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FOREIGN CORRUPT PRACTICES ACT

DOJ Again Clarifies FCPA Due Diligence Expected in Business Combinations

BY CLAUDIUS O. SOKENU

On June 13, 2008, the Department of Justice (the ''Justice Department'') issued Foreign Corrupt Practices Act (''FCPA'') Opinion Release No. 08-02, which opined that no enforcement action would be brought against Halliburton Company (''Halliburton'') for pre-acquisition violations of the FCPA committed by an unnamed target company (the ''British Company'') that Halliburton was looking to acquire, and that, on a conditional basis, no enforcement action would be taken against Halliburton for any FCPA violations that occur during a 180-day post-acquisition window, during which Halliburton represented that it would conduct a comprehensive FCPA due diligence that applicable United Kingdom laws purportedly prevented it from conducting prior to closing the acquisition.[1] While the facts outlined in Opinion Release No. 08-02 are relatively unique, the Justice Department's response demonstrates a welcome awareness of the competitive burdens that the FCPA places on companies subject to its terms, and an equally welcome willingness to adjust its FCPA compliance requirements accordingly. In addition, Opinion Release No. 08-02 serves to reinforce the major lessons of past FCPA cases stemming from mergers, acquisitions and other business combinations. This memorandum analyzes Opinion Release No. 08-02 and its implications in three parts. *First*, this memorandum reviews Opinion Release No. 08-02 and its lessons. *Second*, this memorandum reviews the lessons learned from past FCPA cases arising out of business combinations. *Third*, this memorandum outlines the current best practices for addressing potential FCPA liability associ-

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[1] FCPA Opinion Procedure Release No. 08-02 (Jun. 13, 2008), *available at* http://www.usdoj.gov/criminal/ fraud/fcpa/opinion/2008/0802.html.

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ated with business combinations, including due diligence, compliance and deal structure.

I. FCPA Opinion Release No. 08-02. Opinion Release No. 08-02 relates to Halliburton's efforts to acquire a United Kingdom company. At the time of Halliburton's opinion request, a competing bidder had submitted a bid that, unlike Halliburton's bid, did not include terms and conditions relating to FCPA due diligence, and, unsurprisingly, the British Company's board recommended that shareholders approve the competing bid that did not include the FCPA terms and conditions. Under British law governing the bidding process, the British Company was not required to provide Halliburton additional information that would enable Halliburton to conduct the kind of due diligence review contemplated by the FCPA. Nor was the British Company obligated to entertain an offer from Halliburton containing the vexing FCPA terms and conditions. Moreover, Halliburton was precluded, by the terms of a confidentiality agreement it signed with the British Company, from sharing with the Justice Department information about potential FCPA violations discovered during its limited due diligence. Taken together, these facts meant that Halliburton could not require that the British Company provide the kinds of information Halliburton needed to conduct its FCPA pre-acquisition due diligence and, in any event, even if it could obtain the information necessary to conduct the necessary due diligence, Halliburton was barred from disclosing any potential violation that it managed to uncover to U.S. authorities before closing the deal. Faced with this dilemma, Halliburton proposed a series of post-acquisition measures that it would take to ensure FCPA compliance, and posed three questions to the Justice Department. *First*, Halliburton asked whether the proposed acquisition itself would violate the FCPA. *Second*, Halliburton asked whether it would be liable for the British Company's pre-acquisition conduct. *Third*, Halliburton asked whether it would be liable for any post-acquisition conduct by the British Company disclosed to the Department within 180 days of the closing, and which does not continue beyond the 180-day period or, if in the judgment of the Justice Department, the alleged conduct cannot be fully investigated within the 180-day period, which does not continue beyond such time as the conduct can reasonably be stopped.

As to the first question, the Justice Department responded that it does not intend to take enforcement action against Halliburton for the proposed acquisition of the British Company because the British Company is a public company listed on a major stock exchange and therefore there is a very low probability that shareholders of the British Company (presumably including Halliburton) obtained their shares in corrupt transactions. This had been a concern to Halliburton because a previous release, FCPA Opinion Release No. 01-01, concluded that the funds a corporation contributes as part of a corporate combination transaction may be considered a "payment" "in furtherance of" a bribe within the meaning of Section 30A of the Securities Exchange Act of 1934 if those funds are used to make payments to an agent under a pre-existing unlawful contract that another corporation contributed to the joint venture.

The Justice Department's response to the second and third questions posed by Halliburton turned in significant part on the post-closing due diligence plan proposed by Halliburton.

A. Will Halliburton be Liable for its British Company's Pre-Acquisition Violative Conduct? In its request, Halliburton represented that it intended to take the following steps once it closes its acquisition of the British Company: (i) immediately disclose prior violations discovered in pre-closing investigations; (ii) within ten days of closing, Halliburton will submit an FCPA due diligence plan to the Justice Department to be completed within 180 days of closing. Any issues identified during the 180-day period will be fully investigated no later than one year from the closing date; (iii) retain outside counsel, third-party consultants, and forensic accountants; (iv) sign new contracts that incorporate anti-corruption provisions with all agents and other third parties associated with the British Company; (v) impose all of its Code of Business Conduct and FCPA anti-corruption policies on the British Company and conduct anti-corruption training immediately following closing; and (vi) disclose all FCPA and related violations discovered during the 180-day due diligence and follow any additional steps requested by the Justice Department.

After reviewing Halliburton's plan, the Justice Department stated, in response to Halliburton's second question, that it does not intend to take enforcement action against Halliburton for pre-acquisition conduct by the British Company so long as Halliburton follows its post-closing plan.

B. Will Halliburton be Liable for Post-Acquisition Violative Conduct? The fact that limitations imposed by British law left Halliburton with insufficient time and inadequate access to information that would allow for complete FCPA due diligence also influenced the Justice Department's answer to Halliburton's third question – whether Halliburton would be liable for post-acquisition FCPA violations by the British Company. Perhaps unsurprisingly, the Justice Department did not declare that it would forever refrain from enforcement actions relating to post-acquisition conduct. However, recognizing the very real limitations that British law imposed on Halliburton's ability to ensure that FCPA violations are not presently ongoing at the British Company, the Justice Department responded that it would refrain from taking enforcement action as long as Halliburton (i) discloses post-acquisition conduct within the 180-day review period outlined in Halliburton's proposed post-closing diligence plan, (ii) halts and remediates any such conduct within the 180-day period or (iii) if the Justice Department finds that the diligence review cannot be completed within 180 days, Halliburton stops and remediates any violative conduct as soon as possible, and completes its due diligence and remediation, including all investigations, within one year of the closing.

C. Justice Department Reserves Right to Institute Enforcement Proceedings Against Halliburton and Others. The Justice Department's decision to refrain from enforcement action against Halliburton was expressly conditioned on adherence to the post-closing due diligence and self-reporting plan outlined above. The Justice Department also reserved the right to take enforcement action in the following circumstances (i) if violations committed by the British Company during the 180-day period are not disclosed to the Justice Department; (ii)

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if violations are committed by the British Company with the knowing participation of Halliburton employees; and (iii) if violations identified within the 180-day period are not fully investigated within one year from closing. The Justice Department also expressly reserved the right to take enforcement action against the British Company itself for all FCPA and other criminal violations – irrespective of whether they occur pre or post acquisition and irrespective of whether they are disclosed by Halliburton. However, in the event that Halliburton makes disclosures and enforcement action is taken against the British Company, the Justice Department would give those cases "voluntary disclosure" status under the Principles of Federal Prosecution of Business Organizations, Section VII, and such disclosure may be considered when making the determination to charge the British Company.[2]

Opinion Release No. 08-02 underscores the usefulness of the opinion release procedure where unusual conditions prevent a potential acquirer from conducting the kind of comprehensive FCPA due diligence that the government has come to expect.[3] Moreover, it provides at least limited evidence that when presented with unusual circumstances of this kind, the Justice Department will permit an acquirer to substitute a post-closing investigation for the pre-closing diligence that ordinarily is expected. By the same token, however, Opinion Release No. 08-02 reinforces the lessons of past FCPA cases – acquisitions carry FCPA liability risks, and those risks can be reduced through careful and comprehensive due diligence and, where necessary, prompt disclosure of past violations. A discussion of the pertinent past cases follows.

[2] Principles of Federal Prosecution of Business Organizations, ("McNulty Memorandum"), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

[3] FCPA Opinion Procedure Release No. 08-01 (Jan. 15, 2008), *available at* http://www.usdoj.gov/criminal/ fraud/fcpa/opinion/2008/0801.pdf. The due diligence conducted by the requestor included: (i) the requestor commissioned a report on the Foreign Private Company Owner by a reputable international investigative firm; (ii) the requestor retained a business consultant in the foreign municipality who provided advice on possible due diligence procedures in the foreign country; (iii) the requestor commissioned International Company Profiles on the Investment Target and Foreign Private Company from the U.S. Commercial Service of the Commerce Department; (iv) the requestor searched the names of all relevant persons and entities, including the Foreign Private Company Owner, the Investment Target, and Foreign Private Company, through the various services and databases accessible to the requestor's international trade department—including a private due diligence service—to determine that no relevant parties are included on lists of designated or denied persons, terrorist watches or similar designations; (v) the requestor met with representatives of the U.S. Embassy in the foreign municipality and learned that there were no negative records at the Embassy regarding any party to the proposed transaction; (vi) outside counsel conducted due diligence and issued a preliminary report. An updated report is being prepared, and will be completed before closing the proposed transaction; (vii) an outside forensic accounting firm has prepared a preliminary due diligence report and a final report is being prepared and will be completed before closing the proposed transaction; and (viii) a second law firm has reviewed the due diligence.

II. Cases Stemming from Mergers, Acquisitions, Other Business Combinations and Initial Public Offerings. Since 2001, the government has brought several FCPA cases arising from facts uncovered during or just after a business combination or an initial public offering. That is an unprecedented average of one case per year arising from mergers and acquisitions and other business combinations activities alone. The government's heightened focus on this area drives home the point that U.S. issuers and domestic concerns must pay particularly close attention to FCPA issues in connection with business combinations, and more generally in their business dealings abroad. These cases, described below, demonstrate that companies can use due diligence to shield themselves from FCPA liability. Moreover, they demonstrate the broad variety of FCPA compliance issues that can arise in the context of business combinations, and the widely varying litigation outcomes that a company's actions in response to the unwelcome discovery of an FCPA violation can prompt. These cases are addressed in two parts. The first part provides an overview of the cases in which the pre-acquisition conduct of a target company has led to liability. The second part explores the smaller group of cases in which post-acquisition conduct has been the principal focus of an enforcement action by the Justice Department or SEC.

A. Liability for Pre-Acquisition Conduct of a Target Company.

1. The Tyco Settlement. A 2006 settlement by Tyco International Ltd. ("Tyco") demonstrates that FCPA liability can be inherited when U.S. issuers and domestic concerns acquire businesses that have an ongoing practice of making illicit payments, and suggests that principles of successor liability can create liability for the purchaser even under circumstances where the potentially illegal practices have ceased before the transaction is consumated.

In April 2006, the Securities and Exchange Commission announced that it had filed a settled civil injunctive action against Tyco for numerous securities laws violations, including violations of the anti-bribery provisions of the FCPA.[4] With respect to the FCPA violations, the Commission's complaint alleged that employees at two Brazilian and South Korean subsidiaries acquired by Tyco in the late 1990s made extensive illicit payments to government officials. According to the complaint, 60 percent of the contracts at the Brazilian subsidiary involved "some form of payment to a government official."[5]

The complaint highlighted that Tyco had decided to go through with the acquisitions even though its own due diligence had revealed that "illicit payments to government officials were common" in Brazil and South Korea, and with respect to the Brazilian acquisition, "were portrayed as necessary in the industries in which [the Brazilian acquisitions] conducted business."[6] The complaint also alleged that prior to 2003, Tyco did not have a uniform, company-wide FCPA compliance program in place or a system of internal controls sufficient to detect and prevent FCPA misconduct at its globally

[4] *SEC v. Tyco Int'l Ltd.*, Litigation Release. No. 19657 (Apr. 17, 2006).

[5] *SEC v. Tyco Int'l Ltd.*, 06 CV-2942, at ¶ 49 (S.D.N.Y. filed Apr. 17, 2006).

[6] *Id.* ¶¶ 48, 53.

dispersed business units. Employees at [the Brazilian and South Korean subsidiaries] did not receive adequate instruction regarding compliance with the FCPA, despite Tyco's knowledge and awareness that illicit payments to government officials were a common practice in the Brazilian and South Korean construction and contracting industries.[7]

Without admitting or denying the allegations in the complaint, Tyco consented to a permanent injunction against further securities laws violations, $1 in disgorgement, and a $50 million civil penalty.[8]

Several lessons can be learned from the Tyco settlement: (i) the theory of successor liability in the FCPA context is here to stay; (ii) $50 million is a stiff price to pay for somebody else's violations, especially when such violations can be detected and fixed before the closing of the acquisition; (iii) any issuer with international business must have a robust FCPA compliance program that covers every aspect of the company's operations, no matter how remote; (iv) pre-acquisition due diligence is critical; (v) address pre-acquisition problems before closing the transaction; (vi) do not ignore known red flags; and (vii) devise and implement a plan to instill a culture of compliance once acquisition is completed.

2. Lockheed Martin Corporation Abandons its Planned Merger with Titan Corporation. In 2004, Lockheed Martin Corporation (''Lockheed''), a major U.S. defense contractor, walked away from a proposed merger with Titan Corporation (''Titan''), a military intelligence and communications company based in San Diego, California, following Lockheed's discovery during pre-acquisition due diligence that Titan had committed serious FCPA violations.[9] These violations stemmed from Titan's decision to employ a third-party agent to assist on a project to build a wireless telephone network in Benin.

According to the government, Titan hired an advisor, who purportedly had close ties to the then President of Benin, without performing adequate due diligence to determine if the advisor was complying with the FCPA.[10] Of the $3.5 million that Titan paid the advisor, approximately $2 million were indirect contributions to the President's re-election campaign.[11] Allegedly, the purpose of the payment was to influence the outcome of the presidential election in Benin in order to secure the President's assistance in developing a telecommunications project in Benin.[12] At the direction of a Titan senior officer, at least two payments of $500,000 each were wired from Titan's bank account in San Diego to the agent's account in Monaco. The remaining payments were made in cash.[13] Titan characterized the payments on its books and records as ''social program payments'' that were required by its contract with the government of Benin.[14] Additionally, Titan gave a $1,850 pair of earrings to the President of Benin's wife.[15] Separately, Titan falsified documents to enable its agents to under-report local commission payments in Nepal, Bangladesh, and Sri Lanka.[16] Titan also falsely reported commission payments to the U.S. government on equipment exported to Sri Lanka, France, and Japan.[17]

After Lockheed discovered evidence of this misconduct, Lockheed and Titan jointly disclosed their findings to the government, which promptly initiated an investigation. The closing date of the merger was pushed back twice to give Titan time to settle the government's actions, but the merger ultimately collapsed when Titan was unable to resolve the government's investigation before a June 2004 deadline.[18]

Some nine months later, on March 1, 2005, the government announced that Titan had agreed to settle charges that it had violated the FCPA.[19] Titan pleaded guilty to substantive violations of the FCPA's anti-bribery and books and records provisions, as well as a criminal tax violation. Titan was sentenced to three years of supervised probation and ordered to pay a criminal fine of $13 million. Additionally, Titan was ordered to institute a strict compliance program and internal controls designed to prevent FCPA violations.[20] In settling the SEC's charges that it had violated the FCPA's anti-bribery, books and records, and internal controls provisions, Titan agreed to pay $15.5 million in disgorgement and pre-judgment interest and $13 million in civil penalties, which was satisfied by payment of the criminal fines. The SEC also required Titan to retain an independent consultant to review its FCPA compliance procedures and to adopt its recommendations. Relatedly, the Commission issued a 21(a) Report criticizing Titan's proxy statement for incorporating what it deemed false FCPA representations and warranties.[21]

In addition to showing that conducting meaningful due diligence is essential in identifying and avoiding a potential FCPA liability, the Lockheed-Titan case also illustrates that parties to a planned transaction must be mindful of public representations regarding FCPA compliance in the course of due diligence, and need to continually and carefully assess their disclosure obligations under the federal securities laws. On the same day that the Titan settlement was announced, the SEC also released a Report of Investigation cautioning issuers to

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[7] *Id.* ¶ 55.

[8] *SEC v. Tyco Int'l Ltd.*, Litigation Release No. 19657 (Apr. 17, 2006).

[9] *SEC v. Titan Corp.*, No. 05-0411, at ¶ 3 (D.C. filed Mar. 1, 2005); *United States v. Titan Corp.*, Case No. 05 CR 0314-BEN (S.D. Cal. filed Mar. 1, 2005); *see also International Client Alert*, Mondaq Bus. Briefing, Nov. 18, 2004, at *6, *available at* 2004 WLNR 12284237.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

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

[19] Press Release, U.S. Attorney, S.D. Cal., News Release Summary (Mar. 1, 2005), *available at* www.usdoj.gov/criminal/pr/press_releases/2005/03/2005_3859_titancorp030105.pdf (hereinafter ''Titan Press Release''); *SEC v. Titan Corp.*, No. 05-0411 (D.C. filed Mar. 1, 2005); *United States v. Titan Corp.*, Case No. 05 CR 0314-BEN (S.D. Cal. filed Mar. 1, 2005).

[20] *Id.*

[21] *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on Potential Exchange Act Section 10(b) and Section 14(a) Liability*, Exchange Act Release No. 51283 (Mar. 1, 2005) (hereafter, the ''Report of Investigation'').

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ensure that disclosures regarding material contractual provisions – such as representations regarding FCPA compliance – are not materially misleading.[22] The Report of Investigation noted that Titan had represented in its merger agreement with Lockheed that it was in compliance with the FCPA.[23] Titan then twice publicly disclosed this representation in a proxy statement and in the parties' merger agreement, which was attached to the proxy statement.[24] Although the merger agreement was amended at various times due to the government's investigation of potential FCPA violations, Titan's FCPA representation in the merger agreement remained unchanged.[25] The Report of Investigation cautioned that when an issuer makes a public disclosure, it is required to consider whether additional disclosure is necessary in order to put the information at issue in context so that it is not misleading.[26]

3. York International Corporation. A third case suggests, on the other hand, that Lockheed's response to the prospect of FCPA liability may have been overstated. Johnson Controls, which acquired York International Corp. (''York''), was not charged with any wrongdoing and was not prosecuted for any of York's actions. Johnson acquired York in 2005, yet the case settled in 2007. Following an internal investigation, York reported widespread FCPA violations to the Justice Department relating to bribes paid under the United Nations' Oil-for-Food program. York further reported paying kickbacks to government agents in Bahrain, India, Turkey, the United Arab Emirates and China. Pursuant to the three-year deferred prosecution agreement, York, which provides heating and ventilation systems and services around the world, paid a $10 million criminal penalty, cooperated with ongoing investigations and retained an independent compliance monitor to ensure that future FCPA violations did not occur.[27] York also settled with the SEC and agreed to disgorge about $10 million in ill-gotten gains and pay $2 million in civil fines.[28]

4. InVision Technologies Inc. In December 2004, proposed merger partners, General Electric Company (''General Electric'') and InVision Technologies Inc. (''InVision'') (collectively, ''GE/InVision''), entered into agreements with the Justice Department and the Commission to resolve charges that InVision violated the FCPA. General Electric's pre-acquisition due diligence was instrumental in uncovering potential FCPA violations, which were promptly reported to the government.

InVision allegedly marketed and sold its airport security/explosion detection systems via local sales agents and distributors. InVision was aware of the high probability that its agents or distributors in Thailand, China, and the Philippines had paid or offered to pay money (*i.e.*, travel expenses and/or gifts) to foreign officials or political parties in connection with the sale of airport security screening machines.[29] Certain of these payments were improperly accounted for in InVision's books and records as a ''cost of goods sold,'' resulting in profits of approximately $589,000 from the sale of two machines in China.[30] These violations occurred, at least in part, because InVision failed to develop an adequate process to select and train its foreign sales agents and distributors.[31]

InVision consented to a two-year non-prosecution agreement with the Justice Department in which it agreed to (i) accept responsibility for its misconduct, (ii) pay an $800,000 fine, (iii) negotiate in good faith with the SEC, and (iv) fully disclose any evidence of FCPA-related misconduct to the government.[32] General Electric, for its part, agreed to a cognate agreement that obligated it to fully integrate the InVision business into General Electric's FCPA compliance program, retain an independent consultant acceptable to the Justice Department to evaluate the efficacy of the integration, oversee InVision's performance of its obligations under the non-prosecution agreement, and to disclose any evidence material to the then-ongoing government investigation. InVision settled the SEC case approximately two months later by agreeing to pay $500,000 in civil penalties and $617,700 in disgorgement and prejudgment interest, totaling approximately $1.2 million.[33] The merger subsequently closed successfully.[34]

Although notable for the fact that it was the first time a non-prosecution agreement was used to settle an FCPA action, the GE/InVision FCPA investigation again demonstrates the importance of conducting thorough pre-acquisition due diligence to resolve any potential FCPA problems before the transaction closes. On the downside, as is to be expected, government investigations will slow down the closing of corporate merger and acquisition transactions. In the GE/InVision case, General Electric announced the acquisition in March 2004 and the transaction did not close until December 2004, after GE/InVision reached an agreement to settle the criminal charges. Critical to the conclusion of the successful resolution of the government action was the fact that GE/InVision self-reported to the government. Importantly, the self-disclosure successfully prevented an illicit payment in Thailand. Finally, the strength of General Electric's compliance program was instrumental in the manner the settlement was structured.

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[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *United States v. York Int'l Corp.*, No. 1:07-CR-00253 (D.D.C. filed Oct. 1, 2007); *see also* Justice Department Release No. 07-783 (Oct. 1, 2007).
[28] *SEC v. York Int'l Corp.*, No. 1:07-CV-01750 (D.D.C. filed Oct. 1, 2007); *see also*, SEC Litigation Release No. 20319 (Oct. 1, 2007).
[29] *SEC v. GE/InVision Inc.*, C 05-0660 (N.D. Ca. filed Feb. 14, 2005).
[30] *id.*
[31] *id.*
[32] *InVision Technologies Inc. enters Into Agreement With The United States*, Justice Department Release No. 04-780 (Dec. 3, 2004).
[33] *Supra* note 30.
[34] *International Client Alert*, *supra* note 10 at 5-6 (noting delay in closing of General Electric's acquisition of InVision due to an ongoing review of potential FCPA violations at InVision, and reporting that General Electric discovered FCPA violations at InVision during pre-acquisition due diligence); Press Release, Justice Department, InVision Technologies Inc. enters into Agreement with the United States (Dec. 6, 2004) (discussing InVision's resolution of criminal FCPA liability and General Electric's acquisition of InVision).

5. ABB Vetco Gray Limited. The acquisition of the upstream oil and gas business of Asea Brown Boveri Limited ("ABB Limited"), a Swiss corporation with ADRs listed on the NYSE, by JP Morgan Partners, Candover Partners Limited and 3i Group (collectively, the "Equity Club") led to the uncovering of potentially illicit payments during pre-acquisition due diligence. ABB Vetco Gray Inc. and ABB Vetco Gray (UK) Ltd. paid more than $1 million to officials of NAPIMS, a Nigerian government agency, to obtain confidential bid information and favorable recommendations from Nigerian government agencies in connection with seven oil and gas construction contracts in Nigeria for which companies expected to realize profits greater than $12 million.[35] These illicit payments included cash and gifts to NAPIMS officials, travel and entertainment, and per diem payments.[36] Additionally, illicit payments were made to foreign government officials in Angola and Kazakhstan for reasons similar to those made in Nigeria.[37]

On July 6, 2004, ABB Vetco Gray Inc., the U.S. subsidiary, was charged as a "domestic concern," whereas ABB Vetco Gray UK Ltd. was charged under the 1998 provision expanding jurisdiction to foreign companies that engage in conduct in the U.S. in furtherance of a bribe. Both companies pleaded guilty to substantive violations of the FCPA's anti-bribery and books and records provisions, and each agreed to pay a criminal fine of $5.25 million.[38] On the civil side, the SEC alleged that ABB Limited, the parent company, had violated the FCPA's anti-bribery and books and records provisions. ABB Limited agreed to pay $5.9 million in disgorgement and pre-judgment interest and a $10.5 million penalty, which was satisfied by the criminal fines paid by ABB Limited's subsidiaries to settle the criminal case. As part of the settlement, ABB Limited was required to retain an independent consultant to review its FCPA compliance policies and procedures, even though ABB Limited had sold off the Vetco Gray entities.

The lessons from the ABB Limited investigation include the following: *First*, it is critically important to conduct rigorous due diligence and monitor the activities of foreign agents, consultants, representatives, distributors, suppliers and joint venture parties. *Second*, FCPA violations uncovered during due diligence do not necessarily spell the end of the transaction, assuming the parties to the transaction can work together to resolve the government's investigation prior to closing the acquisition. *Third*, on a related point, where the transaction is going to go forward despite the FCPA issues and the facts warrant it, the acquiring company should consider getting an opinion letter from the Justice Department stating that the acquiring company will not be charged with additional undiscovered pre-acquisition conduct.[39] In so doing, the acquirers can gain some assurance about their potential liability for past FCPA violations.[40] ABB Limited did not follow the course of action that Halliburton chose.

6. Delta & Pine Land Company. While conducting premerger due diligence in Monsanto Company's bid to acquire Delta & Pine Land Company ("Delta & Pine"), Monsanto discovered that Delta & Pine had made payments to officials of the Turkish Ministry of Agricultural and Rural Affairs in violation of the anti-bribery, books and records, and internal controls requirements of the FCPA.[41] According to the complaint filed by the Commission, from 2001 to 2006, Delta & Pine, through its Turkish subsidiary, had made payments of approximately $43,000 in order to obtain the necessary certifications to operate in Turkey. The improper payments were first uncovered by American officers of Delta & Pine in 2004. Rather than immediately stopping the payments, Delta & Pine channeled the bribes through a third party in Turkey. Delta & Pine, which manufactures cottonseed, settled the matter with the Commission and agreed to pay a $300,000 penalty and install a compliance monitor.[42] Despite the Commission's enforcement action, Monsanto still acquired Delta & Pine in June 2007, a month before the settlement.

7. Paradigm B.V. While conducting due diligence before its initial public offering in January 2007, Paradigm B.V. ("Paradigm"), an oil and gas services provider, discovered that it had made payments to foreign officials in violation of the FCPA.[43] Between 2000 and 2007, Paradigm bribed officials in China, Indonesia, Kazakhstan, Mexico and Nigeria in order to receive contracts from those governments.[44] While the exact total of payments was not stated in the complaint, Paradigm is estimated to have paid about $22,500 in Kazakhstan, $100-200 per Chinese official, several hundred thousand dollars to Mexican officials, and between $100,000-200,000 to Nigerian government agents.[45] These payments, which were funneled through third party consulting agencies, were inappropriately accounted for as entertainment and travel expenses.[46]

On September 24, 2007, because Paradigm voluntarily disclosed its conduct and took extensive steps to prevent similar occurrences from happening again, the

[35] *SEC v. ABB Ltd*, No. 1:04-CV-1141 (RBW) (D.D.C. filed Jul. 6, 2004); Litigation Release No. 18775 (Jul. 6, 2004); *U.S. v. ABB Vetco Gray Inc.*, No. CR H-04-279 (S.D. Tex. Jun. 22, 2004). *See also* FCPA Opinion Procedure Release, No. 04-02 (Jul. 12, 2004), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2004/0402.html.

[36] *See generally id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Unfortunately, employees of Vetco Gray Ltd. and other Vetco Gray affiliates continued to make payments to foreign officials in violation of the FCPA. In February 2007, three Vetco Gray subsidiaries pleaded guilty to FCPA charges and paid a combined $26 million in fines – a record in the FCPA realm. The Justice Department made clear that Vetco Gray Ltd.'s status as a repeat offender was a major reason for the scale of this fine. *See* Justice Department Release No. 07-075, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines, *available at* http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html.

[41] *SEC v. Delta & Pine Land Co.*, 1:07-CV-01352 (filed Jul. 25, 2007).

[42] *In the Matter of Delta & Pine Land Co. and Turk Deltapine Inc.*, SEC Admin. Proc. 3-12712 (Jul. 26, 2007).

[43] *Paradigm B.V. Agrees to Pay $1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries*, Justice Department Release No. 07-751 (Sept. 24, 2007), *available at* http://www.usdoj.gov/criminal/press_releases/2007/09/09-24-07paradigm-agree.pdf.

[44] *Id.*

[45] *Id.*

[46] *Id.*

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Justice Department agreed to an 18-month deferred prosecution agreement, rather than the more common three-year term.[47] Additionally, Paradigm was required to pay a $1 million fine and retain an independent compliance monitor.[48]

B. Liability for Post-acquisition Conduct of a Newly Acquired Company.

1. Baker Hughes Inc. Among other allegedly violative conduct, in 1998, Baker Hughes, Inc. (''Baker Hughes'') authorized payments to government agents in India, but allegedly did not conduct sufficient due diligence to ensure that the payments would not be directed to government officials.[49] In August 1998, Baker Hughes acquired Western Atlas Corporation (''Western Atlas''), which provided services relating to offshore oil drilling.[50] Western Atlas subsequently was scheduled to perform work in India, but needed to receive a special license from the Indian Coastal Commission (''ICC'').[51] Less than a month after it was acquired by Baker Hughes, in September 1998, and in order to facilitate the issuance of the license from the ICC, the General Manager of Western Atlas authorized a $15,000 illicit payment.[52] Shortly after the illicit payment was made, Western Atlas received approval from the ICC.[53] Separately, in 1999, Baker Hughes also authorized KPMG to make illicit payments to government officials in Indonesia.[54] Baker Hughes settled with the Commission and the Justice Department, on September 12, 2001, by agreeing to cease-and-desist from future violations of the FCPA.[55]

2. Syncor International Corporation. In the course of conducting pre-merger due diligence, Cardinal Health Inc. (''Cardinal'') uncovered evidence that employees of its planned merger partner, Syncor International Corp. (''Syncor''), a radiopharmaceutical company based in California, had violated the FCPA by making illicit payments to government employees in Taiwan, Mexico, Belgium, Luxembourg, and France.[56] Between 1997 and 2002, Syncor's Taiwanese subsidiary made improper payments (''commissions'' totaling $344,000) to physicians who were employed by state-owned hospitals to influence their decision to buy Syncor products and services. These payments were authorized by Syncor's board chairman located in California. The SEC alleged that additional payments, totaling $600,000, were made through Syncor's foreign subsidiaries in Mexico, Belgium, Luxembourg, and France. These payments were made with the knowledge and approval of Syncor's founder and chairman. Furthermore, these payments were improperly recorded as ''commissions.''

Syncor self-reported to the government, and settled the resulting charges. Syncor Taiwan Inc. (''Syncor Taiwan''), a Taiwan corporation and wholly-owned subsidiary of Syncor, pleaded guilty to substantive violations of the FCPA's anti-bribery and books and records provisions, and was sentenced to three years of supervised probation and ordered to pay a $2 million fine.[57] On the SEC front, Syncor agreed to pay $500,000 in civil penalties (which at the time was the largest penalty ever obtained by the Commission in an FCPA case) and to cease-and-desist from future violations of the FCPA.[58] Additionally, Syncor was required to retain an independent consultant to review and make recommendations concerning the company's FCPA compliance and procedures.[59]

Several lessons can be gleaned from Cardinal's discovery of wrongdoing at Syncor. *First*, Syncor agreed, on November 22, 2002, to extend the date prior to which either party could unilaterally terminate the planned merger from December 31, 2002 to January 15, 2003.[60] *Second*, the terms of the merger shifted dramatically in Cardinal's favor: whereas the original merger terms called for Syncor shareholders to receive 0.52 of a share of Cardinal common stock for each outstanding share of Syncor stock, the amended merger terms reduced the exchange ratio to 0.47.[61] *Third*, the acquisition was delayed until the investigation was concluded and agreements were struck with the government. *Fourth*, the Syncor enforcement action was the first time the Justice Department charged a foreign company under the 1998 amendments to the FCPA for acts—*i.e.*, the chairman's approval—in the United States. *Fifth*, parent company liability was established through the foreign subsidiary's books and records. *Sixth*, employees of a state-owned entity are instrumentalities of the government. *Seventh*, Cardinal's due diligence efforts were crucial to this favorable outcome. As Robert D. Walter, the then-chairman and chief executive officer of Cardinal put it:

> As a result of our further extensive domestic and international due diligence, which included investigations conducted by outside legal and forensic accounting teams, and the separate investigation conducted by the Syncor Special Committee, the issues have been identified and dealt with decisively. We believe that these actions, in conjunction with the agreements reached with the Department of Justice and SEC, bring these issues to closure and give us the confidence that Cardinal shareholders will be protected as we move forward to complete the acquisition.[62]

And, *eighth*, Cardinal, using the Justice Department's review process, was able to obtain reassurance that it will not be charged with additional undisclosed preacquisition conduct of Syncor and its subsidiaries.

III. FCPA Due Diligence to Avoid Successor Liability. In light of the steep penalties that now routinely accompany the discovery of an FCPA violation, it is essential

[47] *Id.*
[48] *Id.*
[49] *In the Matter of Baker Hughes, Inc.*, Exchange Act Release No. 44784 (Sept. 12, 2001), *available at* http://www.sec.gov/litigation/admin/34-44784.htm.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *SEC v. Syncor Int'l Corp.*, Litigation Release No. 17887 (Dec. 10, 2002), *available at* http://www.sec.gov/litigation/litreleases/lr17887.htm.
[57] *id.*
[58] *id.*
[59] *id.*
[60] Cardinal Health, Inc. & Syncor Int'l Inc., Joint Press Release, ''Syncor and Cardinal Health Announce Amendment To Merger Agreement To Extend Termination Date,'' Nov. 22, 2002, *available at* http://www.secinfo.com/drDX9.31Cm.htm.
[61] Cardinal Health Inc., Press Release, ''Cardinal Health and Syncor Announce Amended Merger Agreement,'' Dec. 4, 2002, *available at* http://www.secinfo.com/drDX9.31db.htm.
[62] *Id.*

for companies to take proactive measures to ensure that they do not acquire liability for the past sins of a target company, and to ensure that they do not incur FCPA violations in their future operations. In addition to the financial concerns associated with acquiring a company that will likely face serious criminal charges, there are reputational concerns to worry about, not to mention disbarment, suspension from participating in certain government contracts and other collateral consequences. Well-designed pre-acquisition due diligence and comprehensive FCPA compliance programs can significantly reduce the likelihood that FCPA issues will arise.

The Titan/Lockheed case, as discussed above, demonstrates that by conducting careful pre-acquisition due diligence specifically designed to identify suspicious payments to foreign officials, acquiring companies can uncover potential FCPA problems before the transaction is complete. In Lockheed's case, this discovery spared it from exposure to a $13 million criminal fine and $15.5 million in disgorgement—the sums that Titan ultimately paid to settle the government's charges.

In conducting FCPA due diligence, particular attention should be paid to the following warning signs: (i) business activity in countries with widespread official corruption; (ii) payments of excessive or unusually high compensation; (iii) a request for increased compensation during a sales campaign; (iv) requests that payments be made to third countries or third parties; (v) requests for payments in cash or bearer instruments; (vi) payments to parties lacking facilities or qualified staff; (vii) use of shell companies; (viii) lack of experience or ''track record'' with product field or industry; (ix) prior allegations related to business integrity; (x) the reputation of representatives or consultants engaged by the target; (xi) absence of written agreements; (xii) close relationships to government officials (close relative or financial/ownership interest); (xiii) the recommendation of a representative and/or consultant by a government official or customer; (xiv) violations of local law or policy (*e.g.*, prohibitions on commissions, currency or tax law violations); (xv) misrepresentations or inconsistencies in the application or the due diligence process; and (xvi) refusal to certify compliance with the FCPA.

These general principles are, however, only the beginning. Given the wide variety of potential sources of FCPA liability, it is essential that the acquiring company conduct pre-acquisition diligence that is carefully tailored to the particular risk factors posed by the acquisition and take other steps, including obtaining written representations and warranties concerning FCPA compliance and structuring the transaction to minimize potential successor liability. A January 15, 2008 Opinion Release by the Department of Justice broadly confirms that U.S. authorities view these and other measures as appropriate elements of an FCPA due diligence inquiry.[63]

While the level of pre-closing due diligence possible will depend on the type of transaction and the facts and circumstances of each deal, it is recommended that as much due diligence as is permissible should be conducted. As indicated above, the level of pre-closing due diligence possible will depend on the nature of the transaction and the facts and circumstances of each transaction. For example, in the case of a hostile takeover, virtually no due diligence will be possible other than searching and reviewing publicly available information about the target company. In an auction, relatively little may be possible prior to the signing of the stock purchase or merger agreement. Indeed, even friendly acquisitions may not provide access to significantly more information than would be available in hostile takeovers or auctions.

As many of the following issues as possible should be addressed before the deal closes:

(1) in what countries does the target company do business;

(2) how does the target company conduct business in each of those foreign countries;

(3) does the target company engage agents, consultants, distributors, or third-party intermediaries to assist in its business;

(4) in what countries has the target company ceased conducting business;

(5) do employees of the target company hold foreign government positions or serve on any boards of directors of foreign government-owned entities;

(6) does the target company have FCPA, money-laundering or anti-kickback policies and compliance or other due diligence procedures, including training programs for its employees, agents, consultants, distributors, or third-party intermediaries;

(7) will the proceeds from the sale be used to pay or reimburse bribes promised or made by the target company;

(8) do written procedures exist relating to the conduct of a due diligence review of foreign agents, consultants, distributors, or third-party intermediaries;

(9) does the target company maintain due diligence and/or contract or engagement files for agents, consultants, distributors, or third-party intermediaries;

(9) does the target company maintain due diligence files for all persons who have acted as agents, consultants, distributors, or third-party intermediaries prior to the last five years, but who received payments (or to whom the company owed payments) within the past five years;

(10) does the target company conduct periodic reviews and certifications of its foreign agents, consultants, distributors, or third-party intermediaries;

(11) does the target company maintain commission, retainer, and expense reimbursement information for all persons who have acted as agents, consultants, distributors, or third-party intermediaries regardless of whether or not the target company executed a formal agreement with such persons; and

(12) does the target company have any written internal audit policies and procedures relating to the foregoing items?[64]

Other questions and issues that an acquirer must resolve include:

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[63] *See supra* note 4.

[64] *See generally* Margaret M. Myers & Bethany K. Hipp, *FCPA Considerations in Mergers and Acquisitions*, in The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risks Fall 2007, at 241-271 (PLI Corporate Law and Practice, Course Handbook Series No. B-1619, 2007); Dale Chakarian Turza, *Foreign Corrupt Practices Act Implications For Mergers*, *Acquisitions*, *Joint Ventures And Other Business Combinations*, (PLI Corporate Law and Practice, Course Handbook Series No. B-1619, 2007).

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(1) has the target company ever been the subject of any bribery, money-laundering, or anti-kickback investigation by any government authority in the United States or abroad;

(2) if the target company bribed foreign government officials in the past, did the misconduct involve personnel that are important to the target company's current business;

(3) will continuing bribes be required to retain a concession/license/ tax break/contract that may be material or important to the target company's business;

(4) if past bribes have been paid and the target company is a U.S. exporter or government contractor, does it risk losing its export licenses or government business;

(5) the impact, if any, of past bribes on target company's books and records, accounting, and/or disclosure that would need to be addressed if the transaction closes;

(6) does the target company maintain records, including hotline logs, relating to any allegations of impropriety implicating bribery, money-laundering or anti-kickback laws;

(7) has the target company ever conducted, with or without the assistance of outside counsel, any internal investigations involving allegations of impropriety involving bribery, money-laundering or anti-kickback laws in the United States or abroad; and

(8) does the target company maintain records showing responses to questions raised by internal and external auditors relating to impropriety involving bribery, money-laundering or anti-kickback laws?

In addition to the foregoing, the following are additional areas of inquiry an acquirer must explore:

(1) whether the target company provides anything of value, including hospitality, entertainment, gifts, or trinkets to foreign government officials, officials of political parties or candidates for political office (''Foreign Officials'');

(2) whether the target company sponsors travel for Foreign Officials, and, if so, the circumstances under which such travel is provided and what expenses are paid;

(3) whether the target company engages Foreign Officials to provide services or products;

(4) the target company's charitable, social or political contributions in the foreign countries in which it operates;

(5) the written procedures relating to the approval of requests for charitable, social, or political contributions in the foreign countries in which the target company operates;

(6) whether the target company maintains due diligence files relating to the approval of requests for charitable, social, or political contributions in the foreign countries in which it operates;

(7) whether the target company received from any foreign government entity or judicial authority any grants, tax benefits, rulings, or orders related to the target company's business;

(8) whether a senior management level employee is assigned responsibility for the target company's compliance program; and

(9) whether the target company conducts periodic internal compliance audits relating to potential FCPA anti-bribery and books and records violations.

The answers to these and other questions should guide an acquirer's decision whether to go forward with the deal. What is perhaps most important in reaching a determination about whether to go forward with any business combination, from an FCPA compliance standpoint, is whether ethical behavior is emphasized at the very top of the target company. Accordingly, those questions and requests for information that are directed towards answering the—tone at the top—question must be asked and answered prior to closing. Another very important non-FCPA reason for engaging in this exercise is that it is likely to be very instructive in determining the actual worth of the target company and the right price to pay for the deal. In circumstances where only limited due diligence will be permitted prior to closing, an acquirer should consider whether to obtain a written agreement containing certain terms, representations, and warranties. Indeed, it may well be prudent to obtain these and other representations and warranties no matter how much access an acquirer is provided pre-closing. For example, Lockheed's ability to walk away from the Titan acquisition was due to sound due diligence and proper protective language inserted into the transaction documents. The converse of the aborted Lockheed-Titan acquisition is the Tyco acquisition discussed above.

IV. Conclusion. Taken together, Opinion Release No. 08-01 and No. 08-02 and the cases discussed above stemming from pre-acquisition due diligence all support the conclusion that companies contemplating mergers, acquisitions and other business combinations must be keenly aware of the FCPA problems faced by their target companies before closing the transaction, regardless of how the transaction is to be structured.

Given the record $26 million criminal fine imposed against three wholly-owned subsidiaries of Vetco Gray International companies, Vetco Gray Controls Inc., Vetco Gray Controls Ltd., and Vetco Gray UK Ltd.,[65] the combined civil and criminal record fine of $44 million against Baker Hughes Inc., [66] and the record number of FCPA cases that are being filed by the Justice Department and the Commission, companies considering mergers, acquisitions, or any other type of business combinations, including joint ventures, must conduct extensive FCPA due diligence prior to closing to determine what, if any, FCPA exposure is outstanding. The checklist of questions discussed above is a good starting point in helping companies begin to assess their potential FCPA risks when considering a business combination.

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[65] Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines, Justice Department Press Release No. 07-075 (Feb. 26, 2007).

[66] *SEC v. Baker Hughes Inc.*, No. H-07-1408 (S. D. Tex. filed Apr. 26, 2007); *see also* Litigation Release No. 20094 (Apr. 26, 2007); Justice Department Press Release No. 07-296, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007).