DEAL POINTS

The Newsletter of the Committee on Mergers and Acquisitions

FROM THE CHAIR

By Leigh Walton

I look forward to seeing many of you at the American Bar Association's Business Law Section Spring Meeting in Denver to be held April 22, 2010 through April 24, 2010. Our base hotel is the Sheraton Denver Downtown Hotel. The Committee on Mergers and Acquisitions is sponsoring several great programs, including a program on Thursday, from 8:00 a.m. until 10:00 a.m., entitled "Creating Contractual Limitations on Seller Liability that Work Post-Closing: Avoiding Serious Pitfalls in Domestic and International Deals" and a program on Saturday, from 10:30 a.m. until 12:30 p.m., entitled "No Shops and Jumping Bidders: When to Talk and How to Walk." I am pleased to report that there will be an expanded number of substantive presentations at our many subcommittee and task force meetings that occur generally Friday and Saturday.

During our full Committee meeting on Saturday, from 12:30 p.m. until 3:00 p.m., we will receive perspectives from Chief Justice Myron Steele on the legal issues arising out of changes in proxy access and constituent directors. We look forward to welcoming the general counsel of Molson Coors Brewing Company, who will share his thoughts on "The Use of Outside Counsel in M&A Transactions: Perspectives from a Fortune 100 Company." Our program will include a presentation on "Closing Failures – An Analysis of Remedies

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The only choice to lead the Committee for its first year is Diane Holt Frankle. She has invested innumerable hours of her professional time in the Model Merger Agreement. It only makes sense that she should launch the Subcommittee. She will have the reigns through the end of 2010, supported by Vice Chairs Jim Griffin and Lorna Telfer. If you have ideas, approach them. We are very appreciative of the fine job that Diane and Steve Knee have done in leading the Task Force throughout its entire existence. The work product that this Task Force is about to publish is nothing short of remarkable.

As a closing note, most view the Committee as a family. We participate in this Committee not only to learn, but also to network. And when we network, we form friendships. During this process, most of us have formed a friendship with George Taylor of Burr & Forman in Birmingham, and his lovely wife Honey. Their son Clinton died recently when in an accident as a passenger in a car returning from a debate tournament. I am sad that we lost a person who I am confident would have been a future member of our Committee. Our sincere condolences go out to George, Honey, and their extended families.

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FOR A SCHEDULE
OF OUR MEETINGS
AND OTHER ACTIVITIES
IN DENVER
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FEATURE ARTICLES

FCPA Lesson: Anatomy of an Acquisition Gone Awry

By

James T. Parkinson
and
Lauren R. Randell[1]

Most companies understand that they run afoul of the Foreign Corrupt Practices Act ("FCPA") if they pay bribes to foreign officials. But the caution with which most companies conduct their own operations does not always match the practices at companies they plan to acquire. In the harried moments surrounding a new acquisition, it may be tempting for an acquiring company to defer inquiry into the on-the-ground practices of its target, or perhaps even turn a blind eye to a representation that seems too good to be true.

An FCPA violation by the target of an acquisition can, and will, become the acquirer's problem if the acquirer fails to conduct adequate pre-acquisition due diligence and follow through on whatever it finds. That was certainly the case for an ill-fated telecom acquisition in 2007, when eLandia International Inc. ("eLandia") bought Latin Node Inc. ("Latin Node"). Just months after closing on the acquisition, eLandia's attempts to integrate Latin Node's operations revealed millions of dollars in improper payments to agents and officials of foreign government-owned

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companies. Disclosure to the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") followed. Before Latin Node pleaded guilty to violating the FCPA in 2009 and agreed to pay a $2 million penalty, the following events occurred: (i) its senior management had been fired and its assets sold; (ii) eLandia had sued the former owners and taken a $20.6 million charge to operations; and (iii) the governments of Yemen and Honduras initiated their own investigations into the same conduct.

In this article, we first set forth the basic contours of the FCPA. We then describe three FCPA enforcement actions in which improper conduct was discovered by an acquiring company either before or after the acquisition closed. Finally, we examine the eLandia-Latin Node deal in greater detail to identify (i) lessons that may be learned from that transaction, including potential indicators of FCPA risk, and (ii) actions M&A counsel may consider after discovering potential FCPA problems.

The FCPA

The Foreign Corrupt Practices Act of 1977[2] was enacted in response to the discovery during the Watergate investigation that US companies had paid hundreds of millions of dollars in bribes to foreign officials. The FCPA has two main components: (i) the anti-bribery provision, prohibiting bribery of foreign public officials; and (ii) the accounting provisions, which require accurate books and records and adequate internal accounting and compliance controls.

Anti-Bribery Provisions

The FCPA prohibits an issuer of securities, or an officer, director, employee, or agent of that issuer, any US citizen or US private company, or anyone else while on US soil, from (i) offering, paying, promising to pay, or authorizing the payment of (ii) money or things of value to (iii) foreign officials (iv) for the purpose of obtaining or retaining business.[3]

A few notes about the expansive nature of each of these elements may be helpful. A "foreign official" is defined broadly as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of" such an entity.[4] The DOJ has interpreted this provision as meaning that any employee of a foreign state-owned company is a foreign official, an interpretation which rears its head in many of the M&A-related FCPA cases we describe below. No money needs to change hands; the mere offer of money or a thing of value is enough to trigger the anti-bribery provision.[5] Passing money or offers to pay through agents is the equivalent of directly paying the bribe, and deliberately shielding oneself from knowledge about the conduct of agents or other third parties does not prevent liability.[6]

Criminal penalties for corporations include fines of up to $2 million per violation or twice the benefit obtained.[7] Individuals can face up to five years imprisonment and fines up to $250,000 per violation or twice the benefit

[2] Pub. L. No. 95-213, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff, as amended).

[3] 15 U.S.C. § 78dd-1(a) (issuers); *id.* § 78dd-2(a) (domestic concerns); *id.* § 78dd-3 (anyone else "while in the territory of the United States").

[4] *Id.* § 78dd-1(f)(1).

[5] *Id.* § 78dd-1(a).

[6] *Id.* § 78dd-1(a)(3) (prohibiting such pass-throughs "knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official").

[7] *Id.* § 78ff(c)(1); Alternative Fines Act, 18 U.S.C. §§ 3571(c), (d).

obtained.[8] Civil fines and disgorgement are also possible penalties. A violation of the anti-bribery provisions carries with it significant collateral effects, including potential debarment from contracting with the US government or the European Union. Mindful of that fact, as in the recent prosecution of BAE Systems, the DOJ has in many cases permitted pleas to violations of the accounting provisions or conspiracy, with no substantive bribery count.[9]

Accounting Provisions

The accounting provisions of the FCPA require issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer," and to "devise and maintain" an adequate "system of internal accounting controls."[10] "[K]nowingly circumvent[ing] or knowingly fail[ing] to implement a system of internal accounting controls or knowingly falsify[ing] any book, record, or account" is a violation of the FCPA.[11] A parent company that consolidates the financials of its subsidiaries can find itself in violation of the accounting provisions if its subsidiary's books were misstated. Criminal penalties for corporations violating the accounting provisions include fines up to $25 million or twice the benefit obtained.[12] Individuals can face up to twenty years imprisonment and fines up to $5 million or twice the benefit obtained.[13]

The FCPA in M&A Practice – Case Examples

FCPA enforcement in general has vastly increased in the last decade, and so too have the number of enforcement actions triggered by the discoveries of acquirers of companies with FCPA problems. Some acquiring companies discovered the issues during pre-acquisition due diligence, affording them the opportunity to walk away or amend the deal. Others failed to detect the underlying violations until after the acquisitions had closed. Below we describe just a few such actions.

The Titan Corporation / Lockheed Martin Corp.

The Titan Corporation ("Titan") was a military intelligence and communications company that in 2003 executed a merger agreement with Lockheed Martin Corp. ("Lockheed"). In the merger agreement, Titan represented that it and its subsidiaries were not in violation of the FCPA. Lockheed proceeded to conduct due diligence, which uncovered conduct calling into question the adequacy of Titan's FCPA representation. Lockheed reported what it had found to the DOJ and SEC, reduced its offered price for Titan, and finally terminated the merger agreement in 2004.

What sunk the merger? While developing a telecommunications project in Benin, Titan had paid over $3.5 million to an agent who was also the business advisor of the president and his occasional personal

[8] 15 U.S.C. § 78ff(c)(2); Alternative Fines Act, 18 U.S.C. §§ 3571(b), (d).

[9] The BAE Sentencing Memorandum, for example, stated: "European Union Directive 2004/18/EC, which has recently been enacted in all EU countries through implementing legislation, provides that companies convicted of corruption offenses shall be mandatorily excluded from government contracts. . . . Mandatory exclusion under EU debarment regulations is unlikely in light of the nature of the charge to which BAES is pleading." United States v. BAE Sys. PLC, No. 10-00035 (D.D.C. Feb. 22, 2010), available at http://www.justice.gov/criminal/pr/documents/03-01-10%20bae-sentencing-memo.pdf.

[10] *Id.* §§ 78m(b)(2)(A), (B)

[11] 15 U.S.C. § 78m(b)(5).

[12] *Id.* § 78ff(a); Alternative Fines Act, 18 U.S.C. §§ 3571(c), (d).

[13] 15 U.S.C. § 78ff(a); Alternative Fines Act, 18 U.S.C. § 3571(d).

ambassador abroad. The payments were falsely documented as consulting services. Titan also had paid both a Benin official for travel expenses and a World Bank analyst for assistance with its telecommunications project, in addition to numerous instances worldwide of under-reporting commissions and falsifying documents. On March 1, 2005, Titan pleaded guilty to three felony counts, including violating both the anti-bribery and accounting provisions of the FCPA, and aiding and abetting the filing of a false income tax return.[14] Titan agreed to pay a $13 million fine and implement an FCPA compliance program. On the same day, Titan settled with the SEC for an additional $15.5 million in disgorgement and prejudgment interest, and agreed to retain an independent consultant to review its FCPA compliance and procedures.[15] Later in 2005, Titan was instead acquired by L-3 Communications.

Delta & Pine Land Co. / Monsanto Co.

Delta & Pine Land Co. ("Delta & Pine") was a cotton seed company with operations worldwide, including in Turkey through its wholly owned Turk Deltapine subsidiary. In 2006, Monsanto Co. ("Monsanto"), which was in talks to acquire Delta & Pine, discovered during pre-acquisition due diligence that in order to obtain government certifications and pass field inspections, Turk Deltapine allegedly paid $43,000 in cash or things of value to officials at a Turkish government agency. In the context of the $1.5 billion Monsanto offered for Delta & Pine, $43,000 might have been easy to downplay as *de minimus* or immaterial. The payments were not correctly recorded on Turk Deltapine's books and records. Monsanto required Delta & Pine to disclose the violations. Delta & Pine and Turk Deltapine ultimately settled with the SEC on July 25, 2007 and, without admitting any charges, agreed to pay $300,000 in penalties and accept a corporate monitor.[16] While the action against Delta & Pine was still pending, Monsanto completed the acquisition.

Syncor International Corp. / Cardinal Health, Inc.

In June 2002, Cardinal Health, Inc. ("Cardinal Health"), a large pharmaceuticals wholesaler, agreed to acquire Syncor International Corp. ("Syncor"), a radiopharmaceuticals and medical imaging company. In the course of conducting pre-acquisition due diligence, Cardinal discovered that Syncor's wholly owned Taiwanese subsidiary ("Syncor Taiwan") had for five years made improper commission payments to doctors at state-owned hospitals. Syncor Taiwan then sold radiopharmaceuticals to hospitals employing those doctors. The subsidiary also made separate payments to doctors for referring business to the subsidiary's medical imaging centers. The payments were recorded as "promotional and advertising expenses" in Syncor Taiwan's books. Syncor Taiwan pleaded guilty on December 10, 2002 to a single violation of the FCPA's anti-bribery provision, and paid a $2 million fine. Syncor simultaneously settled with the SEC and agreed to pay a $500,000 penalty.[17] Cardinal ultimately delayed the closing of the acquisition, at a reduced purchase price, until a month after Syncor's plea.

[14] United States v. Titan Corp., No. 05-00314 (S.D. Cal. Mar. 1, 2005).

[15] SEC v. The Titan Corp., No. 05-0411 (D.D.C. Mar. 1, 2005).

[16] SEC v. Delta & Pine Land Co. and Turk Deltapine, Inc., No. 07-01352 (D.D.C. July 25, 2007).

[17] SEC v. Syncor Int'l Corp., No. 02-02421 (D.D.C. Dec. 10, 2002); United States v. Syncor Taiwan, Inc., No. 02-1244 (C.D. Cal. Dec. 4, 2002). Syncor's founder settled with the SEC five years later and paid a $75,000 penalty. SEC v. Monty Fu, No. 07-01735 (D.D.C. Sept. 28, 2007).

As these examples demonstrate, FCPA violations within a target company can have a significant bearing on the success of a transaction. In the next case, we describe in greater detail the possible consequences from one deal gone very much awry.

Anatomy of a Deal Gone Awry – Latin Node Inc. and eLandia International Inc.

eLandia's acquisition of Latin Node in June 2007 had a lot of promise. Latin Node was a small telecommunications company bringing "Voice over Internet Protocol" ("VoIP") services to countries in South America, the Caribbean, and the Middle East. eLandia was a larger provider of telecommunications, networking, infrastructure, and internet services in Latin America and the South Pacific. As eLandia said in its April 18, 2007 10-K, it was enthusiastic that Latin Node can "provide us with an excellent telecommunications service delivery platform throughout major areas of Latin America." Two months later, eLandia acquired Latin Node preferred stock convertible into 80% of the issued and outstanding shares of its common stock, for a total of $26.8 million.

At the time of the acquisition, eLandia obtained certain standard representations and warranties from the president of Latin Node as well as Retail Americas Voip LLC ("RAV"), the then-owner of all of Latin Node's common stock. Among them was a representation that "[n]either [Latin Node] nor any of its Subsidiaries has offered or given, and [Latin Node] is not aware of any Person that has offered or given, on [Latin Node's] or Subsidiaries' behalf, anything of value to, in violation of any law, including the Foreign Corrupt Practices Act of 1977, as amended: (i) any official of a governmental body . . .; (ii) any customer or member of any governmental body; or (iii) any other Person, for the purpose of any of the following . . .", including assisting Latin Node or its subsidiaries in obtaining or retaining business.[18] A boilerplate representation such as this may be familiar to many M&A practitioners.

The ink on the closing documents was barely dry before eLandia realized it had bought more trouble than it bargained for. eLandia began conducting a post-acquisition review of Latin Node's finance and accounting departments, and in particular their internal controls and legal compliance procedures. It is unknown to what extent eLandia had conducted pre-acquisition due diligence into Latin Node's operations, but later pleadings suggest that little was done pre-acquisition to assess potential FCPA exposure. eLandia quickly discovered irregularities in Latin Node's relationships with consultants and counterparties in one or more countries in Central America. A Special Committee of eLandia's Board of Directors initiated an internal investigation, conducted by a law firm, which uncovered details of payments to officials of government-owned companies in Honduras and Yemen, made by Latin Node either directly or through consultants. By November 2007, eLandia had fired Latin Node's senior management and voluntarily disclosed what it discovered to the Department of Justice.

What was eventually discovered was a web of improper payments totaling more than $2 million over three years, according to the criminal Information filed by the DOJ.[19] Latin Node, as an internet-based telecom provider, was dependent on accessing existing networks belonging to local telecom companies. As in many countries around the world, in both Honduras and Yemen these telecom companies

[18] See Complaint at 8, eLandia Int'l, Inc. v. Granados et al., No. 08-37352CA20 (Fla. Cir. Ct. June 27, 2008).

[19] Information, *United States v. Latin Node, Inc.*, No. 09-20239 (S.D. Fla. Mar. 24, 2009), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/latinnode-info.pdf.

were state-owned, and Latin Node needed to reach agreement with them to gain access to the networks, as well as on the rate that would be charged to Latin Node for that access (the "interconnection rate").

In 2005 in Honduras, Latin Node negotiated with Hondutel, the state-owned telecom, and was awarded an interconnection agreement under which Latin Node would pay Hondutel a certain rate per minute for access to its network. Contemporaneous emails show Latin Node executives admitting that a "prize" would be needed to win over a Hondutel official. Latin Node's Guatemalan subsidiary had set up a nominally independent company ostensibly to sell refurbished cell phones; instead, this "independent" company signed a sham consulting agreement with a company controlled by the brother of a Hondutel executive. Checks eventually totaling over $500,000 were cut by Latin Node executives and sent to the "independent" company over the next two years. According to the Information, Latin Node executives knew that some of that money would end up in the pockets of Hondutel officials. When Latin Node later wanted to lower the rate it paid to Hondutel, emails spelled out the bribe payments that would be required and included bank account information for Hondutel officials. Latin Node began making direct payments to the Hondutel officials' bank accounts, and obtained a verbal agreement to lower the rate pursuant to the interconnection agreement, as well as to conceal the preferential rate by falsifying the number of minutes it was buying each month. Latin Node later agreed to make payments to additional Hondutel employees to conceal the falsification. In total, over a million dollars passed from Latin Node's bank account in Miami to Hondutel officials, directly or through the "independent" Guatemalan company. Latin Node also hired one of the officials after she left Hondutel.

Latin Node was simultaneously seeking to penetrate the Yemeni telecom market, controlled by the state-owned TeleYemen. Rather than obtain its own interconnection agreement with TeleYemen, Latin Node partnered with a private businessman who already had such an agreement on extremely favorable terms due to his past and continuing payment of bribes to officials at TeleYemen and his close relationship with the family member of a Yemeni government official. Latin Node made over $1 million in payments either to the private businessman, or directly to Yemeni officials. According to the Information, Latin Node executives knew that some of the money paid to the businessman would be in turn paid to TeleYemen officials.

In March 2009, twenty months after eLandia made its voluntary disclosure to the government, Latin Node pleaded guilty in Miami federal court to a single violation of the FCPA and agreed to pay a $2 million fine. As we discuss further below, eLandia was able to confine the effect of the guilty plea to its subsidiary through its extensive cooperation with the government. By that point, though, Latin Node's operations in Latin America were terminated, and eLandia had taken $20.6 million of the $26.8 million it paid to acquire Latin Node as a charge to operations.[20] Most of Latin Node's remaining assets were sold in July 2008, and litigation is ongoing over the proceeds of the sale of the assets.

Invoking the purchase agreement, and in particular the FCPA representation and warranty, eLandia sued RAV and Latin Node's former president in Florida state court for, *inter alia*, indemnification, breach of contract, breach of the obligation of good faith and fair dealing, and fraud.[21] The case settled in February 2009

[20] eLandia Form 10-Q/A, Sept. 5, 2008.

[21] eLandia Int'l, Inc. v. Granados et al., No. 08-37352CA20 (Fla. Cir. Ct. June 27, 2008).

with the release of a number of escrowed eLandia shares back to eLandia.[22]

The fallout from the discovery of the Latin Node bribery schemes went far beyond the economic impact to eLandia. The Yemeni government began investigations in 2009 into the recipients of the payments. In Honduras, the alleged corruption at Hondutel contributed to the arrest of a number of former Hondutel officials, including the nephew of the now-deposed President of Honduras. Both investigations can be expected to continue well into the future.

Conclusion – Lessons Learned

Pre-Acquisition Due Diligence—Looking Beyond FCPA Representations

The first lesson learned is the most obvious—regardless of the representations and warranties obtained from the target, there is no substitute for pre-acquisition due diligence. In the above examples, Lockheed, Cardinal, and Monsanto all took this step, and reacted to what they found by amending the merger agreements or walking away entirely. In contrast, eLandia relied on what turned out to be an empty representation from the former owners of Latin Node, and was stuck with potential successor liability, a criminal fine to be paid on Latin Node's behalf, and a worthless acquisition.

In addition to detecting existing problems, thorough pre-acquisition due diligence allows the acquiring company to stop FCPA violations from continuing post-acquisition. While an acquiring company may be able to distance itself from past bribes paid by a target, it is unlikely that bribery that remains undetected at the time of the acquisition will stop at the moment of acquisition, possibly leaving the acquirer on the hook for bribes made after that point. Once potential problems are detected, companies need to reassess the accuracy of any FCPA representations that have been given to that point, especially if they have been incorporated into a public filing.[23]

Know your target and its risk profile – examples of FCPA red flags

While no list of potential red flags can be exhaustive, in the FCPA context it is important to at least look at the following indicators of the target's risk profile:

- In which countries do the target or its subsidiaries do business? Extra investigation may be required when companies do business in certain hot spot countries.[24]
- Does any of the target's revenue come from contracts with foreign governmental entities or state-owned companies?
- How frequently must the target interact with foreign regulators? For example, do the target's business affairs require obtaining numerous licenses, or are governmental inspections required?
- Are any former regulators or employees of state-owned companies employed by the target?

[22] eLandia Form 10-Q, Nov. 16, 2009.

[23] Following Titan's plea, the SEC issued a Report of Investigation regarding the incorporation of Titan's FCPA representation into the merger agreement, which had been appended to the filed proxy statement. Report of Investigation, SEC Release No. 51283 (Mar. 1, 2005). Titan had not withdrawn or amended its FCPA representation even after the FCPA violations came to light and were reported to the SEC. The SEC warned that it would "consider bringing an enforcement action . . . if we determine that the subject matter of representations or other contractual provisions is materially misleading to shareholders because material facts necessary to make that disclosure not misleading are omitted." *Id.*

[24] Organizations such as Transparency International provide useful indices of corruption around the world.

- How many agents, consultants, sales representatives, and distributors does the target use in each country, and can the target produce contracts with each intermediary, and in particular contracts that include an FCPA clause or certification?
- Does the target have an FCPA policy, and can it produce evidence of that policy being enforced, with FCPA training given to employees around the world? Titan, for example, lacked a company-wide FCPA policy despite operating in numerous countries and working with over a hundred agents and consultants.[25]
- How robust are the target's accounting and compliance systems? Latin Node lacked an internal auditor, and its accounting staff had "limited familiarity with reporting requirements under US GAAP and SEC Rules and Regulations."[26] Titan's and its subsidiary's auditors had already noted the African subsidiary's lack of an accounting system or internal controls.[27]
- Does the target have an account for facilitating payments?

These are some of the questions that should be asked on pre-acquisition due diligence, but these should also be tailored and extended for the industry, region(s), and business operations of the company.

[25] Information at 10, United States v. Titan Corp., No. 05-00314 (S.D. Cal. Mar. 1, 2005). Titan also never gave its employees information or training regarding FCPA compliance. *Id.*

[26] eLandia Form 8-K/A, Sept. 14, 2007.

[27] Information at 11, United States v. Titan Corp.

Consider seeking a DOJ Opinion

One option to consider after discovering potential violations is the DOJ's FCPA Opinion Procedures, which allow companies to petition the DOJ for an opinion on whether a particular proposed transaction would "conform[] with the Department's present enforcement policy regarding the antibribery provisions of the" FCPA.[28] While a positive opinion is not a guarantee of non-prosecution, it creates a rebuttable presumption that the transaction complies with the FCPA.[29] Several opinions over the years have been issued in response to requests by acquiring companies eager to know whether they will be taking on FCPA liability if they consummate their acquisitions. After it discovered potential FCPA violations at Syncor Taiwan, Cardinal is believed to have requested what became DOJ Opinion Procedure Release 2003-01 (Jan. 15, 2003), in which the DOJ laid out the remedial steps that Cardinal promised to undertake if the transaction closed, and concluded that "the Department does not presently intend to take any enforcement action against the Requestor for the pre-acquisition conduct [] described in its request."[30] In a different posture, in 2008 Halliburton requested an opinion regarding its bid to acquire U.K.-based Expro International Group PLC because it was unable to conduct sufficient pre-acquisition due diligence to find potential latent FCPA problems.[31] Halliburton agreed to an extensive

[28] 28 C.F.R. § 80.1; 15 U.S.C. § 78dd-1(e).

[29] 28 C.F.R. § 80.10; 15 U.S.C. § 78dd-1(e).

[30] http://www.justice.gov/criminal/fraud/fcpa/opinion/2003/0301.pdf. For other Opinion Procedure Releases touching on M&A issues, see Release 2004-02 (available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.pdf), and Release 2008-01 (available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0801.pdf).

[31] DOJ Opinion Procedure Release 2008-02, available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf. Halliburton was also bound by a confidentiality

series of periodic reports to the DOJ on any FCPA, accounting, or internal controls issues it discovered, as well as to an internal investigation utilizing external counsel and forensic auditors, revamping how Expro contracted with agents or intermediaries, and agreeing not to divest Expro until any DOJ investigations were over. The DOJ, in return, gave a green light to Halliburton's continuing the bid, as well as assurances that it did not intend to take enforcement action on improper payments made by Expro for a short period of time after the acquisition. The DOJ recognized that in certain situations, "there is insufficient time and inadequate access to complete appropriate pre-acquisition FCPA due diligence and remediation."

Voluntary Disclosures and Cooperation

Possibly the smartest thing that eLandia did upon discovery of Latin Node's improper payments was to walk into the DOJ and SEC and voluntarily disclose what it had learned. It has been clear for many years that the DOJ's default position is that acquiring companies are responsible for FCPA liabilities of the companies they acquire. Unlike companies that discovered problems with their targets before the acquisitions closed, eLandia faced the possibility of a much more punishing enforcement action against it personally. Its decision to promptly voluntarily disclose and cooperate throughout the government's subsequent investigation appears to have been a critical factor in the government's decision to accept a plea from a by-then empty subsidiary.

The DOJ's subsequent recognition of eLandia's cooperation reads like a checklist for a company seeking cooperation credit, lauding "Latinode's and eLandia's commendable efforts to uncover evidence of corrupt activities, its authentic cooperation with the Government throughout the investigation, and its significant remedial efforts upon discovery by eLandia of the misconduct." The efforts included the following: (i) immediately initiating an internal investigation, including witness interviews and review of documents; (ii) making a prompt voluntary disclosure; (iii) producing "thousands of non-privileged documents to the Government"; (iv) terminating culpable senior Latin Node officers and employees; (v) strengthening eLandia's own anti-corruption compliance program; (vi) committing to pre-acquisition due diligence in any future transactions; and (vii) most importantly to the DOJ, "dissolv[ing] Latinode from an operational perspective, at a cost to eLandia of millions of dollars, and … ceas[ing] doing business relating to the tainted contracts."[32]

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agreement that prohibited it from disclosing to the DOJ what it already knew about potential FCPA violations at Expro. Unsurprisingly, the DOJ "discourage[d] companies wishing to receive an FCPA Opinion Release in the future from entering into agreements which limit the information that may be provided to the Department." *Id.*

[32] Sentencing Memorandum at 6-7, United States v. Latin Node, Inc., No. 09-20239 (S.D. Fla. Apr. 3, 2009), available at http://www.justice.gov/criminal/fraud/fcpa/cases/docs/latinnode-govt-sent.pdf.