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DISPUTE RESOLUTION ALERT

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In recent years, South African organisations have become increasingly cautious in relation to the reputational and associated financial risk arising from affiliations with third parties who are publicly perceived as “*corrupt*”. This is especially so in the era of State Capture, where it has become commonplace for allegations of impropriety to extend to public and private sector entities.

CORPORATE INVESTIGATIONS

Sticking to the ABCs of DDs

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For this reason, comprehensive anti-bribery and corruption (ABC) or integrity due diligences (DDs) have become an essential feature in greater merger and acquisition (M&A) due diligences, to establish the potential bribery and corruption risks posed by transacting with third parties.

The need for comprehensive ABC DDs is more pertinent now, in comparison to previous years, considering the expected upward trend in fraud and financial crime during times of economic depression such as the COVID-19 pandemic.

First-tier ABC DDs generally involve screening the target, its directors and members of senior management for adverse media mentions or affiliations to politically exposed persons. Secondly, gaining assurances that the target, its directors and members of senior management are not subject to international and local sanctions or have been subject to regulatory enforcement action. Thirdly, screening relating to litigation in which the target, its directors and members of senior management are involved assists in assessing the financial and legal risks posed by the target. If

red flags are identified, a second-tier ABC DD will be warranted which may include a review of the target’s ABC policy framework and interviews with directors, members of management and other key employees.

For multinational organisations with operations in South Africa, international best practice, standards and guidance will find application and place an added onus on those organisations to mitigate ABC risks during the M&A process.

The issue of successor liability in the context of an M&A transaction, was addressed in the US Department of Justice (DOJ) Opinion Paper 08-02. In this guidance, the US enforcement authorities were cognisant of the limited time periods in which DD investigations are often required to be conducted. Therefore, it stated that it did not intend to take enforcement action against the purchaser for the target’s violations of the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) during a period of 180 days from the date of closing, provided the purchaser, amongst others:

- (1) disclosed any misconduct of the target during the 180-day period;
- (2) stopped and remediated the conduct either within the 180-day period or, if the DOJ determined that this is not practical, as soon as reasonably possible thereafter; and
- (3) completed its due diligence and remediation efforts, including its investigation of all issues identified during the 180-day period, within one year of the date of closing.

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Sticking to the ABCs of DDs

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In the context of an M&A transaction, the purchaser may perform both pre-acquisition and post-acquisition ABC DDs.

In most cases, US enforcement authorities have pursued enforcement actions against the target company (rather than the purchaser), particularly when the purchaser uncovered and timeously remedied the violations or when the governmental and/or regulatory investigation of the target company preceded the acquisition.

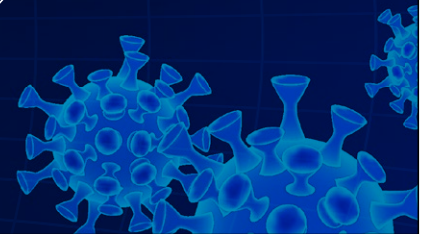
UK enforcement authorities have adopted similar approach in their enforcement actions under the UK Bribery Act, 2010. The approach of the US and UK authorities is significant in light of the purported extra-territorial reach of the US and UK legislation, both of which are widely considered to be the leading international pieces of ABC legislation from an enforcement perspective. The scope of application of the FCPA and the Bribery Act extends to offending conduct by individuals and entities anywhere in the world provided that, among other things, citizenship (in the case of individuals) and a footprint (in the case of entities) can be established in the US and UK, respectively.

In the context of an M&A transaction, the purchaser may perform both pre-acquisition and post-acquisition ABC DDs. Where possible, ABC DDs should be carried out in the early stages of the transaction thereby allowing for further investigation and negotiation of the appropriate warranties, if required. In circumstances where that is not feasible pre-closing, once the transaction is completed the purchaser should implement adequate ABC measures as soon as possible post-acquisition, including:

- conducting an ABC DD on the target;
- conducting a risk assessment in relation to the target's operations and compliance with ABC laws;
- immediately implementing the purchaser's ABC policies, protocols and procedures;
- providing training to the directors, officers and employees and members of management and, when appropriate, training agents and business partners on relevant ABC laws, policies, protocols and procedures;

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CORPORATE INVESTIGATIONS

Sticking to the ABCs of DDs

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US enforcement authorities are likely to give meaningful credit to companies who undertake these actions and, in appropriate circumstances, may consequently decline to bring enforcement actions, however, this is not guaranteed.

- disclosing any unlawful activity discovered during the ABC DD to the relevant law enforcement or regulatory authorities and cooperating with subsequent investigations; and
- taking steps to remediate identified unlawful activity by implementing measures to detect and prevent repeated misconduct.

US enforcement authorities are likely to give meaningful credit to companies who undertake these actions and, in appropriate circumstances, may consequently decline to bring enforcement actions, however, this is not guaranteed.

The requirement to conduct comprehensive ABC DDs goes hand in hand with the implementation of corporate compliance programs to enforce organisational ABC controls, including policies, procedures, training and remediation in newly acquired or merged entities. The above measures constitute international best practice in relation to ABC DDs during the M&A process and both multinational as well as South African organizations doing business abroad will be well advised to ascribe to those standards to mitigate the risk of successor liability for unlawful corporate conduct. Our next article will deal with the hallmarks of an effective corporate compliance program.

Gasant Orrie and Krevania Pillay



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DOING BUSINESS IN SOUTH AFRICA

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2021 RESULTS

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2018 - 2021 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

CHAMBERS GLOBAL 2020 - 2021 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

Chambers Global 2021 ranked our Construction sector in Band 3: Construction.

Chambers Global 2021 ranked our Administrative & Public Law sector in Band 3: Administrative & Public Law.

Pieter Conradie ranked by CHAMBERS GLOBAL 2019 - 2021 as Senior Statespeople: Dispute Resolution.

Clive Rumsey ranked by CHAMBERS GLOBAL 2013-2021 in Band 1: Construction and Band 4: Dispute Resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2021 in Band 3: Dispute Resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2021 in Band 3: Dispute Resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Construction

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming Restructuring/Insolvency lawyer.



Cliffe Dekker Hofmeyr's Dispute Resolution rankings in THE LEGAL 500 EMEA 2020:

CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Jonathan Witts-Hewinson is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Pieter Conradie is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Rishaban Moodley is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Kgosi Nkaiseng is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.

Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.

Gareth Howard is ranked as a Rising Star in THE LEGAL 500 EMEA 2020.

CDH's Construction practice is ranked in Tier 2 in THE LEGAL 500 EMEA 2020.

Clive Rumsey is ranked as a Leading Individual in Construction in THE LEGAL 500 EMEA 2020.

Joe Whittle is recommended in Construction in THE LEGAL 500 EMEA 2020.

Timothy Baker is recommended in Construction in THE LEGAL 500 EMEA 2020.

Siviwe Mcetywa is ranked as a Rising Star in Construction in THE LEGAL 500 EMEA 2020.



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Insuralex Global Insurance Lawyers Group
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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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