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May 13, 2019

## **SEC Fines Telefônica Brasil S.A. \$4.125 Million Relating to World Cup Tickets Given to Government Officials**

On May 9, 2019, the SEC fined Telefônica Brasil S.A. a \$4.125 million civil penalty to resolve allegations that the company's internal accounting controls failed to protect sufficiently against the risk that things of value, like World Cup tickets and related hospitality, would be given improperly to government officials, and that the company inaccurately recorded such expenses in its books and records, all in violation of the accounting provisions of the Foreign Corrupt Practices Act ("FCPA"). Telefônica Brasil has agreed to settle the allegations without admitting or denying the SEC's findings.

Specifically, the SEC alleges that Telefônica Brasil, a subsidiary of Telefônica S.A., a Spanish multinational broadband and telecommunications provider, failed to devise and maintain sufficient internal accounting controls over a hospitality program that the company hosted in connection with the 2014 World Cup and the 2013 Confederations Cup. Telefônica Brasil, a foreign issuer whose ADRs trade on the New York Stock Exchange, allegedly offered and provided tickets and hospitality to government officials who were directly involved with, or in a position to influence, government actions affecting the company's business. In total, Telefônica Brasil allegedly provided World Cup and Confederations tickets and related hospitality with a combined total value of nearly \$740,000 to approximately 127 government officials between 2012 and 2014.

According to the SEC, although Telefônica Brasil had in place a general code of ethics that prohibited these gifts to public officials, it was not followed due to a lack of internal accounting controls, a compliance breakdown, and a deficient internal audit function. Additionally, the SEC alleges that, because the company recorded the ticket purchases and hospitality as being for general advertising and publicity purposes, when in fact the tickets and related hospitality were given to government officials, Telefônica Brasil's books and records did not, in reasonable detail, accurately and fairly reflect the disposition of the company's assets.

As we explain below, this settlement further demonstrates that the SEC will enforce the internal accounting controls provisions of the FCPA, even where it is unable to establish, or chooses not to charge, violations of the FCPA's anti-bribery provisions, and that lavish gift, travel and hospitality programs and expenses are a significant risk area for companies.

## Factual Allegations

In March 2012, Telefônica Brasil agreed to purchase 1,860 World Cup tickets from a FIFA vendor for a total of approximately \$5.1 million. According to an internal memorandum written to obtain approval for the purchase, the tickets were for “relationship-building activities with strategic audiences.”<sup>1</sup> Although the paperwork seeking approval for the purchase did not mention that the tickets were intended for government officials, individuals within the company knew that to be the case.<sup>2</sup> Telefônica Brasil purchased the World Cup tickets and intended to pay for related hospitality at an average cost per guest of approximately \$3,204, of which \$2,750 was for the tickets.<sup>3</sup> Telefônica Brasil also paid a FIFA vendor an additional \$428,219 for 240 tickets to the Confederations Cup of which thirty-eight were given to thirty-four government officials.<sup>4</sup> Combined with the cost of the related hospitality, the total value given to the thirty-four government officials amounted to \$117,230.<sup>5</sup>

The company allocated the tickets to different internal departments, including approximately 10 percent to the Institutional Relations Department, which interacted with the Brazilian government and foreign governments.<sup>6</sup> Through the Institutional Relations Department, Telefônica Brasil gave 194 World Cup tickets to ninety-three government officials. The total value of the tickets and related hospitality given to the government officials amounted to \$621,576.<sup>7</sup> The government officials who received the tickets were allegedly significant to the company’s business, and included Brazilian federal congressmen and senators, mayors and other officials. A small number of personnel from foreign embassies who were commercial customers of Telefônica Brasil, including an ambassador, also received tickets.<sup>8</sup>

In its Order, the SEC cited to internal documents demonstrating that, in selecting ticket recipients, management looked at the possible benefit to the company from providing tickets to important officials. In creating the lists of recipients, one manager from the Institutional Relations Department wrote in an email that he took “into account the importance of the actions that each guest has already effectively done in our favor.” In another email, an employee of the same department requested a ticket for a federal legislator’s

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<sup>1</sup> See *In the Matter of Telefônica Brasil S.A.*, Exchange Act Release No. 85819 (May 9, 2019) (hereinafter “Release No. 85819”), at ¶ 7. Available [here](#).

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

<sup>3</sup> *Id.* at ¶ 8.

<sup>4</sup> *Id.* at ¶ 12.

<sup>5</sup> *Id.* at ¶ 11.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at ¶ 9.

chief of staff who “has opened many doors for us,” noting that there was additional legislative activity “going through the House and I will need his help.” Other documents suggested that a tax official received a ticket and, in turn, was asked for his “ongoing support” in receiving a customs clearance for a particular company invoice. According to internal emails, Telefônica Brasil employees also suggested inviting two Brazilian mayors, but only if, during the telephone calls inviting the mayors, the company’s IT department could raise with the mayors certain “legislative amendments” of importance to the company.<sup>9</sup>

Although Telefônica Brasil had a general code of ethics that explicitly prohibited offering or accepting gifts, hospitality or other types of incentives that might “reward or influence a business decision,” as well as a policy that barred donations linked with a political party, the SEC found that the company lacked adequate internal accounting controls to implement and maintain these policies.<sup>10</sup> Moreover, Telefônica Brasil characterized the ticket purchases as publicity and advertising and failed to record them properly as purchases and related expenses for government officials.<sup>11</sup> In arriving at a civil money penalty, the Commission considered the company’s enhanced internal accounting controls and compliance functions, including the company’s new anti-corruption policy and compliance structure, and the company’s cooperation with the SEC, including voluntarily producing and translating documents.<sup>12</sup>

## Analysis

In certain circumstances it may be appropriate to pay for travel and related hospitality for government officials provided the expenses are “reasonable and bona fide” and directly related to either (a) the promotion, demonstration or explanation of products or services, or (b) the execution or performance of a contract with a foreign government or agency thereof.<sup>13</sup> This is, however, a relatively narrow exception. It is well-established that providing tickets or anything else of value to government officials corruptly in order to influence them may form the basis for an FCPA violation. Therefore, while entertaining clients by providing complimentary tickets to sports and entertainment events may be standard business practice in a number of industries, entertaining government officials, including employees of state-owned entities, should always be subject to a company’s strict anti-bribery policies and procedures, and only done in compliance with local law and government ethics restrictions.

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at ¶¶13–14.

<sup>11</sup> *Id.* at ¶¶ 16–18.

<sup>12</sup> *Id.* at ¶ 20.

<sup>13</sup> See 15 U.S.C. §§ 78dd–1(c); see also DOJ & SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 18 (Nov. 2012), available [here](#).

The Telefônica Brasil settlement further demonstrates that providing travel and hospitality to government officials, even in the absence of bribery, may constitute an FCPA violation. In a number of resolutions over many years, the SEC has made clear that these practices can result in enforcement actions. In 2007, the SEC filed a settled complaint against Lucent Technologies Inc. alleging violations of the books and records and internal controls provisions of the FCPA in connection with payments of Chinese Officials' travel and entertainment expenses. Lucent agreed to pay a \$1.5 million civil penalty.<sup>14</sup> In November 2013, the SEC settled an enforcement action with Weatherford International, an oil and gas company, for a number of FCPA violations, including violating the books and records and internal accounting provisions of the Act by paying for two government officials to attend the 2006 FIFA World Cup.<sup>15</sup> Similarly, the SEC charged Diebold Inc. with violating the internal controls and books and records provisions of the FCPA for spending approximately \$1.8 million on travel, entertainment and other improper gifts for Chinese and Indonesian officials.<sup>16</sup>

Continuing in this vein, in 2015 the SEC announced a settled enforcement action against Anglo-Australian global resources firm BHP Billiton Ltd. and BHP Billiton Plc (collectively, "BHP"), for \$25 million—at the time the largest-ever civil fine imposed by the SEC in an FCPA enforcement action—after BHP offered three-to-four day hospitality packages, each with a price of approximately \$12,000 to \$16,000, to 176 foreign government officials to attend the 2008 Beijing Summer Olympic Games.<sup>17</sup>

At the time, we noted that the BHP enforcement action marked a significant expansion of the SEC's use of the FCPA's accounting provisions in cases in which the SEC believed an issuer's compliance program created the potential for bribery, even if bribery had not occurred or could not be established.<sup>18</sup> The BHP enforcement action raised the prospect that issuers could face charges under the FCPA's accounting provisions—even if there is no evidence of a *quid pro quo*, corrupt intent, or any improperly awarded business or government action—provided that the SEC is not satisfied that the issuer's internal accounting controls and anti-corruption compliance program are sufficient to manage corruption risks adequately.<sup>19</sup>

The Telefônica Brasil resolution is a continuation of the SEC's enforcement of such cases through the accounting provisions of the FCPA, although notably the amount of the fine imposed against the company

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<sup>14</sup> See SEC, Litigation Release No. 20414 (Dec. 21, 2007), available [here](#).

<sup>15</sup> See SEC, Litigation Release No. 22880 (Nov. 26, 2013), available [here](#); Complaint, *SEC v. Weatherford Int'l Ltd.*, No. 4:13-cv-3500 (S.D.Tex. Nov. 26, 2013), available [here](#).

<sup>16</sup> See SEC Press Release, *SEC Charges Diebold with FCPA Violations* (Oct. 22, 2013), available [here](#).

<sup>17</sup> See Client Memorandum, Paul, Weiss Rifkind, Wharton & Garrison LLP, SEC Extends Application of FCPA Accounting Provisions in BHP Billiton Enforcement Action (May 28, 2015), available [here](#).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

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was considerable less than that imposed against BHP. Even so, the SEC's continued vigilance regarding "risk of bribery" cases demonstrates further the importance of establishing an anti-bribery compliance program reasonably designed to mitigate the risk of bribery through corporate expenditures, and makes clear that if corporate controls leave an unacceptable level of risk of *potential* for bribery, then an investigation and enforcement action may follow.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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