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FCPA Evolution Through an M&A Lens: How M&A Impacted FCPA Enforcement and Guidance

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Modern FCPA enforcement owes its rapid growth in many ways to mergers, acquisitions and divestments (M&A). The DOJ and SEC have continually expanded their FCPA enforcement activities in relation to both acquired and successor corporations since the early 2000's, matching the increasingly global M&A activity of the companies falling within their combined FCPA jurisdiction. There have been approximately 28 FCPA resolutions involving companies that acquired successor liability through M&A. More than 50 cases have involved M&A transactions occurring or being negotiated during the course of investigation or resolution of FCPA-related misconduct.

The FCPA and M&A, however, are more significant dance partners than the raw case metrics suggest. Tracking the FCPA through the lens of M&A illustrates how much modern FCPA enforcement and compliance practice owes to M&A. The FCPA and M&A story offers insights into the growth of regulatory and stakeholder compliance guidance, and the professionalization of corporate compliance practice, both within law firms and in-house. Importantly, revisiting this history can also provide useful lessons on how to successfully mitigate risks and maximize opportunities that companies can benefit from today and into tomorrow.

This two-part article series reflects on the history and evolution of FCPA enforcement as an M&A story, via key enforcement events, case studies and guidance. This baseline will inform the second part of the series that will focus on practical approaches for in-house counsel to increase their value-add to their business by providing confidence and leadership in M&A and growth strategies. In applying these lessons, compliance and legal advisors have the opportunity to not only protect value but also enable sustainable growth and real market differentiators via compliance programs aimed at anti-corruption and other emerging risk areas.

See "Effective Compliance in the Spotlight: Roles, Reality and Real-Life Suggestions" (Nov. 13, 2019).

1977 to 2000: The FCPA's Slow Beginning

Recalling its original motivations and Watergate-era roots, the recently updated FCPA Resource Guide begins with a quote from the U.S. House of Representatives upon the statute's introduction: "Bribery of foreign officials by some American companies casts a shadow on all U.S. companies." Despite the enduring strength of this sentiment and broad reach of the new law, enforcement actions remained relatively few and far between into the late 1990's. Before the wide-spread use of email, global enforcement authority cooperation and promulgation of OECD inspired anti-corruption enforcement, detecting potential foreign corruption activity with a U.S. nexus was challenging. In a pre-whistleblower-protection culture, even when, for instance, news reporting may have uncovered allegations, enforcers were still left with the uphill task of proving the FCPA elements by sufficient evidence, often without the assistance of email records and detailed electronic money trails. The period from 1977 to 1999 saw 49 public DOJ and SEC corporate enforcement actions, resulting in just over $120 million in total monetary sanctions, and only a handful of cases reaching multi-million dollar amounts. The 1990's and very early 2000's saw many of these matters resolved as SEC Administrative Orders, in which a company would neither admit nor deny facts underlying Section 13-related conduct, with most penalties below the $300,000 mark – six zeros below the highest billion dollar FCPA resolutions of today.

2000: SOX, Email and M&A

The new millennium was accompanied by a new focus on corporate governance, and the impact of the Sarbanes-Oxley Act (SOX). Email also quickly moved into everyday use, as globalization and the tech bubble continued to build. From computers to Blackberries to smart phones – electronic communication now came with back-up tapes and trails that documented authors' intent in their own words, giving prosecutors a new tool to help juries find beyond their reasonable doubts. At the same time, tech growth and market forces increased M&A activity and as M&A activity scaled upwards, related FCPA enforcement actions scaled with it.

In a preview of what was to come, a 2003 DOJ Opinion Release Procedure (2003 Release) requested by a U.S. issuer, targeting the acquisition of a company with disclosed improper payments by one of its subsidiaries, marked one of the first instances where successor liability under the FCPA was clearly addressed. Foreshadowing future cases and guidance, as part of the 2003 Release, the acquirer undertook to continue to cooperate and disclose relevant matters to the DOJ and SEC, and to implement its existing compliance program at the target post-close. And so it began.

2004 to 2007: FCPA and M&A Come of Age With the Vetco Gray Matters

With the early DOJ opinion releases, Vetco Gray matters, and the so-called "Halliburton Protocol," practitioners saw the first significant FCPA evolution via M&A. In this period, M&A is responsible for the increasing focus on successor liability risk, voluntary disclosure and cooperation, as well as the introduction of FCPA compliance consultants and monitors.

The starting gun sounded with the two bellwether Vetco Gray Matters, culminating in separate 2004 and 2007 resolutions. The first of these matters involved a private equity investment group's acquisition of Vetco Gray subsidiaries of a foreign issuer. The transaction resulted in the voluntary disclosure of suspicious payments to the DOJ and SEC in late 2003, and the companies agreeing "to provide 'real-time' disclosure of the results of a joint investigation." The matter also generated a DOJ Opinion Procedure Release (Vetco Gray Release) addressing successor liability. U.S. and U.K. subsidiaries of the foreign issuer also entered guilty pleas, with the issuer agreeing to disgorgement and a civil penalty in a civil SEC resolution. The foreign issuer was also required to hire an outside consultant to review its system of internal controls.

Cooperation With Enforcers and the Role of External Counsel

The all-in resolutions of approximately $16.4 million represented a step-change in FCPA enforcement. The Vetco Gray Release provides the basis for concepts that have become foundational to FCPA practice. These concepts include the importance of voluntary disclosure and cooperation, as well as the featured role of external counsel's internal investigation and "real time" reporting to the DOJ and SEC.

This matter also set a new FCPA benchmark for external counsel investigations in providing evidence for use by enforcement. For example, according to public disclosures, the internal investigation involved more than 115 lawyers (over 44,700 billable hours), over 100 forensic accountants, 21 countries visited and hundreds of thousands of transactions reviewed. The Opinion Release notes that all documents and witness interview memoranda were provided to the DOJ and SEC as they were produced. This foreshadowed issues related to external counsel and cooperation, that later became bumps in the road of FCPA corporate enforcement – including controversies over privilege waiver as an element of cooperation, and Constitutional concerns regarding enforcement agencies' role and reliance upon external counsel-led investigations.

The Rise of Effective Compliance: A Proactive "Defense"

In addition, in the Vetco Gray Release, DOJ stated its intent not to take enforcement action against the acquirer, so long as certain compliance measures were met, including disciplining employees engaged in misconduct and installing rigorous anti-corruption compliance measures. In this matter, practitioners can see the seeds of future enforcement guidance as to the potential benefits of proactive corporate cooperation, the criteria for leniency that would later be formalized as part of DOJ's Pilot Program, and the elements of an effective compliance program elaborated on in the Vetco Gray Release's list of forward-looking requirements. The imposition of an external compliance consultant was also a bellwether of the external compliance review and reporting trend, that would expand and contract (from monitors to reporting) over the next two decades.

In 2007, Vetco Gray was again in the M&A headlines as a target for acquisition by General Electric. Notwithstanding the compliance expectations under the Vetco Gray Release, ongoing post-close conduct by three Vetco Gray subsidiaries came to light. The result was a new 2007 plea agreement and DPA that mandated a going forward compliance monitor, required completion of the commitments made in the 2004 Opinion Procedure Release, and imposed a $26-million fine on the companies that, at the time, was the largest criminal fine by DOJ in an FCPA prosecution. This resolution also fulfilled a closing pre-condition for the previously announced sale.

Compliance Due Diligence and Integration as a Value Generator

This matter also highlighted to companies and practitioners across the globe, that compliance due diligence is not complete upon close. The DOJ clearly communicated the importance of using due diligence to inform not only transaction valuation decisions, but also to provide the basis for successful post-close risk analysis and compliance. The Vetco Gray Matters show how due diligence and compliance can be a value generator, especially in a global economy where companies have the potential for multiple M&A touchpoints, and lack of compliance can result in lost value via resulting enforcement, commercial considerations and reputational impact.

See "Digging Deep Into M&A Anti-Corruption Due Diligence Best Practices: An Interview With William Michael, Partner at Mayer Brown LLP" (May 29, 2013).

Compliance's Increasing Impact on Deals

This period continued to shine a light not only on how M&A impacts FCPA enforcement, but on how the new phase of FCPA enforcement might impact M&A. For example, the planned acquisition of Titan Corporation by Lockheed Martin Corporation was terminated in 2004, after Titan failed to timely resolve FCPA concerns with the U.S. government in relation to allegations of improper payments in multiple countries.

In another example, in 2007, telecommunications and IT solutions company eLandia International Inc. acquired Latin Node Inc. for $20 million. Post-close, eLandia discovered potential improper payments made by Latin Node and voluntarily disclosed to the DOJ. The matter was eventually resolved after a $2-million criminal fine and losing virtually the entire value of the investment, after Latin Node was placed into bankruptcy. With these matters, companies were again reminded of the underlying commercial imperative of understanding and effectively tackling potential FCPA risk as part of their M&A activities.

2008: The Haliburton Protocol Addresses Practical Pre-Close Difficulties With Increased Post-Close Expectations

In 2008, another DOJ Opinion Procedure Release, that came to be known as the "Halliburton Protocol," provided companies and their advisors with the most comprehensive guidance to date in support of their M&A due diligence efforts.

Halliburton, a global oil field service company and U.S. issuer, had been unable to access the information needed to complete its FCPA due diligence while seeking to acquire a U.K. company, as a result of certain local legal restrictions inherent in the bidding process. The target company operated in over fifty countries, and across five continents. With apparent concern about potential successor liability risks, Halliburton submitted a request for a DOJ opinion procedure release. The resulting release (Haliburton Protocol) laid out a specific timetable for compliance review and disclosure measures tied to 10-, 60-, 90-, 120- and 180-day intervals post-close. This protocol included Halliburton immediately imposing its own code of business conduct and specific FCPA and anti-corruption policies and procedures on the target, and fully completing each stage of its post-close due diligence and remediation once able, including the investigation of any issues identified within the first 180-days, by no later than one year from the date of closing.

Based on the Halliburton Protocol, DOJ indicated that they would not take enforcement action against Halliburton for any pre- or post-acquisition conduct by the U.K. firm, if the company complied with the detailed plan as laid out. The Halliburton Protocol provided a practical guide for companies facing impediments to completing pre-close due diligence. The trade-off required had also become apparent – enabling transactions to proceed would mean significant post-close requirements. At the same time, as the lessons from cases like Vetco Gray and Latin Node were driving home the importance of M&A due diligence, compliance counsel were taking note of the Haliburton Protocol's implications for post-close reviews and integration. The lessons from these matters were being operationalized in day-to-day enforcement expectations and ultimately became memorialized in official enforcement guidance.

However, an increase in available guidance did not mean a reduction in enforcement activity. Halliburton itself was soon once again at the center of a new M&A-related FCPA enforcement matter. In 2009, in relation to a joint venture formed by one of its subsidiaries, it appears Halliburton had not detected ongoing misconduct as part of pre-acquisition due diligence, nor was it able to implement an effective compliance program post-close, instead paying a total of $579 million in fines, penalties and disgorgement to the DOJ and SEC.

2008 to 2015: Increased Enforcement Resources and Compliance Guidance – Chicken or Egg?

While some might see it as proof that "nothing succeeds like success," whether it was causation or correlation, the mid-2000s also saw enforcement agencies rapidly expand the resources allocated to FCPA investigations and increased focus on corporate compliance as a factor in enforcement decisions.

The DOJ was first off the blocks to establish a specialized FCPA unit within the Fraud Section in 2005, followed by the FBI in 2007, and the SEC in 2010 announcing the creation of its own dedicated FCPA enforcement unit. At one point, a DOJ official said the FCPA was second only to terrorism in its enforcement priorities.

Alongside this enhanced allocation of resources, U.S. enforcement also began to provide more guidance on the routes for companies to mitigate potential FCPA liability. This area evolved significantly alongside the iterations of memoranda setting out the factors DOJ prosecutors consider when making charging decisions against corporations. The 2003 DOJ memorandum issued by then Deputy Attorney General Larry Thompson regarding "Principles of Federal Prosecution of Business Organizations" (Thompson Memorandum) provides one of the often-cited sources of guidance for prosecutors determining whether to charge a corporation with a crime in cases of apparent corporate misconduct. Alongside the pervasiveness of wrongdoing within the corporation, it includes as relevant factors the existence and adequacy of the corporation's compliance program, and the corporation's remedial actions, including any efforts to implement or improve an effective corporate compliance program. Regulatory expectations of corporate cooperation and voluntary disclosure (among other matters) were continually updated and superseded in turn by the 2006 McNulty Memorandum, the 2008 Filip Memorandum, and the 2015 Yates Memorandum. Each iteration of the Memorandum refined guidance, and addressed the particularly hot-button topics of the day, from cooperation status and requests for waiver of the attorney-client privilege, to the role of individual executive accountability in corporate resolutions.

See "How Will the Yates Memo Change DOJ Enforcement? (Part One of Two)" (Sep. 23, 2015); Part Two (Oct. 7, 2015).

2015 to Present: Compliance Professionalizes and Guidance Gains Sophistication

The mid 2000's also saw the rise and increasing professionalization of compliance as a distinct corporate discipline. Even outside of highly regulated industries, compliance became a standalone function, beyond the traditional legal and internal audit functions, with corruption risk as the central focus.

At the same time, greater enforcement guidance was in demand, prompted by increasing pressure, both at home and abroad. While the take-up of deferred and non-prosecution agreements (DPAs and NPAs) were useful tools for the increasingly efficient resolution of FCPA investigations, by 2010 the opaque nature of the process left companies wanting more of a roadmap to meet enforcement expectations. In the U.S., the DOJ and SEC faced increasing criticism from Congress and certain business groups about an apparent lack of clarity on FCPA compliance, and even some calls for FCPA reform, including specifically, on the scope of successor liability.

For example, in February 2012, a business coalition, involving the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform, sent a Coalition Letter to Assistant Attorney General Lanny Breuer, asking for, among other things, clear parameters for successor liability under the FCPA. A further external impetus came via U.S. foreign policy obligations under the Organization for Economic Cooperation and Development (OECD) peer review evaluation of U.S. enforcement of the FCPA, as required by the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Bribery Convention).

See "Practical Approaches to M&A Compliance From Avis Budget Group" (Jun. 27, 2018).

The FCPA Resource Guide

With a goal of setting the global standard, and growing pressure from Congress, in November 2012, the DOJ and SEC released the first edition of "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (the Resource Guide).

The Resource Guide included a new dedicated section on successor liability, emphasizing the risk that successor companies would assume a predecessor company's liability for criminal violations, including FCPA violations, post-close. It also described options for how to identify and reduce FCPA risk in M&A and provided a number of examples of potential acquisitions that would produce, or not produce, successor liability.

See "Second Edition of the DOJ/SEC FCPA Resource Guide Spotlights U.S. Enforcers' Controversial Legal Interpretations" (Jul. 8, 2020).

The Corporate Enforcement Policy

Four years later, in 2016, the DOJ Criminal Division launched the FCPA Pilot Program (rebranded as the FCPA Corporate Enforcement Policy after it became permanent in 2017). Designed to motivate and remediate FCPA-related misconduct in cooperation with the Fraud Section, the Pilot Program provided greater clarity on the meaning of "voluntary self-disclosure," "full cooperation," "remediation," and disclosure credit.

The policy's scope has continued to broaden with respect to M&A activity. In a September 2018 speech, then Deputy Assistant Attorney General Matthew Miner announced that the FCPA Corporate Enforcement Policy would apply to other types of potential wrongdoing uncovered by an acquirer in the course of an M&A transaction, beyond just FCPA violations.

See "Miner's First Speech As a Criminal Division Leader Focuses on M&A" (Aug. 8, 2018).

Recent Updates: Even Enforcement Guidance Is Subject to Continuous Improvement

The proliferation of new and updated sources of guidance continued, with the DOJ's Evaluation of Corporate Compliance Programs (ECCP). First published in 2017, and most recently updated in June 2020, the ECCP expressly references the importance of a "process for timely and orderly integration of the acquired entity into existing compliance program structures and internal controls," and conducting "post-acquisition audits, at newly acquired entities."

The Second Edition of the Resource Guide, published in July 2020, also brought additional focus on M&A and the importance of post-close efforts, including new examples of declinations related to successor liability based on M&A due diligence, post-close look-back and integration efforts, and a buyer's proactive and timely voluntary disclosure. This latest round of regulatory updates are fundamentally in keeping with the long-held messaging from U.S. enforcement that there are clear benefits when law-abiding companies enter higher-risk markets or merge or acquire companies with less robust compliance programs bringing those companies up to their own higher standards in the process. But guidance was not the only thing FCPA enforcers were doing in the M&A space.

See the Anti-Corruption Report's two-part series on updates to the ECCP: "Encouraging Companies to Make Compliance a Positive Feedback Loop" (Jun. 24, 2020); "Providing More Nuance on Training, M&A and Third-Party Management" (Jul. 8, 2020).

The Enforcement Message: You Are What You Buy

Overall, the 2010's saw a new high in FCPA enforcement, including a consistent stream of M&A related resolutions bringing a renewed focus on the risk of successor liability and the importance of post-close compliance review and integration efforts. Some notable matters in this period include Mondelēz, Bio-Rad Laboratories and Kinross Gold.

Even minority investments have come under increased scrutiny. Recent cases have confirmed that minority interests can pose FCPA risks to acquirers, particularly given the very expansive scope of agency theory under the FCPA. This includes the April 2020 resolution based on the books and records and internal controls provisions between the SEC and Italian multinational oil and gas company Eni S.p.A., in relation to alleged improper payments made by a minority investment in Algeria.

See "Structuring M&A Transactions to Minimize Corruption Risk" (Oct. 18, 2017).

What Is the Next Song for the FCPA and M&A Dance?

The FCPA story viewed through the lens of M&A shows how the two have been consistent dance partners, with M&A touchpoints playing a critical role in the development of FCPA enforcement and guidance. Likewise, the FCPA has left its own indelible mark on M&A strategy across industries and created the cottage industry of FCPA M&A due diligence in corporate compliance programs and law firms alike.

Looking ahead, it may be expected that global M&A activity and related FCPA enforcement will once again trend upward, as companies eye new opportunities post-COVID, and the potential effects of the cocktail of pressure, remote control functions and government funded relief programs provide a fertile ground for corruption and result in FCPA related due diligence observations and findings.

In this movement of the FCPA and M&A dance, compliance empowerment in M&A has never been more valuable to a company. The second part of this article series will focus on providing practical approaches for in-house counsel tackling the M&A due diligence challenge and strategies that highlight FCPA due diligence as a risk mitigator and value-driver for a business. It will also preview approaches to leverage FCPA and anti-corruption due diligence to effectively and efficiently address other non-financial emerging risks, as many in-house programs are increasingly asked to address a broader scope of risk subjects, with the same or fewer resources.

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