Tyson Foods DPA-Part II: Compliance Program *Best Practices* under the FCPA

In this post we are concluding our review of the Tyson Foods settlement, which both the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) announced last week, of its violations of the Foreign Corrupt Practices Act (FCPA). In yesterday's posting we discussed the reasons for the settlement and the specifics of the monetary penalty assessed against Tyson Foods. In today's posting we will discuss the requirements set forth in the Corporate Compliance Program, which is found as Attachment C to the Tyson Foods Deferred Prosecution Agreement (DPA) and our thoughts on why the Tyson Foods matter falls directly into conduct which the FCPA is designed to prevent.

I. Corporate Compliance Program

As indicated the Corporate Compliance Program is set forth in Attachment C of the DPA. Although made specific to the facts and circumstances surrounding the Tyson Foods enforcement action, it nevertheless gives a full picture of the DOJ's current thoughts on the minimum compliance policies and procedures for a *best practices* FCPA compliance program. Interestingly, the DOJ set out the basis for the Corporate Compliance *reporting* which Tyson Foods is required to make under its DPA. The five bases are:

1. Tyson Foods has "already engaged in significant remediation related to the misconduct" at issue and "implemented and enhanced compliance program".
2. Approximately 85-90% of Tyson Foods sales are domestic.
3. Tyson Foods operates 6 production facilities outside the US; 3 in Brazil and 3 in Mexico. All 6 have had "rigorous FCPA reviews".
4. Tyson Foods only direct government customers are domestic US. and
5. The problematic operations in Tyson Foods' Mexican entity, which led to the underlying FCPA violations, comprise less than 1% of Tyson Foods global net sales.

In addition to more well-known factors that the DOJ/SEC utilizes in assessing a company's conduct during a FCPA enforcement action are a couple of factors not previously discussed. Those are factors 3, 4 and 5 above. Recognizing that there is no *de minimus* requirement or defense in the FCPA, nevertheless these factors may set a precedent for examples a company may use in negotiations with the DOJ/SEC on a go-forward basis. They are:

1. FCPA Compliance Policy and Tone at the Top. The Company should develop and promulgate a clearly articulated and visible corporate policy against violations of the FCPA and a strong commitment from senior management.

2. Anti-Corruption Policies and Procedures. The Company should develop and promulgate compliance standards and procedures which shall include policies governing:

a. gifts;

b. hospitality, entertainment, and expenses;

c. customer travel;

d. political contributions;

e. charitable donations and sponsorships;

f. facilitation payments; and

g. solicitation and extortion.

3. Use of Risk Assessment. The Company should develop these compliance standards and procedures using a risk assessment.

4. Annual Review. The Company should review its anti-corruption compliance standards and procedures, on no less than an annual basis.

5. Senior Management Oversight and Reporting. The Company should assign responsibility to one or more senior corporate executives of the Company for the implementation and oversight of its Company's anti-corruption policies.

6. Internal Controls. The Company should ensure that it has a system of internal controls for the purpose of foreign bribery or concealing bribery.

7. Training. FCPA training which shall include: (a) training for all directors and officers, and, where necessary and appropriate, employees, agents, and business partners; and (b) annual certifications, certifying compliance with the training requirements.

8. Ongoing Advice and Internal Reporting. The Company should establish or maintain an effective system for (a) Providing Guidance; (b) Internal Reporting; and (c) Response to such internal reporting.

9. Discipline. The Company should have appropriate disciplinary procedures to address, violations of the anti-corruption laws and the Company's anti-corruption compliance code, policies, and procedures.

10. Foreign Business Representatives. The Company shall (1) Perform appropriate due diligence on foreign business representatives; (2) Inform foreign business partners on its FCPA compliance program; (3) Seek reciprocal anti-corruption and anti-bribery commitments from its foreign business partners.

11. Compliance Terms and Conditions. The Company should include FCPA terms and conditions in its contracts with foreign business partners.

12. Ongoing Assessment. The Company should conduct ongoing assessments of its FCPA compliance program.

In the evolving *best practices* for a FCPA compliance program, as set forth in the Tyson Foods DPA, we would note a relatively new factor to be considered in a company's risk assessment. That is found in Section 3 of Attachment C; wherein the risk assessment shall take into account the following factors when assessing the risks of foreign bribery: (1) the company's geographic organization; (2) interaction with foreign governments; and (3) ***industrial sector of operation***.

This final factor would appear to require a risk assessment to include the industry to which the company operation is embedded. Presumably this would include foreign government licenses, permits or other approvals which a US company would be required to obtain in operations overseas. As Tyson Foods required a veterinarian's inspection of its Mexican food products, this requirement may focus directly on Tyson Foods. Noted FCPA specialist Michael Volkov, has opined he believes "that the DOJ is trying to refine its compliance program expectations and baseline requirements." The addition of language reflects DOJ's "experience with industry-wide investigations through which it learns basic practices in the industry and wants to ensure that compliance programs address specific risks arising from the industry practice." Whatever the correct answer may be, this new factor is something which all US companies should now include in their overall FCPA risk assessment.

We would also note that will Tyson Foods is required to make three reports to the DOJ, which shall incorporate "*the Department's views and comments on Tyson's prior reviews and reports, to further monitor and assess whether the policies and procedures of Tyson are reasonably designed to detect and prevent violations of the FCPA and other applicable anticorruption laws*." The reader will note that the most significant part of this obligation is that it does NOT include an external corporate monitor.

II. Applicability of FCPA

In his post entitled, "*Tyson Foods Settles FCPA Enforcement Action Involving Mexican Veterinarians and Their No-Show Wives*" our colleague the ***FCPA Professor*** stated:

> *Yet another FCPA enforcement action raises the issue of whether the FCPA's "obtain or retain business" element means anything anymore or whether the FCPA, contrary to Congressional intent, has morphed into an all-purpose corporate ethics statute and - in a game of chicken - companies opt to settle rather than mount a legal defense.*

We believe that the Tyson Foods enforcement action is precisely the type of matter that Congress intended to outlaw by passing the FCPA. In the DPA Attachment A, entitled "Statement of Facts"; it relates that fictitious and fraudulent payments were made to wives of federal meat inspectors who had regulatory supervision over the Tyson Foods Mexican food processing

operation. Paragraph 19 of the "Statement of Facts" related that a Tyson Foods official noted that the payments to the wives were to keep the TIF [Mexican federal inspectors] veterinarians "from making trouble at the plant…" For a food processing plant, there does not sound like a much more solid basis for "keeping or retaining business" than by paying off, through their wives, the federal inspectors.

Although this "Statement of Facts" did not detail precisely just what the inspectors were paid to overlook, I think it is reasonable to assume that there was a *quid pro quo* for payments that were made. Even if there was no overt action, or commission by affirmatively approving food products which should have been destroyed because they did not meet code; the simple of fact of omission in failing to timely inspect can be equally troubling and illegal. I think it is also fair to assume that if Tyson Foods had adequate records of inspections, it would have produced them in this enforcement action.

The FCPA was passed in 1977 to deal with a US problem; that being US companies were paying bribes to foreign governmental officials to obtain or retain business. It is a supply side solution to a supply side problem. While the US government cannot control the fact that a federal food product inspector in Mexico may ask for or accept a bribe in exchange for not banning or quarantining an unsafe food product, the DOJ/SEC can and should prosecute companies which pay food inspectors to do so.

In an article, dated February 12, 2011 in the New York Times, entitled "*Tyson Settles U.S. Charges of Bribery*" Richard Cassin, author of the **FCPA Blog**, is quoted. He stated "*It raises the question whether there were food safety issues in the plants that were overlooked because of the bribery*." He also stated that this information made him consider the safety of some of the food products which may have come out of this facility. These observations drive home one of the points which the **FCPA Blog** posts upon regularly, and did so again on Friday in a post entitled "*Playing Chicken With The Rule Of Law*". It is that public graft is simply not a victimless crime. The posting quoted Elizabeth Spahn, on the issue of petty bribery, "Like it or not, we are all in this together. Everybody gets hurt."

Here the actions of Tyson Foods executives may have put the American public at a health risk, by allowing us to eat food that was not been properly inspected, based upon simple bribery to keep the Mexican federal inspectors "from making trouble at the plant". This certainly sounds like Tyson Foods was using this illegal scheme to obtain or retain the business of the American food eating public.

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