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Business Transaction Due Diligence for Safety Professionals

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Introduction

Consider the following scenario: You have been asked to assist in the due diligence of the acquisition of another company by your executive officers. They believe that, as a safety professional, you have the knowledge and the judgment to protect your company from unreasonable risk due to safety, health and environmental issues. But what do you do now? You are being brought in at the last minute, and expected to determine the overall risk and the cost to remediate any environmental contamination or bring the acquired company into compliance with safety, health and environmental legal requirements immediately after closure of the deal. Also, you are being asked to predict the amount of money that should be deducted from the purchase price of the acquisition target to compensate for the decrease in market value of the deal due to the safety, health and environmental risks.

How do you shift from an everyday safety compliance orientation to viewing the enterprise as a whole, and assessing threats to the viability of the deal or even to the business that survives the transaction? Are you buying a superfund site or a major, possibly criminal, safety or health disaster? What key employees are going to come into your company from the target company? Do they have regulatory or legal baggage that you have not discovered? What if they are untruthful or fail to disclose material facts? Should you demand concessions or provisions in the structure of the deal to protect your company?

These are some of the issues we will discuss in this paper. We will identify the major issues in safety, health and environment that need to be on your radar screen. We will discuss not only OSHA and EPA rules, but also some SEC and other business or accounting requirements of which you should be aware if the stock of the target company is publicly traded. We will also review several state laws that affect business transactions and disclosures. Some of these state laws can prevent the completion of the transaction if the state agency is not satisfied that threats to public health and safety have not been adequately addressed. Responsibility for environmental liability has also been the subject of legislation in the European Union (EU) and in national legislation around the world. For example, if the deal includes the acquisition of facilities in the UK, the provisions of the Contaminated Land legislation and the Environmental Damage and Environmental Liability regulations may apply (NetRegs, 2010).

Types of Business Transactions

What sort of business transactions might have their value affected by safety, health and environmental consequences? We will limit our discussion to mergers and acquisitions of companies, and purchase or lease of real estate. In a “merger of equals,” two firms, often about the same size, agree to become a new company, issuing new stock in the name of the new company, and the previous companies no longer exist. The new, merged company contains all the assets and liabilities of both predecessors. This doesn’t happen often. Most often, one company takes over another, and the stock of the taken over, or “target” company is purchased by the acquiring company (Investopedia, 2010). Both the merger of equals and the acquisition transaction are “stock deals,” in which the surviving company stands in the shoes of the former companies, and is responsible for all liabilities incurred by the former companies. Another transaction that may take place is an “asset deal,” whereby one company buys the assets of another company, which could include some or all of the equipment, buildings, intellectual property, receivables, and so forth, of the other company. In this case, the company that sold the assets continues to exist. The liabilities that go to the acquiring company are only those that stem from the assets themselves; for example, hazardous operations or materials used in a manufacturing process in a factory that was bought by the acquiring company. Liabilities from contamination at facilities not acquired or from historical operations of the selling company do not become the responsibility of the company buying the other assets. A purchase of real estate is an asset deal. Leasing of real estate is not without risks to the acquiring company due to environmental impairment.

We will primarily focus on potentially negative consequences to the value of the transaction. Occasionally, a safety, health or environmental consideration enhances the value of the transaction. For example, a product developed by the company to be acquired may have significant energy savings or may eliminate the creation of harmful waste or byproducts, or is otherwise considered a bona fide “green” product or service. If there is significant positive value to such a product or service, the business principals driving the transaction have usually already taken this into account. In the uncommon case where this is true, you must be on your guard not to let it overshadow any potential negative aspects.

Getting Started: The Data Room

Due to the need for confidentiality, it has been common practice for the company to be acquired to set up a “data room” at an off-site location, usually at the office of a law firm representing the company. This allows the acquisition due-diligence team to access the financial, legal, and other significant business information about the company in a discrete manner. Typically, documents are not allowed to be removed from the data room, and copies of certain document are not allowed to be made. Now, more often, a “virtual” data room is set up over a secure Internet site.

As the responsible safety professional, you should request permission to personally view the documents provided in the data room. The documents you should seek include a list of properties, their size and location, their function (manufacturing, warehousing, offices, and so on), and whether they are owned or leased. A list of environmental permits, such as Clean Air Act Title V operating permits or state issued air permits, National or State Pollution Discharge Elimination System (NPDES or SPDES) direct discharge wastewater permits, Underground Injection Control permits, hazardous and solid waste disposal permits issued under federal or state programs, are examples of such documents that exert control over how a facility may operate. Notices of lawsuits from private groups or the government claiming harm due to safety, health or

environmental matters should also be in the data room. Workers' compensation cases, illness and injury statistics, and possibly significant accident investigation reports should also be available. If such documents are not found in the data room, you should make a list of such documents and request, through your company lawyer, that they be produced or obtain a written response that they do not exist.

The company to be acquired has made statements that your attorney refers to as "representations and warranties." Representations are statements that the target company holds out to be factual about the state of the company. You would be most interested in statements about the compliance with safety, health, and environmental legal requirements. Commonly, such statements are framed to the effect that the company is not in "material violation" of any occupational safety or environmental laws, rules, or regulations that apply to the conduct of its business or any facilities or property owned, leased, operated, or used by the company, and that the company is aware of no current circumstances likely to result in the imposition or assertion of such a citation, fine, or penalty. Typically, there are also similar representations regarding litigation, including notices from occupational safety, health, or environmental agencies. If there are such material violations or actual or threatened litigation, the circumstances must be described here. Warranties are statements that are not only held to be true, but further assert that the acquiring company will be held harmless or made whole, or otherwise compensated or protected if found to be untrue after the deal closes. The list of "reps and warranties" is one of the most crucial documents in the data room because the target company has held them out to be true, usually "to the best of (their) knowledge." What if their representations turn out to be inaccurate, or there are no safeguards to ensure that the warranties can be implemented? We will discuss possible approaches to remedy in the "Tailoring the Transaction" section.

There are many issues to be identified and evaluated regarding their potential effects on the value of the company and the viability of the deal to be consummated. For example, you may become concerned about safety hazards and compliance with machine guarding, if you find reports of injuries including several lacerations and an amputation have occurred at one manufacturing location, and a fatality occurred at another manufacturing location, when a worker was struck by a robot. Or you may discover a notice of intent to bring a class action against the company for alleged product safety or health hazards. If the data room also contained a letter received within the past month from the EPA, asking for information about onsite waste disposal at a plating facility that had once been owned by the target company, you certainly would need to learn more. If the EPA letter also asked about waste materials sent from the plating company to a landfill that had been improperly closed, and is now contributing to groundwater contamination in a rural area where the aquifer is used for a source of drinking water, you might become even more interested. In a situation such as this, you may learn that the EPA has retained a environmental consulting firm to conduct a remedial investigation/feasibility study (RI/FS) of the landfill and has spent several million dollars from the Superfund, for which EPA seeks reimbursement.

CERCLA and Similar Environmental Laws

You have probably read or heard news accounts about environmental cleanups of contaminated property where the "Superfund" was incurred to pay for the cleanup. This federal law that created the Superfund is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §§ 9601 et seq.), also known by its acronym, CERCLA. This law was intended to provide funding and enforcement authority for EPA to respond to hazardous substance spills and waste sites from decades past.

CERCLA liability is strict, joint and several, and retroactive. A currently viable “deep pockets” company can be compelled under CERCLA to retroactively pay for the cleanup of a property, even though the activities that caused the contamination were legal or even industry-standard practice at the time of original occurrence. Also the “strict” liability aspect of CERCLA means that fault or negligence does not have to be proven; all that is necessary to show is that the company owned or operated the facility, or transported or decided that hazardous substances should be placed on a property, and that the release of hazardous substances caused damage to human health or the environment.

Consider the following language from a real estate transaction contract from 1953:

> Prior to the delivery of this instrument of conveyance, the grantee herein has been advised by the grantor that the premises above described have been filled, in whole or in part, to the present grade level thereof with waste products resulting from the manufacturing of chemicals by the grantor at its plant in the City of Niagara Falls, New York, and the grantee assumes all risk and liability incident to the use thereof. It is therefore understood and agreed that, as a part of the consideration for this conveyance and as a condition thereof, no claim, suit, action or demand of any nature whatsoever shall ever be made by the grantee, its successors or assigns, against the grantor, its successors or assigns, for injury to a person or persons, including death resulting therefrom, or loss of or damage to property caused by, in connection with or by reason of the presence of said industrial wastes. It is further agreed as a condition hereof that each subsequent conveyance of the aforesaid lands shall be made subject to the foregoing provisions and conditions.(Zuesse, 1)

This is from the deed conveying the property which, in the late 1970s, became known as Love Canal from Hooker Electrochemical Company to the Board of Education of the School District of the City of Niagara Falls, NY. The Board of Education clearly was warned about the dangerous chemicals that had been disposed of on the property. Hooker management even escorted School Board officials onto the property to observe eight test borings through the clay cap that Hooker had placed over the waste (which was actually beyond state of the art in the 1950s). Yet Hooker’s successor company was successfully sued, and faced environmental enforcement actions and extremely unfavorable worldwide publicity.

The “joint and several” liability aspect of CERCLA means that, if all the other owners of contaminated property and all the other parties who deposited hazardous substances on the property are no longer in existence, or no longer have the financial wherewithal to contribute to reimbursing EPA for using Superfund money, and your company is the only “deep pocket” left, your company will be responsible for the entire amount.

These liability provisions of CERCLA introduced a great deal of uncertainty in evaluating the risks of acquiring businesses that dealt in hazardous substances or in contaminated property, even if the toxicity of the substances or the amount of contamination was relatively minor. In order to relieve some of this uncertainty, the Small Business Liability Relief and Revitalization Act was signed into law in 2002. This law is known as the “Brownfields Law” because it was intended to encourage the re-development of abandoned factories usually in “Rust Belt” cities so that mildly contaminated properties could be cleaned up efficiently and appropriately, and the property returned to productive and safe use, and the local economy could be stimulated. The Brownfields Law directed EPA to clarify the requirements to claim an “innocent landowner” defense from CERCLA and to establish liability limitations for “bona fide prospective purchasers” of

contaminated property or property contiguous to contaminated property. To do so, these parties must conduct "all appropriate inquiry" of the status of the property as they conduct their due diligence investigation.

The acquiring company can be considered a "bona fide prospective purchaser" and enjoy limited liability under CERCLA only if the process required in 40 CFR Part 312 , EPA's all appropriate inquiry (AAI) rule, has been strictly followed. This rule establishes qualifications to be considered an "Environmental Professional (EP)" who can perform assessments and inquiries to identify conditions indicative of releases or threatened releases of contaminants from the site.

The EPA has stated that the process, outlined in ASTM E 1527-05 *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process* to investigate the environmental condition of commercial real estate, is in full compliance with AAI. This ASTM standard specifically addresses the environmental site assessment (ESA) of commercial real estate with regard to CERCLA hazardous substances and petroleum products. No sampling and analysis of soil, surface water, ground water, air or any other environmental media is conducted in a "Phase I" ESA; such activities would constitute part of a "Phase II" ESA. The goal of the Phase I ESA is to identify "recognized environmental conditions," which are defined as "the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, ground water or surface water of the property" (ASTM 2005). A recognized environmental condition could exist, even though the amount of contamination is in compliance with laws. However, a recognized environmental condition does not include "de minimis" conditions that generally do not present a threat to human health or the environment, and that generally would not be subject to regulatory enforcement if brought to the attention of the appropriate government agencies. The EP will assume that the Phase I ESA is being done to secure landowner liability protection under the Brownfields Act. If you want the scope to include other considerations; for example, if environmental conditions might significantly affect the operation of a facility at the site, it is your responsibility to negotiate this with the EP up front. The ASTM E 1527-05 standard notes that "business environmental risks" may exist in addition to the "recognized environmental conditions." These business environmental risks are beyond the scope of the Phase I, but again you should negotiate with the EP if you expect to expand the scope to include such issues as asbestos-containing building materials, radon, lead-based paint, lead or other contaminants in drinking water, wetlands, regulatory compliance, cultural and historical resources, industrial hygiene, health and safety, ecological resources, endangered species, indoor air quality, biological agents and mold. In addition, the EP will expect you to inform him or her before the site reconnaissance of any actual or specialized knowledge or experience that is material to recognized environmental conditions about the property, or if you have knowledge of any environmental liens or activity or use limitations encumbering the property, or any commonly known or "reasonable ascertainable" information in the local community about recognized environmental conditions. Also, if the purchase price of the property is significantly below the fair market value of a similar uncontaminated property, you should try to identify a reason for the lower purchase price and make a written record of such explanation to preserve your liability protections.

A typical Phase I ESA report under ASTM E 1527-05 will include a description and current use of the property, as well as adjoining properties, the results of reviewing environmental records on the property and adjoining properties, and interviews with the current owner, site

manager, occupants, local government officials, and others who might have knowledge of potential contamination. The report must include an opinion, conclusion, and a discussion of any deviations from the ASTM standard practice. The records' review is generally conducted by purchasing commercially available downloads of numerous federal, state and local government databases about environmental issues. These include sites which have been added to the National Priority List under Superfund, hazardous waste generators, and permits for hazardous waste treatment, storage, transportation or disposal, underground injection wells, underground and above ground storage tanks, air emission permits, stormwater or wastewater permits, and so on. Other publicly available information sources, such as toxic release inventories required under Section 313 of Title III the Superfund Amendments and Reauthorization Act, (the Emergency Planning and Community Right to Know Act), would also be included. Generally, all sites within one-half to one mile of the subject property should be included in the database search. The report should also include a USGS 7.5 Minute Topographic Map and aerial photographs going back to the property's first developed use, or 1940, whichever is earlier. Fire insurance maps indicating uses of properties and sometimes materials used at specific dates are also very helpful, as are property tax records and recorded land deed records. The local county assessor's office can be a very useful resource, as well as local historical societies and librarians. There are very helpful, non-mandatory informational appendices in ASTM E 1527-05, and a careful perusal of this standard practice is recommended.

The transfer of property may also need to take account state laws where the transaction occurs or where the property is located. More than 35 states have enacted legislation, most of which is related to real property transactions. In the most stringent cases, the laws have established full-blown regulatory bureaus, which must give permission for transactions to be made final. In other cases, the laws require notification of the prospective purchaser of potential contamination, such as the presence of solid or hazardous waste landfills or underground storage tanks prior to closing the sale. Some state laws merely require that the property owner record the existence of environmental contamination or conditions on the deed and register that information with the local county or parish.

New Jersey was one of the first states to enact legislation with the power to stop or hold up real estate transactions because of environmental issues with the Environmental Cleanup Responsibility Act (ECRA) in 1985, now reformulated as the Industrial Site Recovery Act (ISRA). Under this state law, the New Jersey environmental agency was required to approve a cleanup plan or a "negative declaration" that there was no environmental problems before the industrial real estate transfer could be legally consummated.

Connecticut has a Property Transfer Act that governs any change in ownership of real estate or a business which meets the definition of an establishment (generally meaning after 1980, a small or large quantity generator of hazardous waste, a hazardous waste storage, transfer, recycling or disposal facility or, after 1967, a dry cleaner, furniture stripping or vehicle body refinishing operation). Similar to New Jersey, a commitment must be made to investigate and remediate any environmental contamination on the property, as attested to by a Licensed Environmental Professional.

State laws may be enacted or repealed without gaining national attention. The Illinois Responsible Property Transfer Act was repealed in 2001, for instance. Therefore, if you are engaged in a large transaction that affects many properties in numerous states, it may be advisable to seek guidance from law firms with offices in the regions affected for the most up-to-date advice.

EPA and OSHA Audit Policy and Similar State Provisions

So far, we have primarily discussed the investigation of environmental contamination of property. However, significant liability can be derived from safety, health, and environmental hazards due to operational activities, facilities, and equipment. Consider the catastrophic explosion at the BP Texas City, Texas refinery in March 2005, resulting in 15 fatalities and 170 injuries. This incident has been the subject of multi-million dollar governmental penalties and civil litigation. The blue ribbon panel led by former secretary of state, James A. Baker III, formed under the auspices of the U.S. Chemical Safety Board, reported that before the explosion, Amoco, which was acquired by BP in a stock deal on December 31, 1998, had cut maintenance spending at the Texas City refinery by 41 percent and capital spending by 84 percent from 1992 to 1998 (Mufson, 2007). Such facts may raise a red flag to a vigilant safety professional conducting a due diligence inspection of a refinery or a chemical plant, particularly if the safety professional is well versed in the OSHA Process Safety Management standard and the EPA Clean Air Act Risk Management Plan rule.

Other red flags that might arise during a site inspection by a safety professional could include the effects on building structural integrity from the use of heavy forging hammers; corrosion of exhaust ventilation system ductwork and roof structures from the improperly controlled use of strong acids and caustics; or the accumulation of potentially combustible dust on rafters, floors, mezzanines and silos. Or suppose that you had a qualified consultant review the information in the virtual data room, and you found the use of chlorinated solvents without adequate ventilation and without appropriate personal protective equipment (PPE) in one of the manufacturing units, and buildings with transite asbestos siding at another location. All of these conditions could lay the groundwork for catastrophic failures or serious occupational health claims if not quickly remedied, and the underlying root causes eliminated.

However, some organizations may be reluctant to document such conditions if the knowledge of the acquiring company were to become discoverable in the wake of a catastrophe soon after the deal closed. In order to encourage voluntary audits and the opportunity to expeditiously fix problems discovered as a result of an acquisition, EPA established an Interim Approach to Applying the Audit Policy to New Owners (73 FR 44991-45006, Friday, August 1, 2008). The intent was to lessen the fear of environmental enforcement for acquiring companies if they want to make a “clean start” by correcting non-compliance that began prior to the acquisition. For nine months after the closing of a transaction, a new owner can choose to enter into an audit agreement with the EPA, which will specify the facilities to be audited, scope of regulatory programs covered, dates for completion of audits, and disclosure of violations. Or the new owner can choose to make disclosures individually, as violations are discovered, but each disclosure would have to be made within 21 days of discovery or within 45 days of the closing of the transaction, whichever is longer. Penalties for economic benefit from avoided operation and maintenance costs will be assessed against the new owner from the date of the acquisition. But penalties for economic benefit from delayed capital expenditure or unfair competitive advantage will not be assessed against the new owner if the violations are corrected in accordance with the EPA Audit Policy within 60 days of the date of discovery, or another reasonable time frame to which EPA has agreed.

OSHA has adopted a policy regarding voluntary employer safety and health self-audits in general. This policy states, “…where a voluntary self-audit identifies a hazardous condition, and the employer has corrected the violative condition prior to the initiation of an inspection (or a related accident, illness or injury that triggers the OSHA inspection) and has taken appropriate

steps to prevent the recurrence of the condition, the Agency will refrain from issuing a citation, even if the violative condition existed within the six month limitations period during which OSHA is authorized to issue citations" (OSHA 2000).

Texas has gone a step further in offering relief to companies that proactively seek to discover, disclose and correct safety, health, and environmental violations. The Texas Environmental, Health and Safety Audit Privilege Act provides immunity to companies that notify the Texas Commission on Environmental Quality (TCEQ) in advance of an audit, disclose the violations, and commit to a corrective action plan agreeable to the state agency. Texas has not applied for approval to operate the federal OSHA program, but the Texas Act can establish the "evidentiary privilege" and, once violations are identified and corrected, OSHA's audit policy can be used to protect the employer from penalties that OSHA would have levied if the violations had been identified during an inspection (Sarahan 423).

Security and Exchange Commission (SEC) Rules and Accounting Principles

In March 2005, the Financial Accounting Standards Board (FASB) issued FASB Interpretation No. 47, *"Accounting for Conditional Asset Retirement Obligations — An Interpretation of FASB Statement No. 143"* ("FIN47"). FIN47 clarifies the term "conditional asset retirement obligation," as used in SFAS No. 143, *"Accounting for Asset Retirement Obligations,"* and addresses the diverse accounting practices that have developed with respect to the timing of liability recognition for legal obligations associated with the retirement of a tangible long-lived asset when the timing and (or) method of settlement of the obligation are conditional on a future event. In addition, FIN47 clarifies that an entity is required to recognize a liability for the fair value of a conditional asset retirement obligation when incurred if the liability's fair value can be reasonably estimated.

The possibility exists that the SEC will bring an action against the target company for not having completely divulged the estimated cost of retiring assets (including those impaired by environmental contamination) in their required stock market-related disclosures under FIN 47.

Therefore, another set of rules now exists to support the truthfulness and accuracy of estimating long-term liabilities, such as the cost of the eventual closure of a waste disposal unit, or a manufacturing facility where hazardous substances were used, stored or disposed of during its useful life.

For example, consider the 2007 order issued by the SEC against Ashland Inc. and William C. Olasin, the former Environmental Remediation Director of Ashland. A whistleblower alleged wrongdoing in the preparation and reporting of the environmental liabilities of the company, and sought protection under the Sarbannes-Oxley Act. The SEC ordered Ashland to document all adjustments to environmental remediation estimates and the reasons why they were made; and to maintain a complete audit trail; to require the manager to consult with an outside remedial engineer on each adjustment; to prevent Mr. Olasin from having any involvement with environmental reserves; and to have PriceWaterhouseCoopers review its policies, procedures, and internal accounting controls relating to environmental reserves and submit the report and recommendation to Ashland's audit committee and the SEC. The accounting events that were the basis for this SEC action took place before the provisions that impose civil and criminal penalties under the Sarbannes-Oxley law were in effect. Until more case law evolves, it is not possible to accurately predict how the outcome might differ today. However, SEC rules under Sarbannes-

Oxley require the CEO and CFO of public companies to sign and certify their SEC periodic reports and disclosure controls and procedures. False certifications are subject to penalties of up to $100,000 for individuals and $500,000 for the companies, and under SEC 906, a certifying officer who knowingly certifies a periodic report that does not fairly present, in all material aspects, the financial condition and results of operations of the issuer can be fined not more than $1 million or imprisoned for up to 10 years. An officer who willfully makes the certification knowing that the accompanying periodic report does not fairly present this information may be fined not more than $5 million and be imprisoned for up to 20 years (Environmental Protection, 2006).

Emerging environmental issues, such as climate change, have also gained the attention of the SEC. On February 2, 2010, the SEC issued an interpretive release, "Commission Guidance Regarding Disclosure Related to Climate Change." This guidance takes note of the New York Attorney General's settlement agreements with three energy companies about their disclosures related to greenhouse gas emissions and potential liabilities resulting from climate change legislation; federal and state greenhouse gas monitoring and reporting requirements; and voluntary reporting initiatives such as the Climate Registry, the Carbon Disclosure Project and the Global Reporting Initiative (Law and the Environment, 2010).

Working with Consultants and Other Professional Resources

Certainly you could spend many entertaining hours online searching databases, such as "My Environment" on the EPA website, or using a geographical information system, such as Google Earth, to gather a portion of the information available. But given the vast amount of information potentially available, and the possibility that at least some of the information is out of date or erroneous, your time is best spent managing the technical and legal resources available to you. During the heat of the hunt may be the best opportunity to get management attention and support for your phase of the due diligence effort. The safety professional functioning as the acquiring company's representative needs to have a sense of the company's risk tolerance. If the company is acquiring a firm in the same line of business, the acquiring management may be more comfortable assessing risk from operations or products with which they are familiar than a company in a field new to them. You may be the person who ultimately recommends what to emphasize to your company management as potential deal killers or issues that will need to be the subject or attorney-client privileged audits or immediate management control during the integration phase.

The previous discussion of the user responsibilities and negotiations that could be conducted with an Environmental Professional in the context of CERCLA's all appropriate inquiry and the ASTM E 1527-05 Standard Practice for conducting Phase I ESA's provides a starting point for considering the entire range of risks to be assessed for a business transaction. You may need to rely on several technical consultants, attorneys, forensic engineers, or toxicologists to identify all the critical issues from the extensive safety and health rules in 20 CFR 1910 or 1926, and state health and safety laws to the federal and state environmental regulations governing air, water, and waste materials. The development of new products or significant new uses of existing chemicals are stringently regulated under TSCA, and may be beyond the scope of environmental professionals who focus on compliance with emission and waste regulations. You should also inquire to what extent the changes in the classification and labeling of hazardous chemicals under the UNECE Globally Harmonized System (GHS), and changes that are occurring in the European Union countries under their REACH legislation, may affect how the business with international customers must operate. For transactions involving entities or properties outside of the United

States, you should make sure that your consultant is aware of these aspects of the transaction, and that they aren't approaching their duties from a strictly U.S. environmental law approach, which may be the case with consultants who are experienced in compliance or remediation issues, but not in supporting business transactions. The consultant should be familiar with environmental impact study requirements, and the transferability of permits and authorizations that may be affected by the change of ownership in the various countries involved. The cost of these types of studies, and the deadlines involved, need to be part of the transactional cost and integration planning of the deal.

Tailoring the Transaction

What if the representations that the target company made about its compliance with the law, or the condition of the properties, or litigation against the company, turn out to be not completely true? This is termed a "breach" of a representation. How can you ensure that the warranties and relief promised are actually delivered? Often, an escrow is demanded, whereby funds are set aside to cover such instances; usually there is a cap on this amount of money, and it is only available for a limited time, usually one year, after the date of the closing of the transaction. Insurance products are sometimes available to cover the risk that the warranties are not followed through. The use of an insurance instrument might also be attractive to the selling company in an asset deal, since funds that could be put to other use would not be tied up. Such insurance policies are written on a customized basis; the premium depends on the risks covered, but generally ranges from 3% to 5 % of the policy limit. There may be an opportunity to structure the insurance protection in a tiered fashion to reduce the underwriting risk and also the premium. For example, the first million dollars of a specific loss could be escrowed by the selling company; the next million dollars for that issue could be self-insured or escrowed by the buyer; and the next several million dollars, up to the policy limit, would be the responsibility of the insurance provider or, more likely, a re-insurer.

You must also make sure that the concessions in price and agreements to pay for certain improvements and cleanup activities are actually carried out in the immediate aftermath of the acquisition. Sometimes, after the excitement of the new acquisition has worn off, the management team is on to other ventures, and the mop up of these unpleasant issues is assigned a low priority. Meanwhile, you are now responsible for the resolution of these issues, with less than adequate resources or management support. Therefore, now is the time to secure a written commitment of funding, and a schedule of deadlines for completion of follow-up audits or remedial actions.

Conclusion

A business transaction can range in scope from the purchase of a pristine "greenfield" parcel of real estate to the acquisition of the stock of a major corporation engaged in energy production, manufacturing, health care or any number of activities, products or services with safety, health, and environmental consequences. The safety professional responsible for safeguarding the acquiring company's management, assets, reputation, and where applicable, shareholders, needs to be aware of an ever-widening panorama of safety, health, and environmental issues.

A complex transaction will require much more than a cursory review of data room documents, a site visit, and brief interviews with site management, or a typical Phase I ESA. The safety professional with an understanding of the operations and materials, and experience in

controlling the hazards of the industry, is best positioned to direct the outside technical consultants and to prioritize their findings for explanation to the management decision makers.

The safety professional must be the last line of defense to be sure the purchase contract sets aside an adequate basket of funds or insurance to pay for matters that are discovered or confirmed after the deal closes. Is there a set procedure and information required, and a deadline for accessing these funds? If so, has the planning for the immediate integration activity focused on these requirements and deadlines? With your knowledge and experience as a safety professional, you are best equipped to make sure that your company and your existing and new employees and neighboring communities are protected as the transaction goes forward.

Bibliography

ASTM International (ASTM). 2005. *Standard Practice for Environmental Site Assessments: Phase I Site Assessment Process* (ASTM E 1527-05). West Conshohocken, PA: ASTM International.

Investopedia. 2010. *Mergers and Acquisitions: Definitions* (retrieved February 25, 2010) (http://www.investopedia.com/university/mergers/mergers1.asp).

Law and the Environment website. *Ashland Order Reveals SEC Expectations for Corporate Internal Controls for Environmental Disclosure.* (retrieved February 27, 2010) (http://lawandenvironment.typepad.com/law_and_the_environment/2007/02/ashland_order_r.html).

Law and the Environment website. *Securities and Exchange Commission Issues Guidance on Risk Disclosure.* (retrieved February 26, 2010) (http://lawandenvironment.typepad.com/law_and_the_environment/2010/02/securities-and-exchange-commission-issues-guidance-on-climate-risk-disclosure.html)

Mufson, Steven. "BP Failed on Safety, Report Says: Baker Panel Finds that Oil Company Skimped on Spending." *The Washington Post.* January 17,2007. (retrieved on March 2, 2010) (http://www.washingtonpost.com/wp-dyn/content/article/2007/01/16/AR2007011600208.html).

NetRegs Partnership between UK environmental regulators. 2010.*Who is Responsible for Cleaning up Contaminated Land?* (retrieved March 3, 2010) (http://www.environment-agency.gov.uk/netregs/63412.aspx).

Occupational Safety and Health Administration (OSHA). 2000. 65 Federal Register 46498-46503. *Final Policy Concerning the Occupational Safety and Health Administration's Treatment of Voluntary Employer Safety and Health Self-Audits* (retrieved March 3, 2010) (http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=16434).

Sarahan, P. C. "Auditing as a Tool for Ensuring Compliance with Nanotechnology Safety Requirements." *Nanotechnology Law & Business.* Winter 2008: 417-428.

Stone, Darren. “The New Deal: Tightening disclosure rules are making it difficult for companies to hide environmental liabilities.” *Environmental Protection.* September 1, 2006 (retrieved on February 28, 2010) (http://eponline.com/Articles/2006/09/01/The-New-Deal.aspx?p=1)

U.S. Environmental Protection Agency (EPA). *Interim Approach to Applying the Audit Policy to New Owners* (73 FR 44991-45006, Friday, August 1, 2008)

Zuesse, E. “Love Canal: The Truth Seeps Out.” *Reason.* February 1981 (retrieved on February 25, 2010) (http://reason.com/archives/1981/02/01/love-canal)