## CORPORATE MATTERS:

# IS YOUR DEAL SAFE? HOW THE F.C.P.A. AFFECTS MERGERS & ACQUISITIONS

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Foreign-based companies that do not do business in the United States might understandably ask how the Foreign Corrupt Practices Act ("F.C.P.A.") can impact them. The answer is unexpectedly and profoundly – if the foreign company becomes an acquisition target of a U.S. company.

As 2015 begins, it is no longer news to anyone that a U.S. company doing business abroad must have a robust anti-corruption and anti-fraud compliance program. An effective compliance program can prevent F.C.P.A. problems from arising or, if such problems do arise, reduce a company's penalties. It is equally important to remember that the F.C.P.A. can have as significant an impact on a company's merger and acquisition transactions as it can on its everyday operations. For that reason, a foreign company looking to partner with, or be acquired by, a U.S.-based entity, must make sure that its conduct does not adversely affect or jeopardize such efforts. Recent developments in 2014, as well as past history, illustrate this point.

The F.C.P.A. plays a significant role in mergers and acquisitions. An acquiring company is expected to conduct due diligence to ascertain the acquired entity's F.C.P.A. compliance. If in the course of that due diligence, the acquiring company uncovers violations by the entity to be acquired, it is expected to disclose them and remedy them. Otherwise, it risks F.C.P.A. liability of its own. In guidance issued in 2012, the D.O.J. warned:

> [A] company that does not perform adequate FCPA due diligence prior to a merger or acquisition may face both legal and business risks. Perhaps most commonly, inadequate due diligence can allow a course of bribery to continue—with all the attendant harms to a business's profitability and reputation, as well as potential civil and criminal liability.[1]

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In practice, the D.O.J.'s guidance is illustrated as follows: Suppose Company A acquires Company B, which it knows to conduct substantial business outside of the United States. Suppose further that Company A performs only cursory due diligence regarding Company B's F.C.P.A. compliance, choosing instead to rely mostly on Company B's representations and warranties. Now suppose that several months after the acquisition closes, Company A discovers that prior to the acquisition, under predecessor management, Company B had bribed foreign officials in one or more of those foreign countries but that such practices had ceased prior to the closing. Company A subsequently discloses Company B's pre-acquisition conduct to the D.O.J. for the first time. In this scenario chances are likely that Company A will face significant financial penalties, as well as the possibility of a guilty plea.

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[1] D.O.J./S.E.C. Publication: "A Resource Guide to the U.S. Foreign Corrupt Practices Act"

A scenario very similar to the one just described occurred in 2009 with regard to eLandia, International Ltd. ("eLandia"). In 2007, eLandia acquired Latin Node, an Internet telecommunications company. Shortly after the acquisition, eLandia discovered that Latin Node had made payments to foreign officials and reported those findings to the D.O.J. The D.O.J. required Latin Node, whose operations eLandia had shut down in January 2008 (partially due to Latin Node's foreign bribery activities), to enter a guilty plea to an F.C.P.A. violation and pay a substantial fine.

Now, let's change the facts of our hypothetical. Suppose that instead of a perfunctory, on-paper-only compliance structure, Company A has a vigilant, well-staffed one, and while carrying out a thorough vetting of Company B's operations, Company A discovers that Company B's compliance is lacking and that it has been making payments to foreign officials, but there is a question as to whether those payments would fall under the F.C.P.A.'s jurisdiction. How should Company A proceed?

The safe bet would be for Company A to impose pre-acquisition remediation on Company B and institute its own compliance standards. Then, Company A might have its counsel make an opinion request to the D.O.J. and have the transaction, and Company B's behavior, evaluated in advance. If it follows this strategy, the D.O.J. is likely to decide not to take any enforcement action. A recent D.O.J. Opinion Procedure Release confirms this.

In Opinion Procedure Release 14-02, a U.S.-based issuer (the "Requestor") discovered that the company it was acquiring had made several payments to foreign officials. Those payments had "no discernible nexus" to the United States. Nonetheless, the Requestor developed a pre-acquisition remediation program, and articulated the post-acquisition steps it would take to ensure that the acquired company was fully integrated into its compliance program. Based on these represented facts, the D.O.J. concluded that it would take no enforcement action regarding the acquired company's pre-acquisition conduct. Quoting the D.O.J.'s 2012 Guidance, Release 14-02 stated:

> It is a basic principle of corporate law that a company assumes certain liabilities when merging with or acquiring another company. In a situation such as this, where a purchaser acquires the stock of a seller and integrates the target into its operations, successor liability may be conferred upon the purchaser for the acquired entity's pre-existing criminal and civil liabilities, including, for example, for FCPA violations of the target. 'Successor liability does not, however, create liability where none existed before.'

The Release went on to say:

> The Department 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; (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. See FCPA Guide at 29. Adherence to these elements by Requestor 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.

Release 14-02 addresses the efforts of the acquiring party to rectify an acquiree's wrongful conduct. However, it would be fair to speculate that the acquiree's conduct likely affected the terms of the acquisition, especially the purchase price. Other events in 2014 remind us that the F.C.P.A. issues can have practical effects on mergers and acquisitions. The past year saw the largest fine in F.C.P.A. history as part of the settlement the D.O.J. reached with the French engineering company Alstom SA ("Alstom"). The D.O.J. required Alstom to plead guilty and pay a $772 million fine. The guilty plea and huge settlement were predicated on Alstom's failure to disclose and voluntarily remediate its conduct in a timely manner. Notably, however, the settlement with the D.O.J. provided that GE, which is in the process of acquiring Alstom's core assets, will not be liable for any payments. That issue had created uncertainty regarding the asset sale. With Alstom alone responsible for the guilty plea payments under the settlement, GE is able to go ahead with its asset purchase.

In another case, the acquisition of medical device maker Biomet by Zimmer Holdings has been delayed by a D.O.J. investigation into alleged bribes paid by Biomet to officials in Brazil and Mexico. Whether the acquisition will occur, under its present terms or at a reduced price, remains to be seen. Further, there is no telling what conditions the D.O.J. will require going forward to ensure that future violations do not occur. For example, even if the acquisition takes place, the D.O.J. could require the hiring of a monitor to oversee compliance efforts.

All of the problems described in the examples above could have been avoided if the companies being acquired had developed and maintained thorough and effective anti-bribery and anti-corruption policies and practices. Foreign companies envisioning relationships with U.S.-based firms are well advised to establish compliance programs, regardless of whether they currently do business in the U.S.