

BizJet FCPA Settlement Illustrates the Benefits of Self-Reporting and Compliance

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March 23, 2012

Background

On March 14, BizJet International Sales and Support, Inc. ("BizJet"), signed a Deferred Prosecution Agreement ("DPA") with the Department of Justice (DOJ), the terms of which will allow it to pay \$11.8 million to the United States in order to avoid criminal prosecution under the Foreign Corrupt Practices Act ("FCPA"). Unlike many recent headline-grabbing FCPA cases, the BizJet settlement is notable for the comparatively *small* fine that the government has agreed to accept in return for the settlement. The BizJet case demonstrates how important it is for companies engaged in international business to maintain robust compliance protocols and engage in thorough and honest FCPA self-reporting. Here, BizJet's internal processes helped it identify a problem, avoid prosecution, and save tens of millions of dollars in fines.

The Facts

BizJet is an American company headquartered in Tulsa, Oklahoma and incorporated under Oklahoma law. It is a "domestic concern" under the terms of the FCPA. BizJet provides aircraft maintenance, repair and overhaul services to customers both within the United States and abroad. A portion of the work that BizJet performs internationally is for customers based in Latin America, specifically Mexico and Panama. In or around March of 2010, while conducting an internal audit of FCPA compliance related to the use of third-party consultants, BizJet discovered that some of its executives had been conspiring for years with executives of companies with which it was doing business to make illegal payments to foreign government officials. BizJet executives made these payments – both directly and indirectly – to foreign officials in order to build favor with various government agencies and instrumentalities, including the Mexican Federal Police, the Mexican President's Fleet, and the Panama Aviation Authority. By doing so, BizJet hoped to obtain or retain lucrative contracts with these agencies.

Soon after discovering the conduct through its internal audit, BizJet voluntarily disclosed its findings to the DOJ.

The DPA's Terms and the Benefits to BizJet of Self-Reporting, Cooperation, and Compliance

The DPA makes it abundantly clear that BizJet benefited greatly in its dealings with the DOJ as a result of its proactive, responsible behavior. In the section entitled "Relevant Considerations," the DPA states that BizJet's cooperation was "extraordinary," and that the company engaged in

“extensive remediation, including terminating the officers and employees responsible for the corrupt payments [and] enhancing its due diligence protocol” The DOJ credited BizJet for continuing to “enhance its compliance program” and agreeing “to cooperate with the Department in any ongoing investigation of the conduct of BizJet and its officers, directors, employees, agents, and consultants....” The DPA also notes that BizJet turned over material evidence to the DOJ, made knowledgeable employees available to the Department for interviews, and terminated those responsible for the violations. Further, BizJet agreed to continue to fully cooperate with the DOJ’s investigations. The DPA makes clear that all of these factors played an important role in the DOJ’s decision to enter into a DPA with BizJet, rather than require it to plead guilty, and in agreeing to the greatly reduced fine that was ultimately paid.

Under the corporate sentencing provisions of the United States Sentencing Guidelines, BizJet was assigned an offense level of 34 based on Guideline calculations, and a “Base Culpability Score” of 5 was applied. This baseline score was enhanced by 3 points because of the size of BizJet’s business organization, and the fact that high-level personnel at BizJet were involved in the commission of the offense. However, BizJet received a significant 5-point reduction in its culpability rating based on a finding that, “prior to imminent threat of disclosure or government investigation and within a reasonably prompt time after becoming aware of the offense, [BizJet] reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct.” This lowered BizJet’s culpability level from an 8 to a 3 – lower, even, than the baseline culpability level assigned for the offense. Plotting the offense level against the culpability level here yielded a suggested fine range of \$17.1 million to \$34.2 million, far smaller than the \$45.6 million to \$91.2 million range the Guidelines would have suggested for an offense level of 34 plotted against a culpability level of 8.

Additionally, BizJet received a 30% reduction off the minimum suggested fine of \$17.1 million, with the government consenting to a payment of only \$11.8 million. The DPA notes that the parties arrived at this number based upon “the facts and circumstances of this case, including the nature and extent of BizJet’s voluntary disclosure, extraordinary cooperation, and extensive remediation in this matter.” Thus, due to BizJet’s extensive cooperation and remedial efforts, the fine imposed was nearly \$35 million less than the minimum fine that might have applied without that level of cooperation, and almost \$80 million less than the maximum. Moreover, BizJet successfully avoided a criminal conviction and the collateral consequences that might have ensued.

The DPA also requires BizJet to periodically review its compliance procedures, and to report back to the government annually. Further, BizJet must develop a top-down “corporate culture” of compliance by establishing, among other things, an effective system of anonymous reporting, assigning high-level executives to compliance oversight positions, demanding reciprocal compliance commitments from the companies they do business with, and putting into place a closely regulated system of accounting.

It is notable that the DPA does not require BizJet to retain an independent monitor. DPAs and other settlement agreements with the government often contain such a requirement, and typically require the settling party to incur the costs related to the monitorship.

The Takeaway

The BizJet settlement highlights the importance and benefits of maintaining a healthy FCPA compliance program. BizJet initially discovered that illegal payments were being made while

conducting an internal audit, demonstrating that effective review procedures truly can make a difference. The fact that BizJet was forthcoming about its FCPA violations clearly contributed to the reduced fee it was required to pay. The DOJ's decision to forego prosecution, based conditionally upon BizJet's future efforts to review and strengthen its internal FCPA controls, shows how valuable these compliance efforts are in the eyes of the government.

The BizJet settlement stands in stark contrast with the last FCPA case we detailed here, concerning Marubeni Corporation, which was one of the companies snared in the now infamous investigation of bribery of Nigerian officials in connection with the construction of liquefied natural gas facilities. There, the DPA did not mention any existing compliance programs or any efforts made by Marubeni to cooperate with the government. As a result, Marubeni received only a single point reduction in culpability for accepting responsibility for its actions. In that case – which also involved an offense level of 34 – the suggested fine ranged from \$54.6 million to \$109.2 million. The government ultimately collected \$54.6 million; though it was the bottom end of the range, absolutely no discount like the one given to BizJet was given to Marubeni. This demonstrates quite clearly the extreme importance of tight controls and cooperation with the government in the context of FCPA investigations.

It is also worth remembering another company involved in the Nigerian bribery scheme, Kellogg, Brown & Root (KBR). KBR was required to plead guilty to a five-count criminal information, pay a criminal fine of over \$400 million, pay another \$177 million in settlement with the SEC, and retain a monitor, while being subject to a three-year term of probation.

BizJet's experience is a lesson for all companies doing business overseas. A proven commitment to compliance, coupled with an honest attitude about violations, can end up saving companies millions of dollars. This case is a paradigmatic example of how a little bit of extra work on the front end can prevent harsh treatment later on.

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