

MLB Standings, the Luxury Tax and FCPA Investigation Costs

The baseball season is nearly 40% complete and there are already several surprises. At least in the National League (NL) two of the biggest surprises are that the Washington Nationals are leading the NL East while the five time division champions Philadelphia Phillies are trailing the field in last place. Last week I was lucky enough to attend games at both teams' home parks. The Nationals fans were fired up throughout and the Phillies had a matinee performance sell-out. *Jim Crane, are you listening?* Nothing puts fans in the seats like a winning team.

I thought about the collation between the amount of money spent on each team and their respective standings. Interestingly, I found that the Phillies have the second highest payroll in Major League Baseball (MLB) at just over \$174MM, while the Nationals have the 20th highest at just over \$81MM. The sad sack Houston Astros come in at 28 out of 30 with a total payroll spend of \$60MM. Additionally, they are also the 28th worst team in MLB. Coincidence? *Jim Crane, are you listening?* To win you have to spend money, not just buy the team and then immediately cave in to MLB by agreeing to go to the American League (AL) West.

I thought about these overall team costs whilst reading a recent article by Jaclyn Jaeger in the Compliance Week Magazine, entitled "*High Cost of Conducting Full FCPA Investigations*". In her article, Jaeger reported the costs of some very large and ongoing Foreign Corrupt Practices Act (FCPA) investigations, which are reflected in the FCPA Investigation Cost Box Score below, remember at this point we do not know what the Wal-Mart investigative costs are to-date.

Company	Length of Investigation	Reported Costs
Weatherford	2009 to date	\$123MM
News Corp	July 2011 to date	\$191MM
Avon	2008 to date	\$247MM

While noting that not all FCPA investigations have such exorbitant investigative costs, Jaeger quoted "the costliest FCPA investigations are the ones that grab the headlines." One way to hold down such costs is defining the scope. Attorney Claudius Sokenu was quoted as stating "The important question at the outset of the investigation is scope, because that drives the costs." However, even if you can define the scope, one of the main reasons for these high investigative costs in a FCPA investigation is the dreaded question "*where else?*" If your company has had a complete failure of internal controls to allow a FCPA violation in one geographic region, the Department of Justice (DOJ) may want to inquire if it is a systemic problem worldwide. In other words, not mission creep but mission explosion. In addition to a systemic failure of internal controls, it may be that an employee caught paying bribes in one country, who previously worked in another country, may have engaged in similar conduct in his prior postings, meaning you will need to investigate those countries as well. Another red flag that could indicate the "*where else?*" question is if an employee alleged to have engaged in bribery manages a regional

office which oversees operations in several countries. This could require an investigation into countries other than the one which may have been the subject of the original investigation.

To understand how this question of “*where else*” can play out one need only look at the current Wal-Mart internal investigation. In an article in the Wednesday, June 13 Wall Street Journal (WSJ), entitled “*Wal-Mart Review Includes India, South Africa*”, reporter Shelly Banjo wrote about the expanding Wal-Mart internal FCPA investigation. The allegations originally arose from the company’s operations in Mexico. After the New York Times (NYT) broke the story, Wal-Mart instituted an internal investigation of its Mexico subsidiary and the investigation quickly spread to Wal-Mart’s operations in Brazil and China. This expansion increased again with Brand’s report that Wal-Mart’s counsel has recommended the internal investigation further expand to include Wal-Mart’s operations in South Africa and India. Soon there may not be much of the globe where Wal-Mart operates which is not under investigation.

So what are some of the ways to hold down investigative costs? One sure way is to not self-disclose and face the “*where else*” question. Jaeger noted that “sometimes it could be just a matter of promptly implementing remedial measures and revising and enhancing compliance policies and procedures.” Jaeger quoted Sokenu who stated “Only in rare circumstances would I recommend to a client that self-disclosure is the way to go, because no good deed goes unpunished.” Sokenu went on to list some of the factors which he would consider when recommending self-disclosure to the DOJ and Securities and Exchange Commission (SEC).

- Awareness of a potential whistleblower reporting an incident to the government because “You want to go to government before that whistleblower does.”
- The conduct in question is “systemic and involves senior management-such as the chief executive, chief financial officer, general counsel or heads of business units.”
- The incident requires a disclosure which is “required under securities laws anyway.”
- That the company’s auditors “will not sign off on filings with the Securities and Exchange Commission.”

I have heard Mike Volkov provide a similar list of issues when he discusses the factors you should consider when making a decision to self-disclose. It is certainly not one to be taken lightly. However, Jaeger’s article provides some key elements to consider when evaluating whether to self-disclose a potential FCPA investigation.

Of the costs reported so far only Avon is north of the New York Yankees annual payroll of \$197MM but News Corp is closing in quickly. Wal-Mart has not released its costs for its investigation, as yet, but it may well exceed both Avon and News Corp. In MLB, there is luxury tax put on the aggregate payroll of a team to the extent that it exceeds a predetermined guideline level set by the league. For 2011 the MLB cap is \$178MM so only one team currently pays this luxury tax (the Yankees with a payroll of \$197MM). Now how about the investigative fees paid by companies for failing to have an effective FCPA compliance program?

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