

UTStarcom and Gifts and Entertainment Under the FCPA

To close out the FCPA year, on December 31 the telecom equipment maker UTStarcom Inc. agreed to pay the Justice Department \$1.5 million in criminal fines and pay the SEC an additional \$1.5 in penalties to resolve Foreign Corrupt Practices Act violations in China and Thailand. Other FCPA penalties were agreed to by the company.

As reported in the FCPA Blog and the FCPA Professor last week, UTStarcom is alleged to have engaged in conduct which violated the FCPA which included:

1. Arranging and paying for travel to popular tourist destinations in the United States, including Hawaii, Las Vegas and New York City, when such trips were recorded as training expenses at UTStarcom facilities. However UTStarcom had no facilities in these areas. These trips included a cash allowance of between \$800 and \$3,000 per person.
2. Spending nearly \$7 million lavish gifts and all-expenses paid executive training programs in the U.S. for existing and potential foreign government customers in China and Thailand.
3. Presenting expensive gifts to and engaging in entertainment with government agents such as nearly \$10,000 on French wine, as a gift to agents of a government customer and spending \$13,000 on entertainment expenses for the same customer in an attempt to secure business.
4. Providing foreign government customers or their family members with work visas and purportedly hiring them to work for UTStarcom in the U.S., when in reality they did no work for UTStarcom.
5. UTStarcom was also alleged to have made payments to sham consultants in China and Mongolia while knowing that they would pay bribes to foreign government officials.

Guidelines for Gifts and Entertainment under the FCPA

The UTStarcom matter provides an opportunity to review the application of the FCPA to gifts and business entertainment expenditures to foreign officials. While gift and business entertainment is an area open to vagueness under the FCPA as there are no clear guidelines in the FCPA itself or the legislative history, the conduct of UTStarcom goes far beyond anything that has been previously approved or discussed in any DOJ Release Opinions. While prohibiting payment of any money or thing of value to foreign officials to obtain or retain business, the FCPA arguably permits incurring certain expenses on behalf of these same officials. Under the FCPA, the following affirmative defense regarding the payment of expenses exists:

[it] shall be an affirmative defense [that] the payment, gift, offer or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official,

party, party official, or candidate and was directly related to...the promotion, demonstration, or explanation of products or services; or...the execution or performance of a contract with a foreign government or agency thereof. *15 U.S.C. § 78dd-1(c)(2)(A)-(B)*.

There is no *de minimis* provision. The presentation of a gift or business entertainment expense can constitute a violation of the FCPA if this is coupled with the corrupt intent to obtain or retain business. With the above in mind and DOJ Release Opinions, the following are suggested guidelines for gifts and business entertainment.

A. Gifts to Governmental Officials

Based upon the FCPA language and relevant Release Opinions (Opinions 81-01, 81-02 and 82-01), a Company can provide gifts up to an amount of value of \$250. Below are the guidelines which the Release Opinions would suggest that a Compliance Policy incorporate regarding gifts:

- The gift should be provided as a token of esteem, courtesy or in return for hospitality.
- The gift should be of nominal value but in no case greater than \$250.
- No gifts in cash.
- The gift shall be permitted under both local law and the guidelines of the employer/governmental agency.
- The gift should be a value which is customary for country involved and appropriate for the occasion.
- The gift should be for official use rather than personal use.
- The gift should showcase the company's products or contain the company logo.
- The gift should be presented openly with complete transparency.
- The expense for the gift should be correctly recorded on the company's books and records.

B. Business Entertainment of Governmental Officials

Based upon the FCPA language (there are no Release Opinions on this point), there appears to be a threshold that a Company can establish a value for business entertainment of up to the amount of \$250. However this must be tempered with clear guidelines incorporated into the business expenditure component of a Compliance Policy, which should include the following:

- A reasonable balance must exist for bona fide business entertainment during an official business trip.
- All business entertainment expenses must be reasonable.

- The business entertainment expenses must be permitted under (1) local law and (2) customer guidelines.
- The business entertainment expense must be commensurate with local custom and practice.
- The business entertainment expense must avoid the appearance of impropriety.
- The business entertainment expense must be supported by appropriate documentation and properly recorded on the company's book and records.

C. Travel and Lodging for Governmental Officials

A Company should be able to bring foreign officials into the United States for legitimate business purposes. Once again, a key component is guidelines clearly articulated in a Compliance Policy. Based upon Releases Opinions 07-01 and 07-02, the following should be incorporated into a Compliance Policy regarding travel and lodging:

- Any reimburse for air fare will be for economy class.
- Do not select the particular officials who will travel. That decision will be made solely by the foreign government.
- Only host the designated officials and not their spouses or family members.
- Pay all costs directly to the service providers; in the event that an expense requires reimbursement, you may do so, up to a modest daily minimum (e.g., \$35), upon presentation of a written receipt.
- Any souvenirs you provide the visiting officials should reflect its business and/or logo and would be of nominal value, e.g., shirts or tote bags.
- Apart from the expenses identified above, do not compensate the foreign government or the officials for their visit, do not fund, organize, or host any other entertainment, side trips, or leisure activities for the officials, or provide the officials with any stipend or spending money.
- The training costs and expenses will be only those necessary and reasonable to educate the visiting officials about the operation of your company.

The incorporation of these concepts into a Company's Compliance Policy is a good first step towards preventing any FCPA violations from arising, but it must be emphasized that they are only a first step. These guidelines must be coupled with active training of all personnel, not only on a Company's Compliance Policy, but also on the corporate and individual consequences that may arise if the FCPA is violated regarding gifts and entertainment. Lastly, it is imperative that all such gifts and entertainment be properly recorded, as required by the books and records component of the FCPA. One of the FCPA violations alleged against UTStarcom was that it falsely recorded these trips as 'training' expenses, while the true purpose for providing these trips was to obtain and retain lucrative telecommunications contracts. All business gifts, entertainment and expenses must be properly recorded.

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