The FIFA Scandal: Lessons for the Corporate World

Jarrod Baker, ACA
Senior Managing Director,
FTI Consulting
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By: Jarrod Baker
Forensic & Litigation Consulting
What Happened?

• FIFA officials charged with conspiring to solicit and receive well over $150 million in bribes and kickbacks

• Primarily in exchange for their official support of the sports marketing executives who agreed to make the unlawful payments

• Other alleged schemes relate to the payment and receipt of bribes and kickbacks in connection with:
  - Sponsorship of CBF (Brazilian Football Confederation) by a major U.S. sportswear company
  - Selection of the host country for the 2010 World Cup
  - 2011 FIFA presidential election

• There are also question marks over the bidding and subsequent awarding of the 2018 and 2022 World Cups to Russia and Qatar respectively
There are five distinct elements which must be met to constitute a violation under the anti-bribery provision:

**Who**
- Potentially applies to any individual, firm, officer, director, employee, or agent of the firm and any stockholder acting on behalf of the firm
- Encompasses any third party relationships such as foreign affiliates and joint ventures

**Corrupt Intent**
- Person making or authorizing the payment must have corrupt intent
  - Payment must be intended to prompt the recipient to misuse his official position to direct business wrongfully to the payer or any other person
  - Offer of a corrupt payment can constitute a violation even if the corrupt act does not succeed

**Payment**
- Prohibits paying, offering, or promising to pay money or anything of value

**Recipient**
- Extends to corrupt payments to:
  - A foreign official
  - A foreign political part or party official
  - Any candidate for foreign political office

**Business Purpose Test**
- Payment must be made for the purpose of: (i) influencing, inducing or otherwise affecting an official act, decision or omission thereof, (ii) securing an improper advantage, or (iii) assisting in obtaining or retaining business for any person or entity

Source: www.usdoj.gov/criminal/fraud/docs/dojdocb.html.
The Legal Framework – What Laws Apply?

- The indictment does not contain charges under the FCPA:
  - FCPA only applies to bribe payers
  - FIFA is a Swiss verein - officials not government officials
- Charges relate to “wire fraud, racketeering, and money laundering”:
  - 47 charges under the U.S. Racketeer Influenced and Corrupt Organizations Act
  - Travel Act also applicable
- This is a case of private sector corruption but the principles of the scandal have many parallels with anti-corruption legislation like the FCPA
Global Anti-Corruption Compliance Benchmark

1. Commitment from senior management and a clearly articulated policy against corruption
2. Code of conduct and compliance policies and procedures
3. Oversight, autonomy, and resources
4. Risk assessment
5. Training and continuing advice
6. Incentives and disciplinary measures
7. Third-party due diligence and payments
8. Confidential reporting and internal investigation
9. Continuous improvement: periodic testing and review
10. Mergers and acquisitions: pre-acquisition due diligence and post-acquisition integration

• Similar in nature to both the:
  ▪ “Adequate Procedures” guidance issued by the UK Ministry of Justice in connection with the introduction of the UK Bribery Act
  ▪ Organisation for Economic Co-operation and Development’s “Good Practice Guidance on Internal Controls, Ethics and Compliance”
Lesson 1

You can be subject to international laws based on your conduct, and there is increasing cooperation between international authorities.

- The extra-territorial application of U.S. law:
  - Three of the defendants are U.S. citizens
  - Many of the regional soccer associations implicated have offices in the U.S.
  - Several of the intermediate sports marketing companies and their affiliates have an office or operations in the U.S.

- Further allegations concerning use of U.S. based bank accounts and conduct in the U.S. including phone calls and meetings

- Switzerland and the U.S. have an extradition treaty - U.S. Attorney General - “I would like to reiterate our thanks to the Swiss authorities who worked so well with us in coordinating the arrests.”
Lesson 1 – An Example in The Corporate World

BHP Billiton:

• FCPA enforcement action by the SEC over the company’s entertainment at the 2008 Beijing Olympic Games - 60 guests attended as well as some spouses and others – hospitality packages valued at $12,000 to $16,000

• As per the SEC: “…footed the bill for foreign government officials to attend the Olympics while they were in a position to help the company with its business or regulatory endeavors”

• Jurisdiction - FCPA applied as the company has American Depository Receipts

• SEC noted the cooperation of the Australian Federal Police
Lesson 1 – Key Takeaways

• A company needs to:
  ▪ Be aware of what anti-corruption legislation applies to their operations around the world
  ▪ Ensure their compliance programme covers the nuances with each applicable law
Lesson 2

You must conduct a thorough and objective investigation that is satisfactorily concluded

- Michael Garcia investigated the bidding process and decision to award the right to host the 2018 and 2022 World Cups.

- Chairman of FIFA’s Ethics Committee's adjudication chamber released a 42-page summary of his findings after reviewing Garcia's report clearing the bids from Russia and Qatar of any wrongdoing.

- Garcia resigned from his role as FIFA ethics investigator, citing a “lack of leadership” and lost confidence.
Lesson 2 – An Example in The Corporate World

Walmart:

• Currently subject to an FCPA investigation
• Confronted with evidence of widespread corruption in Mexico following an internal investigation, top Walmart executives focused more on damage control than on rooting out wrongdoing
• The New York Times ran a report covering Walmart's alleged bribery in Mexico and the cover up that followed
Lesson 2 – Key Takeaways

• As per the FCPA Guide:
  ▪ Once an allegation is made, the company should have in place an efficient, reliable, and properly funded process for investigating the allegation and documenting the company’s response, including any disciplinary or remediation measures taken
  ▪ The company also needs to consider the “lessons learned” from incidents

• Morgan Stanley: self-disclosed and took remedial action—no penalty

• Alstom: only began cooperating after the DOJ publicly charged several of the company’s executives—US$ 775 million penalty
Lesson 3

Whistleblower protection is paramount

- Phaedra Al-Majid worked as an international media officer for the Qatar World Cup 2022 and alleges that Qatari bid officials gave US$ 1.5 million each to three African FIFA executives to pay for their votes.

- She later signed an affidavit saying her allegations were false but later claimed the affidavit was signed under duress.
Lesson 3 – An Example in The Corporate World

Securency and Note Printing Australia:

• Two subsidiaries of the Reserve Bank of Australia engaged in widespread bribery and corruption of foreign public officials in various Asian and other countries to secure banknote printing contracts.

• The company secretary of Note Printing Australia, Brian Hood, raised his concerns with various senior people in the organisation and the Reserve Bank of Australia.

• Hood was later made redundant and told his position had become untenable.

• Following a media report two years later, the Australian authorities commenced an investigation.
Lesson 3 – Key Takeaways

- Whistleblower protection is paramount, and that is why it is in law in many jurisdictions and generally enshrined in company policy.
- According to the ACFE 2014 Report to the Nations:

![Figure 14: Impact of Hotlines](chart.png)

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You cannot “outsource” bribery to an agent

• Traffic Sports Management is alleged to have paid bribes on behalf of companies looking to secure apparel and sports equipment deals with South American football federations.

• Media reports list Nike as part of the “sports equipment deals.”

• Nike became the major sponsor of the Brazilian national football team in 1996, and the contract helped drive the company's revenue and sponsorship.
Lesson 4 – An Example in The Corporate World

Alcatel-Lucent:

- Subject to an FCPA enforcement action in 2010 for bribing officials in Costa Rica, Honduras, Malaysia, and Taiwan to win local contracts
- Paid consultants who in turn passed on money to government officials to assist in retaining and obtaining business
Lesson 4 – Key Takeaways

- The FCPA expressly prohibits corrupt payments made through third parties or intermediaries.
- Before engaging a third party such as an agent, a company should conduct due diligence.
- The level of due diligence required will depend on the industry, country, size, and nature of the transaction with the third party.
Lesson 5

A company cannot use the pretense of charitable contributions as a way to funnel bribes

• The South African government is alleged to have made a payment of US$ 10 million to promote Caribbean football.

• The U.S. authorities allege the payment was made so that South Africa could secure the rights to host the 2010 World Cup.

• Former FIFA Vice President and President of CONCACAF, Jack Warner, used the US$10 million for cash withdrawals, personal loans, and to launder money.
Lesson 5 – An Example in The Corporate World

Schering Plough:

• Schering Plough was subject to an enforcement action by the SEC for payments it made in Poland to a castle restoration foundation.

• The head of the foundation was also a senior government official in the Polish health system who could influence the company’s product being purchased.
Lesson 5 – Key Takeaways

• The U.S. regulators list five questions in the FCPA Guide that you should ask when making charitable payments:
  ▪ What is the purpose of the payment?
  ▪ Is the payment consistent with the company’s internal guidelines on charitable giving?
  ▪ Is the payment being requested by a foreign official?
  ▪ Is a foreign official associated with the charity and, if so, can the foreign official make decisions regarding your business in that country?
  ▪ Is the payment conditioned upon receiving business or other benefits?
Lesson 6

A bribe does not necessarily involve a transfer of money

• Eckert’s summary mentioned that Garcia’s report identified “the [England] bid team often accommodated Mr Warner’s wishes, in apparent violation of bidding rules and the FIFA Code of Ethics”

• “Mr. Warner pressing, in 2009 and again in 2010, England’s bid team to help a person of interest to him find a part-time job in the UK”
Lesson 6 – An Example in The Corporate World

BNY Mellon:

• BNY Mellon settled charges with the SEC that it violated the FCPA by providing student internships to family members of foreign government officials affiliated with a Middle Eastern sovereign wealth fund.

• The bank’s employees viewed the internships as important to keep the sovereign wealth fund’s business.
Lesson 6 – Key Takeaways

- Hiring such children would not necessarily be a violation of the FCPA if certain criteria are followed:
  - Stick to normal hiring processes that exist within the company.
  - Apply the same standards to these candidates as with others.
  - Have policies and procedures in place that help determine whether a candidate is connected to a public official and whether the timing of the hire is around a key business decision involving the public official.
  - Train employees involved in hiring on the potential risks.
  - Tell the foreign officials asking for the favour that such a request is well and truly off-limits.
Lesson 7

Bribery laws can be breached even if the purpose of the payment is not achieved

- Football Federation Australia paid US$ 500,000 to CONCACAF to assist with renovating a stadium in the Caribbean, but the funds were allegedly misappropriated by Jack Warner.
- At the time, Australia was seeking to be awarded the right to host the 2022 World Cup.
- The payment has been scrutinised by U.S. authorities and referred to the Australian Federal Police.
Lesson 7 – An example in the corporate world

Monsanto:

• Subject to an enforcement action by the DOJ and SEC in 2005 for violating the FCPA

• Made a payment totalling US$ 50,000 to a senior Indonesian Ministry of Environment official to repeal an unfavourable decree that ultimately was not repealed
Lesson 7 – Key Takeaways

• Zero tolerance for all forms of bribery and corruption is the standard to which every company must hold themselves to.
Thank you

Jarrod Baker
Senior Managing Director
Forensic & Litigation Consulting
jarrod.baker@fticonsulting.com

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Critical Thinking at the Critical Time™
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