

Tyco NPA and Chris Economaki - Details from the Pits

“This is Chris Economaki in the pits.”

That was the signature line of race car announcer Chris Economaki, who died last week at the age of 91. For a generation of us who grew up watching ABC’s Wide World of Sports, Chris Economaki was the voice of the Indy 500, the Dayton 500, the Summer and Winter Nationals of the National Hot Rod Association (NHRA) and a host of other auto races. In addition to having one of the most unique names this Southerner had ever heard of, Economaki had a staccato vocal delivery that, as noted in his obituary in the New York Times (NYT) by writer Douglas Martin, “reminded some of a rumbling racing engine.”

The Bribery Schemes

I thought about Chris Economaki and the detail he brought as a track-side commentator to a generation of Wide World of Sports’ aficionados when considering the various documents released last week in connection with the Tyco International Ltd (Tyco) Foreign Corrupt Practices Act (FCPA) enforcement action. For the most comprehensive summary of the Department of Justice’s (DOJ) criminal enforcement action and the Securities and Exchange Commission’s (SEC) civil action, I recommend either of the FCPA Professor’s excellent posts on Tyco. In addition to the points raised by the Professor I believe that there are significant lessons learned for the FCPA compliance practitioner. With a tip of our collective caps to the baseball pennant races which are down to the final few days, I present the Tyco Bribery Box Score.

Tyco Subsidiary	Bribe Amount Paid	Profits Earned by Conduct
M/A Com	Not reported	\$71,770
TTC Huzhou and TTC Shanghai	\$196,267	\$3,470,180
TWW Germany and Erhard	\$2,371,094	\$4,684,966
TFC HK and Keystone	\$137,000	\$378,088
TFCT Shanghai	\$24,000	\$59,412
ET Thailand	\$292,268	\$879,258
TFIS France	\$363,839	\$1,256,389
THC China	\$250,000	\$353,800
TVC ME	\$488,479	\$1,153,500
ADT Thailand	\$78,000	\$473,262
Tatra	\$96,000	\$226,863
Eurapipe	\$358,000	\$1,298,453
THC Saudi Arabia	Not reported	\$1,900,600
Dulmison	\$68,426	\$109,249

I set out the full Box Score of bribes paid by Tyco in this detail to emphasize how bad the conduct of the company is and this is in the ***VERY BAD CONDUCT*** realm, coupled with the facts that (a) Tyco is now a two-time loser under the FCPA and (b) most of the illegal conduct occurred after Tyco agreed to an initial FCPA based Deferred Prosecution Agreement (DPA) in 2006 for prior FCPA sins. Yet even with all of this Tyco was able to obtain a Non Prosecution Agreement (NPA). Such a result is fairly stunning if you think about it in a superficial basis. However, if you consider what Paul McNulty continually says, and which I continually write about, the most important question will be *What did you do when you found out about it?*

As noted in the letter from the DOJ to counsel for Tyco, the DOJ entered into the NPA with Tyco based upon the following factors: (1) timely and voluntary self-disclosure; (2) a full and complete global investigation by Tyco; (3) extensive remediation including implementation of an enhanced compliance program, termination of employees responsible for the conduct at issue, severing contracts with third party agents who were parties to the frauds, closing subsidiaries involved in the illegal conduct; and (4) provide annual written reports to the DOJ on progress of the company's enhanced compliance program.

Corporate Compliance Program

Tyco agreed to a robust corporate compliance program that either currently exists or will be implemented in the future. This Corporate Compliance Program is somewhat different than most of the 13 minimum *best practices* compliance regimes reported in DPAs and NPAs since the Panalpina DPA of November, 2010. Tyco agreed to a point compliance regime, which consists of the following.

1. **High level commitment.** The Company will ensure that its senior management provides strong, explicit, and visible support and commitment to its corporate policy against violations of the anti-corruption laws and its compliance code.
2. **Policies and Procedures.** Tyco will promulgate compliance standards and procedures designed to reduce the prospect of violations of the anti-corruption laws and the Company's compliance code, and the Company should take appropriate measures to encourage and support the observance of ethics and compliance standards and procedures against foreign bribery by personnel at all levels of the company. These anti-corruption standards and procedures shall apply to all directors, officers, and employees and, where necessary and appropriate, outside parties acting on behalf of the Company 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"), to the extent that agents and business partners may be employed under the Company's corporate policy. The Company shall notify all employees that compliance with the standards and procedures is the duty of individuals at all levels of the company. Such standards and procedures 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. **Internal Controls.** Tyco will ensure that it has a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts to ensure that they cannot be used for the purpose of foreign bribery or concealing such bribery. This system should be designed to provide reasonable assurance that:
 - a. Transactions are executed in accordance with management's general or specific authorization;
 - b. Transactions are recorded to permit preparation of financial statements in accordance with GAAP;
 - c. Access to assets is permitted only in accordance with management's general or specific authorization; and
 - d. Recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken if discrepancies are found.
4. **Periodic Risk-Based Reviews.** Tyco agreed to develop these compliance standards and procedures, on the basis of a risk assessment addressing the individual circumstances of Tyco, in particular the foreign bribery risks it faces including, its geographical organization, interactions with various types and levels of government officials, industrial sectors of operation, involvement in joint venture arrangements, importance of licenses and permits in the company's operations, degree of governmental oversight and inspection, and volume and importance of goods and personnel clearing through customs and immigration.
5. **Proper Oversight and Independence.** Tyco will (or once again has) assign responsibility to one or more senior corporate executives of the Company for the implementation and oversight of the Company's anti-corruption policies, standards, and procedures. Such corporate official(s) shall have direct reporting obligations to the Tyco's independent monitoring bodies, including internal audit, the Board of Directors, or any appropriate committee of the Board of Directors, and shall have an adequate level of autonomy from management as well as sufficient resources and authority to maintain such autonomy.
6. **Training and Guidance.**
 - a. *Training.* Tyco will implement mechanisms designed to ensure that its anti-corruption policies, standards, and procedures are communicated effectively to all

directors, officers, employees, and where appropriate, agents and business partners. These mechanisms shall include periodic training for all directors and officers, and, all employees in positions of leadership or trust or positions which might otherwise pose a risk of corruption to the company. The training shall also be provided to agents and business partners. Lastly there shall be biannual certifications by all such directors and officers, and, where necessary and appropriate, employees, agents, and business partners, certifying compliance with the training requirements.

- b. *Guidance.* Tyco is required to maintain an effective system for providing guidance and advice to directors, officers, employees, and, where necessary and appropriate, agents and business partners, on complying with Tyco's anti-corruption compliance policies, standards, and procedures, including when they need advice on an urgent basis or in any foreign jurisdiction in which Tyco operates.
7. **Internal Reporting and Investigation.** Tyco will provide an effective system for internal and where possible, confidential reporting by, and protection of, directors, officers, employees, and, where necessary and appropriate, agents and business partners, concerning violations of the Company's compliance program. Tyco also agreed to dedicate sufficient resources to respond to such requests and undertaking necessary and appropriate action in response to such reports.
8. **Enforcement and Discipline.** Tyco will institute appropriate disciplinary procedures to address, violations of the anti-corruption laws and the Company's anti-corruption compliance code, policies, and procedures by the Company's directors, officers, and employees. This shall include disciplining of those within the company no matter how the position of the person or their perceived authority. In addition to discipline, Tyco agrees to add appropriate mechanisms to incentivize compliant behavior.
9. **Third Party Relationships.** Tyco agreed to institute appropriate due diligence and compliance requirements pertaining to the retention and oversight of all agents and business partners, including: (a) properly documented risk-based due diligence pertaining to the hiring and appropriate and regular oversight of agents and business partners; (b) informing agents and business partners of the Company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the Company's ethics and compliance standards and procedures and other measures for preventing and detecting such bribery; (c) seeking a reciprocal commitment from agents and business partners and (d) including appropriate compliance terms and conditions in the contract.
10. **Mergers and Acquisitions.** Tyco agreed to develop and implement appropriate compliance policies and procedures for any acquisition based upon an appropriate risk-analysis which would be completed as soon as practicable. Further such changes would be implemented as soon as practicable. Directors, officers and employees of newly acquired entities would be trained as soon as practicable.

11. **Monitoring and Testing.** Tyco agreed to conduct periodic review and testing of its anti-corruption compliance code, standards, and procedures designed to evaluate and improve their effectiveness in preventing and detecting violations of anticorruption laws and the Company's anti-corruption code, standards and procedures, taking into account relevant developments in the field and evolving international and industry standards.

So the prior 13 point *best practices* program is now folded down to 11 for Tyco. Nevertheless, the general concepts are still the same for a company seeking to implement or enhance its compliance solution. Much like Chris Economaki reporting from the Pits at the Indy 500, the level of detail provided in the Tyco NPA should allow the compliance practitioner to evaluate their company's compliance program.

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