

## What Was Wrong With BHP Billiton's Compliance Program

*Law360, New York (May 22, 2015, 5:00 PM ET)* -- On May 20, 2015, the U.S. Securities and Exchange Commission announced a \$25 million settlement with global resources company BHP Billiton Ltd. to settle charges that BHP Billiton violated the books and records and internal controls provisions of the Foreign Corrupt Practices Act by providing luxury travel packages to foreign government officials and their spouses at the 2008 Beijing Olympic Games.

The settlement, imposed through a cease-and-desist order, comes on the heels of Leslie Caldwell's remarks at Compliance Week's annual conference in Washington, D.C., where Caldwell, the head of the Criminal Division of the U.S. Department of Justice, reiterated a common theme from enforcement agencies that "having written policies — even those that appear specific and comprehensive 'on paper' — is not enough." The BHP Billiton settlement is the quintessential case in point.

According to the order, in December 2005, BHP Billiton became an official sponsor of the 2008 Beijing Olympics. To take advantage of its status as a sponsor with preferred access, BHP Billiton established a sponsorship program "to reinforce and develop relationships with key stakeholders" in China. The sponsorship program entailed inviting foreign government officials and stakeholders at state-owned enterprises to attend the Olympic Games and offering them hospitality packages valued at between \$12,000 and \$16,000, which included business class airfare, luxury hotel rooms, meals, event tickets and sightseeing excursions. Each business division selected certain foreign officials as potential invitees, and the company ranked invitees in order of importance, with those in "Category A" considered "most critical to the business." Ultimately, BHP Billiton invited 176 foreign officials plus 102 spouses of those officials to attend the Olympic Games.

BHP Billiton's anti-corruption compliance program may have seemed sufficient on paper. During the relevant period, the company's "Guide to Business Conduct" covered "financial inducements" and prohibited payments "to influence individuals to award business opportunities to BHP Billiton or to make a business decision in the Company's favour." [1] It also included specific, hypothetical scenarios, including one that aptly covered whether it was proper to provide travel to the wife of a minister who was considering the company's application for a permit (it was not). In addition to the paper policy, the company had a compliance structure in place, the Global Ethics Panel Subcommittee, to advise the businesses on ethical and compliance issues, which was composed of external and internal advisers, including personnel from legal and human resources.

But beyond paper and structure, the compliance program lacked meaningful depth and put the onus of compliance squarely on the shoulders of the business. For example, the president of each business division was responsible for ensuring their business' compliance with the guide. Annually, the presidents had to certify that they read and understood the guide and discussed it with their direct reports, and

confirm their direct reports had also read and understood it. Additionally, the company provided generalized training, but did not give guidance to the business on how the scenarios described in the guide applied to them. Furthermore, the company's legal department was centralized and did not have any dedicated compliance professionals. Though the legal department had a role on the company's ethics panel, it had no apparent ground-level responsibilities with respect to compliance issues.

BHP Billiton had enough of a compliance program to recognize the anti-corruption risk inherent to inviting the government officials to attend the Beijing Olympics and to form a process to deal with it, but the process promised more than it delivered and allowed the business people to police themselves.

For example, BHP Billiton formed an Olympic Sponsorship Steering Committee, chaired by the head of the ethics panel, to provide advice with respect to implementation of the hospitality program. These committees, however, did nothing to alert the business to the specific risks involved in evaluating whether to invite a particular foreign official to the Olympics. In addition, for each official invited, business employees had to complete hospitality applications with detailed questions regarding the current business relationship between the company and the potential invitee. The hospitality applications, as well as the company's intranet site, stated, respectively, they would be approved and subject to scrutiny by the ethics panel. But the ethics panel reviewed only 10 of the applications. The company also did not require independent legal or compliance review, even though there are indicia that lawyers may have drafted the applications, which included questions written in legal style aimed at identifying compliance risks and included reminders about the anti-bribery provisions in the company's guide.

If BHP Billiton had a compliance program with substance, or instituted a process to deal with the Olympic hospitality packages that involved meaningful review, it may have avoided charges for what the SEC found to be "insufficient" controls that "did not adequately address the anti-bribery risks associated with offering expensive travel and entertainment packages to government officials." In its order, the SEC makes plain that it viewed the lack of involvement by legal or compliance personnel as a serious omission in the compliance process. But the SEC also seemed to suggest that the process adopted by the company here was deficient at an even more basic level. Indeed, a simple review of one of the many DOJ opinion procedure releases on corporate hospitality would have led to a clear understanding of suggested best practices.

As the DOJ's Leslie Caldwell stated earlier in the week, enforcement agencies "really expect that corporations will take compliance risks as seriously as they take other business risks." Having a compliance program like BHP Billiton that looks good on paper, even if well intentioned, is not sufficient if it doesn't properly address the risks at hand. Rather, companies need to commit to compliance, assess and understand their risks, tailor compliance processes and controls to those risks, and monitor the internal controls that are adopted. As the BHP Billiton settlement demonstrates, one-size-fits-all and off-the-shelf strategies will not only fail in practice, they will never survive regulatory scrutiny.

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[1] BHP Billiton, Guide to Business Conduct, SEC EDGAR (May 2003),  
<http://www.sec.gov/Archives/edgar/containers/fix031/811809/000119312503065962/dex111.htm>.

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