

M&A in the FCPA Context: What a Seller Should Do

I have written about mergers and acquisitions (M&A) in the context of the requirements of the Foreign Corrupt Practices Act (FCPA). However I usually write about the acquiring company and its obligations under the FCPA. I recently have worked with some companies which are in the acquired position so I thought it might be a propitious to give some thought to what such companies may need to do if they find themselves in a friendly takeover or other merger situation.

In a recent article in the Houston Business Journal, entitled, “*Dodd-Frank brings expansion opportunities and obstacles*” attorney Annette Tripp, a Houston-based partner in the law firm of Sutherland Asbill & Brennan LLP discussed more generally the drivers for a wave of bank mergers that she believes the Dodd-Frank legislation will spawn. In her article she lists five common tasks for both buyers and sellers of businesses to prepare for an acquisition or sale. We will use her article as a starting point for some general guidelines that the seller of a business should keep in mind regarding its role regarding FCPA issues in any such sale.

1. **Identify Your Goals.** As my colleague Howard Sklar often notes, water is wet and along those same line, to execute a plan, there needs to be one. Your plan should lay out where your company is in satisfying its compliance obligations under the FCPA and how you might be ready to remedy any shortcomings. Understanding the current regulatory environment, particularly your company’s obligations under the FCPA, will allow you to plan to respond quickly and efficiently to an acquirer’s request for information.
2. **Create a M&A Team.** You need to create a M&A team to spearhead your efforts. Simply by naming it M&A does not define it as an acquiring team only, it can also work on efforts to acquire your company. This team should give direction to your efforts and will allow your company’s management to continue its day-to-day business operations without the distractions of responding to all the requests of a proposed acquirer. You may have team members from outside your company such as your regular legal counsel and any outside financial consultants you might employ. Your internal resources should include your in-house counsel, accounting and finance representatives and a leader from your business operations.
3. **Communicate with Your Board.** The M&A team needs to communicate regularly with the Board and keep them updated. This means keeping the Board fully informed on all aspects of any proposed transactions. As with all Board communications, you need to be ready to answer any and all questions, recognizing the Board may not inquire down the granularity that you should be prepared to answer. However, as a senior partner told me when I was a very young trial lawyer, whatever you prepare for, the judge will not ask you about and if there is something you do not prepare for the judge will quiz you on those issues. A complete level of preparedness will lead to communication which will allow the Board to react quickly to any opportunities which may arise and may well expedite required Board approval.

4. **Put Your Own House in Order.** In the compliance world not only is this good advice, it is absolutely critical for a seller. If you do not have an effective compliance program, get one, as in now. If you do have a compliance program; perform a risk assessment which can inform where your compliance program needs any enhancements. Any acquirer will be required to fully review your compliance program. They will want to review your agents, payments to agents, due diligence on agents, your contracts with your agents and want to know how you manage your agents. An acquiring company does this because they are so obligated under the FCPA. If your risk assessment leads you to conclude that FCPA issues exist, begin remediation as soon as possible. If you do not do so before the acquirer begins its due diligence, it could well delay or even derail the proposed acquisition.
5. **Set Expectations to the New Normal.** The reality of the currently legislative and regulatory scheme can extend the time it takes to fully perform due diligence on a proposed transaction or expand the scope beyond the scope of simple financial due diligence. No longer is a ‘data dump’ sufficient for an acquirer. You, as a legal or compliance officer, should prepare your company for the types of information that you can expect in FCPA due diligence in the M&A context. There are many sources you can go to. You can: (1) Review current Deferred Prosecution Agreements (DPAs) which discuss M&A such as the Johnson and Johnson DPA; (2) Review Department of Justice Opinion Releases which discuss M&A such as Opinion Release 08-02 [the ‘Halliburton Opinion Release’] or (3) Read this blog on a regular basis. Whatever source you utilize, you need to set the expectation of what you will be required to provide to any proposed acquiring company so that no person in your company delays the process.

We cannot think of a better way to end this piece than to quote the author which inspired this posting, Annette Tripp, by quoting the final paragraph of her article:

Regardless of the reasons for a transaction, the next few years promise to be an interesting and challenging time for merger participants. The time to prepare is now.

This publication contains general information only and is based on the experiences and research of the author. The author is not, by means of this publication, rendering business, legal advice, or other professional advice or services. This publication is not a substitute for such legal advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified legal advisor. The author, his affiliates, and related entities shall not be responsible for any loss sustained by any person or entity that relies on this publication. The Author gives his permission to link, post, distribute, or reference this article for any lawful purpose, provided attribution is made to the author. The author can be reached at tfox@tfoxlaw.com.

© *Thomas R. Fox, 2011*