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## **Tyson Foods Resolves FCPA Investigation with U.S. Government**

Tyson Foods, Inc., one of the world's largest processors of chicken, agreed to resolve a Foreign Corrupt Practices Act investigation with the payment of \$5.2 million in fines and penalties following the filing of criminal charges by the Department of Justice ("DOJ") and a civil complaint by the Securities and Exchange Commission ("SEC"). According to court documents, the FCPA enforcement actions were focused on payments made by Tyson and its wholly-owned subsidiary in Mexico to Mexican veterinarians responsible for inspections in its plants. These payments were, in part, funneled through a ghost payroll scheme to the wives of the payees.

In a criminal information filed by the DOJ in federal court in the District of Columbia, Tyson was charged with conspiracy to violate the Foreign Corrupt Practices Act (FCPA) and with violating the FCPA. The details set forth in the criminal information reveal that Tyson's Mexican subsidiary, Tyson de Mexico, between 2004 and 2006 paid about \$90,000 to two publicly employed veterinarians who inspected and certified chicken products in its Mexican plants, resulting in profits of approximately \$880,000. Some of the money was paid to the veterinarians' wives, who were on the company payroll while providing no service to the company. According to the information, the bribe payments were discovered after Tyson purchased the subsidiary in 1994. The company attempted to stop the payments but continued to make them when it was threatened by the veterinarians with an interference with its shipments. The wives were later removed from the payroll and payments were continued through the use of invoices submitted to Tyson de Mexico by one of the veterinarians for "services." It was not until two years after Tyson Foods officials first learned about the subsidiary's illicit payments that its counsel instructed Tyson de Mexico to cease making the payments.

Tyson agreed to enter into a deferred prosecution agreement with the DOJ in which it agreed to payment of a \$4 million penalty. As part of the agreement, Tyson acknowledged that the facts set forth in the criminal information were "true and accurate" and then accepted responsibility for the actions of its subsidiaries, employees and agents who made improper payments. Tyson agreed to implement a "rigorous" anti-corruption compliance system and internal controls, as well as to continue to cooperate fully with the DOJ and the SEC. The agreement also requires that Tyson report to the DOJ at least every six months during the two-year term of the agreement regarding its enhanced compliance policies and procedures. The agreement recognizes Tyson's voluntary disclosure and thorough self-investigation of the underlying conduct. The DOJ has agreed to dismiss the criminal information if Tyson complies with the terms of the agreement.

In the SEC's complaint, also filed in federal court in the District of Columbia, the SEC alleged that the company failed to keep accurate books and records and failed to implement a system of effective internal controls to prevent the salary payments to phantom employees and the payment of illicit invoices. The corrupt payments were improperly recorded as legitimate expenses in Tyson de Mexico's books and records and included in Tyson de Mexico's reported financial results for fiscal years 2004, 2005 and 2006. Tyson de Mexico's financial results were, in turn, included in Tyson's consolidated financial statements filed with the SEC for those years. According to the information release filed by the SEC, "[w]ithout admitting or denying the SEC's allegations, Tyson Foods consented to the entry of a final judgment ordering disgorgement plus pre-judgment interest of more than \$1.2 million and permanently enjoining it from violating the anti-bribery, books and records, and internal controls provisions of the FCPA."

## Lessons Learned

There are real-time lessons that companies with global operations requiring government interaction can take from the enforcement action against Tyson.

### ***1. The benefits to cooperating with the government are real.***

Government regulators acknowledged that, before the filing of the criminal and civil charges, Tyson fully cooperated with them in the investigation and engaged in acts to remediate its conduct. Government regulators continue to urge that companies voluntarily and timely disclose the existence of evidence of foreign bribery. The benefit to Tyson in this regard is a significant reduction in its financial penalty. According to the U.S. Sentencing Guideline calculations, the potential fine for the conduct acknowledged by Tyson was \$5.04 to \$10.08 million. The government and Tyson agreed upon a monetary penalty of \$4 million, which was about \$1 million below the calculated range.

### ***2. Periodic compliance program risk assessments are an essential element of a robust compliance program.***

Under the terms of the deferred prosecution agreement, on at least three occasions during its two-year term, Tyson is required to review and assess whether its anti-corruption programs and policies are “reasonably designed to detect and prevent violations of the FCPA and other applicable anticorruption laws.” The U.S. Sentencing Guidelines for business organizations (“U.S. Guidelines”) and the UK Bribery Act’s Consultative Guidance (“Bribery Act Guidance”) both list this kind of compliance risk assessment as the first and essential step in creating an effective anti-corruption and anti-bribery program. The Bribery Act Guidance specifically states that companies should “... regularly and comprehensively assess the nature and extent of the risks relating to bribery to which it is exposed.” Government regulators expect that a well-managed organization will monitor and attend to the corruption risks it faces in its various marketplaces.

### ***3. Don’t underestimate the importance of “tone at the top.”***

In the Tyson deferred prosecution agreement, the company acknowledged that senior company employees described as an “Executive,” “VP International” and “VP Audit”, along with others, developed and implemented a plan for the continuation of the payment of bribes to the Mexican government officials. We note that FCPA enforcement actions are rich with examples of executives who looked the other way rather than putting a halt to corrupt behavior. If top management is not fully committed to an ethical and compliance culture, this lack of commitment sends the wrong signals to other employees and promotes a less than ethical workplace. The CEO and other senior executives of any company should be counted upon to lead the way in sending the anti-corruption messages within the workplace. According to the U.S. Guidelines, those with substantial authority within an organization “shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”

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