A Primer on FCPA Due Diligence in Cross-Border M&A Transactions: Avoiding Legal and Business Risks

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I. Introduction

The due diligence process is a critical underpinning of a successful M&A transaction that cannot be overlooked. Given the enactment of new anti-corruption laws in Latin America and the intensified enforcement of the ("FCPA") in the U.S.[2], prospective acquirers are increasingly utilizing additional due diligence resources to ensure that target companies are indeed complying with applicable anti-corruption legislation. The economic and reputational consequences of failing to detect and end a target's noncompliance with anti-corruption laws are severe. Violators (both individuals and entities) may be subject to criminal and civil charges, which include penalties, fines, profit disgorgement, prejudgment interests, and the potential incarceration of individual wrongdoers. Furthermore, a collateral consequence of a corruption conviction can include disqualification from contracting with governmental agencies and public international organizations.

In 1977, the United States enacted the Foreign Corrupt Practices Act (the "FCPA" or the "Act") in response to foreign policy concerns pertaining to widespread overseas bribery by U.S. companies. In addition to companies incorporated in the U.S. and those issuing securities listed on a U.S. securities exchange (including their subsidiaries, affiliates, partners and agents), the FCPA also governs the conduct of foreign firms and persons that cause unlawful payments to take place within the U.S. The FCPA's broad jurisdictional reach and its strict enforcement by the U.S. Securities and Exchange Commission and the U.S. Department of Justice (collectively, the "U.S. Authorities"), has resulted in hundreds of investigations, enforcement actions and settlements both in the U.S. and abroad, including throughout Latin America.

In the years following its enactment, FCPA prosecutions were rare, but in recent years the U.S. Authorities have increased the frequency and the fervor of FCPA enforcement actions. In 2010, the U.S. Authorities created FCPA-specific task forces focused on prosecution of

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[2] *See, e.g.* Brazil's Clean Company Law: New Risks for Companies Doing Business in Brazil, Jones Day Commentary, August 2013, *available at* http://www.jonesday.com/brazils-clean-company-law-new-risks-for-companies-doing-business-in-brazil-08-12-2013/; *see also* the U.K.'s Bribery Act 2010, Chapter 23, *available at* http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf ; *see also* Columbia Joins OECD Anti-Bribery Convention, OECD, Nov. 12, 2012, *available at* http://www.oecd.org/daf/anti-bribery/colombiajoinsoecdanti-briberyconvention.htm; *see also* Mexico's Anti-Corruption Law Targets Bribery in Government Contracting, INSIDE COUNSEL, Nov. 28, 2012, *available at* http://www.insidecounsel.com/2012/11/28/mexicos-anti-corruption-law-targets-bribery-in-gov.

alleged FCPA violations.[3] Shortly thereafter, during a January 2011 speech, the then-U.S. Assistant Attorney General noted that the recent spike in FCPA enforcement activity indicated that the law, "which was once seen as slumbering, is now very much alive and well."[4] Moreover, the ten largest (in terms of financial penalties assessed) FCPA resolutions involving a corporate defendant occurred within the last ten years—with two of these cases settling in a six month period between May and November 2013.[5]

Moreover, the uptick in FCPA enforcement is not limited to purely U.S. conduct and, rather, there has been an increase in FCPA enforcement actions arising out of conduct that occurred, or is occurring, in Latin America.[6] In the eight years from 2005-2013, there were 21 FCPA enforcement actions involving conduct alleged to involve Latin America. Of those 21, "Mexico accounted for 8 FCPA enforcement actions, while Brazil accounted for five. Meanwhile, Argentina and Venezuela each had four."[7] Although, relative to its size and the importance of Latin America in the global marketplace, 21 enforcement actions in 8 years may not seem like many, it is important to note that 9 of the 21 enforcement actions occurred in the last 3 years. This upward trend is expected to continue in light of the "significant staffing up of dedicated FCPA teams at the DOJ and SEC," and the "globalization of anti-corruption and anti-bribery legal initiatives and enforcement."[8] Practitioners have noted the U.S. Authorities' increased scrutiny of Latin America conduct. One forensic consulting firm stated that roughly half of its Latin America case load is now FCPA-related and that it "expect[s] this to continue to trend upwards with the continued and significant staffing up of dedicated FCPA teams at the DOJ and SEC under the Obama administration, the growing globalization of anti-corruption and anti-bribery legal initiatives and enforcement, and also, following the financial crisis which has left US growth prospects weak, a spike in investment in Latin America by US corporations that have not ventured into the region before and need assistance."[9]

Under the FCPA, an acquirer can be held liable for violations of the FCPA by the target company if failed to detect, cease, and remediate the Target's wrongful conduct. U.S.

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[3] *See, e.g.*, SEC Press Release 2010-5, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence, Jan. 13, 2010, *available at* http://www.sec.gov/news/press/2010/2010-5.htm.

[4] Lanny A. Breuer, Assistant Attorney General, Dep't of Justice, Criminal Division, Remarks at the Annual Meeting of the Washington Metropolitan Area Corporate Counsel Association, Jan. 26, 2011, *available at* http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html.

[5] *See, e.g.*, Richard Cassin, Weatherford Lands on Our Top Ten List, FCPA BLOG, Nov. 27, 2013, *available at* http://www.fcpablog.com/blog/2013/11/27/weatherford-lands-on-our-top-10-list.html

[6] "There has been an increase in FCPA enforcement actions against individuals for conduct in Latin America for the first seven months of 2013 as compared to all of 2012." *See*, Joachim Bamrud, Latin America: FCPA Cases Grow, LATINVEX, Aug. 28, 2013, *available at* http://www.latinvex.com/app/article.aspx?id=898.

[7] *Id.*

[8] Joachim Bamrud, More FCPA Cases in Latin America, LATINVEX, June 28, 2010 (quoting Simon Strong, senior managing director of forensic and litigation consulting at FTI) *available at* http://www.latinbusinesschronicle.com/app/article.aspx?id=4311

[9] *Id.*

Authorities have expressly noted that an acquirer that fails to undertake adequate FCPA due diligence in the context of a merger or acquisition may face both legal and business risks.[10] The possibility of a governmental enforcement action premised on successor liability underscores the importance of undertaking an effective pre-acquisition FCPA due diligence investigation and additional risk-mitigation steps following the consummation of the proposed transaction. This article summarizes the salient provisions of the Act, particularly how the FCPA creates successor liability in the context of mergers and acquisitions, and the steps that can be taken to discover, remedy, and prevent future FCPA violations by implementing, among other measures, thorough due diligence both before and after the acquisition. The implementation of these procedures and policies may help a prospective acquirer avoid or substantially reduce the costs and fines associated with an FCPA violation.

II. FCPA Overview

The FCPA was enacted in order to prevent U.S. businesses or persons from engaging in corrupt practices with foreign governments and their officials. The U.S. Authorities are tasked with enforcing the FCPA, and both agencies have made enforcement a priority in recent years.

The FCPA covers a wide range of conduct, persons, and entities. Specifically, it applies to:

- U.S. domiciled companies, citizens, and permanent residents;
- companies that securities trading on a U.S. exchange;
- employees and agents of U.S. domiciled companies, companies with securities trading on U.S. exchanges, citizens, and permanent residents;
- foreign individuals and companies that cause prohibited acts in the U.S.; and
- anyone who aids or abets a violation of the FCPA.[11]

The substance of the FCPA can be broken down into two types of provisions: (1) the anti-bribery provision, and (2) the books and records provisions.

The FCPA's anti-bribery provision makes it unlawful to make (or promise to make) payments to foreign officials, political parties, instrumentalities, or other persons for the purposes of inducing a foreign official to act in a particular manner or to secure a business advantage.[12]

The FCPA's books and records provisions require that books, records, and accounts accurately reflect a company's transactions and that a company devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that (i) the company's transactions are executed in accordance with management's general or specific authorizations,

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[10] A Resource Guide to the U.S. Foreign Corrupt Practices Act, p. 62.

[11] Clark Keeler, *supra* note 1.

[12] *See* 15 U.S.C. §78dd-1.

(ii) transactions are recorded in a manner to ensure the preparation of financial statements in conformity with generally accepted accounting principles and in a manner permitting the company to maintain accountability for its assets, (iii) access to assets is permitted only in accordance with management's general or specific authorization, and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[13]

The Act imposes criminal liability for knowingly circumventing or failing to implement a system of internal controls or knowingly falsifying any company books, records, or accounts. The FCPA is enforced criminally by the DOJ and civilly by the SEC. The Act provides for severe criminal and civil penalties against corporations and individuals.

It should be noted that the U.S. Authorities have charged parent companies for the wrongdoing of their subsidiaries and affiliates, even where the parent company did not participate in, or have knowledge of, the misconduct. These charges are based on the existence of an agency relationship between the parent company and its subsidiaries and affiliates, where the actions and knowledge of the subsidiary are imputed to the parent.[14] Enforcement actions may also be based on successor liability theories. Whether a corporate acquisition will expose an acquirer to successor liability depends on the facts and applicable law.[15]

A. The Anti-Bribery Provision

In general, the anti-bribery provision in the FCPA prohibits the direct or indirect payment of money or "anything of value" to a "foreign official" in order to "obtain or retain business." It is also a violation to promise an improper payment even if no bribe is ultimately paid or to authorize the making of a corrupt payment.[16] The following elements must be present to establish an FCPA violation.

1. Required Mental State

The FCPA's knowledge requirement can be shown through either actual knowledge or "conscious disregard," "willful blindness," and "deliberate ignorance" that a violation of the Act has occurred or is likely occurring.[17] In assessing whether an entity was "willfully blind," the U.S. Authorities will analyze whether indicia of improper payments—so called "red flags"—were present and whether those "red flags" were properly addressed or ignored.[18] In an

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[13] *See* 15 U.S.C. §78m

[14] Resource Guide at 27.

[15] *Id.* at 28.

[16] § 78dd-1(a), § 78dd-2(a), and § 78dd-1(a).

[17] *See* 15 U.S.C. §§ 78dd-1(f)(2)(B), 78dd-2(h)(3)(B), 78dd-3(f)(3)(B).

[18] *See, e.g., U.S. v. Kozeny and Bourke*, 664 F. Supp. 2d 369 (S.D.N.Y. 2009); *aff'd* 667 F.3d 122 (2d. Cir. 2011), *cert. denied* 133 S.Ct. 1794 (2013).

enforcement action, the U.S. Authorities will have the benefit of hindsight when alleging that circumstances of potential wrongdoing were ignored. Hence, as discussed in further detail in Section IV, infra, in order to avoid successor liability, a U.S. Acquirer or issuer must identify and address any "red flags" of potential FCPA violations to ensure that any wrongdoing is detected, stopped and remediated.

2. "Anything of Value"

In their enforcement actions, the U.S. Authorities construe "anything of value" broadly to include cash, gifts, lavish travel and entertainment, loans, training or educational expenses, and promises of future employment. For example, in *SEC v. UTStarcom, Inc.*,[19] an action was brought against a company that spent almost $7 million on approximately 225 trips to popular U.S. tourist destinations for customers, including the employees of foreign state-owned companies. The company claimed the trips were for training purposes, but no training occurred on many of the trips, nor did the company have facilities at many of the destinations. In *SEC v. ABB Ltd.*,[20] the defendant gave a wider variety of gifts to a government official, including a country club membership, payment of household and cell phone bills, an automobile, and limousine services.

The U.S. Authorities confirmed their broad interpretation in their FCPA guidance. Importantly, however, the U.S. Authorities recognize that sometimes small gifts can be appropriate business courtesies. According to the U.S. Authorities' comprehensive guidance captioned *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "Resource Guide"), "hallmarks" of an appropriate gift are: (1) it is given openly and transparently; (2) it is properly recorded in the giver's books; (3) it is provided only to reflect esteem or gratitude; and (4) it is permitted under local law. Examples of appropriate expenditures may include modest meals, company promotional items, cab fare, and other business courtesies of nominal value that are unlikely to improperly influence an official.[21]

3. "Foreign Officials" and State "Instrumentalities"

The FCPA defines a "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[22] While many government leaders and employees can be easily identified as "foreign officials," it is not clear what constitutes an employee of a state "instrumentality." The U.S. Authorities take the view that a state-owned or state-controlled enterprise (a "SOE") is an "instrumentality" and therefore its employees are "foreign officials" under the Act. The U.S.

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[19] *SEC v. UTStarcom, Inc.*, No. 09-cv-6094 (N.D. Cal. Dec. 31, 2009).

[20] *SEC v. ABB Ltd.*, No. 04-cv-1141 (D.D.C. July 6, 2004).

[21] Resource Guide at 15.

[22] § 78dd-1(f)(1).

Authorities adopt this interpretation to account for the different ways that foreign governments are organized and operate.[23] Regrettably, there is no bright line test, and the DOJ takes the position that even entities that resemble a commercial entity, which are majority owned by private parties or whose shares are traded on public exchanges, may constitute governmental "instrumentalities" under the FCPA.[24]

Two 2011 cases provide a non-dispositive list of factors that U.S. courts will consider when assessing whether an entity is an "instrumentality":

- Whether the entity provides a service to citizens;
- Whether the key officers and directors of an entity are, or are appointed by, government officials;
- Whether an entity is financed, at least in large measure, through governmental appropriations or government mandated royalties;
- The foreign state's degree of control over an entity;
- The purpose of an entity's activities;
- The circumstances surrounding an entity's creation; and
- The extent of the foreign state's ownership of an entity.[25]

In both cases, the court upheld the DOJ's expansive definition of "instrumentality" and denied the defense motions to dismiss the indictments. The *Carson* court determined that whether an entity is an "instrumentality" is a fact-specific question for which state ownership or control is "only one of several considerations" and noted that corporations have long been used to achieve government objectives, such as in the case of banks and railroads.[26]

It is unsettled whether the U.S. Authorities must identify a specific "foreign official" in order to show a violation of the Act. In *U.S. v. O'Shea*,[27] there was "gossip" that bribes were being paid to foreign officials, but the government failed to produce evidence that any specific foreign official received any improper payment. The court found this problematic, explaining that while "the government does not have to trace a particular dollar to a particular pocket of a

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[23] Resource Guide at 20.

[24] *U.S. v. Carson, et al.*, 2011 WL 5101701 (C.D. Cal. May 18, 2011) (noting that the U.S. government employs commercial entities—such as the Federal Deposit Insurance Corporation, the Overseas Private Investment Corporation, and the Tennessee Valley Authority—to provide government services and finding that the mere fact that an entity is a corporation or has corporate functions does not foreclose a determination that the entity is a government "instrumentality").

[25] *U.S. v. Aguilar*, 783 F.Supp.2d 1108 (C.D. Cal. April 20, 2011); *U.S. v. Carson*, *supra* note 18.

[26] *U.S. v. Carson*, *supra* note 18.

[27] *United States v. O'Shea*, 4:09-cr-00629 (S.D. Tex. Nov. 16, 2009).

particular official, it has to connect the payment to a particular official."[28] In *SEC v. Jackson*, on the other hand, the court concluded that allegations of payments to unspecified foreign officials were sufficient to state a FCPA violation. In *Jackson*, the defendant corporate officers were accused of knowing that certain payments would be used to bribe foreign officials. The defendants challenged the sufficiency of the allegations, arguing that the "SEC must allege by name, or at minimum by role and job responsibility, the foreign official who was sought to be influenced," and that the SEC had not done so. The court agreed that the SEC had not identified the officials, but rejected the defendants' arguments that this was necessary, citing the plain language of the statute, the legislative history, and other domestic anti-bribery laws.[29]

4. "Obtain or Retain Business"

The DOJ uses a broad "business purpose test" to determine whether an FCPA violation has occurred.[30] This test requires that an improper payment be made in order to "obtain or retain business" or otherwise obtain unfair advantage. The Resource Guide examples of "Actions Taken to Obtain or Retain Business," which includes, winning a contract, influencing the procurement process, circumventing the rules for importation of products, gaining access to non-public bid tender information, evading taxes or penalties, influencing the adjudication of lawsuits or enforcement actions, obtaining exceptions to regulations, and avoiding contract termination.[31] In sum, if an illicit payment has a nexus to a "business purpose," then the U.S. Authorities will likely assert that the "obtain or retain business" or an improper advantage element of an FCPA bribery charge is satisfied.[32]

In *U.S. v. Kay*, a federal appellate court considered whether a payment to a "foreign official" to avoid paying customs duties and to lower sales taxes constituted a payment to "obtain or retain business." The court consulted the legislative history of the FCPA and concluded that Congress intended to reach corrupt conduct beyond cash payments to secure government contracts. In the specific case of payments to lower taxes, however, the court reversed the district court's dismissal of the indictment, which was based on the district court's conclusion that the FCPA did not criminalize bribes to avoid tax liability.[33] This suggests that whether a payment is made to "obtain or retain business" again depends on the facts of the case. In at least one case, *U.S. v. Pou*, decided prior to *Kay*, one defendant successfully argued for acquittal because his payments to ensure the release of seized aircrafts was not to "obtain or retain

[28] Motion for Acquittal and Ruling, *United States v. O'Shea*, 4:09-cr-00629 (S.D. Tx. Jan. 16, 2012).

[29] *SEC v. Jackson*., 908 F. Supp. 2d 834 (S.D. Tex. 2012).

[30] Resource Guide at 12.

[31] Resource Guide at 13.

[32] Resource Guide at 12-13.

[33] *U.S. v. Kay,* 359 F.3d 738 (5th Cir. 2004).

business," but rather were made only to speed up the bureaucratic process.[34] This so-called "facilitation payment" defense is discussed in more detail below.

5. Affirmative Defenses

The Act provides three statutory defenses to the anti-bribery provision: (1) "facilitating" or expediting payments, (2) legality under local law, and (3) legitimate product promotion.[35]

Facilitating payments are those made in furtherance of routine government functions over which the foreign official does not have discretion to act. Common examples include connecting a worksite to a power grid or paying for police protection. In assessing whether or not a payment was a "facilitating payment," the U.S. Authorities will look at the purpose of the payment, not the value.[36] However, as a practical matter, facilitating payments are typically not substantial sums.[37] Furthermore, as discussed below, "[a]s with any expenditure, facilitating payments may still violate the FCPA if they are not properly recorded in an issuer's books and records."[38]

A second defense is that the alleged payment is lawful under the laws and regulations of the jurisdiction in which it was made. It is important to note that the conduct must be expressly permitted under the jurisdiction's written laws and regulations. It is not sufficient to argue that the payment was made pursuant to "local custom" or "local business practices."

A third defense is that the conduct was for "a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of an foreign official" that are directly related to either "(A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof."[39] This defense is most typically raised in the contexts of the provision of hospitality or product promotion and demonstration. There is no bright line test as to what constitutes appropriate hospitality. However, the U.S. Authorities have charged FCPA violations where lavish hospitality was provided, where a foreign official's family members were provided first class travel, or where site visits included detours to popular tourist destinations like Disney Land or Las Vegas.

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[34] *U.S. v. Pou*, 89-802-CR-KEHOE, Defendant Duran's Motion for Judgment of Acquittal (S.D. Fla. Apr. 17, 1990); *U.S. v. Pou*, 89-802-CR-KEHOE, Judgment of Acquittal (S.D. Fla. Apr. 19, 1990).

[35] § 78dd-1(b), § 78dd-2(b), § 78dd-3(b).

[36] Resource Guide at 25.

[37] As a practical matter, there is a growing trend for companies to prohibit their employees from making them. Moreover, the U.K. Bribery Act does not permit facilitation payments. Accordingly, a company subject to both the Bribery Act and the FCPA would likely not permit its employees to make facilitation payments of any kind.

[38] Resource Guide at 26.

[39] § 78dd-1(c), § 78dd-2(c), § 78dd-3(c).

As a practical matter, most companies choose to settle FCPA enforcement actions with the U.S. Authorities rather than contest bribery allegations in court where a conviction could have significant or catastrophic economic and reputational consequences for the organization, including debarment from contracting with government entities and international organizations. As a result, there is not an extensive body of litigated case law on the FCPA generally or these three defenses specifically. Therefore, the U.S. Authorities' narrow interpretation of the scope of these affirmative defenses generally governs.[40]

B. The Books and Records Provisions

The number of enforcement actions based on the FCPA's books and records provisions has increased in recent years. The SEC is primarily responsible for increase in civil enforcement actions, but knowing violations of the books and records provisions can also lead to criminal liability. The books and records provisions require that public companies (as issuers of U.S. securities), "(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer," and "(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that-- (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences."[41] Accordingly, public companies must accurately and completely describe all expenditures and must take adequate measures to ensure that expenditures are appropriate and authorized. When a company pays a bribe to a foreign official, the books and records provisions would be violated if such payment is concealed or mischaracterized on such company's books and records. For example, recording a bribe as a "sales commission" would constitute an FCPA books and records violation. Importantly, there is no materiality or *de minimus* exception.

The FCPA provides a good faith exception to the books and records provisions when a public company "holds 50% or less of the voting power with respect to a domestic or foreign firm." In that case, public companies are only required to "proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls." If the public company is able to show that it has used good faith efforts to influence the domestic or foreign firm, it will be deemed to have complied with the requirements of the provisions.[42]

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[40] Ashby Jones, FCPA: Company Costs Mount for Fighting Corruption, Wall Street Journal (Oct. 2, 2012), http://online.wsj.com/news/articles/SB10000872396390444752504578024893988048764.

[41] § 78m(b)(2).

[42] § 78m(b)(6).

III. The FCPA in Cross-Border Due Diligence

Under the FCPA, mergers and acquisitions and other similar transactions may not give rise to liability for the past unlawful conduct of an acquired company.[43] Therefore, neglecting to perform thorough FCPA due diligence or to respond to any red flags exposes U.S. companies and companies with securities trading on U.S. exchanges (including ADRs for which the company must make periodic filings with the SEC) to potential successor liability, which can result in substantial penalties and fines from the U.S. Authorities and which may be imposed months or even years after a deal has closed.[44] Furthermore, a buyer that fails to conduct adequate FCPA due diligence may find after closing that it has purchased interests that will not be as productive or profitable without bribery or other corrupt practices.[45] Such a scenario poses not only significant civil or criminal liability risks, but also significantly jeopardizes a buyer's reputation and profitability.

The most concise statement regarding the U.S. Authorities' views of the adequacy of an acquirer's response to FCPA red flags in an acquisition target is found in their comprehensive Resource Guide. The Resource Guide outlines concrete steps that a company subject to the FCPA should take upon considering a merger or acquisition:

> (1) conduct thorough risk-based FCPA and anti-corruption due diligence on potential new business acquisitions;
>
> (2) ensure that the acquiring company's code of conduct and compliance policies and procedures regarding the FCPA and other anti-corruption laws apply as quickly as is practicable to newly acquired businesses or merged entities;
>
> (3) train the directors, officers, and employees of newly acquired businesses or merged entities, and when appropriate, train agents and business partners, on the FCPA and other relevant anti-corruption laws and the company's code of conduct and compliance policies and procedures;

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[43] Department of Justice Foreign Corrupt Practices Act Opinion Procedure Release No. 03-01 (Jan. 15, 2003).

[44] 18 U.S.C. § 3282 states that in the context of FCPA violations, a five year statute of limitations runs from each bribe. Accordingly, where there is an ongoing scheme, there is a five year statute of limitations for each corrupt payment. An important consideration in FCPA cases is liability under criminal conspiracy. The statute of limitations for criminal conspiracy is five years from the last act in furtherance of the conspiracy—which may not necessarily be a bribe payment. *United States v. Schlesinger*, 360 F. Supp. 2d 512, 520 (E.D.N.Y. 2005) ("The applicable statute of limitations for an action brought under § 371 is five years. 18 U.S.C. § 3282. In order for the conspiracy charge alleged . . . to fall within the statute of limitations, (1) the conspiracy must still have been ongoing within the five year period preceding the indictment, and (2) at least one overt act in furtherance of the conspiratorial agreement must have been performed within that period.") (internal quotations and citations omitted). For example, a prosecutor could argue that efforts to conceal a corrupt scheme or any ongoing performance under a contract corruptly obtained constitute "acts in furtherance" of the conspiracy. Thus, a prosecutor could reach conduct that would be time barred under the FCPA (or other applicable criminal statues such as wire fraud or money laundering) if the prosecutor could establish an overarching scheme lasting more than five years.

[45] Anti-Corruption Due Diligence in Cross-Border M&A, *supra* note 33.

(4) conduct an FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable; and

(5) disclose any corrupt payments discovered as part of its due diligence of newly acquired entities or merged entities.

The U.S. Authorities will give meaningful credit to companies who undertake these actions, and, in appropriate circumstances, the U.S. Authorities may consequently decline to bring enforcement actions.[46]

A. Conducting Thorough Pre-Acquisition Risk Based Due Diligence

While the FCPA does not include an affirmative defense of "due diligence," buyers that conduct adequate FCPA due diligence on their acquisition targets should be able to demonstrate to the U.S. Authorities a commitment to compliance, which is often taken into account if problems arise post-closing.[47] Conducting due diligence on a target before signing an agreement related to a deal also permits the potential buyer to reevaluate or terminate a deal if significant corruption related problems are discovered. Thus, effective pre-acquisition due diligence not only helps mitigate legal risks but also allows potential buyers to more accurately value potential targets. Furthermore, findings in due diligence can give potential buyers leverage to negotiate a price adjustment or the inclusion of indemnification and escrow provisions that specifically address the anti-corruption risk.[48] Ultimately, thorough due diligence is a key component of a larger mitigation strategy, and if done properly, can inoculate buyers against the considerable time, monetary, and reputational costs associated with newly acquired companies that have breached the FCPA.

An effective due diligence process is not only vital to uncovering potential FCPA violations, but is also an integral part of a larger strategy to set the tone for the target's transition to tighter internal controls and compliance protocols.[49] Such controls help protect against future liability and help ensure that a buyer's post-acquisition due diligence process properly supplements its pre-acquisition strategy. Accordingly, throughout the deal process, FCPA due diligence should seek to accomplish a number of broad goals, including:[50]

- Identifying corruption-related risks arising from a transaction;
- Confirming anti-corruption contractual representations;

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[46] Resource Guide at 29.

[47] Resource Guide at 62.

[48] *Id.*

[49] Conducting Effective Anti-Corruption Legal Due Diligence in Mergers & Acquisitions, Jones Day Commentary, R. Christopher Cook (March 20, 2013).

[50] *Id.*

- Determining the feasibility and cost of implementing adequate compliance measures after acquisition;
- Evaluating whether to adjust personnel, contracts, markets and relationships;
- Communicating a commitment to compliance to a target's management and employees; and
- Documenting a good faith effort though due diligence and compliance.

As discussed in Section III C, "Recent FCPA Cases Addressing M&A Due Diligence," *infra*, if a buyer opts to proceed with a transaction after due diligence indicates improper activities or if a buyer fails to detect, cease, and remediate a target's illegal conduct, then the acquiring company can be subject to an FCPA prosecution.

While FCPA due diligence is vital for all U.S. companies and issuers (including foreign issuers whose American Depository Receipts are listed on a U.S. exchange) involved in cross-border mergers and acquisitions, this is particularly true when potential targets are located in countries perceived to be "high risk" from a corruption perspective or have extensive foreign operations.[51] Identifying "high risk" jurisdictions may require consulting independent resources such as Transparency International's Corruption Perception Index (the "CPI"). The CPI broadly defines corruption as "the misuse of public power for private benefit," and the index ranks countries according to "their perceived levels of corruption, as determined by expert assessments and opinion surveys."[52] For example, many emerging markets fare poorly on the CPI; Brazil, Venezuela, Argentina, Bolivia, China, Russia, India and Mexico are just some of the higher profile countries currently considered to be high risk for corruption.[53]

In addition to considerations regarding situs of operations, certain industries are perceived to be "high risk" from an anti-corruption compliance perspective. For example, there have been numerous FCPA prosecutions of participants in the construction, defense contracting, energy, health care, mining, telecommunications, and transportation sectors. Historically, these heavily regulated industries often had limited anti-corruption safeguards, and the combination of high local business regulation with few safeguards created circumstances under which bribery could occur.[54] For example, the Chinese pharmaceutical industry is highly regulated and Chinese authorities set pricing margin structures for all market participants, and yet there is a perception that pervasive corruption exists among Chinese doctors who demand bribes in order

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[51] Bloomberg Law Reports, Mergers & Acquisitions, Vol.2, No. 19. (Sept 29, 2008).

[52] Corruption Perceptions Index, Transparency International (2012), *available at* http://www.transparency.org/research /cpi/overview.

[53] Other Latin American countries that the CPI currently considers to be high risk include: Argentina, Bolivia, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, Suriname and Venezuela.

[54] Kroll, Global Fraud Report at 13 (2011), *available at* http://www.kroll.com/media/pdfs/ KRL_FraudReport2010-11.pdf.

to prescribe medicines.[55] Even within these "high risk" industries, the level of risk can vary according to whether a target is publicly or privately held, or whether there is any state-owned interest or involvement.[56] Additionally, FCPA risk generally increases when a target employs or is closely associated with government personnel, particularly when such individuals or their associates are a key part of the target's leadership, management, or operations.[57]

In addition to identifying and scrutinizing at-risk countries and industry sectors, a prospective buyer must respond to any "red flags" discovered during diligence. While not a complete list, the following are some "red flags" that may signal a high likelihood that FCPA violations may be occurring and require additional scrutiny:[58]

- Past FCPA violations or investigations, as well as any other corruption-related investigation;
- Past violations or allegations relating to business integrity or other violations of local law, including tax and customs compliance;
- The use of agents or third parties who are paid unusually high commissions or billing rates without sufficient supporting details and documentation or who demand unusual payment terms, such as payments in cash or requests that payments be made to a third party or to accounts in an unrelated jurisdiction;
- The use of agents or third parties who appear to lack qualifications to perform the duties contemplated by the engagement or a heavy reliance on political or governmental contacts as opposed to knowledgeable employees or staff;
- Employment or engagement of any person or party based on personal, familial, or professional relationships with a government official or the suggested use of any party by a foreign official;
- Unusually high or frequent political contributions;
- Payments to third parties that are not well-known in the industry or that reside outside of the country where the goods or services are to be provided;
- Reliance on shell companies or cash transactions;
- Lack of anti-bribery policies, trainings, compliance programs or codes of conduct;

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[55] *See* "Why Corruption is Inevitable in China's Pharmaceutical Industry," China Briefing (July 2013), *available at* http://www.china-briefing.com/news/2013/07/25/why-corruption-is-inevitable-in-chinas-pharmaceutical-industry.html. Furthermore, in several recent FCPA prosecutions, the U.S. Authorities have considered doctors working in a state-owned hospital or employed in a state-run medical system to be "foreign officials" because they are employees of state "instrumentalities." *See* Section III(A)(3), *supra*.

[56] <u>The Foreign Corrupt Practices Act: Overview, Summary of Recent Developments & Impact on the M&A Environment</u>, Jones Day Commentary (Feb. 4 2013).

[57] *Id.*

- Lack of written agreements with agents or business partners, particularly where there are close relationships with government officials and regulators;
- Any misrepresentations, reluctance or failure of the target to cooperate in the due diligence process; or
- The country's or industry's reputation or history of corruption problems.

Once all red flags are identified, preventing FCPA successor liability in cross-border deals requires an assessment of the target's overall risk profile in order to design and implement an appropriate response to identified red flags.[59] In general, this process must involve detailed documentation of all due diligence efforts, particularly when evaluating potential FCPA violations. As discussed in Section III(A)(1), the FCPA's knowledge requirement encompasses both actual knowledge as well as "conscious disregard," "willful blindness," and "deliberate ignorance" that a violation of the Act has occurred. Accordingly, all red flags must be thoroughly investigated and resolved. Resolution may require self-reporting or use of the DOJ's Opinion Procedure Release ("OPR") process.[60] Additionally, if FCPA violations are uncovered, a potential buyer should negotiate appropriate contractual provisions from the target in the applicable transaction document, such as requesting the spin-off or closing of the corrupt business, if it can be isolated, prior to closing, retaining audit and indemnification rights post-closing, or escrowing proceeds.

It is vital that throughout the due diligence process potential buyers do not rely solely on information provided by the target or interested third parties. In particular, there must be independent verification of critical details and business relationships, such as consultant and agent contracts, ownership structure, the interests of key business partners or customers, and any third-party payment information.[61] While this may require a significant upfront investment, the costs will likely be lower than the potentially substantial costs, reputational harm, and lost business that results from an investigation by the U.S. Authorities.

In situations where pre-acquisition due diligence is not possible, it is important to note that, in some limited and justified instances, the U.S. Authorities will not prosecute acquiring companies who undertake extensive post-acquisition FCPA due diligence. For example, in DOJ OPR 08-02, the DOJ stated that it would not prosecute Halliburton where it could not conduct fulsome pre-acquisition due diligence on a British target due to U.K. legal restrictions and where

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[59] The Foreign Corrupt Practices Act: Overview, Summary of Recent Developments & Impact on the M&A Environment, *supra* note 46.

[60] The Opinion Procedure Release ("OPR") mechanism "enable[s] issuers and domestic concerns to obtain an opinion of the Attorney General as to whether certain specified, prospective--not hypothetical--conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the [FCPA]." 28 C.F.R. part 80. An OPR is only binding upon the parties who submit the request. However, given the paucity of judicial opinions analyzing the FCPA, OPRs provide useful guidance when assessing whether certain conduct likely would trigger an FCPA enforcement action.

[61] M&A and SEC Developments: Practice Tips for the 2013 Deal and Proxy Season, Jones Day (Nov. 15, 2012).

Halliburton provided a detailed 180 day work plan[62] pursuant to which it would conduct a robust post-closing anti-corruption compliance review of the target and would inform the DOJ at regular intervals of the review's findings.[63] Furthermore, it is important to note that, in the Resource Guide, the U.S. Authorities state that final steps in all transactions include an FCPA-specific audit and disclosure of any corrupt payments to the U.S. Authorities.

B. Post-Acquisition Steps

The U.S. Authorities take the position that thorough pre-acquisition due diligence and responses to red flags alone are not sufficient to eliminate possible successor liability. Rather, post-acquisition, the acquirer must (1) ensure that the acquiring company's code of conduct and compliance policies and procedures regarding the FCPA and other anti-corruption laws apply as quickly as is practicable to newly acquired businesses or merged entities; (2) train the directors, officers, and employees of newly acquired businesses or merged entities and, when appropriate, train agents and business partners, on the FCPA and other relevant anti-corruption laws and the company's code of conduct and compliance policies and procedures; (3) conduct an FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable; and (4) disclose any corrupt payments discovered as part of its due diligence of newly acquired entities or merged entities. The U.S. Authorities will give meaningful credit to companies who undertake these actions, and, in appropriate circumstances, the U.S. Authorities may consequently decline to bring enforcement actions.[64]

As set forth in further detail in Section IV(B), post-acquisition, a buyer can mitigate the target's pre-transaction wrongdoing by ensuring that its risk mitigation plan builds on its pre-acquisition strategy. Depending on the level of risk uncovered during pre-acquisition due diligence, a post-acquisition plan may entail anything from establishing requirements concerning compliance and remediation procedures to obtaining re-certifications of FCPA compliance from key employees and business partners. As with pre-acquisition due-diligence, a company's strategy post-closing must be risk-based and proportional to the size and scope of the transaction. It also should be tailored to ensure sufficient monitoring and auditing procedures focused on detecting any noncompliance with the FCPA.[65]

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[62] In the Halliburton OPR, the DOJ characterizes the proposal as follows: "Halliburton represents that, in light of the above restrictions, if it makes an additional bid which is successful and thus acquires Target, it intends to implement the following post-closing plan …" (The Department of Justice, FCPA Review, Opinion Procedure Release (June 13, 2008), *available at:* http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.) Unhelpfully, unlike the SEC No Action Process, it does not appear that the DOJ published Halliburton's materials requesting an OPR. Accordingly, it is not clear whether Halliburton proposed or negotiated the post-closing plan. However, the takeaway from this OPR, which in some respects was subsequently formalized in the FCPA Resource Guide, is that a fulsome post-closing audit is an effective way for an acquiring company to mitigate the risk of FCPA successor liability.

[63] DEP'T OF JUSTICE, FCPA Opinion Procedure Release 08-02 (June 13, 2008), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.htm.

[64] Resource Guide at 29.

[65] Conducting Effective Anti-Corruption Legal Due Diligence in Mergers & Acquisitions, *supra* note 40.

C. Recent FCPA Cases Addressing M&A Due Diligence

Underlying this guidance are Opinion Procedure Releases (each, an "OPR")[66] and cases actually brought by the U.S. Authorities regarding FCPA violations in M&A transactions. Analysis of the successor liability cases over the last ten years further demonstrates the nominal risk faced by U.S. acquirers. In three successor liability cases, the U.S. Authorities did not charge the successors for pre-acquisition misconduct and in two they did. The cases turn on whether the acquiring company detected, stopped, and remediated the target's conduct. Where the answers to these questions were "yes," the U.S. Authorities did not prosecute the successors. Conversely, where the answers to these questions were "no," the U.S. Authorities charged the acquirer with violating the FCPA.

1. Opinion Procedure Releases highlight the importance of robust anti-corruption due diligence and appropriate responses to corruption risks.

Three OPRs further underscore what the U.S. Authorities view to be appropriate due diligence and response to corruption red flags.

First, in OPR 2001-01, the DOJ stated that it would not take enforcement action where a U.S. company entered into a joint venture with a French company provided that, among other things, the French company represented and warranted that there were no undisclosed transactions that would violate any anti-bribery law and that the U.S. company could terminate the joint venture in the event that such representation and warranty turned out to be false.[67]

Second, in OPR 2003-01, the DOJ stated that it would not take any enforcement action against an acquirer where the acquirer self-reported certain misconduct and agreed to:

> (1) cooperate (i) with the U.S. Authorities in their respective investigations of the past payments and, (ii) cooperate with foreign law enforcement authorities;
>
> (2) ensure that any employees or officers of the target company found to have made or authorized unlawful payments to foreign officials were appropriately disciplined;
>
> (3) disclose to the DOJ any additional pre-acquisition payments to foreign officials made by the target company or its subsidiaries that it discovers after the acquisition;
>
> (4) extend to the target company its existing compliance program. Such compliance program to be, if necessary, modified to ensure that it is reasonably designed to detect and deter, through training and reporting, violations of the FCPA and foreign bribery laws; and

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[66] *See* OPR explanation, *supra* note 52.

[67] *See* DOJ, FCPA OPR 2001-01 (May 24, 2001), http://www.justice.gov/criminal/fraud/fcpa/opinion/2001/0101.pdf.

(5) ensure that the target company implements a system of internal controls and makes and keeps accurate books and records.[68]

In a third OPR, various investment funds sought to purchase a business and entered a preliminary agreement to do so on October 16, 2003.[69] The agreement included a provision to jointly conduct an FCPA compliance review of the target business.[70] The investment funds represented that they conducted a very extensive review of the target company, including engaging independent lawyers who spent thousands of hours reviewing millions of documents and interviewing numerous current and former employees of the target company. The funds also engaged forensic accountants who travelled to many countries where the target did business, analyzed hundreds of thousands of transactions, and drafted numerous analytic reports.[71] The investment funds effectively agreed to the five steps described in the Resource Guide.[72] On July 6, 2004, the DOJ announced the target's guilty plea to violations of the FCPA and, one week later, announced that it did not intend to take any action against the investment funds.[73] This result underscores the importance of conducting thorough pre-acquisition risk based due diligence and complying with the Resource Guide steps when considering a merger or acquisition.

2. Three cases in which the acquiring company was not prosecuted because the target's corrupt conduct was identified, ceased, and remediated.

Prior to the General Electric Company's ("GE") acquisition of InVision Technologies Inc. ("InVision"), a publicly traded company based in California, the companies discovered that "InVision, through the conduct of certain employees, was aware of a high probability that its agents or distributors in Thailand, China, and the Philippines had paid or offered to pay money to foreign officials or political parties in connection with transactions or proposed transactions for the sale by InVision of its airport security screening machines."[74] Before the acquisition closed, the companies voluntarily disclosed the findings of the internal investigation to the U.S. Authorities, and the companies entered into agreements with the U.S. Authorities.[75] InVision admitted to the allegations in the statement of facts, paid an $800,000 fine, and agreed to continue cooperating with the U.S. Authorities. GE entered into a one year agreement with the DOJ in exchange for the DOJ's agreement to not prosecute GE; specifically, GE agreed (i) to

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[68] DOJ, FCPA OPR 2003-01 (Jan. 15, 2003), http://www.justice.gov/criminal/fraud/fcpa/ opinion/2003/0301.pdf.

[69] *See* DOJ, FCPA OPR 2004-02 (July 12, 2004), http://www.justice.gov/criminal/fraud/fcpa/opinion/ 2004/0402.pdf.

[70] *See id*.

[71] *See id*.

[72] *See id. See also* Section VI, *supra*.

[73] *See id.*

[74] *See* InVision Technologies Enters into Agreement with the United States, DOJ Press Release No. 04-780 (Dec. 6, 2004), http://www.justice.gov/opa/pr/ 2004/December/04_crm_780.htm.

[75] *See id*.

integrate InVision into GE's FCPA compliance program and retain an independent consultant to evaluate the efficacy of GE's efforts, (ii) to cause InVision to comply with the terms of InVision's Non Prosecution Agreement with the DOJ, (iii) to accept the factual statements in the InVision Agreement and refrain from contradicting the settlement, and (iv) to continue to cooperate in the U.S. Authorities' on-going investigation.[76] Hence, by disclosing the target's potential misconduct and agreeing to absorb the client into the acquirer's FCPA compliance regime, the acquiring company avoided successor liability.

Similarly, the discovery and disclosure of pre-acquisition misconduct enabled the Monsato Company ("Monsato") to avoid successor liability. Delta & Pine Land Company ("Delta & Pine") and its wholly-owned subsidiary were "domestic concerns" under the FCPA. In July 2007, they paid $300,000 to resolve allegations that the subsidiary paid bribes to Turkish officials in order to obtain business permits to operate in Turkey.[77] The SEC's complaint alleges that the improper payments began in 2004 and "did not cease until 2006, when the payments came to light in connection with due diligence being performed by a potential acquirer of Delta & Pine."[78] Monsato, the acquirer, was not prosecuted for the target's pre-acquisition conduct.[79]

Likewise, Johnson Controls Inc. ("Johnson Controls") was able to avoid successor liability following its acquisition of York International Corporation ("York"), also a domestic concern, by discovering and disclosing pre-acquisition misconduct to the U.S. Authorities.[80] Johnson Controls acquired York in 2005, and the U.S. Authorities alleged that, prior to this acquisition, York International's subsidiary paid bribes and kickbacks to Chinese, Emirati, Indian, Iraqi, and Nigerian officials in order to secure government projects.[81] Neither the DOJ nor the SEC prosecuted Johnson Controls for the pre-transaction conduct of York; however, York's deferred prosecution agreement with the DOJ required Johnson Controls to adopt new, or to modify existing, internal controls regarding, among other things, appropriate due diligence regarding agents and business partners.

3. Successor liability imposed where acquirer fails to cease and remediate a target's corrupt conduct.

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[76] *See id*.

[77] *See* Delta & Pine Land Company and Turk Deltapine Agree to Pay a $300,000 Penalty to Settle FCPA Charges, SEC Litig. Release No. 20214 (July 26, 2007), http://www.sec.gov/litigation/litreleases/2007/ lr20214.htm (the "Delta & Pine Press Release").

[78] *SEC v. Delta & Pine Land Company*, 1:07-cv-01352 (D.D.C. July 25, 2007), Complaint ¶ 10.

[79] *See* Delta & Pine Press Release.

[80] *See* Justice Department Agrees to Defer Prosecution of York International Corporation in Connection With Payment of Kickbacks Under the U.N. Oil For Food Program, DOJ Press Release No. 07-783 (Oct. 1, 2007), http://www.justice.gov/opa/pr/2007/October/ 07_crm_783.html.

[81] *See* SEC Files Settled Foreign Corrupt Practices Act Charges against York Int'l Corp., SEC Litig. Release No. 20319 (Oct. 1, 2007), http://www.sec.gov/litigationllitreleases/2007/lr20319.htm.

Two cases from 2009 involved companies that failed to detect, stop, and remediate illegal bribery schemes post-acquisition.

The SEC found that, after the Avery Denison Corporation ("Avery") acquired a company in June 2007, employees of the acquired company continued their practice of making illegal petty cash payments to customs and other officials in several foreign countries. Similarly, the Halliburton Company ("Halliburton") was held liable as successor for its insufficient due diligence prior to acquiring Dresser Industries, Inc. ("Dresser") in September 1998. One of Dresser's wholly-owned subsidiaries was Kellogg Brown & Root LLC ("KBR").[82] KBR, through its predecessor companies, was a member "of a four-company joint venture that won construction contracts worth more than $6 billion."[83] The SEC alleged that, as early as 1994, members of the joint venture bribed Nigerian officials in order to obtain construction contracts, and concealed the illicit payments through the joint venture's entry into sham contracts with agents who funneled the bribes to Nigerian officials.[84] The SEC's complaint further alleged that the bribery schemes lasted from 1998 to 2006 and thus that the internal controls of both KBR and Halliburton "failed to detect or prevent the bribery, and that Halliburton records were falsified as a result of the bribery scheme."[85] In order to resolve parallel U.S. Authorities' investigations, Halliburton and KBR paid a combined $559 million in criminal and civil penalties.[86]

IV. Mitigating Risks in M&A Transactions

1. Conduct an investigation to determine the extent of the problem.

Once a potential buyer discovers FCPA violations, the next step involves an internal investigation to determine the extent or pervasiveness of the wrongdoing and, in turn, the extent of the additional risk of value-loss.[87] An internal investigation allows the potential buyer to

[82] *See* SEC Charges KBR and Halliburton for FCPA Violations, SEC Litig. Release 2009-23 (Feb. 11, 2009), http://www.sec.gov/news/press/2009/2009-23.htm.

[83] *Id*.

[84] *Id*.

[85] *Id*.

[86] The two agents used by the joint venture were extradited to the United States and pleaded guilty. As part of his plea, Jeffrey Tesler, one of the two agents who delivered the bribes to Nigerian officials, agreed to a $149 million criminal forfeiture and was sentenced to 21 months in federal prison. (Main Justice, Tesler gets 21 Months for FCPA Violations, Feb. 23, 2012, *available at:* http://www.mainjustice.com/justanticorruption/2012/02/23/breaking-tesler-gets-21-months-for-fcpa-violations/). The other agent, Wojciech Chodan, agreed to $700,000 forfeiture and was sentenced to one year of unsupervised probation. (The FCPA Blog, A Survey of FCPA Sentences, Feb. 28, 2012, *available at:* http://www.fcpablog.com/blog/2012/2/28/a-survey-of-fcpa-sentences.html). KBR's former CEO Jack Stanley pleaded guilty, was sentenced to 30 months in federal prison, and ordered to pay $10.8 million in penalties. (*See U.S. v. Albert Jackson* Stanley, Judgment in Criminal Case 4:08CR00597-001, available *at:* http://www.justice.gov/criminal/fraud/fcpa/cases/stanleya/2012-03-01-stanleya-judgment.pdf).

[87] "Requesting that the target launch an internal investigation is critical to determining the magnitude of any issues in advance of closing." Anti-Corruption Due Diligence in Cross-Border M&A, *supra* note 33.

evaluate the costs and benefits of proceeding with the deal as opposed to terminating negotiations and abandoning the deal all together, as a target's value to a potential buyer is likely to be diminished by potential FCPA violations if the buyer can reasonably anticipate being subject to future FCPA action.

2. Consider whether disclosure to the U.S. Authorities is necessary.

Either during or subsequent to the internal investigation, the parties should consider and discuss disclosure of the discovered violations to the U.S. Authorities. As further discussed in the final section of this article, "the possibility of cooperating with the government and mitigating penalties may provide incentives to self-disclose."[88] In developing a strategy, the parties would be wise to consider the risk of an employee coming forward as a whistleblower before the parties have had time to develop a plan to address and remedy the violation.

3. Re-examine the operative deal documents to protect the acquirer from the target's pre-transaction conduct.

After the potential buyer has assessed the risk of value-loss attributed to the violation or potential violation, the buyer may also seek to protect against value-loss by reexamining the transaction agreement. The transaction agreement serves as a risk distribution and management tool long before post-closing discovery of violations of anti-corruption law. It is commonplace for transaction agreements to contain FCPA representations in which the target represents that it has not engaged in conduct that would violate the FCPA. The following is a sample FCPA representation:

> Neither the Company nor any Subsidiary (including any of their officers, directors, agents, distributors, employees or, to the Knowledge of the Company, other Person associated with or acting on their behalf) has, directly or indirectly, taken any action which would cause it to be in violation of the Foreign Corrupt Practices Act of 1977, as amended, or any rules or regulations thereunder or any similar anti-corruption or anti-bribery Legal Requirements applicable to the Company or to the Knowledge of the Company, any Subsidiary in any jurisdictions other than the United States (in each case, as in effect at the time of such action) (collectively the "FCPA"), used any corporate funds for unlawful contributions, gifts, entertainment or other unlawful expenses relating to political activity, made, offered or authorized any unlawful payment to foreign or domestic government officials or employees, whether directly or indirectly, or made, offered or authorized any bribe, rebate, payoff, influence payment, kickback or other similar unlawful payment, whether directly or indirectly.[89]

[88] Anti-Corruption Due Diligence in Cross-Border M&A, *supra* note 33.

[89] Agreement and Plan of Merger by and Among Salesforce.com, Inc., Bullseye Merger Corporation, Buddy Media, Inc. and Shareholder Representative Services LLC as Stockholder Representative, Dated as of June 3, 2012, *available at* http://www.sec.gov/Archives/edgar/data/1108524/000119312512257938/d360062dex21.htm.

Note that the definition of "Knowledge of the Company" used in the FCPA representation may be different than the one used for other representations in the transaction agreement. The definition used in the FCPA representation should take into account the FCPA's knowledge requirements discussed in Section III(A)(1) of this Article. Although discovery of a violation of anti-corruption law during the due diligence process may require specific amendments to the general FCPA representation and/or the scheduling by the target company of any known FCPA violations or potential issues, the risk created by the discovery of a violation may also prompt renegotiation or the addition of other provisions of the agreement. These additional anti-corruption provisions, discussed below, seek to protect against, or reallocate to the seller, the value-loss attributed to a discovered violation, its disclosure, and the potential buyer's efforts to obtain compliance.

In particular, a potential buyer may seek to expand the existing indemnification provisions in the proposed agreement or add a specific and focused indemnification clause to address potential damages attributed to FCPA violations. In addition, and because FCPA violations may be traced to certain individuals or divisions within the target, the parties may negotiate for modification or termination of employment or management agreements. Further, in light of the many costs of managing and remedying violations of anti-corruption laws, among other accommodations the buyer may insist that the seller divests, or otherwise isolates the corrupt business from the target, and request a lower purchase price if the transaction is to continue.[90]

The parties may also amend their respective covenants, conditions of closing, or termination rights to add conditions related to the violations and investigation. For example, in the failed merger between Lockheed Martin and Titan Corporation, upon the discovery of FCPA violations, the parties amended the merger agreement to provide for termination rights if Titan breached any of the following covenants relating to discovered FCPA violations:[91]

> (a) Company covenants and agrees to use its commercially reasonable efforts to obtain a final resolution and/or settlement as to Company and its Subsidiaries with the CD DOJ, the SEC, the United States Department of Defense and the United States Department of State of all matters related to or arising from (A) allegations of violations of applicable law in connection with payments that were made, or items of value that were provided, by consultants or representatives for Company or its Affiliates to foreign officials; or (B) allegations of violations of the books

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[90] For example: In the 2002 merger of Syncor International Corporation and Cardinal Health, Inc. the parties amended the merger agreement to lower the stock-for-stock exchange ratio after due diligence revealed that officers of Syncor's foreign subsidiary had made illegal payments to obtain or retain business. *See* Press Release, Cardinal Health and Syncor Announce Amended Merger Agreement, Dec. 3, 2004, *available at* http://www.sec.gov/Archives/edgar/data/202763/000095017202002651/dec02rel.txt; *See also* Richard L. Cassin, The FCPA Blog, Syncor's Founder Settles FCPA Charges with the SEC, Oct. 1, 2007, *available at* http://www.fcpablog.com/blog/2007/10/1/syncors-founder-settles-fcpa-charges-with-the-sec.html.

[91] *See* Amendment No. 3 to Agreement and Plan of Merger by and Among Lockheed Martin Corporation, LMC Sub One, Inc. and The Titan Corporation, dated as of September 15, 2003, *available at* http://www.sec.gov/Archives/edgar/data/936468/000119312504058446/dex992.htm.

and records and internal controls provisions of applicable law (the allegations in the foregoing clauses (A) and (B), collectively, the "Alleged FCPA Violations"), which final resolution and/or settlement may include the following:

(i) a written statement or written confirmation from the CD DOJ that it considers its investigation of the Alleged FCPA Violations resolved as to Company and its Subsidiaries and does not intend to pursue any claims as to Company and its Subsidiaries in respect of the Alleged FCPA Violations, or the entry of a judgment of conviction signed by a United States district court judge pursuant to Federal Rule of Criminal Procedure 32(k) or other applicable rules resulting from Company's or any of its Subsidiaries' plea of guilty and a plea agreement with the United States under Federal Rule of Criminal Procedure 11(c) or other applicable rule;

(ii) entry of a settled cease-and-desist order by the SEC pursuant to Section 21C of the Exchange Act and that may include the filing by the SEC of a settled civil action in a United States district court in which Company consents to a judgment related to or arising from the Alleged FCPA Violations;

(iii) execution of a written agreement or other written confirmation with the cognizant debarring official that the debarring official has determined that the debarment of Company or any of its Affiliates is not in the interests of the United States pursuant to Federal Acquisition Regulation subpart 9.406-1, 48 C.F.R. § 9.406-1, as a result of the Alleged FCPA Violations and/or in the event of the entry of a criminal judgment of conviction of Company or any of its Affiliates, the entry of a settled cease-and-desist order by the SEC against Company, or Company's consent to a judgment from the filing of a civil action by the SEC, related to or arising from the Alleged FCPA Violations; and

(iv) execution of a written agreement or other written confirmation with the Department of State, Directorate of Defense Trade Controls ("DDTC") that DDTC has determined that it will not deny, revoke, suspend or amend any license and other approvals, including applications, of Company or any of its Affiliates registered as an exporter with the Department of State, pursuant to 22 U.S.C. § 2778(g)(4) and 22 C.F.R. §§ 126.7(a)(4), 127.7, and 127.11, as a result of the Alleged FCPA Violations and/or in the event of the entry of a criminal judgment of conviction of Company or any of its Affiliates related to or arising from the Alleged FCPA Violations.

The items enumerated in the foregoing clauses (i) through (iv), are collectively referred to as the "FCPA Resolution and Settlement."

> (b) Company covenants and agrees that it will not enter into any of the agreements, consent decrees or settlements contemplated by the FCPA Resolution and Settlement without the written consent of Acquirer, which consent shall not be unreasonably withheld or delayed. In considering whether any such requested consent of Acquirer is unreasonably withheld or delayed, it shall not be considered unreasonable if Acquirer withholds its consent in a situation in which, taking into account any or all of the agreements, consents, decrees, or settlements contemplated by the FCPA Resolution and Settlement, (A) the aggregate payments in fines, penalties, or settlement made or to be made by Company or any of its Affiliates are materially adverse in relation to Company's consolidated financial condition, assets or stockholders' equity, or (B) such agreements, consent decrees or settlements include provisions that impose significant adverse restrictions or limitations on the business or operations of Company or any of its Affiliates. For purposes of this Section 6.23(b), significant adverse restrictions or limitations on the business or operations of Company or any of its Affiliates shall not include training programs, auditing processes, compliance programs, reporting obligations or any other procedures or processes included in Acquirer's ethics and compliance program. Acquirer covenants and agrees that it will extend its ethics and compliance programs to Company and its Affiliates if requested by any Governmental Entity to satisfy any requirements post-closing in relation to compliance or compliance-related matters that any of the Governmental Entities may require as part of reaching with Company FCPA Resolution and Settlement.
>
> (c) Acquirer covenants and agrees that it will use its commercially reasonable efforts to cooperate and assist Company in obtaining any FCPA Resolution and Settlement with any Governmental Entity

Ultimately, Lockheed Martin walked away from the transaction when Titan failed to reach a plea agreement with the DOJ before the closing deadline. Commenting on why Lockheed abandoned the year-long negotiation of the $2.2 billion deal, a spokesman for the company stated that "[i]t's not a decision that [Lockheed Martin] took lightly," and that Lockheed Martin "did not want the uncertainty that surrounded the transaction to continue indefinitely."[92] Lockheed's apprehension of inheriting FCPA violations may have been a result of its own experience with FCPA violations when its predecessor company, Lockheed Corp., "pleaded guilty to conspiring to bribe an Egyptian politician for help in securing a contract for three C-130H cargo jets" ten years before the proposed Titan deal.[93]

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[92] Lockheed Martin Scuttles Titan Acquisition, Washington Post, June 27, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A8745-2004Jun26.html.

[93] *Id.*

V. After Closing: How to Achieve FCPA Compliance

When a buyer chooses to proceed with an acquisition despite the discovery of violations of the FCPA, it is important that such buyer continue its efforts in the post-closing period to uncover and remedy any violations and their effects. The importance of post-closing due diligence and compliance is two-fold: first, as a going concern, the buyer has an interest in ensuring that the acquired business is free of corrupt behavior that may jeopardize the value of its business going forward. Second, because an acquisition will often close before any government action is taken, a buyer taking affirmative steps in the period following an acquisition may demonstrate to the U.S. Authorities that changes are being made and therefore prosecution is not necessary.

The DOJ, and more recently the SEC, has shown a willingness to enter into Non-Prosecution Agreements ("NPAs") or Deferred Prosecution Agreements ("DPAs") when a buyer has disclosed the acquired company's violations, cooperated with government investigations and taken steps to implement a compliance program.[94] In remarks made during the 5th Annual Conference for Corporate Financial, Legal, Risk, Audit & Compliance Officers, Assistant Attorney General Lanny Breuer noted the DOJ's stance on disclosure and cooperation, stating:

> If you come forward and if you fully cooperate with our investigation, you will receive meaningful credit for having done so. In talking about "meaningful" credit, we are not promising amnesty for doing the right thing. But, self-reporting and cooperation carry significant incentives—by working with the Department, no charges may be brought at all, or we may agree to a deferred prosecution

[94] A Deferred Prosecution Agreement ("DPA") allows the DOJ to file criminal charges against a company—typically through a criminal information—but then defer the actual prosecution of the case for a period of time that typically ranges from two to four years. During the period in which prosecution is deferred, the company is prohibited from engaging in further wrongdoing and usually must implement policies and procedures designed to prevent future violations of the law. If the company complies with the terms of the DPA, at the completion of the period of deferred prosecution, the DOJ dismisses the charges. The end result to the company is no guilty plea, no criminal record, and fewer collateral consequences than those associated with a guilty plea or a conviction and the resulting criminal record. Similar to a DPA, a Non Prosecution Agreement ("NPA") is a written agreement between the DOJ and a company pursuant to which the DOJ agrees not to file criminal charges against the company for a set period of time—like a DPA, the period is typically two to four years—and the company agrees to comply with certain terms and conditions over that period of time. However, unlike a DPA where the DOJ files criminal charges with the court, the DOJ does not publicly file any charging documents in an NPA resolution. Accordingly, there is typically no public record of the agreement. The terms and requirements of NPAs vary, but the most common terms include (1) a fine, (2) a requirement that the company cooperate in an ongoing government investigation, (3) a prohibition on future violations of the law for a set period of time (Companies are always prohibited from violating the law, but when this prohibition is included as a term of the NPA, a subsequent violation of the law may form the basis for the government prosecuting the company for the underlying conduct that led to the NPA), (4) defined improvements in a company's internal controls, and/or (5) some form of government oversight of the company's compliance with the terms of the NPA. Finally, the DOJ could grant a "declination" and decline to prosecute the company altogether—the best possible resolution for a corporate criminal defendant.

> agreement or non-prosecution agreement, sentencing credit, or a below-Guidelines fine."[95]

Moreover, Assistant Attorney General Breuer noted that "every case is fact-specific" and the amount of leeway or forgiveness to be earned from disclosure and cooperation varies.[96]

In addition to the five steps for effective M&A due diligence set forth in the Resource Guide,[97] the DOJ's Principles of Federal Prosecution of Business Organizations lists the factors the DOJ will consider before pursuing an FCPA enforcement action:[98]

- The nature and seriousness of the offense, including the risk of harm to the public;
- The pervasiveness of wrongdoing within the corporation;
- The corporation's history of similar misconduct;
- The corporation's timely and voluntary disclosure of wrongdoing and willingness to cooperate;
- The existence and effectiveness of the corporation's compliance program;
- The corporation's remedial actions;
- The existence and magnitude of collateral consequences of the violation;
- The adequacy of the prosecution of the individuals responsible; and
- The adequacy of remedies such as civil or regulatory enforcement actions.

Although the DOJ considers a variety of factors when deciding whether to prosecute violations, most of the factors are not within the buyer's control. The seriousness of the violation(s) as well as the target's history of misconduct cannot be changed in the post-acquisition period. However, because a buyer may influence the likelihood and extent of prosecution by way of those factors within its control—namely timely and voluntary disclosure and the existence of an effective compliance program—particular attention has been paid to the Resource Guide's section addressing remedial actions.

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[95] Lanny A. Breuer, Assistant Attorney General, Criminal Division, U.S. Department of Justice, Prepared Remarks to Compliance Week 2010—5th Annual Conference for Corporate Financial, Legal, Risk, Audit & Compliance Officers, May 26, 2010, *available at* http://www.justice.gov/criminal/pr/ speeches-testimony/2010/05-26-10aag-compliance-week- speech.pdf.

[96] *Id.*

[97] DOJ/SEC's Resource Guide to the U.S. Foreign Corrupt Practices Act: Jones Day Summary and Analysis (December 2012), *available at* http://www.jonesday.com/doj_sec_resource_guide_to_fcpa/.

[98] Title 9, Chapter 9-28.00, Principles of Federal Prosecution of Business Organizations, *available at* http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf.

The Resource Guide's discussion of corporate compliance programs emphasizes that "check-the-box" compliance programs may be inefficient and ineffective and that "effective compliance programs are tailored to the target's specific business and to the risks associated with that business."[99] Although the Resource Guide emphasizes that compliance programs should aim to be dynamic and evolve to meet the risks of the business, the Resource Guide does list a set of "Hallmarks of Effective Compliance Programs." The inclusion of these hallmarks or best practices have been interpreted by some as an indication that "a compliance program that fails to include these 'hallmarks' may be viewed skeptically by the DOJ and the SEC."[100] Accordingly, buyers would be wise to be sure that any post-acquisition compliance program implemented aims to satisfy the requirements outlined below.

An effective compliance program is marked by:[101]

- A "tone at the top," starting with the board of directors and senior executives, "setting the proper tone for the rest of the company" and a demonstrated commitment to compliance;
- A code of conduct that is clearly written, concise, and accessible to all employees and those doing business on the company's behalf;
- A senior executive assigned the responsibility of overseeing the implementation and management of the compliance program who also has the autonomy and resources to ensure effective implementation;
- A protocol for assessing, analyzing, and addressing risk;
- Periodic training and certification for all directors, officers, relevant employees, and (where appropriate) agents and business partners;
- Consistent and prompt disciplinary measures following violations and positive incentives to drive compliant behavior;
- Procedures and protocols for assessing the risk of doing business with third parties and monitoring third party compliance; and
- Procedures and protocols for confidential reporting of violations or misconduct and mechanisms for efficient, reliable, and properly funded investigations.

From the above, we can conclude that, when a buyer proceeds with an M&A transaction despite the discovery of FCPA violations, such buyer may be subject to prosecution based on pre- and post-acquisition conduct of the acquired company. Therefore, during the post-closing period, buyers should take steps to mitigate the likelihood and extent of criminal prosecution,

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[99] Resource Guide at 56-57.

[100] DOJ/SEC's Resource Guide to the U.S. Foreign Corrupt Practices Act: Jones Day Summary and Analysis, *supra* note 89.

[101] Resource Guide at 56-61.

including possibly entering into NPAs and DPAs with the government.[102] By looking at the factors the DOJ considers in its prosecution decisions as well as the factors that the government considers "hallmarks" of effective compliance programs, a buyer may enter the post-closing period with confidence in the steps constituting the "right thing" in the eyes of the U.S. Authorities. Chief among these next steps is disclosure, cooperation with the government investigation, and the strengthening of an existing compliance program or the implementation of a compliance program if one did not previously exist. Such a program should be built around the U.S. Authorities' "hallmarks of effective compliance programs" while also recognizing that the program should be dynamic and evolve with the risks of the business. While none of this provides a clear checklist for the post-closing period, the U.S. Authorities' guidance does provide a rough road map of appropriate steps a successor company may take in the post-acquisition period.

VI. Conclusion

Under the FCPA, a buyer can be held liable for the violations of the FCPA by the acquired company if such violations were relatively evident and the buyer did not undertake an investigation that would establish facts to the contrary. The possibility of a government enforcement action premised on successor liability highlights the importance of pre-acquisition FCPA due diligence. The extent of this due diligence should be determined by identifying risk factors that may suggest past or ongoing FCPA violations. Among these risk factors are past FCPA violations, unusually high compensation or political contributions, reliance on shell companies, lack of written compliance policies, a large volume of cash payments made to a third party or to accounts in an unrelated jurisdiction, and the failure of the target company to cooperate in due diligence or audit processes. Once risk factors are identified, due diligence should aim to identify contracts or relationships in which the risk of corruption is high, confirm anti-corruption representations in existing contracts and business relationships, identify existing anti-corruption policies, and document a good faith effort to discover any questionable conduct or outright violations of the FCPA.

When pre-acquisition due-diligence uncovers potential violations of the FCPA, a significant risk of value-loss is introduced into the transaction. The costs of governmental investigations and related fines, as well as those costs associated with remedying past violations and ensuring compliance going forward, may result in the renegotiation of the transaction

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[102] The SEC recently announced its first ever NPA with a company for violations of the FCPA. Citing the company's "prompt self-reporting and extensive cooperation," and though not in the context of a merger, the SEC entered into an NPA with Ralph Lauren Corporation to resolve the allegations that Ralph Lauren violated the FCPA when its Argentine subsidiary made improper payments to government and customs officials to ensure the importation of the company's goods into Argentina. In addition to disclosure, cooperation with the investigation and disgorgement of profits, "[t]he SEC also stated that it took into account the significant remedial measures undertaken by [Ralph] Lauren, including the company's implementation of a comprehensive new compliance program throughout its operations." Ralph Lauren took additional remedial steps specific to its business including "termination of employment and business arrangements with all individuals involved in the wrongdoing . . ." and "conducting a risk assessment of its major operations worldwide to identify any other compliance problems."

agreement to reallocate these costs. A potential buyer may wish to reduce the purchase price, strengthen existing indemnity or escrow provisions and/or include fulsome and protective representations and warranties, covenants and termination rights to reflect the discovery of FCPA violations. The uncertainty and costs associated with FCPA violations may also cause a potential buyer to terminate the deal altogether. Buyers that proceed despite FCPA violations must institute thorough post-closing due diligence and compliance procedures to mitigate the likelihood of government action.

The U.S. Authorities have issued advisory opinions suggesting that buyers can take steps post-acquisition to increase the likelihood of entering into an NPA or DPA so as to avoid harsh penalties. Although the U.S. Authorities have not enumerated specific steps buyers should take, by looking at the factors the U.S. Authorities consider in deciding when to prosecute violations, the timely and voluntary disclosure of any violation is always a crucial first step. While every case is fact specific, cooperation with the government can demonstrate a commitment to compliance that may influence any decision to prosecute. In addition, the U.S. Authorities have made it clear that implementing or strengthening compliance programs is vital to remedying past violations and preventing future enforcement actions.

Ultimately, the increasing globalization of the marketplace has made cross-border mergers and acquisitions common place. The broad scope of the FCPA's jurisdiction makes it more crucial than ever for potential buyers to understand the risk factors associated with FCPA violations, as well as how to mitigate those risks. This article has shown that steps can be taken to discover, remedy, and prevent future FCPA violations by implementing a thorough due diligence process both before and after an acquisition, and subsequently establishing appropriate mitigation and remediation protocols.