

Is Your Business Toxic-in the FCPA Compliance Context

Is your business toxic? I do not mean that it holds the type of sub-prime Collateral Debt Obligation assets which were so prominently mentioned in the press just a few years ago. I mean is your business so devoid of anything close to a *best practices* compliance program that you are not able to obtain loans, manage risk through insurance or other equally traditional business practices? Yesterday I wrote about the new types of insurance available for investigation of, and claims based upon, alleged violations of the Foreign Corrupt Practices Act (FCPA). This also included Directors and Officers liability coverage if such persons are made parties in a stock holder derivative action based upon violations of the FCPA. I also wrote about banks and other financial institutions which are now reviewing compliance programs to determine if they meet some type of minimum *best practices*. However, now the failure to have a minimum *best practices* compliance program in place may have a more drastic effect; it may deny you the ability to access your company's value in the capital markets.

Reverse Mergers

There has been much written about Chinese companies engaging in reverse mergers to obtain access to US capital markets. Writing in forbes.com, in an article entitled "*Chinese Reverse Merger Companies: The Auditor Angle*", Francine McKenna defined a reverse merger as "through such a transaction the private company becomes a SEC [Securities and Exchange Commission] reporting company with registered securities without filing a registration statement with the US SEC." One of the cornerstones to the FCPA is that if a company is publicly listed it has a books and records requirement, which is enforced by the SEC. Any company which does not have a minimum *best practices* compliance program, including books and records which accurately reflect all transactions, have made themselves immediately liable under the FCPA if they become a US publicly listed company through a reverse merger.

Re-financing

If your company is going through traditional corporate refinancing in the next 18 months, you had better start to audit, or at a minimum assess your compliance program. Why? Because any bank or other financial institution that you go to will want to not only review your compliance program but may well want to review where that compliance program may be in terms of an overall assessment of the compliance risks that your company faces. Are you in the telecom business; pharmaceutical business; energy business or any other area that the Department of Justice (DOJ) or SEC has targeted for a FCPA review? You better have all your compliance ducks in a row and ready to turn over to the financing institution for review.

Selling Your Business

Here is where your company may have risen (or sunk) to the level of toxic. If a company comes along and wants to purchase some or all of your business and they look under the FCPA compliance hood, what will they see? If there is no *best practices* compliance program in place they may well not take a second look. If you are a Private Equity company with a number of Portfolio Companies, what is the state of the compliance program in each Portfolio Company? If you have one of ten with a *best practices* compliance program, does that not “set the bar” for the minimum standard in all the other Portfolio Companies? While the DOJ has provided guidance in Opinion Release 08-02 and the Johnson & Johnson Deferred Prosecution Agreement (DPA) as to the steps an acquiring company can take to try and protect itself from successor liability under the FCPA, no lawyer can assure a client of complete absolution.

If you are simply a small business with a superior product or service and thereby well positioned to sell, what would be the price carve-out and/or indemnity which you would have to sign if you have less than a *best practices* compliance program? What if your compliance program cannot be assessed in the time available for pre-acquisition due diligence, would or should a company consider purchasing your business?

Yesterday I focused on some of the market developments which may drive implementation and enhancements of compliance program. Compliance programs may now be driven by the ultimate market factor of access to the value of your company. So we ask again is your company toxic because it has a less than *best practices* compliance program?

Ed. Note-to the Braves fans, you really could not have thought the 106-loss Astros would beat the Cards with the playoffs on the line. And congratulations to the Astros MVP, Hunter Pence (who just happens to play for the Phillies) for the game winning hit over the Braves. As to the Red Sox fans, I don't know what to say, it is not as bad as Bill Buckner but it has to be up there with Buck (F-ing) Dent. I am glad you had a couple of titles last decade so salve the pain of this one.

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