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FCPA Enforcement Following *UTStarcom*

The settlement of the *UTStarcom* case by the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC) on December 31, 2009 capped a year of active FCPA enforcement efforts by both the SEC and the DOJ.

UTStarcom is a Nasdaq-listed, US-based manufacturer of telephone network equipment and handsets. The vast majority of its business was in China – with more than 75 percent of its business at one time coming from sales to PRC government-controlled municipal- and provisional-level telecommunications companies.

What – if any – insights do the facts of the *UTStarcom* case provide about FCPA enforcement and risks for 2010?

Key Points

- Overseas travel was used by UTStarcom as a key business tool – akin to the situation in the *Lucent* case, resolved with the DOJ almost two years to the day (December 21, 2007) before UTStarcom's announced settlement with the SEC and DOJ.
- Unlike Lucent, UTStarcom appears to have attempted to "gussy up" some of the travel by arranging travel to participate in executive training programs at US universities (i.e., there was a business focus to that part of the travel, even though it was not travel for purposes of understanding UTStarcom's product offerings).

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- UTStarcom also engaged in visa fraud by offering employment in the United States to employees of government customers in Thailand and China or their relatives. Salaries and benefits were paid, false performance reviews generated and false documentation was even provided to enable three individuals to obtain permanent residency status ("green cards") in the United States.
- The SEC noted that UTStarcom's Thailand-based general manager spent nearly US\$10,000 on French wine as a gift to the agents of a government customer including rare bottles costing more than US\$600 apiece. Interestingly, that allegation does not state that the agent was himself a "foreign official" for FCPA purposes or that the wine was in turn transferred to the foreign officials working for the government-controlled telecommunications company whose sales contract UTStarcom was seeking.

Implications for Business Conduct Drawn from *UTStarcom*

- The FCPA's affirmative defense for payment of *bona fide* expenditures, including reasonable travel and lodging, associated with promotion or demonstration of products or services is in fact tied to there being a demonstration or explanation of products/services. That element was missing in the travel UTStarcom funded: the travel was not related to showing the quality of UTStarcom's products and the trips were described as being for "training." The result here makes clear that even when company-funded travel for foreign officials has a *business* focus (i.e., avoiding the Disney trap of the *Lucent* or *Control Components* cases), it doesn't work in terms of FCPA compliance if there is not a legitimate purpose connected to demonstrating or inspecting what is for sale. Note, in *UTStarcom* the facts were not entirely favorable on the "business" nature of the travel – some of the destinations included Las Vegas and Hawaii (places where UTStarcom had no facilities and no training took place) – nonetheless, the trips were still described as being for training.
- Luxury gifts – even where the price tag is below US\$1,000 – are suspect. If your company is giving Louis Vuitton wallets or Hermes ties to your foreign government-controlled customers, even where the price of the item is only a few hundred dollars, a lesson from *UTStarcom* is that you are skating on thin ice. Note, the *Avery Dennison*

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case, also resolved in 2009, involved gifts to foreign officials some of which were valued at only US\$125.

- Companies in industries known to be largely dependent on sales to government-controlled players are probably more likely to be subject to stricter scrutiny by relevant US enforcement personnel (e.g., telecoms, oil/gas and pharmaceuticals).
- If the government finds evidence of FCPA violations in government sales, as well as evidence of bribes paid in connection with commercial sales to private parties, it might also look to use the Travel Act to prosecute those private sales as commercial bribery violations. This was a popular enforcement tool in 2009 and we will be looking to see if the trend continues in 2010.
- The penalties imposed on UTStarcom were relatively light (US\$1.5 million each to the DOJ and SEC) and the DOJ indicated that its decision to enter into a non-prosecution agreement was due to three factors: (1) active, "real-time" cooperation by the company with the DOJ and the SEC; (2) timely, voluntary and full disclosure of the facts; and (3) the degree of remediation already undertaken and promised by the company (for example, a founder and CEO of the company resigned and other senior executives also departed the company).

In conclusion, the facts disclosed in settling *UTStarcom* suggest that the reach and interpretation of the FCPA were not extended by its resolution. The case is nonetheless noteworthy for a couple of reasons: first, in reinforcing the lessons offered in earlier "travel" and "gift" cases (e.g., *Lucent* and *Control Components*) and also in confirming statements that the SEC and DOJ have been making publicly since the *Siemens* case, to the effect that active cooperation can lead to substantially lower penalties. In the *Control Components* case, also settled in 2009, the bribes paid in violation of the FCPA amounted to US\$4.9 million (and US\$1.95 million in commercial bribes serving as predicate acts for a Travel Act violation). By contrast, UTStarcom spent US\$7 million on improper leisure trips alone, plus US\$4 million in executive training programs and more than US\$1.5 million to phony consultants – a total of more than US\$12 million in corrupt payments. In *Control Components* the penalties assessed were US\$18.2 million, yet only US\$3 million in penalties were levied against UTStarcom. Presumably the low penalty

amount in *UTStarcom* – despite the high value of the improper payments made – was because of the degree of cooperation offered and self-initiated remediation undertaken by the company. In *Control Components* by contrast, facts disclosed to date (such as that one of the individual defendants was found trying to flush incriminating documents down the toilet during the internal investigation) suggest that there may have been less forthcoming cooperation there. Will the result in *UTStarcom* encourage more self-disclosures for 2010? Stay tuned.



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