

## **Gifts and Business Entertainment under the FCPA**

If one were to reflect upon the providing of gifts and business entertainment to foreign governmental officials by a US Company, one might reasonably conclude that after 30 odd years of the Foreign Corrupt Practices Act (FCPA), US companies might follow its prescriptions regarding gifts and business entertainment. However 2009 brought about a couple of notable FCPA enforcement actions where one of the significant FCPA violations was precisely in this area.

In July 2009, Control Components, Inc (CCI) pled guilty to substantive FCPA anti-bribery charges and to conspiring to violate the FCPA. CCI engaged in actions including rewarding customers' employees for the award of contracts with expensive gifts and extravagant overseas holidays, to destinations including Disneyland, Las Vegas and Hawaii, under the guise of training and inspection trips. In addition, CCI paid the college tuition for the children of at least two executives of CCI's customers. For the Department of Justice (DOJ) information filed against CCI, [click here](#).

To round out the year on December 31, 2009 UTStarcom pled guilty to conduct which violated the FCPA which included (among other FCPA violations):

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, it is worthwhile to note that UTStarcom had no facilities in these areas. The trips also included a cash allowance of between \$800 and \$3,000 per person.

2. Spending nearly \$7 million on lavish gifts and all-expenses paid executive training programs in the US 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, 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.

For the Non-Prosecution Agreement between the DOJ and UTStarcom, [click here](#).

### ***What does the FCPA Itself Say?***

Although gift and business entertainment is an area open to vagueness under the FCPA as there are no clear guidelines in the FCPA or the legislative history, the conduct of CCI and UTStarcom went far beyond anything that has been previously approved or discussed in any DOJ Opinion Releases. 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. 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. 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)*.

As with most matters under the FCPA, there is little direct guidance on what conduct may step over the line set out above. Of course there is always the *gut check test*, which simply measures “*if it feels wrong in your gut, it probably is wrong*”. It is something good to always keep in mind in any circumstance.

### ***Opinion Releases***

Somewhat surprisingly, this commentator was not able to find any recent DOJ Opinion Releases dealing with the values for gifts and business entertainment under the FCPA. However, there are three Opinion Releases from the early 1980s which can provide some guidance to current practitioners.

In Opinion Release 82-01, the DOJ approved the gift of cheese samples made to Mexican governmental officials, by the Department of Agriculture of the State of Missouri to promote the state of Missouri’s agricultural products. However the value of the cheese to be presented was not included in the Opinion Release. In Opinion Release 81-02, the DOJ approved a gift of its packaged beef products from the Iowa Beef Packers, Inc to officials from the Soviet Ministry of Foreign Trade. The total value of all the samples presented was estimated to be less than \$2,000 and the Iowa Beef Packers, Inc averred that the individual sample packages would not exceed \$250 in value.

The final Opinion Release relating to gifts is 81-01. In this release Bechtel sought approval to use the SGV Group, a multinational organization headquartered in the Republic of the Philippines and comprised of separate member firms in ten Asian nations and Saudi Arabia, which provide auditing, management consulting, project management and tax advisory services. The SGV Group desired to solicit business on behalf of Bechtel who had proposed to reimburse the SGV Group for gift expenses incurred in this business solicitation. Regarding the reimbursement of gift expenses by Bechtel to the SGV Group the DOJ stated:

(d) Expenses for gifts or tangible objects of any kind incurred without Bechtel's prior written approval will be reimbursed only where such expenditures are permitted under the local laws, the ceremonial value of the item exceeds its intrinsic value, the cost of

the gift does not exceed \$500 per person, and the expense is commensurate with the legitimate and generally accepted local custom for such expenses by private business persons in the country.

### ***Guidelines for Gifts and Business Entertainment under the FCPA***

#### **A. Gifts to Governmental Officials**

Based upon the FCPA language and relevant Opinion Releases (81-01, 81-02 and 82-01), it would appear reasonable that a Company can provide gifts up to a value of \$250. Below are the guidelines which the Opinion Releases would suggest incorporating into a Compliance Policy 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 FCPA language (there are no Opinion Releases 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 FCPA 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.

The incorporation of these concepts into a FCPA Compliance Policy is a good first step towards preventing potential 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 FCPA Compliance Policy, but also on the corporate and individual consequences that may arise if the FCPA is violated regarding gifts and business entertainment. Lastly, it is imperative that all such gifts and business 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.

And, as always, do not forget the *gut check test*.

For previous posting on Travel and Entertainment under the FCPA, [click here](#).

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