

TI Guidance on Anti-Corruption and Anti-Bribery Due Diligence for M&A Transactions – Part II

Transparency International (TI) recently released a consultation draft of its White Paper entitled “*Anti-Bribery Guidance for Transactions*”. In Part I we discussed the risks to companies involved in international mergers and acquisitions. The TI White Paper notes that anti-corruption and anti-bribery due diligence is “often not undertaken, neglected, or allocated insufficient time and resources.” In Part II we will discuss the due diligence process suggested by Transparency International for such transactions.

Aims of Due Diligence

The TI White Paper begins by listing what TI believes to be the core aim of anti-corruption and anti-bribery due diligence. This core aim is to assure that the business to be acquired is sound and not distorted by bribery and its apparent business value is not a product of bribery. To accomplish assurance the acquiring company should identify the risks of corruption and bribery for the target through indicia such as countries of areas of geographic operation, transactional markets and any business partners. There should also be an evaluation of the adequacy of the target’s company’s anti-corruption and anti-bribery program and any corruption or bribery exposure that could cause the transaction to be aborted or modified.

Organizing for Due Diligence

TI next identifies three groups which should be organized for the due diligence. Each group has separate responsibilities and reporting lines which must be clearly delineated. These groups include:

- (1) Internal Team. The Internal Team should will include some or all of the acquiring company’s internal corporate functions: the portfolio management team: a due diligence team if it exists: the internal company support functions of finance, general counsel, compliance, corporate affairs; and the appropriate approval and oversight bodies including investment, audit or other committees, executive committee, partners or the board.
- (2) External Advisors. The External Advisors will include outside legal counsel, accounting and other forensic outside advisors that specialize in anti-corruption and anti-bribery issues.
- (3) Internal Approvers. These Internal Approvers will include the Board of Directors or Partners who will be ultimately responsible for ensuring that their own company has implemented adequate anti-corruption and anti-bribery due diligence procedures during the transaction. These governing bodies must receive the investment and due diligence reports and are required to review these carefully and query management as necessary to check that due diligence has been carried out to a proper extent in assessing corruption and bribery risks.

Integrating Due Diligence into the Transaction Process

1. Initiating the process

TI stresses that anti-corruption and anti-bribery due diligence should begin at the start of the process. It is not something that should be rammed in during the tail end of the process. TI advises there are four immediate actions regarding anti-corruption and anti-bribery due diligence which should begin when transactional due diligence commences. These four steps are:

1. The acquisition team communicates the launch of the project to the relevant internal teams and external advisers;
2. Initial meetings are held with the functions including a cross functional meeting;
3. A timetable with milestones is developed - the time allocated for completion will vary widely with each situation but adequate time should be allocated to the anti-bribery due diligence; and
4. The information needed for due diligence is scoped and prioritized striking a balance between the time schedule, resources available for due diligence, the willingness of the target to undergo detailed scrutiny and the need to ensure that issues are not overlooked.

2. Initial screening

TI advises that the acquiring company should not rely upon any other due diligence work. The risk approaches and risk circumstances for each transaction are never the same. Each potential investment is a fresh start and must be analyzed separately and individually. Although the TI White Paper suggest that this step be carried out by external advisors such as a law firm or consulting company that specializes in anti-corruption or anti-bribery work, I believe that many companies have sufficient internal resources available to them with the expertise to handle this step.

TI specifically advises the following steps for initial screening. They include:

- An understanding of the target company's approach to anti-corruption and anti-bribery and its specific program to prevent; detect and remediate the same.
- An assessment of the commitment of the target company's Board of Directors and leadership to integrity and the entity's anti-corruption and anti-bribery emphasis. (It's 'Tone at the Top')
- Identification of any apparent anti-corruption and anti-bribery exposures or risks through a frank discussion with the management of the target company.

TI concludes by noting that if the anti-corruption anti-bribery risks are high and remediation does not seem an option, "this may lead to the proposed investment being dropped at this stage" before a more detailed investigation is undertaken.

3. Detailed analysis

While my experience in Mergers & Acquisition (M&A) work is that your opportunity for investigation may end with Step 2 above due to the time constraint on any transaction, TI advocates a more detailed analysis at this point. TI envisions that this more detailed analysis would occur after an agreement in principle is reached but before the execution of a binding contract. Here TI sets forth several detailed steps that the acquiring company can engage in. They include:

- A business case analysis will be made including a detailed review of the target company's markets and competitors' activities; this should include whether corruption and bribery is a potential factor.
- The management of the target company starts work to prepare the required information which may be considered by the purchaser.
- A detailed due diligence analysis should be carried out by the due diligence team and/or its advisers to examine in detail the anti-bribery program of the target, assessing its quality and risks of corruption and bribery – this review should include external information from a wide range of sources.
- Interviews and site visits should be conducted by the Internal Team though some of this may be carried out by external advisers.
- External sources can be interviewed to obtain information. External sources could be customers, suppliers, industry experts and embassy officials.
- Support functions will review the results of due diligence and give their opinion to the acquisition or portfolio management team. The functions can include legal counsel, compliance officer, corporate affairs, and any other relevant functions as well as external advisers.
- Where the risk is judged to be unacceptable the proposal may be dropped at this stage.
- As this stage involves detailed examination of the target, consideration should be given to appointing a forensic firm which is a specialist in the UK Bribery Act and Foreign Corrupt Practices Act (FCPA). The firm should research and identify relevant information for analysis. This will include detailed scrutiny of books and records including a ledger analysis in sufficient detail to be able to examine line entries which could be problematic.

4. Decision

The Portfolio Managers or M&A team should next prepare its report for the Acquisition Committee or equivalent body. The report should include a review of the due diligence findings

related to bribery, any identified issues and how these could be mitigated, including discussions with the relevant authorities. Where the risk is judged to be unacceptable the purchaser must decide whether it should now withdraw from the planned investment. If the risk is deemed to be high there should be at least an outline of the remediation plan going forward, including how the target company's anti-corruption and anti-bribery program can be brought to the required adequate level, risks remediated, contracts potentially renegotiated and re-tendered, and how any corrupt employees and associates will be removed from the target company.

5. Post-acquisition integration

The Johnson and Johnson (J&J) Deferred Prosecution Agreement (DPA), released in April, 2011, provides a company with breathing space to move forward with a plan and remediation of an acquired company. This allows an acquiring company to think of due diligence and remediation as a single continuum and not as a series of bi-lateral continuums. To the extent possible, a company should conduct a pre-acquisition FCPA audit of the target company and post-acquisition a full FCPA audit within 18 months and training of all relevant personnel and business representatives within one year of acquisition.

The TI White Paper also suggests that due diligence procedures continue beyond the point of acquisition. Once the purchase or investment is completed, further due diligence will be carried out with the advantage of greater access if it is a majority investment. At this stage, further bribery risks may be identified in which case remedial action will be needed. If bribery is discovered at this stage then it will be necessary to report this to the legal authorities. If such issues are identified quickly after acquisition this will make it easier to resolve them with the relevant authorities.

The key appears to be that a company should follow the time strictures of the J&J DPA and timely and completely report any discovered violations to the relevant regulatory body, whether it be the US DOJ or the UK Serious Fraud Office.

6. Continuing monitoring

The TI White Paper concludes this section by stressing the need for ongoing monitoring. Both the UK Bribery Act and FCPA speak to continuing monitoring, whether in the form of ongoing monitoring or ongoing assessment. Principle Six of the UK Bribery Act's Adequate Procedures discusses the need for ongoing monitoring and review. The Principle states "*The commercial organisation institutes monitoring and review mechanisms to ensure compliance with relevant policies and procedures and identifies any issues as they arise. The organisation implements improvements where appropriate.*" The reasons for this continued monitoring are to ensure that if external events, like government changes, corruption convictions, or negative press reports occur, an appropriate compliance response is triggered. Assistant Attorney General for the Criminal Division of the US Department of Justice, Lanny Breuer, indicated that such an external verification or assurance of the effectiveness of a compliance program is a key

component to assist a company in maintaining a ‘best practices’ FCPA compliance program. He noted that it is through a mechanism such as an ongoing assessment that a company could continue to evaluate its own compliance program with reference to compliance standards which are evolving on a world-wide basis.

As with all TI White Paper’s, this one is a wealth of information for the compliance practitioner. This White Paper lays out one method for thinking through and organizing your anti-corruption and anti-bribery due diligence team for any transactional work. The White Paper also provides to compliance practitioner the specific steps to take in your due diligence and the questions to ask and what to look for. Lastly, the White Paper lays out a way to think through your presentation to management. It is a welcomed addition to the TI library of anti-corruption and anti-bribery White Papers and other materials.

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