

Silver Lining to the FCPA or How to Create Jobs by Following the Law

As most baseball fans know, the Houston Astros, after being tied with the Boston Red Sox through the first six games of the season with joint 0-6 records, the teams have gone their separate ways. The Red Sox have gone 44-25 and now lead the American League East. The Astros have gone 27-43 and now have the worst record in baseball. I mention this for two reasons; the first is that the Red Sox come to Houston for a 3 game set of Interleague Play, beginning July 1, so please wish us some luck as we will need it; and the second is the stunning triumvirate of articles which appeared Friday and Saturday in the Wall Street Journal (WSJ) and New York Times (NYT) pointing out the positives of the Foreign Corrupt Practices Act (FCPA). For those of you keeping score at home; it was two in the WSJ and one in the NYT.

Even at this point I cannot pronounce which of the three articles was more stunning for they all had aspects which have not been previously seen in print; that is, at least not in print in America's top two newspapers.

I. WSJ-Defense of the FCPA

One thing I had not expected to see in the WSJ was any type of defense of the FCPA. On Friday, June 24, reporter John Bussey wrote an article entitled, "***The Rule of Law Finds Its Way Abroad-However Painfully.***" He began his article by noting the internal investigation that Avon is currently conducting regarding possible violations of the FCPA and that Avon has spent over \$100 million on this internal investigation to-date.

However, Bussey, quite quickly, moved into one of the positive aspects of the FCPA. He stated:

The silver lining? The FCPA—passed in 1977 and still controversial with many U.S. companies—may be proving more effective than any other U.S. initiative in extending the rule of law into developing markets. For all its warts, the rules are changing the often lawless marketplace abroad.

He went on to report that while the US was initially a leader in enacting anti-bribery and anti-corruption legislation, many other countries have now passed similar legislation. Many US companies operate internationally and "*now heavily vet their potential suppliers, partners and acquisitions abroad and have extensive training and compliance programs on the FCPA. U.S. business groups from Egypt to Singapore to China run briefings on the law.*" Further many US companies are now the "*greatest proselytizers*" of rules and regulations against corruption and bribery across the globe.

He also reported that the FCPA is having an effect on the world-wide fight against corruption and bribery. Jeffrey Eglash, a lawyer for GE was quoted as stating, "*It's having an impact, and vendors and suppliers increasingly adopt our policies and embrace our training.*" Alexandra Wrage stated that what may have been acceptable conduct in the past, regarding bribery to obtain

business, was no longer acceptable, *"If a Wal-Mart or General Electric or Pfizer can convey to tens of thousands of partners, suppliers, distributors and other intermediaries world-wide that antibribery compliance is valued, the norms would change."*

II. WSJ-Alcoa Speaks

In a second article on Friday, June 24, in the WSJ online edition, entitled "***Alcoa Exec Says Business Leaders Should Stick Up For The FCPA***". Alcoa Vice President for Sustainability and Environment, Health and Safety, Bill O'Rourke, was quoted in remarks he made to the Carnegie Council roundtable earlier this month, on a question about the importance of having these anti-corruption rules, such as in the FCPA, in place and the interest of America in having anti-corruption and anti-bribery laws in place globally. O'Rourke stated in part:

It's myopic for the business leaders not to take a stance. Business is in a position now to make more of an influence on how the world is run than we have taken. Business needs to stand up and take positions, and not be afraid to. They should be standing up and taking these positions. It's even in their own self-interest to have those rules in place to protect us when we are in certain jurisdictions and we can point to them. That could be self-interest.

But it's the right thing to do. It's myopia that is going on in an awful lot of corporate practices—that this might hurt me or my image might get distorted because of that. It's just the opposite. Your image might get raised a little bit if you start speaking out on the right issues.

O'Rourke provided a concrete example of how the FCPA had helped Alcoa in Russia when faced with numerous solicitations for bribes from towns Alcoa was transporting equipment through. Alcoa simply said they would not pay. It told the Russian federal government that if it wanted Alcoa's business, which included its modern equipment to refurbish aging Russian factories, that Alcoa would not pay bribes to transport Alcoa equipment on trucks through Russia. He said the Alcoa approach worked because the company was "*sticking to our guns.*" The people in Russia realized that it was a benefit to do business with Alcoa and that they would make money the old fashioned way-by earning it.

III. NY Times - Tyson Foods - Why No Prosecution of Individuals?

Taking a somewhat different approach, and certainly a different view, was James Stewart, writing in the Saturday, June 25 edition of the NYT in an article entitled, "***Bribery, but Nobody Was Charged***". In this article, Stewart detailed conduct not only violative of the FCPA in Tyson Food's Mexican food processing facility but also detailed discussions internal to Tyson about ways to shift the illegal payments after they were initially discovered.

Stewart reported that Tyson Foods' Mexican food processing facility was paying the wives of the Mexican food inspector as if they were employees while they did no work at the facility. After this was discovered, a "group of executives *were tasked with investigating how to shift the*

payroll payments to the veterinarians' wives directly to the veterinarians,' according to a subsequent statement of facts negotiated by Tyson's lawyers and the Department of Justice (DOJ). Stewart then wrote that a subsequent memo written by Tyson's audit department concluded that the "*doctors [the wives] will submit one invoice which will include the special payments formally [sic] being made to their spouses along with there [sic] normal consulting services fee.*" The invoices would be identified as "*professional honoraria.*" Stewart found this conduct by Tyson to be one of "*only finding a new way*" to make the same payments which violated the FCPA. Stewart did name some of the Tyson Foods' executives involved in the meetings detailed in the above events:

1. President of Tyson International Operation - Gregg Huett
2. Vice President for Operations
3. Vice President for Internal Audit
4. Chief Administrative Officer - Greg Lee

Stewart reported that when he contacted Tyson Foods', a company spokesman told him that all company officials involved with this matter were "either no longer with the company or were disciplined." I certainly hope those folks who engaged in or approved any bribery scheme were terminated.

IV. The Upshot

What is the upshot of these three articles and how do they relate to the Astros and Red Sox? Just as the Red Sox have clearly turned their season around by getting back to their strengths, the FCPA has many strong, positive aspects which were not discussed in the recent House Judiciary Committee hearings on FCPA enforcement. In contrast to last year's Senate hearings, neither Chairman Sensenbrenner nor any of the other House panel members seemed concerned about the lack of individual prosecutions under the FCPA. Stewart's article clearly names some of the Tyson Foods' executives who were involved in the decisions around the company's conduct which was found to violate the FCPA but none of the named individuals were charged.

However, it was the two WSJ articles which seemed to most directly contradict the thesis that the House Republicans were trying to articulate; that somehow the DOJ's enforcement of the FCPA is costing US companies jobs. It is not the FCPA which costs US companies jobs, but the failure of other countries to adopt and enforce the Rule of Law which allows companies from other foreign countries to engage in bribery and corruption which causes US companies to lose business. Both Bill O'Rourke of Alcoa and several persons interviewed by John Bussey for his article pointed out the positive benefits of the FCPA and how it allows US companies to lead the world into a stance of greater rejection of corruption and bribery to successfully secure and transact business.

Indeed, the Alcoa example is one precisely anticipated by the legislators who enacted the FCPA. In the Preamble to the FCPA, one of the reasons listed for its enactment is that by having such

robust anti-corruption legislation in place, US companies could more easily resist the demand for payment of bribes by corrupt foreign officials. One of the guiding principles of a robust FCPA compliance and ethics business program for a US company is to have a Code of Business Ethics which prohibits bribery and other forms of corruption of foreign governmental officials and most US companies doing business internationally have such a Code in place. These Codes uniformly cite FCPA inspired language which prohibits such conduct. This enables a US company employee transacting business overseas to correctly and accurately state that his or her employer specifically prohibits the payment of bribes and engaging in corruption. Such a strong statement of US policy, when delivered by an individual employee, may be the strongest manifestation of the goal of this final prong listed in the Preamble to the FCPA; a tangible business reason, why a US company must not, cannot, and will not engage in corruption of a foreign official.

The House Committee also focused the alleged loss of jobs by US companies due to the FCPA. Just imagine how many jobs that Avon could have created if it had not engaged in “possible” FCPA violations and did not have to spend north of \$100 MM to internally investigate these “possible” FCPA violations. Even Tyson Foods, with a scorecard of no individual prosecutions for self-admitted violations, could have used some of its reported \$5.2MM in fines and penalties paid to the DOJ and Securities and Exchange Commission (SEC) to create jobs. So maybe the answer to job creation is not to amend the FCPA but that US companies should do as DOJ witness Greg Andres stated at the House hearing and not engage in bribery.

Alas the Astros have now become the first team to reach the 50 loss mark in the Major Leagues this year. Unfortunately it does not appear that the Astros have such strong basics to a fall back on this year so the only way the Astros may relate to this discussion of the FCPA is to conclude that we may only be able to enjoy the show the rest of the year.

This publication contains general information only and is based on the experiences and research of the author. The author is not, by means of this publication, rendering business, legal advice, or other professional advice or services. This publication is not a substitute for such legal advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified legal advisor. The author, his affiliates, and related entities shall not be responsible for any loss sustained by any person or entity that relies on this publication. The Author gives his permission to link, post, distribute, or reference this article for any lawful purpose, provided attribution is made to the author. The author can be reached at tfox@tfoxlaw.com.

© Thomas R. Fox, 2011