

JGC Deferred Prosecution Agreement: Cooperation with DOJ Still Key

I had not, at least in recent years, thought I would be able to say that the Houston Astros have a better record this late in the season than the Boston Red Sox. But at least as of yesterday, now 1-5 Astros no longer share the worst record in baseball, which now belongs to the Red Sox and Tampa Bay Rays, both with a 0-6 start. So baseball fans, you had best put on your seat belt for it could well be a bumpy ride this season.

All of which brings us to the JGC settlement this week with the Department of Justice (DOJ) regarding the Nigerian Bribery Scandal. JGC agreed to enter into a Deferred Prosecution Agreement (DPA) and agreed to pay a fine of \$218 million. This settlement closes out the FCPA chapter (corporate division) on the Scandal where the DOJ obtained fines and penalties in the range of \$1.5 Billion. The DPA itself had a couple of interesting features.

The first of which is that the DOJ agreed not to bring any additional FCPA based criminal charges against JGC “related to the conduct of present and former directors, officers, employees, agents, consultants, contractors and subcontractors” for the facts described in the DPA and Statement of Facts. Consider this statement in contrast with the remarks of (then) Senator Arlen Specter last fall at the hearing on proposed amendments to the FCPA, questioning the DOJ’s policy of obtaining large fines from corporations, rather than prosecuting individuals, to deter violation of the law.

The second is that JGC (apparently) did not cooperate with the DOJ as well or as thoroughly as other companies have done in the FCPA investigation. JGC received a -1 credit for reduction in its overall Culpability Score for “clearly demonstrated recognition and affirmative acceptance of responsibility for criminal conduct”. Readers will note that this is the same score received by Alcatel-Lucent in its DPA and the estimated costs to Alcatel-Lucent for this perceived lack of recognition and acceptance ranged between \$20MM to \$10MM, which ‘only’ paid a monetary penalty of \$92MM. Contrast this score with that received by Maxwell Technologies, -5 reduction in its overall Culpability Score for its “Voluntary Disclosure, Cooperation and Acceptance. The clear message here is that full cooperation will bring down a company’s fine and in a very significant amount.

The next items of interest are that JGC agreed to implement (1) a system of internal controls and (2) a rigorous anti-corruption compliance code consistent with the FCPA, Japanese anti-corruption laws and other applicable anti-corruption laws. This language sounds like the company needs to start at the beginning to create such an anti-corruption program. Attachment C of the DPA fleshes out the specifics of the compliance program the DOJ recommends for JGC.

Last is that instead of a Corporate Monitor, JGC agreed to an “Independent Compliance Consultant, who is to “evaluate JGC’s corporate compliance program with respect to the FCPA, Japanese laws implementing the OECD convention...and other relevant anti-

corruption laws. The interesting thing here is that while this position is termed “Independent Compliance Consultant” it really sounds like a Corporate Monitor as the DOJ has the right to choose the candidate, from those proposed by JGC.

Once again the DOJ has clearly informed the compliance community that cooperation in the investigation and enforcement process can pay dividends in terms of a lower fine. I hope companies are getting the message.

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