Corporate Finance/M&A - Mexico

Considering environmental liabilites in M&A transactions

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Introduction

Following a global trend, environmental regulation plays an increasingly important role in Mexico at every level of jurisdiction (federal, state and municipal). Both foreign and national companies place great importance on compliance with the environmental obligations applicable to their activities, both as a consequence of increased environmental awareness and in order to avoid possible administrative penalties and environmental liability.

The environmental legislation is scattered across various laws, regulations and official standards. However, the government has continued to improve environmental regulation, as well as trying to achieve better compliance with it.

This update addresses some of the environmental considerations that arise in M&A transactions.

Environmental liability and corporate veil

In connection with environmental liability and the piercing of the corporate veil, the first issue to consider is the extent to which a company's environmental liability may be extended to other group entities. Under Mexican law, a company has neither any intention of its own nor free will, since it acts through individuals. For this reason officers, directors, administrators and other representatives of the company are responsible for the criminal acts that they commit, whether personally or under the banner of corporate representation.

In accordance with Mexican law, it is not possible to pierce the corporate veil, and therefore it is unlikely that shareholders could face any environmental liability imposed on the Mexican entity. However, criminal environmental liability may be imposed on a shareholder which orders or authorises an environmental criminal act.

Issues for the buyer

When considering a transaction, a buyer usually would – and should – ask the seller to provide or carry out an environmental site assessment (ESA) before acquisition of the company in order to identify any possible environmental conditions or risk. The purpose of the ESA Phase I would be to obtain a general evaluation in order to determine the presence of any contamination or to identify any areas in which the entity's activities that are subject to the transaction do not comply with the applicable environmental legal framework. The ESA Phase I study may be carried out by any specialised company or by companies certified and recognised by the federal environmental authorities.

A further step in the negotiations would be to include in the corresponding agreement the necessary representations and warranties to protect the buyer against any possible environmental risk that could affect it.

Solutions for the seller

Approaching the issue from the other side, the solutions available to the seller to limit environmental liability should also be considered. The most efficient way would be to carry out an ESA Phase I or II before executing the corresponding transaction. The purpose of the ESA would be to prove that at the time of the transaction, there is no environmental liability on the side of the seller. In addition, the correct representations

and warranties should be included in the corresponding agreement.

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