Maersk’s bid to bring a new scale of operations with its 18,000-TEU vessels will send new economies of scale across supply chains.
CORRUPTION IN PURCHASING

THE FOREIGN CORRUPT PRACTICES ACT imposes criminal and civil liability when companies make corrupt payments to foreign officials for the purpose of obtaining or retaining business. Many businesses engaged in international commerce, if they are even aware of the statute’s existence, dismiss the need to proactively address FCPA concerns with a simple justification: “Our company doesn’t pay bribes.”

That reasoning dangerously oversimplifies the challenges presented by the statute, and exposes those companies to huge risks.

Contrary to the rationale implicit in that justification, FCPA liability is not confined simply to payments made by “the company.” The statute also covers payments made by intermediaries such as agents, consultants, distributors, brokers and joint venture partners. In addition, the statute allows for the imposition of “successor liability,” meaning companies may face criminal and civil sanctions not only when their affiliated intermediaries make bribes, but also when unrelated entities make improper payments prior to merging with or being acquired by the company.

Stretching the expansive contours of FCPA liability in this fashion means compliance efforts cannot end with contemporaneous monitoring efforts of current employees and intermediaries. Those seeking to expand their footprint through mergers and acquisitions must devote their efforts to formulate and implement strategies designed to prevent FCPA concerns, and integrate those strategies into the due diligence process.

Any government inquiry includes the possibility of huge fines and other sanctions, and the certainty of substantial legal and professional fees to manage and defend the investigation. Even companies that recognize the risk the FCPA poses typically rationalize it in the M&A context by noting the relatively limited possibility authorities will detect the issue.

Although FCPA enforcement actions have proliferated in the past five years, the risk of detection is relatively low as a result of limited government resources. Separate from the questionable ethical logic of a “let’s roll the dice” approach, there is a compelling financial reason to seek out and address latent FCPA problems in the M&A environment: Entities that have historically paid bribes to get business are overpriced.

Transactions in this setting turn on valuation of revenue streams. Acquirers must assess the volume and source of a target entity’s revenue on a historical basis to make informed decisions about how much it will earn in the future and how much it is worth at present. When the target derives some of its revenue stream through illegal conduct, failing to detect that conduct results in the acquirer paying too much, unless it plans to continue the practice.

Designing effective due diligence strategies in the M&A setting necessitates that the acquiring entity evaluate four key factors:

- **Location.** Target entities operating in countries with widespread corruption are more likely to have engaged in the practice. Due diligence strategies employed in Mexico should differ in degree and in kind from those employed in Canada.

- **Industry.** Bribes to foreign officials are often a function of opportunity. Some industries, especially those marketing goods and services directly to foreign governments and state-owned entities, create greater opportunities.

- **Structure of operations.** Part of the process of calibrating FCPA risk in a target’s operations mirrors what the acquirer should conduct of itself. The extent to which the target utilizes intermediaries that interact with foreign officials on its behalf is critical.

- **Commitment to Compliance.** Companies attuned to FCPA issues are much less likely to have problems lurking below the surface. Acquirers should attempt to determine what the target does to keep its house in order.

With these factors in mind, acquirers should formulate strategies that seek to gather information in a manner that reconciles two potentially conflicting goals of conducting an efficient, comprehensive investigation. This means adopting an incremental approach that aims to immediately identify the presence of issues that will crater the transaction while allowing for the collection of all relevant information.

Acquirers also should understand that some FCPA issues can evade detection, even in the exercise of reasonable due diligence efforts. Nevertheless, a genuine commitment to finding these problems enables the company to argue against the imposition of sanctions if they are later uncovered.

These arguments are even stronger when the acquirer discovers — and discloses — them. This means FCPA compliance efforts shouldn’t stop when the transaction is consummated. Acquirers must be prepared to continue and even intensify their efforts — in the form of “carry-over due diligence” — to learn everything they couldn’t find initially, either because they didn’t have the time or the level of access necessary.

The dramatic increase in FCPA enforcement has created a fundamental change in the way companies operate overseas. Those armed with an understanding of the latent dangers the FCPA presents stand better equipped to survive in this new era. joc

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