

Gifts and Entertainment

Nine Steps to Reduce Corruption Risk When Entertaining Clients at the 2014 Winter Olympics and Beyond

By Kimberly A. Parker, Jay Holtmeier, Erin G.H. Sloane and Daniel F. Schubert, *WilmerHale*

In recent years, the SEC and DOJ have launched multiple anti-corruption investigations relating to corporate hospitality during major sporting events, such as the Olympics and World Cup. While anti-corruption laws do not generally prohibit travel, gifts and entertainment of customers for legitimate business purposes, the line between a bona fide business expense and one that might attract scrutiny from U.S. and other regulators can be at times grey. In advance of this week's Olympics in Sochi, Russia and the upcoming World Cup in Brazil, we provide below nine recommendations to help companies mitigate possible anti-corruption risk attendant to this type of corporate hospitality.

Prior Enforcement Matters

The SEC and DOJ have settled a number of FCPA matters arising out of corporate hospitality. Perhaps most relevant, Weatherford International's November 2013 settlement included an allegation that Weatherford had provided "improper travel and entertainment to officials of a state-owned company in Algeria with no legitimate business purpose . . . [including paying] for a 2006 FIFA World Cup trip by two of the officials." SEC Press Release 2013-252 (Nov. 26, 2013); see also "Oil and Gas Company Weatherford Settles Civil and Criminal FCPA Charges for \$153 Million," *The FCPA Report*, Vol. 2, No. 24 (Dec. 4, 2013).

Other past enforcement actions relating to hospitality include Diebold (\$48 million settlement involving international

leisure travel, entertainment, and improper gifts to Chinese and Indonesian officials); IBM (\$10 million settlement involving travel agency collusion to violate IBM's gifts and entertainment policies); and Eli Lilly (\$29 million settlement involving falsifying expense reports to cover up improper gifts to doctors). At least one other investigation relating to Olympics hospitality is currently ongoing as well.

Notwithstanding these matters, both the U.S. and U.K. enforcement authorities have been clear that companies may continue to provide appropriate hospitality to government officials. For example, the U.K. Ministry of Justice has explained that "as a general proposition, hospitality or promotional expenditure which is proportionate and reasonable given the sort of business you do is very unlikely to engage the [U.K. Bribery] Act. So you can continue to provide tickets to sporting events, take clients to dinner, offer gifts to clients as a reflection of your good relations, or pay for reasonable travel expenses in order to demonstrate your goods or services to clients if that is reasonable and proportionate for your business." U.K. Ministry of Justice Quick Start Guide, p. 7; see also "Britain's Serious Fraud Office Updates Guidance on the Bribery Act, Reinforcing Its Role as a Crime Fighting Agency," *The FCPA Report*, Vol. 1, No. 10 (Oct. 17, 2012).

In his foreword to the U.K. Bribery Act guidance, Ken Clarke, Lord Chancellor and Secretary of State for Justice, specifically addressed high-value hospitality events. He

stated, “No one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix.” Clarke also announced in the U.K. Parliament ahead of the publication of the Guidance that “[o]rdinary hospitality to meet and network with customers and to improve relationships is an ordinary part of business and should never be a criminal offence.” Hansard HC Vol. 523 Col. 793-794 (15 February 2011).

Similarly, the DOJ/SEC Resource Guide explains that it can be appropriate to pay for travel and related hospitality – including business class airfare, meals and entertainment – provided the expenses are “reasonable” and the trip has “a legitimate business purpose.” DOJ/SEC Resource Guide, p. 18; see also “Charles Duross and Kara Brockmeyer Discuss Five FCPA Enforcement Trends That Matter to Regulators: Individual Prosecutions, Administrative Proceedings, Global Coordination, Corporate Monitors and Third Parties (Part One of Two),” The FCPA Report, Vol. 2, No. 24 (Dec. 4, 2013).

Nine Steps to Reduce Corruption Risk

Below are nine recommended steps designed to reduce the anti-corruption risk of providing hospitality during the Sochi Olympics, and inviting clients to future events. Please keep in mind that, although these recommendations are focused on government officials, the U.K. Bribery Act (as well as other laws in the United States and elsewhere) extends to private sector commercial bribery, as well.

1) Document the Business Purpose of the Event

Document the legitimate commercial reasons for hosting the customer at the Olympics. The absence of a clearly

articulated statement of the legitimate business-related purpose for the attendance could increase the risk that its nature could later be misinterpreted by regulators and prosecutors. The business purpose should be reasonably related to the nature of the event. In general, an employee of the hosting organization should accompany the guest, rather than simply giving tickets as gifts.

2) Set Approval Policy for the Provision of Gifts and Hospitality

Require compliance or legal department approval for Olympics gifts and hospitality over a nominal amount. See, e.g., “Gifts, Travel, Entertainment and Anti-Corruption Compliance: Sources of Authority, Best Practices and Benchmarking,” The FCPA Report, Vol. 2, No. 22 (Nov. 6, 2013).

3) Properly Account for Benefits Provided

The costs of any gifts, travel or entertainment, including amenities, and the name and affiliation of each recipient, should be fully and accurately documented in your company’s books and records. See “Structuring FCPA Books and Records Controls to Withstand SEC Scrutiny Without Impairing Sales,” The FCPA Report, Vol. 2, No. 6 (Mar. 20, 2013).

4) Update and Redistribute Anti-Bribery Policies Prior to the Olympics

Ensure that anti-corruption policies and procedures are up to date and circulated in advance of the Olympics to relevant employees involved in planning or hosting Olympics-related hospitality.

5) Consider Local Laws and Rules

Consider whether invited guests are permitted by the local laws and rules applicable to them to accept relevant gifts, travel and hospitality. For significant benefits, consider obtaining confirmation from the guest or the guest's employing organization that the guest is permitted to accept.

6) Consider Issuing Anti-Corruption Reminders to Key Employees Shortly Before the Olympics

The reminder sent to employees should emphasize that provisions in the FCPA and other anti-bribery laws tend to be broadly interpreted by governmental enforcement authorities. For example, "anything of value" under the FCPA can include numerous improper benefits beyond cash such as gift cards, loans, donations, the hiring of family members and other special favors. See "SEC Investigation of JPMorgan Hiring Practices Demonstrates FCPA Nepotism Risks," The FCPA Report, Vol. 2, No. 17 (Aug. 21, 2013).

7) Generally Avoid Expenses that Will Attract Scrutiny

Examples of such expenses include the provision of lavish gifts, per diems and/or side trips with no business purpose.

8) For Future Events, Properly Vet All Invitees

Vet all proposed invitees to identify any situations where the identity of the invitee, his/her position, his/her employer, or any specific circumstances could create an appearance that the relevant hospitality might be seen in a negative light as a proffered quid pro quo, including:

- any government official or state-owned-entity employee requiring further scrutiny;
- any invitee responsible for a pending decision.

See "Who Is a Foreign Official?," The FCPA Report, Vol. 2, No. 18 (Sep. 11, 2013).

9) Implement Additional Safeguards

For any potential invitee whom the vetting process identifies, the following additional measures could be taken to manage the risk that any improper invitation may be extended:

- Require review by legal/compliance prior to issuance of an invitation in order to consider whether, in light of the circumstances, the invitation should issue at all or whether the hospitality offered could be tailored to minimize the risk.
- Send the invitations to the business address, rather than to the home address, of the invitees. This will help avoid any appearance that the invitation was designed to influence a particular decision-maker, avoid the customer's corporate policies, or evade the scrutiny of their management.
- Consider ways to significantly trim the value of the packages being provided, e.g., by not inviting a spouse, by reducing the number of events/tickets, by reducing the number of hotel nights, by reducing the amount of the gifts provided.
- Require that the participants and package are fully transparent and do not allow a third party such as an agent or distributor to issue the invitation on your behalf.
- Wherever practical, pay vendors (hotels, restaurants, etc.) directly rather than reimbursing guests for expenses. If reimbursements are made, require reasonable documentation of the expenses. Do not provide per diems or other cash.

*Kimberly A. Parker is a partner in WilmerHale's Litigation/Controversy Department, and a member of the Investigations and Criminal Litigation and Foreign Corrupt Practices Act and Anti-Corruption Practice Groups. Ms. Parker's practice focuses on white collar criminal matters, internal corporate investigations, and congressional investigations, with a focus on anti-corruption related matters. Ms. Parker is a co-author, with Roger Witten and Jay Holtmeier, of a leading treatise, *Complying with the Foreign Corrupt Practices Act* (Matthew Bender, 8th ed. 2013).*

Jay Holtmeier is a partner in WilmerHale's Litigation/Controversy Department, and a member of the Investigations and Criminal Litigation Practice Group, the Foreign Corrupt Practices Act and Anti-Corruption Group and the Dodd-Frank Whistleblower Working Group. Prior to joining WilmerHale, Mr. Holtmeier served, among other things, as an Assistant United States Attorney in the Southern District of New York. Mr. Holtmeier is a co-author, with Roger Witten and

*Ms. Parker, of a leading treatise, *Complying with the Foreign Corrupt Practices Act* (Matthew Bender, 8th ed. 2013).*

Erin G.H. Sloane is a partner in WilmerHale's Litigation/Controversy and Securities Departments, and a member of the Investigations and Criminal Litigation, Foreign Corrupt Practices Act and Anti-Corruption, and Securities Litigation and Enforcement Practice Groups. Ms. Sloane's practice focuses on government and internal investigations and white collar criminal matters, with a focus on anti-corruption related matters.

Daniel F. Schubert is a partner in WilmerHale's Securities and Litigation/Controversy Departments. Mr. Schubert's practice focuses on corporate investigations, enforcement matters and white collar criminal matters. Mr. Schubert has extensive experience representing corporations and individuals in FCPA matters, including representing Morgan Stanley in connection with the DOJ and SEC investigations of its China real estate business and the landmark resolution to those matters.