Attachment

Compliance Due Diligence: Recent Cases

Below are summaries of some of the most significant recent developments regarding potential successor liability in the mergers and acquisitions context for FCPA and export controls violations.

Titan Corporation

On March 1, 2005, the U.S. government announced that it has reached a settlement with Titan Corporation for civil and criminal violations of the FCPA -- the largest ever in the history of the Act. Under the settlement agreement, Titan is obligated to pay approximately $28.5 million in criminal and civil fines, as well as hire an independent consultant to revamp the company's FCPA compliance program. Under the criminal plea agreement, Titan pleaded guilty to 3 criminal counts for violation of the FCPA, false books and records, and aiding and assisting in filing a false tax return.

The violations that were the subject of the Titan settlement took place in Benin. Titan Wireless, a subsidiary of Titan Corporation, was developing a telecommunications network in Benin. According to the plea agreement, Titan paid over $2 million in "social fees" to the presidential election campaign of the then-president in return for receiving a higher management fee for its contract in Benin. The payments were used to, among other things, purchase t-shirts for use in the re-election campaign. Titan recorded the payments in its books as "customs exoneration." According to the plea agreement, Titan had no FCPA compliance program in place when the violations occurred.

The Titan case grabbed headlines when it derailed Titan's planned merger with Lockheed Martin. On September 15, 2003, an agreement to pursue a merger between Lockheed Martin Corporation and Titan was announced, with an initial value set at $1.83 billion ($22 per share of stock of Titan). As the transaction proceeded toward its scheduled early 2004 closing date, due diligence reportedly uncovered potentially improper payments by Titan business units to consultants in Benin, Saudi Arabia, and East Asia. Though reportedly Titan met with authorities in an effort to negotiate a resolution of the investigations, in early June the SEC apparently issued a "Wells" notice to Titan signaling the agency's intention to recommend an FCPA enforcement action against Titan. On June 26, 2004, Lockheed announced the termination of the merger agreement.

At the time it settled the FCPA case against Titan, the SEC, in a Section 21(a) Report, announced its intent to investigate Titan for making representations which it knew or should have known were misleading in the Titan-Lockheed merger agreement and proxy statement that were disclosed to shareholders. In those disclosures, Titan included representations that the company was not aware of any past FCPA violations by the company that could create liability. The SEC noted that, although the merger agreement and proxy statement were amended several times due to subsequent investigations of Titan for FCPA violations, Titan did not modify the FCPA representation.

GE-InVision

On December 3, 2004, both InVision Technologies, Inc. ("InVision") and the General Electric Company ("GE") entered into a settlement agreement with the Department of Justice because of alleged violations of the FCPA by InVision relating to transactions in China, Thailand, and the Philippines. GE announced its intention to buy InVision on March 15, 2004. InVision disclosed potential violations of the FCPA to the Department of Justice and the SEC in late July 2004. Under the terms of the merger agreement, the merger could not go forward while there was any pending or threatened litigation.

Under the agreement with the Department of Justice, InVision agreed to pay a penalty of $800,000, and it accepted responsibility for FCPA violations. InVision agreed to continue to cooperate with the Department of Justice and the SEC. Under the agreement, InVision also agreed to negotiate in good faith for a settlement with the SEC.

The settlement agreement between the Department of Justice and InVision specifies that InVision must retain and pay for an outside, independent, law firm to monitor InVision's compliance with the FCPA and with the settlement agreement, and report to the SEC about its findings. Under the terms of the agreement, this commitment would not need to be fulfilled, however, if the company had merged with General Electric before January 1, 2005.

GE entered into a separate agreement with the Department of Justice. Under that agreement, GE would be exempt from liability from any transactions that occurred before the agreement, if they had been disclosed by InVision or GE. The agreement specified that GE was required to take steps to integrate InVision into its GE's FCPA compliance program. In addition, GE agreed to affirmatively disclose any violations discovered that would be relevant to the government's investigation.

On February 14, 2005, after the merger between GE and InVision had been completed, the SEC announced it had reached a settlement of charges against InVision. Under the settlement, GE InVision agreed to disgorge the $589,000 in profits arising from the alleged FCPA violations, to pay prejudgment interest of $28,703.57, and to pay a $500,000 civil penalty.

GM/General Dynamics

On November 12, 2004, GM and General Dynamics jointly agreed to a $20 million settlement for violations of the State Department's International Traffic in Arms Regulations ("ITAR"). According to the draft charging letter, most of the alleged violations in the case related to a light-armored vehicle program. GM allegedly exported technical data to foreign national employees, permitted unauthorized access to technical information in company databases, and allowed unauthorized access to technical data by suppliers and vendors. General Dynamics bought the GM division in question and was thus included in the case under successor liability.

GM and General Dynamics would have been jointly charged with 248 violations of the ITAR in the draft charging letter. As part of the settlement, dated Nov. 1, 2004, GM agreed to appoint a special compliance officer from outside the company for a three-year term. Each company agreed to spend $5 million to enhance its compliance programs.

ABB

On July 6, 2004, to resolve civil FCPA investigations, ABB, Ltd., a Swiss-based foreign issuer ("ABB"), agreed to a settlement requiring it to disgorge $5.9 million in allegedly ill-gotten earnings and pay a $10.5 million civil penalty to the SEC. At the same time, two ABB subsidiaries each agreed to plead guilty to a two-count felony information, and were each assessed $5.25 million criminal fines. The SEC's $10.5 million civil fine against the parent was deemed satisfied by the subsidiaries' payment of the criminal fines. These amounts represented an unprecedented sanction in a case involving voluntarily disclosure of misconduct to the SEC and the Justice Department, particularly as ABB was acknowledged to have fully cooperated in the ensuing investigation, and its subsidiaries were cited for their "extraordinary disclosure and coordination of the joint investigation."

ABB's voluntary disclosure in late 2003 reportedly derived from due diligence performed by the companies in advance of an agreement between ABB and a consortium to sell the subsidiaries involved. Resolution of the potential liability and completion of internal due diligence were reportedly conditions of the January 2004 Purchase and Sale Agreement, and were expressly acknowledged in the plea agreements entered into by ABB's subsidiaries. Under the plea agreement, the Justice Department agreed not to file criminal charges after the acquisition for any prior payments or accounting irregularities that were disclosed to the U.S. government as a result of the joint internal investigation. The agreement did not foreclose future criminal charges for misconduct not disclosed, or against individuals associated with bad acts, but contained language protecting the acquiring consortium against liability for the acts covered in the agreement.

In order to further inoculate itself from future liability, the investors seeking to purchase companies and assets from ABB sought an opinion as to whether they would be subjected to fines or penalties from FCPA violations that were subsequently discovered. Shortly after the guilty plea, in Opinion Procedure Release 2004-02 (July 12, 2004), the DOJ indicated that it would not take enforcement action against the acquiring parties for FCPA violations that occurred prior to acquisition of the entities. Unlike the plea agreement, the opinion protects the acquiring parties from violations that had not yet been disclosed or discovered.

In its Opinion Procedure Release, the DOJ noted that ABB and the acquiring parties jointly had conducted an extensive due diligence review. The review involved 115 lawyers and 44,700 lawyer-hours. The review included the manual review of over 1600 boxes of printed documents, in addition to 4 million pages of electronic information. There were over 165 interviews of employees. 100 forensic accountants visited 21 countries and reviewed thousands of transactions. A conservative estimate of the cost of this investigation based on an average hourly rate for lawyer hours and forensic accountant hours and travel expenses is $25 million. All documents and witness interview memoranda were provided to the DOJ and SEC as they were produced.

The acquiring parties also undertook significant commitments to future FCPA compliance. The acquiring parties represented that they would continue to cooperate with DOJ and SEC investigations, including disclosing any additional payments that they discover. The DOJ noted that the acquiring parties would appropriately discipline employees who made or authorized unlawful or questionable payments to foreign officials, and that it would develop a stringent FCPA compliance program. The compliance program included adoption of a corporate policy against FCPA violations; assignment of senior corporate officials with responsibility for oversight of compliance and that they would report to the Board of Directors; a reporting system for suspected violations; financial and accounting procedures designed to ensure accurate books and records; an extensive training program that included agents of the company; and independent audits at least every three years.

<u>EDO Corporation</u>

A late 2003 $2.5 million civil settlement between EDO and the State Department's Directorate of Defense Trade Controls ("DDTC") sharply demonstrates the application of successor liability to export control violations committed by the acquiree, even if the violations occurred prior to the acquisition. EDO agreed to pay a $2.5 million civil penalty to settle charges of multiple violations of International Traffic in Arms Regulations ("ITAR") stemming from the alleged unlawful exports of technical data and defense services to the Swedish military by Condor Systems, Inc. ("Condor"), which EDO acquired in 2002. The ITAR violations that Condor allegedly committed occurred before it was acquired by EDO.

The terms of the settlement allow EDO to apply $750,000 of the fine towards a remedial export compliance system. The DDTC gave the company credit of $175,000 in recognition of the amount EDO already invested in strengthening export compliance. EDO is required to invest the remainder of the funds over three years. The Consent Agreement painstakingly details specific remedial measures EDO must undertake: the appointment of an outside Special Compliance Officer, on-site audits by the DDTC, and specific measures to strengthen compliance policies, procedures, and training, including measures to identify and resolve any export compliance issues in mergers and acquisitions. These costly and intrusive requirements demonstrate the government's growing expectation that exporters will devote significant resources to export compliance, in general, and the pre-acquisition compliance, in particular.

<u>Syncor</u>

In a criminal information prepared in December 2002, the Justice Department charged the Taiwanese subsidiary of Syncor ("Syncor Taiwan") with violation of the FCPA bribery offense. The DOJ alleged that, between 1997 and 2002, Syncor Taiwan had sought to obtain and retain radiopharmaceuticals business and patients for its medical imaging centers by funneling some $457,000 in contractual "commissions" and referral payments to foreign doctors employed by state-owned hospitals in Taiwan. An SEC civil complaint filed at the same time charged the parent company, Syncor, with violating the anti-bribery, books and records and internal controls provisions of the FCPA, alleging that from the mid-1980s through at least September 2002, Syncor's subsidiaries in Taiwan, Mexico, Belgium, Luxembourg, and France made payments to state-employed doctors totaling at least $600,000.

Cardinal Healthcare, Inc., a U.S. company negotiating a merger and acquisition of Syncor, discovered the payments during its due diligence investigation, and they were disclosed soon thereafter. After an intensive period of additional due diligence and negotiations with U.S. authorities, Syncor Taiwan pleaded guilty to a one count FCPA anti-bribery offense and agreed to pay a $2 million penalty, the maximum penalty authorized by the FCPA for a single violation. Syncor also settled the SEC allegations, agreeing to a consent decree under which it was obligated to pay a $500,000 civil penalty and to retain an independent consultant to review and make recommendations concerning the company's FCPA compliance policies and procedures.

As with the *ABB* case discussed in the Alert and below, soon after the disposition of the enforcement action, the Justice Department issued a formal opinion addressing facts similar to those in the Cardinal Healthcare-Syncor merger in which it stated that it planned no enforcement action against the acquiring company. The Department's opinion cited the intensive investigation and detailed remedial actions that the acquiring company had taken prior to completion of the merger.

Sigma-Aldritch

On November 4, 2002, the Commerce Department's Bureau of Industry and Security ("BIS") announced that it had reached civil settlement agreements with Sigma-Aldrich Corporation and two of its subsidiaries (collectively, "Sigma-Aldrich"). Under the terms of the settlement, Sigma-Aldrich paid $1.76 million to settle charges that a company it acquired in 1997 made hundreds of unlicensed exports of bio-toxins to Europe and Asia.

The settlement followed a ruling in which an administrative law judge held that successor companies could be held liable for the pre-acquisition export control violations of companies they acquire, even if the acquisition was structured as an asset purchase. This was the first case in which the Commerce Department's aggressive theory of successor liability was tested and upheld on administrative review. Senior BIS officials continue to cite the *Sigma-Aldrich* cases to reiterate their view of potential successor liability and the need for pre-acquisition regulatory due diligence.