

Alert

White Collar Defense & Investigations

M&A FCPA Advisory Following SEC's Enforcement Action Against Goodyear

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The importance of conducting pre- and post-acquisition due diligence to uncover business practices at a target company that could raise issues under the U.S. Foreign Corrupt Practices Act (FCPA) was highlighted again by the U.S. Securities and Exchange Commission's (SEC) recent enforcement action against The Goodyear Tire & Rubber Company (Goodyear).¹ Goodyear acquired a majority interest in a retail tire distributor in Kenya in 2006, but subsequently did not detect over \$1.5 million in corrupt payments to employees of "government-owned or affiliated entities" and private parties made by the subsidiary from 2007 to 2011. Goodyear also held another subsidiary in Angola that was engaged in the business of selling tires for mining equipment, and which, from 2007 to 2011, paid over \$1.6 million in bribes to government officials and private parties to secure tire sales. In both cases, managers at the subsidiaries approved the use of false invoices and false accounting entries to generate funds for bribes and conceal bribe payments.²

The SEC held Goodyear liable for violating the FCPA's books, records and internal control provisions, 15 U.S.C. §§ 78m(b)(2)(A) and 78m(b)(2)(B). The SEC noted that Goodyear had not "conduct[ed] adequate due diligence when it acquired" the Kenyan subsidiary and had not "implement[ed] adequate FCPA compliance training and controls" at both subsidiaries when it controlled them.³ As part of the settlement, Goodyear agreed to pay over \$14 million in disgorgement of profits and over \$2 million in prejudgment interest, *and*, as a remedial measure, agreed to divest its interest in both subsidiaries.⁴ Goodyear must also self-report to the SEC on its remediation efforts for a three-year period.⁵

In announcing the enforcement action, the SEC indicated that it had given Goodyear consideration for self-disclosure of the bribery, cooperation with the SEC's investigation, and remedial efforts across its international operations.⁶ The SEC also favorably cited some of Goodyear's remedial actions, including:

- enhancing anti-corruption training for management, sales and finance personnel at the subsidiary level;
- engaging in regular internal audits designed to focus on corruption risks;
- implementing an enhanced anonymous reporting hotline and a case tracking system for complaints and investigations;

- using technology to link subsidiary functions to the company's global network; and
- updating its policies for retaining third-party agents and vendors.⁷

The SEC's enforcement action is in line with both the SEC's and the U.S. Department of Justice's (DOJ) previous guidance regarding liability under the FCPA in conjunction with M&A transactions. In their 2012 *Resource Guide to the U.S. Foreign Corrupt Practices Act*,⁸ at 29-33, the DOJ and SEC stated that acquirers could become liable for a target's post-acquisition bribery if they failed to conduct appropriate post-closing anti-corruption due diligence, training, and remediation at the target (including enhancing compliance policies and internal controls). Importantly, even if a target's pre-acquisition bribery was not subject to FCPA jurisdiction, post-acquisition control of a target by a U.S. firm could make any ongoing and new bribery subject to the FCPA.⁹

In 2014, the DOJ addressed this issue again in FCPA Opinion Release 14-02, which concerns an acquisition by a U.S.-based public, multi-national company of a foreign seller and its wholly-owned subsidiary (collectively, the Target). Pre-acquisition due diligence revealed the Target likely had made improper payments to government officials, but none of the payments to government officials had any discernable nexus to the United States. Although the DOJ noted that it did not intend to take any enforcement action with respect to the Target's pre-acquisition bribery because the conduct was not subject to FCPA jurisdiction, it cautioned that post-acquisition bribery by the Target could give rise to liability.¹⁰ It thus advised that the acquirer should implement the acquiring company's anti-corruption policies, engage in training and remediation, conduct an "FCPA-specific audit" of the Target's operations, and disclose to the DOJ any corrupt payments "as quickly as practicable" post-closing.¹¹ The DOJ stated that "[a]dherence to these elements . . . may, among several other factors, determine whether and how [the DOJ] would seek to impose post-acquisition successor liability in case of a putative violation."¹²

The *Goodyear* matter and Opinion Release 14-02 serve as a reminder of several key points:

- **Post-Closing Due Diligence Plan:** To minimize exposure to post-closing FCPA liability, acquiring firms must have a post-closing plan to conduct FCPA due diligence of the target's operations, institute and enhance management and employee training, institute appropriate anti-corruption policies, procedures and internal controls, and, to the extent necessary, take appropriate remedial action. Conducting anti-corruption due diligence is particularly important when acquiring companies are located or operating in countries that are ranked high for corruption by reputable non-governmental organizations, such as Transparency International.¹³ In some cases, it may be in the acquirer's interest to disclose to regulators any FCPA issues that are discovered post-closing.
- **Forensic Audits of the Target's Records:** Corrupt conduct can be concealed by methods which may be difficult to discover without a forensic audit. The bribe payments at Goodyear's African subsidiaries, for example, were concealed through inflated and phony invoices.
- **Anti-Corruption Issues and Valuation:** Corruptly obtained lines of revenue are at risk under the FCPA. In Goodyear's case, to appease the SEC, it agreed to divest both of its subsidiaries in Africa at which the bribes occurred. Similarly, lucrative but otherwise high-risk business relationships may need to be terminated post-acquisition.
- **Doing Business with State Enterprises:** Some of the corrupt payments made by Goodyear's subsidiaries were for the benefit of employees of state-owned or controlled enterprises, bringing such conduct within the ambit of the FCPA. Post-closing, business relationships with such entities should be scrutinized for corruption risks.¹⁴
- **Anonymous Reporting:** The corrupt conduct in Goodyear was brought to the company's attention

by someone with knowledge of the bribes. Given the risk that employees and third-parties with knowledge of bribery may inform the SEC and DOJ of such conduct, acquiring companies should establish a channel for such complaints to be made and proactively investigate them.¹⁵

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1. *In re The Goodyear Tire & Rubber Co.*, Exchange Act Release Order No. 74356 (Feb. 24, 2015).
 2. *See id.* at 3-4.
 3. *Id.*
 4. *Id.* at 5-6.
 5. *Id.* at 6.
 6. *Id.* at 5.
 7. *See id.*
 8. Available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

9. Although the SEC only has FCPA jurisdiction over U.S. issuers, the DOJ has jurisdiction over both U.S. issuers and all private U.S. firms. See 15 U.S.C. §§ 78dd-1 and 78dd-2.
10. Department of Justice FCPA Opinion Procedure Release 14-02 (Nov. 7, 2014), at 3-4.
11. *Id.*
12. *Id.* at 4.
13. Transparency International maintains a widely-used annual corruption ranking called the “Corruption Perceptions Index,” which is available [here](#).
14. For a further discussion of how officers and employees of state enterprises may be considered “government officials” under the FCPA, please refer to our FCPA Alert of May 22, 2014, available [here](#).
15. For a further discussion of the implications of the SEC’s whistleblower program, please refer to our Corporate Internal Investigations Alert of September 12, 2014, available [here](#).

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