Client Alert: Bribery Due Diligence

Date : June 5, 2017

Bribery due diligence is in the news again recently with the proposed John Wood deal with Amec Foster Wheeler and the disclosures those businesses have made. But what is the position in the UK?

Bribery Act 2010

The Bribery Act 2010 is the legislation in the UK which deals with most bribery offences committed after 2011. You can find out more background to this legislation in our FAQs here http://www.corderycompliance.com/uk-bribery-act-2010-faqs/

In addition to the legislation the Bribery Act 2010 was accompanied by some guidance from the Ministry of Justice (MoJ) in March 2011. We have looked recently at that guidance and its relationship with similar guidance issued in the US here http://www.corderycompliance.com/us-department-of-justice-on-evaluation-of-corporate-compliance-how-does-it-compare-to-uk-bribery-act-2010/

The MoJ guidance has a whole section - Principle 4 of due diligence which is one of the 6 Principles of good practice outlined in the guidance. Most of Principle 4 is however directed at due diligence into associated persons (such as agents) rather than potential M&A targets. Principle 4.4 however says:

"*Organisations will need to take considerable care in entering into certain business relationships, due to the particular circumstances in which the relationships come into existence…The importance of thorough due diligence and risk mitigation prior to any commitment are paramount in such circumstances. Another relationship that carries particularly important due diligence implications is a merger of commercial organisations or an acquisition of one by another."*

Can I ask the authorities for guidance?

There is no equivalent of the US Opinion procedure in the UK. In the US it has been possible to seek guidance from the Department of Justice when entering into an acquisition. These opinions are rare but in one in 2008 it set out its thoughts on issues relating to a corporate acquisition by Halliburton. This Opinion, Opinion Procedure Release 08-02, is commonly known as the Halliburton Opinion. In this Opinion the DoJ agreed to delay action for 180 days against Halliburton for possible FCPA violations incurred through the acquisition, on condition that they did a rigorous post-closing plan requiring FCPA due diligence and disclosure. Whilst some of the items in the Halliburton Opinion might make good sense in the UK there can be no guarantee that following the same processes would guarantee safety in the UK. Additionally in recent years the D0J seems to have qualified the Halliburton Opinion and it is no longer available on the DoJ's website.

What else can be done?

If a due diligence exercise does uncover potential issues the acquirer should consider whether they will invite the target company to self-report. If they do that – or if the Serious Fraud Office (SFO) is already investigating as may to be the case here – it may be possible to consider a Deferred Prosecution Agreement (DPA) to try and crystalize the liability. The SFO's first DPA in the Standard Bank case was a DPA in the context of a wider corporate transaction involving the bank. There is more information on this case and a short film here: http://www.corderycompliance.com/uks-first-dpa/.

The first step however will be thorough due diligence including if necessary (and subject to privilege considerations) an opportunity to interview key personnel and associated persons.

For more information please contact Jonathan Armstrong who is a lawyer with Cordery in London where his focus is on compliance issues.

Jonathan Armstrong, Cordery, Lexis House, 30 Farringdon Street, London, EC4A 4HH
Office: +44 (0)207 075 1784
Jonathan.armstrong@corderycompliance.com