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Gifts of Travel and Luxury Watches to Saudi Officials Not Mere 'Icing on the Cake' for FCPA Charges

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Improper Gifts Alone, Without Cash Bribes, Serve as Basis for SEC's Latest FCPA Enforcement Action

Earlier this week, the SEC announced fines for two former defense contractor employees for FCPA violations relating to gifts given to Saudi officials. The individuals, Stephen Timms and Yasser Ramahi, each consented to the entry of settled administrative proceedings and agreed to pay $50,000 and $20,000 in fines, respectively. According to the SEC, in 2008 and 2009 the two men (employees of Boston-based FLIR Systems, Inc. at the time and each a US citizen) gave Saudi officials luxury watches and a 20-night multi-continent trip to win contracts for binoculars and security cameras. This enforcement action is noteworthy for being one of very few premised solely on improper gifts.

Typically, large cash bribes are the focus of charges, while improper gifts are cited in the charges as an add-on. In the Giffen/Mercator case, for example, the company pleaded guilty to having diverted tens of millions of dollars into Kazakh officials' Swiss bank accounts. Although the original indictment against Mercator's president, James Giffen, mentioned gifts of "fur coats, jewelry, speed boats, and snowmobiles" to senior Kazakh officials, those allegations read as an afterthought to the central allegations of complex financial transactions used to funnel oil revenues into Kazakh officials' offshore bank accounts.[1]

[1] After a lengthy period of pre-trial maneuvering, Giffen eventually agreed to plead guilty to a tax misdemeanor, while his company, Mercator, pleaded guilty to a FCPA conspiracy.

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In the past, FCPA charges that did focus on gifts typically involved either extenuating circumstances, extreme conduct, or both. For example, in Lucent, the company spent millions of dollars on over 300 trips for Chinese government officials. The trips, while characterized by the company as "factory inspections" or "training," included trips to Disneyland, Universal Studios, and the Grand Canyon. In the Metcalf & Eddy matter in the 1990s, the defendant paid travel and entertainment costs incurred by an Egyptian official and his family on an international trip, but also reimbursed the official for a "per diem" of 150% of the allowed per diem amount.

Here, the alleged misconduct relates solely to the gift of five watches and a single three-week "world tour" for a set of Saudi officials, as well as to the subsequent falsification of records to hide those gifts. There are no allegations that Timms and Ramahi made any cash payments to foreign officials. The SEC brought the charges under both the FCPA's anti-bribery provisions and the books and records provisions.[2]

At the time of the offense, FLIR Systems already had a contract to supply the Saudi government with thermal binoculars. The contract required FLIR to conduct a "Factory Acceptance Test" at FLIR's factory in Billerica, Massachusetts, to be attended by Saudi Ministry of Interior (MOI) officials. Timms—head of FLIR's Midde East office in Dubai at the time—and Ramahi organized and handled the logistics of the Saudi officials' travel to the US for the factory tour. At the same time, Timms and Ramahi were trying to win additional business from the Saudi MOI. According to the allegations, Timms and Ramahi arranged for the Saudis not only to tour the Massachusetts factory, but also to travel to Casablanca, Paris, Beirut, and New York City at FLIR's expense. The Saudi officials spent only a few hours total at FLIR's facilities during their seven days in Boston.

The FCPA contains an affirmative defense for "reasonable and bona fide expenditure" related to the performance of a contract with a foreign government.[3] Undoubtedly, defining which travel and entertainment-related expenses are reasonable and bona fide is difficult. Regardless, providing gifts, entertainment, and hospitality to customers is clearly permissible under the FCPA, provided adequate controls are in place to ensure that the benefit cannot be construed as a quid pro quo for obtaining or retaining business. The travel arranged by the FLIR employees involved a few hours of factory inspection across three weeks of travel. It involved cities and continents far beyond the single facility in Massachusetts at issue under the contract. The travel arranged by the FLIR employees is well outside the bounds of reasonable and clearly not bona fide. (And, it goes without saying that a defense contractor's gifts of luxury watches to foreign officials are not reasonable under the FCPA's other affirmative defense, for promotion, demonstration, or explanation of

[2] Sections 30A and 13(b)(5) and 13(b)(2)(A) of the Exchange Act of 1934, codified at 15 U.S.C. §§ 15dd-1, 15m(b)(5), 15(b)(2)(A).

[3] 15 U.S.C. § 78dd-1(c).

products or services.) Under these circumstances, it is not surprising that the government concluded that the payments fell outside the "reasonable and bona fide" perimeter.

The SEC alleges that as a result of the gifts, FLIR Systems received $10 million in payments from the Saudi Ministry of Interior for binoculars and another $18 million for security cameras and related accessories. When FLIR Systems' finance department questioned the expenses for the watches and the travel, the two men falsified records and devised a false cover story with an agent in Saudi Arabia.

Shortly before the alleged conduct, both men received training on the FCPA and on the company's code of conduct, which prohibited employees from violating the FCPA. The SEC noted that the training that both Timms and Ramahi received in 2007 and 2008 specifically identified luxury watches and vacations as examples of improper gifts. It seems plausible that the SEC's decision to charge Timms and Ramahi, rather than the company, was influenced not only by the fact that the men appeared to act alone (and attempted to hide the bribes from company), but also by the recency and the specificity of the FCPA compliance training provided by the company.

This matter contains a few compliance lessons. First and foremost, the government's tendency to mention improper gifts as a mere add-on (or "icing on the cake") to more serious allegations of cash bribes does not mean that prosecutors will not bring enforcement actions for gifts alone. The government can and will bring FCPA charges even without transfers of funds or cash changing hands. Second, contracts with foreign governments that obligate companies to arrange or pay for travel by foreign officials are a compliance landmine. If entered into, such contracts require extra vigilance. Third, it is probably unwise to have the same staff that are trying to win business from foreign officials arrange travel for those same foreign officials, at least without active supervision.

The matter is SEC Administrative Proceeding No. 3-16281.

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