

# Lawyer Insights

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## Even Without Bribes, Foreign Sponsorship Presents FCPA Risks

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In the recent FIFA indictment, 14 individuals, including nine FIFA officials and five corporate executives, were charged with racketeering, wire fraud and money laundering.

The charges stem from allegations of corruption involving the selection of hosts countries for the World Cup competitions, but also include allegations related to bribes and kickbacks for marketing and broadcast deals.

In total, over \$150 million in bribes and kickbacks are alleged. While the indictment did not include charges under the Foreign Corrupt Practices Act, allegations in the indictment should raise concerns of possible FCPA violations for sponsors who work with FIFA.

The FCPA is known for its two main provisions: anti-bribery and records. Since the FIFA indictment alleges the payment of bribes and kickbacks, much has been written of the anti-bribery provisions, which generally prohibits the bribery of foreign government officials for the purpose of obtaining any improper business advantage.

However, much less attention has been given to records provisions, which are much more likely to affect international sponsors.

As part of the expanding enforcement of the FCPA, the Justice Department and Securities and Exchange Commission may use the records provisions to prosecute companies for FCPA violations because the burden of proof is easier to satisfy than that of the anti-bribery provisions.

The records provisions, require companies to keep books and records in reasonable detail so that they accurately reflect the company's transactions including accounting for payment, gifts and entertainment. Any off-book transaction with a foreign government or its agents, whether a bribe or not, is a violation of the records provision.

While specific intent is not a requirement to establish civil violation, inaccurate books and records are seen by as evidence of intent because inaccurate books and records could be the result of attempts by employees to disguise bribe payments and create slush funds for those payments.

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## **Records Trip**

The records provisions also requires internal accounting controls to ensure that company procedures are followed, transactions are recorded, and access to and accountability of assets is controlled and regularly monitored.

For example, a U.S. steel company settled FCPA charges brought under the records provisions after its employees paid commercial bribes to sales managers of privately owned steel mills in China and South Korea who were not foreign officials. The payments violated the FCPA because they were improperly recorded as commissions or rebates.

The FIFA indictment has allegations that have prompted foreign governments to investigate possible corruption related to sponsorships. For example, the indictment contains allegations that Sports Company A, as part of its \$160 million deal in 1996 to be the outfitters for the Brazilian soccer team, paid \$40 million in so-called marketing fees that were not in the initial contract to a marketing agency's Swiss account. This payment is being investigated by both U.S. and Brazilian authorities.

Sports Company A might face FCPA charges if it did as little as failing to record the \$40 million payment in the manner necessary to permit a preparation of financial statements in conformity with generally accepted accounting principles.

It will be extremely likely to face FCPA charges if it is determined that the \$40 million was a commercial bribe instead of marketing fees even though there will not have been a bribe paid to an foreign official.

A recent indictment and settlement related to the 2008 Olympics foreshadows what may be in store for FIFA sponsors. Last year BHP Billiton, or BHPB, a mining company, settled an investigation of FCPA violations for \$25 million based on the records provisions.

## **Entertainment Pitfalls**

As part of BHPB's sponsorship activities it invited people from around the world to attend. BHPB recognized the risks associated with its entertainment and tried to take precautions in advance of inviting government officials to the Summer Games by using a specifically designed "Olympic-specific internal approval process" to check the company's invitations.

However, the SEC determined BHPB's efforts fell short in part because:

- BHPB did not require an independent legal or compliance review of hospitality applications,
- Some hospitality applications were not accurate or complete,
- While BHPB conducted training for its Guide to Business Conduct, as well as general compliance training, it did not have specific training related to Olympic and
- BHPB did not institute a process assess the appropriateness of invitations if conditions changed. Notably absent from the allegations was the specific intent to influence a government official with a bribe.

While companies may be tempted to cut corners to obtain and take advantage of sponsorship rights with organizations like FIFA, in light of potential liability under the FCPA, companies should make sure that they have appropriate legal and compliance review related to sponsorships.

Companies should also make sure that policies and training are updated to deal with specific programs or events that present new risks.