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Tyson Foods Agrees to Pay \$5.2 Million in Penalties to Settle Foreign Corrupt Practices Act Probe Into Bribery Payments Made to Mexican Food Safety Officials

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On February 10, 2011, the U.S. food giant Tyson Foods, Inc. agreed to pay over \$5 million in civil and criminal fines in settlement agreements with the U.S. Department of Justice and Securities and Exchange Commission for violations of the Foreign Corrupt Practices Act (FCPA) in connection with illicit payments made by its Mexican subsidiary to Mexican government food safety officials.

Tyson is the one of the world's largest meat protein companies and the second largest food production company in the Fortune 500. The fines stem from the company's voluntary disclosure to the U.S. Government of corrupt payments made by its Mexican subsidiary to two Mexican Government veterinarians who were responsible for reviewing Tyson's poultry exports from Mexico. They also stem from Tyson's failure to maintain proper books and records and to maintain internal controls, as required by the FCPA. In addition to paying the fines, which included both criminal penalties and disgorgement of profits, Tyson has agreed to establish and maintain a strict corporate compliance program to address deficiencies in its internal controls, policies, and procedures regarding compliance with the FCPA.

The FCPA prohibits a broad range of persons and businesses, including U.S. and certain non-U.S. companies, from making corrupt payments to foreign

officials for the purpose of obtaining or keeping business. The FCPA also requires companies with securities listed in the United States to meet its provisions on recordkeeping and internal accounting controls.¹

The U.S. Government's enforcement actions against Tyson Foods are just the most recent of a steady and growing series of prosecutions and investigations by the U.S. Justice Department and Securities and Exchange Commission for violations of the FCPA. This case, along with others from Latin America and elsewhere, are cautionary tales as to why every company covered by the law must maintain and implement robust corporate compliance programs to prevent FCPA violations.

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Background -- What Happened and How It Happened

According to the Deferred Prosecution Agreement between the DOJ and Tyson Foods, Tyson acquired the subsidiary Tyson de Mexico (TdM) in 1994. Under Mexican law, Mexican government veterinarians are assigned to TdM plants as inspectors with responsibility for certifying TdM products as safe for export. At the time of the 1994 acquisition, TdM had two of the

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veterinarians' wives on its payroll for no-show jobs to keep the veterinarians "from making problems at the plants." This practice continued until 2004, when a TdM plant manager alerted Tyson Foods headquarters that TdM was making corrupt payments to the wives. After an internal audit, Tyson terminated the wives' salaries in 2004 but then began making "equivalent" payments directly to the veterinarians through bogus invoices. In 2006, Tyson stopped the payments to the veterinarians. In total, from 1994 through 2006, Tyson made a total of approximately \$350,000 in illicit payments to the Mexican Government veterinarians or their wives. Tyson voluntarily disclosed this course of conduct to the U.S. Government in 2007.

The SEC charged Tyson with violations of the antibribery provisions of the FCPA, a failure to make and keep accurate books, records, and accounts, and a failure to devise and maintain a system of internal accounting controls. The DOJ brought related criminal charges of conspiracy to violate the FCPA and violations of the FCPA.

Tyson settled the SEC's civil claims by consenting to the entry of a final judgment, payment of \$1.2 million in disgorged profits and pre-judgment interest, and a permanent injunction against further violations of the FCPA's anti-bribery, books and records, and internal controls provisions. Tyson avoided a criminal trial by entering into a Deferred Prosecution Agreement with the DOJ under which Tyson agreed to pay \$4 million in criminal penalties and implement and maintain a strong corporate compliance program.²

This mandatory corporate compliance program is a central and critical part of Tyson's agreement with the DOJ. As stated in the Deferred Prosecution Agreement, the compliance program is "designed to detect and prevent violations of the FCPA and other applicable anticorruption laws throughout its operations, including those of its affiliates, joint ventures, contractors, and subcontractors." Tyson agreed to review its existing internal controls, policies, and procedures to ensure the maintenance of fair and accurate books, records, and accounts. Tyson also promised to submit to the DOJ twice-yearly reports on the remediation and implementation of the agreed-upon compliance activities. The DOJ did not appoint an external independent monitor to verify compliance with the agreement, but has done so in other recent cases.

Increase in FCPA Enforcement

This action against Tyson Foods is part of a larger trend of much more vigilant FCPA enforcement by both the DOJ and SEC. The DOJ Criminal Division has substantially increased its FCPA enforcement staff and the SEC has created a new, specialized enforcement unit, both of which have played a major role in significantly increased FCPA enforcement in recent years. DOJ Criminal Division Assistant Attorney General Lanny Breuer summarized the recent surge of FCPA enforcement in a speech on January 26, 2011:

[O]ver the last two years, we have charged more than 50 individuals with FCPA-related offenses and collected nearly \$2 billion in FCPA-related fines and penalties – by far the most people charged and penalties imposed in any similar period. We have brought these cases against some of the largest corporations in the world. As just one example, in November we resolved a wide-ranging FCPA investigation involving the freight forwarding company Panalpina World Transport, its U.S. subsidiary, and five oil and gas service providers. They agreed to pay combined criminal penalties of \$156 million.

In one very recent example, in December 2010, the French telecommunications company Alcatel-Lucent S.A. and three of its subsidiaries agreed to pay more than \$137 million in fines and penalties to settle a foreign bribery investigation into illicit payments in Costa Rica, Honduras, Malaysia, and Taiwan. Robert Khuzami, director of the SEC's Division of Enforcement, observed:

Alcatel and its subsidiaries failed to detect or investigate numerous red flags suggesting their employees were directing sham consultants to provide gifts and payments to foreign government officials to illegally win business. Alcatel's bribery scheme was the product of a lax corporate control environment at the company.

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In this connection, the U.S. Government has held individual corporate executives personally liable for bribery schemes within their companies under the FCPA's accounting and internal control provisions, without regard to whether they were actually aware of the bribery. For example, in 2009, the SEC charged Nature's Sunshine Products (NSP), NSP's CEO Douglas Faggioli, and NSP's former CFO, Craig Huff, with violations of the FCPA for alleged bribes that NSP personnel made through third party brokers to Brazilian customs officials to import unregistered products into Brazil. The SEC did not allege that Faggioli and Huff had knowledge of or involvement in the bribery, but charged them with failure to adequately ensure that their staff kept accurate books and records and had adequate internal controls in place.

Increased Prosecution of FCPA Violations in Latin America

The DOJ and SEC's stepped-up enforcement efforts, combined with instances of corruption in Latin America, has perhaps unsurprisingly resulted in an uptick of FCPA enforcement actions against companies that do business in Latin America.

In 2008, the German industrial giant Siemens AG was ordered to pay \$800 million, the largest FCPA fine in history, for corrupt payments it made through consultants to officials in a number of countries, including Argentina and Venezuela. In 2009, Pride International, a United States offshore drilling company, agreed to pay close to \$33 million in criminal fines and over \$23 million in disgorgement and pre-judgment interest for paying bribes via vendors and marketing agents to government officials in Mexico and Venezuela. Two individual former Pride executives were ordered to pay \$40,000 and \$25,000 in civil penalties as a result of civil suits brought by the SEC against them individually. Alcatel-Lucent's recent \$137 million in penalties included violations of the FCPA in Costa Rica and Honduras. As reflected in all of these cases, the FCPA covers payments for illicit purposes, whether made directly by the company and its employees or made indirectly through third parties such as consultants, agents, or advisors.

Smaller companies doing business in Latin America have not been immune from the U.S. Government's vigorous anti-corruption enforcement, including business in connection with their acquisition of companies with a history of illicit payments to foreign governments. In 2009, eLandia, a provider of information and communication technology, consented to fines of \$2 million in connection with prior illicit payments made to Honduran government officials by a telecommunications company eLandia subsequently acquired, even though eLandia had no knowledge of the bribes at the time of the acquisition. The acquired company's former CEO and former vice president of business development was also personally charged with criminal offenses in connection with the corrupt payments.

These cases illustrate the fact that FCPA violations can arise in any company, big or small, and can occur in all industries and in virtually any country. In addition, a U.S. company that merges with or acquires another company must be vigilant in connection with possible liability for actions of an acquired company prior to the merger or acquisition.

Conclusion

The DOJ and SEC have significantly increased FCPA enforcement actions in Latin America and elsewhere during the last two years, focusing their attention on corrupt payments made directly or indirectly to government officials in countries throughout the region.

The DOJ and SEC have also focused on failures to keep appropriate books and records and maintain internal controls as required by the FCPA. Companies doing business in Latin America would therefore be wise to conduct enhanced due diligence on their international operations, as well as any companies they are considering acquiring, and create and maintain a strong FCPA compliance program and robust internal controls to prevent bribery and avoid liability under the FCPA.

1 The anti-bribery provisions of the FCPA make it unlawful for a U.S. person, and foreign issuers of securities registered in the United States, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. These provisions also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States. The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls.

2 Tyson's commitment to the U.S. Department of Justice included the following requirements:

"Tyson will develop and promulgate compliance standards and procedures designed to reduce the prospect of violations of the anti-corruption laws and Tyson's compliance code and will take appropriate measures to encourage and support the observance of ethics and compliance standards and procedures against foreign bribery at all levels of the company. These standards and procedures shall apply to all directors, officers, and employees and, where necessary and appropriate, outside parties acting on behalf of Tyson in a foreign jurisdiction, including but not limited to, agents and intermediaries, consultants, representatives, distributors, teaming partners, contractors and suppliers, consortia, and joint venture partners (collectively, "agents and business partners"), and shall notify all employees that compliance with the standards and procedures is the duty of individuals at all levels of the company."

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