

## Avoiding Compliance Red Cards After FIFA Scandal

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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. Press reports indicate that further investigations are currently underway and that more prosecutions may be initiated.

Top FIFA sponsors are weighing their options and the potential fallout 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 now taking place 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.



Jeff Severson

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.

## **Steps to Take Now**

### ***1. Anti-Corruption Compliance Due Diligence***

Sponsors and SMCs should ask for specific information about the counterparty's anti-corruption compliance policies. The counterparty should identify the individuals responsible for compliance with anti-corruption laws as well as the counterparty'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.

Sponsors and SMCs should ask how actively their counterparty enforces its anti-corruption compliance policies. They should ask if the counterparty regularly updates its policies as its business evolves, and if it requires its employees to participate in anti-corruption training. An anti-corruption policy that looks strong on paper but is poorly implemented offers scant protection to sponsors and SMCs.

### ***2. Anti-Corruption Contract Provision***

Sponsors and SMC's should negotiate for the inclusion of an anti-corruption provision in the agreement that will oblige the counterparty to have implemented an anti-corruption program. Sponsors and SMCs should evaluate how robust the anti-corruption program is, and what remedies are available to them should the counterparty violate the clause. During the past year, these clauses have become a standard sponsorship contract term.

- Anti-corruption provisions have the advantage of fostering trust between sponsors and SMCs and their counterparties by providing clear anti-corruption expectations. Sponsors and SMCs can also take comfort in knowing that they have a remedy should corrupt actions by the counterparty be uncovered.
- The International Chamber of Commerce has created a model anti-corruption clause that can serve as a starting point in negotiations between sponsors and SMCs and counter-parties.

### ***3. Morals Clause Scope***

Sponsors and SMCs 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.

- Sponsors and SMCs should generally attempt to negotiate a broadly worded morals clause that allows them, in their sole discretion, to determine if the clause has been triggered. Counterparties are likely to oppose such wording, and will attempt to more narrowly delineate the type of behavior that triggers the clause.
- Suspension rights under morals clauses have taken on greater significance in recent years as scandals have seemed to be on the rise and become more widely publicized through social and digital media. Having the ability hit the pause button during a scandal can provide dual protections for a sponsor under the right circumstances. When exercised, a strong and often public message is sent to the sports property that a meaningful response and corrective action will be necessary to retain the sponsor. At the same time, suspension rights can allow the sponsor to preserve the brand equity built up and marketing benefits secured through significant sponsorship investment, which is something mere termination rights will not provide.

#### ***4. 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 counterparty for additional information sufficient to indicate that the payment was not corruptly made for purposes of obtaining or retaining business.

- Sponsors and SMCs should also ask if the counterparty, its employees or its agents have faced allegations that they violated anti-corruption laws, and if they have should request information about the resolution of those allegations.
- If sponsors and SMCs operate in countries with a high risk of corruption they should ask for information about which government agencies and foreign officials the counter-party does business with, whether the counterparty needed to obtain operating permits from those agencies or officials, and how it obtained those permits.

#### ***5. 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.

- An effective compliance program begins at the top, with the board of directors and senior executives. A senior executive should be assigned responsibility for the compliance program and should have sufficient autonomy to ensure it is implemented effectively.

- Effective compliance programs are tailored to a company's business model and do not rely on one-size-fits-all approach. Sponsors and SMCs should continuously update their policies, particularly if they are operating in a new country with a high risk of corruption.
- Sponsors and SMCs should ensure that all employees have meaningful access to their compliance policies and that the company conducts trainings on their policy.
- Even if a sponsor or SMC violates an anti-corruption law, an effective compliance program can be beneficial. If a company commits a violation, the U.S. Department of Justice and U.S. Securities and Exchange Commission evaluate the adequacy of a company's compliance program when deciding on any potential penalty or sanction, and an effective, well-implemented policy can mitigate the severity of any penalties.

## **6. 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.

—By David Ervin, Jeff Severson and Christopher A. Cole, Crowell & Moring LLP

*David Ervin and Christopher Cole are partners in Crowell & Moring's Washington, D.C., office. Jeff Severson is an associate in the firm's New York office.*

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