DOJ Offers Opinion On Successor Liability Under FCPA

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The Department of Justice recently issued Opinion Release 14-02, its second release of the year regarding the Foreign Corrupt Practices Act, and it offers valuable insight for any U.S. company looking to merge with or acquire a foreign entity. The opinion request came from a U.S. consumer products company that intends to acquire a foreign manufacturer with no direct sales or distribution contracts in the U.S. In the course of its pre-acquisition due diligence of the foreign company, the U.S. entity identified a number of likely improper payments to government officials, as well as substantial accounting and recordkeeping problems. In light of these identified concerns, the U.S. company set forth a plan to take remedial pre-acquisition measures and post-acquisition integration steps. The opinion request, however, focused on whether the DOJ would bring an FCPA enforcement action against the U.S. company for the foreign company's pre-acquisition conduct, despite the fact that the DOJ lacked jurisdiction over the foreign company at the time the potentially improper payments occurred. Based on the facts provided, the DOJ advised that it does not intend to pursue enforcement action with respect to any pre-acquisition bribery that may have taken place. Importantly, the DOJ relied on the established corporate law principle that successor liability does not create liability where none existed before. According to the DOJ, if an issuer of securities acquires a foreign corporation that was not previously subject to the FCPA's jurisdiction, the mere acquisition does not retroactively create FCPA liability for the acquiring issuer. This guidance was previously included in the November 2012 Guide and the Opinion Release referenced that point. However, the Opinion Release provided more guidance than the November 2012 Guide in several respects. First, it revealed that, in formulating its opinion, the DOJ specifically relied on the requesting issuer's representation that none of the potentially improper pre-acquisition payments by the foreign entity were subject to the jurisdiction of the United States. The DOJ also considered it relevant that the foreign corporation acquired no contracts or other assets through bribery that would remain in operation or provide financial benefit to the U.S. entity following the acquisition. Finally, the DOJ encouraged companies engaging in mergers and acquisitions to take the following precautionary steps in order to ensure that an acquisition did not result in future liability for the acquiring company:

- Conduct thorough risk-based FCPA and anti-corruption due diligence as part of the M&A due diligence;
- Implement the acquiring company's code of conduct and anti-corruption policies as quickly as practicable;
- Conduct FCPA and other relevant training for the acquired entity's directors and employees, as well as third-party agents and partners;
- Conduct an FCPA-specific audit of the acquired entity as quickly as practicable; and

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- Disclose to the DOJ any corrupt payments discovered during the due diligence process.

The Opinion Release thus builds upon the November 2012 Guide and provides a road map for U.S. companies looking to acquire foreign entities with suspect practices. Those considering such M&A will want to follow the steps above in order to mitigate the risk of liability arising out of an acquisition or merger. Still, U.S. issuers should consult with counsel and consider the potential ramifications before voluntarily disclosing any information to the DOJ.