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Watergate Special Prosecution Force Created...The Birth of the FCPA

On November 2, 1973, the Watergate Special Prosecution Force was established in the Department of Justice. For those of you too young to remember, the Watergate scandal began with the arrest of five men for breaking and entering into the Democratic National Committee (DNC) headquarters at the Watergate complex in Washington D.C. on June 17, 1972. The Federal Bureau of Investigation (FBI) connected cash found on the burglars to a *slush fund* used by the Committee for the Re-Election of the President, a fundraising group for the Nixon campaign. It appears that the slush funds had not been used just for domestic political contributions, but also for paying bribes to foreign government officials with an eye to landing contracts abroad. According to an article in the Wall Street Journal, "Stanley Sporkin, the SEC's enforcement director from 1974 to 1981, had watched the Watergate hearings on television and was curious about how the companies had booked the illegal contributions. Digging further, he and his staff found that some companies also dipped into the secret funds to pay off foreign officials, with an eye to landing contracts abroad."

Fast forward a couple of years to 1975....Lockheed Aircraft Corporation admitted to the SEC that it had slipped at least \$22 million under the table to foreign government officials and political organizations. Lockheed claimed that it was doing what was necessary to carry out business in certain parts of the world. In fact, at that time there was no law prohibiting this behavior. In 1977, for the first time, bribery of foreign government officials was made illegal in the United States with the passage of the Foreign Corrupt Practices Act. In 1994 Lockheed found itself once again under the microscope. This time it was alleged that one of the divisions of Lockheed paid a member of the Egyptian legislature for his assistance in the sale of three aircraft to the Egyptian government. The legislator was allegedly paid monthly retainer fees and also was given a commission of \$600,000 for each aircraft purchased by Egypt. Fast forward to 2005....Lockheed was in the midst of a merger negotiation between itself and the Titan Corporation when suddenly the merger was aborted after Lockheed discovered that the Titan Corporation had apparently used *slush funds* to assist in the re-election of the president of Benin, Africa.

It might have taken thirty years but apparently Lockheed had learned its lesson, and wasn't about to repeat its past mistakes...Good Job!

The practical pointer for today's blog is this - A company with a long record of FCPA compliance may acquire another firm and find itself responsible for the legal consequences of the target firm's less rigorous historical practices. Although the acquirer played no role in the historical FCPA violations of the target firm, the Justice Department may nevertheless hold the acquiring company responsible for the target's past misdeeds. Since an acquiring company may be held criminally liable for FCPA violations committed by the target company both before and after closing, pre-closing due diligence is critical to assessing risks and avoiding liability. Additionally, the acquiring entity should take the following steps to shield themselves from successor liability: they should request measures for good governance, ask for proof of accurate recordkeeping and anti-bribery efforts, seek audit rights and request that the target

firm make both anti-corruption representations as well as written commitments to abide by anti-corruption laws. If the acquirer cannot adequately ensure that the target has not (a) violated the FCPA or (b) taken steps to isolate the exposure for the acquiring company, then the acquiring company should probably heed the steps taken by Lockheed and terminate the acquisition plans.

Consider the following policy language:

When the Company pursues the acquisition of any business entity or its assets, the Company Compliance Officer or his or her designee will determine whether to conduct an anti-corruption due diligence investigation and if so, the scope of the investigation based on the level of anti-corruption risk associated with the proposed acquisition. To assess the anti-corruption risk, the Company Compliance Officer or his or her designee may consider:

- the level of perceived corruption in the countries in which the proposed acquisition target has operations;
- the proposed acquisition target's type of operations, including whether those operations have required the proposed acquisition target to have contact with any Government Official; and
- the amount of money involved in the proposed acquisition.

When the Company Compliance Officer or his or her designee elects to conduct an anti-corruption due diligence investigation of a proposed acquisition target, that investigation shall assess the acquisition target's compliance with the FCPA and all other applicable anti-corruption and/or anti-bribery laws. The information to be obtained in connection with such investigation shall be specified by, and the written results of such investigation shall be reviewed by, the Company Compliance Officer or his or her designee.

As part of the due diligence process, the Company should ask for written confirmation from the target or its shareholders that the target is in full compliance with the FCPA and all other applicable anti-corruption and/or anti-bribery laws. Investigations should be carefully documented and relevant documents, such as due diligence questionnaires, reports, and compliance certificates should be maintained by the Company Compliance Officer or his or her designee.

In addition to having a full investigation performed on the target company, consider the following additional activities:

- What actions of the target company "touch" government officials? Review contracts and records relating to customs, taxes, visas, licenses, permits, importation of equipment, etc.
- Who acts on behalf of the company when interacting with the government to secure the above? Do they retain third parties? If so, review all third-party contracts with agents, consultants, distributors, joint venture partners, freight forwarders, customs brokers. Did the target company perform due diligence when it hired these third parties? Did the contracts with these third parties contain the contractual language, with representations and warranties that you, the acquiring company, require? Do an audit of the invoices and supporting documentation on the third parties from the files located at the target company's offices.

We will pick up this series again on Monday, November 5th. On November 5, 1920, Two Oklahoma law enforcement personnel helped uncover the details of a liquor raid. During the investigation the authorities took into custody one gallon of corn juice, one quart of gasoline, and one live prisoner! Seems like a natural segue into "2010 Gun Sting raid". Stay Tuned.

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