

## CLIENT MEMORANDUM

# BHP Billiton Fined \$25 Million for FCPA Violations Related to Olympic Entertainment

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## AUTHORS

**Martin J. Weinstein** | **Robert J. Meyer** | **Jeffrey D. Clark**

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On May 20, 2015, BHP Billiton (“BHPB”), a mining and natural resources company based in England and Australia, agreed to pay a \$25 million penalty to settle Securities and Exchange Commission (“SEC”) charges that the company violated the Foreign Corrupt Practices Act (“FCPA”) in connection with sponsoring the attendance of foreign government officials at the 2008 Summer Olympic Games in Beijing, China. The SEC brought charges against BHPB for violating the FCPA’s books and records and internal control provisions. BHPB neither admitted nor denied any of the allegations in the settlement. BHPB’s American Depositary Shares (“ADSs”) are registered with the SEC and listed on the New York Stock Exchange. BHPB is accordingly an “issuer” and is covered by the FCPA.

As an official sponsor of the 2008 Beijing Summer Olympic Games, BHPB paid a sponsorship fee and supplied raw materials to make the Olympic medals, had the right to use the Olympic trademark, and was granted “priority access to tickets, hospitality suites, and accommodations in Beijing for the Summer Olympics.” BHPB developed an Olympic Hospitality Program and invited guests, including foreign government officials, to attend the Summer Games as part of the company’s sponsorship-related activities.

According to the SEC’s order instituting a settled administrative proceeding, BHPB invited 650 people, 176 of whom were government officials, to attend the Summer Games. Ninety-eight of the 176 invited government officials were representatives of “state-owned enterprises that were BHPB customers or suppliers.” The SEC noted that the government

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officials came mostly from Asian and African countries with “well-known histories of corruption” such as the Republic of Burundi, the Philippines, the Democratic Republic of the Congo, and Guinea. Ultimately, 60 of the original 176 invited government officials and employees attended the Summer Games, and 24 of the government invitees brought spouses or guests at BHPB’s expense. BHPB paid for the foreign government officials to attend the Summer Games on three-to-four day hospitality packages that included “luxury hotel accommodations, meals, event tickets, and sightseeing excursions.” Each package cost approximately \$12,000 to \$16,000. According to the SEC’s order, BHPB’s sponsored packages to the 2008 Beijing Summer Olympic Games were intended to “enhance [BHPB’s] business opportunities by strengthening relationships with its guests.”

The SEC alleged that BHPB had insufficient internal controls over its Olympic Hospitality Program, and, as a result, BHPB invited government officials who were “directly involved in or in a position to influence pending negotiations, regulatory actions, or business dealings with BHPB.” The SEC alleged that BHPB maintained false books and records because it did not “accurately and fairly reflect pending negotiations or business dealings between BHPB and government officials invited to the Olympics” on internal approval forms. Overall, the SEC concluded that BHPB failed to implement compliance controls that adequately addressed the “antibribery risks associated with offering expensive travel and entertainment packages to government officials.”

During the lead-up to the Summer Games, BHPB operated through distinct divisions called “Customer Sector Groups” or “CSGs.” Each CSG president was responsible for enforcing BHPB’s Guide to Business Conduct and anticorruption policies. BHPB developed a hospitality application to be filled out and signed by a BHPB employee with “knowledge of the invitee’s relationship with the company, and approved in writing by the president of the relevant CSG or BHPB country president.” However, the SEC order noted that BHPB did not require an independent legal or compliance review of the application. BHPB also did not provide any specific training on how to fill out the hospitality applications or on how to evaluate whether an invitation complied with the company’s Guide to Business Conduct. In addition, many of the approvals were outdated by the time of the Olympics; most of the hospitality applications had been approved in mid-2007, and BHPB did not require the applications to be reassessed when a government official subsequently became involved in business dealings with the company. Furthermore, the company’s review process lacked coordination among BHPB’s different departments and business units; BHPB had no process to determine whether one department’s invited guest was involved in another department’s business dealings. As a result of these processes, some of the applications were not accurate or complete.

The BHPB settlement represents an aggressive stance by U.S. regulators with regard to providing entertainment and hospitality to government officials. As part of BHPB’s 2008 Summer Olympic Games sponsorship activities, the company invited people from all around the world. BHPB recognized the anticorruption risks potentially associated with such entertainment and tried to take precautions in advance of inviting government officials to the Summer Games by using a specifically designed “Olympic-specific internal approval process” to vet the company’s invitations. However, the SEC determined BHPB’s efforts fell short. In particular, the SEC noted that (1) BHPB did not require an independent legal or compliance review of hospitality applications; (2) some hospitality applications were not accurate or complete; (3) although BHPB had an annual Guide to Business Conduct review and certification process, as well as general compliance

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training, it did not have specific training on how to fill out the hospitality forms for the Olympic entertainment or evaluate applications under the company's existing policies; (4) BHPB did not institute a process to update or reassess the appropriateness of invitations if conditions changed; and (5) the review process did not coordinate or assess whether an invitee from one CSG was involved in the business dealings of other CSGs. The SEC order does not allege that BHPB provided entertainment as part of a *quid pro quo* arrangement or allege a violation of the FCPA's antibribery provisions. The order does not state how the SEC arrived at the civil monetary penalty of \$25 million, a seemingly harsh penalty based on the facts alleged in the order.

The BHPB settlement is a reminder to companies of the inherent FCPA risks in entertaining non-U.S. government officials, particularly when the entertainment involves international travel, major events, and/or paying for spouses or other guests of the officials. In the context of gift-giving and travel for foreign officials, the Department of Justice ("DOJ") and the SEC have recognized that giving small gifts of nominal value among business people is an appropriate way to show esteem or gratitude.<sup>1</sup> However, the DOJ and the SEC are more likely to view larger or more extravagant gifts as motivated by an "improper purpose."<sup>2</sup> Companies are well served to have robust internal controls around such high-risk activities, including independent legal or compliance reviews, periodic training, and centralized coordination of compliance activities. As noted by an official from the SEC's Division of Enforcement in the SEC's press release about the BHPB settlement, "[a] 'check the box' compliance approach of forms over substance is not enough to comply with the FCPA."

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If you have any questions about this memorandum or would like additional information, please contact Martin J. Weinstein (202-303-1122, [mweinstein@willkie.com](mailto:mweinstein@willkie.com)), Robert J. Meyer (202-303-1123, [rmeyer@willkie.com](mailto:rmeyer@willkie.com)), Jeffrey D. Clark (202-303-1139, [jdclark@willkie.com](mailto:jdclark@willkie.com)) or the Willkie attorney with whom you regularly work.

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<sup>1</sup> See Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act*, pg. 15 (Washington, D.C.: U.S. Department of Justice and U.S. Securities and Exchange Commission, 2010.)

<sup>2</sup> *Id.*