GIBSON DUNN

FCPA M&A: Identifying and Mitigating Anti-Corruption Risk in Cross-Border Transactions

Webcast Briefing

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MCLE Certificate Information

MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance in four weeks following the webcast.

- Virginia Bar Association members should anticipate receiving their certificate of attendance in six weeks following the webcast.

- All questions regarding MCLE Information should be directed to Jeanine McKeown (National Training Administrator) at 213–229-7140 or jmckeown@gibsondunn.com.

Topics to Be Discussed

- **An Overview of FCPA Enforcement**
  - U.S. Foreign Corrupt Practices Act ("FCPA")
  - UK Bribery Act ("UKBA")
- **Anti-Bribery Risks and Issues Relating to M&A Activity**
- **M&A Best Practices to Avoid Anti-Bribery Liability**

The U.S. Foreign Corrupt Practices Act

Overview: FCPA

What is the Foreign Corrupt Practices Act?

The FCPA was enacted in 1977 in the wake of reports that numerous U.S. businesses were making large payments to foreign officials to secure business.

- ***Anti-Bribery Provisions:*** The FCPA prohibits corruptly giving, promising, or offering anything of value to a foreign government official, political party, or party official with the intent to influence that official in his or her official capacity or to secure an improper advantage in order to obtain or retain business.

- ***Accounting Provisions:*** The FCPA also requires issuers to maintain accurate "books and records" and reasonably effective internal controls.

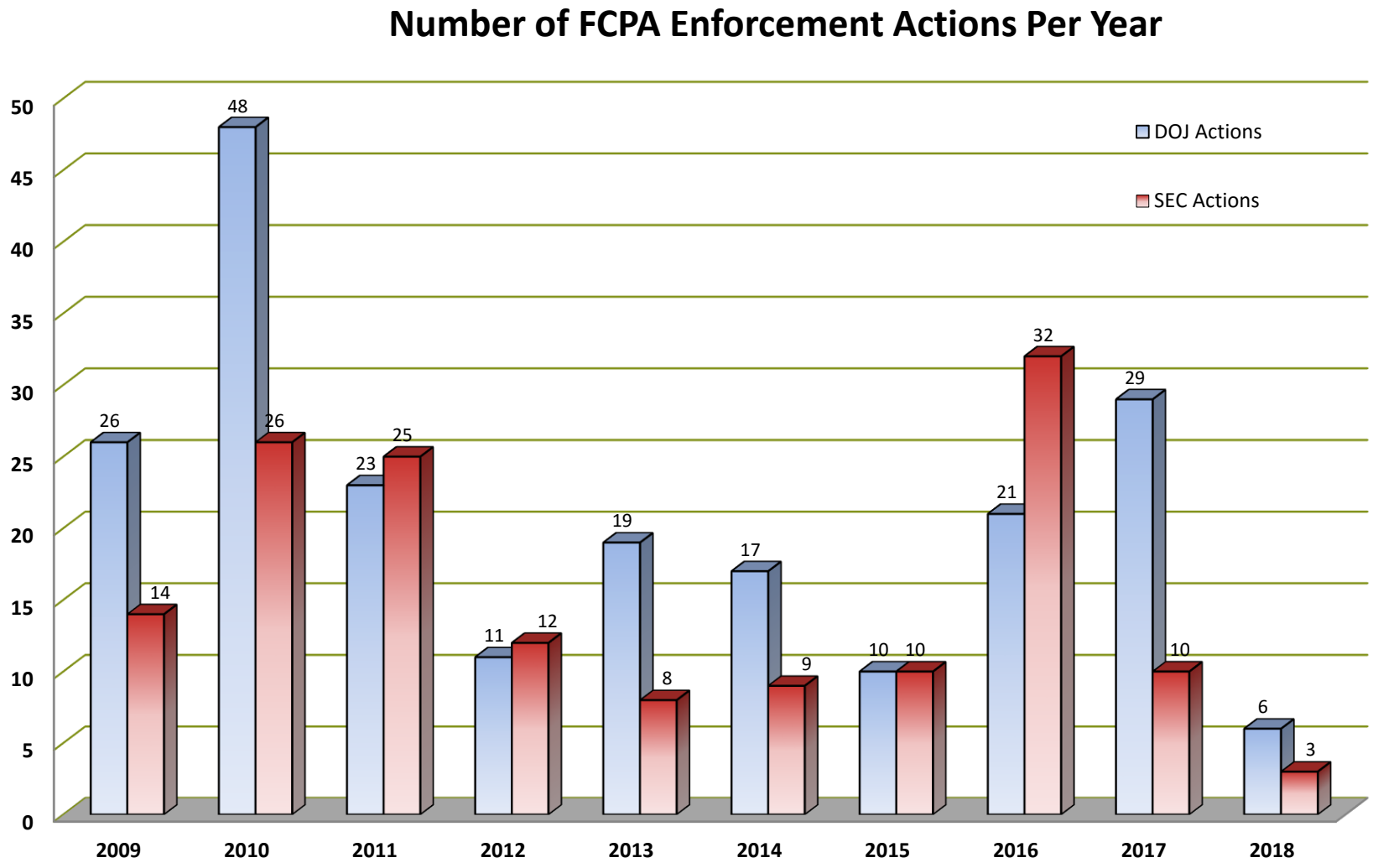
FCPA: Who Is Covered by the FCPA?

- ***Issuers*:** Any company whose securities (including American Depository Receipts and registered debt) are registered in the United States or that is required to file periodic reports with the SEC.
  - The FCPA also applies to stockholders, officers, directors, employees, and agents acting on behalf of the issuer.
  - Issuers must adhere to both the FCPA's ***Anti-Bribery*** and ***Accounting Provisions***.

- ***Domestic Concerns*:** Any individual who is a U.S. citizen, national, or resident of the United States (not just U.S. citizens), or any business organization that has its principal place of business in the United States or which is organized in the United States.
  - The FCPA also applies to stockholders, officers, directors, employees, and agents acting on behalf of the domestic concern.
  - Domestic Concerns must adhere to the FCPA's ***Anti-Bribery Provisions***.

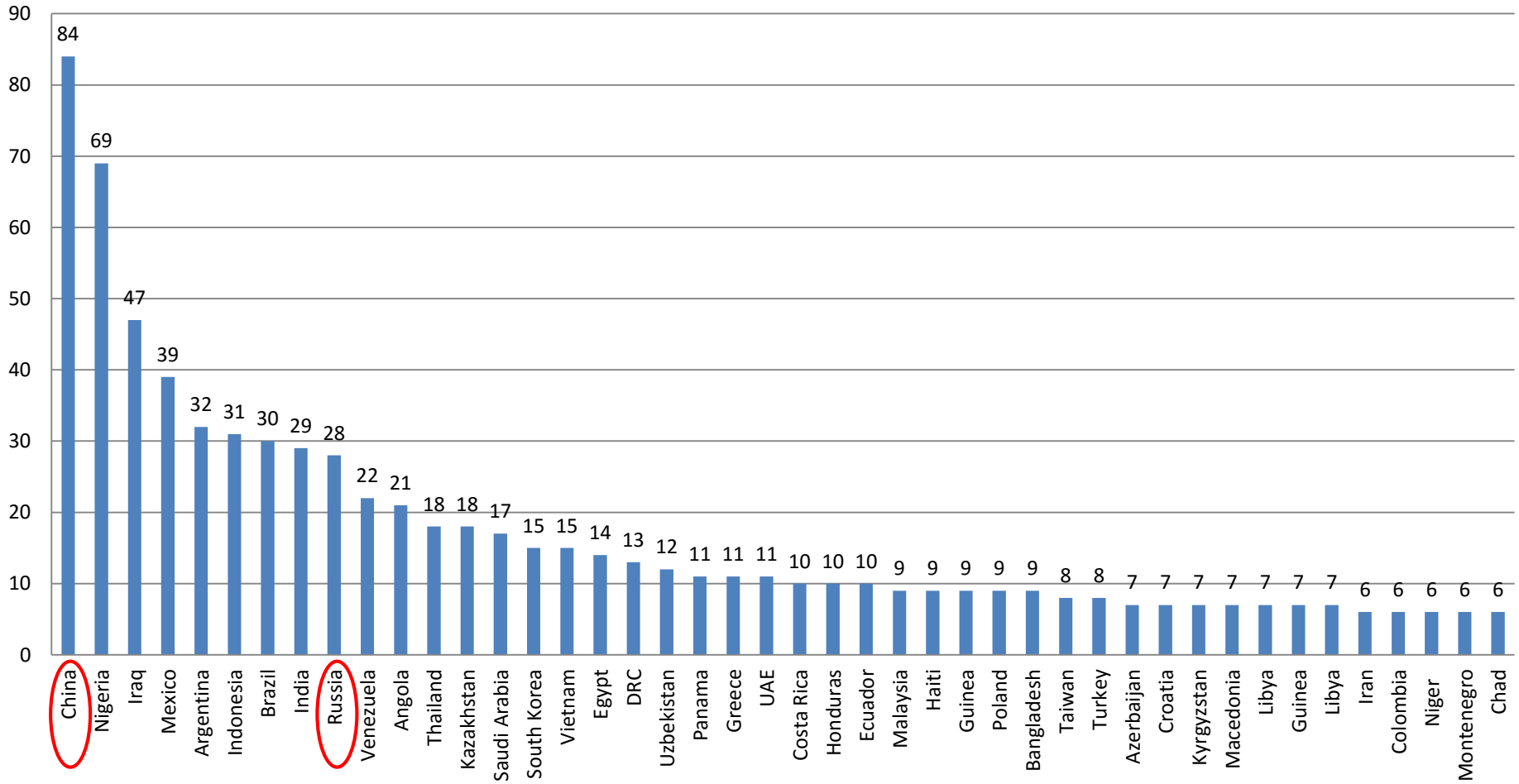
- ***Other Persons*:** Anyone who takes any act in furtherance of a corrupt payment while within the territory of the United States.
  - "Other Persons" must adhere to the FCPA's ***Anti-Bribery Provisions***.

FCPA Enforcement Actions Per Year (2008-Present)



As of April 24, 2018

Number of FCPA Enforcement Actions by Country (2006 to Present*)



* min. 6 enforcement actions

As of January 15, 2018

China: FCPA Enforcement Actions

Since 2002, the DOJ and the SEC have collectively brought enforcement actions against 46 corporations relating to business activities in China.

Automotive
- Daimler AG, 2010

Aircraft
- Nordam Group, Inc., 2012

Cosmetics/Personal Care
- Avon Products (China) Co., Ltd, 2014
- Nu Skin Enterprises, 2016

Mining/Energy
- Maxwell Technologies, 2011
- BHP Billiton, 2015

Finance
- JPMorgan, 2016

Gaming
- Las Vegas Sands, 2016 & 2017

Healthcare/Life Sciences
- Diagnostic Products Corp., 2005
- AGA Medical, 2008
- Biomet, Inc., 2012
- Pfizer/Wyeth, 2012
- Eli Lilly, 2012
- Bruker Corp., 2014
- Mead Johnson Nutrition, 2015
- Bristol-Myers Squibb, 2015
- SciClone Pharmaceuticals, 2016
- Novartis AG, 2016
- AstraZeneca, 2016
- GlaxoSmithKline, 2016

Infrastructure
- Schnitzer Steel Industries, 2006
- Watts Water Technologies, Inc., 2011
- General Cable, 2016

Manufacturing
- Control Components, Inc., 2009
- InVision Technologies, 2004
- York International, 2007
- Siemens AG, 2008
- ITT Corporation, 2009
- Avery Dennison, 2009
- Diebold, Inc., 2013
- Tyco, 2012
- Keyuan Petrochemicals, Inc., 2013
- Nortek Inc., 2016
- Johnson Controls, 2016

Technology
- Paradigm BV, 2007
- Faro Technologies, 2008
- RAE Systems, Inc., 2010
- Rockwell Automation, 2011
- IBM Corp., 2011
- PTC Inc., 2016
- Akamai Technologies Inc., 2016

Telecommunications
- Alcatel-Lucent, 2007
- UTStarcom, Inc., 2009
- Veraz Networks, Inc., 2010
- Qualcomm Inc., 2016

Tobacco
- Alliance One International, 2010

No. 1: *While there was only a single enforcement action relating to PRC conduct in 2017, China remains the source of the largest number of FCPA enforcement actions in the past decade.*

Russia: FCPA Enforcement Actions

Since 2006, the DOJ and the SEC have brought enforcement actions against 13 corporations relating to business activities in Russia.

Automotive

- Daimler AG, 2010

Mining/Energy

- Baker Hughes Incorporated, 2008

Healthcare/Life Sciences

- Pfizer Inc./Pfizer H.C.P. Corporation, 2012
- Eli Lilly, 2012
- Bio-Rad Laboratories, 2014
- Analogic Corporation, 2016
- AstraZeneca, 2016
- Nordion (Canada) Inc., 2016
- Teva / Teva LLC / Teva Pharmaceuticals, 2016

Manufacturing

- Siemens AG, 2008
- Diebold, Inc., 2013

Technology

- Hewlett-Packard / ZAO Hewlett Packard A.O., 2014

Logistics

- Panalpina, Inc. / Panalpina World Transport (Holding), Ltd., 2010

Enforcement of the FCPA: Criminal Penalties

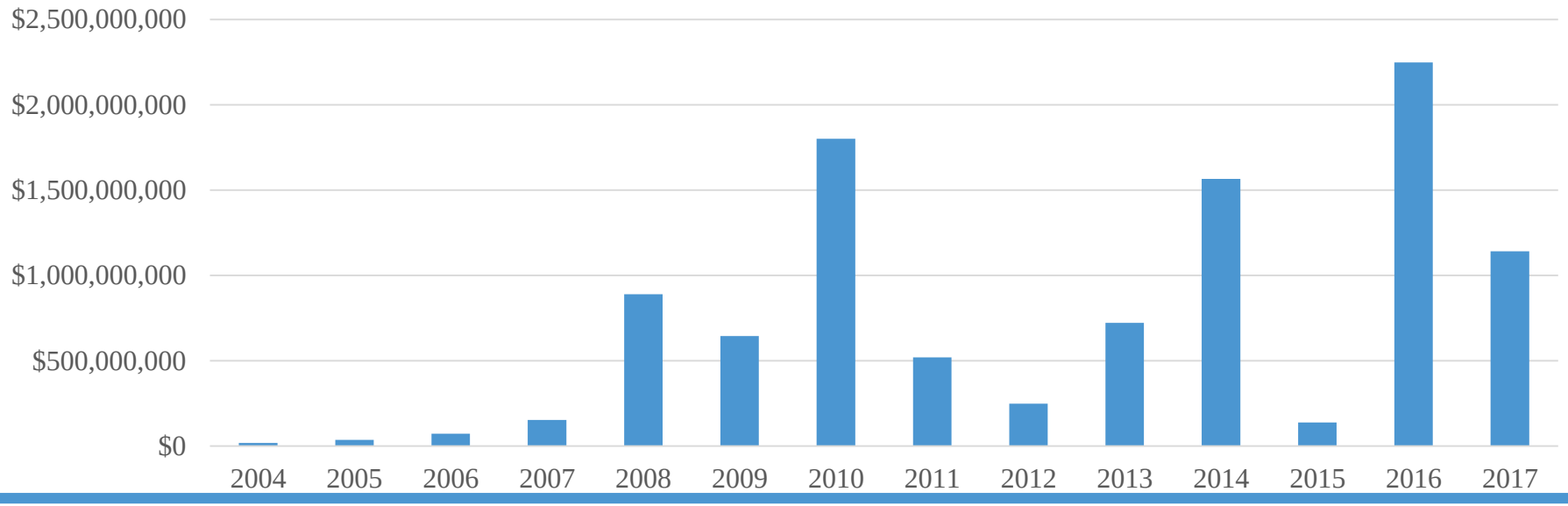
Anti-Bribery Provisions

- ***Corporations*:** USD 2 million fine *or* twice the pecuniary gain or loss.
- ***Individuals*:** Up to five years' imprisonment, *and* a USD 250,000 fine *or* twice the pecuniary gain or loss.

Books and Records Provisions

- ***Corporations*:** Criminal penalties up to a USD 25 million fine.
- ***Individuals*:** Up to 20 years' imprisonment, and a USD 5 million fine.

Total Value of Corporate FCPA Monetary Resolutions (2004 – 2017)



The UK Bribery Act

Overview: UK Bribery Act

Broader than the FCPA, the UK Bribery Act covers both public and commercial bribes, no matter where in the world they are paid, if any part of the bribery offense is committed in the UK or by a UK person, or if the bribes were on behalf of any company doing business in the UK.

The UK Bribery Act Includes Four Relevant Primary Offenses:

- **Commercial & Domestic Bribery:** Offering, promising, or giving a bribe to any person;
- **Passive Bribery:** Agreeing to receive or accepting a bribe;
- **Bribery of Foreign Officials:** Offering, promising, or giving a bribe to a foreign government official with intent to influence the performance of his/her functions to obtain/retain business or business advantage; and
- **Corporate Offense:** Failing as a corporate entity to have adequate compliance procedures in place to prevent bribery by persons acting on its behalf.

Overview: UK Bribery Act – Section 7, "Failure to Prevent Bribery"

Section 7 of the UK Bribery Act penalizes "**relevant commercial organisations**" for failing to prevent an "**associated person**" from committing active corruption.

"Relevant Commercial Organisation":

- A business incorporated under the law of any part of the UK, regardless of where it conducts business;
- Any other company that carries on a business, or part of a business, in any part of the UK;
- A partnership formed under the law of any part of the UK, regardless of where it conducts business; or
- Any other partnership that carries on a business, or part of a business, in any part of the UK

"Associated Person":

- Anyone who "performs services for or on behalf" of the organization, including employees, agents, and subsidiaries.
- The conduct need not involve UK territory or citizens.

Overview: UK Bribery Act – Third-Party Payments and Strict Liability

- A company is strictly liable for any bribe paid on its behalf by any third party anywhere in the world.

- Only defense: "[A]dequate procedures" in place to prevent bribery.

- What are "adequate procedures"?

Overview: UK Bribery Act – Adequate Procedures – the Six Principles

Ministry of Justice Guidance: "principles-based," non-prescriptive, and flexible—a company's procedures can be adapted to its size, structure, and sector.

- Six key principles for the establishment of adequate procedures:
  - **Proportionate procedures:** proportionate to the bribery risk the company faces and the nature, scale and complexity of its activities.
  - **Top-level commitment:** commitment at board, owner or equivalent level to preventing bribery and fostering zero tolerance culture.
  - **Risk assessment:** Periodic, informed and documented assessment of the nature and extent of a company's external and internal risks using five risk criteria – country, sector, transaction, business opportunity, and business partnership.
  - **Due diligence:** proportionate, risk-based assessment of "associated persons" to mitigate identified bribery risks.
  - **Communication (incl. training):** anti-bribery policies to be embedded throughout organization via internal and external communication and training.
  - **Monitoring and review:** continuous assessment of anti-bribery procedures, making improvements where necessary; reporting and whistle-blowing arrangements.

UK Bribery Act – Adequate Procedures Spotlight on Skansen Interiors Ltd.

UK Jury Rejects Adequate Procedures Defense

- On February 21, 2018, refurbishment contractor Skansen Interiors Limited ("Skansen") was convicted by a jury in an action brought by the Crown Prosecution Service under section 7 of the UK Bribery Act. The prosecution related to payments made to a third-party agent for allegedly fictitious services in connection with the award of two refurbishment contracts in 2013.
- Skansen raised an adequate procedures defense, arguing that its existing compliance procedures at the time of the alleged payments, which required ethical, open and honest dealings (but did not include an express anti-corruption element), were adequate for a company of its size. Skanesen was a small company with a workforce of approximately 30 individuals based at a single site.
- Even though Skansen's new leadership had self-disclosed the payments and fully cooperated in the ensuing government investigation, a jury was not persuaded that these controls were sufficient to meet the adequate procedures defense of the UKBA and returned a guilty verdict.

Overview: UK Bribery Act – Adequate Procedures in M&A

Ministry of Justice Procedures Emphasize the Importance of Risk-Based Due Diligence

"Organizations will need to take considerable care in entering into certain business relationships, due to the particular circumstance in which the relationships come into existence. [One] relationship that carries particularly important due diligence implications is a merger of commercial organizations or an acquisition of one by another." – *Ministry of Justice Guidance, Procedure 4.4*

External Risks (Procedure 3.5):

- Country Risk
- Sectoral Risk
- Transaction Risk
- Business Opportunity Risk
- Business Partnership Risk

Procedures

4.3 As this guidance emphasises throughout, due diligence procedures should be proportionate to the identified risk.

Internal Risks (Procedure 3.6):

- Deficiencies in employee training, skills, and knowledge
- Bonus culture that rewards excessive risk taking
- Lack of clarity in policies and procedures regarding hospitality and promotional expenses, and political or charitable contributions
- Lack of clear financial controls
- Lack of clear anti-bribery message from top-level management

Anti-Bribery Risks and Issues Relating to M&A Activity

M&A: Successor Liability – General Principles

Successor liability poses significant risks.

- Under principles of successor liability, an acquirer can inherit FCPA/Bribery Act liability of a target.
- U.S. courts recognize theories that allow holding an acquiror liable for the past acts of an acquired entity.
- Many recent corporate FCPA enforcement actions have implicated successor liability issues.

Collateral consequences can undermine the purpose of the transaction.

- Financial penalties can outbalance anticipated revenue.
- Key personnel may need to be replaced, which may damage the acquiror's business.
- Both the acquiror and acquiree may have significant negative publicity.
- Remediation of anti-corruption violations by the target company could require termination of lucrative contracts or important customer relationships.

M&A: Successor Liability, Cont'd
eLandia – A Cautionary Tale

Pre-Investment Conduct Results In Wipeout of Investment Value

Parent:	eLandia
Year:	2009
Target:	LatinNode, a telecom services provider.
Conduct:	In August 2007, during a post-closing financial integration review, eLandia discovered evidence that Latin Node had paid approximately $2.25 million in bribes to Honduran and Yemeni government officials between March 2004 and June 2007. eLandia voluntarily reported the payments to the DOJ.
Result:	eLandia's entire $26+ million investment in Latin Node was reportedly nearly wiped out due to the inflated acquisition price of a corrupt company and investigation costs. It paid a $2 million fine in connection with DOJ's inquiry and placed Latin Node into bankruptcy.

A "cautionary tale" of what can happen when an acquirer conducts "little, if any, [FCPA] due diligence."

— Former DOJ FCPA Unit Chief (Nov. 17, 2009)

Successor Liability Cont'd – General Electric

Inadequate Pre-Signing Due Diligence Leads to Stalled Deal and Penalties

Parent:	General Electric ("GE")
Year:	2004/2005
Target:	InVision Technologies, manufacturer of airport screening devices.
Conduct:	InVision's agents and distributors allegedly made illegal payments to win business in the Philippines and Thailand.
Due Diligence:	InVision was allegedly aware of a high probability that its distributor was using margin to pay bribes. InVision disclosed this conduct after signing.
Result:	The $900 million merger was stalled until GE and InVision reached a settlement agreement with DOJ. GE: NPA and $1,117,700 civil penalty. InVision: NPA and $800,000 criminal fine.

M&A: Successor Liability, Cont'd
Mondelēz/Cadbury

Successor Liability for Prior Acts of Target with Independent FCPA Liability

Parent:	Mondelēz International
Year:	2017
Target:	Cadbury Ltd., a UK-based confectionary and beverage company.
Conduct:	A Cadbury subsidiary in India had retained an agent to obtain licenses and approvals for a chocolate factory in India. According to the SEC, Cadbury India failed to conduct due diligence on, and monitor, the agent, "creat[ing] the risk" that funds paid to the agent could be used for improper purposes. Cadbury India's books and records allegedly also did not accurately and fairly reflect the services rendered by the agent.
Result:	The SEC assessed a $13 million penalty against Mondelēz, finding that Cadbury had violated the books and records and internal controls provisions of the FCPA. The SEC expressly found that "[a]s a result of Mondelēz's acquisition of Cadbury stock, Mondelēz [was] also responsible for Cadbury's violations."

M&A: Post-Acquisition Liability for Failure to Identify & Mitigate

- The *Resource Guide* makes clear that DOJ and SEC have ***no jurisdiction over a foreign company's pre-acquisition misconduct*** where the foreign company was neither an issuer or domestic concern, nor otherwise subject to U.S. territorial jurisdiction.
- ***But***
  - The acquirer can be subject to prosecution for any ***post-acquisition misconduct***.
  - The acquirer is potentially subject to prosecution if it fails to put a stop to the ***target company's misconduct*** post-acquisition.

"The acquisition of a company does not create jurisdiction where none existed before."

—*Resource Guide*, pg. 31

M&A: Post-Acquisition Liability for Failure to Identify & Mitigate, Cont'd – KBR

Liability for Failure to Detect Misconduct

KBR

Parent:	Halliburton
Year:	2009
Target:	Kellogg, which merged with an existing Halliburton subsidiary to form KBR.
Conduct:	Kellogg was part of a joint venture that allegedly paid nearly $182 million in bribes to secure more than $6 billion in contracts. Senior KBR employees allegedly knew of the scheme but did not disclose it to Halliburton.
Due Diligence:	Halliburton allegedly either ignored or failed to detect the improper payments when conducting due diligence and otherwise failed to implement an effective compliance program. Halliburton also allegedly failed to vet Kellogg's legacy third-party agents after the acquisition.
Result:	Halliburton and KBR: $177 million in civil fines plus disgorgement. KBR: Guilty plea, $402 million criminal fine, independent monitor.

M&A: Post-Acquisition Liability for Failure to Identify & Mitigate, Cont'd – Kinross

Liability for Failure to Mitigate

Parent:	Kinross Gold Corporation
Year:	2018
Target:	Two African subsidiaries acquired in a $7.1 billion transaction in 2010.
Conduct:	Kinross conducted due diligence on the target companies in the months preceding acquisition, and knew at closing that the African subsidiaries lacked anti-corruption compliance programs and internal accounting controls. According to the SEC, it took Kinross nearly three years to implement adequate controls, despite multiple internal audits flagging compliance deficiencies. The SEC also alleged continuing violations once controls were implemented.
Result:	SEC Cease and Desist Order premised on internal controls violations, including a $950,000 civil penalty.

M&A: Post-Acquisition Liability for Failure to Identify & Mitigate, Cont'd: Bio-Rad

Joint Venture Inadequate Due Diligence and Failure to Mitigate

Parent:	Bio-Rad Laboratories, Inc.
Year:	2014
Target:	Diamed South East Asia Ltd. ("Diamed Thailand").
Conduct:	Among other things, the SEC and DOJ alleged that Diamed Thailand had an "established bribery scheme" whereby it paid a portion of commissions to government officials in exchange for business contracts. The SEC and DOJ further alleged that Bio-Rad had conducted "very little due diligence" on Diamed Thailand before acquiring a 49% interest in the company, and that the misconduct continued for several years post-acquisition, even though Bio-Rad's Asia Pacific General Manager was on notice of the alleged bribery scheme beginning in March 2008.
Result:	In connection with this and other alleged conduct in Russia and Vietnam, the SEC found that Bio-Rad had violated the anti-bribery, internal controls, and books and records provisions of the FCPA and ordered Bio-Rad to disgorge $35 million and pay prejudgment interest of $5.6 million.

M&A Best Practices to Avoid Anti-Bribery Liability

M&A: Representations and Warranties

Tailored Anti-Corruption Representations & Warranties in Acquisition Agreement

Anti-Corruption Compliance

Neither the Company nor any of its Subsidiaries (nor, to the knowledge of the Company, any of their respective directors, executives, representatives, agents or employees) (a) has used or is using any corporate funds for any illegal contributions, gifts, entertainment or other unlawful expenses relating to political activity, (b) has used or is using any corporate funds for any direct or indirect unlawful payments to any foreign or domestic governmental officials or employees or any employees of a foreign or domestic government-owned entity, (c) has violated or is violating any provision of the Foreign Corrupt Practices Act of 1977 or any other anticorruption Law applicable to the Company or any of its Subsidiaries, (d) has made, offered, authorized or promised any payment, rebate, payoff, influence payment, contribution, gift, bribe, rebate, kickback, or any other thing of value to any government official or employee, political party or official, or candidate, regardless of form, to obtain favorable treatment in obtaining or retaining business or to pay for favorable treatment already secured, (e) has established or maintained, or is maintaining, any fund of corporate monies or other properties for the purpose of supplying finds for any of the purposes described in the foregoing clause (d) or (f) has made any bribe, unlawful rebate, payoff, influence payment, kickback or other similar payment of any nature. The Company and its Subsidiaries, and, to the knowledge of the Seller, all entities acting on behalf of the Company or its Subsidiaries, have developed and implemented an anti-corruption compliance program that includes internal controls, policies, and procedures designed to ensure compliance with any applicable national, regional or local anticorruption Law. The books of account and other financial records of the Company and its Subsidiaries (i) are accurate, complete, and correct, (ii) represent actual, bona fide transactions and (iii) have been maintained in accordance with sound business practices, including the maintenance of adequate internal accounting controls.

M&A: Due Diligence Best Practices
The FCPA *Resource Guide*

Affirmative Credit for Due Diligence

Companies facing FCPA liability may receive "***meaningful credit***" when they undertake ***five actions*** regarding M&A transactions:

- Conduct thorough FCPA and anti-corruption ***due diligence*** on potential new business acquisitions;
- Ensure application, as quickly as is practicable, of the acquiring company's ***compliance policies and procedures*** to newly acquired or merged businesses;
- ***Train*** directors, officers, employees, and third parties (where appropriate) of new businesses on relevant anti-corruption laws and the acquiring company's policies and procedures;
- Perform FCPA-specific ***audits*** of all new businesses as quickly as practicable; and
- ***Disclose*** any corrupt payments discovered as part of its due diligence.

"***Extensive Due Diligence***" includes:

1. Reviewing the target company's sales and financial data, its customer contracts, and its third-party and distributor agreements;
2. Performing a ***risk-based analysis*** of the target company's ***customer base***;
3. Performing an ***audit of selected transactions*** engaged in by the target company; and
4. Engaging in ***discussions*** with the target company's general counsel, vice president of sales, and head of internal audit regarding all corruption risks, compliance efforts, and any other major corruption-related issues that have surfaced at the target company over the past ten years.

M&A: Due Diligence Best Practices, Cont'd

Due diligence can be carried out either before or after closing, or frequently, both:

- Pre-acquisition due diligence helps to ensure that a potential target has not obtained its business through bribery. The acquirer or target may face enforcement actions for prior misconduct if the target previously was subject to the FCPA.
  - Pre-acquisition due diligence also allows the acquiring company to evaluate the potential cost of remediation in the event that anti-corruption compliance violations are detected, and—in extreme cases—afford the acquiring company the opportunity to renegotiate price or terminate the transaction, commensurate with identified risks.
- Post-acquisition due diligence and integration requires the acquirer to rapidly integrate the acquired entity into its compliance program and conduct further due diligence, especially if the pre-acquisition due diligence was limited.

M&A: Due Diligence Key Risk Areas

Key Risk Areas to Consider When Conducting Due Diligence:

- Industry
- Countries and regions of operation
- Commercial model (e.g., direct vs. intermediary sales)
- Primary customers
- Government touchpoints (sales, permitting and licensing, registration, etc.)
- Use of third-party intermediaries to interact with government officials
- Historical conduct (particularly within the past five years)
- Age, quality, and comprehensiveness of anti-corruption compliance program

M&A: Due Diligence Best Practices, Cont'd

Conduct Thorough Pre- and/or Post-Closing Due Diligence

- To avoid successor liability, extensive, risk-based due diligence of the target is needed.
- Understand the target's ownership structure.
- Review the target's compliance program and internal controls.
- Assess its past compliance and any past corruption issues.
- Focus on its operations in countries with high perceived levels of corruption—e.g., what are the requirements relating to customs in those foreign countries and how does the target meet those requirements?
- Evaluate particular risks associated with its business, including its sales and marketing methods and commercial dealings with state-owned customers.

M&A: Due Diligence Best Practices, Cont'd

Conduct Thorough Pre- and/or Post-Closing Due Diligence, Cont'd

- Focus on governmental "touchpoints" —e.g., tax matters; customs and immigration issues; any required government permits, licenses, or approvals.
- Evaluate its use of and control over subsidiaries and field/branch offices.
- Assess third parties and "associated persons" —e.g., anyone that "performs services for or on behalf of" the organization, including employees, agents, and suppliers.
- Review any joint ventures, teaming, or consortium arrangements.
- Analyze charitable donations for proper approvals and potential red flags.
- Conduct further due diligence of any "red flags" that arise during the diligence process.

180 days post-closing is the golden window to identify and report potential FCPA violations.

M&A: Example – Halliburton (DOJ FCPA Op. Proc. Rel. 2008-02)

Aggressive Post-Closing Due Diligence Results in Leniency

- In 2008, Halliburton planned acquisition of a UK-listed oil and gas company.
- Halliburton represented that it had insufficient time and access to conduct pre-closing due diligence due to UK legal restrictions.
- DOJ Opinion: Halliburton ***not liable for FCPA violations detected and reported to DOJ within 180 days of closing*** based on representations that the company would:
  - train key Target personnel on its FCPA and anti-corruption policies within 60 days of closing and the remainder of Target's 4,000 employees within 90 days;
  - require legacy third-party representatives with whom it would work post-closing to sign agreements that "incorporate appropriate FCPA and anti-corruption representations and warranties, anti-corruption provisions, and audit rights";
  - take "appropriate remedial action" against legacy third-party representatives and employees that it discovers were improperly involved in FCPA or anti-corruption matters; and
  - "immediately impose its own Code of Business Conduct and specific FCPA and anti-corruption policies and procedures on Target, including effectively communicating the same to all Target employees."

M&A: Different Transaction Structures Mandate a Flexible Approach to Due Diligence

Type	Characteristics	Approach
Public takeover	▪ Regulatory hurdles in some jurisdictions to access information ▪ Highly formalized acquisition process ▪ Target is subject to a high degree of reporting obligations	▪ (Mostly) Limited due diligence rights ▪ Review of all relevant disclosures ▪ Conduct management interviews ▪ Identify risks through third-party sources
Auction sale	▪ Process hurdles to access information ▪ Highly formalized acquisition process ▪ Limited other information available	▪ (Mostly) Limited due diligence rights ▪ Increased rights in the course of the bidding process ▪ Conduct management interviews ▪ Identify risks through third-party sources
Private sale	▪ Freely negotiated acquisition process ▪ Access to information depends on relevant bargaining power ▪ Limited other information available	▪ Early request for right to full due diligence ▪ Intensity of due diligence may increase in the course of the transaction
Put-Option	▪ Buyer has limited or no bargaining power to avoid acquisition ▪ Target characteristics mostly defined in respective put-option agreement	▪ Include protective clauses in put-option agreements, e.g.: ➢ Conditions precedent ➢ Confirmatory due diligence ➢ Indemnification

M&A: A Risk-Based Approach Ensures the Right Balance between Efforts and Costs

	Abstract Risks	Typical Risks	Red Flags
Characteristics	▪ Not target specific ▪ Mainly country risk	▪ Not target specific ▪ Risks typically faced by companies operating in a similar environment	▪ Target-specific risks ▪ Past conduct ▪ Integrity concerns with key management or culture
Examples	▪ Target has main operations, main customers, or critical supplier in high-risk country	▪ Industry ▪ Business model ▪ Customer base ▪ Regulatory environment	▪ Past violations ▪ Uneven or problematic corporate culture of target ▪ Concrete facts of violations or significant rumors
Approach	▪ List most important countries for key markets, key customers, key suppliers and key operations ▪ List any operation in high-risk countries ▪ Use TI CPI as an indicator to measure country risk	▪ Assess target's business ▪ List typical risks faced by similar business(es) ▪ Leverage expertise from similar businesses in the same industry sector ▪ Tailor due diligence to cover the relevant risks	▪ No 80:20 or sample approach to red flags ▪ Concrete facts of violations should be fully understood ▪ Significant rumors should be investigated ▪ Integrity concerns need to be promptly addressed

M&A: Compliance Risks in Negotiations and Proper Documentation – Examples

	Abstract Risk	Typical Risk	Red Flag
Reps & Warranties	General provision warranting conduct of business in accordance with all applicable anti-bribery laws	Specific provision addressing specifics of the business that were relevant for the compliance risk assessment	▪ Specific provision confirming presence or absence of certain facts ▪ Define Key Personnel to attribute knowledge of compliance relevant facts
Indemnification	General provision to indemnify buyer from any losses and damages caused by a violation of applicable anti-bribery laws	Specific provision indemnifying for risks caused by issues which could not be fully clarified during the due diligence	Specific provision indemnifying for risks caused by issues which could not be fully clarified during the due diligence
Condition Precedent	▪ Generally not appropriate ▪ In exceptional cases carve-out transaction prior to closing	▪ Carve-out or wind-down business fields with unacceptable risk prior to closing	▪ Carve-out or wind-down business fields with unacceptable risk ▪ Full remediation in case of violations ▪ Disclosure of violations?

M&A: Typical Challenges for M&A Due Diligence

- Corporate laws may limit access to relevant business information
  - E.g., Principle of equal treatment of shareholders in corporations
- Competition laws may limit ability to exchange information
  - E.g., antitrust lawyers may advise the parties not to share information regarding pricing and pricing strategies, costs or bids for new work.
- Target company may have limited visibility into detailed information of its subsidiaries
  - E.g., Consolidated financial data available at corporations of limited value for detailed analysis of high-risk accounting entries
- Local laws may limit access to relevant shareholder information
  - Public access to shareholders' register still limited in some jurisdictions*
- Data privacy laws may limit access to relevant data for FCPA due diligence
  - E.g., Limitations under new European General Data Privacy Regulation

*Note proposed amendment to the Sanctions and Anti-Money Laundering Bill requiring the British Overseas Territories (including BVI, Cayman, Bermuda, Gibraltar, Turks & Caicos – not Jersey, Guernsey and the Isle and Man) to adopt public company registries or have them imposed by the UK to take effect by 2020.

Special Focus: Third Parties Remain the Single Greatest Area of Corruption Risk

Issues involving third parties have been at the core of recent enforcement actions conducted by the SEC, the DOJ, and local enforcement agencies. High-risk third parties may include:

China: Consultants, Design Institutes, PR/Marketing Firms, Event Organizers, Travel Agents, or Distributors

India: Sales Agents, Distributors, Tendering/Procurement Agents, Government Liaison Agents, Logistics Providers, Joint Venture Partners, or Fictitious Vendors

Russia: Distributors, State-Owned Customers, Fictitious Service Providers, Vendors, or Private Customers

Latin America: Sales and Marketing Agents, Customs Brokers, Lobbyists, or Tendering Agents

Africa: Joint Venture Partners and Consultants

SBM Offshores Uses Sales Agents to Secure Winning Bids

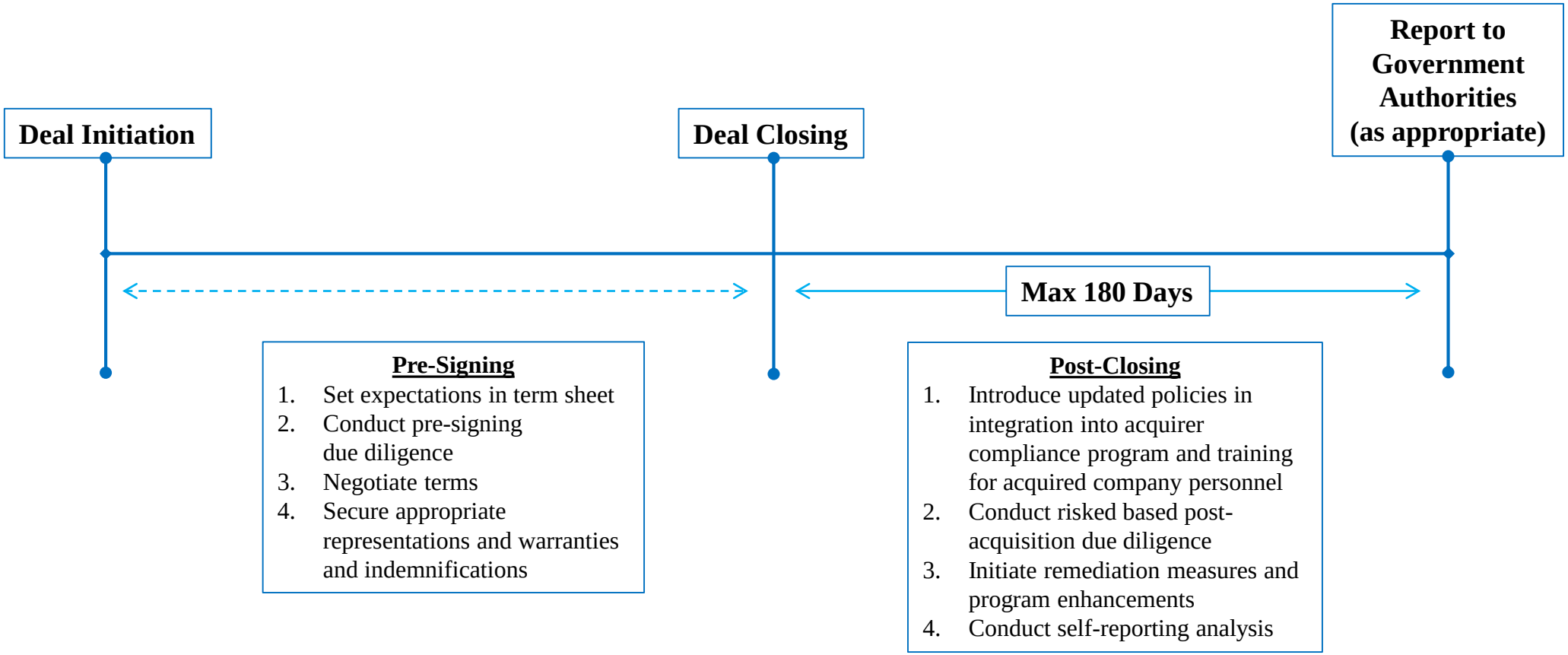
According to the DOJ, SBM Offshores pleaded guilty to conspiracy to violate the FCPA in a scheme to bribe officials in Brazil, Angola, and Equatorial Guinea to secure oil drilling bids and agreed to pay a criminal penalty of $238 million.

Anthony Mace, the CEO of SBM Offshores, admitted that he authorized payments to individuals who he knew had a high risk of being Equatorial Guinean officials or their agents, and that he paid a portion of the intermediary's commission to an account in Brazil and another portion to accounts in Switzerland held in the name of shell companies, while deliberately avoiding learning that the payments to shell companies were ultimately received by Brazilian officials.

Robert Zubiate, the sales and marketing executive of SBM Offshores, admitted that he engaged in a conspiracy to use a third-party sales agent to pay bribes to foreign officials at Petrobras in exchange for their help in securing winning bids.

Mace and Zubiate are scheduled to be sentenced in June 2018.

M&A: Sample Due Diligence Timeline



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