

## Take Me Out to the (FCPA) Ballgame

It is September and the pennant races are taking hold. The Yankees and Red Sox just completed a 3 game series with great baseball; dramatic home runs, retaliatory beanings and the inevitable scuffles. So the National Pastime is rounding into its most enjoyable time of the year. However, for sheer entertainment this year nothing can beat the Herculean struggle that is the battle between Major League Baseball (MLB) and the Los Angeles Dodgers.

Let's briefly recap, in April MLB took control of the Dodgers and assumed day-to-day operations of the club, from owner Frank McCourt. In June McCourt countered by placing the Dodgers in bankruptcy. There have been various legal maneuverings and machinations typical to bankruptcy courts which are better suited to the E Entertainment network than ESPN. But something occurred yesterday which would even interest the Foreign Corrupt Practices Act (FCPA) practitioner.

In a September 1, article in the Los Angeles Times, Bill Shaikin reported that a group headed by Bill Burke offered to purchase the Dodgers for a MLB record of \$1.2bn, all in cash. The interesting part of this, from the FCPA perspective, is that some unstated portion of the funding was by Chinese investors, who were only said to be "***certain state-owned investment institutions of the People's Republic of China***". Does that sound like a government owned Sovereign Wealth Fund (SWF) to you? Shaikin's article did not report on how much of the \$1.2bn bid was funded by this governmental entity as he reported that in addition to the SWF money, there were other 'unidentified American investors.' So what are the consequences if over 50% of the "all in cash" bid comes from "***certain state-owned investment institutions of the People's Republic of China***"?

As reported by the FCPA Professor in a blog entitled, "House Hearing-Overview and Observations", former Attorney General Mike Mukasey's testimony focused on this issue of ownership. According to Mukasey, "majority ownership is the most plausible threshold" for whether a state-owned or state-controlled enterprise constitutes a foreign government "instrumentality." So if SWF puts up more than 50% of the money to purchase the Dodgers, are the Dodgers now an instrumentality of the Chinese government? If so are Dodger employees now "foreign officials" under the FCPA?

With that question in mind I wish a happy Labor Day Weekend to all. Watch some great baseball and ponder the following: Is that extra \$5 you slip a Dodger employee for a better parking slot at Dodger Stadium next year a facilitation payment or is it a bribe paid to a foreign governmental official?

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