

Heightened anticorruption enforcement

The increasing focus on enforcement of the US Foreign Corrupt Practices Act (FCPA), Canadian Corruption of Foreign Public Officials Act, and UK Bribery Act, as well as similar anti-corruption laws around the globe, has made anti-corruption compliance more essential than ever.

In particular, conducting pre-acquisition anti-corruption due diligence is a critical element of any cross-border merger or acquisition. The failure to conduct pre-acquisition anti-corruption due diligence can result in severe legal and financial consequences, as well as reputational damage, for both buyers and sellers. For buyers, anti-corruption diligence can be especially critical because, under US principles of successor liability, a buyer may be held liable for pre-closing FCPA violations by the target. And if illegal conduct by the acquired company continues post-closing, the buyer can be held directly liable, even if it had no knowledge of or participation in the violation.

For sellers, apart from individual liability (which would survive a transfer of ownership or control), concerns about potential pre-closing violations can strongly influence a deal's value, if not threaten the entire transaction. Moreover, sellers may be asked to provide specific representations -- or even fundamental representations -- and warranties as to anti-corruption compliance that are backed by broad indemnification provisions and hefty escrow amounts.

The two US government agencies responsible for enforcing the FCPA, the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC), have endorsed a risk-based approach to conducting pre-acquisition anti-corruption due diligence. Such an approach requires an initial evaluation of the target's risk profile, followed by the creation and subsequent implementation of a work plan that incorporates review procedures specifically tailored to and commensurate with the risks identified. Even if pre-acquisition anti-corruption diligence does not reveal evidence of bribery, conducting such a review can help to identify "red flag" indicators of corruption and potential control weaknesses. The prospective buyer can then address the issues with the seller (including through remediation) and the results of the review can be factored into the deal terms and pricing. If you do not devote sufficient time and resources to try to detect corrupt practices pre-closing, arguments that you were an "innocent purchaser" may fall on deaf ears.

Focus on China

The Chinese government is vigorously pursuing endemic and widespread corruption. In 2013, this trend was especially evident in the healthcare industry. In June 2013, a Chinese subsidiary of GlaxoSmithKline (GSK) was accused of paying almost \$500 million in bribes to Chinese doctors and hospitals in exchange for purchasing or prescribing GSK's products. In response, China has issued a series of new measures. The National Health and Family Planning Commission (NHFPC) and its provincial branches will maintain and publish on their websites a blacklist of medical manufacturers and distributors with a history of bribing hospitals or health care professionals. Such companies will be prohibited from participating in or will be downgraded in public hospitals' procurement of medicine and medical devices. NHFPC also issued new rules reiterating the prohibition on hospitals and healthcare professionals from receiving kickbacks and other forms of bribery. In particular, hospitals and healthcare professionals are not permitted to receive improper sponsorship and donations from outside parties. Sponsorships and donations must not be conditional upon any terms that will "impact fair competition" or be related to the procurement of products or service. In 2014, the medical industry will continue to be closely monitored by the Chinese government. Given rampant commercial bribery in China's medical system, medical companies will face serious challenges in the future as they balance the realities of business and the crackdown by authorities.

Apart from the healthcare sector, multiple anti-corruption measures have been passed by government agencies at the central and local levels in 2013. These regulations ban the use of luxury cars, eliminate lavish gifts for government officials, and place limits on galas, official dinners, and special privileges that party cadres have long enjoyed. The Chinese government also launched a series of high profile enforcement actions against senior-ranking government officials at both the central government and local levels. As an example, the former Railways Minister Liu Zhijun was convicted of accepting bribes and given a suspended death sentence.