KING & SPALDING

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TRANSACTIONS: CORPORATE/LONDON: M&A: The Importance of Bribery and Corruption Due Diligence - A UK Perspective

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With M&A activity in the energy sector still buoyant, particularly in developing economies, the need for effective and risk sensitive diligence into potential bribery and corruption by target entities is becoming more important than ever.

US Experience

FCPA due diligence is now standard in energy M&A transactions, in the main because the Department of Justice ("DOJ") has taken enforcement actions for failures by purchasers to conduct proper pre-closing and post-closing diligence.

It is the DOJ's view that liability can attach to purchasers for pre-closing conduct of the target and has accordingly brought actions consistent with this view. In its Opinion Procedure Releases (notably in relation to Haliburton's proposed purchase of a UK-based company), the DOJ advised that a purchaser can minimise its (or insulate itself from) liability for unlawful payments made by entities it acquires by performing adequate due diligence prior to acquisition, disclosing any pre-acquisition misconduct to the government, and implementing effective compliance procedures thereafter.

The DOJ has clarified that a purchaser may be held liable for any unlawful payments made by the target (or its personnel) post-closing. Both the DOJ and the SEC have brought successful enforcement actions against parent companies for unlawful payments made by their newly-acquired subsidiaries, even if the bribes were made shortly after closing, highlighting the failure of purchasers to perform adequate due diligence to uncover corrupt payments, and their failure to take corrective action when diligence uncovers historic corruption.

If a purchaser discovers bribery in a target, there are advantages in reporting this to the DOJ - the purchaser might decide not to proceed until the target reaches a settlement with the DOJ to clear the way for the transaction to proceed without successor liability risk for the purchaser.

UK Bribery Act 2010

The UK Bribery Act 2010 created four offences: paying a bribe, receiving a bribe, and bribing a foreign

public official (the "principal offences"), and failure by a commercial organisation to prevent bribery in the course of business (the "failure to prevent bribery offence"). The principal offences require intent or knowledge, with the company being liable for bribery where a senior officer of the company either participates or otherwise consents or connives in a bribery scheme. An organization will have a defence to the "failure to prevent bribery offence" by having adequate procedures in place to prevent bribery.

The Act has extra-territorial reach:

- A UK company will commit the "failure to prevent bribery" offence if an employee, subsidiary, agent, or service provider ("associated persons") bribes another person anywhere in the world. A foreign subsidiary of a UK company can cause its UK parent company to commit the "failure to prevent bribery" offence, when the subsidiary commits an act of bribery when performing services for the UK parent.
- The offence of "failure to prevent bribery" also applies to any overseas entity that carries on a business or part of a business in the UK. Such an overseas entity could be prosecuted even where the bribery takes place wholly outside the UK and the benefit or advantage to the company is intended to accrue outside the UK.

The Act only came into force in mid 2011, so it is still uncertain how it will be interpreted and enforced. However, a purchaser is likely to be liable for on-going bribery by an acquired company post-closing in the following situations:

- A principal offence will be committed if the purchaser knowingly joins with, encourages, or turns a blind eye to (by way of consent or connivance) the bribery activities of the target entity, and may occur where the diligence process has revealed bribery by the target and the purchaser continues with the bribery, or allows it to continue, post-closing. Likewise, if the purchaser knows of on-going bribery and deliberately fails to conduct diligence so that the deal closes, this conduct could be viewed as criminal intent to participate in on-going corruption.
- A failure by the purchaser to discover on-going corruption will not make a person or company liable for a principal bribery offence. However, if the undiscovered bribery continues post-acquisition, and is subsequently discovered, the purchaser may be guilty of the "failure to prevent" offence. This risk might be reinforced if poor anti-bribery diligence has been undertaken. On the other hand, the purchaser may be able to rely on the "adequate procedures" defence if it has conducted thorough and risk sensitive diligence.

A purchaser will not be liable under the Act with respect to "historic" bribery, whether undiscovered or discovered in due diligence, because:

- at the time the offences were committed by the target, the purchaser was not associated with the target (association in most transactions occurring on closing); and

- the purpose of the conduct would, in all likelihood, have been for the benefit of the target, not for the purchaser.

The individuals involved, of course, would still be liable to prosecution, with the bad media and business interruption that might come with it post-closing. Actions have also been brought in relation to offences under the UK Companies Act 2006 for failure to keep adequate accounting records.

If a purchaser acquires a target that historically or currently is involved in bribery (thereby acquiring a revenue stream from assets tainted by the illegality) or if the purchaser acquires an asset which itself has been obtained by bribery, the purchaser risks committing a money laundering offence under the UK Proceeds of Crime Act 2002 ("POCA").

It will generally be good practice to report any incidence of bribery discovered during due diligence to the appropriate authorities. In the UK, this is mandatory if money laundering is involved. The SFO has stated that it is sympathetic to situations where a purchaser reports corruption revealed during due diligence and confirmed that, in certain circumstances, it will take no action if the purchaser is committed to anti-bribery remedial actions, although it is not clear yet whether this is dependent upon the purchaser disclosing the corruption prior to closing.

Will the scope of FCPA due diligence be enough for Bribery Act purposes? Possibly not. As we highlighted in the July issue of the Energy Newsletter[1], compliance with the FCPA will not necessarily ensure compliance with the Act:

- the Act applies to bribery of public officials **and** private citizens;
- there is no facilitation payment defence;
- the FCPA does not contain an equivalent to the corporate offence for failing to prevent bribery; and
- there is no requirement to prove "corrupt" intention under the Act.

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[1] Howell, Nina, Oil & Gas Companies May Face Most Investigations Under New UK Anti-Bribery Laws, available at ://www.kslaw.com/library/newsletters/EnergyNewsletter/2011/July/article2.html.

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