

# Blakes Bulletin

## White Collar Crime

### Importance of Anti-Corruption Due Diligence for International Transactions

MARK MORRISON, MICHAEL DIXON, CLIFF SOSNOW AND DAVID NEAVE

When acquiring a company, an acquirer may inadvertently inherit significant financial liability and reputational damage associated with a target company's prior violations under anti-corruption legislation. In order to minimize this risk, anti-corruption due diligence is becoming an increasingly important part of M&A due diligence for international transactions. U.S. enforcement authorities have made clear their expectation that acquirers and investors will conduct anti-corruption due diligence on transactions presenting corruption risk. U.S. counsel have followed this guidance and now frequently engage in detailed anti-corruption due diligence for international transactions. The same approach is being taken in Canada as many Canadian companies are subject to both U.S. and Canadian anti-corruption legislation and Canadian enforcement authorities have recently committed significant resources to robust anti-corruption compliance enforcement. U.S. acquirers are also insisting on anti-corruption due diligence when acquiring Canadian companies. The benefits of anti-corruption due diligence for both the acquirer and the target are discussed below.

#### BACKGROUND

The U.S. *Foreign Corrupt Practices Act* (the FCPA) and its Canadian equivalent, the *Corruption of Foreign Public Officials Act* (the CFPOA), criminalize the provision of benefits by a company or its agents to a foreign government official in consideration for any act to be undertaken by that official. While there are various exceptions to the application of these Acts, the gist of these offences is to criminalize bribery of foreign officials.

While the FCPA has been around for over 30 years, there has been a dramatic increase in United States Department of Justice (the DOJ) enforcement activities in the past four years. In addition to significant corporate fines and penalties in the hundreds of millions

of dollars, the DOJ has made clear that it intends to continue these enforcement actions to ensure FCPA compliance, including pursuing charges against senior company officials, personally.

While the U.S. has clearly been at the forefront of international anti-corruption enforcement, the enforcement of anti-corruption laws by other nations has also recently escalated. The Canadian government has established a Royal Canadian Mounted Police Unit dedicated to the investigation and enforcement of CFPOA offences, and this Unit has confirmed that they are actively conducting a number of international investigations with the intention of determining CFPOA compliance. This was discussed in our prior bulletin entitled: *Canada's Corruption of Foreign Public Officials Act: What You Need to Know and Why*.

#### IMPORTANCE OF ANTI-CORRUPTION DUE DILIGENCE IN M&A TRANSACTIONS

The benefits to an acquirer of conducting anti-corruption due diligence include:

- anti-corruption due diligence potentially saves an acquirer significant financial and reputational costs associated with inheriting liability for violations under anti-corruption legislation in Canada, the United States, the U.K. and elsewhere;
- the opportunity to identify and resolve any anti-corruption liability issues prior to closing the deal, including through the review of financial accounts and the interviewing of key employees;
- the potential ability to negotiate an appropriate reduction in the purchase price to account for potential liability; and
- the ability to tailor appropriate representations, warranties and indemnity provisions.

Just as acquirers benefit from due diligence of this nature, targets need to be prepared to respond to concerns about potential or actual violations of anti-corruption legislation. A target must consider that an acquirer will identify a potential CFPOA/FCPA violation and:

CONT'D ON PAGE 2

## White Collar Crime

CONT'D FROM PAGE 1

- insist on its resolution prior to closing a deal;
- use it to negotiate a reduction in price;
- walk away from the deal; or
- report potential violations to the authorities.

From the perspective of a target, it makes considerably more sense to proactively conduct a thorough internal due diligence review to identify and resolve potential CFPOA/FCPA questions and concerns ahead of any potential anti-corruption issue being raised by the acquirer, rather than having to respond unprepared – and therefore from a position of relative weakness – to questions raised in the midst of the transaction. This raises the importance of an effective anti-corruption policy, and enforcement of that policy, which we addressed in our prior bulletin entitled: *The Long Reach of the Law: Practical Tips for Compliance with Anti-Corruption Legislation*.

While circumstance dependent, components of anti-corruption due diligence will typically include identification or investigation of “red flags”. Due diligence may include:

- a review of the target’s policies to determine whether it has an anti-corruption policy, its compliance with FCPA and CFPOA requirements and, if such policies exist, the nature and extent of policy training provided to the target’s personnel;
- an assessment of risk arising from the overseas countries in which a target does business;
- a review of the target’s foreign operations, including contracts, licences, payments and other business interactions with foreign governments;
- a review of any agency or joint venture partners which a target has in foreign countries;
- a review of the target’s contractual arrangements with agents or joint venture partners and a list of all persons acting as foreign agents for the target;
- a review of the target’s customary practices for commissions to its agents, in the foreign countries in which the target engages such agents;
- a review of accounting documentation (potentially including retention of independent accountants); and
- interviews of target personnel operating overseas, and their agents and joint venture partners.

### CONCLUSION

Canadian corporations are coming under increasing security to ensure that their domestic and foreign operations comply with anti-corruption legislation. As a result, it is increasingly important that Canadian companies conduct appropriate and thorough due diligence in transactions in which a business with foreign operations is acquired to ensure that the target business has implemented effective anti-corruption policies and ensured compliance.

A failure to conduct due diligence can expose a Canadian acquirer – and its directors and officers – to significant criminal penalties and civil liability. For the target company, a similar failure of due diligence may result in a delayed closing of the transaction, an acquisition at a price otherwise below market value or may cause the negotiation of the transaction to come to an end.

For further information, please contact:

<u>Vancouver</u>	<u>David Neave</u>	604-631-3338
<u>Calgary</u>	<u>Mark Morrison</u>	403-260-9726
	<u>Michael Dixon</u>	403-260-9786
<u>Toronto</u>	<u>Paul Schabas</u>	416-863-4274
	<u>Tony Wong</u>	416-863-2180
<u>Ottawa</u>	<u>Cliff Sosnow</u>	613-788-2233
<u>Montréal</u>	<u>Robert Torralbo</u>	514-982-4014

For further information on our White Collar Crime Group, click [here](#).

Go to [blakes.com/english/subscribe.asp](http://blakes.com/english/subscribe.asp) to subscribe to other Blakes Bulletins.

NEW YORK      MONTRÉAL      OTTAWA      TORONTO      CALGARY      VANCOUVER  
CHICAGO      LONDON      BAHRAIN      AL-KHOBAR\*      BEIJING      SHANGHAI\*      [blakes.com](http://blakes.com)

\* Associated Office