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Intensified International Trade and Security Policies Can Present Challenges for Corporate Transactions

Harry L. Clark & Sanchitha Jayaram†

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Introduction

The U.S. government's approach to enforcement of international trade and security policies has recently taken on a new emphasis, and this change can substantially affect prospects for corporate transactions. In recent years:

- The U.S. government prevented an initial attempt to acquire a U.S. communications business by Hong Kong and Singapore companies because of national security concerns about wiretapping.¹ The government approved a subsequent attempt only after the removal of

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1. See Dennis K. Berman, *Bush Is Expected To Approve Global Crossing Deal*, WALL ST. J., Sept. 9, 2003, at A2; Yochi J. Dreazen and Dennis K. Berman, *Who Can Tap Undersea Wires Is Key to Merger*, WALL ST. J., July 17, 2003, at B1 (discussing the U.S. government's national security concerns over the Singapore company's efforts to acquire Global Crossing, the U.S. communications business).

the Hong Kong company from the transaction and the imposition of extensive security measures.²

- Several congressional committees held extensive, public hearings regarding allegations of improper military-related assistance in connection with two U.S. satellite manufacturers' commercial dealings with Chinese satellite launch service authorities.³ One of the two companies and its former corporate owner agreed to pay \$32 million in civil penalties to resolve an administrative enforcement action that arose from the matter.⁴
- The Commerce Department assessed liability against a company for alleged export violations committed by another business before the company acquired that business notwithstanding that: (1) the acquisition was a purchase of assets rather than the purchase of the entity that held these assets and (2) the entity that held the assets continued to exist.⁵
- Parties to a merger discovered that the target medical supply company had made irregular payments to foreign government health-care providers.⁶ The target company pleaded guilty to Foreign Corrupt Practices Act violations and paid \$2.5 million in penalties to the Justice Department and the Securities and Exchange Commission.⁷
- The U.S. Treasury Department initiated rulemaking proceedings to implement vastly expanded anti-money laundering policies.⁸
- The Defense Department withdrew \$1 billion in contracts with and suspended the future government contracting eligibility of a leading U.S. satellite launch provider due to government bidding viola-

2. See Berman, *supra* note 1; *F.C.C. Clears Global Crossing-S.I.T. Deal*, N.Y. TIMES, Oct. 9, 2003, at C8, available at <http://query.nytimes.com/gst/abstract.html?res=F0091EF83D5B0C7A8CDDA90994DB404482> [hereinafter *F.C.C.*]; Bryan Lee, *No Plan B Yet, Says ST Telemedia*, STRAITS TIMES, Aug. 1, 2003, available at http://www.it.asia1.com.sg/newsdaily/news003_20030801.html.

3. See, e.g., House Report 105-851 of the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China (May 25, 1999), <http://www.access.gpo.gov/congress/house/hr105851/>; Jeff Gerth, *2 Companies Pay Penalties for Improving China Rockets*, N.Y. TIMES, Mar. 5, 2003, at A9.

4. Consent Agreement of Hughes Electronics Corporation and Boeing Satellite Systems, at 3 (Mar. 4, 2003) (available at the U.S. Dep't of State, Bureau of Political Military Affairs and copy on file with authors); see Betsy Taylor, *Boeing, Hughes Settle Charges of Giving Technical Rocket Data to China*, ASSOCIATED PRESS, Mar. 5, 2003; Renae Merle, *Hughes, Boeing Settle with U.S.*, WASH. POST, Mar. 6, 2003, at E1, available at 2003 WL 15464242.

5. Sigma-Aldrich Business Holdings, Inc., Case Nos. 01-BXA-06, 07, and 11, at 11 (Aug. 29, 2002), http://www.bxa.doc.gov/Enforcement/CaseSummaries/sigma_aldrich_alj_decision_02.pdf [hereinafter Sigma-Aldrich] (denying the acquiring company's motions for summary judgment); Natalia W. Geren et al., *Do Due Diligence for Acquisition. Don't Buy an Enforcement Action*, THE EXPORT PRACTITIONER, Sept. 2003, at 4.

6. See *infra* Part II (regarding Syncor).

7. *Id.*

8. *Infra* Part I.F.

tions.⁹ The provider's government contracting eligibility was reinstated more than eight months after the penalties were levied.¹⁰

The U.S. government has historically treated enforcement of international trade and security restrictions very seriously, but recently has increased the intensity and breadth of its monitoring and enforcement efforts. This is attributable to at least two developments. The first and most important development is the post-September 11, 2001 war on terrorism. International trade and security restrictions are considered to be critical means of fighting this war.¹¹ The Commerce Department's Bureau of Industry and Security observed in a recent report: "As demonstrated by recent events, having a modern, coherent, and effective system of dual-use export controls—to prevent terrorists, rogue states, and proliferators of weapons of mass destruction from accessing sensitive U.S.-origin goods and technology—is now more important than ever."¹² Similarly, the 2002 National Money Laundering Strategy specifies that "[f]ollowing the terrorist attacks against the United States on September 11, 2001, we . . . recognize that the fight against money laundering is integral to the war against terrorism. . . ."¹³

The second development is the recent strengthening of policies and enforcement regarding corporate ethics and liability. This development was heralded by the prosecutions of Enron and Arthur Andersen and the enactment of the Sarbanes-Oxley statute.¹⁴ In declaring "a new era of corporate integrity," President Bush has emphasized that "[w]e will hold corporate criminals accountable for their misdeeds, and we will deter corporate crimes by enforcing tough penalties."¹⁵ There is a particular focus on international business. Secretary of Commerce Donald Evans recently stated:

Companies must not export bribery and corruption into the markets where they do business, any more than they would engage in such behavior at home.

...

We hope that every country will join us to create an international "no safe haven" policy that denies corrupt officials the ability to travel freely, launder

9. Renae Merle, *U.S. Strips Boeing of Launches*, WASH. POST, July 25, 2003, at A1; Edward Wong, *Lockheed Shooting for Stars as Space Unit Gets Big Break*, N.Y. TIMES, Aug. 2, 2003, at C1.

10. Andy Pasztor, *Boeing Nears Accord on Rocket Work*, WALL ST. J., Apr. 5, 2004, at A3.

11. See, e.g., U.S. Department of Commerce Bureau of Industry and Security, *Streamlining and Strengthening Export Controls*, <http://www.bxa.doc.gov/ea.html> (last visited Nov. 16, 2003).

12. *Id.*

13. U.S. Department of Treasury and U.S. Department of Justice, 2002 NATIONAL MONEY LAUNDERING STRATEGY 15 (2002), at <http://www.ustreas.gov/press/releases/docs/monlaund.pdf>.

14. 15 U.S.C.S. § 7245; see, e.g., Christina R. Salem, Note, *The New Mandate of the Corporate Lawyer After the Fall of Enron and the Enactment of the Sarbanes-Oxley Act*, 8 FORDHAM J. CORP. & FIN. L. 765 (2003).

15. President George W. Bush, Remarks at the Corporate Fraud Conference (Sept. 26, 2002), at <http://www.whitehouse.gov/news/releases/2002/09/20020926-10.html>.

money and act with impunity.¹⁶

This Article first reviews principal U.S. international trade and security policies. These policies include the Exon-Florio Amendment to the Defense Production Act, export and reexport controls, economic sanctions, industry security rules, the Foreign Corrupt Practices Act, anti-money laundering requirements, and anti-boycott rules. Next, it examines how enforcement of these international trade and security policies can affect corporate transactions and the post-transaction company or companies. Lastly, this Article discusses steps that parties to transactions can take to minimize risks in connection with trade and security policies and thereby successfully complete transactions in the face of those policies.

I. Overview of Relevant International Trade and Security Policies

A. Exon-Florio Amendment

The Exon-Florio Amendment to the Defense Production Act directly addresses certain types of corporate transactions. The statute authorizes the President to block non-U.S. acquisitions of and mergers with U.S. business operations if they are determined to be a potential threat to U.S. security interests.¹⁷ The President can order divestment in the case of a concluded transaction that could threaten U.S. security interests.¹⁸

Parties to a planned corporate transaction can seek government clearance that would preclude adverse action under the Exon-Florio Amendment.¹⁹ The Committee on Foreign Investment in the United States (the "CFIUS") administers the clearance process.²⁰ CFIUS is chaired by the Secretary of Treasury and is comprised of the Secretaries of Commerce, Defense, Homeland Security, and State, along with the Attorney General and six White House officials.²¹

Government examinations under the Exon-Florio Amendment have been virtually dormant during many years since its enactment in 1988.²²

16. Commerce Secretary Donald L. Evans, Remarks at the Third Annual Forum on Fighting Corruption and Safeguarding Integrity (May 31, 2003), at http://www.osec.doc.gov/ogc/occic/SecEvans_GFIII.htm.

17. 50 U.S.C. app. § 2170(d) (2000).

18. *Id.*

19. 31 C.F.R. §§ 800.401, 800.402 (2004).

20. 31 C.F.R. § 800.203 (2004).

21. U.S. Department of Treasury, Committee on Foreign Investments in the United States (CFIUS), *Exon-Florio Provision*, <http://www.treas.gov/offices/international-affairs/exon-florio/index.html> (last visited Nov. 12, 2003) [hereinafter CFIUS]. The other six White House officials in CFIUS are the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, the Director of the Office of Management and Budget, the U.S. Trade Representative, and the Chairman of the Council of Economic Advisers. *Id.*

22. See, e.g., Rick Wartzman, *Keep Out: Foreign Moves To Buy U.S. Defense Firms Face Higher Hurdles, New National Security Law Orders Tighter Scrutiny in Wake of Thomson Case—Would Clinton Be Tougher?*, WALL ST. J., Nov. 2, 1992, at A6 (noting that, before the Thomson case, CFIUS gave only thirteen out of 700 transactions more than a cursory review).

In the 1990s, parties typically only bothered to seek a clearance from the CFIUS if the transaction directly implicated military activity, such as the acquisition of a defense contractor.²³

The Exon-Florio Amendment has received considerably more attention in recent years, particularly since the terrorist attacks of September 2001: In a series of Exon-Florio cases, the Bush Administration has made it clear that it intends to scrutinize inbound investment more closely and that it has adopted a broader view of the types of transactions that could threaten national security. For example, the Defense Department sought to block acquisition of a semiconductor lithography company, Silicon Valley Group ("SVG"), by the Dutch lithography company ASML. The parties ultimately obtained a clearance for the transaction, but it required a ruling by the President himself.²⁴

The government also intensely scrutinized several acquisitions of telecommunications and Internet service companies. These have included Nippon Telegraph and Telephone's purchase of Verio,²⁵ Vodafone's purchase of AirTouch,²⁶ and Deutsche Telekom's purchase of VoiceStream.²⁷ The Hong Kong-based conglomerate Hutchison Whampoa abandoned its efforts to acquire the bankrupt U.S. telecommunications company Global Crossing after encountering severe resistance in the Exon-Florio clearance process.²⁸ Only after a lengthy review and agreement on extensive network security measures did the President and the Federal Communications Commission approve Singapore Technologies Telemedia's acquisition of the U.S. firm.²⁹ Bush Administration officials contended that the proposed transactions would threaten the national security even though the principal Global Crossing asset at issue was a commercial telecommunications network.³⁰

23. See, e.g., Peter Spiegel, *FBI Highlights Concern over Foreign Takeovers: National Security Fears Dog Company Acquisition Plans*, FIN. TIMES, Jan. 11, 2001, International Economy, at 9.

24. Press Release, ASM Lithography, ASM Lithography N.V. Completes Acquisition of Silicon Valley Group, Inc. (May 22, 2001), <http://asml.com/NASApp/asmldotcom/show.do?ctx=5869&rid=981>; Press Release, ASM Lithography and Silicon Valley Group Receive CFIUS Approval To Proceed with Merger (May 3, 2001), <http://asml.com/NASApp/asmldotcom/show.do?ctx=5869&rid=982>; Press Release, Presidential Review Required for Approval of the Merger of ASM Lithography and SVG (Apr. 24, 2001), <http://asml.com/NASApp/asmldotcom/show.do?ctx=5869&rid=983>.

25. See *NTT Closes \$5.5 Billion Offer for Net-Service Provider Verio*, ASIAN WALL ST. J., Sept. 1, 2000, at 8.

26. See *FCC Wireless Bureau Approves AirTouch-Vodafone Merger*, WASH. TELECOM NEWSWIRE, June 22, 1999.

27. See Press Release, Hutchison Whampoa Limited, VoiceStream Wireless Notes Completion of CFIUS Review (May 1, 2001); *Telecommunications: U.S. Green Light for Deutsche Telekom/VoiceStream Merger*, TECH EUR., May 11, 2001.

28. See *Hutchison Whampoa Pulls Out of Global Crossing Deal*, TELECOM MARKETS, May 20, 2003 (Telecom Markets); Berman, *supra* note 1.

29. See *Company News; Global Crossing Sale Clears One U.S. Hurdle*, N.Y. TIMES, Sept. 20, 2003, at C4, available at <http://query.nytimes.com/gst/fullpage.html?res=9E07E6DE113AF933A1575AC0A9659C8B63> [hereinafter *Global Crossing*]; Berman, *supra* note 1; F.C.C., *supra* note 2.

30. See Berman, *supra* note 1.

The process of obtaining clearance can complicate and delay transactions enormously, even when clearance is ultimately provided. The clearance process is designed to last no more than 80 days.³¹ However, the parties are often forced to withdraw and refile their transaction notifications, thereby restarting the process, under threat that the transaction will otherwise be blocked.³² In addition, clearance has increasingly been made contingent on adjustments to the planned transactions and commitments to take a variety of actions that are deemed to obviate perceived security concerns. ASML, for example, committed to sell an SVG subsidiary and to maintain investment in SVG at a specified level, and not to transfer operations out of the United States to receive clearance for its merger.³³

In the telecommunications acquisitions, the parties have executed "network security agreements" that authorize the Federal Bureau of Investigation ("FBI") to access facilities for wiretaps and electronic surveillance.³⁴ In the Global Crossing cases, the proposed acquirers had signaled a willingness to take extraordinary steps to forestall security concerns in their efforts to obtain Exon-Florio clearances. Hutchison Whampoa indicated that it would place its investment interest in a trust controlled by an unrelated proxy group comprised of four eminent U.S. citizens. This arrangement would have made Hutchison's interest a completely passive investment. Nonetheless, Hutchison ultimately withdrew its investment offer to Global Crossing because it did not believe that an Exon-Florio clearance was forthcoming.³⁵ Singapore Technologies Telemedia received final approval only after it agreed to an extensive network security agreement, which included, among other measures, a requirement that all customer and network data be stored in the United States, appointment of a third party compliance auditor,³⁶ and authorization of U.S. law enforcement agencies to access facilities for wiretaps and electronic surveillance.³⁷

Most recently, the CFIUS intensely scrutinized the acquisition of IBM's personal computer business by Lenovo Group Ltd., a Chinese company.³⁸ The CFIUS cleared the transaction on the condition that IBM transfer personnel from IBM units not being acquired to a separate facility.³⁹

31. 31 C.F.R. §§ 800.404, 800.504 (2004).

32. 31 C.F.R. § 800.505.

33. Press Release, ASM Lithography, ASML Sells Tinsley Laboratories Inc. to SSG Precision Optronics Inc. (Dec. 19, 2001). The SVG subsidiary involved was Tinsley Laboratories, a lens polishing company that CFIUS deemed a threat to national security because it had been involved in the Strategic Defense Initiative nine years ago. Ian Cameron, *Litho Merger Has Strings Attached*, ELECTRONICS TIMES, May 14, 2001, at 6.

34. See e.g., Berman, *supra* note 1.

35. See *Hutchison Whampoa Pulls Out of Global Crossing Deal*, *supra* note 28; Lee, *supra* note 2.

36. F.C.C., *supra* note 2.

37. Berman, *supra* note 1.

38. *Government Oversight Body CFIUS Clears IBM PC Division's Sale to China's Lenovo*, DAILY REPORT FOR EXECUTIVES (BNA), Mar. 11, 2005, at A-19 [hereinafter *CFIUS Clears IBM PC Division's Sale*].

39. *Id.*

High-profile Exon-Florio cases like ASML/SVG, Hutchison/Global Crossing, Deutsche Telekom/VoiceStream, and IBM/Lenovo can become politically charged, as members of Congress and others sometimes urge the Administration to block transactions.⁴⁰ For example, Congress held hearings on the Deutsche Telekom/VoiceStream case.⁴¹

B. Export Controls

The United States restricts exports and reexports of a variety of goods, services, software, and technology. There are many different U.S. export control regimes, but the foremost sets of regulations are the Export Administration Regulations (the "EAR")⁴² and the International Traffic in Arms Regulations (the "ITAR").⁴³ The EAR, administered by the Commerce Department, apply to commercial items that are considered to have security-sensitive applications, including a variety of electronics, aerospace, and machine tool products ("dual use" items).⁴⁴ The ITAR are administered by the State Department and are targeted toward military items ("defense articles" and "defense services").⁴⁵ Both the EAR and the ITAR include lists of items that are subject to license requirements.⁴⁶ Companies that produce or export defense articles or provide defense services must register with the State Department.⁴⁷

Paradoxically, export controls apply to some purely domestic transfers. Under "deemed export" rules of the EAR, a license can be required to release controlled technology or software to a foreign national in the United States.⁴⁸ The transfer is deemed to be an export to the recipient's home country.⁴⁹ Deemed export restrictions can be particularly onerous in connection with employment of non-U.S. engineers because providing

40. See, e.g., *CFIUS Clears IBM PC Division's Sale*, *supra* note 38 (noting that three House of Representatives committee chairmen wrote to the Secretary of the Treasury in opposition to clearance of IBM/Lenovo transaction); Spiegel, *supra* note 23 (discussing governmental opposition to the Deutsche Telekom/VoiceStream transaction); Frank J. Gaffney, Jr., *Defense Fire-Sale Redux*, WASH. TIMES, Apr. 3, 2001, at A15 (discussing various governmental opposition to the ASML/SVG transaction).

41. See, e.g., *Foreign Government Ownership of American Telecommunications Companies: Hearings Before the Subcommittee on Telecommunications, Trade and Consumer Protection of the Committee on Commerce*, 106th Cong. (2000) [hereinafter *Telecom Hearings*].

42. 15 C.F.R. pts. 730-74 (2004).

43. 22 C.F.R. pts. 120-30 (2004).

44. See 15 C.F.R. § 774, *supp.* 1 (2004).

45. 22 C.F.R. § 120.1(a) (2004).

46. For the EAR, see the Commerce Control List in 15 C.F.R. § 774, *supp.* 1. For the ITAR, see the U.S. Munitions List in 22 C.F.R. § 121.1 (2004).

47. 22 C.F.R. pt. 122 (2004). Even a manufacturer who merely produces and does not export the defense articles needs to register. 22 C.F.R. § 122.1 (2004).

48. 15 C.F.R. § 734.2(b)(2)(ii) (2004); see also 22 C.F.R. § 120.17(4)-(5) (2004) (defining "export" in part as "disclosing . . . or transferring technical data to a foreign person, whether in the United States or abroad; or . . . [p]erforming a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad"). However, deemed export restrictions do not apply to releases to lawful permanent residents of the United States. 15 C.F.R. § 734.2(b)(2)(ii); 22 C.F.R. § 120.15 (defining "U.S. person" to include lawful permanent residents).

49. 15 C.F.R. § 734.2(b)(2)(ii).

the employees with access to controlled technical data and software in, for example, databases, can require a license.⁵⁰

Export controls can complicate corporate transactions in several ways. First, the parties often must have outstanding export licenses and other export approvals transferred from pre-transaction parties to parties surviving the transaction.⁵¹ Similarly, corporate transactions can occasion the need for amended or new ITAR registrations,⁵² which require government approval.⁵³

Second, the ITAR require notifications regarding certain types of corporate transactions involving ITAR-registered companies.⁵⁴ Furthermore, the State Department sometimes conducts informal reviews of the transaction and the parties in connection with transfers of export approvals and registration changes. These reviews purportedly ensure that the party resulting from the transaction is a reliable exporter. Reviews under the ITAR are particularly searching with respect to acquisitions of U.S. operations by non-U.S. companies.

Third, the State Department takes the position that some foreign acquisitions, particularly those involving aircraft and satellites, actually require State Department approval.⁵⁵

Fourth, export control considerations can bear substantially on Exon-Florio cases. CFIUS members evaluate parties' export control practices, including their compliance records, in assessing whether the proposed transaction would threaten the national security.⁵⁶ A target U.S. company that generates or holds sensitive export-controlled technology tends to create more intensive scrutiny under Exon-Florio.⁵⁷

Fifth, an acquiring company can be held liable for export control violations committed by the acquired operations before the transaction. In 1997, Sigma-Aldrich Corporation ("SAC") purchased the assets of Research Biochemicals Limited Partnership ("RBLP").⁵⁸ In assessing penalties against SAC for RBLP's pre-acquisition violations, the Commerce Department established that successor liability applied notwithstanding that: (1) the acquisition was a purchase of assets rather than the purchase of a com-

50. See 15 C.F.R. § 734.2(b)(2)(ii).

51. See 22 C.F.R. § 122.4 (2004).

52. See *id.*

53. See, e.g., 22 C.F.R. § 122.4(d).

54. 22 C.F.R. § 122.4. For instance, a registrant must notify the State Department of "any intended sale or transfer to a foreign person of ownership or control of the registrant" *Id.*

55. 22 C.F.R. § 123.8 (2004).

56. See W. Robert Shearer, Comment, *The Exon-Florio Amendment: Protectionist Legislation Subject to Abuse*, 30 Hous. L. Rev. 1729, 1762-66 (1993) (describing how export controls impacted investigations of transactions involving Fairchild Industries/Matra, Unisoft Group/CMC, and LTV/Thomson); cf. CFIUS Clears IBM PC Division's Sale, *supra* note 38 (noting that three Congressmen complained that the transaction under review "may transfer . . . export-controlled technology' to the Chinese government.").

57. See *id.*

58. See *Exporter Agrees To Pay \$1.76M Fine*, J. COM. ONLINE, Nov. 4, 2002, Trade, at WP.

pany itself, which under common law generally does not subject the surviving entity to successor liability and (2) the entity that held the assets before the transaction, RBLP, continued to exist.⁵⁹

Similarly, EDO Corporation of New York acquired Condor Systems of California and, in the process, acquired its existing export compliance problems.⁶⁰ In 2003, Condor Systems pled guilty to two violations concerning false statements in an export license application for a signal processing system sold to the Swedish military.⁶¹ EDO Corporation ultimately signed a consent agreement requiring payment of \$2.5 million in civil penalties for the violations.⁶²

Export control violations can result in severe civil and, potentially, criminal penalties.⁶³ Civil penalties can include not just civil fines but also orders forbidding participation in export transactions.⁶⁴ An export “denial order” can be cataclysmic for companies that rely heavily on export sales.

C. Economic Sanctions

The Treasury Department administers economic sanctions against a variety of countries, governments, and private parties. These sanctions include broad trade and investment embargos against, presently, Burma,⁶⁵ Cuba,⁶⁶ Iran,⁶⁷ Sudan,⁶⁸ and Syria.⁶⁹ To varying degrees, these sanctions broadly forbid economic interaction with the target country.⁷⁰ The Treasury Department’s economic sanctions also include measures forbidding any dealings with designated individuals and entities, including the following: (1) parties affiliated with a sanctioned country or government (“specially designated nationals”),⁷¹ (2) parties connected to terrorist

59. Sigma-Aldrich, *supra* note 5, at 7-8, 10-11; see Geren, *supra* note 5, at 4.

60. See EDO, *A Military Contractor, To Buy Rival's Assets*, N.Y. TIMES, May 29, 2002, at C4; Renae Merle, *EDO Buys Darlington To Boost Defense Business*, WASH. POST, Mar. 12, 2003, at E05.

61. *State Settlement Deal Makes Due Diligence a Future Requirement*, THE EXPORT PRACTITIONER, May 2004, at 9-10; Henry K. Lee, *Guilty Plea by Condor About Sale; False Statements to Federal Officials*, S.F. CHRON., Feb. 11, 2003, at B5.

62. Consent Agreement of EDO Corporation, at 2 (Nov. 24, 2003) (available at the U.S. Dep’t of State, Bureau of Political Military Affairs and copy on file with authors).

63. 22 U.S.C. § 2778(c) (2000); 50 U.S.C. § 1705; 15 C.F.R. § 764.3 (2004); 22 C.F.R. § 127.3.

64. 15 C.F.R. § 764.3(a)(2). These orders are called “denial of export privileges.” *Id.*

65. Exec. Order No. 13,310, 31 C.F.R. pt. 537 (2004); 68 Fed. Reg. 44,853 (Jul. 30, 2003).

66. 31 C.F.R. pt. 515 (2004).

67. 31 C.F.R. pt. 560 (2004).

68. 31 C.F.R. pt. 538 (2004).

69. Exec. Order No. 13,338, 69 Fed. Reg. 26,751 (May 13, 2004).

70. See, e.g., 31 C.F.R. §§ 560.201, 560.204 (2004) (prohibiting “the importation into the United States of any goods or services of Iranian origin” and “the exportation, reexportation, sale, or supply . . . of any goods, technology, or services to Iran . . .”); 31 C.F.R. § 537.201 (2004) (prohibiting “new investment in Burma by United States persons . . .”).

71. See, e.g., 31 C.F.R. § 500.306, app. A (2004).

activities,⁷² and (3) parties connected to the international narcotics trade.⁷³

After the September 2001 terrorist attacks, the Bush Administration began sanctioning not only terrorists themselves but also parties who provide support for or are “otherwise associated with” a terrorist.⁷⁴ The breadth of this sanction is unclear. For example, it is not known whether the Treasury Department would apply it against a European electrical utility that provides power to an entity that is found to be involved in international terrorism.

Under a variety of circumstances, consummation of corporate transactions can violate economic sanctions requirements. For example, a U.S. company’s purchase of a Mexican firm’s assets can violate the Cuba embargo if the acquired assets include supply contracts with a Cuban entity.⁷⁵ Likewise, investment in a joint venture could constitute a violation if other participants include sanctioned parties, such as certain Burmese government entities.⁷⁶

Often, connections between a target foreign business and a sanctioned country will not necessarily preclude, categorically, acquisition of the business by a U.S. company, but such connections will nonetheless present difficult compliance challenges after the transaction is completed. This might be the case, for example, if a U.S. company acquires even a minority interest in the shares of a German company that engages in significant sales to an Iranian customer. The acquiring U.S. company will probably encounter difficult questions about its compliance with a provision that prohibits U.S. persons from “facilitating” actions by non-U.S. persons that would violate the embargo if undertaken by a U.S. person.⁷⁷

Sanctions compliance can be challenging because requirements are typically broad and are often ambiguously drafted. At the same time, the Treasury Department sometimes adopts far-reaching, and often undocumented, interpretations of the regulations.⁷⁸ As with export controls, violations of economic sanctions can result in severe criminal and civil penalties.⁷⁹

72. 31 C.F.R. pts. 595-97 (2004). Such parties include governments that support international terrorism and terrorist organizations. *Id.*

73. 31 C.F.R. pt. 598 (2004). All parties individually sanctioned by the Office of Foreign Assets Control are listed at 31 C.F.R. ch. V, app. A.

74. Exec. Order No. 13,224, 31 C.F.R. § 594.201 (2004).

75. See 31 C.F.R. § 515.201(b) (2004).

76. See Exec. Order No. 13,310, 68 Fed. Reg. 44,853 (July 30, 2003).

77. See 31 C.F.R. § 560.208 (2004) (“[N]o United States person . . . may approve, finance, facilitate, or guarantee any transaction by a foreign person where the transaction by that foreign person would be prohibited . . . if performed by a United States person or within the United States.”).

78. The court in *Looper v. Morgan*, for example, characterized a certain Treasury Department Office of Foreign Assets Control interpretation as “Kafkaesque.” *Looper v. Morgan*, 1995 U.S. Dist. LEXIS 10241, at 49 (S.D. Tex. 1995).

79. See, e.g., 50 U.S.C. § 1705 (2000).

D. Industrial Security Rules and Other Government Contracting Requirements

Government contracting regulations can also complicate corporate transactions. Foremost among these are “industrial security” rules designed to safeguard classified and other sensitive information held by government contractors.

Industrial security requirements are administered through the “National Industrial Security Program” (“NISP”)⁸⁰ and are embodied principally in the NISP Operating Manual.⁸¹ As to defense contracting, the NISP is administered by the Defense Department’s Defense Security Service.⁸²

Application of NISP requirements is based on administration of one or more “facility clearances” held by the contractor.⁸³ The government will not disseminate classified information to a contractor unless it has a facility clearance.⁸⁴ In turn, contractor employees must have “personnel clearances” to access classified information.⁸⁵ There are a variety of specialized industrial security rules, such as communications security or “COMSEC” rules administered by the National Security Agency (“NSA”).⁸⁶

NISP rules regarding “foreign ownership, control, or influence” (“FOCI”)⁸⁷ can present major challenges for acquisitions of U.S. government contractors or contracting operations by non-U.S. persons. These rules generally preclude a contractor from obtaining or retaining a facility clearance if it is under FOCI.⁸⁸ The NISP Operating Manual provides for a variety of methods to negate FOCI risk, including special contractual arrangements and, if necessary, voting trust or proxy agreements whereunder U.S. citizens exercise the voting rights of a foreign owner.⁸⁹ Addressing FOCI is especially difficult if the acquisition target holds particularly sensitive data, such as Top Secret or COMSEC information.⁹⁰

Government contracting requirements apart from industrial security rules can also give rise to unusual risks for parties to corporate transactions. For example:

80. Exec. Order No. 12,829 (Jan. 6, 1993), 58 Fed. Reg. 3,479 (Jan. 8, 1993), as amended by Exec. Order No. 12,885 (Dec. 14, 1993), 58 Fed. Reg. 65,863 (Dec. 16, 1993), available at <http://www.fas.org/irp/offdocs/eo12829.htm>.

81. DEP’T OF DEFENSE, NAT’L INDUS. SECURITY PROGRAM OPERATING MANUAL, DoD 5220.22-M (Jan. 1995) [hereinafter NISPOM]; DEP’T OF DEFENSE, NAT’L INDUS. SECURITY PROGRAM OPERATING MANUAL SUPPLEMENT, DoD 5220.22-M-Sup (Feb. 1995).

82. Defense Security Service, *DSS: Who We Are*, at <http://www.dss.mil/aboutdss/index.htm> (last updated Feb. 16, 2005).

83. NISPOM, *supra* note 81, at §§ 2-100, 2-102.

84. *Id.* at § 2-100.

85. *Id.* at § 2-104.

86. DEP’T OF DEFENSE, COMSEC SUPPL. TO INDUS. SECURITY MANUAL FOR SAFEGUARDING CLASSIFIED INFORMATION, DoD 5220.22-S (Mar. 1988).

87. NISPOM, *supra* note 81, at § 2-300-2-311.

88. *Id.* at § 2-301.

89. *Id.* at § 2-306.

90. *See id.* at § 2-302.

- Limitations on transfers of interests in government contracts can complicate financing arrangements;⁹¹
- In some circumstances, corporate transactions can trigger the need for government approval to “novate” government contracts;⁹²
- Contracting “debarment” and “suspension” rules can render a target company ineligible for new contracts;⁹³
- The U.S. government ordinarily has special rights to terminate government contracts;⁹⁴
- There are myriad special bases for legal exposure in government contracting, including liability for providing the government with inaccurate or incomplete product cost or pricing data;⁹⁵ and
- Government contracting rules provide for special, and sometimes disadvantageous, rules regarding allocation of intellectual property rights.⁹⁶

As with export controls, government contracting considerations can weigh heavily on the government’s decisionmaking in Exon-Florio cases. Ordinarily, the CFIUS will not clear the transaction unless it is evident that the parties will take requisite steps to satisfy industrial security requirements. In the case of Hutchison Whampoa’s proposed acquisition of Global Crossing, however, the most intrusive safeguards against FOCI were found to be insufficient to neutralize national security risks.⁹⁷

E. Foreign Corrupt Practices Act and Other Antibribery Measures

The Foreign Corrupt Practices Act (the “FCPA”) was enacted in 1977 to combat U.S. companies’ use of illicit payments to advance their business interests overseas.⁹⁸ It has two components: (1) a prohibition on overseas corrupt payments and related actions⁹⁹ and (2) accounting control and recordkeeping rules that companies subject to U.S. securities regulations must observe, regardless of whether they are involved in foreign activities.¹⁰⁰

The FCPA antibribery provisions forbid not only direct bribery of foreign officials by U.S. companies, but also any payment by a U.S. company if that company knows or is aware of a “high probability” that the funds

91. See 31 U.S.C. § 3727 (2000); 41 U.S.C. § 15 (2000); 48 C.F.R. §§ 32.802, 32.805 (2004).

92. See *id.*

93. 48 C.F.R. §§ 3.104-7, 9.405 (2004).

94. 48 C.F.R. §§ 49.502, 49.503, 52.249-1 to 52.249-7 (2004).

95. 48 C.F.R. § 15-407-1 (2004).

96. See 48 C.F.R. pt. 27 (2004).

97. *Hutchison Whampoa Pulls Out of Global Crossing Deal*, *supra* note 28; Lee, *supra* note 2.

98. See Lynne Baum, *Foreign Corrupt Practices Act*, 35 AM. CRIM. L. REV. 823, 823 (1998).

99. 15 U.S.C. §§ 78dd-1 to -3 (2000). This prohibition applies to issuers, domestic concerns, and persons other than issuers and domestic concerns. *Id.*

100. 15 U.S.C. § 78m(b) (2000); see also Baum, *supra* note 98 for an overview of the FCPA.

will be subsequently used for a corrupt payment.¹⁰¹ This potential exposure for payments to third parties, particularly overseas sales agents and joint venture partners, is often the most challenging aspect of the FCPA.¹⁰²

In 1997, the United States, the other twenty-eight members of the Organization for Economic Cooperation and Development, and five non-members entered into the Convention on Combating Bribery of Foreign Public Officials in International Business (the "Antibribery Convention").¹⁰³ The Antibribery Convention commits the signatories to establish bribery of foreign officials as a criminal offense, as the FCPA does.¹⁰⁴ Parties to a corporate transaction should consider the potential for risk of liability under other countries' measures against overseas bribery that implement the Antibribery Convention in addition to the FCPA.¹⁰⁵

Companies may be fined up to \$2 million or twice the gain or loss from the offense for violations of the FCPA antibribery provisions.¹⁰⁶ Individuals can be fined up to \$250,000 or up to twice the gain or loss, imprisoned up to five years, or both for willful violations.¹⁰⁷ Companies and individuals can also be assessed up to \$10,000 per violation in civil penalties.¹⁰⁸

F. Anti-Money Laundering Requirements

Since 1986, U.S. law has forbidden money laundering as a substantive

101. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3); see also § 78dd-1(f)(2)(B) (defining knowledge as the awareness "of a high probability of the existence of a particular circumstance, unless the person actually believes that such circumstance does not exist").

102. For example, Lockheed Martin's planned acquisition of Titan Corporation was recently called off in light of a Justice Department foreign bribery investigation into payments made by Titan's international consultants that were uncovered during due diligence reviews. Ellen McCarthy, *Post-9/11 Mergers Brought Problems; Government Service Firms Often Leaped Before They Looked*, WASH. POST, Aug. 23, 2004, at E01; *Titan Facing SEC Charges*, WASH. POST, June 5, 2004, at E02.

103. See Nora M. Rubin, Comment, *A Convergence of 1996 and 1997 Global Efforts to Curb Corruption and Bribery in International Business Transactions: The Legal Implications of the OECD Recommendations and Convention for the United States, Germany, and Switzerland*, 14 AM. U. INT'L L. REV. 257, 283-88 (1998); *Banning Bribes, Finally*, WASH. POST, Nov. 28, 1997, at A26; see also International Anti-Bribery and Fair Competition Act of 1997, Pub. L. No. 105-366, 112 Stat. 3302 (1998).

104. Rubin, *supra* note 103, at 286-87.

105. See Organization for Economic Cooperation and Development (OECD), *Steps Taken and Planned Future Actions by Participating Countries To Ratify and Implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, June 19, 2003 (describing legislation promulgated by OECD countries to implement the Antibribery Convention), available at <http://www.oecd.org/dataoecd/50/33/1827022.pdf>.

106. 15 U.S.C. §§ 78dd-3(e), 78ff; 18 U.S.C. § 3571 (2000).

107. *Id.* See generally Bus. Info. Serv. for the Newly Independent States, *Foreign Corrupt Practices Act Antibribery Provisions*, at <http://www.bisnis.doc.gov/bisnis/fcp1.htm> (last visited Nov. 13, 2003); U.S. Dep't of Justice and U.S. Dep't of Commerce, *Foreign Corrupt Practices Act Antibribery Provisions*, at <http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm> (last updated Mar. 15, 2002) (discussing penalties including the Alternative Fines Act).

108. 15 U.S.C. § 78dd-3(e).

crime.¹⁰⁹ The Money Laundering Control Act prohibits parties from knowingly conducting a financial transaction that involves proceeds from specified types of unlawful activity.¹¹⁰

The Congress strengthened and expanded U.S. anti-money laundering requirements through the "USA Patriot Act," enacted shortly after the September 2001 terrorist attacks.¹¹¹ As required by this legislation, the Treasury Department is engaged in a broad variety of rulemakings to extend anti-money laundering requirements to a range of commercial sectors beyond banks and other traditional financial institutions.¹¹² Newly regulated industries include, for example, securities brokerages, mutual funds, and operators of credit card systems.¹¹³

In addition to expanding the scope of regulated industries, the USA Patriot Act imposes broader anti-money laundering obligations on financial institutions. For example, covered entities must now establish a protocol for screening customers.¹¹⁴ At a minimum, firms must institute procedures for verifying the identity of anyone wanting to open an account, maintaining records of the information used to verify identity, and establishing whether the potential customer appears on terrorist lists provided to the firm by any governmental agency.¹¹⁵

The USA Patriot Act also requires firms to establish due diligence measures designed to prevent and detect money laundering.¹¹⁶ Mandatory

109. Jonathan H. Hecht, Comment, *Airing the Dirty Laundry: The Application of the United States Sentencing Guidelines to White Collar Money Laundering Offenses*, 49 AM. U. L. REV. 289, 294-96 (1999) (providing a background on money laundering legislation).

110. 18 U.S.C. §§ 1956(a), 1957(a) (1994), amended by Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1301-02 (1996).

111. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (to be codified at 31 U.S.C. § 5318) [hereinafter Patriot Act].

112. See Press Release, U.S. Dept. of Treasury Office of Public Affairs, Treasury Department USA Patriot Act Update (Apr. 23, 2002), at <http://www.treas.gov/press/releases/po3034.htm>.

113. *Id.*

114. Patriot Act § 326.

115. 31 U.S.C. § 5318(l)(2). For final rules regarding customer identification programs, see 31 C.F.R. pt. 103 (2004). For examples of previous rulemakings, see Customer Identification Programs for Financial Institutions, 68 Fed. Reg. 55,335 (Sept. 25, 2003); Customer Identification Programs for Banks, Savings Associations, Credit Unions and Certain Non-Federally Regulated Banks, 68 Fed. Reg. 25,090 (May 9, 2003); Customer Identification Programs for Broker-Dealers, 68 Fed. Reg. 25,113 (May 9, 2003); Customer Identification Programs for Futures Commission Merchants and Introducing Brokers, 68 Fed. Reg. 25,149 (May 9, 2003); Customer Identification Programs for Mutual Funds, 68 Fed. Reg. 25,131 (May 9, 2003). For a Treasury Department notice of proposed rulemaking for customer identification programs, see Customer Identification Programs for Certain Banks Lacking a Federal Functional Regulator, 68 Fed. Reg. 25,163 (May 9, 2003).

116. Patriot Act § 312. For final rules implementing Section 312, see 31 C.F.R. pt. 103. For examples of previous rulemakings including sample proposed, interim, and final rules implementing Section 312, see Special Due Diligence Programs for Certain Foreign Accounts, 67 Fed. Reg. 48,348 (July 23, 2002); Amendment to the Bank Secrecy Act Regulations—Requirement that Brokers or Dealers in Securities Report Suspicious Transactions, 67 Fed. Reg. 44,048 (July 1, 2002); Due Diligence Anti-Money Laundering Programs for Certain Foreign Accounts, 67 Fed. Reg. 37,736 (proposed May 30, 2002).

anti-money laundering programs must include, for example, designation of a compliance officer, an ongoing employee training program, and an independent audit function to test the programs.¹¹⁷

Given expanded anti-money laundering requirements and enforcement priorities, anti-money laundering due diligence is increasingly important for corporate transactions.

G. Anti-Boycott Rules

The United States maintains two sets of policies designed primarily to prevent compliance with the Arab League's boycott of Israel. These measures are complex and counterintuitive in many respects.

The Commerce Department administers rules that generally forbid U.S. companies and their controlled overseas affiliates, among other things, to refuse, knowingly agree to refuse, or require any other person to refuse to do business with or in Israel.¹¹⁸ Separately, federal income tax provisions withhold a variety of tax benefits from U.S. taxpayers if they or certain related parties "participate in or cooperate with" the boycott.¹¹⁹ Both sets of measures require U.S. companies to report certain types of boycott-related communications.¹²⁰ However, many aspects of the two sets of measures are inconsistent, with certain activities implicating one but not the other set.

117. Patriot Act § 352. For final rules implementing Section 352, see 31 C.F.R. pt. 103. For examples of previous rulemakings including proposed and interim final rules issued under Section 352, see Anti-Money Laundering Programs for Commodity Trading Advisors, 68 Fed. Reg. 23,640 (proposed May 5, 2003); Anti-Money Laundering Programs for Investment Advisors, 68 Fed. Reg. 23,646 (proposed May 5, 2003); Anti-Money Laundering Program Requirements for "Persons Involved in Real Estate Closings and Settlements," 68 Fed. Reg. 17,569 (advance notice of proposed rulemaking Apr. 10, 2003); Anti-Money Laundering Programs for Dealers in Precious Metals, Stones or Jewels, 68 Fed. Reg. 12,155 (correction of Mar. 13, 2003 to proposed rule); Anti-Money Laundering Programs for Businesses Engaged in Vehicle Sales, 68 Fed. Reg. 8,568 (advanced notice of proposed rule Feb. 24, 2003); Anti-Money Laundering Programs for Travel Agencies, 68 Fed. Reg. 8,571 (advanced notice of proposed rule Feb. 24, 2003); Anti-Money Laundering Programs for Dealers in Precious Metals, Stones or Jewels, 68 Fed. Reg. 8,480 (proposed Feb. 21, 2003); Anti-Money Laundering Programs for Insurance Companies, 67 Fed. Reg. 68,540 (correction of Nov. 12, 2002 to proposed rule); Anti-Money Laundering Programs for Financial Institutions, 67 Fed. Reg. 21,110 (Apr. 29, 2002); Anti-Money Laundering Programs for Money Services Businesses, 67 Fed. Reg. 21,114 (Apr. 29, 2002); Anti-Money Laundering Programs for Mutual Funds, 67 Fed. Reg. 21,117 (Apr. 29, 2002); Anti-Money Laundering Programs for Operators of a Credit Card System, 67 Fed. Reg. 21,121 (Apr. 29, 2002); Anti-Money Laundering Programs for Insurance Companies, 67 Fed. Reg. 60,625 (proposed Sept. 26, 2002); Anti-Money Laundering Programs for Unregistered Investment Companies, 67 Fed. Reg. 60,617 (proposed Sept. 26, 2002); cf. Recordkeeping and Termination of Correspondent Accounts for Foreign Banks, 67 Fed. Reg. 78,383 (Dec. 24, 2002) (extending time for certain financial institutions to comply with anti-money laundering requirements pursuant to Patriot Act §§ 313(a) and 319(b)); Recordkeeping and Termination of Correspondent Accounts for Foreign Banks, 67 Fed. Reg. 60,562 (Sept. 26, 2002) (to be codified at 31 C.F.R. pt. 103).

118. See 15 C.F.R. § 760.2 (2004).

119. 26 U.S.C. § 999 (2000).

120. 26 U.S.C. § 999(a)(1); 15 C.F.R. § 760.5.

The complexities and obscurities of the anti-boycott requirements can make compliance challenging, especially for companies that do substantial business in the Middle East. Furthermore, following the practice established in the SAC case described above,¹²¹ the Commerce Department recently established that an acquiring company can be held liable for pre-acquisition anti-boycott violations of the target company.¹²²

II. How International Trade and Security Policies Can Affect a Corporate Transaction and Its Outcome

A party planning or executing a corporate transaction should be mindful of three ways in which U.S. international trade and security policies could bear on the transaction and the company or companies emerging from the transaction.

First, the transaction could require or occasion the need for one or more government approvals or clearances under U.S. international trade and security statutes and regulations.

The likelihood that the parties will need to approach the U.S. government for one or more approvals or clearances is particularly pronounced if the transaction entails a non-U.S. party's acquisition of control over U.S. operations. Most obviously, it might be advisable to pursue an Exon-Florio clearance. In addition, however, foreign acquisitions can give rise to a need for export control and industrial security authorizations.

Even in the absence of the need for formal U.S. government approval, there may be sound reasons to meet with U.S. government officials to alert them to the transaction, avoid misunderstandings, and minimize confusion. Because the U.S. government can often be a significant regulator or customer, informal support from U.S. officials can often be helpful. In addition, there may be political reasons to confer with U.S. officials.

Second, compliance issues that require resolution before or after closing could emerge.

Typical compliance concerns might include, for example: "deemed export" violations involving the U.S. acquisition target's employment of Chinese or Russian engineers,¹²³ sanctions violations involving the U.S. acquisition target's arrangements to supply components to a French company because the finished French systems are dedicated to a particular Iranian customer,¹²⁴ foreign corrupt payments involving a U.K. acquisition target's irregular payments to third country government officials,¹²⁵ and an Australian acquisition target's unreported boycott-related inquiries from the Arab League which contravene U.S. requirements because the target company was controlled by a U.S. company.¹²⁶

121. See *supra* Part I.B.

122. Sigma-Aldrich, *supra* note 5.

123. See *supra* Part I.B.

124. See *supra* Part I.C.

125. See *supra* Part I.E.

126. See *supra* Part I.G.

Compliance concerns do not necessarily involve legal violations. For example, the target financial company could lack an adequate anti-money laundering compliance system. This inadequacy might not violate any legal requirements but would nonetheless need to be resolved.¹²⁷

The parties will often want to resolve compliance concerns before closing by taking steps similar to those described in the next section. For example, they should implement changes before closing if the target company is noncompliant or if closure itself would violate economic sanctions requirements. The latter might be true if, for instance, the target is a Mexican firm that has supply relationships with Cuban entities.¹²⁸

Third, compliance or security issues can come to the U.S. government's attention before or after the transaction is consummated.

For a variety of reasons, corporate transactions often result in greater visibility for the parties in the eyes of executive branch agencies and congressional offices. Government officials are exposed to media reports about the transactions. Business rivals worried about the transaction's impact on competitive forces could try to impede it through reports to the government. Employees who are dissatisfied with or apprehensive about how the transaction will affect them may report compliance issues to enforcement officials.

Any number of adverse developments can follow the government's discovery of compliance issues or circumstances that indicate that the transaction will undermine U.S. security interests: an administrative investigation or enforcement proceeding,¹²⁹ a criminal investigation or prosecution,¹³⁰ congressional investigations, hearings, or efforts by congressional offices to affect an executive branch agency's approach to the issue,¹³¹ shareholder suits,¹³² and negative publicity.¹³³ The repercussions from negative publicity can be particularly adverse, as the company might be characterized not simply as a lawbreaker but also as a threat to U.S. security.

Developments of this kind can complicate and delay consummation of the transaction. In addition to cost and inconvenience, such developments

127. See *supra* Part I.F.

128. See *supra* Part I.C.; 31 C.F.R. pt. 515.

129. For example, potential foreign acquisition of U.S. interests triggers an Exon-Florio review process conducted by CFIUS. See, e.g., Berman, *supra* note 1.

130. An example includes investigations and prosecutions for foreign corrupt practices. See, e.g., 15 U.S.C. §§ 78dd-3(e), 78ff.

131. An example of a congressional hearing includes the hearings held in the Deutsche Telekom/VoiceStream case. See *Telecom Hearings*, *supra* note 41.

132. See, e.g., *Howes v. Ashland Oil, Inc.*, No. 87-5939, 1991 U.S. App. LEXIS 10306, at 2 (6th Cir. 1991) (shareholder's derivative action alleging that defendant's management violated the Foreign Corrupt Practices Act).

133. See, e.g., Seth Lubove, *PET Project: Little Noticed Until It was Hit by a Corporate Scandal, Syncor Now Has To Convince Folks That It Still Has a Future*, FORBES.COM, Dec. 23, 2002 (describing consequences for Syncor International's reputation after company officials allegedly made illegal overseas payments), at http://www.forbes.com/forbes/2002/1223/070a_print.html.

can result in extensive legal liability for one or more parties to the transaction or for the company that results from the transaction.

As noted above, irregular payments discovered during due diligence severely disrupted a recent merger between two U.S. healthcare companies. Cardinal Health, the company seeking to acquire Syncor International Corporation ("Syncor"), discovered during due diligence that Syncor affiliates had made illicit payments to government healthcare providers in Taiwan and at least four other countries in connection with the company's sale of health supplies.¹³⁴ As a result, the Justice Department and the Securities and Exchange Commission ("SEC") investigated the company, leading to delay and renegotiation of the transaction.¹³⁵ The merger proceeded only after \$2.5 million in penalties and the resignation of Syncor's chairman.¹³⁶

Similarly, due diligence uncovered problems with alleged corrupt payments in connection with Lockheed Martin's planned acquisition of Titan Corporation.¹³⁷ Unlike the Syncor transaction, Titan could not overcome FCPA compliance concerns by working with U.S. officials following a voluntary disclosure, and Lockheed Martin withdrew from the transaction.¹³⁸

III. Steps To Minimize Risk And Successfully Complete Corporate Transactions

Given intensified visibility and scrutiny by enforcement authorities and the Congress, and the significant exposure to adverse consequences as described above, companies should address international trade and security policies with at least as much care as they address, for example, tax, pension, and environmental policies.

Parties considering a corporate transaction should, at the outset, identify and assess the magnitude of international trade and security-related policy concerns. Relevant variables include, for example, expected participation in the transaction by non-U.S. parties; connections between parties and compliance-sensitive activities, such as whether a party is a defense contractor, technology company, oil company, or financial company; connections between parties and compliance-sensitive areas of the world, such as the Middle East, central or southeast Asia, or Africa; and a party's heavy

134. Syncor Int'l Corp., Exchange Act Release No. 46,979 (Dec. 10, 2002), available at <http://www.sec.gov/litigation/admin/34-46979.htm> [hereinafter Syncor Int'l Release]; Lubove, *supra* note 133.

135. See Andrew Morse, *Cardinal Sin*, CORP. CONTROL ALERT, Dec. 23, 2002, at 4, available at <http://www.thedeal.com/im/DF/pdf/V19N10.pdf>; Press Release, U.S. Dep't of Justice, Syncor Taiwan, Inc. Pleads Guilty to Violating the Foreign Corrupt Practices Act (Dec. 10, 2002); SEC v. Syncor Int'l Corp., SEC Litigation Release No. 17,887 (Dec. 10, 2002), at <http://www.sec.gov/litigation/litreleases/lr17887.htm> [hereinafter Syncor Litigation Release]; Syncor Int'l Release, *supra* note 134.

136. See *Company News: Cardinal to Still Acquire Syncor But At a Lower Price*, N.Y. TIMES, Dec. 5, 2002, at C5; Morse, *supra* note 135, at 4; Syncor Litigation Release, *supra* note 135.

137. Jonathan Karp, *Lockheed Says Probe Jeopardizes Takeover of Titan*, WALL ST. J., Mar. 8, 2004, at B2.

138. McCarthy, *supra* note 102.

reliance on export markets. Thus, a Chinese company's proposed acquisition of a maker of military electronics would present vastly different considerations than a wholly domestic issuance of debt securities by a U.S. consumer products company.

Parties should also consider challenges in structuring a transaction. It is useful for the parties at least to consider concerns regarding international trade and security policies in developing the structure of the transaction. For example, suppose a non-U.S. company proposes to acquire the electronics operations of a U.S. company. One relatively minor component of those operations is devoted to highly classified defense contracts. It might be advisable for the acquisition to exclude that component.

Further, parties should complete due diligence and appropriately address their findings. International trade and security due diligence should be a standard feature of due diligence, in the same way that there is standard tax and pensions due diligence. The character and breadth of international trade and security due diligence should depend on variables like those described above. Due diligence should be particularly intensive in the case of, for instance, acquisition of a petroleum services company with extensive operations in the Middle East. For a transaction that involves reasonably pronounced international trade and security issues, due diligence should involve, among other things, initial written inquiries and interviews with company officials about the scope and nature of parties' government businesses, overseas operations, export businesses, and financial businesses; relevant internal compliance programs; and any relevant compliance issues that have arisen. Parties conducting due diligence should also review government contracts and industrial security clearances; export authorizations, registrations, and classifications; compliance disclosures to the U.S. government; documentation regarding compliance investigations and findings; and internal compliance program documentation. Due diligence findings should be documented and analyzed in a form that facilitates decisionmaking by the parties.

It might be useful for the parties to take a variety of steps to address due diligence findings, including one or more of the following:

- *Negotiate Protective Contract Provisions:* An acquiring party should pursue provisions of the purchase agreement and perhaps other instruments in order to allocate international trade and security-related rights and obligations in a helpful manner. Relevant provisions can include representations, closing conditions, and indemnifications. Contract provisions cannot, of course, protect against non-monetary sanctions, including denial orders precluding participation in export transactions.
- *Submit Requisite Government Notices and Pursue Requisite Government Clearances and Approvals:* A foremost international trade and security-related clearance, as discussed above, is that by the CFIUS under the Exon-Florio Amendment. Although not mandatory for any transaction, it is prudent to pursue Exon-Florio clearance for any transaction that involves both acquisition of control of U.S.

operations by a non-U.S. person and any security-related sensitivities. Such sensitivities include, for example, defense contracting or advanced technology activities. Other agencies, such as the State Department and the Defense Department, may also require approval.

- *Make Internal Corporate Adjustments To Address Compliance Issues:* Due diligence can uncover relatively minor irregularities or corporate practices that might have resulted in modest noncompliance or no noncompliance at all. For example, it might be discovered that the company is not tracking the non-U.S. status of its employees to guard against violations of “deemed export” rules, although no violations are evident. These types of issues can be addressed through implementation or modification of internal compliance procedures.
- *Complete More Intensive Factual Inquiries Regarding and Legal Assessments of Identified Concerns:* Sometimes identified issues merit intensive internal investigation to develop and evaluate relevant facts. This was true, for example, in connection with the recent merger in the medical supply sector described above, in which due diligence uncovered payments by the target company, Syncor, to government-employed physicians in several foreign countries.¹³⁹ Both Syncor and the acquiring party, Cardinal Health, undertook extensive investigations to assess the extent of exposure under the FCPA.¹⁴⁰
- *Disclose Compliance Issues to Government as Appropriate:* In some instances, the parties might discover violations and determine that consummation of the transaction should be contingent on disclosure to the government and resolution with government enforcement authorities. In the case of the medical supply acquisition, the facts were so egregious the acquirer made closing contingent on confirmation by the Justice Department and the Securities and Exchange Commission such that there would be no legal exposure for the acquiring company, Cardinal Health.¹⁴¹

Finally, parties sometimes should design and implement a government relations strategy. Resolution of regulatory and compliance issues is generally driven by the relevant facts. At the same time, it can be useful to design and implement a strategy to disseminate an appropriate view of the transaction among congressional and senior executive branch officials. As discussed above, it has become common for U.S. companies seeking to block a transaction to urge U.S. officials to act against the transaction under the Exon-Florio Amendment, and congressional offices have offered input in several high-profile Exon-Florio cases.¹⁴² A thoughtful govern-

139. Morse, *supra* note 135.

140. *Id.*

141. Michael D. Goldhaber, *Oil Company Bribery Suit Settles; Government Lays Out Blueprint for Successor Liability in Resolving Case*, NAT'L L. J., July 12, 2004, at 5.

142. See *supra* Part I.A.

ment relations strategy can be critical to preventing or addressing these types of developments.

Conclusion

International trade and security policies are becoming increasingly relevant to corporate transactions. Parties that are considering a corporate transaction are well-advised to consider carefully trade and security policies when they are planning and executing the transaction.

