Recent Developments in Successor Liability under the FCPA and UK Bribery Act

I. New Guidance from the DOJ

On November 7, 2014, the Department of Justice ("DOJ") issued a Foreign Corrupt Practices Act ("FCPA") Opinion Procedure Release 14-02 (the "DOJ Opinion") that provides real-world guidance on DOJ's application of FCPA successor liability principles.[1]

The Opinion offers important insight into how DOJ assesses whether or not to pursue wrongful pre-acquisition conduct where the target was not historically subject to the reach of the FCPA. The DOJ Opinion clarifies and reinforces the DOJ's prior guidance regarding successor liability and offers some certainty for acquirers concerned about the prospect of inheriting FCPA liability.

The DOJ Opinion was the product of a formal request from a U.S.-based multinational (the "Requestor"), who was contemplating acquiring a foreign-listed consumer products company (the "Target").[2] In the course of its pre-acquisition due diligence, the Requestor uncovered evidence suggesting that the Target made improper payments to government officials and had serious recordkeeping deficiencies. Neither the suspicious payments nor any of the Target's business practices historically had a jurisdictional nexus to the U.S. The Requestor asked DOJ whether it might pursue an enforcement action based on the Target's pre-acquisition conduct alone.

The DOJ answered that it would not. On the one hand, the DOJ was clear that "[i]n a situation such as this, where a purchaser acquires the stock of a seller and integrates the target into its operations, successor liability may be conferred upon the purchaser for the acquired entity's pre-existing criminal and civil liabilities." But on the other hand, DOJ reaffirmed its position that "***successor liability does not . . . create liability where none existed before.***" (emphasis added). The absence of any historical jurisdictional nexus to the U.S. deprived the DOJ of a basis to proceed against either the Requestor or the Target based on the Target's pre-acquisition misconduct.

The DOJ Opinion should be welcomed by acquiring companies after several recent DOJ actions that have made acquiring companies nervous. For example, in February 2010, Kraft Food Groups, Inc., acquired U.K.-based Cadbury Ltd. and has faced regulatory scrutiny related to allegedly improper payments Cadbury previously made to establish a facility in Baddi, India. According to a Kraft SEC filing in 2011, the company received a subpoena from the SEC and launched an investigation into the payments.[3] Similarly, the SEC investigated U.S.-based Dialogic on a successor liability theory after its purchase of Veraz Networks, Inc., another U.S.-based company. In that case, Veraz Networks was already subject to the FCPA before its acquisition. In the case of U.S.-based Watts Water Technologies, the failure to swiftly set up compliance controls after Watts' acquisition of a Chinese manufacturer led to a 2011 SEC enforcement action levying hundreds of thousands of dollars in fines and millions in disgorgement after the subsidiary engaged in corrupt activity.

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[1] Foreign Corrupt Practices Act Review Opinion 14-02, Dept. of Justice, Nov. 7, 2014, *available here*.
[2] The DOJ's opinion release process is confidential and DOJ did not disclose the Requestor's identifying information.
[3] Samar Srivastava, *Sticky Situation at Cadbury India*, FORBES INDIA, Aug. 15, 2012, *available here*.

As the most recent expression of FCPA policy, the DOJ Opinion amplifies the DOJ's and SEC's 2012 guidance on successor liability found in their jointly issued Resource Guide.[4] There, the DOJ and SEC stated that, although they generally decline to take action against companies that voluntarily disclose and remediate wrongdoing in an acquisition context, the government focuses resources on cases "involving egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition."[5] The two agencies' view of successor liability in the FCPA is consistent with longstanding U.S. legal principles of corporate liability for the prior criminal acts of acquired companies. Since the Supreme Court's decision in *Melrose Distillers, Inc. v. United States*, 359 U.S. 271 (1959), which upheld successor liability for antitrust violations, federal courts have generally obliged prosecutorial attempts to impose criminal liability on corporations even after a change in control.[6]

Consistent with the DOJ Opinion, recent DOJ statements reflect a shift in enforcement priority to focus on individual bad actors, a policy development that may implicate concerns of successor liability to the extent that misconduct is tied to former or outgoing management. In remarks given on November 19, 2014, Assistant Attorney General Leslie R. Caldwell explained that enforcement priorities have increasingly been directed at pursuing individuals responsible for "bribes of consequence," noting that the "trend in prosecuting individuals" is expected to continue.[7] Ms. Caldwell spoke at length about the importance of companies self-disclosing to the DOJ evidence of potential criminal activity. She emphasized that regulators are willing to favorably credit corporations that cooperate fully in rooting out bad actors.[8]

II. Successor Liability Under the UK Bribery Act

Global companies increasingly find themselves subject not only to the FCPA, but also to the UK Bribery Act ("UKBA"). The UK does not have an analogous procedure to obtain formal guidance along the lines of the DOJ's Opinion Procedure Release, though its enforcement regime is premised on familiar legal principles of successor liability.

The Serious Fraud Office does not publish the equivalent of the DOJ/SEC Resource Guide,[9] and there is no formal guidance from the SFO or Ministry of Justice on successor liability. There are, however, a number of factors under English law that acquirers need to understand.

First, as in the U.S., new directors of the acquired company are not liable for the historical actions of the company. Acquirers may nevertheless find themselves the targets of scrutiny under the UK's extensive anti-money laundering regime if the proceeds of historical bribery or corruption are still contained within the business—whether in the form of cash or a corruptly obtained operating license or permit, for example. New directors must of course remediate any culture of non-compliance to mitigate the risk of future offenses for which they will be held liable.

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[4] DEPT. OF JUSTICE, SEC. AND EXCHANGE COMM'N, FCPA – A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES, *available* here.
[5] *Id.* at 28.
[6] *See also United States v. Alamo Bank of Texas*, 880 F.2d 828, 830 (5th Cir. 1989) (affirming criminal successor liability for Bank Secrecy Act violations); *United States v. Polizzi*, 500 F.2d 856, 907 (9th Cir. 1974) (affirming criminal successor liability for conspiracy and Travel Act violations); *United States v. Shields Rubber Corp.*, 732 F. Supp. 569, 571-72 (W.D. Pa. 1989) (permitting criminal successor liability for customs violations).
[7] Erica Teichert, *Expect More FCPA Cases Against Individuals, DOJ Warns*, LAW360.COM, Nov. 19, 2014.
[8] Leslie R. Caldwell, Assistant Attorney Gen., Dep't of Justice, Speech at the at American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), *available here*.
[9] Note that the Ministry of Justice has released short guidance on the Bribery Act 2010.

Second, it is imperative that directors ensure there is an adequate compliance program in place in light of the UKBA offense for failing to prevent bribery. This failure to monitor offense subjects a company to strict liability where an "associated person" commits a bribery offense.[10] Under the strict liability standard, the offense occurs unless the company had adequate procedures in place to prevent bribery. Accordingly, acquirers who fail to implement an adequate compliance program may find themselves responsible for continuing misconduct, even where they are unaware it is occurring. While there is no direct analog under the FCPA, the adequacy of a company's compliance program is an important factor when U.S. prosecutors consider whether to charge a company.

Finally, directors of a company convicted of a bribery-related offense may be debarred from public contracts, notwithstanding that the company has changed hands in the intervening period. This can damage the value of a company irreparably and, as with the other issues listed above, may cause severe reputational difficulties for the acquirer and/or its directors.

III. Implications

Concerns over subsequent anti-corruption enforcement where the acquirer uncovers suspicious circumstances during the due diligence process need not deter a commercially viable acquisition. Where the target company has not historically had a U.S. nexus, the DOJ has reiterated that acquisition by a U.S. company cannot create historical liability where none existed previously.

As a general matter, the DOJ's recent pronouncements on successor liability and the UK enforcement regime underscore that a company should take taking certain steps to mitigate the risk of successor liability, including:

- Conducting robust anti-corruption pre-acquisition due diligence;
- Conducting an anti-corruption audit of the acquired company post-acquisition;
- Immediately implementing an internal anti-corruption policy in conjunction with a training and monitoring program covering the Company and its associated persons; and
- Considering whether the circumstances warrant disclosing pre-acquisition misconduct to regulators.

If you have questions about these recent enforcement trends, please contact the Ropes & Gray attorneys with whom you regularly work.

[10] Section 7, UK Bribery Act 2010. An "associated person" is one who acts on behalf of the Company.