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Voluntary Self-Disclosure of FCPA Violations Following Acquisition Avoids Corruption Charges

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Last week, the Department of Justice ("DOJ") announced it declined to prosecute Lifecore, a U.S. biomedical company, after Lifecore voluntarily disclosed that a company it acquired paid bribes to Mexican officials and falsified documents both before and after Lifecore's acquisition.[1]

The case highlights two DOJ initiatives: its voluntary self-disclosure policy and its recently announced mergers and acquisitions "safe harbor."

In February, the DOJ announced the latest iteration of its voluntary self-disclosure policy, outlining new incentives for companies to report corporate misconduct before an "imminent threat of disclosure or government investigation."[2] Declining to prosecute criminal activity brought to its attention through voluntary disclosure is one of the key benefits under this policy.

In October, Deputy Attorney General Lisa Monaco announced a mergers and acquisitions "safe harbor" policy, under which companies will presumptively not be prosecuted when coming forward with evidence of misconduct discovered before or within six

months after an acquisition.[3]

What is the FCPA?

The Foreign Corrupt Practices Act ("FCPA") prohibits U.S. companies from engaging in bribery and corruption abroad when the payments are directed at foreign government officials to gain an improper business advantage.[4] No corrupt payment is too small to fall within the scope of the FCPA, but the DOJ has broad discretion to determine when to prosecute.

What did Lifecore do?

In December 2018, Lifecore acquired Yucatan, a Mexican company. During Lifecore's pre-acquisition due diligence, Yucatan concealed misconduct related to the heart of its business: the operation of a wastewater treatment plant in Mexico.

After the deal closed and Lifecore was integrating Yucatan's operations, Lifecore learned employees and agents of Yucatan "engaged in a scheme to pay approximately $14,000 in bribes to a government official through a third-party intermediary to secure a wastewater discharge permit."[5] Yucatan also paid a third-party service provider $310,000 to prepare fraudulent statements showing the wastewater was properly disposed of, avoiding payments for the actual treatment of the wastewater.

As soon as Lifecore learned of this scheme, it conducted a thorough internal investigation and immediately addressed the illegal activity. "Within three months of first discovering the possibility of misconduct and hours after an internal investigation confirmed that misconduct had occurred" Lifecore voluntarily self-disclosed to the DOJ.[6] Lifecore fired the Yucatan employee who

was primarily responsible for the scheme, withheld their bonus and other compensation, and “substantially improv[ed] its compliance program and internal controls.”[7]

Lifecore sought to fully remedy the situation by paying charges that had been avoided by the bribery and forgery and constructing a wastewater plant. Lifecore’s costs for these items totaled $880,000—and were ultimately credited against the $1,200,000 disgorgement to which it consented.

Based on the thorough and prompt investigation, timely self-disclosure, and remedial actions, the DOJ declined to bring a criminal case against Lifecore.

Is Self-Disclosure Always Best for FCPA Violations?

American companies acquiring foreign corporations need to assess the risks carefully. While pre-acquisition due diligence is important, it does not always uncover misconduct. Learning about corruption after a deal closes presents difficult questions about whether to self-disclose, as Lifecore did. The DOJ’s recent pronouncements certainly encourage voluntary disclosure, particularly the mergers and acquisition “safe harbor.”

But with the “safe harbor” only extending six months from the date of closing, it may not be possible to detect misconduct and fully investigate in this timeframe to obtain the benefit of “presumptive” declination. Even if illegal activity is discovered and disclosed more than six months after a transaction closes, however, the DOJ can still decline to prosecute.[8]

This article was co-authored by Lucas Amodio.

FOOTNOTES

[1] Letter from Dallas Kaplan, Trial Attorney, Fraud Section, DOJ, to Manuel Abascal, Latham & Watkins (Nov. 16, 2023) [hereinafter "Declination Letter"] (available here) (with agreement and consent from Lifecore's chief executive officer).

[2] United States Attorneys' Office, Voluntary Self-Disclosure Policy (2023) (citing U.S.S.G. §8C2.5(g)(1)) (accessible here).

[3] Lisa Monaco, Deputy Attorney General, DOJ, Remarks at the 22nd Annual Compliance and Ethics Institute: Policy Designed to Encourage Disclosure of Misconduct and Hold Individual Wrongdoers Accountable (Oct. 4, 2023) (accessible here).

[4] 15 U.S.C. §§ 78dd-1, *et seq*.

[5] Declination Letter, *supra* note 1.

[6] *Id.*

[7] *Id.*

[8] *See id.* It appears that Lifecore discovered the misconduct more than six months after closing: the Declination Letter states Lifecore investigated as soon as it found out, but that the conduct carried on for nine months post-acquisition.

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