

## Services

### LEGAL

# Game over

FIFA, BHPB cases underline unique FCPA challenges around international sports

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 US Department of Justice's FIFA allegations 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 organisation.

Although overshadowed by the DOJ's allegations in FIFA, the Securities and Exchange Commission enforcement action against BHP Billiton (BHPB), 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 scrutinise how corporate sponsorships are acquired, BHPB 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 BHPB as an official sponsor of the 2008 Beijing Olympic Games. In exchange for providing the raw materials for the Olympic metals and financial support, BHPB received priority access to event tickets and luxury accommodations during the games.

To take full advantage of their priority status, BHPB 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 BHPB.

The overall objective of BHPB was "to reinforce and develop relationships with key stakeholders" across Asia and Africa.

Recognising the potential anti-bribery risks posed by the possibility of inviting foreign officials to the 2008 Summer Games, BHPB created an internal approval process where the company's managers were required to complete applications for any individuals they wished to invite. Several of the ques-



tions in the application sought to assess whether an invitee (such as a foreign official) could improperly influence the award of business to BHPB as a result of the invitation.

The SEC alleged, however, that, despite creating the application process, BHPB failed to ensure that the applications were adequately reviewed and approved.

The BHPB 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 10.

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 recognised the business has a prominent role as the front line of compliance, it also insisted that BHPB 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 BHPB'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 BHPB failed to provide any training on how to fill out the applications and how business leaders should evaluate the applications.

Of the 650 individuals BHPB invited to attend the Olympic Games in Beijing, 176 were government officials. Sixty officials, along with their spouses, attended the games under BHPB sponsorships and were treated

to event tickets, luxury hotels stays, and sightseeing trips while in Beijing – valued at about US\$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 BHPB's business interests received invitations from BHPB employees.

As a result of BHPB'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, BHPB shows that even after acquiring valuable corporate sponsorships, compliance programmes 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. While there may be a fine line between hospitality and bribery, the FCPA does not prohibit marketing to clients. Companies can use their corporate sponsorships to promote their products and services, but must implement efficient policies and programmes to ensure compliance with the FCPA.

However, creating these compliance procedures will not, in and of itself, be sufficient to avoid violating the FCPA. As seen in BHPB, paper compliance programmes where little follow-through takes place will not avoid FCPA liability.

If BHPB had effectively managed the compliance procedures that it established, it seems likely that the company would be in a very different position today.

In conclusion, FIFA and BHPB should not deter companies from seeking to acquire and utilise 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, 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. ▼