

M&A and Dealmaking Implications of the FCPA Resource Guide, Second Edition

The Foreign Corrupt Practices Act plays a crucial role in cross-border dealmaking. When a company makes an acquisition, it acquires the target company's liabilities, including its FCPA liabilities. As a result, criminal charges and other potential issues can arise for the acquiring company. But there are steps an acquirer can take to minimize enforcement actions, including conducting appropriate due diligence, reporting any issues to U.S. regulators, and implementing an effective compliance program.

If the target was not subject to the FCPA when the "bad acts" occurred, an acquisition by an entity that is subject to that law doesn't appear to give rise to automatic liability for the acquirer. Still, the acquirer must put in place robust compliance and training programs and take appropriate remediation actions to minimize liability.

Below are some best practices.

Due Diligence

Conduct effective risk-based due diligence to ensure that the target is properly valued in terms of its FCPA-related risks. Those risks may include the cost to discover and remediate problems, to improve controls, and possible loss of future business that had been obtained improperly.

An appropriately tailored due diligence exercise will examine:

- The robustness of the target's existing compliance programs
- Whether the target operates in high-risk countries
- How dependent the target is on government business and how its employees interact with government authorities
- The nature and extent of government contracts. If the company has many small contracts, due diligence might focus on patterns of contracting. If it has one or two critical contracts, the focus might be on how those contracts were obtained.
- Any outside agents whose role is opaque or whose compensation does not match the stated work

If an acquirer's due diligence identifies red flags, but the deal context may not allow for fully examining these before closing, there are steps that can minimize liability. Consider drafting appropriate representations and warranties and indemnities and conducting a post-signing or closing review.

Taking a "one step at a time" approach is often the best course.

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Minimizing Risk from Past Bad Acts

If an acquirer identifies potential FCPA violations by the target:

- **Report** the full set of problems to regulators and cooperate with any investigation.
- **Integrate** the target's business into your own robust training and compliance programs. Between signing and closing, prioritize planning the roll-out of compliance and training programs.
- **Remediate** the bad acts. If the target's senior management team was involved in negative past actions—even if that team is critical to the value proposition justifying the transaction—they may have to be replaced.

Talk to your advisers. There is no “one size fits all” solution.



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