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## DOJ: Successor Liability Does Not Create FCPA Liability Where It Did Not Exist Pre-Acquisition

The Department of Justice (“DOJ”) recently issued its second Foreign Corrupt Practices Act (“FCPA”) Opinion Procedure Release of the year. [1] The good news for companies considering foreign acquisitions is that successor liability does not create FCPA liability when the target company has made improper payments to foreign officials before the acquisition but the conduct was not within FCPA jurisdictional requirements. In other words, successor liability does not create FCPA liability where none previously existed. However, that should not stop companies from embarking on a thorough due diligence program to discover whether a target company has previously engaged in illegal conduct in order to prevent it from happening again after the acquisition, when, in all likelihood, there will be liability for the acquiring company.

Here, a multinational consumer products company (the “Requestor”) was taking steps to acquire a foreign consumer products company and its wholly owned subsidiary (collectively, the “Target Company”), both of which were incorporated and operated in a foreign country (“the Foreign Country”). During the course of its pre-acquisition due diligence, Requestor identified a number of likely improper payments by the Target Company to government officials of the Foreign Country, as well as substantial weaknesses in accounting and recordkeeping. None of the payments had a discernible jurisdictional nexus to the United States. In light of the bribery and other concerns, Requestor created a plan that included

remedial pre-acquisition measures and detailed post-acquisition steps to integrate Target Company. In addition, it sought an Opinion from DOJ as to whether, under the circumstances presented, DOJ would bring an FCPA enforcement action against it for Target Company’s pre-acquisition conduct.

### THE REQUESTOR AND THE RESULTS OF ITS DUE DILIGENCE

According to the Opinion Procedure Release, Requestor informed DOJ that, beginning in 2015, it intended to acquire 100% of Target Company’s shares. Target Company’s shares were then held almost exclusively by another foreign corporation (“Seller”), which was listed on the stock exchange of the Foreign Country. Seller, also a prominent consumer products company, has more than 5,000 employees and annual gross sales in excess of \$100 million. Seller and Target Company largely confined their operations to the Foreign Country, were never issuers of securities in the United States, and had negligible business contacts, including no direct sale or distribution of their products, in the United States. In preparing for the acquisition, Requestor undertook a due diligence review and retained an experienced forensic accounting firm (“the Accounting Firm”) to carry out the review.

The review brought to light evidence of apparent improper payments, as well as substantial accounting weaknesses and poor recordkeeping. On the basis of a risk profile analysis of Target Company, the Accounting Firm reviewed approximately

CONTINUED ON NEXT PAGE

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1,300 transactions with a total value of approximately \$12.9 million. It identified over \$100,000 in transactions that raised compliance issues, the vast majority of which involved payments to government officials related to obtaining permits and licenses. Other transactions involved gifts and cash donations to government officials, charitable contributions and sponsorships, and payments to members of the state-controlled media to minimize negative publicity. None of the payments, gifts, cash donations, contributions, or sponsorships occurred in the United States and none was made by or through a U.S. person or issuer. The review also showed that the Target Company had significant recordkeeping deficiencies. Specifically, the vast majority of cash payments and gifts to government officials as well as charitable contributions were not supported by documentary records. And, expenses were improperly and inaccurately classified in Target Company's books. In fact, Target Company's accounting records were described as so disorganized that the Accounting Firm was unable to locate or identify many of the underlying records for the tested transactions. Finally, Target Company had not developed or implemented a written code of conduct or other compliance policies and procedures, nor had Target Company's employees shown adequate understanding or awareness of anti-bribery laws and regulations.

According to the Opinion Procedure Release, in light of Target Company's glaring compliance, accounting, and recordkeeping deficiencies, Requestor took several pre-closing steps to begin to remediate Target Company's weaknesses prior to the planned closing in 2015. And, it indicated that it anticipated completing the full integration of Target Company into its compliance and reporting structure within one year of the closing. In its submission, Requestor also

set forth an integration schedule for Target Company that encompassed risk mitigation, dissemination and training with regard to compliance procedures and policies, standardization of business relationships with third parties, and formalization of Target Company's accounting and recordkeeping in accordance with Requestor's policies and applicable law.

## DOJ'S ANALYSIS

The Department opined that it did not intend to take any enforcement action with respect to pre-acquisition bribery that Seller or Target Company may have committed. While noting that 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, the Department observed that "[s]uccessor liability does not, however, create liability where none existed before. For example, if an issuer were to acquire a foreign company that was not previously subject to the FCPA's jurisdiction, the mere acquisition of that foreign company would not retroactively create FCPA liability for the acquiring issuer."<sup>[2]</sup>

Addressing the facts here, the Department observed that none of the potentially improper pre-acquisition payments by Seller or Target Company was subject to the jurisdiction of the United States. Specifically, none of the payments occurred in the United States and no U.S. person or issuer appeared to have participated in the payments. In addition, the Requestor represented that no contracts or other assets that would remain in operation and from which Requestor would derive financial benefit following the acquisition were acquired through bribery. Thus, the Department concluded that it would lack jurisdiction under the FCPA to prosecute

Requestor (or, for that matter, Seller or Target Company) for improper payments made by Seller or the Target Company prior to the acquisition.<sup>[3]</sup>

The Department did not opine on the adequacy or reasonableness of Requestor's integration of Target Company and specifically pointed out that corporate mergers or acquisitions are unique and require specifically tailored due diligence and integration processes. However, it encouraged 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; and (4) conduct an FCPA-specific audit of the acquired entity. While no due diligence review can assure that every potential violation is uncovered, a specifically tailored due diligence and integration process, both before and after an acquisition, will minimize risk and put companies on more secure footing not only to avoid enforcement actions but also to prevent criminal activity from taking place once an acquisition takes place.

[1] [www.justice.gov/criminal/fraud/fcpa/opinion/2014/14-02.pdf](http://www.justice.gov/criminal/fraud/fcpa/opinion/2014/14-02.pdf)

[2] *FCPA – A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 28 ("FCPA Guide").

[3] *See 15 U.S.C. §§ 78dd-1, et seq. (setting forth statutory jurisdictional bases for anti-bribery provisions).*