

Avoiding Legal Pitfalls in Sports and Entertainment Marketing

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“Avon Products has been the subject of an investigation since 2008 for possible violations of the Foreign Corrupt Practices Act. The investigation is looking at travel, entertainment, gifts,.. The final tally for the internal investigation could easily reach \$250 million... Given the widening investigation of payments at Avon, the settlement number will likely run into the millions of dollars, depending on the amount of any corrupt payments and the benefits the company derived from them.”

*“The High Price of Internal Inquiries,”
Peter Henning, DealBook, May 6, 2011*

Event Tickets and Anti-Corruption Compliance

Hosting business clients and associates by providing complimentary tickets to sports and entertainment events is a well-ingrained business tradition. From Super Bowl and Final Four tickets, to tickets to a badminton match in China, to sold-out arena concerts, many companies provide event tickets to clients and business associates as a means of expressing

appreciation for loyalty and fostering business relationships.

It is certainly possible to furnish tickets as a part of normal business hospitality without violating global anti-corruption laws. As explained by the United Kingdom’s chief enforcer, no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix.” But in an environment of heightened anti-corruption enforcement – which has led to billions of dollars of fines and penalties over the last few years – companies run the risk of triggering anti-corruption laws if their marketing and entertainment expenditures cross a line into conduct that could be characterized as bribery. In particular, companies need to understand the strict limits placed on providing things of value, including tickets to sports and entertainment events, to both domestic and foreign government officials, to employees of state-owned enterprises, and even to purely private, commercial customers. So, while companies may continue to entertain clients at such events, they need to take affirmative steps to ensure that corporate travel, meals, entertainment and gifts and other business courtesies are given in accordance with the requirements of global anti-corruption laws.

Overview of FCPA and Foreign Anti-Bribery Laws

“The Foreign Corrupt Practices Act of 1977, as amended (the “FCPA”), as well as the laws of numerous other countries around the globe, govern the worldwide activities of U.S. companies and their employees. In general, the FCPA prohibits offering, paying, promising to pay or authorizing payment of money, gifts or anything of value to a foreign official: (i)



to influence any act or decision by the official; (ii) to induce the official to use his or her influence to affect any act or decision; or (iii) to seek any improper advantage to assist the company in obtaining or retaining business. The FCPA also prohibits the payment of anything of value to persons acting on behalf of a U.S. company, such as agents, representative or other business partners, while knowing that all or part of the payment would be used in this fashion. Publicly traded companies also must maintain internal controls intended to inhibit corrupt payments and keep records that, in reasonable detail, record transactions appropriately.”

Of key importance to many firms that operate abroad, “foreign official” is broadly defined to include not only traditional government officials or individuals employed by the government, a government agency or a government ministry, but also employees of an entity owned or controlled by a foreign government, even if the government entity operates in a purely commercial fashion. Likewise, under the FCPA, the phrase “obtain or retain business” is broadly interpreted to include not only conduct that leads to specific government business, but also conduct that assists the company in doing business in the general sense, such as obtaining licenses or permits. Even unsuccessful bribery attempts are violations of the law and grounds for prosecution.

Further complicating the anti-corruption calculus is that many countries have laws in place that outlaw purely commercial bribery. These laws, including the UK Bribery Act, prohibit any corrupt payment to anyone – not just to foreign officials – to obtain or retain business. U.S. enforcement authorities have also prosecuted companies and individuals for paying bribes to domestic government officials and to private parties using such laws as the Travel Act and wire and mail fraud statutes. Because of these laws, the growing trend in anti-corruption compliance is to draft policies broadly, so as to restrict both government-related and commercial bribery.

“Anything of Value” is Broadly Defined

Important to note for companies considering entertaining clients or business associates, the FCPA broadly defines “anything of value” to include much more than just cash or cash equivalents. “Anything of value” can include the payment of travel expenses, providing services, golf outings or other entertainment not customary to a particular business transaction, assumption or forgiveness of debt, personal favors, offers of employment, and even charitable donations. Naturally enough, this would include event tickets, golf outings, and many other forms of sports-related corporate booster activities. Normal business entertainment expenses directly connected to a bona fide business purpose, as well as nominal gifts such as small gifts with a corporate logo, are generally acceptable under the FCPA. As discussed below, however, excessive marketing expenses, including lavish entertainment and travel given in return for obtaining or retaining business, might violate anti-corruption laws.

Running Afoul of the FCPA for Excessive Business Entertainment

Several FCPA enforcement actions have targeted companies alleged to have provided overly lavish entertainment to foreign officials. For example, in 2007, Lucent Technologies agreed to settle parallel DOJ and SEC enforcements by paying \$2.5 million in fines and penalties. In doing so, the company acknowledged that it paid over \$10 million for employees of a Chinese state-owned company to take approximately 315 trips to the U.S. over a three-year period. These trips, which often included spouses and children, also included visits to tourist destinations such as Las Vegas, Disney World, Niagara Falls, and Hawaii. In addition, officials were given a high daily expense allowance upwards of \$500 to \$1,000.

Similarly, Control Component, Inc. (“CCI”) was fined over \$18 million for making improper payments to government officials in China, Malaysia, South Korea and the United Arab Emirates in order to win contracts. Notably, CCI was alleged to have provided government



officials in these countries extravagant overseas holidays to destinations that included Disneyland, Las Vegas and Hawaii. Other companies that have settled FCPA charges that, at least in part, involved providing lavish entertainment and travel to government officials include IBM (China, South-Korea) and Ingersoll-Rand Italiana S.p.A. (Iraq).

Entertaining While Remaining Compliant

“Unfortunately, when a company gets caught up in a Foreign Corrupt Practices Act investigation, its legal costs can continue for years, even after a settlement with the government.”

“The High Price of Internal Inquiries,” Peter Henning, *DealBook*, May 6, 2011

From box seats at the U.S. Open going for upwards of \$45,000, to business seats at the 2010 World Cup Quarter finals costing \$2,500, the high cost of in-demand tickets to sports and entertainment events puts companies entertaining clients or associates at risk if proper protocols are not followed. Most important, companies need to ensure that the entertainment costs are *reasonable* under the circumstances and are connected to a legitimate business purpose. Ultimately, client entertainment must be provided in good faith and without a corrupt intent or the expectation of a favor in return.

Summary and Best Practices

Inviting prospects and customers to sports and entertainment events has become a mainstream sales and marketing tactic. Used correctly, entertainment of this nature can make a positive contribution to sales and marketing efforts. But used incorrectly, the risk of running afoul of the law is high and the potential penalties are significant.

Unfortunately, there are no bright lines to distinguish between acceptable client entertainment and those payments that could be construed as violating the FCPA or other anti-corruption laws. Nonetheless, below are ten protocols companies should consider

following when providing gifts (including tickets), meals, entertainment, and travel, including when entertaining clients at sports and entertainment events:

1. The company should avoid entertaining government officials (and employees of state-owned entities). When they do, companies should have strict policies in place requiring any expenses over a certain threshold to be reviewed and cleared in advance;
2. The company should have set levels beyond which entertaining expenses will receive special scrutiny. Although the level should vary depending upon the market at issue, as a general matter any expected tickets valued above \$250 should receive this heightened level of scrutiny, which may include approval by the company’s compliance officer or legal department;
3. The level of entertainment should be in accordance with generally accepted business standards;
4. As a general rule, company personnel should be in attendance at the event to support the business justification of relationship-building;
5. The government agency, or state-owned entity, should be notified of any entertaining that is occurring;
6. The company should have in place procedures requiring the accurate reporting of all disbursements and reimbursements associated with business courtesies;
7. The company should train agents and consultants authorized to act on its behalf regarding the anti-corruption requirements, and monitor their business-generating and entertainment activities to ensure that they are not stepping over the line;
8. The company should avoid paying per diems to their customers or business associates;



9. The company should have some mechanism for flagging repeated gifts, meals; entertainment, and travel expenses repeatedly given to the same person.
10. The company should maintain procedures to ensure the accurate tracking and identification of all business-related gifts, meals, entertainment, and travel payments and expenses.

The adoption of policies such as these cannot eliminate the risk of a potentially suspect payment, especially for companies operating in countries that have a reputation for corruption. Nonetheless, well thought-out procedures, tailored to the company's operations, are essential for companies that are going to provide valuable business courtesies, such as tickets to sporting events, to commercial partners. Some variation of these procedures will help mitigate the risk that a company's business entertainment could be construed as violating the global anti-corruption laws, and are essential, given the increasingly aggressive enforcement of these laws that are a hallmark of today's regulation of multinational corporations.

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