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Caveat emptor - why investigations expertise seals the M&A deal

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M&A legal due diligence - anti-corruption, anti-money laundering, sanctions, and criminal and regulatory risk - is now an integral feature of corporate transactions, and its importance only increases as governments and international regulators expand their enforcement efforts.

Numerous questions abound - can the consequences of bad conduct be inherited by the acquirer? What is the risk that past misconduct will continue post-acquisition? When the purchaser finds less-than-perfect compliance systems, but no evidence of actual misconduct, how can the risk of the unknown be mitigated? If actual past or ongoing crime is discovered, can it be addressed and the liability contained, pre-closing? If not, what potential consequences may exist post-closing?

The UK Bribery Act, with its enhanced liability for the very wide range of 'associated persons' under the section 7 corporate offence, is causing UK investigations lawyers to follow the example set during the past 20 years by US criminal defence counsel by joining the M&A team at the earliest stage and advising through to closing. The crucial input of UK investigations lawyers includes early due diligence advice on questionnaires and drafting specific and far reaching representations and warranties.

The work is not just restricted to the Bribery Act, of course - anti-money laundering and sanctions are among the other risks that must also be considered.

As the transaction progresses, investigations lawyers advise the acquisitions team on the target's responses to due diligence requests and analyse information arriving in the data room or via compliance calls. If an issue arises, their contribution to the debate can be fundamental, and they can be involved in meetings with senior compliance and board personnel from the target company. Advice will span the regulatory risk and reporting issues, how to deal with red flags, and how to mitigate the risk that the target company's liability will be inherited.

There is little indication that this trend will abate. All signs are that regulators and prosecutors will continue be active in the years ahead, both in the UK and elsewhere. The Financial Conduct Authority has been quick to cement its reputation as tough on compliance and, in its nine months of existence, has fined firms more than the Financial Services Authority did in the whole of 2012. The enforcement actions brought against EFG Private Bank in March 2013, and Guaranty Trust Bank (UK) in August 2013, both alleged the lack of effective anti-money laundering systems and controls and failures in corporate governance, which were punished by substantial fines.

The Serious Fraud Office (SFO) has launched its first prosecution under the Bribery Act, the Sustainable AgroEnergy case. Further cases are likely to follow: in a September 2013 speech, SFO Director David Green QC, said that eight Bribery Act cases were then under investigation.

The recent consultation by the Sentencing Council on fraud, bribery and money-laundering offences proposes increased penalties for companies. Those found guilty of a corruption offence could face a fine of up to 400% of the gross profit derived from the wrongdoing. Addressing red flags properly at the due diligence stage is thus essential to mitigate the risk of substantial fines.

Finally, deferred prosecution agreements (DPAs) will come into force in the UK in 2014, and while this initiative highlights the range of options open to the SFO and to companies to avoid a criminal prosecution, farsighted M&A due diligence can be a vital prevention against the need for such settlements.

In short, investigations lawyers have much to offer companies considering potential transactions. Acquiring companies do well to consider leveraging their experience to identify -and mitigate- potential legal liability before they close the deal.

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