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ANTI-CORRUPTION DUE DILIGENCE IN CORPORATE TRANSACTIONS: HOW MUCH IS ENOUGH?

Foreign Corrupt Practices Act violations by a target company may derail an acquisition or create liability for the acquirer, even if previously unknown. The parties' due diligence, the authors suggest, should be tailored to the transaction's risk profile, performed in tandem with standard due diligence, and, when an issue is uncovered, fully addressed from a compliance and risk mitigation standpoint.

By Gary DiBianco and Wendy E. Pearson *

Vigorous enforcement of the Foreign Corrupt Practices Act ("FCPA") continues to be a priority for both the Department of Justice and the Securities and Exchange Commission. Indeed, 2007 saw the largest number of FCPA cases brought by the DOJ (16), the largest DOJ fine to date ($26 million), and the largest combined DOJ and SEC FCPA settlement ($44 million). Government officials, the defense bar, and compliance specialists expect this trend of aggressive enforcement to continue. Criminal fines, civil penalties, and disgorgement likely will increase, as will the number of actions brought by the DOJ and SEC. Several recent cases involve conduct identified in the context of transactional due diligence, and regulators have emphasized their belief that transactional due diligence should include, as a matter of course, procedures to test compliance with the anti-bribery, books and records, and internal controls provisions of the FCPA. However, not all transactions have the same FCPA risk, due diligence, and contractual representations and warranties, and post-closing compliance procedures all should be tailored to the transaction's specific risks. Parties and counsel to a transaction frequently ask, "how much diligence is enough?" One size does not fit all. This article explores the factors and procedures that should be considered in ensuring sufficient and robust FCPA diligence.

THE CONTEXT

In light of the government's recent enforcement efforts, the framework of the FCPA is generally familiar. The FCPA was enacted in 1977, and has two primary components: the anti-bribery provisions, and the accounting provisions. The anti-bribery provisions prohibit payments or other benefits to foreign officials to obtain or retain business, or an improper business advantage. The accounting provisions require accuracy in financial reporting, and internal controls sufficient to ensure that transactions are recorded in accordance with management direction. The statute applies civilly to U.S. SEC registrants, including foreign private issuers, and criminally to U.S. issuers, domestic concerns, and

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other persons.[1] The FCPA's jurisdictional reach is broad, and several recent settlements involve non-U.S. subsidiaries and affiliates of U.S. issuers.[2]

The public record shows both successes and failures in closing transactions in the face of FCPA issues. In 2002, Cardinal Health Inc.'s acquisition of Syncor International Corp. was salvaged after Syncor quickly resolved FCPA issues uncovered during post-signing due diligence. Two years later, in 2004, Lockheed Martin bowed out of an attempted $2.2 billion acquisition of Titan Corp. after Titan failed to resolve FCPA issues that arose during due diligence investigations.[3] Nearly one year after the failed merger, the SEC and DOJ announced that Titan had settled, agreeing to pay $15.5 million in civil penalties and $13 million in criminal penalties.[4] Also in 2004, identification of FCPA issues during pre-closing due diligence in GE's acquisition of InVision Technologies led to a deferred prosecution agreement and an $800,000 fine, but allowed GE to avoid successor liability for InVision's conduct and to conclude the deal.[5]

Resolution of FCPA issues also has been a predicate of a U.S. initial public offering. In September 2007, the DOJ entered into a deferred prosecution agreement with Paradigm B.V., relating to allegedly improper payments made through agents in Kazakhstan, China, Mexico, Nigeria, and Indonesia.[6] The payments were identified during pre-IPO due diligence, and voluntarily disclosed to the DOJ.

Nor does the closing of a transaction always end potential FCPA issues. In July 2004, in connection with a sale to a consortium of private equity investors, ABB Vetco Gray UK and ABB Vetco Gray, Inc. pled guilty to FCPA violations based on payments to Nigerian customs officials and agreed to pay a $10.5 million penalty. According to the DOJ, the payments continued even after the plea, and resulted in a follow-on investigation that was resolved with additional pleas of guilty when two of the Vetco Gray companies were sold in January 2007 to GE.[7] Vetco International described the DOJ settlement as a closing condition of the 2007 sale.[8] During due diligence of Monsanto's acquisition of Delta & Pine, Monsanto identified potentially improper payments by Delta & Pine's Turkish subsidiary. Monsanto insisted that Delta & Pine report the conduct to the DOJ and SEC, ultimately leading to a post-closing

[1] 15 U.S.C. 78dd-1(a), 78dd-2(a) and 78dd-3(a).

[2] *See, e.g., SEC v. Westinghouse Air Brake Technologies Corp*., Civil Action No. 08-CV-706 (E.D.Pa.)(involving Indian subsidiary); *SEC v. Flowserve Corp*., Civil Action No. 08-CV-00294 (D.D.C.)(involving French and Dutch subsidiaries); *SEC v. Akzo Nobel*, N.V., Civil Action No. 07-CV-02293 (D.D.C.)(involving two Dutch subsidiaries); *SEC v. Ingersoll-Rand Company Ltd.*, Civil Action No. 107-CV-01955 (D.D.C.)(involving Irish and Italian subsidiaries); *SEC v. Baker Hughes Inc*., Case No. H-07-CV-1408 (S.D. Tex.)(involving subsidiary with operations in Kazakhstan); *SEC v. Dow Chemical Company*, Civil Action No. 07-CV-00336 (D.D.C.)(involving fifth-tier Indian subsidiary); and *SEC v. Delta & Pine Co. and Turk Deltapine*, Civil Action No. 1:07-CV-01352 (D.D.C.)(involving Turkish subsidiary).

[3] Renae Merle, *Lockheed Martin Scuttles Titan Acquisition*, Wash. Post, June 27, 2004 at A09, *available at* http://www.washingtonpost.com/wp-dyn/articles/A8745-2004Jun26.html.

[4] *The Titan Corporation and the Foreign Corrupt Practices Act ("FCPA")*, http://www.oppenheimer.com/news/detail.asp?id=b22.

[5] Alice S. Fisher, Assistant Att'y Gen., U.S. Dep't of Justice, American Bar Association, Prepared Remarks at the National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), at 8.

[6] *See* U.S. DOJ Press Release, Paradigm B.V. Agrees to Pay $1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries (Sept. 24, 2007), http://www.usdoj.gov/opa/pr/2007/September/07_crm_751.html.

[7] U.S. DOJ Press Release, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines (Feb. 6, 2007).

[8] Vetco International Press Release (Feb. 6, 2007).

FCPA settlement.[9] Delta & Pine had identified the payments years earlier but determined that they did not violate the FCPA. Finally, corruption allegations cast a shadow over Statoil's merger with Norsk Hydro. Statoil had reached agreements with the DOJ and SEC to settle FCPA charges in October 2006, regarding allegedly improper payments to secure a contract to develop an oil and gas field in Iran. In October 2007, simultaneous with the closing of Statoil's merger with Norsk Hydro, public reports emerged regarding an anti-corruption investigation into payments by Norsk Hydro to a Libyan consultant in connection with Norsk Hydro's Libyan portfolio, which it purchased from Saga Petroleum in 1999. Norsk Hydro's Chairman of the Board stepped down to allow the investigation to proceed.

The threshold issues facing an acquiror are straightforward, and have both a regulatory and economic component: First, does the target's past or present business practices create a risk of liability for the acquiror after closing? For example, over six years after acquiring Coastal Corporation, El Paso reached agreements with the SEC and DOJ regarding illegal surcharges to the former government of Iraq in connection with purchases of crude oil from third parties under the United Nations' Oil-for-Food Program. The settlement involved actions by Coastal prior to its acquisition by El Paso, as well as actions by El Paso after the acquisition.[10] Similarly, in 2006, Tyco paid $50 million to settle a number of charges, including one that a company acquired by Tyco continued to pay bribes after the acquisition was completed.[11] Second, are there practices that, if stopped before or upon closing, will reduce the target's ability to generate revenue and thus impact the value of the acquisition?

Regulatory risk is most frequently analyzed through theories of successor liability, under which regulators would argue that an acquiror could be held liable for pre-closing actions of the target that are either known or unknown at the time of closing but are only resolved, by settlement or government enforcement action, after closing. However, in addition to the traditional successor liability theory, regulators potentially could seek to impose liability on an acquiror in the context of an asset purchase, rather than a share purchase. Although such a theory has not been litigated in the FCPA context, the government may argue that it is supported by a non-FCPA administrative opinion from the Department of Commerce's Bureau of Industry and Security ("BIS") in an export control matter.[12] BIS imposed successor liability on three companies known as Sigma-Aldrich based on a theory of "substantial continuation" of the business of the assets purchased.[13] Applied in the FCPA context, this theory counsels for avoiding the purchase of a contract obtained by means of an improper payment, as regulators could take the position that the revenues from that asset remain tainted and are subject to civil disgorgement or constitute criminally derived proceeds.[14]

Under both successor liability and asset purchase theories, due diligence has several goals from the acquiror's perspective. First and foremost, it is to find out whether there are questionable payments, improper accounting entries, or controls weaknesses that could create liability under the FCPA. Second, due diligence has a prophylactic aspect: an acquiror should satisfy itself that it took prudent and reasonable steps to identify potential risks. If none are discovered pre-closing, but an issue arises later, the due diligence procedures will form the basis for arguments that no liability should be imposed on the good faith buyer for past transgressions of the target.

A target's incentives during due diligence may not always – and frequently do not – coincide with the goals of the buyer. First, to the extent that a transaction is lucrative and important for the target's management and shareholders, the target's main incentive may be to close the deal. Second, a target must rationally guard against the possibility that FCPA due diligence procedures (as with other due diligence procedures) could identify issues that reduce the value of the transaction, or prevent it all together. A target's nightmare scenario is identification of an issue that not only scuttles the

[9] *SEC v. Delta & Pine Co. and Turk Deltapine*, Civil Action No. 1:07-CV-01352 (D.D.C.).

[10] *SEC v. El Paso Corporation*, No. 1:07-CV-00899-LAP (S.D.N.Y Feb. 7, 2007).

[11] *See, e.g., SEC v. Tyco International Ltd.*, No. 06 CV 2942 (S.D.N.Y. filed Apr. 16, 2006).

[12] *See*, *In the Matter of Sigma-Aldrich*, Case Nos. 01-BXA-06 07, 11 (Aug. 29, 2002).

[13] *Id.*

[14] The DOJ has indicated that a U.S. company could be held liable if a joint venture partner contributes assets to the venture that have been acquired in violation of the FCPA. *See* DOJ FCPA Opinion Procedure Release No. 2001-01 (no action taken against a U.S. company forming a joint venture with a French company because none of the contracts contributed to the new venture by the French company were acquired in violation of the FCPA), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opiindx.htm.

transaction, but also leads to a public, lengthy, and expensive government investigation.

CONDUCTING DUE DILIGENCE

In light of potentially conflicting risks and incentives, each party should think strategically about: (1) its own FCPA risk relative to the transaction; (2) its strategy for handling due diligence and any FCPA issues that may arise; and (3) post-closing compliance requirements. FCPA risks, such as those associated with ongoing FCPA investigations or business activity in high-risk markets, will vary with the circumstances of each transaction. The earlier these risks are identified, the more likely that they can be addressed in a manner that is least disruptive to the transaction.

Risk Profile

Not every transaction has the same risk profile, and FCPA due diligence should be tailored to the risks of a specific transaction. For low-risk transactions, parties understandably do not want to spend valuable time and resources on straightforward issues. By the same token, extra steps should be taken in a transaction that presents higher risk. The corporate structure of the parties, their industry, relevant geographies, and compliance history all impact the risk profile. For example, when both parties to the transactions are U.S. registrants or foreign private issuers, U.S. authorities will expect the parties to have existing FCPA policies and compliance functions in place and to conduct specific FCPA due diligence in connection with the transactions. In a multinational transaction, the parties likely will want to focus their FCPA scrutiny and perform a heightened level of due diligence on affiliates and subsidiaries operating in countries where corruption risk is high.[15] If one of the parties to the transaction is already under investigation or has recently been under investigation for possible anti-corruption violations – either in the U.S. or elsewhere – the transaction has a higher perceived risk and authorities will expect heightened attention to corruption due diligence.

When a U.S. registrant acquires a non-U.S. registered public company or a private company, risks are higher because the target likely does not have a history of robust anti-corruption compliance. Due diligence should focus on the company's compliance with its own local anti-corruption laws, as the target may not have been previously subjected to the requirements of the FCPA. In these transactions, a key economic issue for the acquiror is whether enforcing anti-corruption compliance at the target will affect the target's business model or operation. Given the expectation of "day one" compliance after the closing of a deal, an acquiror should assess whether imposing necessary compliance programs will result in a loss of sales, licenses, or similarly valuable assets.

Due Diligence Procedures

Anti-corruption due diligence usually can be performed, at least initially, in tandem with standard economic and financial due diligence requests. Indeed, there are strategic reasons to proceed in this manner, because a target – particularly one outside of the United States – may resist broad, corruption-focused due diligence requests that presume the worst from the outset.

The following areas can be explored by initial requests for data room materials, followed by interviews of relevant management as appropriate.

- The controls environment: policies, procedures, employee training, audit environment, and whistleblower issues.
- Relationships with distributors, sales agents, consultants, and other third parties (who can be used to facilitate improper payments).
- The nature and scope of government sales and the history of significant government contracts or tenders. Risk of payments to government officials in connection with government sales – improper commissions, side agreements, cash payments, and kickbacks.
- Travel, gifts, entertainment, and educational or promotional expenses that are being used to provide benefits to government officials.
- Important regulatory relationships, such as key licenses, permits, and other approvals.

When formulating the scope of due diligence, acquiring companies should be mindful that each transaction is unique, involving different facts and circumstances that will determine the breadth and focus of the inquiry that is required. For example, a target whose revenues rely primarily on large non-U.S. government contracts presents the specific risk of traditional payments to obtain business. Due diligence

[15] *See* Transparency International, Corruption Perceptions Index, http://www.transparency.org/policy_research/surveys_indices/cpi.

procedures should focus on bid processes, to assess whether, for example, any improper side payments or kickbacks have been made. A similar risk is presented by mining, oil and gas, and other businesses where access to natural resources is important. Diligence should focus on whether there has been any questionable conduct in securing a concession or acquisition rights.

Highly regulated businesses present a different sort of risk, and diligence should be tailored accordingly. For example, a non-U.S. pharmaceutical manufacturer may have no government sales, but may need regular inspection approvals from local health and safety authorities. Due diligence in that context would focus on employees who interact with these regulators, and whether there are any fees, expediting payments, gifts, or other benefits that have been conveyed to government inspectors.

Additional risks are borne by industries that depend heavily on product instruction and demonstration, with sales accomplished through regular educational seminars or conferences. Whether benefits are being provided to employees of state-owned enterprises should be diligenced by examining expense records and conference attendee lists.

Finally, third-party agents present special risks, and an acquiror should assess the target's relationships and procedures to ensure that business relationships are formed with reputable and qualified agents and contractors. A number of recent settlements have been based on payments through third parties, contractors, or consultants, and the issue arises both in the context of securing sales and in contracting for administrative services.[16] For example, the DOJ and SEC recently have focused on the use of customs and freight-forwarding agents to obtain preferential treatment during the customs process. In this context, it is important to assess whether an entity: (1) has processes for review and approval of contracts with third parties; (2) requires consulting agreements to be in writing and to include appropriate compliance clauses; and (3) authorizes payments only after services have been documented and only to appropriate recipient bank accounts. Evidence of third-party due diligence inquiries and representations should be maintained in the company's files. The acquiror also should determine whether the target has contractual rights to audit third-party contractors and the right to terminate an agent or business partner in the event of a breach of anti-corruption laws or representations.

Timing of FCPA Due Diligence Procedures

In addition to discussions about scope, parties to a transaction frequently negotiate the timing of FCPA due diligence, whether it will be completed prior to signing a definitive agreement, or whether all or some of the inquiry will be performed after signing but before closing. Post-signing FCPA due diligence may be preferable when an initial agreement is reached quickly or in an auction or other competitive process, but it also has risks. If an issue is identified after signing, it may lead to renegotiation of price, public disclosures, or voluntary disclosures to government authorities. All of these possibilities may delay or ultimately prevent closing.

To maximize the possibility that post-signing due diligence will be confidential and orderly, it is often prudent to have a written work plan spelling out precisely what the review will consist of, who will conduct it, and what access each party will have to the findings. When drafting such a plan, due consideration should be given to privilege issues, confidentiality, and each party's rights and duties regarding disclosure of information that is gathered in the diligence.

WHEN AN ISSUE IS DISCOVERED

The actions taken once an issue is identified can profoundly affect the government's response and can determine whether a merger can be completed. In both the Cardinal Health/ Syncor and GE/InVision transactions, the acquiror avoided successor liability by conducting a thorough investigation, disclosing the results, and reaching a settlement with the authorities, prior to or in connection with closing. These matters provide some guidance regarding regulators' expectations, and best practices to minimize liability.

Syncor/Cardinal Health Response

Voluntary disclosure and a rapid internal investigation allowed the completion of the merger between Cardinal Health and Syncor, after Cardinal Health identified potential improper payments during its pre-merger due diligence of Syncor. As detailed in Syncor's public statements, Syncor disclosed these

[16] *See, e.g., SEC v. Monsanto Co.*, Civil Action No. 05-CV-14 (D.D.C. 2005)(involving Indonesian consultant); *SEC v. Titan Corp.*, Civil Action No. 05-CV-0411 (D.D.C. 2005)(involving payments to President of Benin's business advisor); *United States v. Statoil ASA*, No. 06-cr-00960-RJH-1 (S.D.N.Y. 2006)(involving a Turks & Caicos consulting firm); *SEC v. Baker Hughes Incorporated*, No. H-07-1408 (S.D. Tex. 2007)(involving payments to agents in Kazakhstan).

potential FCPA violations to the DOJ and the SEC, and conducted an internal investigation to determine whether additional foreign corrupt payments had been made in connection with the company's overseas business. Ultimately, Syncor Taiwan Inc. agreed to plead guilty to one count of violating the anti-bribery provisions of the FCPA and to pay a $2 million fine, based on allegations that it made illicit payments to doctors affiliated with government-controlled hospitals. The DOJ claimed that the payments were made to secure pharmaceutical business at the hospitals. The DOJ also asserted that the payments were made with the knowledge of senior management of the subsidiaries and, in at least one case, with the approval of the chairman of Syncor's board of directors. In exchange for the cooperation provided by Syncor, the continuing obligations of Syncor, and the plea agreement by Syncor Taiwan, the DOJ agreed to "not investigate or prosecute Syncor, *or any successor*, for the foreign payments or the accounting thereof disclosed by Syncor to the [DOJ] as of the date of this agreement." [17] Cardinal Health moved forward with the merger after Syncor reached agreements with the DOJ and SEC.

In order to reduce the risk of the acquisition, Cardinal Health (the "Requestor") pursued an opinion letter under the DOJ Opinion Release Procedure. The DOJ's Opinion Release states that the acquiror was "concerned that by acquiring Company A it is also acquiring potential criminal and civil liability under the FCPA for the past acts of Company A's employees."[18] In this regard, the Requestor pledged to:

- continue to cooperate with the DOJ, SEC, and foreign law enforcement investigations into improper payments;
- discipline Company A employees and officers who made or authorized improper payments to foreign officials;
- disclose to the DOJ any additional pre-acquisition payments to former officials identified post-acquisition;
- incorporate Company A into its anti-bribery compliance program; and
- ensure that Company A implements a system of internal controls, and makes and keeps accurate books and records.[19]

The DOJ stated that it would not hold the Requestor responsible for the pre-acquisition conduct "of companies that will be wholly owned subsidiaries following the acquisition."[20] In addition, the DOJ made clear that its statement did not apply to any post-acquisition payments.

GE/InVision Response

The GE/InVision Technologies, Inc. ("InVision") merger also illustrates that a merger may proceed if a thorough yet expeditious internal investigation occurs alongside cooperation with the government. GE discovered several potential FCPA violations during its due diligence of InVision, which InVision disclosed to the DOJ and the SEC. GE and InVision then conducted a joint internal investigation which identified possible improper payments. In settling the matter, the DOJ charged that from at least June 2002 through June 2004, InVision employees, sales agents, and distributors pursued transactions to sell explosive detection machines to airports in China, the Philippines, and Thailand. According to the DOJ, in each of these transactions InVision was aware of a high probability that its foreign sales agents or distributors made or offered to make improper payments to foreign government officials in order to obtain or retain business for InVision, but that InVision nevertheless allowed the agents or distributors to proceed on its behalf.

Settling the matter delayed closing of the GE/InVision transaction, but the transaction was successfully completed. According to the DOJ's deferred prosecution agreement, voluntary disclosure, ongoing cooperation, and prompt disciplinary action all benefited InVision in reaching a resolution of the investigation.[21] The DOJ also reached an agreement with GE, whereby it agreed not to prosecute GE or its successor or subsidiary based on the voluntarily disclosed pre-acquisition transactions as long as GE agreed to ensure that InVision performed on its obligations under its agreement, cooperated fully with the ongoing investigations of the DOJ and the SEC, and retained an independent monitor to report to the DOJ

[17] Letter Agreement between the Department of Justice and Syncor at ¶1 (emphasis added).

[18] DOJ Opinion Procedure Release 2003-01 (January 15, 2003).

[19] *Id.*

[20] *Id.*

[21] InVision Agreement at ¶ 3.

regarding the integration of InVision into GE's compliance program.

REPRESENTATIONS AND WARRANTIES

Just as there is no single roadmap to the depth of due diligence, there is no stock answer to the question of whether specific FCPA or anti-corruption representations and warranties should be included in a definitive transaction agreement. In a transaction involving public companies and therefore public transactional documents, a specific FCPA representation may signal that one or both parties consider the transaction to carry specific anti-corruption risks. Such a disclosure may lead to increased public or regulatory scrutiny.

In addition, government regulators ascribe minimal value to bare representations and warranties that are not supported by a company's internal controls and accounting records, or by FCPA-specific due diligence procedures. If a decision is made to warrant compliance with the FCPA and/or other anti-bribery laws, both the party making the warranty and the party relying on it should be prepared to demonstrate that such reliance is reasonable and supported. For example, a company that is prepared to represent that it is in compliance with the FCPA should be in a position to show that a reasonable control system has been in place and that there have been periodic audits to assess compliance with company policies and procedures.

POST-CLOSING COMPLIANCE MEASURES

Regardless of pre-transactional compliance levels, the SEC and DOJ expect the post-transactional organization to fully comply with the FCPA and other anti-corruption laws.

The February 2007 criminal pleas by three wholly owned subsidiaries of Vetco International illustrate the importance of focusing on post-closing, anti-corruption compliance, when an issue has been identified prior to closing.[22] Vetco International, a U.K.-based company, had been acquired from ABB Ltd. in 2004 by a consortium of private equity investors. At the time of that acquisition, two Vetco Gray subsidiaries pleaded guilty to FCPA violations based on payments to Nigerian customs officials. In connection with the acquisition, the DOJ issued an opinion release stating that it would not take any enforcement action against the acquirors, provided that they agreed, among other things: (1) to continue to cooperate with the DOJ and SEC in ongoing government investigations; (2) to disclose any additional pre-acquisition payments as these were discovered; and (3) to adopt internal accounting controls and a rigorous anti-corruption compliance code.[23] Following the acquisition, Vetco Gray UK Ltd. remained subject to the plea agreement with the U.S. government.

In the 2007 plea agreements, the three Vetco subsidiaries admitted to making approximately 378 payments totaling $2.1 million to Nigerian customs officials over a two-year period to receive preferential treatment during the customs process. The agreements include an admission that the improper payments underlying the 2004 guilty plea continued after the plea and until at least mid-2005. The 2007 plea agreements required Vetco to complete the investigation of the companies' conduct as originally required under the 2004 Vetco Gray UK plea agreement. The subsidiaries also were required to retain an independent compliance expert to monitor their implementation of and compliance with new policies and procedures. The agreements provide that any future purchaser is bound to these monitoring and investigating obligations in the event the subsidiaries are sold.

In a similar vein, the government's FCPA settlements with El Paso Corporation relate to conduct by Coastal Corporation, which El Paso acquired in January 2001. The SEC complaint settling the matter describes conduct both before and after the acquisition, and alleges that El Paso either knew or was reckless in not knowing about improper payments after the acquisition.[24]

In addition to the legal risk, the parties should consider the business risk associated with bringing a company into compliance with the FCPA, especially where historic corruption controls have been limited. This issue commonly arises where one party to the transaction was not previously subject to the FCPA or similarly stringent anti-bribery laws. To the extent

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[22] U.S. DOJ Press Release, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines (Feb. 6, 2007). The three subsidiaries, Vetco Gray Controls Inc., Vetco Gray Controls Ltd., and Vetco Gray UK Ltd., agreed to pay criminal fines totaling $26 million. The DOJ also entered into a deferred prosecution agreement with a fourth wholly owned subsidiary of Vetco International, Aibel Group Ltd., regarding similar underlying conduct.

[23] FCPA Opinion Procedure Rel. No. 04-02 (July 12, 2004).

[24] *SEC v. El Paso Corporation*, No. 1:07-cv-00899-LAP (S.D.N.Y Feb. 7, 2007).

permitted by antitrust laws, the parties may want to begin outlining a post-closing compliance policy framework and organizational structure immediately after signing a letter of intent. Key elements of such a program include: (1) written policies that address U.S. and other governing anti-corruption laws; (2) revised reporting structures; (3) compliance resources for sales personnel and other relevant employees; (4) training; and (5) an audit function to review compliance. Because of differing legal requirements and cultures, standard U.S. compliance policies and procedures may require significant adaptation in connection with a cross-border transaction.

CONCLUSION

In light of recent enforcement activity, FCPA due diligence has taken on a more important role. A company's thorough due diligence and rapid response to FCPA issues may determine whether a deal is completed and whether the successor entity is liable for any violations. ■