



FCPA and Anti-Corruption News E-lert

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A Lesson in Successor Liability: GE Settles Oil for Food FCPA Allegations

On July 27, 2010, General Electric Company ("GE") agreed to pay a \$1 million fine and to disgorge \$22.5 million to settle a complaint brought by the United States Securities and Exchange Commission ("SEC"), accusing GE of bribing Iraqi government officials to receive contracts under the United Nation's Oil For Food Program. The SEC complaint alleges that GE's conduct violated the Foreign Corrupt Practices Act ("FCPA") provisions of the Securities Exchange Act of 1934 that relate to keeping and maintaining accurate books and records and implementing sufficient controls to prevent inaccurate recording of transactions. GE received confirmation from the Department of Justice ("DOJ") that it had closed its investigation and will take no criminal action against GE relating to these matters.

The SEC complaint alleged that between 2000 and 2003, two foreign subsidiaries of GE -- Marquette-Hellige and OEC-Medical Systems -- and two companies that GE later acquired -- Ionics Italba S.r.L. and Nycomed Imaging AS -- made kickback payments valued at approximately \$3.6 million in the form of computer equipment, medical supplies and services to the Iraqi Health Ministry in exchange for contracts with Iraqi government agencies to supply medical and water purification equipment. The complaint alleges that the illegal payments were inaccurately described in the companies' books and records as commissions and other legitimate business expenses and were concealed under fictitious line items.

Significantly, the SEC found GE liable for violations that Ionics and Nycomed committed before GE acquired them. Indeed, GE was careful to note in its press release that only 4 of the 18 contracts at issue in the SEC's complaint were with the then existing GE subsidiaries. Nevertheless, in the SEC's press release, Cheryl J. Scarboro, chief of the SEC's new FCPA Enforcement Unit, specifically stressed "[c]orporate acquisitions do not provide GE immunity from FCPA enforcement of the other two subsidiaries involved."

GE's payment of significant fines for companies it did not own when the bribes and illegal conduct were committed only serves to underscore the need for pre-acquisition FCPA due diligence. With appropriate due diligence, acquiring companies can avoid this type of successor liability. But finding an FCPA red flag or violation during due diligence does not necessarily mean the transaction needs to be abandoned. Among other measures, the acquiring company can:

- Insist that the target corporation hire independent counsel to conduct a pre-acquisition internal investigation at its expense to determine the severity and breadth of the problem;

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- Require that any control weaknesses be remedied pre-acquisition;
- Require that the target corporation voluntarily disclose to DOJ and the SEC pre-acquisition;
- Insist that the target corporation create a reserve to pay any potential fines or disgorgement; and
- Drive down the price of the transaction.

If your business is contemplating acquiring a corporation that operates in the international marketplace, or deals with foreign governments or foreign government-controlled businesses, involve counsel expert in the FCPA in the due diligence process. Don't purchase an FCPA problem along with your new subsidiary. For companies that may be acquired, consider an FCPA audit to ensure that your FCPA house is in order so your deal is not jeopardized by an unknown FCPA problem.

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