

## A shift towards post-deal anti-bribery/corruption DD in M&A

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**A**mid an uptick in anti-bribery and corruption (ABC) regulatory developments globally in recent months, we’ve seen an increase in inquiries from clients (current and prospective) regarding ABC-related due diligence (DD) and – more broadly – in respect to post-acquisition DD.

From an OECD Anti-Bribery Convention meeting last month in Paris<sup>1</sup>, to a recently created post for a compliance counsel at the US Department of Justice (DOJ)<sup>2</sup> – not to mention China’s ongoing anti-corruption campaign<sup>3</sup> – the notably sterner trend is, in our view, having marked influence on corporate decisions around ABC DD.

In terms of M&A, key issues can arise on successor liability (i.e. historical breach by an M&A party surfacing post deal that violates current statutory obligations of the investor). This can be especially pertinent for investors in China given historic business practices, necessitating thorough FCPA (US Foreign Corrupt Practices Act) or similar (e.g. UK Bribery Act, led by the UK’s Serious Fraud Office (SFO)) DD.

Not surprisingly, hurdles regarding full access to books pre-deal can arise given personal liability concerns of the Target’s management and commercial sensitivities, etc. However, we’ve seen a trend – likely to be exacerbated given the broader stricter compliance regimes globally – in the past year or two towards post-deal ABC DD. Efforts around ABC DD (whether pre- or post-deal) can not just bring practical operational benefits, but can also affect outcomes from legal/regulatory perspectives should historical compliance breaches surface post deal (for instance, the DOJ may credit companies that have conducted thorough post-acquisition FCPA DD<sup>4</sup>).

In our experience, investors generally fall into one of three broad categories regarding initiating ABC DD:

- Fail to initiate any ABC DD (citing stiff hurdles)
- Initiate pre-deal ABC DD (but might be limited)
- Initiate post-deal ABC DD (often in addition to pre-deal ABC DD).

In China, given a general lack of confidence in books among many M&A targets, pre-acquisition ABC DD is even more likely to be met with resistance.

Source: 1) OECD Anti-Bribery Ministerial Meeting, [oecd.org](http://oecd.org) (accessed Mar. 17); 2) New Compliance Counsel Expert Retained by the DOJ Fraud Section, [justice.gov](http://justice.gov) (accessed Jan. 20); 3) Overseas experts laud China’s anti-corruption gains (15 Jan. 2015, [xinhuanet.com](http://xinhuanet.com)); 4) US Dept. of Justice, FCPA Op. release 08-02 (13 Jun. 2008); 5) New DOJ metrics for an effective compliance program ..., [acfs.org](http://acfs.org) (accessed Mar. 19); 6) DOJ Hires New Compliance Expert: How Will This Impact Businesses? ([alstonwhitecollar.com](http://alstonwhitecollar.com), accessed Mar. 17). Credit: KPMG China’s Jerry Liu (Manager) and Nick Lindsey (Editor) contributed to this article.

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Even if pre-deal ABC DD is activated, the limitations imposed can hamper insight or meaningful findings.

Some investors, though, might conclude that given a token effort was made to initiate pre-deal ABC DD (but which then became limited in scope), that if successor liability arose they would be shielded from home-country ABC-related penalty to some extent, arguing the M&A target’s uncooperative disposition impeded thorough investigation pre-deal. Likewise, some investors feel a ‘tick-the-box’ approach might suffice, crafting impressive-looking ABC policies on paper, but which might lack substance or oversight.

Such a stance would be unwise (and likely even more so going forward). For instance, the prior-mentioned DOJ post – that of Hui Chen, who has a strong private-sector background in compliance, including time in China<sup>2</sup> – dovetails with an apparent push by the DOJ to bolster firms’ in-house compliance programs<sup>5</sup>. Chen will reportedly be “looking beyond the company’s window dressing to examine whether companies truly embody a culture of compliance”.<sup>6</sup>

Thus, we see no let up in demand for post-deal ABC DD and effective ABC remedial program advisory. Thankfully, in our experience the acquired company (i.e. the previously reticent management) is likely to cooperate in full during post-acquisition ABC DD, facilitating completion of the work scope set out in the planning phase; the DD can also easily be extended upon discovery of new issues.

Regulators such as the DOJ and SFO do (and will continue to) expect thorough ABC DD to take place – whether pre- or post-acquisition. Professional advisors can do an initial assessment followed by more focused actions based on initial findings, depending on risk appetite around the deal. Key focal areas typically include ‘tone from the top’ as to management awareness of ABC, identifying risks for sample transaction testing, and tailored training around ABC to ultimately integrate the company from an ethics/operational stand-point. Post-deal ABC DD requires a robust plan and appropriate remediation measures/timelines – *time* being of the essence in order to meet regulators’ minimum expectations.

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