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UK BRIEFING - US ANTI-CORRUPTION LEGISLATION: IMPACT ON UK AND NON-US CORPORATE LIFE AND DEAL MAKING

To Our Clients and Friends:

Although a country's criminal laws typically apply to entities and individuals within that country, the long arm of US anti-corruption legislation can apply to non-U.S. companies and citizens for conduct outside the United States. Examples abound of events which, whilst having only a modest connection with the US, have led to high profile FCPA enforcement actions against non-US companies and their employees who may never have considered that they might be vulnerable to US enforcement authorities.

Enforcement

The resources and powers available to the US Securities and Exchange Commission (SEC) and Department of Justice (DOJ) to pursue corruption around the world are the envy of agencies in other countries. The US has 65 prosecutors working solely on the FCPA with access to practically unlimited resources. The FCPA reaches conduct even where there is very limited nexus with the US. There is no materiality safe harbour or compliance defence.

Penalties: Fines and Imprisonment

Eight of the top ten monetary settlements ever imposed under the FCPA were on non-US companies. Each year since 2008, the average value of a corporate FCPA fine or settlement has exceeded \$20 million. The costs of multi-jurisdictional investigation and defence in these matters can dwarf the fines and the reputational cost is unquantifiable. Local prosecutors, such as the UK's SFO have also stepped up their game; and political will to address corruption is evident in recent calls from David Cameron and EU Commissioner Cecilia Mallström for more concerted international anti-corruption enforcement. The number of executives who have been jailed under the FCPA has also been increasing with more being extradited and jail terms in excess of two years.

Risks to Deal Making

On any M&A process or capital-raising, it has to be assumed that at least some potential acquirers or investors will be subject to the US anti-corruption regime. However much investors or bidders like a business or want to invest, it is essential that compliance matters are addressed.

There are two principal dangers from an anti-corruption perspective. First, there is the risk that the business has previously breached the FCPA and that any purchaser will inherit the liability. The SEC

and DOJ have taken the position that liability can attach for pre-acquisition conduct and approximately one-third of recent corporate FCPA enforcement actions have involved successor liability issues.

Second, is the risk that the business has entered into corrupt arrangements and that the purchaser fails to identify and stop the misconduct post-acquisition, exposing them to direct liability.

This does not mean that any business that has fallen foul of the rules in some way, whether or not material, is unsalable. What does matter is that, where possible, anti-corruption due diligence takes place prior to the sale process beginning, that appropriate compliance systems exist and, where problematic issues have been discovered, a clear strategy for resolving them has been agreed.

There are several benefits to this process, including identifying issues early that may cause the deal to fall through, guarding against potential successor liability risks, and, if an issue is identified, serving as a mitigating factor for purchasers.

Pre-acquisition anti-corruption due diligence should be commensurate to the risks, should begin early enough to prompt further review, and should be followed with prompt post-acquisition due diligence.

If that level of due diligence is not possible before the acquisition, as may be the case with public bids in the UK, then in practice there is a six-month window of opportunity post-acquisition to conduct additional due diligence, put compliance procedures in place and deal with any concerns that have been identified.

Preliminary Considerations

There are some basic questions to ask at the outset:

1. What is the business's reputation for integrity? If it has confronted corruption-related challenges in the past, that is a clear warning sign.
2. Where does the business operate? If it is operating in countries known to face pronounced corruption risks, that is another clear warning sign. There are a number of published rankings which identify the countries where concern is greatest, for example the Transparency International Corruption Perceptions Index.
3. What is the extent of the business's interactions with local or national authorities or entities. The term "foreign official" for the purposes of the FCPA is broadly defined and includes employees at all levels at companies otherwise private in appearance (for example, state-owned banks, and national oil companies and many healthcare and utilities operators around the world).
4. Does the business operate in regulated areas, i.e., does it need approvals and licences from regulators to operate and/or is it already subject to regulatory regimes governing ethical business practices? Licensing and authorisation is a key focus for corruption.

5. Does the business model involve reliance on third-party agents or intermediaries? How do they get paid? How are they monitored, what happens to the money they receive etc.? What are their anti-corruption policies, and what anti-corruption undertakings did they give upon appointment?
6. Are there any unusual or unexplained payments going through the books, particularly expense accounts? Are proper records being kept of who is being entertained? Is entertainment repeatedly being offered to the same people? Does the entertainment offered appear unduly generous or lavish? Are all charitable donations that have been made appropriate, proportionate to the business and consistent with CSR policies?
7. And most importantly what policies, processes and culture exists in the business to address anti-corruption compliance?

Deal Preparation

We are all used to accountants' reports, general legal due diligence reports and sometimes environmental reports as part of vendor due diligence.

Today a critical element is to conduct anti-corruption due diligence.

This should involve completion of a risk-based compliance due diligence inquiry. We usually advise clients to request information about the target's compliance program, foreign operations and joint ventures, and past or ongoing compliance challenges. Where higher risks are identified, then a review of the target's policies and procedures and interviews with senior officials in the business, as well as external due diligence, using human intelligence may be appropriate.

The due diligence will also impact the level of caution with which negotiations and closing proceed. If risks have been identified there needs to be a strategy to deal with them, whether or not a transaction proceeds - this may not necessarily involve self-reporting. Some contractual protections may be possible and, in any event, after closing, it is advisable to conduct a process to confirm the information learned through due diligence and also to gain relevant information about any matters that could not be obtained previously.

Conclusion

US anti-corruption legislation is far-reaching and the DoJ and SEC have all the resources and incentives they need to enforce it vigorously and on a global basis. But these issues need not disrupt deal-making and companies can confidently invest in markets and companies if they conduct reasonable pre-acquisition due diligence and post-acquisition follow up with thought, experience and a clear strategy.

Without appropriate preparation there is a risk that any US (or US-related or funded) bidder will pull out of a process if and when an issue emerges or it becomes apparent that policies and procedures have not been properly implemented or followed. Depending on the timing of such an event, this can have

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deal-ending consequences. The only thing that is certain is that bidders will ask the questions so it is better to be prepared and on the front foot.

For recent developments in relation to FCPA enforcement, please follow this [LINK](#); for a focus on long-arm enforcement specifically, please follow this [LINK](#).

For a more comprehensive collection of our recent publications and webcasts in this area, including information on anti-corruption enforcement in the UK, continental Europe and emerging markets, please follow this [LINK](#).



Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding the above developments. Please contact the Gibson Dunn lawyer with whom you usually work, or the following:

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