

FCPA COMPLIANCE

— Mitigating Risk in M&A Transactions

● Mergers and acquisitions is an area that often carries many hidden Foreign Corrupt Practices Act (FCPA) liability risks. A company with a long record of FCPA compliance may buy or merge with another firm and find itself responsible for the legal consequences of the target firm's less rigorous historical practices. Given the increased awareness and enforcement of anti-bribery laws worldwide, companies would be wise to expand their financial and legal M&A due diligence to include efforts aimed at uncovering possible corrupt practices, as although companies engaging in M&A activity are usually familiar with the legal and financial due diligence that precedes a deal, there has been a recent focus across many regions on compliance with anticorruption laws.

An increased level of scrutiny is required from prospective buyers in order to avoid acquiring potential corruption liability along with a new business. The FCPA requires that companies maintain accurate books and records and a system of internal controls designed to prevent and detect suspect payments. Potential acquirers need to ensure that their new target business complies with these requirements before entering into any agreements.

Acquisition International discusses the complexities of FCPA compliance with experts in the subject.

Gönenç Gürkaynak, LLM, Esq. is a Partner and Ç. Olgu Kama, LLM is an Associate at ELİG, Attorneys-at-Law.

While ELİG, Attorneys-at-Law takes pride in being able to assist its clients in almost all fields of law, the main focus of its practice consists of: corporate law; mergers & acquisitions; competition law; white collar irregularities; EU law; banking and finance; litigation; telecommunication law; energy, oil and gas law; administrative law; real estate law; and intellectual property law. As an independent Turkish law firm, ELİG collaborates with many international law firms on various projects.

ELİG has a significant practice in Turkey in terms of internal investigations and white collar crime matters in connection with Turkish corporate compliance issues under the FCPA, the UK Bribery Act, and under the mandatory provisions of Turkish law on anti-corruption.

ELİG has interviewed over 200 employees, drafted disclosure petitions, dealt with PR and GR aspects of projects of this nature, prepared extensive white collar due diligence reports, provided over 90 FCPA trainings, and helped clients adopt and implement policies of detecting and ensuring full corporate compliance in Turkey. The firm holds a significant capability in all the fields of law required for such projects, including but not limited to employment law, data privacy law, and corporate law.

Commenting on the requirements of the Foreign Corrupt Practices Act, Mr. Gürkaynak noted that the anti-bribery provisions prohibit certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining businesses. For these purposes, the U.S. Department of Justice seeks corporations subject to these provisions to implement corporate compliance programs (Principles of Federal Prosecution of Business Organisations, Title 9, Chapter 9-28.800).

"In particular, companies engaging in a merger or acquisition should be able to, inter alia, conduct appropriate risk-based FCPA and anti-corruption due diligence, ensure that the company's anti-corruption policies and procedures also apply to the newly acquired or merged entities as quickly as practicable, and train the employees of the newly acquired or merged entities on anti-corruption laws," said Mr. Gürkaynak.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions (15 USC Section 78m). The FCPA's accounting provisions require those corporations that are covered by these provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation. These provisions also require corporations to devise and maintain an adequate system of internal accounting controls.

Ms. Kama stated that legal and financial FCPA due diligence is an important safeguard for companies contemplating mergers and acquisitions. This is because matters such as illegal practices, inaccuracies in the books and records of the target company may become the responsibility of the acquiring company or the merged entity.

"FCPA due diligence can allow the company to assess potential exposure from the target's past activities, and potentially unearth unaccounted or unreasonably high expenditures for gifts and entertainment, as well as small, but regular expenditures as facilitation payments," she explained.

"Insufficient FCPA due diligence or a lack thereof may expose corporations to liability for the past corrupt acts of a target company in a contemplated merger or acquisition transaction. Furthermore, the value of the target business may be reduced if it is discovered that its business depends on bribes to be profitable."

According to Mr. Gürkaynak, ELİG is highly sensitive to several main points while it is conducting a thorough due diligence on the potential target.

"We review the target's prior third party transactions and cross check them with the target's books and records, in cases where the target is engaged in transactions with government, we control whether the target has ever been banned from a tender, etc," he explained. *"Although it is intangible, our experiences have also taught us that conducting research on the target's reputation in the market is also an asset while considering the potential deal."*

Ms. Kama noted that acquiring a company that has not complied with FCPA may result in the acquirer to assume certain legal liability for past FCPA violations.

"Conducting due diligence before making any payment for the transaction may enable the buyer to lower the price or even pull out of the transaction because of violations that may have been especially detected through reasonable review prior to the acquisition," she commented.

Discussing recent changes to regulation, Mr. Gürkaynak noted that the legal provision regulating "bribery" in the Turkish Criminal Code No. 5237 was significantly amended in July 2012, bringing clarity on the types of actions that constitute bribery under Turkish law, as well as expanding bribery's scope of application to private commercial bribery. He added that ELİG is expecting the long-awaited FCPA guidance to be released by the end of 2012.

Mr. Gürkaynak concluded with the best piece of advice he has been given:

"Corporations contemplating mergers and acquisitions should be particularly attentive about FCPA risks as well as compliance with local laws and regulations that are associated with and necessitated by the transaction. Conducting appropriate due diligence should constitute an inherent building block of the company's compliance measures and corporate policies."

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