Mahajan & Aibara

Case study on FCPA Due Diligence during Mergers & Acquisition

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About the Foreign Corrupt Practices Act (FCPA):
A U.S law that prohibits corporates and individuals from offering bribes to foreign officials to further business deals. The US Securities and Exchange Commission (SEC) and the US Department of Justice (DOJ) are responsible for enforcing FCPA.

FCPA impact on Mergers & Acquisitions :
Cross-border mergers and acquisitions have become an integral part of business survival and expansion strategies. When implementing a cross-border corporate merger or acquisition, the acquiring company may be held liable for infractions under the FCPA committed by the target company. This could be in the scenario where the acquiring company failed to identify, terminate and remediate the target company's past unlawful conduct. Therefore, neglecting to perform a pre-acquisition anti-bribery and corruption due diligence exposes companies that are subject to the FCPA to potential successor liability.

DOJ and SEC encourage companies engaging in mergers and acquisitions to:
(1) Carry out FCPA anti-bribery corruption due diligence reviews.

(2) Ensure that the acquiring company's code of conduct as well as compliance policies and procedures related to the FCPA are implemented quickly as feasible to acquired or merged entities.
(3) Conduct training programs for directors, officers, and employees, as well as for agents and business partners, of newly acquired businesses or merged entities. Topics to cover FCPA and other relevant anti-corruption laws as well as the company's code of conduct and compliance policies and procedures.
(4) Conduct an FCPA compliance testing review of newly acquired or merged businesses as soon as feasible and
(5) Disclose any corrupt payments identified during the due diligence of newly acquired entities or merged entities.
The DOJ and SEC give due regard to companies who undertake such actions, and in certain circumstances, may not bring enforcement actions against them for rogue/one-off incidents

Case study

The client was a Global consumer company looking to acquire an Indian company in the office supplies business:

Background

The appointment of the team was made to carry out a US FCPA due diligence on operations of the target entity, based in Mumbai, with branches in Delhi and Bangalore.

Work done

- During the course of the FCPA due diligence review, the team carried out data analytics of bank payments, customer and vendor master data, and sales orders. They also carried out testing of physical transaction records.
- During transaction testing of selected samples, the team discovered several payments to vendors for services that appeared excessively priced and unsupported by adequate bills.
- In a few cases, vendor bills, that were attached to bank payment vouchers, were discovered to be fictitious, when the team carried out covert market intelligence on the vendors
- High value orders were received from customers with little to no operations, as discovered from public domain searches
- Many of these customers were intermediaries, that were placing orders on behalf of several private and public sector companies. They were given a 30-40% discount on their purchases from the target.

- Market intelligence on these customers revealed that they were front entities, whose role was to route bribe payments to procurement officials of actual underlying customers
- Several vendors were similarly used to generate slush funds to route payments to Government officials
- With adequate safeguards, training, policies and procedures, the acquirer was able to regularize the acquisition.

Key Take away

- Adequate anti-bribery and corruption due diligence carried out by the acquiring company helped them identify FCPA violations by the target company and mitigate risks of potential successor liabilities under the FCPA.

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