



DOJ Clarifies Successor Liability for Foreign Acquisitions in Latest Opinion Release

Nov 20, 2014

Reading Time : **2 min**

Under the DOJ's FCPA enforcement program, issuers and domestic entities may request opinion letters from the U.S. Attorney General regarding "whether certain specified, prospective—not hypothetical—conduct" conforms to the DOJ's current FCPA enforcement policies. Opinion letters issued by the DOJ do not have any precedential force over future FCPA cases but are intended to serve as general guidance and are released publicly to afford wide availability of that guidance.

The opinion letter released this week concerned a multinational company headquartered in the United States that was in the midst of conducting pre-acquisition due diligence on its target — a foreign corporation with no employees or operations in the United States. The due diligence inquiry turned up more than \$100,000 in likely improper payments made to government officials within the foreign target's country and prevalent inaccuracies and discrepancies in its records. None of the payments were made to or through a U.S. person or issuer. The opinion release also noted that the U.S. acquirer determined that no contracts or assets acquired through bribery would remain in operation following the acquisition from which the U.S. acquirer would receive any financial benefit. Despite the would-be FCPA violations, the DOJ confirmed that the U.S. acquirer would not face successor liability, because the payments had "no discernible jurisdictional nexus to the United States;" therefore, they were not subject to FCPA enforcement.

However, the DOJ's opinion provided important cautionary guidance regarding successor liability, affirming its previously articulated principle (in guidance issued jointly in November 2013 by the U.S. Securities and Exchange Commission and the DOJ, *FCPA — A Resource Guide to the U.S. Foreign Corrupt Practices Act*) that, in general, an acquiring company may become liable as a successor for pre-existing FCPA violations committed by an acquired company

where those violations were subject to the FCPA's jurisdiction when committed. Going further, the DOJ opinion also raises the suggestion of liability in more nuanced circumstances, such as when an acquiring company becomes the post-acquisition beneficiary of illegal conduct committed prior to the acquisition, for instance, by passively benefiting from a target company's pre-existing contract obtained by paying bribes. Of course, although not stated in the opinion release, post-acquisition conduct could also result in culpability for the acquiring company.

The DOJ's opinion release serves as a reminder to U.S. issuers to conduct careful due diligence, during both the pre- and post-acquisition phases, to determine whether a target or acquired entity was previously subject to the FCPA. Failure to investigate, suspend and address illegal pre-acquisition conduct could still generate successor liability for the issuer if it stands to later benefit from the wrongdoing.

Moreover, through its opinion release, the DOJ reinforced its view of the importance of bringing a new acquisition within the fold of the acquiring company's effective compliance program. The release noted that, while the foreign target had no written compliance policy or code of conduct and did not demonstrate an awareness of anti-bribery laws, the acquiring company had already taken pre-closing steps to begin to remediate these issues and had set out a schedule for integrating the acquiring company's compliance, training, accounting, and recordkeeping policies and procedures on the target company.

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