THE WORLD OF INTERNATIONAL COMPLIANCE: WHAT TRANSACTIONAL LAWYERS NEED TO KNOW TO PERFORM ETHICALLY AND RESPONSIBLY

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I. INTRODUCTION

Recent enforcement has shown that conducting thorough transactional due diligence on compliance issues is a strategic necessity for transactional lawyers. Failure to perform due diligence on Foreign Corrupt Practices Act (FCPA),[1] export controls, and Alien Tort Statute (ATS)[2] matters can derail a transaction and destroy the reputations of those involved.

The defunct merger between Lockheed Martin and Titan Corporation illustrates the transactional risks raised by compliance issues. In the course of its due diligence for the proposed merger, Lockheed Martin uncovered evidence of FCPA violations by Titan, a military intelligence and communications contractor. The violations included approximately $2 million in bribes and illegal political contributions to the re-election campaign of the president of Benin, improper payments to agents in various countries, books and records violations, and internal controls deficiencies.[3] The uncovered violations were disclosed to the government, and Lockheed Martin renegotiated the deal to lower the acquisition price by $200 million.[4] The transaction ultimately was called off when a deal with law enforcement authorities could not be reached by the date of the shareholder vote to approve the acquisition.[5]

On March 1, 2005, Titan was sentenced to the largest FCPA penalty in history: a combined $28 million civil and criminal fine, three years probation, adoption of a strict compliance program, and external compliance monitoring.[6] Titan could have

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1. 15 U.S.C. § 78dd-1 (2000).

2. 15 U.S.C. § 1350 (2000).

3. Complaint at 1–3, SEC v. Titan Corp., No. 05-0411 (JR), 2005 WL 516541 (D.D.C. Mar. 30, 2005).

4. Renae Merle, *Lockheed Martin Scuttles Titan Acquisition*; *San Diego Defense Contractor Fails to Settle Federal Bribery Investigation*, WASH. POST, June 27, 2004, at A9.

5. *Id.*

6. News Release, Office of the United States Attorney, Southern District of California, News Release Summary (Mar. 1, 2005), *available at* http://www.dodig.mil/IGInformation/IGInformationReleases/Titan_030105.pdf. Although the Titan prosecution represents the largest total combined criminal and civil penalties assessed to

avoided this outcome had it devised and maintained a stronger compliance program before the proposed merger. Instead, the lack of such a program led to severe government penalties and a collapsed transaction. The Titan outcome has spurred a heightened interest and focus on compliance-related due diligence in corporate mergers, acquisitions, and other transactions.

This paper will focus on the key compliance issues every transactional lawyer should be aware of when conducting due diligence on a target company prior to a joint venture, agreement or acquisition. Section II will discuss the FCPA, export compliance, and ATS issues that every transactional lawyer needs to consider when pursuing opportunities abroad. Section III will explore the risk factors raised by these issues and will outline preventive and corrective actions that should be implemented to mitigate these compliance risks.

II. FCPA, EXPORT COMPLIANCE, AND HUMAN RIGHTS ISSUES: A POCKET GUIDE

A. *Overview of the FCPA*

The FCPA consists of two key sections: the antibribery provisions and the accounting provisions.[7] The antibribery provisions prohibit U.S. persons and entities, as well as individuals or organizations working on their behalf, from bribing or attempting to bribe foreign officials in order to obtain or retain a business benefit.[8] A bribe can consist of any thing of value, including cash or a cash equivalent, loans or business opportunities, charitable donations, travel expenses, gifts, labor contracts, and golf outings or other entertainment unrelated to customary entertainment connected with a particular deal or

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date, the DOJ's recent settlement with three subsidiaries of Vetco International Ltd. for $26 million is the largest criminal fine to date in an FCPA prosecution. Press Release, U.S. Department of Justice, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines (Feb. 6, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html.

7. Simeon M. Kriesberg, *Proceed with Caution: International Trade Compliance in Lending Transactions*, 123 BANKING L.J. 579, 580 (2006).

8. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2000).

contract.[9] Moreover, offers or promises, even if no payment is actually made, may nonetheless be actionable under the FCPA.[10]

A "foreign official" is any officer or employee of a foreign government or any department, agency, or instrumentality thereof, including customs or tax officials[11] and employees of state-owned enterprises.[12] Employees of PEMEX (Mexico), PETRONAS (Malaysia), SOCAR (Azerbaijan), and SONANGOL (Angola), for example, are all foreign officials under the FCPA. Employees or officials of public international organizations are also considered foreign officials, as well as members of royal families and others exercising official authority, albeit outside an official government role.[13]

Under the FCPA, a company may also be liable for bribes paid by its third-party representatives, agents, or consultants.[14] The bribe or attempted bribe must be *knowing*, which includes, in addition to actual knowledge, conscious disregard of, willful blindness to, or deliberate ignorance of facts that put a company on notice that its agent, consultant, or representative may

9. *See, e.g.*, *In re* Schering-Plough Corp., Exchange Act Release No. 34,49838, Accounting and Auditing Enforcement Release No. 2032, Administrative Proceeding File No. 3,11517, 20 SEC Docket 3644, 3645 (June 9, 2004) (finding that charitable donations to Chudow Castle Foundation constituted a "thing of value" to a foreign official under the FCPA because the contributions were requested by the President of the Foundation, who was also a government health official in a position to favor Schering-Plough).

10. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2000) (enumerating "offer," "promise to pay," and "promise to give" as prohibited actions under the act).

11. *See In re* BJ Servs. Co., Exchange Act Release No. 34,49390, Accounting and Audit Enforcement Release No. 1972, Administrative Proceeding File No. 3,11427, 82 SEC Docket 1282, 1282–83 (Mar. 10, 2004) (defendant allegedly bribed Argentine customs officials to overlook a violation of Argentine customs law to allow the importation of oil well maintenance equipment).

12. *See* SEC v. Syncor Int'l Corp., Litigation Release No. 17,887, Accounting and Auditing Enforcement Release No. 1688, 79 SEC Docket 270, 270 (Dec. 10, 2002) (describing doctors at hospitals controlled through foreign government ownership considered "foreign officials" under FCPA).

13. *See In re* BellSouth Corp., Exchange Act Release No. 34,45279, Accounting and Auditing Enforcement Release No. 1494, Administrative Proceeding File No. 3,10678, 76 SEC Docket 1655, 1656–57 (Jan. 15, 2002) (defendant hired wife of legislator to "lobby" for repeal of unfavorable telecommunications law).

14. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2000) (enumerating an "agent . . . acting on behalf" of the concern can trigger liability).

commit a violation.[15] Several factors, such as a country's reputation for corruption or a customer's request for over-invoicing, may constitute "red flags," putting a company on notice that its agent may commit a violation.[16]

In the *Titan* complaint, for example, the SEC accused the company of making payments to an agent in Benin without performing any meaningful due diligence into the background of the agent, and for ignoring red flags, such as evidence of a close relationship between the agent and the President of Benin.[17] Under these circumstances, the company was liable for bribe payments made by the agent to the President of Benin in the form of campaign contributions.[18]

The accounting provisions of the FCPA require issuers[19] to meet certain standards regarding their accounting practices, books and records, and internal controls. Specifically, a company and its subsidiaries must keep its books, records, and accounts in reasonable detail to accurately and fairly reflect transactions and dispositions of assets, and to devise and maintain appropriate internal accounting controls.[20] The provisions expressly apply only to issuers, but the SEC has taken the view that they also apply to *any affiliate* whose financial results are incorporated into the consolidated financial statements of the issuer.[21]

The accounting provisions are more widely prosecuted than the antibribery provisions because they are easier to prove. Any intentional inaccurate recording of a payment may constitute a violation even if the government does not prove that the payment was a bribe.[22] For example, a facilitation payment to

15. Kriesberg, *supra* note 7, at 582 (emphasis added).

16. Valerie Ford Jacob, *The Foreign Corrupt Practices Act and the Due Diligence Process*, 1545 PRAC. L. INST./CORP. 59, 64–65 (2006).

17. Complaint, *supra* note 3, at 1, 6, 21.

18. News Release, Office of the United States Attorney, Southern District of California, *supra* note 6.

19. Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(8) (2000) (defining issuer as "any person who issues or proposes to issue any security . . .").

20. 15 U.S.C. § 78m(b)(2)(a)–(b) (2000 & Supp. III 2003).

21. SEC v. Monsanto Co., Litigation Release No. 19,023, Accounting and Auditing Enforcement Release No. 2159, 84 SEC Docket 2284, 2284–85 (Jan. 6, 2005).

22. *See* 15 U.S.C. § 78dd-1(b) (2000) (enumerating an exception to the bribery

an official for granting a permit that is recorded as "fees for licenses"[23] may constitute a violation. In *Titan*, the SEC alleged that Titan's failure to adopt and maintain an FCPA compliance program, conduct adequate due diligence before hiring foreign agents, and conduct FCPA due diligence prior to making an acquisition collectively constituted internal control deficiencies, which gave rise to a claim of failing to devise and maintain a system of internal accounting controls.[24]

B. Overview of Export Controls and Trade Sanctions

United States export controls laws are aimed at controlling sensitive goods and technologies to protect and promote U.S. national security, U.S. foreign policy, and U.S. economic interests. Preacquisition due diligence relating to compliance with export controls laws can be especially important because an acquiring company may be strictly liable for the target's violations and may incur significant penalties, such as civil and criminal prosecution, fines, and loss of export privileges.[25] The two primary enforcement agencies are the United States Department of Commerce, Bureau of Industry and Security (BIS) and the United States Department of Treasury, Office of Foreign Assets Control (OFAC).[26]

BIS's mission is to promote legitimate international trade and to implement and enforce controls over commercial goods (so-called dual-use items) under the Export Administration Regulations (EAR).[27] BIS conducted hundreds of investigations during the 2005 fiscal year, resulting in thirty-one criminal convictions and civil and criminal penalties totaling over $14.5

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prohibition, a facilitation payment, that is not an exception to the accurate books and records requirement).

23. *Id.*

24. Complaint, *supra* note 3, at 1, 3, 21.

25. Giovanna M. Cinelli & Jeremy K. Huffman, *Pay Me Now . . . Or Pay Me More Later: The High Price For Inadequate Export Control Due Diligence During Mergers, Acquisitions or Divestitures*, 1504 PRAC. L. INST./CORP. 579, 606 (2005).

26. Christopher F. Corr, *The Wall Still Stands! Complying with Export Controls on Technology Transfers in the Post-Cold War, Post 9/11 Era*, 25 HOUS. J. INT'L L. 441, 460–62 (2003) (explaining the export control law enforcement responsibilities of the BIS and OFAC).

27. *Id.* at 460–61.

million.[28] Dual-use items subject to the EAR include most commercial products, such as computer hardware and software, electronics, vehicles, chemicals, and mechanical equipment.[29] BIS controls may apply whenever an export or commercial transaction involves sensitive, advanced, new or next generation technologies or products.[30]

"Export" means the actual shipment or transmission of an item subject to the EAR out of the United States or the release of technology or software subject to the EAR to a foreign national.[31] An item is subject to the EAR if it is physically located in the United States, a U.S. origin item, made from U.S. technology, or a foreign-made item containing U.S. parts and components (subject to certain de minimis exceptions).[32] The method of transport, transmission, or disclosure is irrelevant.[33]

Exports of dual-use items may require a license depending on the item itself, the country of destination, the identity of the end-user, and the end-use.[34] Most dual-use items controlled for export are those having potential for use in information security, high level telecommunications, navigation, power generation, aeronautics, satellite control, missiles, weapons of mass destruction, and military applications.[35] Exports to U.S. designated state-sponsors of terrorism[36] are generally prohibited,[37] as are exports to certain individuals and

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28. *See* BUREAU OF INDUS. AND SEC., U.S. DEP'T OF COMMERCE, ANNUAL REPORT, FISCAL YEAR 2005, at 10 (2005), *available at* http://www.bis.doc.gov/News/2006/annualReport/BIS_annualReportComplete05.pdf (totaling the criminal penalties at $14.5 million and the administrative penalties at $6.8 million for Fiscal Year 2005).

29. 15 C.F.R. § 730.3 (2006).

30. *See* 15 C.F.R. § 774.1 (2006).

31. 15 C.F.R. § 734.2(b)(1) (2006).

32. 15 C.F.R. § 734.3(a)(1)–(3) (2006).

33. *See* 15 C.F.R. § 734.2(b)(1); United States Department of Commerce, Bureau of Industry and Security, Introduction to Commerce Department Export Controls, What is an Export Control?, http://www.bis.doc.gov/licensing/exportingbasics.htm (last visited Feb. 3, 2007).

34. 15 C.F.R. § 736.2(a)(1)–(5) (2006).

35. 15 C.F.R. §§ 772, 734.2(a)–(b), 734.3.

36. Arms Export Control Act, 22 U.S.C. § 2780(d) (2000 & Supp. III 2003).

37. Export Administration Act, 50 U.S.C.A. app. § 2401 (West 1991 & Supp. 2006).

organizations on the BIS Entity List,[38] Specially Designated Nationals (SDN) list published by OFAC[39] and the BIS Denied Persons List.[40] Exports to certain countries, such as China, are also potentially problematic because of pervasive military involvement in many organizations.[41]

OFAC implements and enforces U.S. trade sanctions, which generally prohibit U.S. persons from doing business with certain designated persons, entities, or countries, such as the well known prohibitions on trade with Cuba and Iran.[42] The U.S. trade sanction laws apply to all U.S. persons.[43] U.S. persons include all individuals and companies in the United States, U.S. citizens or permanent residents, companies organized under U.S. law (including their non-U.S. branches), and the U.S. offices or branches of non-U.S. companies.[44]

One commonly imposed sanction is asset blocking, which has the effect of prohibiting all transactions involving a specified company or entity.[45] Asset blocking is broadly defined to include any property in which the target, a foreign government or national, has an interest.[46]

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38. 15 C.F.R. § 744.1(c) (2006).

39. *See generally* Office of Foreign Assets Control, U.S. Dep't of the Treasury, Specially Designated Nationals and Blocked Persons (Jan. 26, 2007), http://www.ustreas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf.

40. *See generally* Bureau of Industry And Security, U.S. Dep't of Commerce, The Denied Persons List (Jan. 31, 2007), http://www.bis.doc.gov/dpl/thedeniallist.asp (reporting the unofficial list). Official designations to the Denied Persons List are reported periodically in the *Federal Register*. S*ee, e.g.*, Action Affecting Export Privileges, Mohammed Arastafar; Order Relating to Mohammed Arastafar, 70 Fed. Reg. 37,748 (June 30, 2005).

41. Donald Alford Weadon, Jr. & Carol A. Kalinoski, *U.S. Blunders on with China Military-Export Rule*, ASIA TIMES ONLINE, Sept. 22, 2006, *at* http://www.atimes.com/atimes/China_Business/HI22Cb01.html.

42. *See generally* Iranian Assets Control Regulations, 31 C.F.R. § 535.201–.222 (2006); Cuban Assets Control Regulations, 31 C.F.R. §515.201–.208 (2006) (U.S. trade sanctions against Cuba are broader in scope than most trade sanctions, and they also apply to entities that are owned or controlled by U.S. persons, such as the foreign subsidiaries of U.S. companies).

43. 22 U.S.C. § 2780(b)(1) (2000).

44. 22 U.S.C. § 2780(k)(1)(3) (2000).

45. *See* International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1706 (2000 & Supp. III 2003).

46. *Id.* § 1702(a)–(b).

C. Overview of Alien Tort Statute

An alien tort statute claim has three elements: (1) an alien; (2) a tort; and (3) a violation of the law of nations.[47] Courts have held that a private actor, such as an individual or a corporation, can violate the law of nations by acting under color of state authority.[48] Thus, a company that closely coordinates on issues of security and protection with a foreign host government can be accused of liability for violations of the law of nations, such as human rights claims. The key question for the purpose of potential corporate liability under the ATS is determining the circumstances under which a corporation can be deemed potentially liable for the actions of a government.

Courts may consider two potential tests for corporate liability under the statute. The first is a "joint action" test, under which state action exists if a private party acts as a "willful participant in joint action with the State or its agents."[49] Courts evaluate whether the state officials and private parties acted in concert to violate a particular rule of customary international law, and whether the public and private actors shared a "specific goal to violate [the law of nations] by engaging in a particular course of action."[50] The second test for state action is whether the U.S. company "proximately caused" the violation.[51] To establish proximate cause, a plaintiff must prove that the private individuals exercised some form of control over the government official's decision to commit the violation.[52] Examples of proximate cause include some combination of

47. 22 U.S.C. § 1350 (2000).

48. *See*, *e.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206–07 (D.C. Cir. 1985).

49. Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 26 (D.D.C. 2005); *see* Dennis v. Sparks, 449 U.S. 24, 27 (1980).

50. Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1306 (C.D. Cal. 2000), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002) (citing Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1447 (10th Cir. 1995) and Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989)).

51. *Exxon Mobil Corp.*, 393 F. Supp. 2d at 27.

52. *Unocal Corp.*, 110 F. Supp. 2d at 1307 (citing King v. Massarweh, 782 F.2d 825, 829 (9th Cir. 1986) and Arnold v. IBM, 637 F.2d 1350, 1356 (9th Cir. 1981)).

control or power, as well as an express direction to take action,[53] or control over decisionmaking.[54]

There are exceptions to the state action requirement, however, for acts of piracy, slave trading, genocide, war crimes, and forced labor.[55] In 2004, the United States Supreme Court significantly limited the types of international norms that may give rise to an actionable claim under the ATS.[56] In *Sosa v. Alvarez-Machain*, the Court adopted the fairly strict standard that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [of violations of safe conduct, offenses against ambassadors, and piracy]."[57] In *Sosa*, the plaintiff's arbitrary arrest claim did not meet the Court's standard.[58]

The Court specifically rejected the notion that actionable rights under the ATS could be created by international declarations or covenants, such as the Universal Declaration of Human Rights or International Covenant on Civil and Political Rights.[59] Similarly, the Court rejected the claim that treaty provisions that were not self-executing could give rise to an ATS claim.[60] In a concurring opinion, Justice Breyer suggested that potentially cognizable present-day violations may include torture, genocide, crimes against humanity, and war crimes.[61] In such cases, a company may be held liable both for its own direct violations of international human rights standards, or for "aiding and abetting" a foreign state's violations.

53. *Arnold*, 637 F.2d at 1356.

54. *King*, 782 F.2d at 829.

55. Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004) (Breyer, J., concurring) (citing Restatement § 404 and cmt a; Int'l Law Assoc., Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses 2 (2000)).

56. *Id.* at 712–34.

57. *Id.* at 725.

58. *Id.*

59. *Id.* at 734–35.

60. *Id.* at 745.

61. *Sosa*, 542 U.S. at 762 (Breyer, J., concurring).

However, the *Sosa* court noted that federal courts should act cautiously "when considering the kinds of individual claims that might implement the jurisdiction conferred by [the ATS]."[62] A determination whether to craft a remedy for the violation of a new norm of international law involves considerations based on modern conceptions of common law, the role of the federal courts in making common law, appropriate deference to the legislative branch, and potential interference with U.S. foreign relations. Such considerations may impact whether individual corporations can be held liable for direct violations of international law or for "aiding and abetting" a foreign state's violations, as such claims may "impermissibly [interfere] with [a nation's] sovereignty and U.S. foreign policy."[63]

III. COMPLIANCE RISK DUE DILIGENCE

Any lawyer considering a transaction abroad, or an acquisition involving substantial international operations, particularly in a country with a reputation for corruption, potential for export controls violations, trade sanctions violations, or human rights abuses, should follow the following three steps in conducting pretransaction due diligence: (1) Determine Risk Factors; (2) Conduct a Tailored Review; and (3) Determine Post-Review Steps. We discuss each of these in more detail below in the context of the compliance risks presented by the FCPA, Export Controls, and ATS regulations.

A. Risk Assessment

1. FCPA: Look for Red Flags

The first step in conducting FCPA due diligence is assessing the risk of foreign bribery issues by examining potential red flags and the target's FCPA compliance program. Potential red flags include a country's rank on Transparency International's

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62. *Id.* at 725.

63. Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24 (D.D.C. 2005) (holding defendants cannot be liable on an aiding and abetting theory where adjudicating plaintiffs' claims would impermissibly interfere with Indonesia's sovereignty and U.S. foreign policy).

Corruption Perception Index, which can assist attorneys in evaluating perceived FCPA risks for a potential transaction.[64] Transparency International's Corruption Perceptions Index (CPI) ranks countries on a scale of 1 to 10, in which 10 signifies least corrupt and 1 most corrupt.[65]

Second, the company should assess the nature of the target's business in each of the countries in which it operates. Such an assessment could include determining whether (1) the target employs a direct sales force or uses agents, distributors, or other dealers; or (2) by evaluating the degree of reliance the target places on consultants or other third parties. The use of agents or consultants may signify an increased opportunity for corruption since these third parties are outside of the target's direct control.

Third, the assessment should consider the degree to which the target sells to, or otherwise conducts business with, foreign governments. The company should investigate the level of interaction between the target's employees and government officials. If the target has government or government-owned customers or otherwise substantially interacts with government officials, the risk of an FCPA violation may be high. Additionally, if the target's business requires government licenses or approvals, or interaction with customs, police, or military officials, the FCPA risk may be significant.

Fourth, the risk assessment should examine the target company's compliance program and evaluate the strength of that program. This entails a thorough review of the policies, procedures, and controls that the target has implemented to ensure FCPA-compliant behavior.

2. *Export Compliance Assessment: Who is Doing What?*

BIS expects U.S. companies to have an established export compliance program.[66] An Export Management System should

64. Transparency International, Transparency International Corruption Perceptions Index 2006, http://www.transparency.org/news_room/in_focus/cpi_2006/cpi_table.

65. *Id.*

66. U.S. Bureau of Industry and Security, Compliance and Enforcement, Export Compliance and Enforcement, Export Management Systems, http://www.bis.doc.gov/ComplianceAndEnforcement/ExportManagementSystems.htm (last visited Feb. 3, 2007).

provide an organized, integrated operating system that: (1) ensures compliance with U.S. export control laws and regulations; (2) manages export-related questions, decisions, and transactions; (3) provides a streamlined management structure for processing export transactions in a transparent and accountable manner; and (4) protects the company from penalties.

An assessment of a target's export compliance program should involve identifying the target's exported products, including the software required to operate such products, the technology related to such products, and the total annual sales value of the identified products over recent years. Once the export products have been identified, the next step is to determine whether the items exported are subject to the EAR and identify the applicable Export Control Classification Number on the Commerce Control List.[67] The export destinations should be located on the Commerce Country chart, which will assist a lawyer in determining whether a license is or was required for the export.[68]

Once it has been determined that an export is subject to U.S. export controls, the target's polices and procedures for dealing with those exports should be reviewed. In addition, the company should review its export control manuals to determine compliance with the EAR, and other relevant export regulations such as Shippers Export Declarations, delivery verification documents, or use of destination control statements. The target's record keeping practices and procedures should also be examined. To determine whether the end user and end-use of the export is permissible, a transactional attorney should be familiar with the Specially Designated Nationals list, which includes specifically targeted individuals, entities, and organizations, as well as specific activities such as terrorism or narcotics trafficking.[69]

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67. Commerce Control List Overview and the Country Chart, 15 C.F.R. § 738 (2006).
68. 15 C.F.R. § 738, Supp. 1 (2006).
69. Specially Designated Nationals and Blocked Persons, *supra* note 39.

3. *ATS Risk Assessment: Understand the Political and Social Context*

An ATS risk assessment should start with understanding the political and social issues faced by the country. This will result in a far more accurate assessment of the likelihood of allegations of involvement in human rights abuses by potential target companies, partners, or third parties.

Useful sources of information for this assessment include State Department country reports,[70] investigations by security firms, reports by multilateral institutions, and nongovernmental organizations (NGOs) such as Transparency International.[71] The benefits of using NGOs as part of the risk assessment include receiving additional information regarding issues affecting the geographical area of operations, and increasing the credibility of the assessment by demonstrating corporate responsibility and transparency.

It is important to keep in mind, however, that there are drawbacks to using NGOs as part of the risk assessment process. In *Doe v. Unocal*, statements made during meetings with NGOs were later used against the company in an ATS lawsuit.[72] Additionally, reports written by NGOs may constitute notice to the company of potential violations in the area of operations, or create tensions with the host government.

B. Conduct a Tailored Review

Once the risk assessment is completed, the company should conduct a tailored due diligence review of the target's operations. This should include both a review of documents as well as targeted interviews of company personnel. The document review should include an examination of documents relating to

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70. *See, e.g.*, UNITED STATES DEPARTMENT OF STATE, 2005 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (Mar. 2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005 (last visited Feb. 3, 2007).

71. *See* Transparency International, Annual Report 2005 (2005), *available at* http://www.transparency.org/content/download/8101/51449/file/TIAR2005.pdf (last visited Feb. 3, 2007).

72. 110 F. Supp. 2d 1294, 1299–1301 (C.D. Cal. 2000), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

high-risk payments, records of entertainment (for example, meals, and outings), gifts for government officials, correspondence with government officials, copies of any government contracts, export records and licenses, and any indications of human rights abuses indicated by internal records or reported by the media. Additionally, the company should conduct targeted, in-person interviews of the target company's employees who have any knowledge of the relevant documents, transactions, and relationships. Finally, all the information gathered should be analyzed and recorded in a due diligence report. Whether the due diligence report is given orally or written may depend on the results of the review.

C. Post-Review Steps

Following the review, the company should determine whether potential violations, if any, rise to a level of seriousness that may materially affect the transaction. Keeping in mind that the acquiring company may become liable for the target's FCPA liability, export control, or ATS violations, it may become necessary to assess whether this potential liability outweighs the potential benefit from the transaction. This decision may be impacted by an assessment of whether disclosure to the U.S. government or any other government is warranted or by the financial liability arising from a potential lawsuit.

If the acquiring company wants to proceed with the transaction, it may want any preexisting compliance problems to be resolved prior to closing. Moreover, if any violations are discovered during the course of review, it is imperative to take strong and immediate corrective action after the close of the deal. The company may do this in a variety of ways, including "exporting" its own compliance program to the target, disciplining the employees involved in the wrongdoing, and taking ownership of the problem by pursuing follow-up procedures, such as audits, reviews, and compliance certifications.

The company's review should also include due diligence on the target's third-party agents, representatives, and consultants. This should involve reviewing the preexisting due diligence files of the target's agents. The ultimate purpose is to ensure the target has appropriate policies and procedures in place to review agents and consultants.

In all of these respects, the most important post-review step involves integrating the target company into the acquiring company's compliance program. In the *Titan* complaint, the SEC's internal controls charge related in part to Titan's failure to integrate Datron World Communications into Titan's compliance program after acquisition.

IV. CONCLUSION

Before transacting business abroad, a company must consider several areas of international compliance. It is necessary for any transactional lawyer contemplating an international transaction to determine the FCPA risk factors, conduct a tailored review, and identify post-review procedures that will best insulate the company from FCPA liability. Additionally, a transactional lawyer must review a company's export controls and trade sanctions compliance, keeping in mind that the export controls and trade sanctions requirements of the target company (as well as the target's liability for violations) may be assumed by the purchaser.

Finally, to minimize the risk of ATS liability for human rights violations, as well as the possibility of injury to the company's reputation, transactional lawyers should consider ATS risks as a part of its overall international compliance risk assessment. Although it is impossible to immunize a purchaser entirely from potential litigation or investigations related to international compliance, a proactive and well-documented due diligence analysis prior to acquisition will minimize the risks.