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Foreign Corruption and the Integrity Framework: A Difficult Corporate Board Dilemma

Corporate Social Responsibility Bulletin

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Public Works and Government Services Canada ("Public Works") has implemented new measures under its *Integrity Framework* (the "Framework") that raise difficult regulatory choices for corporate board directors and senior management regarding voluntary disclosure of prior foreign corrupt activity of an acquired company discovered post-closing. This article examines why and how this may arise. Because of these choices, deep pre-closing foreign corrupt activity due diligence is an absolute necessity.

The Framework and Its Broad Reach

Any business seeking government contracts must understand the Framework: a set of rules for engaging in *any* procurement with Public Works including construction and goods and services contracts and real property transactions. Reported as being grounded in protecting the integrity of the government contracts process, the Framework says that *any* supplier who is convicted of any of over a dozen offences is debarred for 10 years from participating in federal government procurement bids, subject to a limited set of exceptional public interest circumstances including an emergency or national security. Recently, the Canadian government added the bribing of foreign public officials to the list of offences. Framework debarment may also arise from convictions for "similar" offences in other jurisdictions. Therefore, the Framework captures not only offences under the *Corruption of Foreign Public Officials Act* ("the CFPOA"), but also similar offences under Acts such as the *UK Bribery Act* or the *US Foreign Corrupt Practices Act*.

The Framework defines "convictions" to include convictions of (i) the supplier; (ii) any affiliates of the supplier; (iii) any individual or corporation that controls a corporate supplier, whether the control is in fact or in law or is direct or indirect; and (iv) members of the board of directors. A supplier must certify that neither it, nor any of its affiliates, controlling shareholder or parent, or board members has been convicted of any listed offence. Consequently, a Canadian supplier may be debarred for 10 years, for example, due to an affiliate's violation of the CFPOA, a US affiliate's conviction for a similar offence under the *Foreign Corrupt Practices Act*, or an acquired company's violation of the CFPOA.

A leniency exception existed in a prior version of the Framework: a potential supplier could voluntarily disclose a violation, cooperate with government officials and plead guilty in exchange for more lenient procurement debarment treatment. This has been removed.

Post-Closing Discovery: A Difficult Corporate Board Dilemma

The broad reach of the Framework, the severity of the debarment period and the absence of a leniency program raises troubling regulatory compliance dilemmas for companies intending to bid on future government contracts where, in an acquisition, pre-closing due diligence of a target corporation does not reveal any CFPOA violations that are subsequently discovered post-closing.

The CFPOA imposes criminal liability to a maximum of 14 years imprisonment and/or fines in any amount at the discretion of the court for the commission of a bribe of foreign public officials. The CFPOA does not contain any voluntary disclosure or notification obligations or requirements. But corporate voluntary disclosure and admission of criminal liability, full cooperation with investigating authorities and implementation of a robust anti-bribery and corruption program are likely to be mitigating factors in the severity of the liability. Yet under the Framework, that very same corporate posture will result in Canadian government procurement disbarment for 10 years not only for the company, but also *any* of its affiliates even if the affiliate has been scrupulously clean in dealings with foreign public officials.

The case of Griffiths Energy International Inc. (“Griffiths”), although not a post-closing situation, illustrates the post-closing dilemma. Prior management at Griffiths, a then privately held Calgary oil and gas company, paid bribes indirectly to the Chadian ambassador to Canada to obtain gas contracts in Chad. In preparation for an IPO, new management and new board members discovered the bribe and voluntarily disclosed this to Canadian authorities. Griffiths was found guilty of violating the CFPOA and incurred criminal liability totaling $10.35 million. The sentencing agreement, which the court endorsed, highlighted the importance of Griffiths’ voluntarily agreeing to enter a plea prior to charges being formally laid, and that Griffiths agreed to enter into a guilty plea without the requirement of a preliminary hearing. Griffiths’ voluntary disclosure and cooperation mitigated what would likely have otherwise been a more severe criminal penalty. However, the disclosure means that Griffiths and any of its affiliates are now Canadian government procurement debarred for 10 years.

Hard choices attend an acquiring company that discovers post-closing a prior activity by the acquired company that, for example, violates the CFPOA. Either the company voluntarily discloses the CFPOA violation that may result in a 10 year procurement debarment not only for the acquired company but all other affiliates, or does not disclose and forgoes the potentially mitigating effect that voluntary disclosure could have on any criminal sanctions imposed under the CFPOA.

Conclusion

The broad reach of the Framework and the absence of a leniency program place corporate boards in a difficult dilemma on post-closing discovering of prior activity by an acquired company that violates the CFPOA. For those doing or intending to do business with the Canadian government, it is imperative that they exercise deep pre-closing foreign corrupt practices due diligence prior to any intended acquisition.

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