"We've Got This Covered … Maybe"—Representations and Warranties Insurance And Violations of Anticorruption Laws

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Representations and warranties ("R&W") insurance, once uncommon, is now ubiquitous in M&A transactions. By shifting a seller's obligation to indemnify the buyer for breaches of the seller's representations and warranties, R&W insurance creates several benefits that, along with competitive prices and greater confidence in payment of claims, have led to its widespread adoption in M&A transactions. One of the key seller representations and warranties covered by R&W insurance policies—and one that increasingly is the source of R&W policyholders' claims—is the compliance with laws representation, which encompasses multiple compliance matters including potential violations of the U.S. Foreign Corrupt Practices Act ("FCPA").

A decade ago, R&W insurance policies often expressly excluded violations of the FCPA and other anticorruption laws as a basis for covered claims and losses. More recent R&W policies do not automatically exclude violations of the FCPA and anticorruption laws. M&A acquirers and their counsel seeking to have R&W insurance cover violations of the FCPA and other anticorruption laws should consider how R&W insurance, if sought, may impact their anticorruption due diligence and, if secured, may help demonstrate the sufficiency of their due diligence to the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC"). However, several common exclusions in R&W insurance policies may limit a policyholder's ability to recover for all damages arising from a violation of the FCPA and other anticorruption laws. With very few reported cases applying these provisions in R&W insurance policies, uncertainty remains. Clients and counsel should not assume either that violations of the FCPA and other anticorruption laws are always excluded from coverage or that, if they are not excluded, then they are fully covered. The existence and extent of coverage will depend on the specific facts at issue and precise language of the R&W insurance policy. Both must be carefully reviewed.

Despite its prevalence and potential applicability to representations and warranties addressing anticorruption risks, R&W insurance coverage for compliance matters has received very little attention from white-collar defense as well as deal lawyers. This article seeks to begin to address this evolving and important area for M&A parties and their legal advisers. In Part I, we present an overview of how R&W insurance functions to backstop the seller's indemnification obligations under M&A agreements, and the benefits it provides to M&A parties. Next, in Part II, we review the growth of R&W insurance, claims data, and its changing coverage position for violations of anticorruption laws. In Part III, we summarize the due diligence expectations of DOJ, SEC and R&W insurance underwriters, and the impact on anticorruption due diligence from R&W insurance. Finally, in Part IV, we identify potential obstacles to recovering losses arising from non-excluded violations of anticorruption laws under common exclusions in R&W insurance policies, as well as related practical issues the compliance, deal and insurance coverage lawyers should consider carefully when advising on any potential claim.

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I. AN OVERVIEW OF R&W INSURANCE AND ITS BENEFITS

A. R&W Insurance and Representations and Warranties in M&A Agreements

R&W insurance is a form of transactional insurance in which an insurer pays for losses arising from breaches of the seller's representations and warranties in an M&A agreement that were not known to the buyer at the time of the transaction's closing.[1] The parties to the purchase and sale of an entire company, a substantial equity stake in it, or all or specific types of its assets, will negotiate and enter into an agreement that sets forth the terms governing their deal. The agreement will contain a number of representations and warranties by the seller, which serve several purposes for the buyer including: (i) to elicit information about the target business from the seller, allowing more accurate valuation of the target and post-closing integration and management of the acquired business; and (ii) to provide a basis for the buyer to obtain post-closing indemnification if the information represented and warranted by the seller was inaccurate, avoiding overpayment for the target.[2] The representations and warranties therefore address various matters that impact the target's value to the buyer, including among others the accuracy of the target's financial statements, its customers, contracts and other assets, and its liabilities.

One representation and warranty made by sellers in almost all M&A agreements is that the target business complies with applicable laws, which includes anticorruption laws such as the FCPA. This compliance with laws representation, like other representations and warranties, "'serves two purposes. It allocates responsibility as between buyer and seller for compliance issues, but it will also, hopefully, prompt a seller to raise any such issues or concerns during the disclosure process.'"[3] The representation often encompasses past as well as then current (i.e., at closing) compliance,[4] and may include notices of violations of laws and, less frequently, investigations by government authorities.[5] It may also be qualified by materiality and the "Knowledge" (as defined in the agreement) of an identified set of the seller's

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[1] *See* Scott M. Seaman & Jason R. Schulze, *Representations & Warranties Insurance*, *in* ALLOCATION OF LOSSES IN COMPLEX INSURANCE COVERAGE CLAIMS § 23.2, at 1 (Mar. 2024); *see generally* Memorandum from Jon T. Hirschoff et al. to Judicial Interpretations Working Group of the M&A Committee of the Business Law Section of the ABA (Jan. 12, 2019), at 23-24, https://www.shipmangoodwin.com/a/web/4YUwyQSs4TVLeavAjBA2uw/XbwnF/Successor%20Liability%20in%20Asset%20Acquisition%20Transactions_%20ABA%20Business%20Law%20Section%20Memo_JLawrence_ShipmanGoodwin.pdf.

[2] *See Spay, Inc. v. Stack Media Inc.*, 2021 Del. Ch. LEXIS 297, *16 (Del. Ch. 2021) ("The purpose of representations and warranties is to guarantee the truthfulness of a present fact, whereas covenants are promises to perform."); 1 LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES & DIVISIONS § 11.01[1], at 11-7 (2016) ("[T]here are three distinct reasons for a Buyer to want a Seller to make representations and warranties in general and any specific one in particular: (1) to assist the Buyer in understanding the business it is acquiring and in doing its due diligence; (2) to allow the Buyer to refuse to close the transaction if the representations are not true at closing; and (3) to enable the Buyer to recover damages if a representation turns out to have been false when made, whether or not the transaction closes.") (citations omitted); Richard French & Alvin L. Reynolds, Jr., *Why Fraud Matters When Using R&W Insurance: Revising ABRY and EMSI*, BOS. BAR J. (Aug. 17, 2020) (characterizing these functions as "pre-signing" and "post-signing" price adjustments).

[3] Dan Avery, *What's Market: Compliance with Laws Representations*, BLOOMBERG LAW (May 13, 2024) (quoting Rushna Heneghan, Deputy General Counsel at Charles River Laboratories). Ms. Heneghan further observed that she would prefer to "know the underlying compliance problems than close the transaction with a strong indemnity claim for breach of the rep[resentation]." *Id.*

[4] *Id.* (citing the ABA's Private Target Mergers and Acquisitions Deal Points Studies since 2005 that focus on middle market M&A transactions, which in 2023 were 108 transactions each valued between USD 30 million and USD 750 million).

[5] *Id.*

directors, officers and employees,[6] or even "Material Adverse Effect" under which the standard requiring disclosure is uniquely high.

If a representation and warranty made by the seller proves to be inaccurate, then the seller has breached the parties' agreement.[7] Almost all M&A agreements between sophisticated parties provide indemnification to the buyer, specifying what damages the buyer may be entitled to recoup from the seller for the seller having breached a representation and warranty. To backstop the seller's indemnification obligation, the buyer may also negotiate for the funding of an escrow, which prior to R&W insurance was typically between 5% and 15% of the purchase price.[8] The parties' agreement may limit the buyer to recovering any damages from the escrow and allow the buyer to proceed directly against the seller for any excess amounts.[9] Stating the obvious, under the M&A agreement, the seller is who indemnifies the buyer. R&W insurance shifts who pays indemnification from the seller to a third-party insurer. Under an R&W insurance policy, the insurer agrees to pay the losses arising from an inaccurate representation and warranty made by the seller.

R&W insurance policies can be either "buyer side" or "seller side." These types of R&W insurance policies are quite different from one another.[10] Because most R&W insurance policies are buyer-side policies,[11] references in this article to R&W insurance are to buyer-side policies unless stated otherwise. In addition, because every R&W insurance policy is governed by its specific terms, which may change given the unique circumstances of an M&A transaction, discussions in this article of policy terms are about what the authors generally understand to be "market" terms in 2024 for a buyer-side policy in transactions without unusual underwriting limitations or diligence concerns. The analysis of any alleged breach of a representation and warranty or availability of coverage is highly contextual and will depend on the underlying facts and the precise language used in the M&A agreement and R&W insurance policy.

B. The Benefits of R&W Insurance

R&W insurance provides several significant benefits to the parties to an M&A deal:

- *Elimination or Reduction of Escrows.* R&W insurance fulfills the same purpose as an escrow. Accordingly, an R&W insurance policy may completely avoid the need for, or substantially reduce the size of, any escrow. This substitution escrow results in quicker payment of more of the purchase price to the seller. For certain sellers, in particular private equity funds that want to reinvest the returned capital or distribute it to their limited partners,[12] the total or near total elimination of an escrow fund is an important benefit of R&W insurance.[13]

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[6] *Id.*
[7] *See* Jessica Rivero et al., *The Continued Rise of Representations and Warranties Insurance: 2024 Forecast*, BUS. L. TODAY, (Mar. 21, 2024).
[8] *See* Patrick M. McDermott et al., *Representations and Warranties Insurance: Fundamentals*, PRACTICAL GUIDANCE, Apr. 21, 2023, at 1, https://www.hunton.com/media/publication/90725_representations-and-warranties-insurance-fundamentals-practical-.pdf.
[9] *Id.* at 2.
[10] *See* Rivero, *supra* note 7.
[11] *See id*.
[12] *See* Kevin LaCroix, *Reps and Warranties Insurance: Why It Is Increasingly Common*, D&O DIARY (May 4, 2015), https://www.dandodiary.com/2015/05/articles/reps-and-warranties-insurance/reps-and-warranties-insurance-why-it-is-increasingly-common/.
[13] *See* Seaman & Schulze, *supra* note 1; Woodruff-Sawyer & Co., *Guide to Representations & Warranties Insurance* (2024), at 3, https://woodruffsawyer.com/sites/default/files/document/Guide%20to%20Representations%20and%20Warranties%

- *Larger and Longer Coverage*. Many M&A agreements impose contractual statutes of limitations on representations and warranties, such that the buyer typically must assert a claim for their breach within two years. Moreover, prior to R&W insurance the size of an escrow typically was between 5% and 15% of the purchase price. R&W insurance policies, however, can provide a longer time period for the buyer to submit claims than the survival period for representations and warranties under the M&A agreement, frequently up to three years for most representations and up to six years for certain fundamental representations (e.g., capitalization or taxes).[14] Policies may be bought in any size, as fees are based on the amount of insured payout, with the price typically in the United States being between 2.5% and 4.5% of each insured dollar. Most purchasers of R&W insurance opt for 10% of the purchase price as the amount insured.

- *Reduced Collection Risk and Costs.* While an M&A transaction may be governed by U.S. law or involve a U.S.-based buyer,[15] the target business's operations or the seller may be located outside the United States in jurisdictions with less developed, less predictable, or less favorable legal systems. An open secret among deal lawyers is that R&W insurance reduces collection risk by shifting responsibility for payment from a seller in and the governing law of a more challenging foreign jurisdiction to an insurance provider in and the governing law of the United States.[16] So, in deciding who they prefer to stand behind payment for breaches of the representations and warranties, most buyers select a highly rated insurer with a track record of paying claims and reputational concerns among its customers and the M&A community over almost any type of seller. This choice is even easier when the price of R&W insurance has been driven lower by substantial market competition among R&W insurers. Every buyer seeking indemnification cares about the ability of the seller to pay any claim or judgment, though mitigating collection risk may be particularly valuable to buyers that also distribute their assets.[17] Also, for deals in which the sellers stayed on at the target to help manage the business post-closing, buyers benefit from not endangering that working relationship by resolving indemnity claims with the R&W insurer instead of the sellers.[18]

- *Simplified Negotiations and Contractual Terms*. M&A parties generally have opposing interests when it comes to representations and warranties, which form the basis of indemnification obligations: buyers want broader representations and warranties, and sellers want narrower representations and warranties.[19] M&A parties thus often engaged in protracted and intense negotiations over the specific wording of representations and warranties. R&W insurance helps to align better the interests of the buyer and seller by introducing the R&W insurer as the payor of the obligations.[20] Further, the parties resort to a "market" set of representations and warranties that

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20Insurance%202024.pdf (hereinafter, "2024 R&W Guide"); Rivero, *supra* note 7; Mark S. Baldwin et al., *Representation and Warranty Insurance: Navigating the Claims Process* (Jan. 2019), at 1, https://brownrudnick.com/wp-content/uploads/2019/01/Brown-Rudnick-Alert-Representation-and-Warranty-Insurance-Navigating-the-Claims-Process.pdf.

[14] *See* Jon T. Hirschoff et al., *supra* note 1; 2024 R&W Guide, *supra* note 13, at 5.

[15] These are the typical requirements for insurance coverage.

[16] *See* Francisco J. Cerezo, *Using Representations and Warranties Insurance in Global M&A Deals: 8 Questions and Answers* (Feb. 16, 2016), https://www.lexology.com/library/detail.aspx?g=fde67c7f-aec3-4fb1-a475-a12540d5dd35; LaCroix, *supra* note 12.

[17] *See* Cerezo, *supra* note 16.

[18] 2024 R&W Guide, *supra* note 13, at 6.

[19] *See* Cerezo, *supra* note 16.

[20] *See* 2024 R&W Guide, *supra* note 13, at 4-5; French & Reynolds, Jr., *supra* note 2.

are shaped by what is acceptable to the R&W insurer,[21] which prior to R&W insurance would have been considered highly buy-side favorable. This more standardized approach facilitates competitive auctions—a sale process recognized as often affording less pre-closing due diligence to a successful bidder.[22] Finally, with R&W insurance covering some portion of the seller's potential liabilities for breaches of the representations and warranties, a seller may be more willing to agree to representations and warranties that have less qualifiers and are broader in scope.[23]

- *Greater Finality*. With either a buyer-side or seller-side R&W insurance policy in place, the seller can rest easier at night because it is less likely the buyer will pursue the seller for alleged breaches of the representations and warranties.

These numerous benefits, many of which being prized by private equity funds, active strategic acquirers, and other institutional players that drive the M&A markets, combined with fierce competition among R&W insurers, fueled the rise of R&W insurance from an obscure, bespoke insurance product to a common, norm-setting feature of most M&A deals.

II. THE INCREASED USE AND CHANGING COVERAGE SCOPE OF R&W INSURANCE

A. The Rapid Growth of R&W Insurance in M&A Transactions

R&W insurance in the United States began to be offered in the 1990s.[24] At its inception, R&W insurance suffered from several shortcomings that limited its wider adoption, including a cumbersome underwriting process, a comparatively high price and, equally if not more importantly, no meaningful track record of insurers fairly paying claims. Another hurdle to the widespread adoption of R&W insurance was a real concern about the incentives for parties and their advisors not to accurately report issues to the insurer because those issues would be excluded from coverage under the R&W insurance policy, which generally does not cover known matters.[25]

Decreases in cost and increases in confidence propelled the proliferation of R&W insurance. Competition among R&W insurers and underwriters has driven down premium rates to between 2% and 2.5% of insured limit in 2023, a decline from between 3.5% and 4% in 2022.[26] The underwriting process, which is described in further detail below,[27] is now efficient and usually requires only five days, with R&W insurers now having amassed expertise and following a largely predictable process that meets the tight

[21] *See* 2024 R&W Guide, *supra* note 13, at 3.

[22] ROBERT W. TARUN & PETER P. TOMCZAK, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK (6th ed. 2024), at 286. Indeed, bidders may offer to secure R&W insurance as part of their bids to increase their attractiveness. *See* LaCroix, *supra* note 12.

[23] *See* Seaman & Schulze, *supra* note 1.

[24] Cerezo, *supra* note 16.

[25] In the early years of R&W insurance, there were arguments in the context of compliance violations about whether M&A parties and their counsel would include in disclosure schedules and due diligence reports statements such as, "We received a whistleblower report of a compliance violation related to ABAC matters." On one hand, the matter to be alluded to in the disclosure was not a proven violation. Therefore, that statement should be removed from the schedules to any compliance with laws representation and warranty. On the other hand, no seller wanted to be sued for insurance fraud so, erring on the side of caution, they scheduled matters that arguably did not need to be.

Sellers—the party that has the most information about the target business—are generally not a party to the "buyer side" insurance contract. Insurers may reduce the risk of the seller not scheduling known matters by exerting indirect influence through the subrogation. *See* French & Reynolds, Jr., *supra* note 2.

[26] 2024 R&W Guide, *supra* note 13, at 10. The size of the premium may also be influence by, among other factors, the industry involved, the transaction size, the quality of the due diligence, and the selected retention.

[27] *See infra* § III(B).

deadlines in M&A transactions. R&W insurers have regularly paid claims, with evidence from claims data dispelling prior concerns on incentives of the participants in M&A transactions with R&W insurance.[28] Global insurance carrier Aon reported that "[t]hrough the end of 2023, R&W insurers have paid more than $1 [billion] to Aon clients in North America…. More than $550 [million] of this amount has been paid in the last three years."[29]

The remarkable result of these market trends and incentives is that R&W insurance in M&A deals has become the rule rather than the exception. One of the largest insurance brokerage and consulting firms in the United States in a 2024 report estimated that R&W insurance was used in approximately 75% of private equity deals and 64% of larger strategic deals.[30] A significant majority of middle market M&A deals (i.e., those with purchase prices between USD 50 million and USD 500 million) use R&W insurance. And a significant majority (i.e., approximately 80%) of transactions in which private equity is a buyer or seller use R&W insurance.

B. Claims Under R&W Insurance Policies, Including for Breaches of the Compliance with Laws Representation and Warranty

The amount and number of claims against R&W insurance policies have expectedly risen with the increases in the number of R&W policies and their limits and scope.[31] Metrics on claims under R&W insurance policies reported by two market-leading carriers, Aon[32] and Euclid Transactional,[33] confirm that insurers are paying claims including for breaches of the compliance with laws representations and warranty. Historically, approximately one in five policies (20%) receive notice of a claim (which may or may not exceed the premium).[34] Three representations and warranties formed the basis for a large percentage of those claims. According to an annual study by Aon, in 2023, the most common breaches that resulted in a paid loss were for: financial statements (representing 14% of all claims and 37% of all amounts recovered), material contracts (representing 10% of all claims and 31% of all amounts recovered), and compliance with laws (representing 16% of all claims and 14% of all amounts recovered).[35] Similarly, Euclid Transactional reported that, based on its seven-year data set, breaches of representations related to

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[28] LaCroix, *supra* note 12.

[29] Aon plc, *2024 Transaction Solutions Global Claims Study* (2024), at 5, https://www.aon.com/getmedia/bf235d29-26ba-40a3-9571-b2f1c172067a/2024-Transaction-Solutions-Global-Claims-Study.pdf. Some commentators have begun to raise concerns about the claims process, reporting that recently "getting that payment takes longer and requires a more adversarial process." Robert Freedman, *M&A Reps & Warranties Insurers Increasingly Play Hardball*, LEGALDIVE (Apr. 19, 2023).

[30] 2024 R&W Guide, *supra* note 13, at 3.

[31] *Id.* at 13. Aon reported that in North America, "over 140 new R&W [insurance] claims during the calendar year [2023] and overall, over 225 claims remain active." *See* Aon plc, *supra* note 29, at 6.

[32] Aon plc, *supra* note 29 (North American study presenting results from survey of 18 insurers).

[33] Euclid Transactional, *Global Representations & Warranties Insurance Claims Study* (Nov. 2023), https://euclidtransactional.com/wp-content/uploads/2023/11/ET_claims-study_v8.pdf (analyzing 5,089 policies placed, 1,040 claims received, and 97 payments made from July 2016 through June 2023).

[34] *See* Aon plc, *supra* note 29, at 7.

[35] *See id.* at 10. *Accord*, Euclid Transactional, *supra* note 33, at 8; Baldwin et al., *supra* note 13, at 1 (noting "[t]he most common R&W Insurance claims relate to financial statements (18%), tax (16%), compliance with laws (15%) and material contracts (14%)," citing American International Group, Inc., *M&A Insurance – The New Normal? AIG Global M&A Claims Study* 2018 (June 21, 2018)).

Notably, the representations and warranties on the accuracy of financial statements and existence and enforceability of material contracts may serve as bases for claims arising from failures to comply with applicable laws. *Cf.* Kim Nemirow et al., *Reps & Warranties Insurance from a Compliance Perspective*, LAW360 (July 28, 2016) (summarizing the case of an Australian financial services company that learned after the closing that the target had been paying false involves sent by a third party).

financial statements, and then customers and contracts, "together represent[ed] 65.7% of [Euclid's] Loss Paid" (i.e., the amounts paid by Euclid Transactional's carriers to its clients).[36] "The next largest category relate[d] to breaches of representations regarding Compliance with Laws, which represent[ed] 9.5% of Loss Paid."[37] Euclid Transactional further reported that "Compliance" constituted 14% of claims received in North America.[38]

Significantly, the compliance with laws representation is reported to be the third most common basis for R&W insurance claims. According to Aon's report, in 2023, there was a significant increase in percentage of paid losses attributable to breaches of the "compliance with laws" representation. That year, breaches of the "compliance with laws" representation constituted 14% of total amounts recovered, which was up from only 8.5% in 2022.[39] Factors that have contributed to this growth include, among others, a more complex and extensive regulatory environment and rising costs of defense.[40] In sum, "the number of claims alleging a breach of the compliance with laws representation have continued to climb in frequency and the 2023 data suggests that the severity of the payments on these claims is rising as well."[41]

C. R&W Insurance Coverage for Violations of Anticorruption Laws

More specific to anti-bribery and anticorruption issues, R&W insurance policies have also moved away from expressly excluding violations of the FCPA and other anticorruption laws as a basis of a covered claim or loss. A decade ago, such exclusions were common.[42] Now, while R&W insurance underwriters certainly do sometimes exclude violations of the FCPA and anticorruption laws in specific M&A transactions, they do not in many others.

A complaint filed by a buyer seeking indemnification from sellers that failed to disclose an international bribery scheme in the target business illustrates how an R&W insurance policy can exclude claims for violations of anticorruption laws.[43] In that dispute, the plaintiff had purchased all of the equity interests of a company that sold and serviced medical equipment pursuant to a stock purchase agreement ("SPA").[44] The plaintiffs claimed that after the closing, they learned that a third party had alleged in an arbitral statement of claim against one of the sellers that certain commissions were actually bribes in violation of New York law, and then made a criminal complaint to the Central Office for the Investigation of Financial Crimes of the Attorney General of Mexico City asserting the same bribery allegations. Under the SPA, the sellers had represented and warranted that no seller

[36] *See* Euclid Transactional, *supra* note 33, at 7.
[37] *Id.*
[38] *Id.* at 14.
[39] Aon plc, *supra* note 29, at 10.
[40] *Id.*
[41] *Id.* at 8. We do not know what the underlying basis of the breach of the compliance of laws representation was, particularly if it was a violation of FCPA or other anticorruption laws. The more general data on R&W insurance claims for breaches of compliance with laws representations remains valuable: the obstacles in insurers covering and policyholders seeking damages based on violations of the FCPA or other anticorruption laws apply to many other violations of laws that are also addressed by compliance with laws representations.
[42] *See* Cooley LLP, *Rep and Warranty Insurance: Trends and Key Considerations* (July 1, 2015), https://cooleyma.com/2015/07/01/rep-and-warranty-insurance-trends-and-key-considerations/ ("For many insurers, typical 'exclusions' from coverage include … certain regulatory matters (such as those relating to healthcare laws, unfunded benefit plans and FCPA compliance."); Cerezo, *supra* note 16 (noting that a common exclusion was for losses resulting from FCPA violations).
[43] Compl., *Jordan Health Products III, Inc. v. OSI Holdings I, LLC*, LCV2020782006 (N.J. Super. Ct. 2020).
[44] *Id.*, ¶¶ 3, 34.

> has offered or given anything of value to … (b) any customer or supplier; or (c) any other Person, in any such case for the purpose of the following: … (iv) where such payment is or was contingent upon the award of any Government Contract to [a seller] or that would otherwise be in violation of any applicable law; or (v) where such payment would constitute a bribe, kickback or illegal or improper payment to assist [OSI] in obtaining products or services or obtaining or retaining business for, or with, or directing business to, any Person.[45]

The SPA provided to the plaintiff purchasers indemnification for seller's breaches of its representations and warranties, though it required the plaintiffs first to recover any losses to the extent possible from an R&W insurance policy obtained in conjunction with the SPA.[46] The plaintiffs asserted that they could proceed against the sellers because the R&W insurance policy

> explicitly excluded from coverage any Loss "based upon, arising out of or resulting from any … non-compliance with the U.S. Foreign Corrupt Practices Act, any laws enacted pursuant to, or arising under, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, any other laws or regulations relating to bribery or corruption and any other laws or regulations related to export control, trade embargoes and anti-boycott provisions."[47]

The plaintiffs stated that they submitted a claim to the R&W insurer for the statement of claim and criminal complaint, which the insurer denied "citing to the [R&W insurance] policy's exclusion of matters based upon, arising out of, or resulting from laws or regulations relating to bribery or corruption."[48]

Now, however, many buyer-side R&W insurance policies do not contain a specific exclusion for violations of the FCPA and other anticorruption laws. "As investors increase their reliance on R&W insurance, the scope of coverage has sometimes included compliance-related representations and warranties, including representations relating to corruption, money laundering and sanctions."[49] Indeed, the current market standard in R&W insurance is for full buy-side favorable representations (i.e., no knowledge qualifiers and materiality scrape[50]) with disclosures limited to verifiable facts. Thus, in many instances, the insurer assumes the risk of a breach of the "compliance with laws" representation, which absent an express exclusion encompasses trade, anti-bribery and anti-corruption, and similar compliance matters.

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[45] *Id.*, ¶ 55.
[46] *Id.*, ¶¶ 51-52.
[47] *Id.*, ¶ 58.
[48] *Id.*, ¶ 88.
[49] Nemirow et al., *supra* note 35.
[50] "A full materiality scrape is the concept of disregarding or 'reading out' from the purchase agreement materiality qualifiers in representations and warranties to determine: (1) the amount of losses resulting from a breach or (2) whether the breach has occurred. A partial or single materiality scrape is when the materiality qualifiers are disregarded or read out only for purposes of determining the amount of losses." Yelena Dunaevsky & Emily Maier, *R&W Insurance Cultures Clash in International Deals*, LAW360 (Apr. 10, 2020) (summarizing differences between U.S. and European style R&W insurance policies). For an interesting issue involving materiality scrapes in an R&W insurance policy, *see Novolex Holdings, LLC v. Ill. Union Ins. Co.*, No. 655514/2019 (N.Y. Sup. Ct. Jan. 18, 2024) (holding that the materiality scrape was ambiguous as applied to the representation that there had not been any matter which had or would be reasonably expected to have material adverse effect, and construing ambiguities against the insurer drafter).

Accordingly, M&A parties and their counsel should not assume that R&W insurance policies broadly exclude losses arising from violations of anticorruption laws. The scope of R&W insurance policies and the willingness of R&W insurers have evolved with the maturation of the R&W insurance market. Buyers and their counsel must therefore consider in conducting anticorruption due diligence the expectations of both U.S. governmental authorities and the R&W insurer, as discussed below.[51] Further, parties and counsel would also be incorrect in assuming that losses arising from sellers' violations of anticorruption laws will be covered by R&W insurance. The specific terms of the R&W insurance policy at issue control. As summarized further below,[52] the existence and practical effectiveness of coverage for violations of anticorruption laws may be impacted by several common exclusions and provisions.

III. THE IMPACT OF R&W INSURANCE ON THE BUYER'S ANTICORRUPTION DUE DILIGENCE

Due diligence serves multiple purposes for buyers in M&A transactions, as noted above. In the anti-bribery and anticorruption context, buyers have many reasons to conduct due diligence:

> (i) understanding the true value of the target, including potential liabilities; (ii) avoiding overpayment for assets such as contracts that were obtained through foreign bribes; (iii) mitigating the risk of the acquiring entity being held liable under successor liability principles; (iv) satisfying the acquiring entity's own effective compliance program and internal accounting controls; (v) preventing improper payments after the closing by the successor entity or newly-acquired business; (vi) avoiding accounting and disclosure issues that can arise if there are material contracts or licenses obtained through bribery that may be void or voidable; (vii) supporting efficient post-acquisition compliance integration of the acquired business; (viii) mitigating the risk of follow-on civil litigation and reputational damage; (ix) preventing damage to brand and reputation from the investigation; and (x) demonstrating sound corporate citizenship aligned with an acquirer's own culture of compliance.[53]

Anticorruption due diligence therefore is a critical to mitigating commercial and legal risk in M&A transactions arising from bribery conduct, including as explained below by satisfying the expectations of DOJ, SEC, and R&W insurance underwriters.

A. Due Diligence and the Expectations of DOJ and SEC

DOJ and SEC have consistently urged companies to conduct thorough, risk-based anti-bribery and anticorruption due diligence. In 2008, Halliburton Co. requested DOJ's opinion on its potential liability for pre- and post-closing bribery conduct of a target with a very risky corruption profile on which Halliburton could only perform limited pre-closing due diligence.[54] DOJ indicated that it did not intend to take any enforcement action against Halliburton on the three risks identified by Halliburton in its request based on the facts presented and steps offered by Halliburton therein.[55] Among other steps Halliburton

[51] *See infra* § III(C).
[52] *See infra* § IV.
[53] TARUN & TOMCZAK, *supra* note 22, at 285-86. For an overview of FCPA issues in M&A transactions, *see id.* at 268-305.
[54] U.S. Dep't of Justice, FCPA Opinion Procedure Release No. 08-02 (June 13, 2008).
[55] *Id.* at 4.

promised to complete was that "[w]ithin ten business days of the closing, Halliburton will present to [DOJ] a comprehensive, risk-based FCPA and anti-corruption due diligence work plan which will address, among other things, the use of agents and other third parties; commercial dealings with state-owned customers; any joint venture, teaming or consortium arrangements; customs and immigration matters; tax matters; and any government licenses and permits."[56] Halliburton also was to "organize the due diligence effort into high risk, medium risk, and lowest risk elements," the results of which Halliburton was to report to DOJ within 90, 120 and 180 days after closing, respectively.[57] In 2012, DOJ and SEC released the first edition of A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT.[58] In their joint publication, DOJ and SEC urged buyers in M&A transactions to "conduct thorough risk-based FCPA and anti-corruption due diligence on potential new business acquisitions," in addition to several other actions.[59] In 2020, DOJ and SEC repeated this practical guidance and expectations for anti-bribery and anticorruption due diligence in the second edition of the RESOURCE GUIDE.[60] In both versions of the RESOURCE GUIDE, DOJ and SEC pointed to their 2002 FCPA resolutions involving Syncor International Corp. to show that when an acquirer uncovers violations of anticorruption laws at the target in due diligence, plus voluntarily discloses that misconduct to the U.S. government, fully cooperates in the investigation and effectively integrates the target into its compliance program and accounting controls, DOJ and SEC will decline to purse enforcement actions against the acquirer and instead pursue the target and its subsidiary.[61]

Thorough, risk-based due diligence is also an element of effective compliance programs and a condition to the presumption of a declination for acquirers. As noted in DOJ's 2024 Evaluation of Corporate Compliance Programs, for M&A activity, "[a] well-designed compliance program should include comprehensive due diligence of any acquisition targets…."[62] DOJ will review the extent of diligence conducted as "indicative of whether its compliance program is, as implemented, able to effectively enforce its internal controls and remediate misconduct at all levels of the organization."[63] DOJ prosecutors will ask about the due diligence process:

> Was the Company able to complete pre-acquisition due diligence and, if not, why not? Was the misconduct or the risk of misconduct identified during due diligence? Who conducted the risk review for the acquired/merged entities and how was it done? What is the M&A due diligence process generally?[64]

Acquirers seeking to avail themselves of the presumption of a declination under DOJ's 2023 Corporate Enforcement Policy ("CEP") must also be mindful of the importance of conducting thorough due diligence.

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[56] *Id.* at 2.
[57] *Id.*
[58] U.S. DEP'T OF JUSTICE AND U.S. SECS. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (1st ed. 2012) (hereinafter, "2012 RESOURCE GUIDE").
[59] 2012 RESOURCE GUIDE, *supra* note 58, at 29.
[60] U.S. DEP'T OF JUSTICE AND U.S. SECS. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2d ed. 2020) (hereinafter, "2020 RESOURCE GUIDE").
[61] *See* 2012 RESOURCE GUIDE at 62 & 2020 RESOURCE GUIDE at 66-67 (both citing Compl., *SEC v. Syncor International Corp.*, No. 02-cv-2421 (D.D.C. Dec. 10, 2002), ECF No. 1; Crim. Information, *United States v. Syncor Taiwan, Inc.*, No. 02-cr-1244 (C.D. Cal. Dec. 5, 2002), ECF No. 1)).
[62] U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs (Sept. 2024), at 9.
[63] *Id.* at 10.
[64] *Id.*

In the CEP, DOJ recognized, as it had in previous remarks by DOJ officials,[65] that acquirers can be a force for good in acquiring and integrating companies into the acquirers' more robust compliance programs. The CEP's presumption of a declination requires, among other conditions, that the acquirer "uncover[] misconduct through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts…."[66]

DOJ and SEC have helpfully confirmed that acquirers may complete due diligence after the M&A transaction's closing in appropriate circumstances. In its 2020 second edition of the RESOURCE GUIDE and its 2023 CEP, DOJ and SEC helpfully acknowledged that in certain M&A transactions, a buyer may be precluded from conducting fulsome pre-closing due diligence. In these situations, DOJ and SEC have recognized that they "will look to the timeliness and thoroughness of the acquiring company's post-acquisition due diligence and compliance integration efforts."[67] This flexibility on timing, however, "is not an invitation to voluntarily forego doing any pre-acquisition due diligence and simply wait until after the transaction's closing."[68] Among other reasons, for acquirers seeking to avail themselves of the benefits of DOJ's 2023 Mergers and Acquisitions Safe Harbor Policy by disclosing criminal activity at an acquired company within that policy's fixed deadlines (as may be reasonably extended by DOJ prosecutors), timely disclosure of criminal conduct requires timely discovery of it.[69]

B. Due Diligence and the R&W Insurance Underwriting Process

"While generally an important part of M&A transactions, due diligence becomes integral to obtaining an R&W insurance policy."[70] As noted above, representations and warranties, and the liability for making inaccurate ones, cause a seller that knows more about the target business to disclose information to a buyer that knows less. The insurer does not know as much about the target business as the seller or likely even the buyer. But under the time pressure of an M&A deal and cost pressure of the market for R&W insurance, the R&W insurer cannot itself conduct extensive diligence on the target business to evaluate the truthfulness of the seller's representations and warranties. Instead, the insurer must rely, at least in part, on the diligence conducted by the buyer and essentially "diligence the diligence."[71] In practice, after execution of a non-disclosure agreement, the R&W insurer will review a draft of the transaction agreement and the representations and warranties made by the seller, certain pre-deal agreements (e.g., letter of intent or non-disclosure agreement), the buyer's due diligence report, and key source documents about the target business (e.g., financial statements, corporate formation, governing documents, etc.). Insurers may also review the data room towards assessing the thoroughness of the buyer's due diligence.[72] Insurers are typically limited to less than USD 40,000 of cost (the underwriting fee) to review transactions, regardless of size or scope.

After it has reviewed this information, the R&W insurance underwriter will convene a call with the buyer and its counsel to review the due diligence performed by the buyer, any gaps or omissions in the buyer's

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[65] *See* Deputy Asst. Att'y General Matthew S. Miner, U.S. Dep't of Justice, Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets (July 25, 2018); U.S. Dep't of Justice, Deputy Assistant Attorney General Matthew S. Miner of the Justice Department's Criminal Division Delivers Remarks at the 5th Annual GIR New York Live Event (Sep. 27, 2018).
[66] U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-47.120(4).
[67] 2020 RESOURCE GUIDE at 29.
[68] TARUN & TOMCZAK, *supra* note 22, at 286.
[69] *See id.* at 286-87.
[70] Rivero, *supra* note 7.
[71] *See* 2024 R&W Guide, *supra* note 13, at 6; *see also* McDermott, *supra* note 8, at 2; Rivero, *supra* note 7.
[72] *See* 2024 R&W Guide, *supra* note 13, at 6-8 (presenting a standard step list and timeline); Rivero, *supra* note 7.

due diligence, and material issues detected in the due diligence. The R&W insurance underwriter will also seek to uncover if there are any known issues that have not been properly disclosed and memorialized as an exception to the relevant representation and warranty[73] because, as explained below, R&W insurance policies typically do not cover known risks. If the R&W insurer is unsatisfied with the answers provided by the buyer and its counsel to these inquiries, or believes that the buyer and its counsel did not conduct sufficiently robust due diligence on potential sources of breached representations and warranties, then the R&W insurance underwriter may choose to exclude certain representations and warranties for the scope of the policy, or certain underlying albeit unknown issues that, if a breach of a representation and warranty, would cause substantial losses to the buyer.

Buyers seeking R&W insurance coverage to address corruption risks covered by representations and warranties in the governing agreement should expect to receive "quite detailed" questions from the R&W insurer "regarding the anti-corruption due diligence performed and whether the seller has an anti-corruption compliance programme on which the seller's representations could reliably have been based."[74] Further, beyond simply the quality of the target's compliance policies and program, R&W insurance underwriters are determining coverage based on data such as *Transparency International*'s Corruption Perceptions Index for relevant jurisdictions. More pointedly, R&W insurance underwriters frequently request a copy of buyer counsel's comprehensive due diligence report, and may ask to review "copies of background search reports, completed risk assessment questionnaires, and even anti-corruption due diligence memoranda."[75] Counsel will need to carefully consider the potential implications to legal privileges from sharing materials with the R&W insurance underwriter.[76]

"Compliance" is usually not excluded in an overarching manner. But framed by the R&W insurance underwriter's general focus in evaluating the buyer's due diligence, common potential violations of anticorruption laws will generally require more extensive and searching efforts. For example, a pharmaceutical sales force operating in countries with high levels of perceived or actual corruption requires careful due diligence not be excluded. If the seller has a weak anti-bribery and anticorruption compliance program, then R&W insurance underwriters may also exclude from coverage specific jurisdictions or business segments, or even the relevant representation and warranty. In more extreme situations, this could compromise the buyer's ability to complete the M&A transaction.

C. Potential Impact of R&W Insurance on Anticorruption Due Diligence

Regarding anticorruption due diligence, buyers have significant incentives to conduct thorough, risk based due diligence—not the least of which being DOJ and SEC's consistent urging to do so and the availability of leniency if not a presumed declination under DOJ and SEC policies. The exact process and efforts to be accomplished by a buyer to meet DOJ and SEC expectations will depend on the form of transaction and specific risks presented by the target's business, industry, geographic footprint, and level of government customers and "touch points."[77] They often also will satisfy the quality and extent of due diligence needed by R&W insurance underwriters for their coverage determinations.

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[73] *See* McDermott, *supra* note 8, at 3.

[74] Michael Huneke, *Anti-Corruption Due Diligence Can Help Buyer, Sellers and Their Advisers to Facilitate Acquisitions*, RISK & COMPLIANCE MAG. (Oct.-Dec. 2022), at 4.

[75] Nemirow et al., *supra* note 35.

[76] *See infra* at 16-17.

[77] *See* TARUN & TOMCZAK, *supra* note 22, at 287-98 (discussing how to conduct anticorruption due diligence in an M&A deal—initial risk assessments, due diligence questionnaires, expert sessions, interviews of a target's key employees, reviews

Clients and counsel should be mindful that the buyer's need to conduct sufficient due diligence to obtain an R&W insurance policy in deciding whether to defer certain due diligence until after closing, even if permitted under DOJ and SEC standards. R&W insurance policies can be procured at multiple pre-closing points in the deal,[78] and the due diligence supporting a coverage decision would need to be completed during that underwriting process. Clients and counsel should therefore review any due diligence steps deferred until after closing and ask if they must be completed to support an application for R&W insurance, particularly as to any aspects of the target's business or compliance program that present heightened corruption risk.

A leading insurance brokerage and consulting firm has noted that R&W insurance can "provide[] an impartial review of previous due diligence," which may help a buyer in defending against claims by its stockholders that the buyer failed to conduct sufficient due diligence on the target.[79] Similarly, the due diligence done by the R&W insurance underwriter and its agreement to cover potential unknown violations of anticorruption laws may help a buyer validate the sufficiency of its due diligence in presentations to DOJ and the SEC. However, a buyer and its counsel should not assume that securing R&W insurance coverage constitutes some safe harbor for meeting DOJ and SEC expectations for due diligence. Nor should they lose focus on satisfying DOJ and SEC guidance on due diligence because of the potential availability of monetary recovery under R&W insurance policies.[80] Conducting thorough, risk-based due diligence remains the best strategy to more accurately value the target, more deeply understand the anti-bribery and anticorruption risks before "Day One," and more effectively integrate the target post-closing.

IV. THE POTENTIAL CHALLENGES TO AND PRACTICAL ISSUES IN RECOVERING LOSSES ARISING FROM NON-EXCLUDED ANTICORRUPTION LAW VIOLATIONS

Buyers and their counsel should not conclude that because an R&W insurance policy does not expressly exclude FCPA and anticorruption violations from coverage, they are covered. As an initial matter, counsel will need to confirm that the applicable representation and warranty was breached. Counsel should confirm if the seller disclosed the underlying matter in the relevant section of the disclosure schedules as an exception to the representation and warranty. Longer-running bribery conduct involving multiple transactions, individuals and illicit benefits may pose thorny questions as to whether it is one scheme or multiple individual improper payments, and the timing of when such misconduct occurred (i.e., if it started after closing, or if it occurred between signing and closing and became known by the deal team during that time, which is typically excluded unless specific coverage is purchased[81]).

With respect to potential violations of anticorruption laws, clients and deal and compliance counsel, preferably in collaboration with insurance coverage counsel, must carefully review the specific language of the applicable R&W insurance policy. Among others, counsel will want to analyze the common exclusions in R&W insurance policies for claims for or losses attributable to (i) known breaches and (ii) criminal acts and "criminal fines and civil penalties."

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of a target's books and records—and prepare a due diligence memorandum, and providing other practical due diligence advice).

[78] *See* Cerezo, *supra* note 16.

[79] *See* 2024 R&W Guide, *supra* note 13, at 4.

[80] *See* Avery, *supra* note 3 (conveying observations of Rushna Heneghan).

[81] *See* Baldwin et al., *supra* note 13, at 2.

- *Known Breaches.* As a foundational matter, R&W insurance does not cover known matters. The scope of the policy's exclusion of known matters is established in defined terms that set forth both who and what awareness or understanding constitutes "Knowledge." Under many policies, the individuals relevant for determining knowledge will be limited to lead deal executive, lead deal finance executive, and lead deal legal executive.

  Equally important to establishing what constitutes a known matter is the level of awareness or understanding required of those specified persons. Many R&W insurance policies attempt to limit the "Knowledge" to actual conscious awareness of a fact, event, development, or that there was a breach. Counsel will want to review whether the policy disclaims imputed or constructive knowledge, any duty of inquiry, and the knowledge attributable from outside advisors, counsel, accountants, agents, employees, or other third parties.

  Counsel will also want to carefully review what has been disclosed by the seller in schedules as exceptions to a representation and warranty, as well as what has been discussed in the buyer's due diligence reports, about potential violations of the FCPA and other anticorruption laws as such matters will be excluded from coverage.

- *Criminal Conduct, and Criminal Fines and Civil Penalties*. R&W insurance policies will often provide coverage for a wide variety of conduct and forms of economic loss.[82] However, certain conduct and losses may be uninsurable pursuant to public policy. "The majority of U.S. states preclude coverage for fines and penalties as a matter of public policy. In these states, statutory fines that are considered to be penal, rather than remedial, are not insurable."[83] Coverage of penalties agreed upon pursuant to a deferred prosecution agreement or non-prosecution agreement "is usually precluded based on state public policy or insurance policy exclusions."[84] Determining the insurability of a so-called fine or penalty often depends on whether it is wholly punitive or if it has a compensatory element—a highly fact-specific inquiry.[85] Ultimately, the analysis, in the United States and even more so abroad, is both highly contextual and legally unsettled.

  Mirroring these public policy prohibitions, a policy may provide for a "conduct" exclusion for criminal acts and violations, and nearly all R&W insurance policies may exclude from the "Loss" to be paid by the insurer "punitive and exemplary damages" and, importantly for potential violations of anticorruption laws, "criminal fines and civil penalties." [86] Coverage for "consequential damages" is a major R&W insurance industry issue that has resulted in silence about it in many policies.

  Some have concluded that "R&W insurance, as a matter of both public policy and policy exclusions, would be unlikely to cover criminal or quasi-criminal violations."[87] Significantly, however, counsel should be aware of the fundamental difference between R&W insurance

[82] Thus, reputational losses are generally not covered. *See* Nemirow et al., *supra* note 35.
[83] Clyde & Co. and Marsh LLC, *Insurability of Fines and Penalties (United States)* (Oct. 5, 2022), https://www.marsh.com/en/services/financial-professional-liability/insights/insurability-of-fines-and-penalties.html#us.
[84] Beth Olsen, *Agreeing in the Shadow of the Policy: How Corporate Insurance Policies Impact the Resolution of Governmental Investigations Into Corporate Crime*, 23 CONN. INS. L. J. 349, 352 n. 7 (2017) (citing N.Y. INS. LAW § 1101(a)(1) (McKinney 2000)).
[85] *Id.*
[86] Seaman & Schulze, *supra* note 1; Nemirow et al., *supra* note 35,
[87] Andrew K. Jennings, *The Market for Corporate Criminals*, 40 YALE J. ON REGUL. 520, 538-39 (2023) (citations omitted).

policies and other forms of insurance before borrowing case law interpreting this exclusion in other types of insurance. The exclusion against losses representing criminal fines and civil penalties in many R&W insurance policies often expressly states that it applies only if those fines and penalties cannot legally be insured as to the named insured—the buyer. As such, the moral hazard from insuring criminal activity which in other types of insurance justified public policies and contractual exclusions against doing so may not apply in the R&W insurance context.[88] Additionally, certain R&W insurance policies provide an exception to this exclusion if the loss is insurable under the law of the jurisdiction most favorable to the insurability for the matter at issue.[89] Ultimately, "[t]he typical fines or penalties exclusion in a modern [R&W insurance] policy effectively acts to confirm coverage for fines or penalties unless a very rigorous series of conditions can be met by the insurer that would exclude coverage."[90]

For many FCPA and anti-corruption corporate resolutions, multiple types of monetary payments will be negotiated. The issue of whether restitution and disgorgement payments are uninsurable, given the specific language of the insurance policy, has not been conclusively resolved under all states' laws.[91] Nor has the issue of what exactly constitutes a "criminal fine" or "civil penalty."[92] The interpretation of those terms may present unique issues in international corruption matters with respect to payments to the U.S. government in FCPA corporate resolutions, let alone those to non-U.S. governmental authorities under foreign laws.

Apart from the fines, penalties and other monetary payments, many R&W insurance policies expansively cover fees and costs incurred in the investigation, defense, and settlement of a covered matter. Cross-border FCPA and anticorruption investigations may entail enormous legal and forensic fees, plus advancement of legal fees and costs to the company directors, officers, and employees.[93] A related question is whether investigation and defense costs are covered if the R&W insurance policy does not have a conduct exclusion for criminal activity and only excludes "criminal fines and civil penalties" from what is covered as a "Loss." Certain policies provide that this exclusion does not apply to investigation and defense costs if they are insurable under applicable law that most favors coverage for such costs.

As a practical matter, DOJ may in a DPA or NPA preclude a defendant from using insurance proceeds to satisfy an agreed-upon payment obligation.[94] In many DPAs and NPAs resolving

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[88] John T. Capetta, *A Sheep in Wolf's Clothing: The Fines or Penalties Exclusion in Representation and Warranty Insurance (RWI) Policies* (Dec. 27, 2024), https://martinllp.net/rwi-practice-insights-series-a-sheep-in-wolfs-clothing-the-fines-or-penalties-exclusion-in-representation-and-warranty-insurance-rwi-policies-john-t-capetta/.

[89] *See id.*; Jennings, *supra* note 87, at 539 n. 111 (citing one interviewee who "noted, however, that policies might have exceptions to the crime/regulatory exclusions if local law permits coverage").

[90] Capetta, *supra* note 88.

[91] *See* Olsen, *supra* note 84, at 359; *see generally* Katherine C. Skilling, *Coverage for Ill-Gotten Gains? Discussing the Uninsurability of Restitution and Disgorgement*, 72 WASH. & LEE L. REV. 1077 (2015).

[92] Clyde & Co. and Marsh LLC, *supra* note 83 (discussing cases addressing insurability and contractual coverage of penalties based on its nature as wholly punitive as opposed to partially compensatory, including *J.P. Morgan Securities Inc. v. Vigilant Insurance Co.*, 183 N.E.3d 443 (N.Y. 2021), and *First Health Settlement Class v. Chartis Specialty Insurance Co.*, 111 A.3d 993 (Del. 2013)).

[93] *See* Stanford Law School Foreign Corrupt Practices Act Clearinghouse, Statistics and Analytics, Key Statistics, https://fcpa.stanford.edu/statistics-keys.html (visited January 15, 2025) (reporting the average length of an FCPA related investigation is 39 months, and the average monthly cost for an FCPA related investigation is $1,573,238).

[94] *See* Ltr. from David N. Kelley, U.S. Att'y for S.D.N.Y., to Robert S. Bennett (Aug. 26, 2005), at 4 (setting forth different penalty amounts depending on whether KPMG had insurance coverage).

FCPA violations, the government and the defendant company agree to prohibit the company from using insurance proceeds to pay agreed monetary penalties.[95] Counsel will want to carefully review the language of any statement of facts attached to a DPA or NPA to assess the impact on potential insurance coverage, including for related civil litigation, and noting that defendant companies are frequently precluded from contradicting the agreed-upon statement of facts.[96]

Many of these important issues in recovering under an R&W insurance policy for losses from a violation of the FCPA or other anticorruption laws have yet to be addressed in reported decisions. Courts have not been the forum for interpreting R&W insurance policies, especially as to anticorruption issues in which buyers are reluctant to air publicly their targets' bribery problems. Most R&W insurance policies historically selected confidential arbitration to resolve disputes, though recently R&W policies have allowed the policyholder to select between courts or arbitration, resulting in more cases being brought to court.[97] Regardless, many disputes between policyholders and R&W insurers are resolved short of a decision being rendered in litigation or arbitration.

Finally, counsel should plan to address several practical issues in the underwriting or claims process for R&W insurance with respect to violations of anticorruption laws and resolving any related government investigation.

- *Timely Notice.* As is common to all forms of insurance, all R&W insurance policies require the insured to provide timely notice of detected breaches of representations and warranties, matters that could reasonably be expected to result in such a breach, and demands by third parties including among others from governmental authorities.[98]

- *Cooperation*. R&W policies obligate the policyholder to cooperate with the insurer in any claim, including by providing information to the insurer.

- *Duty to Defend.* Most R&W insurance policies do not obligate the insurer to defend the insured in any third-party claim or litigation, but the insurer often has a consent right, not to be unreasonably withheld, to insured's counsel and a right to associate in the litigation and settlement negotiations.

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[95] *See* Deferred Prosecution Agreement, *United States v. SAP SE*, Case No. 23-cr-00202 (E.D. Va. Jan. 10, 2024), Dkt. No. 17 (providing "[t]he Company shall not seek or accept directly or indirectly reimbursement or indemnification from any source with regard to the Criminal Penalty or disgorgement amounts that the Company pays pursuant to this Agreement or any other agreement entered into with an enforcement authority or regulator concerning the facts set forth in the Statement of Facts"); U.S. Secs. & Exch. Comm'n, Deferred Prosecution Agreement for PBSJ Corporation (Nov. 21, 2014), at (prohibiting company from "seeking or accepting reimbursement or indemnification from any source, including, but not limited to, payment made pursuant to an insurance policy or employment contract, with regard to any civil monetary penalty paid pursuant to this Agreement").

[96] *See* Olsen, *supra* note 84, at 371-74.

[97] *See* Joseph Rockers et al., *Reps & Warranties Claim Disputes in the Courts* (Mar. 17, 2022), https://www.goodwinlaw.com/en/insights/publications/2022/03/03_17-reps-and-warranties-claim-disputes (discussing *Novolex Holdings, LLC v. Illinois Union Insurance Co.*, *WPP Group USA, Inc. v. RB/TDM Investors, LLC*, Index No. 656825/2019 (N.Y. Sup. Ct.), and *pH Beauty Holdings III, Inc. v. Certain Underwriters at Lloyd's, London*, Case No. 21-1586-BLS (Mass. Sup. Ct.)).

[98] *See Ratajczak v. Beazley Sols. Ltd.*, 870 F.3d 650, 656 (7th Cir. 2017) (rejecting coverage in a seller-side R&W insurance policy because, *inter alia*, policyholders impermissibly provided "notice of the claim less than a week before the settlement was concluded"); Olsen, *supra* note 84, at 376. In a 2023 survey, "insurers pointed to late notice as a reason to avoid payment in 20% of cases, up from 13%." *See* Freedman, *supra* note 29 (presenting findings from Lowenstein Sandler LLP, *Are Buyers Still Getting Paid? The Evolution of R&W Insurance Claims*, R&W Insurance Claims Report (Apr. 18, 2023)).

- *Settlement Approvals.* R&W insurance policies also typically require the approval of the insurer for any settlement to be covered.[99]

- *Potential Waiver of Legal Privileges*. "Preservation of a company's attorney-client privilege and related work-product protections are essential components of any legally privileged investigation."[100] But disclosing information to a third-party R&W insurer in the underwriting or claims submission processes may result in a waiver of the attorney-client privilege, and potentially the attorney work product doctrine.[101] The risk of privilege waiver will depend on how applicable state law applies the common interest doctrine to insurers in the insurance context. The complexities of the differing rules for common interest privilege adopted by states preclude any simple answer.[102] Buyers must also beware of disclosing privileged documents and communications to other third parties, such as brokers, who may be deemed to not have a common interest with the buyer. Determining what jurisdiction's law governs the assertion of privilege in the context of an R&W insurance claim for detected violations of anticorruption laws is no easy task. For example, the buyer may be a Delaware corporation headquartered in Texas, which purchased a target organized and headquartered in California, and communicated with an R&W insurer organized and headquartered in New York about a violation in the target's Brazilian business that was investigated by U.S. and Brazilian counsel.

  One step for buyers towards mitigating the risk of being forced to choose between disclosing privileged information and violating their duty to cooperate is to include provisions in the policy addressing when a policyholder may refuse to provide privileged information and the steps the insurer must take to preserve all legal privileges that apply to the documents and communications provided to it.[103] In submitting a claim, a policyholder may also consider entering into a common interest or non-waiver agreement with the insurer.[104] Other strategies include providing the insurer with comparable information or, if the negative consequences of a potential waiver are just too great relative to the expected benefits from doing so, choosing not to provide the privileged documents or communication.[105]

V. CONCLUSION

Despite the increasing prevalence and importance of R&W insurance to M&A transactions, few commentators and even fewer reported cases have addressed its potential coverage of breaches of the target's representations and warranties from violations of the FCPA and other anticorruption laws. White-collar defense and compliance lawyers are almost always asked to assess the corruption risk presented by a target as part of the buyer's due diligence process. They should not forget that anticorruption due

[99] *See Ratajczak.*, 870 F.3d at 656 (rejecting coverage in a seller-side R&W insurance policy because, *inter alia*, the policyholders failed to obtain the insurer's consent for the settlement).
[100] Karen Hewitt et al., *AI Across Frontiers: The Promises and Risks of GenAI in Cross-Border Investigations*, Presented at the American Bar Association's 40th National Institute on White Collar Crime (Mar. 4-7, 2025), at 7.
[101] *See* Syed S. Ahmad et al., *Representations & Warranties Insurance and Privilege*, FC&S LEGAL: THE INSURANCE COVERAGE LAW INFORMATION CENTER (Jan. 17, 2018).
[102] *See id.*; Tatjana Paterno et al., *Privilege Waiver Risks from Reps & Warranties Insurance Use*, LAW360 (May 21, 2021) (collecting cases).
[103] *See* Ahmad et al., *supra* note 101 (presenting a range of potential provisions to be included in the R&W insurance policy to govern the sharing of privileged documents and communications); Paterno et al., *supra* note 102 (same).
[104] *See* Ahmad et al., *supra* note 101; Paterno et al., *supra* note 102.
[105] *See* Ahmad et al., *supra* note 101; Paterno et al., *supra* note 102.

diligence, tailored to the specific corruption risk profile of the target, must satisfy the expectations of DOJ and SEC and, ever more frequently, R&W insurers. Thorough, risk-based due diligence that focuses on the specific corruption risks of the target business remains the touchstone.

R&W insurance, properly understood and used, may help a buyer reduce its exposure to losses attributable to the target's bribery conduct and anticorruption compliance failures not known at the closing. Counsel should not simply assume that R&W insurance will—or will not—cover such liabilities. Compliance counsel should collaborate closely with deal and insurance coverage attorneys to carefully review the R&W insurance policy and its exclusions, as compliance counsel may be better positioned to explain how the types of losses from violations of anticorruption laws may fare under the policy's exclusions. R&W insurance will remain for the foreseeable future an important feature of M&A deals. To advise clients more comprehensively on anticorruption issues in dealmaking, compliance lawyers should be reasonably informed about the latest metrics and trends on R&W insurance claims and evolving case law on the interpretation of specific exclusions in R&W insurance policies.

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Peter P. Tomczak is a partner with Baker McKenzie, and serves as Global Chair of the firm's Investigations, Compliance and Ethics Practice. Mr. Tomczak has conducted sensitive internal investigations, particularly those arising under the U.S. Foreign Corrupt Practices Act, for multinational corporations in more than 30 international jurisdictions. He has counseled clients in addressing compliance and corruption issues in the context of merger and acquisition, joint venture, and commercial transactions. Mr. Tomczak counsels clients and their boards of directors on issues of corporate compliance and corporate governance, including ESG trends and developments. He also has represented clients in complex business disputes, including those involving alleged breaches of fiduciary duties.

Mr. Tomczak regularly publishes and presents on anticorruption, compliance, and corporate governance issues. Among other publications, he coauthored THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK (6th ed. 2024), with Robert W. Tarun, which was recently named Winner of the 2024 Book of the Year in Law by American BookFest. Prior to joining Baker McKenzie, Mr. Tomczak clerked for Vice Chancellor John W. Noble of the Delaware Court of Chancery. He received his Juris Doctorate degree, *Magna Cum Laude*, *Order of the Coif*, from the University of Michigan Law School, and was awarded the Daniel H. Grady Prize for graduating first in his law school class and the Emmett E. Eagan Award for excellence in the study of corporate law.

William J. Rowe is a mergers and acquisitions partner with Baker McKenzie. He partners with global clients, many Fortune 100 strategic acquirers and family offices, with transformational domestic and international mergers, acquisitions, carve-outs, and joint ventures. These deals range from private and public target acquisitions in the United States and around the world to complex, multi-jurisdictional acquisitions and sell side transactions. William Rowe has spoken at conferences held by or been published by Merger Market, Bloomberg, Practicing Law Institute, the Chicago Bar Association and Deal Lawyers, among others, on practical developments for international acquisitions.

Mr. Rowe is the author of several publications on representation and warranty insurance and previously served as the coordinating partner for Baker McKenzie's representation and warranty practice. Among

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Robert W. Tarun is a white-collar criminal defense lawyer admitted to the California and Illinois bars. A Fellow and former Regent of the American College of Trial lawyers and former federal prosecutor in Chicago, he has tried over fifty jury trials across the United States. Best Lawyers in America® named him the White-Collar Criminal Defense Lawyer of the Year in San Francisco. He has also conducted sensitive internal investigations, including those arising under the U.S. Foreign Corrupt Practices Act, for multinational corporations across the nation and in more than 60 international jurisdictions.

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