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On Board

Internal Investigations, Good Governance and Soccer

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The recent controversy involving [the governing board of the Fédération Internationale de Football Association \(FIFA\) and its special outside counsel](#) provides important lessons on board management of internal investigations—especially those that relate to the ethics and integrity of governance. After all, it's not every day that outside counsel resigns its engagement in protest of board interference.

At first glance, the internal travails of an international soccer association (and its arcane rules) might seem a curious source for governance guidance to U.S. companies. Yet the nature of the controversy—a special board committee's handling of outside counsel's investigative report—resonates across industry sectors as well as continental borders. Indeed, it serves to underscore the incalculable value attributed to the integrity by which the board conducts—and especially processes the results of—an internal investigation.

The roots of the controversy are found in the decision to [conduct an internal investigation](#) into the bidding process for the selection of host countries for the 2018 and 2022 World Cup tournaments. The selection in December 2010 (by FIFA's executive committee) of Russia and Qatar, respectively, to host those tournaments were clouded in allegations of corruption. In July 2012, former federal prosecutor Michael Garcia was appointed as independent chairman of the FIFA Ethics Committee's Investigatory Chamber; his co-chair was a FIFA ethics judge, Hans Joachim-Eckert. Garcia's principal responsibility was to conduct an internal investigation of the bidding process and related allegations, and Eckert's principal responsibility was to review Garcia's findings and to make recommendations to FIFA.

Garcia delivered his 430-page report in September 2014. The report spoke to ethical improprieties by the FIFA bid committee, among other matters. Shortly thereafter, Eckert indicated only limited information would be made public, and he subsequently issued a 42-page statement containing his summary and analysis of the Garcia report. Garcia appealed the Eckert statement to the FIFA Appeals Committee, alleging that the statement contained "incomplete and erroneous" descriptions of his report. [The Appeals Committee declined Garcia's appeal](#), and he resigned as outside counsel on December 17. FIFA agreed to a limited public distribution of a "legally appropriate version" of the Garcia report but let stand

the decisions of the bid committee. All of this [played out in the international media](#), with resulting implications to the reputation of FIFA and its officials.

So what's the core governance lesson for the board of a U.S. corporation? That you never want the process by which the internal investigation is conducted to be more controversial than the subject matter of the investigation itself. And that's what seems to have happened to FIFA. No matter what changes are ultimately made within FIFA, chances are that the entire institution will carry the taint of controversy.

And what particular takeaway can a U.S. board and its general counsel apply if and when they are required to implement an internal investigation?

1. Make sure that the board committee that engages and supervises the work of outside counsel consists of independent directors, free from any conflict with respect to the subject matter that is the focus of counsel's investigation. (Some news reports suggested [the presence of conflicts of interest](#) in connection with the decision by FIFA Appeals Committee to reject Garcia's appeal).
2. Empower the outside counsel. Clearly establish that he/she is acting with imprimatur of the full board, and has sufficient authority to interview those corporate officers, employees and agents, and obtain copies of all corporate documents, that he/she feels are germane to the investigation. (According to news reports, Garcia's efforts were hampered by significant difficulties in accessing information, and by internal opposition from those who had originally approved his engagement. Indeed, he was [referred to FIFA's Disciplinary Committee](#) for allegedly violating its Code of Ethics.)
3. Don't allow the general counsel or a committee member to issue a summary (or other characterization) of the outside counsel's report that is not fully approved in advance by the outside counsel. (According to Garcia, "[\[n\]o principled approach](#) could justify the Eckert decision's edits, omissions and additions").
4. Confidentiality is an extremely important consideration in the preparation and release (internally and externally) of an outside counsel's investigative report. But it should not be used as a pretext by the committee or other governance body to limit the full board's access to, and understanding of, the report. ([Garcia challenged Eckert's position](#) that his summary was justified on confidentiality concerns.)
5. When the focus of the investigation is alleged acts of fraud or corruption by senior corporate officers, external transparency in some form must be part of the board's deliberations on the final report. Such transparency rarely is aided by the abrupt resignation of the outside counsel.

FIFA's organizational structure is as different from U.S. corporate governance as soccer is from baseball. But that doesn't mean that the international controversy over the Garcia Report doesn't offer a valuable teaching moment for American boards. Because whatever fiduciary value a board hopes to gain by commissioning an internal investigation can be lost if the process by which its results are received and communicate conducted governance lack credibility and integrity. It's the board's job to make sure that doesn't happen.

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