



CORPORATE ACCOUNTABILITY



REPORT

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Mergers and Acquisitions

Companies Told to Use Proper Due Diligence To Combat Foreign Merger, Transaction Fraud

■ **Practice Tip:** *In light of increased scrutiny and enforcement actions by regulators targeting potential violators of the Foreign Corrupt Practices Act in recent years, companies need to strengthen their due diligence practices prior to entering a foreign merger or other business transaction, experts told BNA in recent interviews.*

Companies would be wise to enhance their due diligence practices before engaging in a foreign merger or other business transaction in light of the Securities and Exchange Commission and Department of Justice's increased scrutiny over Foreign Corrupt Practices Act compliance, an FCPA and international practice attorney and a specialist in foreign overseas practices told BNA in recent interviews.

The heightened scrutiny over FCPA compliance may point to the need for an international set of anti-corruption standards.

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Mergers and acquisitions and FCPA due diligence practices have become more prevalent in recent years, Homer E. Moyer, a member of Miller & Chevalier Chartered's international practice group in Washington, told BNA in a May 9 interview. Due diligence offers many benefits to companies, including, in a merger or acquisition transaction, revealing important details regarding

a target company's general business and compliance practices, he said.

The heightened scrutiny over FCPA compliance may point to the need for an international set of anti-corruption standards, Shan Nair, co-founder and chief executive officer of corporate services company Nair & Co. in Bonita Springs, Fla., told BNA in a May 6 interview. The SEC and DOJ's tougher stance on anti-corruption, along with the relatively new 2010 United Kingdom Bribery Act, creates cost and time related difficulties for companies trying to satisfy all requirements, he said.

Obstacles May Obstruct Due Diligence Practices. The Justice Department expects that the exercise of due diligence be a routine part of a merger or acquisition transaction, Moyer said. This due diligence is not limited to FCPA-related transactions, but applies to other types of

Key FCPA Due Diligence Considerations.

Homer E. Moyer, a member of Miller & Chevalier Chartered's international practice group in Washington, said in a May 9 interview that there are several key issues that companies need to consider when exercising due diligence for FCPA compliance:

■ Merger and acquisition agreements may incorporate provisions that require due diligence and commit the target company to cooperate;

■ The scheduling of a potential transaction should be thoroughly assessed to ensure there is ample time for conduct due diligence; and

■ Complexities, such as acquisitions involving multiple transactions and size and other characteristics of the target company, must be carefully weighed along with due diligence revelations.

transactions as well, he said. There are a number of important issues that companies need to take into consideration when preparing to engage in a foreign business transaction, he said.

“For example, the acquiring company may not have access to all the necessary information it needs to conduct a transaction,” Moyer said. “An important early step requires that companies include in their merger agreements a provision that provides for due diligence and that commits the target company to being cooperative and open with the process,” he said.

Also, companies involved in a transaction may find they have limited time to perform due diligence, Moyer said. “There may be other companies who are at the same time also seeking to acquire the target company. In such a case the acquirer must move quickly, so it is not uncommon for a company set an ambitious or early closing date” he said. A related problem lies in the fact that the larger the target company is, the more complex the due diligence will be, he said.

“Possible complexities are important for companies to take note of as well,” Moyer said. The size of the company is an important factor, because due diligence for large companies will have to be selective, completed on a sampling basis, and be based on a risk assessment of the company’s profile, he said. If, for example, the target company has had recent violations or is subject to a deferred prosecution agreement, the process will be more complicated, he said.

Multiple Transactions May Create Complexities. According to Moyer, the characteristics of a company—whether it is public or private, domestic or foreign—affect the complexity of due diligence as well. “Another potential complication for due diligence may arise if the target company itself has recently acquired other companies. In this situation, there are additional ‘levels’ of due diligence that need to be performed to ensure that all companies involved undergo due diligence,” he said.

Additional risks arise if a party relies heavily on third parties, agents, or sales representatives and pays them commissions, Moyer said. “It is not uncommon that pre-closing due diligence is combined with post-closing diligence.” Sometimes a company may choose to abort a deal after uncovering significant problems from exercising due diligence, he said.

“Companies have also walked away from deals because they are unable to perform due diligence and the target company has a relatively high risk profile,” Moyer said.

An unanticipated benefit of FCPA-related due diligence is that the process is an effective way for companies to gain an in-depth understanding of the target company—which can also be helpful in ways that are unrelated to compliance, Moyer said. The process can also reveal information about the target company’s compliance program, he said.

Global Anti-Corruption Standards Not Uniform. According to Nair, there is no general understanding or unified set of anti-corruption related standards as of yet likely because universal anti-corruption regulation is a developing field. “There has also likely been very little inter-governmental communications through international agencies—such as the Organisation for Economic Co-operation and Development or the United Nations—for agreement on some general anti-corruption principles,” he said.

“It is worrying that there doesn’t appear to be any significant movement towards forming a set of universal anti-corruption standards,” Nair said. Another major problem is that many countries differ in their attitudes towards corruption, he said. “There are a notable number of countries that tolerate corruption. This puts British and American companies at a great disadvantage when working with companies in these countries,” he said.

Even within Europe, different countries have different perceptions on corruption, Nair said.

The problems identified in the SEC investigation of drug maker Eli Lilly & Co.’s potential FCPA violations are issues that many companies encounter, Nair said. “This case brings up the question of who can be classified as an ‘official’ under the FCPA. The answer is very unclear,” he said. “I think what we are finding with these regulations is that definitions are being broadened without the regulations being changed. Furthermore, the zeal with which they are being enforced has increased,” he said.

BY TINA CHI