

The Foreign Corrupt Practices Act and the Need for Due Diligence



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In 2007, corporate enforcement actions under the Foreign Corrupt Practices Act (FCPA) resulted in fines and penalties of more than US\$130 million. In 2008, the FCPA enforcement actions related to Siemens, Inc. alone totaled almost US\$1.6 billion.

Mergers & Acquisitions (M&A) and the FCPA

One of the key objectives of any due diligence investigation is to develop as much information as possible on a potential customer or business partner. The idea is that the more you know about your customers, employees, correspondents, products and risks, the easier it is to prevent exploitative abuses. Appropriate due diligence not only protects a company's reputation, but also mitigates potential hefty monetary fines and possible criminal convictions for violations of regulatory requirements. Over the past 10 years, more than 50 companies have been defendants in FCPA enforcement actions, and in 2008 alone, there were enforcement actions against 11 companies and 26 individuals. Recent FCPA cases have demonstrated that a company is not only responsible for its own conduct, but also for those of an acquired company during a merger or acquisition.

In M&A transactions, prior FCPA enforcements and potential FCPA violations often converge. For example, in June 2007, Norwegian-based companies Herkules Private Equity Fund and Ferd Capital purchased Aibel Group Ltd., a UK company. At the time of the acquisition, Aibel was subject to a FCPA deferred prosecution agreement in connection with violations of the anti-bribery provisions of the FCPA by its then-parent company, Vetco Gray UK Ltd. In November 2008, Aibel admitted to making previously undisclosed illegal payments to Nigerian customs officials from 2002 to 2005. Although the FCPA infractions occurred well in advance of the companies' acquisition of Aibel, Herkules and Ferd were required by the U.S. Department of Justice to ensure the company's compliance with the terms of the deferred prosecution agreement after the acquisition. As this example demonstrates, successor liability of violations prior to the acquisition is a key reason why companies should conduct the appropriate due diligence both prior to and after the acquisition.

In some cases, the nature of a deal may not have allowed for adequate levels of due diligence to uncover possible FCPA risks or concerns. However, even after the acquisition occurs, the purchasing company typically remains liable for FCPA violations that have yet to be uncovered. As such, the DOJ acknowledges that a policy that allows companies to engage in some degree of post-acquisition compliance integration without fear of prosecution for FCPA violations that may be uncovered during the course of such integration "advances the interests of the Department in enforcing the FCPA and promoting FCPA due diligence in connection with corporate transactions." However, failure to report issues with an acquired company following the merger or acquisition can result in serious FCPA violations.

Red Flags and Due Diligence for FCPA Compliance

Conduct due diligence on all third-party participants (i.e., in-country agents/representatives and consultants and joint venture partners)—Identify their prior business history and track record in the country. Do they have a legitimate business purpose/track record OR do they appear to be shell companies/intermediaries for possible facilitation of corrupt payments? Be wary of "cold calls" or agents with an unusual interest in secrecy.

Review activity prior to receipt of contracts or business entry —Were large political contributions made or repeated or significant payments made to third parties or multiple intermediaries?

Investigate rumors or suspicious behavior—Take seriously rumors regarding unethical or suspicious conduct by an employee, marketing representative, consultant, or other business partner or by a government official.

Review documentation—Is there poor recordkeeping for expenses or little to no background or documentation for third-party agents?

Be especially vigilant in high-risk locations—Conduct enhanced due diligence in countries with reputations for bribery concern.

Identify and explore red flags—These include requests for payment to a third party other than the consultant, requests for payments in a third country, and requests for payments in cash.

Future Enforcement Trends

Most experts agree that regulators in the United States and internationally will continue to expand enforcement of FCPA or corruption violations. There appears to be a significant increase in international cooperation on the issue. The Organization for Economic Co-Operation and Development (OECD) and other similar groups have urged foreign officials to step up their investigations into bribery and corruption.

As governments take a more proactive role in stopping corruption, violations will become harder to hide. Law enforcement internationally has increased training and in some locations dedicated special units to fight corruption.

In the United States, it is anticipated that there will be an increase in voluntary disclosures, particularly during merger and acquisition activities. Voluntary disclosures are a part of good corporate governance, and they often limit fines and other penalties that a company may face if the corruption issues surface later.



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