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FIFA and BHP Billiton: The Unique FCPA Challenges Present in International Sports

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Recent enforcement actions by the Department of Justice and Securities and Exchange Commission have raised the profile of corruption in international sport and highlight unique FCPA compliance concerns. This note will explain how the DOJ's recent charges against FIFA officials and the SEC's enforcement action against BHP Billiton call attention to the FCPA compliance risks of acquiring and utilizing corporate sponsorships of international sporting events. As explained below, the failure to remain diligent in overseeing effective anti-bribery compliance practices in these instances risks exposing a company to potential FCPA violations.

Introduction

As of late, the subject of corruption in sports has been on the minds of many. On May 27, 2015 the DOJ released a headline-grabbing 47-count indictment against numerous officials at the international governing body of soccer, FIFA, on charges involving corruption and bribery. Only a week prior, on May 20, 2015, the SEC announced the settlement of an FCPA enforcement action against the multinational mining, metals, and petroleum company, BHP Billiton Ltd., for improper gifts, travel, and entertainment offered in connection with the 2008 Summer Olympics in Beijing. Setting aside the disappointment many feel over seeing some of the world's most beloved sporting events, in particular the World Cup, come under scrutiny for acts of bribery and corruption, these cases underscore the very real FCPA-related compliance risks sporting events pose to companies, particularly those companies seeking to acquire or utilize corporate sponsorships.

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It comes as no surprise that corporate sponsorships for large international sporting events can be valuable assets for companies seeking to promote their products and services. Events such as the World Cup and Olympic Games, where viewership reaches over one billion, offer companies unparalleled exposure in critical markets and, often times, to key individuals.

While the DOJ's allegations in *FIFA* have caused several high profile corporations to raise concerns over how FIFA conducts business, few have connected the dots to explain just how corporate sponsors may have more to fear than the reputational risk of being associated with an allegedly corrupt organization. As detailed below, the DOJ's charges against officials at FIFA underscore the need for companies to monitor the third-party bribery risks associated with how corporate sponsorships are *acquired*, while the SEC's case against BHP emphasizes how companies must continue to oversee how those corporate sponsorships are *utilized* to avoid running afoul of the FCPA's restrictions on gifts, entertainment, and travel.

FIFA and FCPA Risks Associated with Acquiring Corporate Sponsorships

In *FIFA*, the most relevant of the DOJ's allegations concern bribes and kickbacks that FIFA officials allegedly solicited and received from a group of sports marketing agencies in exchange for lucrative marketing and media rights to FIFA soccer events hosted around the world. These media and marketing rights included, to name a few, television and broadcasting rights, advertising rights, licensing rights, and hospitality rights. Upon acquiring the media and marketing agreements from FIFA, the sports marketing agencies would re-sell the rights to various large corporations including television and radio broadcast networks, beverage companies, apparel manufacturers, etc. The indictment went so far as to name several prominent companies who were sold sponsorship rights to a FIFA tournament by some of the sports marketing agencies who are now accused of bribing FIFA officials.

What *FIFA* highlights for FCPA compliance is that companies must be aware of how they acquire sponsorship rights to major sporting events—especially from *whom* they are purchasing the rights from and *how* that third-party acquired the sponsorships rights. While the DOJ's 47-count indictment does not allege that the defendants violated the FCPA, if it can be shown that a company acquiring sponsorship rights to a sporting event was aware of a "high probability" that at least some of the money paid for those rights was used to bribe a "foreign official," such as government representatives to national soccer associations or World Cup or Olympic organizing committees, the government might well assay a FCPA charge.

Indeed, although FIFA and similar international sporting organizations are not government "instrumentalities" within the meaning of the FCPA, the officials of these organizations may still be viewed as government officials under certain circumstances. Under the "foreign official" analysis presented in *Esquenazi*, because many of national athletic associations receive funding from government coffers and frequently exercise exclusive control over

large scale sporting events within their respective countries, it would be a mistake to categorically assume that the government, with its expansive approach to such issues, might not deem such national athletic associations to be "instrumentalities" and their representatives "foreign officials" under the FCPA. Moreover, even without that potential stretch, government representatives to the national athletic associations are, in and of themselves, government officials, potentially leading to varying and complex distinctions amongst different FIFA officials. Given the risk that representatives of international sporting agencies could be treated as "foreign officials," the need from third-party due diligence when acquiring a sponsorship becomes clear. The DOJ and SEC have established that a third-party intermediary, such as a sports marketing agency, who bribes a foreign official while acting on behalf of a company, will not shield that company from violating the FCPA. Moreover, the DOJ and SEC make clear that companies cannot (as shown in the SEC's case against BHP Billiton below), through weak internal controls and compliance programs, purposefully avoid actual knowledge. It is up to a company's internal compliance policies to ensure that third-party bribery risks are appropriately detected.

The DOJ's allegations in *FIFA* describe specific scenarios that should raise eyebrows amongst corporate compliance officers. For example, the DOJ's indictment alleged that many of the sports marketing agencies who allegedly bribed FIFA officials in exchange for media and marketing rights, actually negotiated the acquisition of such rights on behalf of major corporate sponsors. Furthermore, even if there were a degree of separation between a corporate sponsor and a foreign official responsible for awarding media and marketing rights, the DOJ's recent charges only raise the profile and need to scrutinize sponsorship agreements. Now, with public allegations that media and marketing rights for FIFA related sporting events have been acquired through acts of bribery, it will be no excuse for a company to claim ignorance and expect relief under the FCPA.

To avoid FCPA risks in scenario presented in *FIFA*, companies must ensure that its compliance program implements consistent third-party due diligence into each of the agents and consultants it uses to acquire corporate sponsorships. These third-party due diligence programs must, at a minimum, ensure that all relevant data related to a third-party is collected and verified; appropriate training is provided to employees who engage with the third-party; and regular monitoring of a third-party is conducted. The key is that third-party due diligence programs must enable a company to detect and report red flags—a number of which appear relevant to the allegations in *FIFA* are:

(1) Excessive commissions;

(2) Transaction taking place in a jurisdictions known for corruption;

(3) Consulting agreements which fail to describe the services rendered;

(4) The request that monies be paid through offshore bank accounts;

(5) The structuring of financial transactions to avoid reporting requirements;

(6) A close affiliation between the third-party and foreign officials;

(7) Credible reports that the third-party has engaged in acts of bribery.

(8) A third-party's ability to exclusively control a market (e.g., in *FIFA* only a relatively few sports marketing agencies controlled very lucrative markets as a result of alleged bribes).

An effective third-party due diligence program should not only limit the chances that the company will engage a third-party that could place the company at risk of violating the FCPA but also, in the event a third-party makes an

improper payment that is later detected, can assist a company to mitigate its liability over the course of an investigation conducted by the DOJ or SEC.

BHP Billiton and the Risks of Capitalizing on Corporate Sponsorships

Although overshadowed by the DOJ's allegations in *FIFA*, the SEC's enforcement action against BHP, announced only a week prior, must not be overlooked when considering the FCPA risks large sporting events present to companies. While *FIFA* highlights the need to scrutinize how corporate sponsorships are acquired, *BHP* underscores the oversight that is necessary to ensure that those sponsorships are not used in a manner that might violate the FCPA.

As explained in the SEC's cease-and-desist order, on December 8, 2005 the Beijing Organizing Committee for the Games of the XXIX Olympiad ("BOCOG") announced BHP as an official sponsor of the 2008 Beijing Olympic Games. In exchange for providing the raw materials for the Olympic metals and financial support, BHP received priority access to event tickets and luxury accommodations during the Games. To take full advantage of their priority status, BHP established the Olympic Sponsorship Steering Committee ("OSSC") to which employees would submit Olympic Leverage Plans prepared for each country identifying key individuals whose sponsorship to attend the Games may serve the business interests of BHP. The overall objective of BHP was "to reinforce and develop relationships with key stakeholders" across Asia and Africa.

Recognizing the potential anti-bribery risks posed by the possibility of inviting foreign officials to the 2008 Summer Games, BHP created an internal approval process where BHP managers were required to complete applications for any individuals they wished to invite. Several of the questions in the application sought to assess whether an invitee (such as a foreign official) could improperly influence the award of business to BHP as a result of the invitation.

The SEC alleged, however, that, despite creating the application process, BHP failed to ensure that the applications were adequately reviewed and approved. The BHP internal website and the application form both stated that the application would be reviewed by the OSSC and the Ethics Panel. However, the OSSC and Ethics Panel failed to inspect the applications with any regularity. Of the several hundred applications that were completed, the OSSC and Ethics Panel only reviewed ten. Moreover, the OSSC and Ethics Panel only claimed to serve in an *advisory capacity*, making clear that "accountability rest[ed] with business leaders." In essence, although the SEC recognized that the business has a prominent role as the front line of compliance, it also insisted that BHP has failed to exercise sufficient control over the business managers, who obviously faced competing pressures of satisfying sales and client demands with the need to comply with the company's stated policies.

The SEC highlighted other failings in BHP's application processing, such as the fact that many of the applications were inaccurate or incomplete, listing state-owned enterprises as "Customer" rather than "Representative of Government" or failing to identify pending negotiations with the applicant. Pressing further, the SEC indicated that BHP failed to provide any training on how to fill out the applications and how business leaders should evaluate the applications.

Of the 650 individuals BHP invited to attend the Olympic Games in Beijing, 176 were government officials. Sixty officials, along with their spouses, attended the games under BHP sponsorships and were treated to event tickets, luxury hotels stays, and sightseeing trips while in Beijing—valued at approximately $12,000 to $16,000 per package However, given the lack of oversight, the SEC explained that at least four "foreign officials" with the ability to directly influence BHP's business interests received invitations from BHP employees. As a result of BHP's failure to appropriately manage the benefits afforded by its Olympic sponsorship, the SEC concluded that the company violated the books-and-records and internal controls provisions of the FCPA and at a cost of $25 million.

Thus, in contrast to *FIFA*, *BHP* shows that even after acquiring valuable corporate sponsorships, compliance programs must ensure that those sponsorships are not used in a manner that causes the company to violate the FCPA.

This is not to say that the use of corporate hospitality, by way of sponsorships, is altogether off-limits. As we have explained in the past, while there may be a fine line between hospitality and bribery, the FCPA does not prohibit marketing to clients.[1] Companies can use their corporate sponsorships to promote their products and services but must implement efficient policies and programs to ensure compliance with the FCPA. A few compliance procedures that companies should consider when assessing how to utilize hospitality at sporting events are listed below:

(1) Do not offer hospitality to government officials while a specific bid is pending;

(2) Ensure that that amount of entertainment is commensurate with the rank of the client;

(3) Ensure that the hospitality is in compliance with the law of the foreign official's country and the law of the country where the sporting event is taking place;

(4) Obtain written legal opinions to support the assertion that all activities comply with the relevant laws;

(5) Make sure that all arrangements are transparent, including notifying the foreign government and, if possible, acquiring a legal opinion from the foreign government;

(6) Pair the hospitality with a commensurately significant business purpose—such that the entertainment does not outweigh the business purpose of the trip;

(7) Do not simply offer the government official tickets. Make sure that company officials join government clients at the sporting events to ensure that client relationships are developed and that a business purpose is served by the sporting event;

(8) Pay all expenses directly to the service providers (e.g., hotels, restaurants, etc.) or reimburse them through the foreign government using verifiable invoices;

(9) Never provide cash or cash equivalents as gifts to the government official;

(10) Only offer moderate take-away gifts and souvenirs of relatively low value that cannot be converted into cash.

However, creating these compliance procedures will not, in and of itself, be sufficient to avoid violating the FCPA. As seen in *BHP*, paper compliance programs where little follow-through takes place will not avoid FCPA liability. If BHP had effectively managed the compliance procedures that it established, it seems likely that BHP would be in a very different position today.

Conclusion

FIFA and *BHP* should not deter companies from seeking to acquire and utilize corporate sponsorships of large sporting events for purposes of promoting their products and services. However, both cases highlight the pitfalls that companies face if they are not careful. As the DOJ has hinted that further charges may be filed as a result of their allegations in *FIFA*,

[1] See, Philip Urofsky, *Ten Strategies for Paying for Government Clients to Attend the Olympics or Other Sporting Events without Violating the Foreign Corrupt Practices Act*, 1 THE FCPA REPORT 1 (2012) available at http://www.fcpareport.com/article/1480

companies should continue to expect allegations of corruption in sports to continue in the near future. Thus, with the 2015 FIFA Women's World Cup now underway, and looking towards the 2016 Summer Olympics in Rio de Janeiro, companies must remain careful to ensure those sponsorship rights do not cause them to run afoul of the FCPA.

The matter is SEC Administrative Proceeding No. 3-16546

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If you have any questions on any of these matters, please feel free to contact one of our partners or counsel.

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