

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

Transparency International (TI) recently released, in draft form for consultation, a White Paper entitled “*Anti-Bribery Guidance for Transactions.*” Although this version was preliminary draft, available for a commentary period and the final version is to be released later in October, 2011, the guidance provided is well worth reviewing and will be of great use to any company engaged in international transactions. We will therefore review this document over two postings. In Part I, we will review the risks to companies involved in international mergers and acquisitions. In Part II, we will discuss the due diligence process suggested by Transparency International for such transactions.

The TI White Paper suggests that there are greater forces driving compliance than simply compliance with anti-corruption and anti-bribery laws such as the Foreign Corrupt Practices Act (FCPA) and UK Bribery Act. A company engaging in an international acquisition should also strive to avoid “the potential financial reputational damage that may come from investing in or purchasing a company associated with bribery [or corruption]. TI suggests the following should be actively explored:

- Has bribery taken place historically?
- Is it possible or likely that bribery is currently taking place?
- If so, how widespread is it likely to be?
- Does the target have in place an adequate anti-bribery program to prevent bribery?
- What would the likely impact be if bribery, historical or current, were discovered after the transaction had completed?

Financial, legal or reputational risk can have a significant impact the valuation or a transaction or its desirability. The White Paper sets forth the following potential impacts for a purchaser or investor of anti-corruption or anti-bribery risks during due diligence.

	Legal Risk	Financial Risk	Reputational Risk
Current bribery and/or corruption in target company discovered during transaction	High	High	Medium
Current bribery and/or corruption in acquired company discovered in post-transaction	High	High	High
Historical bribery and/or corruption discovered during transaction	High to low depending on jurisdiction	High to low depending on jurisdiction	Low to medium
Historical bribery	High to medium	High to medium	High to medium

and/or corruption in acquired company discovered post-transaction	depending on jurisdiction	depending on jurisdiction	
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The White Paper lists some of the specific consequences where investments are made in a company which has a history of bribery or corruption.

- Both the target company and the acquiring company may place themselves (and their respective Boards of Directors) at risk of criminal or civil fines and penalties.
- The market value of the target company may be overstated and hence damage the overall financial position of an acquiring company. Conversely, such conduct may diminish the asset value and returns for a target company.
- The business instability brought by such conduct. This can include aborted business deals where both sides work long and hard only to have the transaction fall apart near the end of the process.
- The acquired business may not simply be dysfunctional but acquiring such a business may also introduce a culture into the acquiring company which will negatively impact it and bring about employee de-motivation.
- Even if there are no individual criminal actions brought against target or acquiring company employees, there can be a long period of disruption due to lengthy and costly investigations and the attendant reputational damage and media attention.

However, the White Paper also speaks to several positive benefits from appropriate due diligence. These include:

- Management quality indicator which will assess the positive qualities of the target company, including the quality of the target’s management and its overall systems, including books and records. TI believes that the evidence from due diligence of anti-corruption and anti-bribery programs is an indicator of overall management quality.
- The mitigation benefits available if a bribery incident is discovered. Under the UK Bribery Act, if a company has “*Adequate Procedures*” it may have a defense to a claim of violation of the Act. Under the FCPA, evidence of a *best practices* compliance program can be used in mitigation of any alleged violation of the FCPA.
- The reputational gain which an acquiring company may be able to gain with regulators or investors if it can show integrity and responsibility during the due diligence process.
- Lastly an acquiring company can go a long way in meeting investor expectations in the area of Environmental, Social and Governance (ESG) risks, which can include corruption and bribery, during M&A transactions.

These factors listed by TI in its White Paper provide the compliance practitioner strong ammunition when confronted with a management which fails to understand the need for a robust due diligence in a mergers and acquisition transaction. The White Paper does not focus on the regulatory aspect but more on the market reasons for engaging in the appropriate anti-corruption and anti-bribery due diligence. This White Paper continues the trend which emphasizes the business reasons for compliance and we find it a welcome addition to the vast TI store of White Papers and other guidance for the compliance practitioner.

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