

Non-compliance with U.S. Anticorruption Law: Are you losing millions in company value?

Remote as one may think the ramifications are on an Asian company, compliance with the US FCPA can significantly impact upon and increase a company's value.

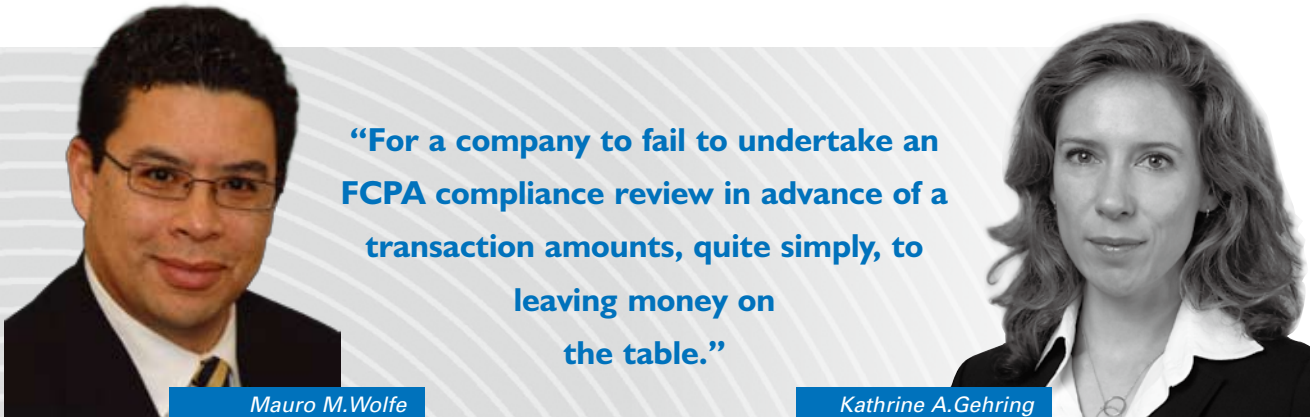
Mauro M. Wolfe and Kathrine A. Gehring of Duane Morris LLP clue us in on the potential opportunity cost of non-compliance ... which can be substantial.

On a recent trip to Asia, I was asked by an Indian CEO, "Why does the application of U.S. law matter to an Asian company?" In my experience, many commentators' responses will focus on the social good or the corrosive impact on society. This may well be true. However, my response took a different angle, a more practical one. Suppose that by making your company compliant with U.S. anticorruption law a buyer was willing to pay you a premium for your company? Is the additional value of your company worth the cost of compliance? In most cases, the answer is yes. That, in addition to the larger societal and moral reasons, may be the best reason to comply with U.S. law: making your company much more attractive to buyers.

The FCPA

The Foreign Corrupt Practices Act, formally 15 U.S.C. §§ 78dd-1, et seq., prohibits companies with connections to the United States from bribing foreign officials to obtain or maintain business. As defined by the Act, a bribe may take any form, including cash, gifts, travel, or even future employment. There are certain accounting transparency requirements that go along with FCPA as well. The U.S. Securities and Exchange Commission (SEC) and the U.S. Department of Justice (DOJ) share authority to bring enforcement actions, and thus violators may face civil and/or criminal liability. The FCPA can apply to conduct anywhere in the world, provided there are sufficient contacts with the United States.

The unprecedented interest in Asian expertise and capacity by U.S. and international companies has led to greater scrutiny by U.S. regulators. The U.S. Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) are now targeting U.S. and multinational companies with Asia-based affiliates, subsidiaries – along with certain Asian companies with U.S. market listings. As a result, FCPA review and compliance has become an essential part of any transactional due diligence with companies subject to U.S. regulation. The U.S. government holds the view, in many cases, that the conduct of the target company in Asia or elsewhere may be attributable to the purchaser. The theory is known as successor liabil-



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ity. Because of successor liability, many U.S. companies or foreign companies with significant contacts with the U.S. are wary of FCPA red flags from foreign targets. The risk to these purchasers is that as a result of the foreign acquisition the resulting penalties, fines, and harm to reputation may outweigh the value of the deal. Therefore, the opportunity exists for target Asian companies to demand a premium for the elimination or minimization of the FCPA risk. This strategy is applicable to any target company in the world.

Opportunities for Asian businesses

Much has been written about the costs to international businesses of acquiring or contracting with Asian companies that have engaged in conduct prohibited by the FCPA. For sellers, the risks of losing a deal – and of civil and criminal liability – have been demonstrated. In one example, Lockheed Martin abandoned a tender offer for Titan Corporation after FCPA violations were discovered. In that case, not only did Titan lose the deal, but it also paid \$28.5 million in an FCPA settlement.

Less attention has been paid to the fact that this new enforcement climate also creates a golden opportunity for Asian businesses to distinguish themselves from their competitors. As Deloitte has reported, buyers now prefer that any potential target identify any FCPA compliance issues up front. Pre-emptive FCPA compliance review is a way to increase value, to heighten bargaining power, and to demonstrate credibility to suitors. It should be seen as a wise investment by companies that anticipate or desire transactions with international buyers.

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The advantages of preemptive FCPA compliance review go beyond negotiating the cost and risk associated with FCPA non-compliance. Demonstrating FCPA compliance is also a good way to increase credibility overall.

Increasing enterprise value

Here are a number of steps that Asian companies can take to maximize company value with the assistance of

experienced, independent experts:

- Conduct an assessment of your company’s FCPA risk based on numerous factors including region of the world, industry, and local operations
- Create policies and procedures that will objectively demonstrate understanding of and commitment to FCPA compliance
- Provide education and training to company employees
- Create adequate audit practices to ensure FCPA transparency
- Hire experienced, independent counsel to assist with or perform FCPA review.
- If you take these steps, among others, your company will be well on its way to greater value.
- <http://www.duanemorris.com/>

www.duanemorris.com
mmwolfe@duanemorris.com
kagehring@duanemorris.com