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Hot Issues in International M&A

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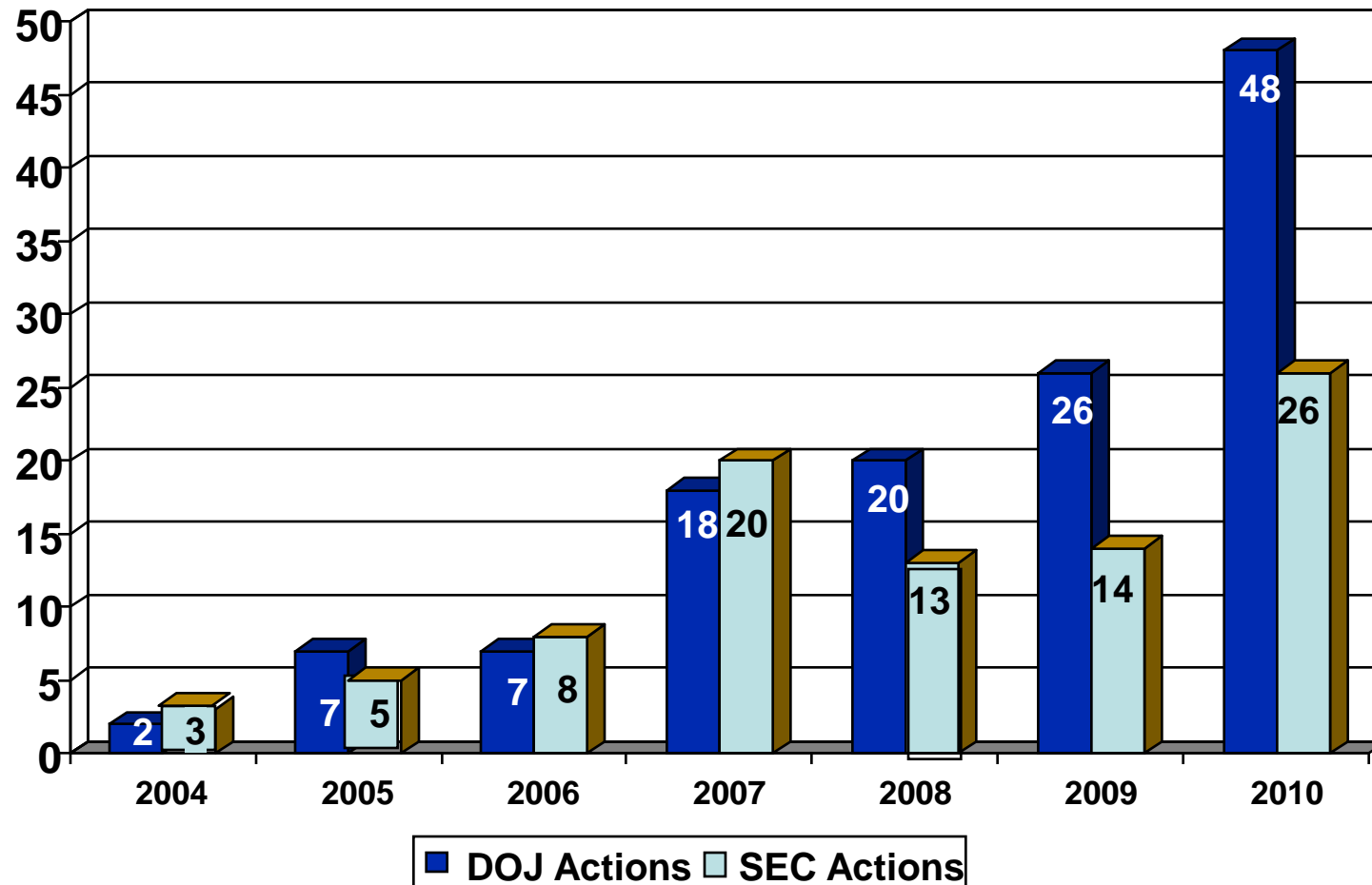


Foreign Corrupt Practices Act ("FCPA") + Other Anti-bribery Regimes





FCPA Enforcement Upswing





Punishing U.S. Fines

COMPANY	YEAR	AMOUNT (millions)
Siemens	2008	\$800
KBR/Halliburton	2009	\$579
BAE Systems	2010	\$400
Snamprogetti Netherlands B.V./ENI S.p.A.	2010	\$365
Technip S.A.	2010	\$338
JGC	2011	\$219
Daimler	2010	\$185
Alcatel-Lucent	2010	\$137
Johnson & Johnson	2011	\$70



International Landscape



The 2010 Corruption Perceptions Index Measures the Perceived Levels of Public-Sector Corruption in 178 Countries Around the World



To Whom Does the FCPA Apply?

- **U.S. person, U.S. company**
- **“Issuers” under the Securities Exchange Act**
- **Individuals and corporations**
 - **If they authorize or assist someone else**
 - **If they conspire to violate the FCPA**
 - **If they commit part of violation in the U.S.**
- **Parent corporations can be liable for conduct of subsidiaries**



FCPA Anti-Bribery Provision

Prohibits:

- **Corruptly paying or offering to pay**
- **Anything of value**
- **To a foreign official**
- **Directly or indirectly**
 - **Risk from 3rd party payments**
 - **Actual knowledge not required**
- **To assist in obtaining or retaining business**



Anything of Value

- **Anything**
 - **Cash and cash equivalents (e.g., gift cards)**
 - **Gifts**
 - **Meals and entertainment**
 - **Travel**
 - **Consulting deals, jobs, internships**
- **Need not be a direct benefit to the official**
 - **Spouse or family member**
 - **Favorite charity**



Who is a Foreign Official?

- **Government employee/party official**
 - **Need not be high level official**
 - **Employee of state-owned enterprise (SOE”)**
 - **Local law not determinative**
 - **Doctors, steel-mill managers, airport officials**



Third Parties & FCPA Exposure

- **Exposure for acts of local subsidiaries, joint ventures, consultants, agents and distributors**
- **Consultants and distributors (or others in the sales channel) frequently create FCPA exposure**
- **Joint ventures and equity investments can create exposure depending on level of control**



UK Bribery Act 2010

- **July 2011 effective date**
- **Public and commercial bribery**
- **New offense: failure to prevent bribery**
 - **Affirmative defense of “adequate procedures” to prevent bribery**
- **If company does business in UK, liability can attach wherever conduct occurred worldwide**



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Managing FCPA Risk in M&A



Successor Liability

- **M&A transaction does not terminate liability for past conduct of acquired entity**
- **Acquirer can be held liable under theories of successor liability**
- **There is no sure-fire “structural solution” to avoid FCPA liability – stock purchases, mergers, and asset purchases all can lead to liability**



Asset Purchases: Protection From FCPA Exposure?

- **An asset purchaser may be responsible even for liabilities not expressly assumed if:**
 - **The deal is a de facto merger**
 - **The purchasing corporation is merely a continuation of the selling corporation**
 - **Deal designed to escape liability**
- **Regulators' view will not be driven by deal structure**



Risk Mitigation: Pre-Acquisition

- **Know what you are buying**
- ***Thoughtful* due diligence is key**
 - **Deliberate ignorance is not a defense**
 - **Due diligence helps to understand the nature of any FCPA risk and to identify areas that need to be addressed**
 - **Form due diligence questionnaires are only a start**



FCPA Risk: 8 Key Questions

- 1. Does the company operate in countries or environments known for a higher than normal degree of corrupt behavior?**
- 2. Is the company reliant on a business model or distribution network that is high risk?**
- 3. Are the company's customers government entities, including state-owned or financed companies?**
- 4. Are government approvals and licenses needed to operate in the high risk countries?**



FCPA Risk: 8 Key Questions (cont'd.)

- 5. Does the company have significant transactions affecting import/export and customs in the high risk countries?**
- 6. Is the company involved in any joint ventures with quasi-governmental entities?**
- 7. Does the company rely on relationships with third party agents or consultants who interact with foreign officials on the company's behalf?**
- 8. Are there red flags which might indicate a higher than normal degree of exposure?**



Contractual Risk Allocation

- **Adjust purchase terms**
 - **Purchase price adjustment**
 - **Claw back provisions**
 - **Indemnification**
- **Updated Reps and Warranties**
- **Pre-Closing FCPA Diligence Covenants**
- **Related Conditions to Closing**



The “Halliburton Procedure”

- **When thorough pre-acquisition due diligence is not possible**
- **Stringent, immediate post-closing efforts persuaded DOJ not to apply successor liability**
 - **Halliburton presented the DOJ a comprehensive due diligence work plan, organizing the effort into high risk (90 days), medium risk (120 days), and low risk (180 days)**
 - **Extensive reporting to DOJ, remediation and training**

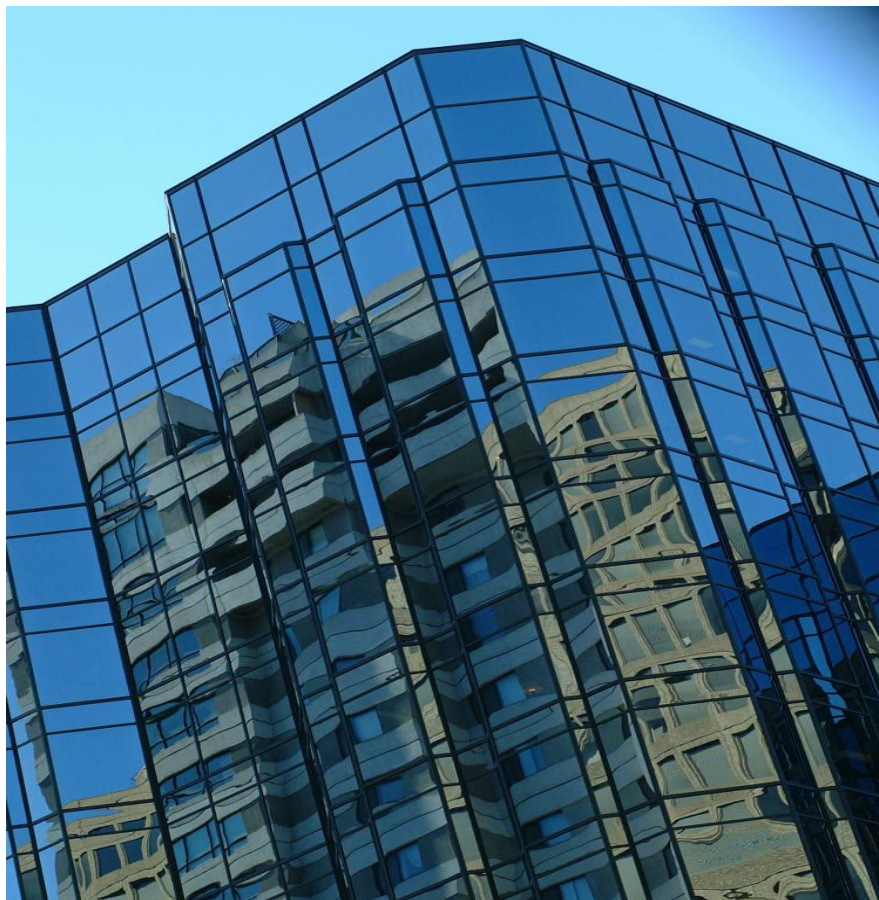


Post-Closing Compliance Plan

- **Based on results of due diligence and risk assessment develop compliance plan**
 - **Set tone at the top from Day One**
 - **Immediately bring new entity into compliance structure**
 - **Policies and procedures**
 - **Sufficiently detailed to give meaningful guidance**
 - **Translated into relevant languages**



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Office of Foreign Assets Control ("OFAC") Overview



Legal Authority for U.S. Trade Sanctions

The Office of Foreign Assets Control (“OFAC”) is responsible for administering U.S. economic sanctions and trade embargoes

The legal authority is based on numerous laws applying different regimes to different countries

The scope of the U.S. embargoes, including countries covered, can change at any time

- February 20, 2011 Libya Sanctions under Executive Order 13566**



General Prohibitions

- **An OFAC sanctions program will utilize various tools to achieve specific policy objectives, including:**
 - **import prohibitions**
 - **export prohibitions**
 - **financial sanctions and**
 - **new investment sanctions**
- **OFAC also identifies specially designated nationals (“SDNs”), which includes terrorists, narcotic traffickers, and foreign terrorist organizations**
 - **Over 6,000 SDNs currently identified**

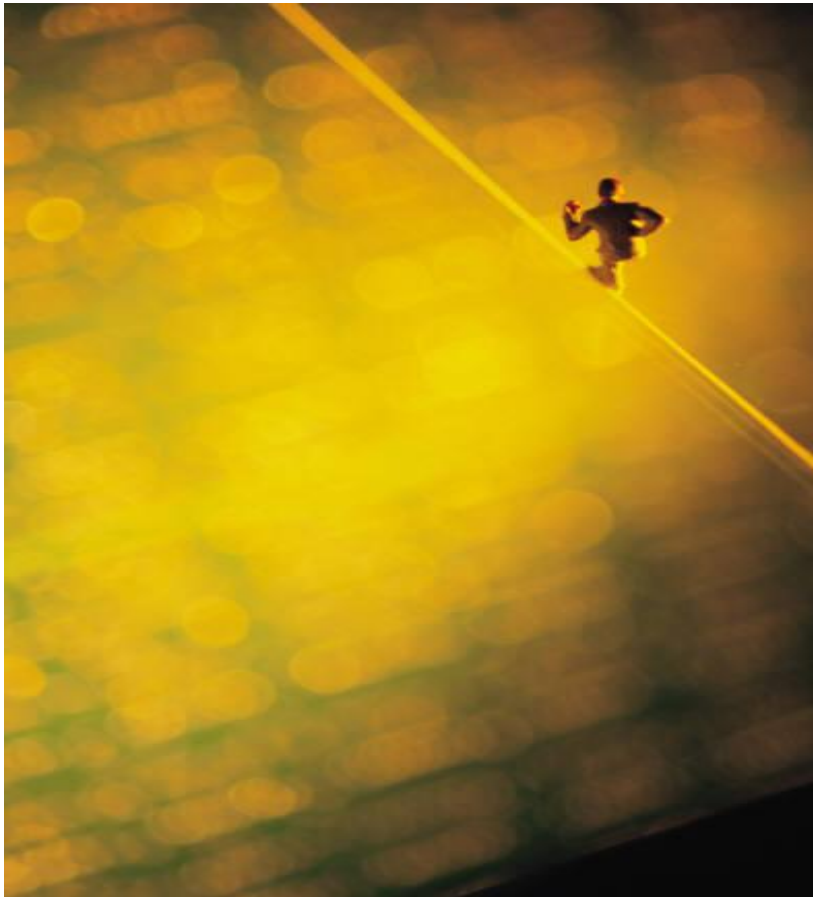


Program-Specific Regulations

- Each embargo is unique with its own regulatory regime.
- Several common themes and provisions:
 - Applicable to U.S. Persons. The jurisdictional scope of each embargo extends to “U.S. persons,” generally any U.S. citizen; permanent resident alien; entity organized under the U.S. laws, including foreign branches; and any person in the United States.
 - No facilitation or evasion. Each embargo has a provision prohibiting “facilitation” or “evasion” of a prohibited transaction.



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Managing OFAC Risk in M&A



Diligence

- **Acquisitions of non-U.S. persons can be challenging**
 - Are they doing business in sanctioned countries or with sanctioned individuals?
 - Are any of their employees “U.S. persons” and unknowingly violating law?
- **Consider how target business will evolve under new U.S. ownership**
 - Services and support provided from U.S.?
 - U.S. persons to assume management and control?



Contract Terms and Integration

- **Covenants to ensure no expansion of OFAC risk**
- **Obligation to disengage from sanctioned countries before closing**
- **Robust reps and warranties and indemnity where seller is a U.S. person**
- **Ensure compliance and no “facilitation” in post-closing management of business**



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