**Instrumentality thereof Under the FCPA: An Absurd Result?**

The prognosticators have now spoken (yet again) and decreed that the Houston Astros will be this year's worst team in baseball. We are well into the first week of Spring Training and the Houston Chronicle has reported that Baseball Prospectus has predicted only 67 wins for the hometown heroes this year; one less than the American League worst Kansas City Royals. Is such a result at this point in the (pre) season absurd or is it justified as defined by Baseball Prospectus' "*sobering piece of analysis for Astros fans with sobering statistics*"? You will have to prognosticate that one for yourself.

All of which brings us to one of the points the defense has used in its Motion to Dismiss in the *US v. Carson* matter. The FCPA and compliance world has literally been "a-twitter" over the filing of this brief which puts squarely before a federal district court the questions of just what is an "instrumentality" of a foreign government and who is a foreign government official. One of the five major points the defense argues is that Government's interpretation that a foreign government commercial investment in an otherwise private company leads to the "absurd" result that such an entity becomes an instrumentality of the foreign government which made the investment. The defense extrapolates that such an interpretation "would transform persons no one would consider to be foreign government employees into foreign officials."

The defense provides the current example of the company CITGO which since 1990 has been a wholly-owned subsidiary of a Venezuelan-state-owned oil corporation, PDVSA. CITGO is headquartered in Houston and traces its corporate roots in the United States to 1910. Under the current thinking of the Department of Justice, the defense argues that CITGO is an "instrumentality" of the Venezuelan government and all of its Houston-based officers and employees are therefore "foreign officials" of Venezuela.

We viewed this portion of the defendant's brief with an eye towards two recent energy related transactions. As reported in the Wall Street Journal on February 10, 2011, the Canadian company Encana will "split costs and profits" for energy development in North America with the Chinese state owned enterprise PetroChina. They will "jointly develop" shale properties and actively seek foreign investors to assist in such developments. Under the current DOJ thinking, such an entity to "split the costs and profits" might well become an instrumentality of the foreign government owned Chinese oil company. ***Absurd?***

Back in January, BP announced it had reached an agreement with the Russian government owned energy company Rosneft, to develop energy production in the Artic. As reported in the Wall Street Journal, the two companies will jointly explore for oil and gas in the Russian Arctic, one of the world's last remaining unexplored hydrocarbon basins. Rosneft will be issued new BP shares equivalent to a 5% stake, valued at $7.8 billion, while BP will receive a 9.5% stake in Rosneft, in addition to the 1.3% it already holds. The deal makes Rosneft the single largest BP

shareholder. Could BP now become an "instrumentality" of Rosneft and thereby subject to the FCPA from that perspective? ***Absurd?***

So at one week into Spring Training, which do you think is the more absurd result; that the Astros will be the worst team in baseball OR that when a foreign government owned entity, invests in an otherwise private company, such investment becomes an "instrumentality" of the foreign government which makes the investment?

For a copy of the defendants brief, click here.

For a copy of the Declaration of Michael Koehler (the FCPA Professor) in support of the defendant's brief, click here.