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DOJ Clarifies Successor Liability for FCPA Violations

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In a recent opinion release, the U.S. Department of Justice (DOJ) provided guidance on a company's potential successor liability for an acquisition target's violations of the Foreign Corrupt Practices Act (FCPA).

The opinion clarifies that acquisitions don't "create liability where none existed before." In other words, an acquirer isn't liable for a target's corrupt acts if the target wasn't subject to U.S. jurisdiction when they occurred.

Acquirer Uncovers Glaring Deficiencies

The opinion involved a U.S.-based multinational company (the "requestor") that intended to acquire 100% of a foreign target's shares. The target and the foreign-corporation owner had never issued securities in the United States and had negligible business contacts there.

In conducting due diligence, the requestor uncovered what the DOJ described as "glaring compliance, accounting, and recordkeeping deficiencies." They included payments to government officials in connection with obtaining permits and licenses, gifts and cash donations to government officials, payments to state-controlled media outlets to minimize negative publicity, and inadequate documentation. Also, the target hadn't implemented a written code of conduct or other compliance policies and procedures and its employees didn't adequately understand anti-bribery laws and regulations.

No Enforcement Action Planned

The DOJ said it didn't plan to take any enforcement action based on the facts and circumstances as represented. It explained that acquiring a foreign company not previously subject to FCPA jurisdiction doesn't retroactively create FCPA liability for the acquirer. The opinion noted that the target and seller had little or no connection with the United States and that none of the potentially improper pre-acquisition payments had occurred in the states or involved United States participants.

The DOJ also emphasized that, according to the requestor, none of the contracts or assets potentially acquired through bribery remained in operation, so the requestor wouldn't derive any financial benefit from them following the acquisition. This suggests that the DOJ might have reached a different conclusion if the requestor would enjoy continuing benefits from the target's ill-gotten gains.

How To Protect Your Company

To avoid or mitigate successor liability issues, the DOJ urges companies involved in mergers and acquisitions to:

- Conduct thorough, risk-based FCPA and anticorruption due diligence on potential targets,
- Implement the acquirer's code of conduct and anticorruption policies as quickly as possible after closing,
- Conduct FCPA and other relevant training for the target's directors, employees, partners and agents,
- Conduct an FCPA-specific audit of the target as quickly as practicable after closing, and
- Disclose to the DOJ any corrupt payments discovered during the due diligence process.

According to the DOJ, a company's pre-acquisition due diligence and post-closing integration of the target are factors it will consider in determining whether to impose successor liability for a target's FCPA violations. The requestor in this case outlined its post-closing integration plans, but the DOJ expressed no view on their adequacy or reasonableness.

Handle Acquisitions With Care

Successor liability for FCPA violations can have severe consequences, including substantial criminal and civil penalties. If your company is involved in mergers or acquisitions, it's critical to conduct anticorruption due diligence and to have a solid post-acquisition integration plan

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