

FCPA Update

A Global Anti-Corruption Newsletter



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Opinion Release 14-02: Revisiting Successor Liability

On November 7, the Department of Justice (“DOJ”) issued its second opinion release of 2014, revisiting the question of successor liability in situations in which a merger-and-acquisition target was not previously subject to the FCPA.¹

Opinion Release 14-02 (“the Opinion”) underscores the importance of conducting meaningful pre-acquisition due diligence and provides some additional guidance as to an appropriate schedule of post-acquisition integration. This topic was addressed previously in the November 2012 “Resource Guide to the U.S. Foreign Corrupt Practices Act,” prepared by the DOJ and the Securities and Exchange Commission (“SEC”),² as well as in the *Halliburton* Opinion Release³ and in Continued on page 2

1. DOJ Op. Rel. 14-02 (Nov. 7, 2014), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2014/14-02.pdf>.
2. DOJ & SEC, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 28-33, <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> [hereinafter “2012 FCPA Guidance”].
3. DOJ Op. Rel. 08-02 (June 13, 2008), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf>.

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the compliance undertakings included in the *Data Systems and Solutions*⁴ and *Johnson & Johnson*⁵ enforcement actions.

At a very basic level, the Opinion reiterates the government's general inclination to show leniency when the acquirer "does the right thing" in terms of pre-acquisition due diligence and post-acquisition integration. In that respect, it is a welcome development that illustrates regulators' follow-through on some of the key statements in the 2012 FCPA Guidance limiting their approach to FCPA enforcement.

The Opinion is, however, notable for questions that are left open, in particular the question of how a company can be sure that prior bad acts fall outside the enforcement agencies' broad theories of the FCPA's jurisdiction. In this respect, the Opinion invites a comparison with the section in the 2012 FCPA Guidance that addresses the specific kinds of U.S. contacts that the government considers sufficient to trigger jurisdiction.⁶ Language in the Opinion also could be read as reviving, or at

"[T]he Opinion reiterates the government's general inclination to show leniency when the acquirer 'does the right thing' in terms of pre-acquisition due diligence and post-acquisition integration."

least not disclaiming, the "tainted contracts" theory of retroactive jurisdiction, a theory that escaped mention in the 2012 FCPA Guidance. As a result, the Opinion fails to deal with some of the important and recurring issues in merger-and-acquisition scenarios, highlighting the need for clarification regarding whether — and how — "tainted contracts" as well as other potential connections to improper activity can subject companies to FCPA liability in the merger-and-acquisition context.

These aspects of the Opinion are not entirely of the government's making and to an extent can be seen as the by-product of the opinion release process. The Opinion thus continues the trend of cautious Requestors seeking assurances regarding mostly benign facts and settled guidance.⁷ Indeed, as the Opinion notes, there is an on-point hypothetical in the 2012 FCPA Guidance that "squarely addresses the situation at hand."⁸

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4. *United States v. Data Sys. & Solutions LLC*, No. 1:12-cr-00262, Deferred Prosecution Agreement (E.D. Va. 2012), at C-5 - C-6.
 5. *United States v. Johnson & Johnson (DePuy)*, No. 11-cr-099, Deferred Prosecution Agreement (D.D.C. 2011), at D-35, ¶ 8.
 6. See 2012 FCPA Guidance at 28-33.
 7. The DOJ's previous opinion release this year, DOJ Op. Rel. 14-01 (Mar. 17, 2014), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2014/14-01.pdf>, which concerned a company's buyout of the business interest held by an individual slated to become a foreign official, is a possible exception.
 8. Opinion at 3.

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In sum, while the Opinion provides some welcome news for in-house counsel and compliance personnel addressing compliance risks associated with merger-and-acquisition activity, difficult questions persist, including how much pre- and post-deal due diligence to conduct; how many compliance and remediation resources to devote at the integration stage; and whether, critically, to self-report issues identified in due diligence, including potentially through the opinion release process.

Requestor's Facts

Requestor, an issuer, was a multinational company headquartered in the United States. It intended to acquire 100% of a foreign company ("Target"), with which it had a pre-existing relationship. Target was headquartered in "Foreign Country" and was owned by "Seller," a prominent consumer products manufacturer listed on the exchange of Foreign Country. Seller had more than 5,000 employees in Foreign Country and annual gross sales in excess of \$100 million. The Opinion does not provide detail on Target's size. Target had been part of Seller's consumer products business. Target and Seller largely concentrated their operations in Foreign Country and "have never been issuers . . . in the United States, and have had negligible business contacts, including no direct sale or distribution of their products, in the United States."

In the course of its diligence, Requestor retained a forensic accounting firm, which identified "apparent improper payments, as well as substantial accounting weaknesses and poor recordkeeping." The forensic accountants reviewed approximately 1,300 payments with a total value of approximately \$12.9 million, identifying more than \$100,000 worth of payments that raised compliance issues,⁹ including "payments to government officials related to obtaining permits and licenses[,] . . . gifts and cash donations to government officials, charitable contributions and sponsorships, and payments to members of the state-controlled media to minimize negative publicity."

The accounting weaknesses were such that the forensic accountants could not locate underlying background records for many of the transactions. In addition, Target had no code of conduct or compliance policies and procedures and its employees did not show "adequate understanding or awareness" of anti-bribery laws and regulations.

With regard to the problematic payments, the Opinion states: "None of the payments, gifts, donations, contributions, or sponsorships occurred in the United States and none was made by or through a U.S. person or issuer."

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9. The Opinion suggests, but does not make clear, that this review of 1,300 transactions was supplemental anti-bribery due diligence undertaken after the initial findings.

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Requestor “set forth a plan that include[d] remedial pre-acquisition measures and detailed post-acquisition integration steps.” The plan included training, standardization of third-party relationships, and formalization of Target’s accounting and recordkeeping, as well as adoption and dissemination of relevant policies and procedures. Requestor anticipated full integration of Target into Requestor’s compliance and reporting structure within one year of closing.

DOJ’s Analysis

The DOJ stated that it did “not presently intend to take any enforcement action with respect to the pre-acquisition bribery Seller or the Target Company may have committed.” This conclusion is unsurprising. As the DOJ noted, pointing to the 2012 FCPA Guidance, successor liability for payments not subject to the jurisdiction of the United States was dealt with there. In fact, the DOJ pointed out, Scenario 1 in the Guidance “squarely addresses” Requestor’s facts.¹⁰

Significantly, this application by the DOJ of the 2012 FCPA Guidance’s teaching was based on Requestor’s representations that “none of the potentially improper [conduct] was subject to the jurisdiction of the United States.”

Commencing with the phrase “for example,” the DOJ listed two representations supporting its conclusion concerning the applicability of the no-successor-liability rule: (i) “none of the payments occurred in the United States, and Requestor has not identified participation by any U.S. person or issuer in the payments”; and (ii) “based on . . . due diligence, no contracts or other assets were determined to have been acquired through bribery that would remain in operation and from which Requestor would derive financial benefit following the acquisition.”

The DOJ expressed “no view as to the adequacy or reasonableness of Requestor’s integration of the Target Company” or its “exact timeline or appropriateness,” but repeated its general guidance encouraging anti-bribery compliance steps in mergers and acquisitions.

Opinion Release 14-02: How Halliburton and its Progeny Have Fared

As was stressed in the 2012 FCPA Guidance,¹¹ the Opinion highlights the importance of pre-acquisition due diligence. Such diligence allows investors properly to assess the value of a transaction and avoid the increasing potential for devastating local law consequences, as investors in India’s 2G mobile telephony market discovered in 2012.¹² With regard to FCPA enforcement risk, such diligence permits the investor

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10. Opinion at 3.

11. See 2012 FCPA Guidance at 28.

12. See Shefali Anand, “India’s 2G Ruling Shocks Telecom Industry,” *The Wall Street Journal* (Feb. 2, 2012), <http://blogs.wsj.com/indiarealtime/2012/02/02/indias-2g-ruling-shocks-telecom-industry>.

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to develop an integration plan that greatly reduces the risk of post-acquisition FCPA liability. The Opinion in this respect justly rewards Requestor's thorough pre-acquisition due diligence by providing some comfort with regard to a less clear potential consequence of an acquisition: successor liability.

Requestor's apparent primary concern in seeking the Opinion was successor liability, which has been a significant focus of attention by compliance professionals since the DOJ issued Opinion Release 08-02, also known as the *Halliburton* Opinion Release, more than six years ago.¹³ Halliburton was taking part in an auction for a publicly traded UK company operating in a high-risk industry. English law limited Halliburton's due diligence rights, and a confidentiality agreement prohibited it from disclosing whether it found any evidence of potential FCPA violations.

“Requestor’s apparent primary concern in seeking the Opinion was successor liability, which has been a significant focus of attention by compliance professionals since the DOJ issued Opinion Release 08-02, also known as the *Halliburton* Opinion Release, more than six years ago.”

In this setting, Halliburton sought an opinion from the DOJ that it would not be subject to successor liability if, post-acquisition, it implemented a compliance program, training, and an FCPA-specific audit within a compressed timeline of immediately upon closing, 60 to 90 days and 90 to 180 days respectively. Halliburton also agreed to disclose any adverse findings to the DOJ. Unlike the Opinion, the *Halliburton* Opinion Release did not discuss whether the target was subject to FCPA jurisdiction.

The *Halliburton* timeline was relaxed somewhat in the “Enhanced Compliance Obligations” set forth in Attachment D to the *Johnson & Johnson* DPA.¹⁴ Under those obligations, Johnson & Johnson agreed to apply its anti-corruption policies to acquisitions “as quickly as is practicable, but in any event no less than one year post-closing” and to train employees and third parties (where relevant) and conduct an FCPA-specific audit within 18 months of acquisition.

The timeline for compliance integration was further relaxed in the *Data Systems & Solutions* DPA. Under Attachment C to that DPA, Data Systems and Solutions LLC (“DSS”) agreed to apply its policies to an acquisition “as quickly as is practicable” and “promptly” conduct training and conduct an FCPA-specific audit “as quickly as practicable.”¹⁵

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13. DOJ Op. Rel. 08-02.

14. See *Johnson & Johnson* at D-35, ¶ 8.

15. *Data Sys.* at C-6, ¶ 14.

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In the 2012 FCPA Guidance, the enforcement agencies went further, noting: “DOJ and SEC have only taken action against successor companies in limited circumstances, generally in cases involving egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition.”¹⁶ The 2012 FCPA Guidance also encouraged the five-step diligence and integration process set forth in the *Halliburton* Opinion Release and subsequent enforcement actions, including (1) risk-based due diligence, (2) quickly implementing compliance policies, (3) training, (4) an FCPA-specific audit, and (5) self-disclosure.¹⁷

“The lack of a representation regarding an FCPA-specific compliance audit might reflect the fact that Requestor’s due diligence was sufficiently broad in scope that an additional audit was deemed unnecessary by Requestor and DOJ on these specific facts.”

Requestor in the most recent Opinion proposed to follow roughly the same timeline as in *Johnson & Johnson, i.e.*, to complete its integration compliance tasks within one year of closing. However, Requestor represented only that it “has set forth an integration schedule of the Target Company that encompasses risk mitigation, dissemination and training with regard to compliance procedures and policies, standardization of business relationships with third parties, and formalization of the Target Company’s accounting and recordkeeping in accordance with Requestor’s policies and applicable law.” Requestor did not represent that it would undertake an FCPA-specific audit of the acquired entity.

The lack of a representation regarding an FCPA-specific compliance audit might reflect the fact that Requestor’s due diligence was sufficiently broad in scope that an additional audit was deemed unnecessary by Requestor and DOJ on these specific facts. However, the Opinion, which did not comment on the propriety of Requestor’s specific integration plans in other contexts, could also be read as potentially an abandonment of the strict checklist approach. The Opinion states:

The Department expresses no view as to the adequacy or reasonableness of Requestor’s integration of the Target Company. The circumstances of each corporate merger or acquisition are unique and require specifically tailored due diligence and integration processes. Hence, the exact timeline and appropriateness of particular aspects of Requestor’s integration of the Target Company are not necessarily suitable to other situations.

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16. 2012 FCPA Guidance at 28.

17. *Id.* at 29. The 2012 FCPA Guidance reaffirmed that the *Halliburton* Opinion Release’s approach remained viable in a situation in which an acquiring company could not conduct all necessary diligence before closing. See *id.* at 32.

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Despite this stated flexibility, the DOJ also noted that “the Department encourages” companies to follow the checklist set forth in the 2012 FCPA Guidance, including an FCPA-specific audit and self-reporting. The Opinion notes “[a]dherence to these elements by Requestor may, among several other factors, determine whether and how the Department would seek to impose post-acquisition successor liability in case of a putative violation.” While the Opinion might suggest some flexibility in the steps a company takes as part of integration, nowhere in the Opinion does the DOJ suggest that post-acquisition compliance integration delays that have led to past FCPA enforcement actions, such as the three-year training delay that led to an SEC enforcement action in the *Watts Water* matter,¹⁸ would at all be tolerated.

Some Observations on the Most Recent Opinion Release

Opinion Release 14-02 is premised on the representation that pre-acquisition payments by Seller were not subject to the jurisdiction of the United States. This is because “[s]uccessor liability does not . . . create liability where none existed before. For example, if an issuer were to acquire a foreign company that was not previously subject to the FCPA, the mere acquisition of that foreign company would not retroactively create FCPA liability for the acquiring issuer.”¹⁹

But, critically, the Opinion does not provide any significant detail about what representations Requestor made with regard to this question. In introducing the Seller and Target, the Opinion states that they “have never been issuers . . . in the United States, and have had negligible business contacts, including no direct sale or distribution of their products in the United States.” Elsewhere in the “Background,” the Opinion states: “None of the payments, gifts, donations, contributions, or sponsorships *occurred in the United States* and none was made *by or through* a U.S. person or issuer” (emphasis added). The analysis states: “[N]one of the payments *occurred in the United States*, and Requestor has *not identified participation by any U.S. person or issuer* in the payments” (emphasis added).

Key questions include which of these factors is determinative and what is the meaning of the italicized terms. The lack of further detail leaves open significant questions as to what an acquirer should look for when evaluating the risk of successor liability in a foreign acquisition. Although the Opinion is helpful as far as it goes, what is missing is meaningful guidance as to when a company can be satisfied that it has done enough diligence to determine whether there is pre-existing FCPA liability.

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18. See *In re Watts Water Tech., Inc. and Leesen Chang*, SEC Admin. Proc. 3-14585 (Oct. 13, 2011), <http://www.sec.gov/litigation/admin/2011/34-65555.pdf> (issuing cease-and-desist order).

19. 2012 FCPA Guidance at 28 (quoted in Opinion at 3).

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In recent years, the United States has asserted that, for example, sending a package to the United States constituted conduct occurring in the United States,²⁰ or that an email that passes through a U.S. server constitutes use of a means or instrumentality of interstate commerce,²¹ or that any U.S. dollar transaction involved conduct in or through the United States as a result of correspondent banking.²²

In the course of pre-acquisition due diligence, when can an acquirer reasonably conclude that the target is not subject to FCPA jurisdiction? Is the fact that the target has had “negligible business contacts” good enough?²³ Is a finding that all discovered payments were in local currency (or U.S. dollars in cash obtained from a local bank) without the involvement of a U.S. citizen and also outside the jurisdiction of the United States sufficient? Or does the acquirer need to conduct

“In the course of pre-acquisition due diligence, when can an acquirer reasonably conclude that the target is not subject to FCPA jurisdiction? Is the fact that the target has had ‘negligible business contacts’ good enough?”

an email review and inquire as to the target’s cloud computing provider? By failing to include additional information about Requestor’s diligence, the Opinion does not answer these questions. The DOJ might be signaling that it will give the benefit of the doubt to companies that “do the right thing,” but the underlying metric DOJ employed to assess the scope of the company’s good faith efforts to comply is far from clear.

More concerning is the possible resurrection of the “tainted contracts” theory of FCPA jurisdiction. The Opinion notes in this regard that “Requestor also represents that, based on its due diligence, no contracts or other assets were determined to have been acquired through bribery that would remain in operation and from which Requestor would derive financial benefit following the acquisition.”

The representation is likely the result of an overly cautious requestor. It should, however, have been irrelevant. While providing no legal analysis to support the relevance of this representation, the DOJ’s failure to state that this representation

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20. See *United States v. Patel*, No. 1:09-cr-00338 (D.D.C. May 23, 2011).

21. See *SEC v. Magyar Telekom, PLC*, No. 11-cv-9646, Complaint at ¶ 23 (S.D.N.Y. Dec. 20, 2011) (“Certain electronic communications made in furtherance of the improper payments . . . were transmitted by Magyar Telekom employees and others through U.S. interstate commerce or stored on computer servers located in the United States.”)

22. See Sean Hecker & Margot LaPorte, “Should FCPA ‘Territorial’ Jurisdiction Reach Extraterritorial Proportions?,” *International Law News*, Vol. 42, No. 1 (Winter 2013).

23. Even if the Opinion gave comfort as to this level of diligence, such a finding would not obviate diligence for local law and business purposes.

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was unnecessary or irrelevant might be an oversight or might be related to the DOJ's arguments in conspiracy cases that receipt of a continuing benefit can be counted as an "overt act" in a conspiracy, extending the statute of limitations period. This "continuing benefits" theory was rejected by the United States Court of Appeals for the Second Circuit last year in *United States v. Grimm*,²⁴ which held that mere passive receipt of the fruits of misconduct could not act as a predicate supporting conspiracy liability, the statute of limitations for which is governed by the last act in furtherance of the crime.²⁵

Without doing so expressly, the inclusion of this representation in the text of the Opinion thus suggests that a bribe paid in the past (and not subject to the FCPA) retroactively becomes subject to the FCPA once an acquirer subject to the statute derives some financial benefit therefrom. This theory was not mentioned in the 2012 FCPA Guidance and has no basis in the statute, which prohibits "an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official,"²⁶ not the mere derivation of benefit from such a payment. Indeed, the apparent use — or at least the lack of a disclaimer concerning the doubtful status — of the "continuing benefits" doctrine in the Opinion goes beyond the statute of limitations issues in *Grimm*, where the "tainted contracts" doctrine was rejected by the court of appeals.

Indeed, the use of the "tainted contracts" theory in the context of successor liability is not a question about the continued life of an illegal act for statute-of-limitations purposes. Rather, it is an attempt, maybe years later, to take an act that was not illegal at the time it was done and make it illegal retroactively.²⁷ While it is certainly not beyond Congress's power to render it improper for natural persons and entities over which the United States has jurisdiction to hold certain assets, the FCPA is not a "hot goods" sanctions regime, and neither Congress, nor the President in exercising authority under the International Emergency Economic Powers Act or other law, has exercised power over foreign contracts tainted by corruption in this manner.²⁸ The theory suggested by the representation is also very different from the

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24. 738 F.3d 498 (2d Cir. 2013).

25. See Sean Hecker, Andrew M. Levine & Steven S. Michaels, "Conspiracy and the 'Indefinite Payments' Doctrine," *New York Law Journal* (Feb. 10, 2014).

26. 15 U.S.C. § 78dd-1(a).

27. To be sure, all liability does not disappear upon acquisition. An acquirer (at least in a stock purchase) may, depending on local law, acquire all of the local law consequences of an illegal contract, including potential criminal and regulatory risk and the civil law risk that the resulting contract will be unenforceable. An acquirer should not, however, acquire any more liability than the seller possessed.

28. See also U.S. Const. art. I, § 9, cl. 3; *Whitman v. United States*, 574 U.S. ___, ___ (2014) (slip op., at 3) ("[I]f a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." (separate statement of Scalia, J., joined by Thomas, J., respecting denial of certiorari)).

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situation in Opinion Release 01-01, in which a company entering into a joint venture received an opinion contingent on the absence of “any knowing act in the future . . . in furtherance of a prior act of bribery” (for example ongoing commission payments to an agent).²⁹

Perhaps the greatest difficulty with the “tainted contracts” theory is practical. Although there may be some extreme cases where, as a matter of equity, an acquirer should acquire liability for bribes paid on pre-existing contracts,³⁰ in most cases the “tainted contracts” theory, like other broad theories of jurisdiction, simply sows confusion and uncertainty. This is due to the difficulty of connecting particular payments to particular contracts. What if the acquired contract is a long-term lease, acquired twenty years ago? In light of the *Grimm* ruling, and the fact that bribery offenses are traditionally treated as “completed crimes” rather than “continuing violations” such as conspiracy, the Opinion’s failure to evaluate the significance of the representation is a missed opportunity to clarify the law governing FCPA liability.

“Although there may be some extreme cases where, as a matter of equity, an acquirer should acquire liability for bribes paid on pre-existing contracts, in most cases the ‘tainted contracts’ theory, like other broad theories of jurisdiction, simply sows confusion and uncertainty.”

Indeed, the facts set forth in the Opinion are such that they might not necessarily have given rise to FCPA violations, even had Target *been* subject to the FCPA. The Opinion does not identify the country involved, although the reference to “payments to members of the state-controlled media to minimize negative publicity” offers a significant hint. The assumption here, of course, is that payments to “members of the media” were payments to “foreign officials,” a legal question the answer to which is by no means certain.

Moreover, it is not at all uncommon to find local companies exhibiting “glaring compliance, accounting, and recordkeeping deficiencies” in the large swaths of the world not operating under GAAP and the Sarbanes-Oxley Act or similar laws.³¹

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29. DOJ Op. Rel. 01-01 (May 24, 2001), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2001/0101.pdf>.

30. This might occur, for example, if a foreign company not subject to the FCPA that does not have the resources to service contracts acquires long-term contracts through bribery and shortly thereafter sells itself, or these assets, to a conniving issuer or domestic concern. In such a case, a better theory for liability would be that the foreign company was acting as a *de facto* agent of the issuer or domestic concern, since the foreign company’s intent was to sell the contracts as soon as possible and the FCPA-covered entity was involved in the improper acts.

31. See Alison O’Connell, “Avoiding Surprises: Anti-Corruption Due Diligence in M&A Deals,” *Global Investigations Review* (Nov. 17, .2014), <http://globalinvestigationsreview.com/article/2009/avoiding-surprises-anti-corruption-due-diligence-m-a-deals> (quoting a general counsel who stated that in Brazil “private and locally owned [companies] . . . often . . . may not have a compliance framework with the strongest policies or . . . may not have one at all”).

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While U.S. enforcement agencies invariably see any payment to a “foreign government official or state-owned enterprise employee” as at least a potential bribe, people in other countries often have differing views about what falls into the gray area between what is permissible and what is not. This is especially true for so-called “small bribes” — the kind of payments described in the Opinion.

For example, the Opinion refers to “payments to government officials related to obtaining permits and licenses.” Were these bribes or “facilitating payments?”³² “Gifts and cash donations to government officials”³³ could be “a token of esteem or gratitude”³⁴ — and not corrupt payments — depending on the size and other surrounding circumstances. “Charitable contributions and sponsorships” are often legitimate.³⁵ Finally, while U.S. enforcement agencies tend to confine extortion or duress to “threats of violence or harm or . . . imminent threats to health or safety,”³⁶ someone living in a country where such demands are common could believe “payments to members of the state-controlled media to minimize negative publicity”³⁷ is a response to extortion and not actionable bribery in any case. Especially in the context of an acquisition of a non-covered company, ignorance of enforcement agencies’ strict view of the boundaries of bribery and the meaning of “foreign official” should be a matter for training and post-acquisition integration, rather than unnecessary fretting over potential successor liability.³⁸

More generally, the Opinion, while providing some reassurance on certain aspects of inherited liability, reinforces the limited utility of the opinion release process. Requestor conducted testing on approximately \$12.9 million in payments and found concerns with \$100,000 of these, or 0.78%. The “vast majority of these transactions” are described in a manner suggesting that they were small. It does not appear from the Opinion that the forensic accountants found any kickbacks, suspicious agents, or suitcases of cash. Assuming Target was acting in a high-risk jurisdiction, it is surprising that more problematic payments were not discovered. Indeed, in some jurisdictions and circumstances, not finding any such payments might constitute a red flag rather than an “all clear,” as the absence of any evidence of any irregularity could be indicative of fraud by the target.

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32. Although facilitating payments are not legally permitted in many high-risk jurisdictions, they are common and extremely rarely subject to prosecution.
 33. Opinion at 2.
 34. 2012 FCPA Guidance at 15.
 35. Opinion at 2.
 36. 2012 FCPA Guidance at 27.
 37. Opinion at 2.
 38. As noted below, a more interesting discussion would have involved examples of payments about which there could be no reasonable disagreement about the boundaries of bribery (e.g., a suitcase full of cash).

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In sum, whether the limited validation Requestor received in Opinion Release 14-02 will have been worth the effort — and the six-month delay from the date of the request to issuance — is a matter only time will tell. For most companies embarking on fast-paced merger-and-acquisition transactions, such a period of delay is not a realistic timeframe in which a deal can simply be placed on hold while the opinion release process runs its course. This fact, together with the other aspects not fully explored in the Opinion, makes it likely the Opinion will stand as only a moderately helpful statement by the DOJ that the U.S. government will not impose legal liability where, as a matter of law, none exists.

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The Fight Against Overseas Corruption: Why Does France Lag?

France perennially ranks high on world lists for wines, as a place to visit, and for other charms; for its fight against overseas corruption, not so much. This observation is widely held and not new. In October 2012 the OECD issued its Phase 3 report on France's efforts to pursue overseas corruption, and noted that the country was falling far behind.¹ In October 2014 the OECD bemoaned, yet again, the continued lack of progress.²

France's poor showing can be linked to very specific elements of French criminal laws and procedures that are impediments and disincentives to more robust prosecution, as well as to more subjective cultural factors that will resist reform efforts.

France's Performance Pursuing Overseas Corruption

France's shortfall relative to other countries in the pursuit of overseas corruption is stark. Fourteen years

ago, it adopted legislation criminalizing official corruption committed outside its territory, which had hitherto been largely tolerated and often resulted in a tax deduction. This legislation is roughly comparable to the U.S. Foreign Corrupt Practices Act, and complies with France's obligation under the OECD Convention.³ In those fourteen years a grand total of *one* corporation has been convicted for illegal overseas payments: in 2012 the French company Safran was sentenced to a fine of €500,000 for bribes paid in Africa to obtain a contract worth more than €170 million. That case is now on appeal and its outcome uncertain.⁴

No other corporation has been convicted, or is now awaiting trial, in France under this legislation.⁵ This cannot be explained by a hypothesis that French companies are so law-abiding that there was nothing to investigate or prosecute. During that period, that is, since 2000, at least three large French

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1. See Organization for Economic Cooperation and Development ("OECD"), Working Group on Bribery in International Transactions, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in France (Oct. 2012), <http://www.oecd.org/daf/anti-bribery/Francephase3reportEN.pdf>.
2. See OECD, Statement of the OECD Working Group on Bribery on France's Implementation of the Anti-Bribery Convention (Oct. 23, 2014), <http://www.oecd.org/newsroom/statement-of-the-oecd-working-group-on-bribery-on-france-s-implementation-of-the-anti-bribery-convention.htm>.
3. France ratified the OECD Convention on Combating Bribery of Foreign Public Officials ("OECD Convention") in 1999 and adopted national legislation prohibiting overseas corruption in 2000. See OECD, Steps Taken to Implement and Enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: France (May 2011), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/42098468.pdf>.
4. See Patricia McKinstry, "Safran Found Guilty of Corruption by French Court," SAI Global Blogs: European Perspective (Sept. 6, 2012), <http://compliance.saiglobal.com/community/blogs/item/3994-safran-found-guilty-of-corruption-by-french-court>; *The International Investigations Review* 145 n.11 (Nicolas Bourtin ed., 4th ed. July 2014) (citing Paris Criminal Court, 5 September 2012, No. 060992023).
5. There have been a number of investigations concerning domestic corruption, which is regularly pursued in French courts, and there have been investigations and trials relating to different international issues such as alleged violations of the U.N.'s Oil-for-Food Program.

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companies — Total,⁶ Alcatel,⁷ and Technip⁸ — reached public agreements with the U.S. Department of Justice (“DOJ”) in which they admitted having made large, and clearly illegal, overseas payments, and French industrial giant Alstom, whose business is now in the process of being purchased in significant part by General Electric, has disclosed that it is the subject of a U.S. investigation⁹ in which one of its former officers has already pleaded guilty to U.S. corruption charges.¹⁰ So why are French companies being pursued more vigorously by U.S. authorities than by their own?

corporate prosecutions. First, it is somewhat more difficult to prosecute a corporation in France than it is in the United States. In the United States, corporations can very rarely claim that anyone connected with the organization — whether an officer, an employee, or even a contractual agent — and who made a payment did not “bind” the corporation and subject it to criminal liability under the principle of *respondeat superior*. In France, Article 121-2 of the Penal Code is more specific. The corporation can be criminally responsible only if an identifiable “organ or representative” commits a criminal

“Although France’s anti-corruption laws are generally comparable to the FCPA, two differences in the general substantive criminal laws inhibit corporate prosecutions.”

**The Impact of Substantive
Criminal Laws**

Although France’s anti-corruption laws are generally comparable to the FCPA, two differences in the general substantive criminal laws inhibit

act “for the account” (or, perhaps, “for the benefit”) of the corporation.

While more flexible than the “controlling or directing mind” requirement applicable in the United Kingdom,¹¹ this provision — which was

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6. See DOJ Press Rel. 13-613, French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme (May 29, 2013), <http://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international>.
 7. See DOJ Press Rel. 10-1481, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay \$92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), <http://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsidiaries-agree-pay-92-million-resolve-foreign-corrupt>.
 8. See DOJ Press Rel. 10-751, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (June 28, 2010), <http://www.justice.gov/opa/pr/technip-sa-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-240-million>.
 9. See Tom Schoenberg, “Alstom Said to Face Wider Bribery Probe and Record Fine,” *Bloomberg* (Mar. 27, 2014), <http://www.bloomberg.com/news/2014-03-27/alstom-said-to-face-wider-bribery-probe-and-record-fine.html>.
 10. See DOJ Press Rel. 14-752, Former Executive of French Power Company Subsidiary Pleads Guilty in Connection with Foreign Bribery Scheme (July 17, 2014), <http://www.justice.gov/opa/pr/former-executive-french-power-company-subsidiary-pleads-guilty-connection-foreign-bribery>.
 11. See Amanda Pinto & Martin Evans, *Corporate Criminal Liability* (3rd ed. 2013) at 35-61.

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adopted only in 1994, and is still being interpreted by the French courts — adds a burden that U.S. prosecutors do not face.

And the requirement is more than theoretical. Following the crash of a Concorde in 2000, an investigation led to the criminal conviction of Continental Airlines for negligence in maintaining an aircraft that took off just before the Concorde, resulting in litter on the airstrip that contributed to the crash. On appeal, the conviction was vacated because the Court of Appeals concluded the negligent Continental employee did not have a status that bound the corporation.¹²

Far more important, however, is the fact that the financial penalties applicable to corporate corruption are a fraction of fines payable under the FCPA in the United States. The basic provision under French criminal law is that a corporation may be sentenced to a maximum of five times the penalty applicable to individuals for the same crime,¹³ which for overseas corruption (applying a maximum sentence increased in 2013 applicable to crimes committed thereafter) yields a maximum sentence of €5,000,000¹⁴

— hardly a terrifying prospect, particularly when compared to U.S. law, which authorizes a fine of up to twice the “gain or loss” occasioned by the criminal misconduct, as well as civil disgorgement of ill-gotten gains and, conceivably, restitution as well to crime victims. Further, there is no tradition or recognized procedure comparable to the U.S. approach of adding separate “counts” for each act of corruption and resulting in a high cumulative penalty, so that this amount is likely to be the “worst case” outcome a corporation can contemplate. The result: a corporate criminal investigation in France is simply not a major threat to a corporation.¹⁵

**The Impact of French
Criminal Procedures**

Far more nuanced is the effect of a number of French procedures that inhibit an environment of aggressive prosecution. Perhaps the most important is the relatively unimportant status of the prosecutor and the absence of negotiated outcomes.

While roughly 90% of all criminal cases in France are handled in the first

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12. See *International Investigations Review* at 144 n.10 (citing Versailles Court of Appeals, 29 November 2012, RG 11/00332).
 13. “The maximum amount of a fine applicable to legal persons [e.g., corporations] is set at five times the maximum fine applicable to individuals, according to the law criminalizing this offence” Code pénal [C. pén.] art. 131-38 (Fr.).
 14. Code pénal [C. pén.] art. 435-3 (Fr.).
 15. Art. 131-39 of the Criminal Code provides a sentencing judge with a very wide array of non-financial penalties applicable to corporations; these include total dissolution, but also more nuanced remedies such as preclusion from certain markets or certain business activities, and up to five years of “judicial supervision.” Code pénal [C. pén.] art. 131-39 (Fr.). These penalties are, however, very rarely imposed; and in a big corruption case where the result may come as much as a decade or more after the relevant facts, it would generally be too late to impose them productively. If actual plea negotiation were to become possible in France, this choice of non-financial outcomes could provide a basis for discussion, although since they only apply to a convicted corporation, they do not, as such, provide a basis for a DPA or other non-criminal outcome.

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instance by the police, who turn over the fruits of their investigation to the Public Prosecutor, in complex cases such as overseas corruption the investigation is conducted by a judge known as an investigating magistrate.¹⁶

The investigating magistrate is formally obligated to establish, in essence, “what happened,” and is tasked with finding (and putting in a formal file) all exculpatory as well as incriminating evidence. Although the Public Prosecutor will be asked for that officer’s views on whether the magistrate’s file contains sufficient evidence to merit prosecution, the ultimate decision on that question remains with the investigating magistrate, who can (and sometimes does) order that a case go to trial over the opposition of the Public Prosecutor.

This structure creates at least two disincentives to aggressive prosecution of corporate crime. *First*, the process simply takes a very long time. Corporate investigations frequently take 10 years or more, basically because the investigating magistrates are thinly staffed and become logjams. And *second*, both formally and practically, investigating magistrates are not in a position to negotiate with corporations being investigated. Their role is to “establish the truth,” not to bargain, and they would find any offer to enter into plea negotiations to be entirely improper. As a result, there is virtually no opportunity for any form of negotiation of criminal outcomes

in France: a corporation can neither negotiate a “Deferred Prosecution Agreement” or similar result that avoids a criminal judgment, nor even negotiate a “guilty plea” with a limited, agreed-upon penalty.

Corporations being investigated thus have little choice but to wait for the matter to be brought to trial in the distant future; there is no environment of “carrots and sticks” creating an incentive to bring a matter to a head for the simple reason that the “stick” (in the sense of a worst-case likely outcome) is not at all fearsome, and there is no “carrot” of obtaining a better result through negotiation.

The result: while in the United States corporations more often than not enter into some form of discussion with prosecutors that leads to a negotiated (and relatively prompt) outcome — often with an element of “cooperation” that may include providing evidence against individuals, as well as promises to undergo strict supervision or a monitor into the future — virtually the only procedurally acceptable outcome in France is to await a full-blown investigation, trial, and appeal many years hence.

This procedural structure may inhibit preventative efforts as well. There is much discussion in France today of the need for corporations to create compliance departments to implement and supervise measures to detect and deter illicit payments by employees. Significant groups of compliance managers and

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16. Code de procédure pénale [C. pr. pén.] arts. 79-84 (Fr.).

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service providers have been established to promote this approach.¹⁷ But a compliance program has relatively little legal status in France in the context of an assertion of corporate criminal responsibility. In the United Kingdom a robust compliance program may be a complete defense to the so-called “corporate crime” prosecutable under the UK Bribery Act, and in the United States the existence of a strong program is considered a very strong

Will Things Change?

There are a number of reasons to believe that the situation will not change any time soon.

First, as noted above, French corporations have little incentive to do anything other than await the end of a very lengthy process because the “worst case” corporate penalties are relatively low. There is little indication of a political will to increase these penalties.

“In France, by contrast, a compliance program is not a defense, and while it might be considered by a sentencing judge . . . or possibly contribute to an argument that the payer of a bribe was acting *ultra vires* . . . [,] there is little immediate incentive for corporations to implement such a function.”

mitigation element in discussions that can lead to a decision by the prosecutor not to pursue corruption charges against the corporation at all.¹⁸

In France, by contrast, a compliance program is not a defense, and while it might be considered by a sentencing judge as a mitigating factor in determining a corporate fine (which, as noted, is already quite low), or possibly contribute to an argument that the payer of a bribe was acting *ultra vires* and did not bind the corporation, in the absence of the opportunity for plea negotiations there is little immediate incentive for corporations to implement such a function.

Second, there is considerable hostility to the U.S. notion of a negotiated outcome of a criminal matter. “Deferred Prosecution Agreements” as they have developed in the United States have been a matter of discussion in France since their relatively recent emergence in the U.S. prosecutor’s toolbox, and by and large the commentary has been negative. Such “deals” are often viewed as unsavory privatizations of justice that are inconsistent with French principles.¹⁹

And third, there is deep, although generally unstated, hostility to the notion of active “cooperation” with a prosecuting authority. Even in civil

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17. See, e.g., Le Cercle de la Compliance, www.cercladelacompliance.com; ETHIC Intelligence, www.ethic-intelligence.com.

18. See Debevoise & Plimpton, “The UK Bribery Act 2010: A Guide to the New Offenses” (May 19, 2010), http://www.debevoise.com/insights/publications/2010/05/the-uk-bribery-act-2010-a-guide-to-the-new-offen__ (follow “Download PDF” hyperlink).

19. See, e.g., Antoine Garapon & Pierre Servan-Schreiber, *Deals de justice: Le marché américain de l’obéissance mondialisée* (2013).

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litigation in France, there is no concept of “discovery” in the U.S. sense, nor any obligation of one party to turn over to an adversary information that could be harmful to it. Discomfort with the idea that a person or company should provide adverse evidence is particularly acute in a criminal context: although neither the phrase nor the concept appears in any formal text, judges and other participants in the criminal justice system openly refer to a criminal defendant’s so-called “right to lie,” pointing out that at criminal trials a third-party witness testifies under oath while an accused does not.²⁰ In the

Some of the concerns voiced by French observers critical of U.S. criminal procedures relating to Non-Prosecution Agreements, Deferred Prosecution Agreements and negotiated corporate guilty pleas are also expressed in the United Kingdom, where judges do not support the notion of a criminal “deal” negotiated solely between a prosecutor and a private corporation. The United Kingdom, however, has addressed this issue in an innovative way by adopting legislation, which went into effect in February 2014, allowing the rough equivalent of a DPA but under strict

“Even in civil litigation in France, there is no concept of ‘discovery’ in the U.S. sense, nor any obligation of one party to turn over to an adversary information that could be harmful to it.”

particular context of a corporate structure, the notion that a corporation would agree to “cooperate” by providing evidence that could implicate its own officers or employees is likely to be completely rejected. U.S. authorities have expressed a suspicion that French companies may have strung out their response to U.S. criminal investigations until the statute of limitations may have run against individual officers or employees.²¹

judicial supervision so that a judge, and not simply adversarial parties, determines whether the process and the result are in the public interest.²² Such an approach would appear to go a considerable way to addressing French concerns that are now firm roadblocks to progress and the fight against corruption. It is not, however, the subject of much discussion in France.

There are some changes, and voices urging more. In December 2013, the

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20. See, e.g., Paroles de juges (blog), “En procédure pénale le droit de se taire, oui, mais le droit de mentir ?” (Sept. 27, 2014), <http://www.huyette.net/2014/06/en-procedure-penale-le-droit-de-se-taire-oui-mais-le-droit-de-mentir.html>.

21. See *United States v. BNP Paribas, S.A.*, No. 14-cr-460, Statement of Facts (S.D.N.Y. June 28, 2014), <http://www.justice.gov/opa/documents/paribas/statement-of-facts.pdf> (guilty plea entered by French bank BNP Paribas to charges concerning evasion of U.S. sanctions relating to Iran, Sudan, and Cuba).

22. See Debevoise & Plimpton, “Client Update: Deferred Prosecution Agreements Enter into Force in the UK” (Feb. 24, 2014), http://www.debevoise.com/insights/publications/2014/02/deferred-prosecution-agreements-enter-into-force__ (follow “Download PDF” hyperlink).

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legislature established a new national prosecutorial office to take the lead in complex financial crimes, including those that are “geographically dispersed,” and also extended whistleblower protection and gave standing to some voluntary organizations to instigate criminal investigations.²³ The French chapter of Transparency International regularly joins the OECD in expressing concern about France’s track record, and urges stronger prosecutorial efforts.²⁴ An inter-ministerial body, the *Service Central pour la Prévention de la Corruption*, was created in 1993 to coordinate efforts relating to corruption (both domestic and overseas), and issues annual reports summarizing the situation and urging greater efforts.²⁵ But given the ingrained nature of the existing procedures and traditions summarized here, real change

may take time. In the meantime, French corporations must remain vigilant about the risk of prosecution for overseas illicit payments — but for the moment the biggest risk is that their activities may provide a jurisdictional hook to U.S. and U.K. prosecuting authorities.

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23. Loi 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière [Law 2013-1117 of Dec. 6, 2013 on the fight against fiscal fraud and large-scale economic and financial crime], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 7, 2013, p. 19941.

24. Transparency International France, “Pourquoi agir contre la corruption?” http://www.transparency-france.org/ewb_pages/p/pourquoi-agir.php.

25. Ministère de la Justice (Fr.), Service Central de Prévention de la Corruption (SCPC), <http://www.justice.gouv.fr/le-ministere-de-la-justice-10017/service-central-de-prevention-de-la-corruption-12312/>.

Bio-Rad Laboratories Settlements Illustrate the Difficult Choices in Self-Reporting Scenarios

In their latest FCPA enforcement action, the U.S. Department of Justice (“DOJ”) and U.S. Securities and Exchange Commission (“SEC”) provide textbook examples of relatively unsophisticated improper payments common in the 2000s (and unfortunately still common in some parts of the world) combined with a lesson of what not to do when it comes to internal controls and record-keeping.

But beyond providing some good examples for a company’s next FCPA training, the Bio-Rad enforcement action raises questions about the benefits of self-reporting and the scope of the FCPA’s books and records and internal controls provisions, particularly in the context of the choice whether to self-report problematic conduct. Although unexplored in the filed documents accompanying the enforcement action, the juxtaposition of remedial measures undertaken by Bio-Rad in response to evidence of misconduct presents both interesting and vexing real-world questions about how best to respond to the discovery of bribery in high-risk jurisdictions.

On November 3, 2014, the DOJ¹ announced a non-prosecution agreement with Bio-Rad Laboratories, Inc. (“Bio-Rad”), a NYSE-listed medical diagnostics and life sciences manufacturing and sales company headquartered in California. At the same time, the SEC announced a cease and desist order, settling an administrative action against Bio-Rad.² The NPA focused on Bio-Rad’s alleged “[k]nowing [f]alsification of [b]ooks and [r]ecords and [f]ailure to [i]mplement [a]dequate [i]nternal [a]ccounting [c]ontrols,” in connection with its business in Russia,³ while the SEC cease and desist order alleged violations of both the anti-bribery and the accounting provisions of the FCPA in connection with Bio-Rad’s business in Russia, Thailand and Vietnam.⁴ Bio-Rad agreed to pay a total of \$55.05 million in fines, disgorgement and pre-judgment interest,⁵ undertake compliance enhancements, and enter into a two-year reporting obligation with the government.⁶

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1. See DOJ Press Rel. 14-1221, Bio-Rad Laboratories Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$14.35 Million Penalty (Nov. 3, 2014), <http://www.justice.gov/opa/pr/bio-rad-laboratories-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-1435>.
 2. SEC Press Rel. 2014-245, SEC Charges California-Based Bio-Rad Laboratories with FCPA Violations (Nov. 3, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543347364#.VG_Bw6LhwYR.
 3. *In re Bio-Rad Laboratories, Inc.* (DOJ), Non-Prosecution Agreement (Nov. 3, 2014) at A-3, <http://www.justice.gov/criminal/fraud/fcpa/cases/bio-rad/Bio-Rad-NPA-110314.pdf> [hereinafter “NPA”].
 4. *In re Bio-Rad Laboratories, Inc.* (SEC), Admin. Proceeding No. 3-16232, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (November 3, 2014), <http://www.sec.gov/litigation/admin/2014/34-73496.pdf> [hereinafter “Cease-and-Desist Order”].
 5. See NPA at 3 (\$14.35 million penalty); Cease-and-Desist Order at 10 (\$35.1 million disgorgement and \$5.6 million pre-judgment interest).
 6. See NPA, Attachments C and D; Cease-and-Desist Order at 10-11.

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Agents in Russia and Local Practices in Southeast Asia

As alleged by the DOJ and SEC, between 2005 and 2010, Bio-Rad's Russia subsidiary engaged three agents to assist it with government tenders in Russia.⁷ The agents were retained through Bio-Rad's French subsidiary and were tied to the same individual.⁸ Although the terms "agent," "government tender" and "Russia" are a red flag when used in the same sentence, the list of red flags alleged in the NPA and Cease-and-Desist Order runs significantly longer. According to the government's allegations, the agents were incorporated in off-shore jurisdictions, using bank accounts in the Baltic states.⁹ The agents were alleged to have been paid very high commissions (15% – 30%) for stated services which were: (i) unnecessary (given the nature of Bio-Rad's products), (ii) duplicative of services provided by other service providers (i.e., Bio-Rad's own distributors) and (iii) grossly overpriced.¹⁰

“Although the terms ‘agent,’ ‘government tender’ and ‘Russia’ are a red flag when used in the same sentence, the list of red flags alleged in the NPA and Cease-and-Desist Order runs significantly longer.”

Moreover, as the company's manager for Russia business was allegedly aware, the agents did not undertake the services for which they were officially paid as all the agents were corporate alter-egos of a single, well-connected individual with no employees.¹¹

Added to these red flags was the company's deficient internal controls system, which allegedly allowed: (i) the structuring (essentially, parceling) of payments (so as to avoid making single payments in an amount that would require additional scrutiny); (ii) the approval, contrary to company policy, of payments without independent review of the underlying documents; (iii) the retention of agents without any due diligence; (iv) the unaddressed failure to provide translated agreements with the agents to the company's legal and finance departments; (v) the generation of agent invoices by Bio-Rad Russia and (vi) on occasion, the pre-payment of agent commissions.¹² Moreover, the managers involved in making the payments to the agents allegedly spoke in code and sent emails instructing others to do so.¹³

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7. See NPA at A-2 to A-3, ¶¶ 7-8; Cease-and-Desist Order ¶¶ 2, 15.
 8. See *id.*
 9. NPA at A-2 ¶ 7; Cease-and-Desist Order ¶¶ 15, 19.
 10. See NPA at A-3 ¶¶ 10-11; Cease-and-Desist Order ¶¶ 15-16, 21.
 11. See NPA at A-2 ¶ 7, A-3 ¶¶ 8, 11; Cease-and-Desist Order ¶ 15.
 12. See NPA at A-3 ¶ 9, A-4 ¶¶ 12, 14, 16; Cease-and-Desist Order ¶¶ 23-26.
 13. NPA at A-4 ¶¶ 13, 15; Cease-and-Desist Order ¶¶ 17, 19.

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The alleged conduct in Bio-Rad's business in Southeast Asia that was at issue was addressed only with a passing mention by the DOJ in the NPA¹⁴ but formed a significant part of the basis for the SEC's Cease-and-Desist Order. This appears to be because "[t]he payment scheme [in Thailand and Vietnam] did not involve the use of interstate commerce, and no United States national was involved in the misconduct," taking the behavior outside of the anti-bribery prohibition of the FCPA.¹⁵ Because the SEC's authority over issuers such as Bio-Rad extended to the consolidated books and records as well as the company's internal controls, the SEC did not need a specific "interstate commerce" nexus arising out of individual transactions or FCPA anti-bribery offenses to find deficiencies in the company's books or records, or controls.

While alleged knowledge on the part of relevant managers is implied in the allegations relating to Russia, relevant managers in Vietnam and Thailand were alleged to have been explicitly told about improper payments and allowed them to continue. Bio-Rad's regional sales manager for Asia Pacific assertedly learned in 2006 that the company was making payments to Vietnamese government officials.¹⁶ However, she was purportedly told by the Vietnam country manager that "paying bribes [is] a customary practice in Vietnam" and, in an email, that "Bio-Rad would lose 80% of its Vietnam sales without continuing" the payments.¹⁷ The regional sales manager and another manager were alleged to have then approved the country manager's proposal to employ distributor/resellers to purchase Bio-Rad's products at a discount, passing part of its savings on to government officials.¹⁸

In Thailand, Bio-Rad had a 49% interest in a Thai joint venture that was managed by its local majority owners.¹⁹ At the time it took over the business (as part of a larger acquisition), Bio-Rad allegedly "performed very little due diligence" on the Thai operations.²⁰ In fact, the government charged, the local owners were using another company (which was partially owned by one of the local Thai owners) to make payments to Thai government officials.²¹

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14. NPA at A-7 ¶ 25.

15. Cease-and-Desist Order ¶¶ 30, 36. The section headings in the Cease-and-Desist Order recognize the distinction between the payments in Russia, which had a U.S. nexus and were improper under the FCPA's anti-bribery provisions and those in Southeast Asia, which had no such nexus and did not violate the anti-bribery provisions. The section heading for Russia is "Unlawful Payments in Russia," while the other sections are entitled "Facts in Vietnam" and "Facts in Thailand." *Id.* at 4, 6, 7; see 15 U.S.C. § 78dd-1(a) (requiring "use of the mails or any means or instrumentality of interstate commerce" for a violation of the anti-bribery provisions). (Neither the SEC nor DOJ charged Bio-Rad under the FCPA's alternative anti-bribery jurisdiction (15 U.S.C. § 78dd-1(g)), which does not require a U.S. nexus, given the lack of alleged action by relevant U.S. persons.)

16. Cease-and-Desist Order ¶ 29.

17. *Id.*

18. See *id.* ¶¶ 29, 30.

19. See *id.* ¶¶ 31-32.

20. *Id.* ¶ 31.

21. *Id.* ¶¶ 33-34.

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While not mentioned in the Cease-and-Desist Order, an issuer “hold[ing] 50 per centum or less of the voting power” in a company managed by its local partner is subject to a statutorily-mandated lower standard when it comes to internal controls charges.²² Section 78m(b)(6) of Title 15 provides a conclusive presumption of compliance with the internal controls provisions to an issuer that owns less than 50% of a subsidiary’s voting equity that “proceed[s] in good faith to use its influence, to the extent reasonable under the issuer’s circumstances, to cause [the subsidiary] to devise and maintain” a system of internal controls.²³ What constitutes “good faith” efforts is often unclear and depends significantly on the circumstances, most importantly the issuer’s degree of control. The SEC presumably determined there was no need to address the issue of the specific control Bio-Rad exercised as the Cease-and-Desist Order suggests that no efforts were undertaken. When informed by the local manager of the Thai subsidiary’s practice of paying kickbacks and after confirming it with Bio-Rad Singapore’s controller, Bio-Rad’s Asia-Pacific GM “did not instruct [the Thai subsidiary] to stop making the improper payments.”²⁴

“The history of the company’s self-reporting . . . presents a more sympathetic portrait of the company, and raises some questions whether the company should have received more lenient treatment in certain respects”

Bio-Rad’s Voluntary Disclosure and the Questions Raised by the Resolutions

The Bio-Rad enforcement action presents textbook examples of bribery schemes, internal controls failures and falsified books and records along with the usual juicy quotes from incriminating emails. As enforcement actions have shown time and again, such compliance failures were not uncommon, especially in the period before the “new era” of FCPA enforcement.

The history of the company’s self-reporting, however, presents a more sympathetic portrait of the company, and raises some questions whether the company should have received more lenient treatment in certain respects and, at the same time, should have been encouraged to maintain operations in high-risk countries, rather than ceding markets to almost certainly less scrupulous competitors.

In 2009 (*i.e.*, shortly after the *Siemens* and other nine-figure enforcement actions brought new urgency to FCPA compliance), the company “recognize[ed] that its

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22. 15 U.S.C. § 78m(b)(6).

23. *Id.*

24. Cease-and-Desist Order ¶ 35.

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internal controls with respect to certain of its international operations were weak.”²⁵ Bio-Rad conducted an internal evaluation and proposed reforms, including reforms that were resisted by the managers involved with the Russia business.²⁶ Shortly thereafter, Bio-Rad discovered unnamed problems in the course of an internal audit and voluntarily disclosed to the U.S. government the foregoing issues immediately *before* retaining independent counsel to conduct an internal investigation.²⁷ Bio-Rad then “voluntarily” expanded its investigation to “to cover a large number of additional potentially high-risk countries.”²⁸ The investigation involved more than 100 interviews, millions of documents and full cooperation with the government over a four-and-a-half year period, during which time it terminated a number of employees and revamped its compliance program.²⁹

“Even with its voluntary disclosure and cooperation, . . . Bio-Rad will be writing the U.S. Treasury a check for over \$55 million.”

In other words, at around the time many companies began seriously to focus on the FCPA, Bio-Rad recognized that its internal controls could be improved. It set about doing so, despite being hampered by some managers involved in wrongdoing. It discovered a possible violation, which it immediately disclosed to the government. Bio-Rad then conducted a multi-year investigation, expanding it to well beyond the originally disclosed wrongdoing, and undoubtedly incurred significant legal and other professional fees, all the while cooperating with the government.

In the end, Bio-Rad discovered a total of \$7.5 million in “improper payments” over a five year period: \$4.6 million in Russia³⁰ and a further \$2.9 million Vietnam and Thailand.³¹ By definition, the payments in Vietnam and Thailand did not violate the anti-bribery provisions of the FCPA. Even with its voluntary disclosure and cooperation, however, Bio-Rad will be writing the U.S. Treasury a check for over \$55 million. On the positive side for Bio-Rad, the company avoided the imposition of a monitor or a compliance consultant, a significant factor that may have been highly persuasive to the company as it decided to accept the proposed resolution.

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25. NPA at A-6 ¶ 21.

26. *Id.* at A-6 ¶¶ 21-22.

27. See NPA at 1; Cease-and-Desist Order at 9, ¶ I.

28. Cease-and-Desist Order at 9, ¶ I.

29. See NPA at 1; Cease-and-Desist Order at 9, ¶¶ I, J.

30. Cease-and-Desist Order ¶ 18.

31. See *id.* ¶¶ 30, 36 (\$2.2 million in Vietnam and \$708,608 in Thailand).

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Perhaps even more important is the broader issue whether the settlement furthers key premises of FCPA enforcement, including the goal of focusing the incentives to self-report on serious, systemic issues. As also noted below, the Bio-Rad settlements highlight two other risks arising from U.S. regulatory policy, namely, the risk that, in the name of remediation, companies may find themselves compelled to abandon high-risk markets rather than work to reform behavior in those markets, and, relatedly, that U.S. enforcement may result in multiple penalties for the same conduct when a foreign government directly affected by misconduct later steps in.

Aggressive Use of Books and Records Provisions

As was the case in the *Diebold* action last year, the SEC chose to use the books and records provisions to reach conduct not covered by the anti-bribery provisions of the FCPA.³² In calculating Bio-Rad's "illicit profits" (all of which were disgorged), the SEC states that Bio-Rad gained \$67.8 million in revenue,³³ generating profits of \$35.1 million.³⁴ The SEC did not explain how it calculated Bio-Rad's 52% profit margin. That said, 43% of the revenue on which this profit was calculated (as well as just under 40% of the improper payments) relate to the company's business in Vietnam and Thailand.

We have previously noted that the use of disgorgement in connection with books and records and internal controls charges is a dubious extension of the equitable remedy.³⁵ In both *Diebold* and *Bio-Rad*, it is unclear how profits made from payments (not illegal under U.S. law) are somehow illicit gains — not from the payments themselves — but rather from a failure properly to record or control them.

Regardless of one's position on that question as a general matter, Bio-Rad's voluntary disclosure and cooperation presented a strong set of equities for the SEC's refraining from employing its dubious theory of disgorgement, which has no logical limit. Just as there is no necessary connection between the books and records and internal controls provisions and "something that looks like bribery," the SEC could just as easily seek disgorgement resulting from any number of local law violations, from off-the-books payments to avoid social insurance charges for employees, to

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32. See *SEC v. Diebold, Inc.*, No. 1:13-cv-01609, Complaint (D.D.C. 2013), ¶¶ 32-34 (allegations relating to commercial bribery in Russia); Paul R. Berger, Sean Hecker, Andrew M. Levine, Bruce E. Yannett & Philip Rohlik, "The Government's \$48 Million ATM Withdrawal: Is it Time to Start Sweating Again?" *FCPA Update*, Vol. 5, No. 3 (Oct. 2013), <http://www.debevoise.com/insights/publications/2013/10/fcpa-update> (follow "Download PDF" hyperlink).
33. Cease-and-Desist Order ¶¶ 18, 30, 36 (\$38.6 million for Russia, \$23.7 million for Vietnam and \$5.5 million for Thailand).
34. *Id.* ¶ 2.
35. Paul R. Berger, Steven S. Michaels & Amanda M. Ulrich, "Do FCPA Remedies Follow FCPA Wrongs? 'Disgorgement' in Internal Controls and Books and Records Cases," *FCPA Update*, Vol. 3, No. 5 (Aug. 2011). <http://www.debevoise.com/insights/publications/2011/08/fcpa-update> (follow "Download PDF" hyperlink).

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fraudulent transfer-pricing tax schemes that having nothing to do with substantive U.S. law. Disgorgement to U.S. authorities by parent-company entities in these scenarios was hardly the intent of Congress when it passed the books and records provisions in 1977, and only emphasizes some of the recurring remedial issues underlying U.S. enforcement, including the risk that overreaching by U.S. authorities will undermine the legitimacy of the United States' efforts to encourage domestic law enforcement overseas. Nevertheless, assuming that, absent intervention by the courts or Congress, the SEC was going (and will continue) to adhere to its theory of "no-charged-bribery" disgorgement, the determination by the DOJ and SEC not to seek a monitor or compliance consultant is some reward for Bio-Rad's handling of the matter once the improper conduct first came to light a number of years ago.

Remediation in High-Risk Jurisdictions

As with most enforcement actions, Bio-Rad received credit for instituting compliance enhancements and taking other remediation measures.³⁶ It has also agreed to compliance enhancements set forth in Attachment B ("Corporate Compliance Program") to the NPA. However, the Bio-Rad enforcement action also touches on issues in remediation which deserve to be noted, even if doing so only invites additional questions.

Most interesting here are Bio-Rad's remedial actions taken in Thailand and Vietnam and the contrast between how they are treated in the NPA. The NPA specifically notes, as an example of a "significant remedial action," that Bio-Rad "clos[ed] its Vietnam office after learning of improper payments by its Vietnam subsidiary."³⁷ Ceasing operations in a country is a reasonable business judgment in reaction to a finding of improper payments (especially considering recent FCPA penalties in the \$50 million range). That said, it is disappointing to see this act being listed as a "significant remedial action." As the SEC recently learned in connection with the sequel to the *Watts Water* enforcement action,³⁸ an enforcement policy that encourages U.S. companies to flee high-risk jurisdictions results in their being replaced by companies with much less noble motives, potentially resulting in an enforcement policy which benefits the U.S. Treasury while doing little or nothing to reduce the incidence of corruption abroad.

In contrast to Vietnam, Bio-Rad decided to stay in Thailand. In Thailand, Bio-Rad's subsidiary was run by its "[l]ocal majority owners . . . until 2011, when Bio-Rad

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36. See NPA at 1; Cease-and-Desist Order at 9.

37. NPA at 1.

38. See *SEC v. China Valves Technology Inc.*, No. 1:14-cv-01630, Complaint (D.D.C. 2014); see also *In re Watts Water Tech., Inc. and Leesen Chang*, SEC Admin. Proc. 3-14585 (Oct. 13, 2011), <http://www.sec.gov/litigation/admin/2011/34-65555.pdf> (issuing cease-and-desist order).

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bought out their interest in the company.”³⁹ Buying out business partners is, again, perfectly sound business judgment and, in many cases, the only way to remove those responsible for the illicit payments. However, doing so unquestionably involves making a payment to the very people alleged to have been responsible for the improper behavior (abandoning an investment could also provide a windfall to the local partner, but without a direct payment). Bio-Rad bought out its partners during the period in which it was cooperating with the government and one can infer that the agencies were alerted to the company’s exit from that business. Unlike its actions respecting its Vietnam business, Bio-Rad’s decision to remain in Thailand also gives it the opportunity to implement the compliance program in Attachment B to the NPA. If successful, it could become a model in Thailand, possibly reducing the incidence of bribery in that country.

“Unlike its actions respecting its Vietnam business, Bio-Rad’s decision to remain in Thailand also gives it the opportunity to implement the compliance program [negotiated with the government]. If successful, it could become a model in Thailand[.]”

Unlike Bio-Rad’s disposition of its Vietnam business, its buying out of its Thai partners is not mentioned as remedial measure in the NPA. Both actions are perfectly legitimate business decisions and examples of hard questions facing American business every day. Why does one act deserve special mention while the other does not? And if one is to be singled out, why not single out the one which could benefit, rather than abandon, local victims of corruption?

Vietnamese Investigation

After the announcement of the Bio-Rad enforcement action by the United States, the Vietnamese Minister of Health requested the opening of an investigation into Bio-Rad in Vietnam.⁴⁰ Vietnam, which ranks 116th on the Transparency International corruption perceptions index,⁴¹ is not particularly well known either for anti-corruption enforcement or for affording due process during investigations. Despite its low ranking, corrupt conduct in Vietnam has received relatively little attention in DOJ and SEC FCPA investigations, with most enforcement attention that has an

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39. Cease-and-Desist Order ¶ 9.

40. See Lien Chau, “Vietnam Reviews Bio-Rad Equipment Purchases in Bribery Scandal,” *Thanh Nien News* (Nov. 7, 2014), <http://www.thanhniennews.com/society/vietnam-reviews-biorad-equipment-purchases-in-bribery-scandal-33664.html>.

41. See Transparency International, “Corruption Perceptions Index 2013,” <http://www.transparency.org/cpi2013/results>.

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Asia component devoted to China. As recently as last April, reportedly no publicly disclosed investigation by U.S. issuers involved Vietnam.⁴² Whether motivated by a desire to demonstrate its opposition to corruption in light of a particularly public scandal or by a desire to ensure that not all of the penalties associated with bribery in Vietnam go to the U.S. Treasury, Vietnam's investigation is another example of the challenge of dealing with multiple jurisdictions and follow-on investigations.

The facts that the follow-on action by Vietnam was announced after the DOJ and SEC acted, and that there appears to have been no coordination or cooperation by U.S. and Vietnamese authorities only highlights the risk of the "dual sovereign" doctrine under U.S. law, pursuant to which U.S. regulators are under no compulsion to reduce the penalties they may lawfully impose based on fines and other remedies available elsewhere. Given the reality of U.S. regulators' sense of primacy in anti-corruption matters implicating U.S. issuers, Bio-Rad's abandonment of its Vietnamese market may have been very logically motivated by a desire to insulate Bio-Rad from future Vietnamese legal proceedings. It is worth noting, however, that the Bio-Rad NPA specifically requires Bio-Rad to "cooperate fully" with foreign investigations, "[a]t the request of the [DOJ]."⁴³ It will be interesting to see if the DOJ makes such a request in relationship to the Vietnamese proceedings.

**"Bio-Rad's abandonment of its Vietnamese market may
have been very logically motivated by a desire to insulate
Bio-Rad from future Vietnamese legal proceedings."**

Conclusion

The government, especially the SEC, likes to use the filing of cases as an opportunity to send a message to companies to help inform and shape behavior in our capital markets. When that message is crystal clear, industry and market participants can learn from that message and act accordingly. When, however, that message is muddled, as it sometimes is with respect to the true benefits of self-reporting and the use of equitable relief such as disgorgement, then industry and market

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42. See Richard L. Cassin, "The Corporate Investigations List (April 2014)," *FCPA Blog* (Apr. 2, 2014), <http://fcpcbog.squarespace.com/blog/2014/4/2/the-corporate-investigations-list-april-2014.html>.

43. NPA at 2.

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participants suffer. We look forward to clearer, more crystallized messaging from the agencies.

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