

Tyson Food's DPA-Part I: A Lesson in Criminal Penalty Reduction under the FCPA

On February 10, 2011, Tyson Foods announced a settlement of outstanding violations of the Foreign Corrupt Practices Act (FCPA) with the Department of Justice (DOJ) and Securities and Exchange Commission (SEC). As reported by the FCPA Blog, the Tyson Foods agreed to pay a \$4 million criminal penalty and \$1.2 million in disgorgement and pre-judgment interest to resolve charges related to illegal payments by company representatives to government-employed inspection veterinarians in Mexico and a cover-up of the payments. This settlement had several interesting elements which should be noted by the FCPA practitioner. We will explore these developments in our next two postings. Today's post will focus on the detailed discussion of the reasons for the settlement and the specifics of the monetary penalty assessed against Tyson Foods.

Initially we would note that in this settlement, the DOJ continues its recent course of action in providing greater specificity in the basis upon which the final settlement was concluded. We applaud the DOJ for this course of action and hope they will continue to do so. By providing such transparency, the DOJ affords greater information on its procedures to the compliance community.

I. The Facts

The fact pattern would seem to be precisely the scenario that the FCPA was designed to prevent. Tyson Food's Mexican subsidiary, Tyson de Mexico, between the years of 2004 and 2006, paid \$90,000 to two publicly-employed veterinarians who inspected its Mexican plants, generating profits for Tyson of \$880,000. The payments went directly to the veterinarians and to their wives who were listed on the payroll of Tyson de Mexico. The bribes were intended to keep the veterinarians from disrupting the operations of the meat-production facilities. When these payments were discovered by Tyson Food's in the US in 2004 and thereafter terminated, Tyson representatives made the same amounts of payments through the creation fictitious invoices for veterinarian services to the wives of the inspectors match the amount previously paid to their spouses.

II. Tyson's Conduct After Self-Disclosure

As stated in the Deferred Prosecution Agreement, the DOJ entered into the DPA with Tyson based, in large part, because of the conduct of Tyson Foods after it self-disclosed the matter to the DOJ. The DOJ noted the following factors:

- a. Tyson voluntarily disclosed the misconduct described in the Information and Statement of Facts;
- b. Tyson conducted a thorough internal investigation of that misconduct;
- c. Tyson reported all of its findings to the DOJ;

- d. Tyson cooperated in the DOJ's investigation of this matter;
- e. Tyson undertook remedial measures as described in this DPA;
- f. Tyson agreed to continue to cooperate with the DOJ in any investigation of the conduct of Tyson and its directors, officers, employees, agents, consultants, subsidiaries, contractors, and subcontractors relating to violations of the FCPA;
- g. Tyson cooperated and agreed to continue to cooperate with the SEC in its investigation of the conduct of Tyson and its directors, officers, employees, agents, consultants, subsidiaries, contractors, and subcontractors relating to corrupt payments and related false accounting and internal controls issues.

All of these actions by Tyson make clear that after disclosure, the best course of action that a company can engage in during an enforcement action is full cooperation with the DOJ and SEC. Followed immediately behind this full cooperation, a company should pro-actively institute remedial measures regarding the conduct which led to the FCPA violation and a full review, assessment and audit of its FCPA compliance program. Companies which wait to be told what the DOJ wants to see in terms of a *best practices* FCPA compliance program would not be as likely to receive such credit by the DOJ in settlement negotiations regarding the penalty assessment.

III. Assessment of Monetary Penalty

We were very impressed that the DOJ set out in detail the calculation on how the monetary penalty was assessed. We set it out in full below.

6. Payment of Monetary Penalty: The Department and Tyson agree that application of the United States Sentencing Guidelines ("USSG" or "Sentencing Guidelines") to determine the applicable fine range yields the following analysis:

- a. The 2006 USSG are applicable to this matter.
 - b. Base Offense. Based upon USSG 2C1.1, the total offense level is 28, calculated as follows:
 - (a)(2) Base Offense Level--- **12**
 - (b)(1) More than one bribe--- **+2**
 - (b)(2) Value of benefit received more than \$400,000--- **+ 14**
- TOTAL OFFENSE LEVEL--- 28**

c. Base Fine. Based upon USSG §8C2.4(a)(1) and (d), the base fine is \$6,300,000 (the fine indicated in the Offense Level Fine Table (\$6,300,000) is used where such number is greater than the pecuniary gain to the organization from the offense (\$880,000).

d. Culpability Score. Based upon USSG §§8C2.5, the culpability score is 4, calculated as follows:

(a) Base Culpability Score---5

(b)(1) Organization had 1,000 or more employees and 311 individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense--- +4

(g)(1) The organization, prior to an imminent threat of disclosure or government investigation, within a reasonably prompt time after becoming aware of the offense, reported the offense, fully cooperated, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct.--- (negative)-5

e. Calculation of Fine Range.

Base Fine--- \$6,300,000

Multipliers 0.8--- (minimum)/1.6(maximum)

Fine Range--- \$5,040,000 to \$10,080,000.

Tyson agreed to pay a monetary penalty in the amount of **\$4,000,000**. The key for the overall reduction in the criminal penalty paid by Tyson is found in the following: *The organization, prior to an imminent threat of disclosure or government investigation, within a reasonably prompt time after becoming aware of the offense, reported the offense, fully cooperated, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct.* So the three key points to be derived from this language are:

1. Self-disclosure;
2. Full cooperation; and
3. Recognition and affirmative acceptance of responsibility.

Once again, we applaud the DOJ and SEC for setting forth in such full detail these calculations and this information in the Tyson Food's DPA. In tomorrow's post we will review the *best practices* in a FCPA compliance program, as suggested by the Tyson Food's DPA and some additional issues. Until then, Happy Valentine's Day to all....