

Anti-Bribery and Corruption: Best Practices for Due Diligence and Post-Acquisition Integration

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Enhanced due diligence of target companies for bribery and corruption risk, including compliance with the Foreign Corrupt Practices Act of 1977 (FCPA), should occur before proceeding with acquisitions, particularly in high-risk emerging markets. This Article provides an overview of best practices for conducting due diligence for bribery and corruption risk and related post-acquisition integration steps consistent with FCPA guidance issued by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC).

When considering acquisitions or significant investments, acquirers should conduct a thorough review of the target's corruption risk and its compliance (or non-compliance) with the Foreign Corrupt Practices Act of 1977 (FCPA) and other applicable anti-bribery and corruption (ABC) laws. ABC due diligence is important not only to identify evidence of actual corrupt activity, but also to aid the assessment of overall risk when evaluating a transaction. Pre-acquisition ABC due diligence can help inform post-acquisition compliance integration at the target company and reduce post-closing exposure of the acquirer.

A thorough review in advance of the transaction is particularly warranted for acquisitions in high-risk emerging markets. In the current M&A environment, acquirers should consider increased ABC risks that may arise from the COVID-19 pandemic. Modifications to the target's anti-corruption program due to operational hardships and efforts to accelerate government approvals at a time when many governmental functions are significantly delayed should be particularly evaluated.

This Article provides an overview of best practices for conducting ABC due diligence and related post-acquisition integration.

Benefits of Enhanced ABC Due Diligence

The FCPA aims to prevent corruption by US issuers and domestic companies and their employees, officers, directors, affiliates, and subsidiaries. As described in

FCPA guidance published by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), US regulators expect companies to undertake ABC due diligence as part of their standard pre-acquisition due diligence.

In certain cases, the DOJ and the SEC have specifically declined to take enforcement action against acquiring companies that:

- Discovered potential corruption at a target as part of pre-acquisition due diligence or post-acquisition reviews.
- Voluntarily and timely disclosed alleged misconduct to the government.
- Cooperated with the government's ensuing investigation.
- Effectively integrated the target company into its compliance program and internal controls.

On the other hand, the DOJ and the SEC have acted against acquiring companies in circumstances where the acquirer failed to:

- Take appropriate steps to identify wrongdoing.
- Participated in the misconduct.
- Failed to stop violations from continuing after an acquisition.

(See DOJ and SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition*, at 66-67 (July 2020).)



Even where no specific corrupt activity is identified, ABC due diligence typically includes an assessment of potential successor liability risk under the FCPA if pre-acquisition violations of law come to light after the transaction closes. Successor liability ultimately depends on the specific facts and interpretation of applicable state, federal and foreign law. The potential for successor liability may exist where the target was subject to the FCPA before the transaction because it:

- Was an issuer of securities registered in the US or otherwise required to file periodic reports with the SEC.
- Was a domestic US company.
- Engaged in relevant misconduct in or through the United States.

For more information on who is subject to the FCPA's requirements, see [Practice Note, The Foreign Corrupt Practices Act: Overview: Who Is Covered by the FCPA](#).

ABC due diligence also helps identify necessary post-acquisition remedial actions. The results of ABC diligence should be used to develop specific, practical, measurable, and achievable recommendations to enhance the target company's compliance program and to integrate the target into the acquirer's compliance and financial control structure post-closing.

For more information about the DOJ's and SEC's recently updated FCPA guidance, see [Legal Update, What's Market: DOJ and SEC Issue Updated Guidance on US Foreign Corrupt Practices Act](#). For more information about the DOJ's FCPA Corporate Enforcement Policy and credit granted for voluntary self-disclosure, see [Practice Note, The FCPA Corporate Enforcement Policy](#). For more information about the scope of the FCPA in general, see [Practice Note, The Foreign Corrupt Practices Act: Overview: What the FCPA Prohibits](#).

Getting Started

Engaging specialized external counsel to collaborate with deal counsel and conduct the due diligence review may be prudent depending on the nature and potential ABC risk of a proposed transaction. For some transactions, this may require separate firms. If the review is overseen by counsel, relevant work papers, communications, and findings can be covered by the attorney-client privilege and work product protections. Acquirers reviewing cross-border transactions should be aware, however, that different privilege and work product rules may apply in different jurisdictions.

Forensic auditors, if used, should be retained directly by counsel. At a minimum, the auditor's engagement terms should specify that it is working at the direction of counsel to increase the likelihood that their work product also will be protected from compelled disclosure. For more information about implementing procedures to protect the attorney-client privilege and the work product of the forensic auditors, see [Practice Note, Internal Investigations: Retaining and Working with Forensic Accountants: Maintaining Confidentiality and Privilege](#).

The ABC Due Diligence Process

While each transaction is different and requires varying levels of diligence, recommended baseline ABC due diligence practices to be directed by external counsel for acquisitions or significant investments include:

- Background checks.
- An assessment of the target's internal ABC policies and procedures.
- Interviews of the target's key personnel and executive team.
- Forensic testing of sample business transactions of the target.
- Preparation of a privileged ABC due diligence report.

Conduct Background Checks

Background checks should focus on the seller, the target company, and their executive officers, directors, and key vendors or other third parties with significant roles in the target business. Background checks should include searches for:

- Adverse media.
- Watch lists (for example, sanctions, debarment, the International Criminal Police Organization (INTERPOL), the Federal Bureau of Investigation (FBI), and the Office of Foreign Assets Control (OFAC)).
- Other biographical background information.

Assess Existing ABC Framework

Counsel should review the target's:

- Relevant policies and procedures (for example, an ABC policy, finance and procurement policies, and policies governing third-party intermediaries).
- Employee training programs.

- Employee and third-party reporting channels (for example, a whistleblower hotline) and any relevant issues uncovered through these channels.
- Relevant internal control procedures, including those governing the maintenance of accounting books and records.

Providing a questionnaire to request relevant documents and information from the target can be helpful. The responses to the questionnaire typically help inform later stages of ABC due diligence, including identification of personnel for interviews and transaction testing, and can provide helpful insight into where gaps may exist.

Interview Relevant Stakeholders

Counsel should direct interviews of relevant stakeholders, including key management personnel and senior executives at the target company. Counsel should also direct interviews of line-level personnel who may have interactions with government officials or oversee high-risk third parties who interact with government officials on the target's behalf.

Interviews should focus on key ABC risk areas, including:

- Donations.
- Political contributions.
- Licenses and permits.
- Use of third-party intermediaries.
- ABC training programs.
- Tone-at-the-top.
- Employees' general knowledge and awareness of relevant ABC laws, policies, and procedures.

For more information on ABC risk areas, see [Practice Note, The Foreign Corrupt Practices Act: Overview: Recognizing Red Flags](#).

Counsel should tailor the interviews for each interviewee and transaction. The appropriate number of interviews may range from a mere handful for smaller, lower-risk transactions, to dozens for higher-risk acquisitions. The interview approach should remain flexible and be capable of adjustment as new information is gathered.

Personnel should be interviewed individually to help ensure robust and independent answers and to avoid group think and chilling effects. Forensic auditors may participate in interviews, particularly regarding accounting-related questions, and can typically provide translation services as needed.

Although questions should not be provided to interviewees in advance of interviews, providing advance notice of broad categories of anticipated inquiry can make the seller and target more comfortable. Interviewees should understand the ABC diligence process and be informed that the questioning is not an interrogation or investigation, but rather an assessment of risk.

Providing a list of personnel to be interviewed as early as possible helps ensure that:

- Relevant personnel can be made available.
- Any logistical or other issues or concerns from the target or seller can be promptly addressed.

If interviews cannot be conducted on-site and in-person, acquirers should consider using secure video conferencing technology so the interviewer can more carefully observe the body language and other reactions of interviewees. Video conferencing options may be especially relevant while international travel is restricted during the COVID-19 pandemic.

Conduct Transaction Testing

The need for forensic testing should be assessed on a case-by-case basis. For larger, higher-risk transactions, it has become standard practice. Even for smaller, lower-risk deals, forensic testing can provide useful information not only about actual corrupt activity, but also accounting risks, gaps in controls, and other areas for potential improvement post-acquisition.

Forensic testing is generally led by the forensic firm at the direction of counsel. The forensic firm typically reviews accounting ledgers, accounts payable information, or both to identify a set of transactions for testing. These usually include transactions that involve:

- Government agencies.
- Third-party intermediaries.
- Gifts and entertainment.
- Round number totals.
- Other indicia of risk.

As with interviews, the number of transactions to be tested varies depending on the size and potential risks of the deal.

Although the scope of testing is often a subject of negotiation between the parties, forensic testing should seek to examine transactions over the past six years whenever possible. The FCPA's anti-bribery and accounting

provisions do not specify a statute of limitations for criminal actions. However, the DOJ has recently stated that violations of the FCPA accounting provisions constitute “securities fraud offenses” under 18 U.S.C. § 3301, which imposes a six-year statute of limitations. (See [DOJ and SEC, A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition, at 36 \(July 2020\)](#).)

The list of transactions should be provided to the seller or target company along with a request for supporting documents deemed necessary to assess whether each transaction was legitimate and recorded in accordance with applicable law, policy, and procedure, for example:

- Underlying contracts.
- Invoices.
- Receipts.
- Internal approval confirmations.

While the transaction testing selection process can occur in parallel to the interviews, it is important to use information from interviews and document review to identify or supplement the transactions to be tested. For example, the scope of tested transactions may be expanded to include payments to:

- A third party or governmental agency that was unknown to counsel and the forensic firm before interviews.
- Persons or entities for which red flags have been identified.

Likewise, the results of transaction testing can be used in interviews (and where applicable, follow-up interviews) of relevant individuals.

Prepare Final Report

Pre-acquisition ABC diligence should typically be described in a privileged written report that identifies:

- The scope and metrics of the work completed.
- Key findings of fact.
- An analysis of applicable law (including laws determining potential successor liability).
- Recommendations for contractual protections in the purchase agreement.
- Remedial measures (including a specific plan for implementing an effective ABC compliance program in the post-transaction period) assuming the transaction goes forward.

The final written report should be provided to officers, directors, and other decision-makers at the acquirer.

Post-Acquisition ABC Integration

As a general rule, acquirers subject to the FCPA must be compliant immediately after the closing. The DOJ and SEC may, however, show some flexibility if pre-acquisition access to information is limited and the acquiring company promptly conducts thorough post-acquisition risk assessments and compliance integration. (See [DOJ and SEC, A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition, at 29 \(July 2020\)](#).)

The ABC due diligence should inform what steps need to be taken post-acquisition (or, to the extent possible, between signing and closing) to enhance the effectiveness of the acquired company’s compliance program. Recommended baseline post-acquisition integration practices include:

- Remediating compliance program gaps and weaknesses and taking related corrective actions.
- Implementing the acquirer’s compliance program and internal controls at the acquired company.
- Training the employees of the acquired company on FCPA requirements and the acquirer’s compliance program and policies.
- Conducting a post-acquisition ABC risk assessment of the acquired company to identify additional necessary and on-going compliance efforts.

Remediate Deficiencies

Any deficiencies (for example, compliance program gaps and weaknesses) identified during the due diligence phase should be remediated promptly post-acquisition. Where feasible, remediation, or planning for the remediation, may begin before closing.

If specific instances of misconduct were identified during due diligence, corrective action should be taken against the parties involved, which may include termination. The acquiring company should take immediate action to stop any misconduct identified during due diligence on closing, if not before closing, if possible.

Implement ABC Compliance Program

Enhanced compliance programs at acquired companies should be aligned with the standards articulated by the

DOJ in its guidance entitled [Evaluation of Corporate Compliance Programs](#) (updated June 2020). The guidance:

- Outlines standard ABC compliance program elements.
- Employs a series of questions for prosecutors to consider in determining whether a compliance program is effective under the DOJ's standards.

While the acquired company need not adopt the acquirer's compliance program precisely in all respects, the acquired company's program should be at least equally robust. In many instances, it may be easier to have the acquired company adopt the acquirer's program in full or certain aspects of the acquirer's program (for example, written standards and financial controls) with appropriate tailoring to match the relevant region, business, and practices of the acquired company.

Train Acquired Employees on FCPA Compliance

Acquirers should develop FCPA training materials and train the employees of the acquired company on the acquirer's compliance program, policies, and culture promptly after closing. Employee training is an essential component of an effective compliance program designed to prevent and detect fraud. If an FCPA violation occurs, employee training can be a mitigating factor when reviewed by the DOJ or SEC.

Cross-border transactions can create additional challenges with language barriers and different business cultures. Training materials and processes should be localized to ensure effectiveness in the different jurisdictions in which the acquired company operates. For training tips and suggestions, see [Foreign Corrupt Practices Act Compliance Checklist: Effectively Train](#)

[Employees in FCPA Compliance](#). For a sample FCPA employee training presentation that can be customized by counsel, see [Standard Document, Foreign Corrupt Practices Act \(FCPA\) Training for Employees: Presentation Materials](#).

Perform Post-Acquisition ABC Risk Assessment

Acquirers should also conduct a post-acquisition ABC risk assessment, particularly in situations where pre-acquisition ABC due diligence was limited. Post-acquisition risk assessments often have the added benefit of full access to the acquired company's records and personnel.

These risk assessments often identify information that requires an internal investigation to ensure that any past misconduct is not continuing and to determine whether any potentially corrupt employees or vendors remain employed or engaged by the company. The discovery of continuing or new misconduct triggers further analysis of the acquirer's disclosure obligations, both internally and externally, and available remedial actions. For more information about key issues to address when dealing with a known or potential FCPA violation and considering remedial actions, see [Practice Note, Mapping an FCPA Strategy: Internal Investigations and Enforcement Proceedings](#).

The results of a post-acquisition risk assessment, along with the results of the ABC due diligence and any post-acquisition internal investigations, should be appropriately and clearly communicated to senior management or other appropriate personnel to inform the acquired company's ongoing compliance efforts (for example, training, enhancement of internal controls, and regular compliance monitoring).

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