

FOREIGN AFFAIRS

WHEN BUYING OVERSEAS, COMPANIES NEED TO EXPAND THEIR M&A DUE DILIGENCE TO INCLUDE FCPA COMPLIANCE OR RISK AN ENFORCEMENT ACTION

BY MARK J. ROCHON AND JAMES G. TILLEN

Foreign Corrupt Practices Act due diligence expectations for an acquiring company have risen recently. Now, if you are acquiring or merging with an entity with substantial overseas operations and you do not engage in meaningful preclosing due diligence that includes a substantial FCPA component, you may be buying an enforcement action that puts your company's name in pleading captions and headlines.

Since November 2002—when an acquirer was found liable for preacquisition violations of export controls laws by the acquired entities—many companies have expanded M&A due diligence to include reviews of compliance with international regulatory regimes, including the FCPA, which prohibits bribery of foreign officials.

Department of Justice and Securities and Exchange Commission enforcement officials encouraged this development and made it clear that the surviving company can be liable for the target's FCPA violations unless those violations are addressed preclosing. M&A due diligence has led to the disclosure of numerous FCPA issues to the SEC and the DOJ. In one case, a proposed merger between Lockheed Martin Corp. and Titan Corp. collapsed over potential FCPA issues at Titan. As a result of issues found during due diligence, Titan reached an FCPA settlement for civil and criminal violations, paid about \$28 million in fines, penalties and disgorgement, and retained a compliance monitor.

In short, in the M&A arena, FCPA issues are often identified, developed,

disclosed and resolved. But if a company chooses not to look at FCPA issues during acquisition and issues are discovered post-closing, officials will treat the surviving entity more harshly when they are discovered.

Many companies enlist outside counsel who specialize in FCPA matters to conduct due diligence. And efforts to conduct that due diligence have become more substantial than due diligence in other areas. Often, deal counsel or whoever is conducting general due diligence will not have the meaningful experience necessary to identify FCPA issues. Moreover, if due diligence identifies FCPA problems, then experienced counsel must address the myriad of issues that arise in resolving those issues.

The scope of FCPA due diligence will depend on the nature of the target company's international operations, on the acquiring company's experience with those issues and on the development of an overall risk profile for the resulting entity. FCPA due diligence tends to be more intrusive than most other forms of due diligence. It often requires overseas interviews of target company employees, review of third-party relationships and joint ventures, and at least some review of relevant books and records. With a fast-moving deal, FCPA due diligence often involves coordinated placement of FCPA specialists in several international venues who simultaneously conduct an integrated review and promptly report.

As noted, M&A due diligence led to several FCPA cases. Handling of these matters is particularly delicate. Usually

there are extreme time pressures, as the acquiring entity will want them resolved before closing. Such resolutions lend certainty to the acquisition, and may reduce the public relations stain of the violation on the surviving entity. Experience suggests that enforcement lawyers are sensitive to the context of an acquisition, but company counsel needs to draw on substantial experience and effort to get a timely resolution.

Enforcement in the context of an acquisition creates tactical issues between the target entity, which is the subject of the enforcement action, and the acquiring company, which caused disclosure of the problem and has an interest in moving the enforcement action along. Such resolutions are particularly delicate when the two companies are competitors or there are antitrust concerns. Indeed, contrary interests may have one company wishing to delay the enforcement action and the other company wishing to accelerate it.

Acquisition is often the first event prompting FCPA concerns in either the target or acquiring company. FCPA penalties and consequences have become harsher, so FCPA due diligence cannot be an afterthought in the overall due diligence during a deal. In fact, FCPA due diligence can begin effective integration of the acquired entity into the surviving company. ■

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