



ABOUT PaRR

The Policy and Regulatory Report (PaRR) focuses on competition laws and sector-specific regulatory changes to provide deep research and actionable intelligence to legal practitioners, financial advisors, corporates and institutional investors around the world. Through a strong aggregation tool, proprietary news articles, a database of M&A timetables and a regulatory pipeline, PaRR keeps subscribers in tune with how government intervention affects them, the market, and their clientele.

Brazil's Olympics and World Cup infrastructure projects highlight FCPA risk

Foreign companies eyeing a slice of Brazil's World Cup and Olympics infrastructure bonanza face a unique set of Foreign Corrupt Practices Act (FCPA) risks, especially concerning the potential for facilitation payments, according to an FCPA practitioner and the Latin America director for a global consulting firm.

Infrastructure projects involve a lot of permitting and licensing opportunities and those are "ground zero" for FCPA violations, according to Matthew Feeley, an attorney specializing in the FCPA at Buchanan, Ingersoll & Rooney.

Furthermore, the time pressures surrounding major sporting events such as the World Cup create added risk. Brazil has already come under criticism for the construction of the facilities needed for the 2014 World Cup and the 2016 Olympics being behind schedule.

Feeley said the further along you get without the infrastructure being built successfully, the more pressure there is to do things quickly.

Such scenarios raise the issue of facilitation payments -- money paid to expedite or facilitate the performance of routine governmental actions by public officials -- which are permissible under the FCPA. Such payments are particularly common in emerging economies where government officials earn low salaries.

However, Feeley said there is a distinction between paying something to be done on an expedited basis and outright bribery. Whenever you are paying a government official to do a task they are already obligated to do, then you necessarily implicate the FCPA or another law, he said.

While the Department of Justice (DoJ) has declined to specify a dollar value on what constitutes facilitation payments, Feeley said the conventional wisdom reflected in corporate compliance programs limits such payments to USD 100.

"There's been no opinion release that put a dollar threshold on facilitation payments but professional wisdom puts the threshold" at USD 100, Feeley said.

Feeley said once that threshold is passed, there is at least the perception that the government official is being paid to do something more than they are obligated to do.

While some commentators have proposed that Wal-Mart (currently subject to a high-profile FCPA investigation) may have a facilitation payment defense because the company paid to receive licensing permits in Mexico, Feeley pointed out that the alleged payments involved tens of thousands of dollars and were cumulatively in the millions.

"I don't think there is anyway the enforcement authorities consider those to be ... facilitation payments," he said. And he added that in light of the Wal-Mart case, companies need to be "extremely careful" about facilitation payments.

Also, changes in the global regulatory environment are also making facilitation payments an increasingly risky tool for companies to deploy overseas.

Feeley said there was an "explicit rejection" of facilitation payments in the 2010 UK Bribery Act.

Therefore, if a US company is committed to entering Brazil beyond the World Cup and the Olympics, Feeley said companies need to spend the resources to understand the local culture, describing it as "money very, very well spent". **1**

Along with the World Cup and the Olympics, Brazil's flagship Growth Acceleration Program (PAC 2) has earmarked more than USD 500bn for key infrastructure investments from 2011 through 2014 and US firms are keen to be involved.

But US companies looking to invest in Brazil are "hyper-aware" of the FCPA, according to Reeve Wolford, managing director for Latin America at the Altrius Group consulting firm.

Wolford said it is "big top-tier" companies that are mostly aware of the FCPA. "Smaller companies figure they are off the radar screen," he said.

While bribery is less prevalent in Brazil than in other emerging economies like Russia, it is still a significant issue as Brazil ranks alongside India on global corruption indexes. And within these economies, infrastructure is a particularly high risk sector.

"In infrastructure, definitely ... wherever you don't see US companies, that's generally where there's the most corruption," Wolford said.

Wolford said corruption in the construction sector often involves a consultant being paid a fee but "no one knows what that fee covers and what the costs might be."

He also pointed out that in a large country like Brazil, with many regional governments, norms towards bribery can vary in different parts of the country.

Another aspect of high-profile sporting events that creates particular FCPA risks is corporate hospitality.

According to Feeley, hosting government officials at high-profile sporting events carries all types of risk and under no circumstances should a government official be given a ticket for an event.

Despite the potential quagmire of FCPA risk, Feeley said there are also broader political factors at play. He said the US has a commercial interest in welcoming Brazil into the "big leagues of world affairs".

"I don't think the US enforcement authorities are going to be very keen to bring an enforcement action or initiate an investigation that might embarrass the Brazilian government," he said.

"I think the US will tread lightly not in relation to Brazil in general but in relation to these two specific events," Feeley added.

by Raymond Barrett in Washington DC

For US sales, please contact Mike Cronan at mike.cronan@parr-global.com

For all other sales questions, contact Olivia Fernandez at olivia.fernandez@parr-global.com