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M&A Compliance
Trend Toward Formal Compliance Due Diligence Continues in 2006

BY KATHRYN ATKINSON (MILLER & CHEVALIER)

The Changing Face of Effective Internal Investigations

Having recently conducted more than a dozen internal investigations, several involving multiple countries, we have seen fundamental changes in how effective internal investigations are, or should be, conducted. Requirements of the Sarbanes-Oxley Act ("SOX") and the urgings of enforcement officials that companies disclose violations voluntarily and promptly have increased the number of internal investigations, and raised the likelihood that results of investigations will ultimately be disclosed to government enforcement officials. Agencies are also insisting that companies immediately act to preserve documents, including often voluminous electronic files or data. And under their own guidelines, agencies are reserving the right to request, at least in some circumstances, waiver of privilege and a measure of cooperation.

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Trade Receivables Securitization
A Comparison between Top US and European Companies

BY DEMICA

Key findings

- **Trade receivables (TR) securitization is now a mainstream financing tool both in the US and Europe**
- **TR securitization is used by top 500 non-financial companies in the US and Europe as a means of accessing greater liquidity to fund growth.**
- **The assumed gulf between the securitization levels in the US and Europe is far less evident between top companies in the two regions than is commonly supposed.**
- **17% of US top 500 (non-financial) companies have conducted a trade receivables securitization in the last ten years, compared with just 11% in Europe.**
- **The technique is equally popular with investment grade rated companies than with sub-investment grade companies seeking reasonably priced liquidity.**
- **23% of respondents are principally looking to technology to deliver economies of scale and increased profitability**

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These dynamics have, in turn, affected how companies decide to structure and conduct investigations. Companies often face pressure to make decisions about self-reporting before they have had an opportunity to fully evaluate the seriousness of a possible issue or violation. With the higher likelihood of ultimate disclosure comes the question of whether the traditional admonition given to interviewees should now be modified. Also at issue is whether the company should take the common step of preparing an investigative report or consider the alternatives of either no written report at all, or two reports – a confidential, internal report and a disclosure report intended for government consumption.

We have found that it is often possible to use various techniques to control costs and keep investigations manageable without compromising their completeness or integrity.

When internal investigations are necessary, we have found that it is often possible to use various techniques to control costs and keep investigations manageable without compromising their completeness or integrity.

M&A Due Diligence as a Best Practice

In 2005, the trend toward formal compliance due diligence in the M&A context that we first forecasted in our 2003 issues preview progressed closer to an established "best practice." We expect that this trend will continue in 2006, as U.S. enforcement officials continue to press in this area, assisted by voluntary disclosures inspired by SOX and a heightened commitment to compliance. The series of FCPA enforcement actions in the M&A context, which began with Syncor in 2002, continued in 2005, and in March the Titan settlement resulted in the largest set of fines and penalties in the history of the FCPA. Parallel trends in export controls also continued in 2005.

As a result, companies have begun to establish M&A compliance due diligence protocols, which provide a "Phase I" determination of the target's compliance risk profile and quickly focus on key risk areas to be explored in greater depth. We have seen a fairly high level of cooperation from targets in these efforts, perhaps as a result of growing recognition that buyers will abandon transactions that present significant compliance uncertainties.

M&A compliance due diligence serves several purposes. First, it identifies potential successor liability risks, which, as past cases have shown, can be deal killers. Equally important, effective compliance due diligence provides critical information *before closing* not only about a target's risk profile, but also about its compliance culture, infrastructure, and program details. This can smooth and accelerate the post-acquisition transition that can otherwise consume tremendous financial and management resources and quickly dissipate the value of the acquisition. ❑

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