiction does not create liability where none existed before, the DOJ also reiterated key steps it recommends that acquirers take to mitigate or avoid potential post-acquisition successor liability. Quoting the FCPA Guidance, Release #14-02 states that the DOJ "encourages companies engaging in mergers and acquisitions to:

1. Conduct thorough risk-based FCPA and anti-corruption due diligence;
2. Implement the acquiring company's code of conduct and anti-corruption policies as quickly as practicable;
3. Conduct FCPA and other relevant training for the acquired entity's directors and employees, as well as third-party agents and partners;

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4. Conduct an FCPA-specific audit of the acquired entity as quickly as practicable; and

5. Disclose to the Department any corrupt payments discovered during the due diligence process."

Although the DOJ acknowledged in Release #14-02 that there is no one-size-fits-all approach to the due diligence and integration process, the Release provides that "adherence to these elements…may, among several other factors, determine whether and how the Department would seek to impose post-acquisition successor liability in case of a putative violation." The Release is consistent with other indications that the DOJ and the SEC may decline to take enforcement action under the FCPA against acquirers that timely discover, voluntarily disclose and remedy improper conduct. It also underlines the importance of ensuring that acquired entities are integrated into an effective compliance program as soon as reasonably practicable.

The full text of Release #14-02 can be found here: http://www.justice.gov/criminal/fraud/fcpa/opinion/2014/14-02.pdf.