

## CLIENT ALERT

### Avoiding Compliance Red Cards After the FIFA Scandal: Anti-Corruption Considerations for Sponsors and Sports Marketing Companies

Jun.08.2015

On May 27, 2015, the U.S. Department of Justice alleged that 14 FIFA officials and marketing executives took over \$150 million in bribes and kickbacks over the course of more than two decades. The government charged the indicted individuals with, among other offenses, wire fraud, money laundering, a racketeering conspiracy, submitting fraudulent tax returns, and the obstruction of justice. In addition, Swiss authorities have opened criminal proceedings related to FIFA's process for awarding the 2018 and 2022 World Cups. At the press conference announcing the allegations former Crowell & Moring partner and current acting U.S. Attorney for the Eastern District of New York, Kelly Currie, said that what those indicted had in common was that "greed ... drove them to use and exploit their positions for cash."

Top FIFA sponsors are weighing their options and the potential fall-out from this scandal very carefully. Several have made public statements that the brands would likely reassess their sponsorship investment unless FIFA initiated quick ethics reforms and operational protections. Considering the size of their financial investment and with the 2015 Women's World Cup starting in Canada, their decisions are not easy ones and are controlled by the contract provisions already in place.

Sponsors not directly impacted by the FIFA bribery scandal are asking two questions right now – do any current sponsorship relationships have similar risks, and what can sponsors do to avoid corruption scandals and limit their potential damage in future sponsorship deals. One factor that needs to be considered very closely is sports marketing companies (SMCs) and the role they play for sanctioning bodies and sports leagues, especially outside of the United States.

SMCs were central to the conduct described in the indictment. Of the 12 schemes in the indictment, nine involved SMCs. SMCs allegedly bribed FIFA officials in order to win media and sponsorship rights, which they in turn sold to broadcasters and sponsors. Four executives of SMCs were also charged in the case. Further, the indictment in particular mentions one sponsor, "Sportswear Company A," which had a contract with a Brazilian SMC, and a portion of the monies paid under that contract was used by the SMC for bribes and kickbacks. The Wall Street Journal has reported that "Sportswear Company A" is Nike, and Nike's actions could potentially implicate the books and records and internal controls provisions of the Foreign Corrupt Practices Act (FCPA).

The alleged criminal conduct by the SMCs raises issues about how both SMCs and sponsors can avoid being taken advantage of and can steer clear of entering into contracts with organizations that engage in bribery and corruption.

We recommend that SMCs and sponsors consider taking several immediate steps to help assess current risks and to protect themselves when negotiating sponsorship, marketing and media agreements—not just with FIFA, but with respect to any major, international sporting event, league, team or sanctioning body:

- **Anti-corruption compliance due diligence.** Sponsors and SMCs should ask for specific information about the counter-party's anti-corruption compliance policies. The counter-party should identify the individuals responsible for compliance

with anti-corruption laws as well as the counter-party's specific plans to ensure compliance. Doing both—and only moving forward if the responses are acceptable—can mitigate risks to the sponsor and its agency if corruption arises down the road.

- **Anti-corruption contract provision.** Sponsors and SMC's should negotiate for the inclusion of an anti-corruption provision in the agreement which will oblige the counter-party to have implemented an anti-corruption program. Sponsors and SMC's should evaluate how robust the anti-corruption program is, and what remedies are available to them should the counter-party violate the clause. During the past year, these clauses have become a standard sponsorship contract term.
- **Morals clause scope.** Sponsors and SMC's should include a morals clause and related suspension and termination rights in the agreement. Such a clause allows the sponsor to pull-out of, suspend, or renegotiate the agreement if the reputation of the sports body (such as FIFA) is badly damaged. If feasible, the sponsor should negotiate to have the clause cover not only the sports body or league but its board members, teams, and athletes when such misconduct is sanctioned or supported by the organization.
- **Due diligence for sponsorship fee allocation.** Sponsors should ask if any portion of the sponsorship fee will be paid to government officials in any jurisdiction. If the answer is yes, then the sponsor should ask the counter-party for additional information sufficient to indicate that the corrupt payment was not for purposes of obtaining or retaining business.
- **Evaluate anti-corruption policies and practices.** Sponsors and SMCs should continually assess their risk of being involved in international corruption and should implement their own anti-corruption policies. This is particularly important if they operate in countries where there is a high risk of corruption, such as China, Brazil, India, and Mexico. The [Transparency International Corruption Perception Index](#) is a particularly helpful tool for evaluating the corruption risk in a given county.
- **Broader termination rights.** Sponsors should negotiate for separate termination rights in the event bribery, corruption, or equivalent charges are made against principals with management control over the sports body or league. Similar clauses have previously been strongly resisted by sports bodies, leagues, and teams. Following the FIFA bribery scandal, however, the time is right to press for this additional protection for sponsors.

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