

Memorandum

SEC Charges Former CEO With Using Corporate Funds for Personal Perks Without Disclosure to Investors

April 9, 2015

Introduction

On March 31, 2015, the Securities and Exchange Commission (“SEC”) filed a complaint in federal court against the former CEO of Polycom, Inc., Andrew Miller, alleging that he used nearly \$200,000 in corporate funds for personal perquisites that were not disclosed to investors.¹ The SEC also instituted settled administrative cease-and-desist proceedings against Polycom due to its alleged failure to implement adequate internal accounting controls and failure to report Miller’s perks to investors.²

The Charges Against Andrew Miller

In its complaint, filed in the Northern District of California, the SEC alleges that Miller “engaged in a long-running scheme to surreptitiously use Polycom funds to pay for his personal expenses, including lavish meals, foreign and domestic travel, clothing, gifts and entertainment for himself, and his relatives and friends” and that he “falsified, and caused others to falsify, business records in order to hide his scheme, and thus evaded the requirement that he and Polycom tell investors about such perquisites.”³ For a period of

¹ See Complaint, *Securities and Exchange Commission v. Miller*, Case 3:15-cv-01461 (N.D. Cal. Mar. 31, 2015); see also U.S. Securities and Exchange Commission, “SEC Charges Former Polycom CEO With Hiding Perks From Investors” (Mar. 31, 2015).

² See *In the Matter of Polycom, Inc.*, Release No. 34-74613 (Mar. 31, 2015).

³ Complaint at 1.

three and a half years – until his July 2013 resignation, which followed an internal investigation and confrontation by Polycom’s Audit Committee – Miller allegedly created the “false impression that the payments he sought from Polycom were for ‘business’ expenses rather than personal charges.” According to the complaint, Miller accomplished his scheme by:

- using a corporate credit card for personal expenses and subsequently obtaining reimbursement from Polycom by submitting, or having an administrative assistant submit, “expense reports with fabricated business descriptions”;
- directing his assistants to pay for his personal charges on the company’s purchasing cards, which Polycom had issued to employees “who might need to charge business expenses but who did not have company-affiliated credit cards,” and providing his assistants with “false business justifications to record as support” for reimbursement;
- charging Polycom “for his personal air travel, which was paid for directly by Polycom” (which allowed flights to be booked and charged without providing any description of their purpose) and not reimbursing the company for the cost of this air travel; and
- using Polycom funds for personal travel, accommodations and other travel-related expenses, such as spa treatments and excursions, and including such funds in the budget for Polycom’s annual incentive trip for its high-performing sales people by directing the company’s event-planning company to falsify invoices.

The complaint alleges that when signing internal financial reporting questionnaires, which “included detailed instructions concerning his obligations to report perks and other personal benefits,” Miller omitted the perks from his responses. According to the complaint, “Miller provided these false and misleading responses knowing that the false information therein would be used in preparing Polycom’s proxy statements and annual reports filed with the Commission.”

The complaint further asserts that from 2010 through his resignation in July 2013, Miller signed annual proxy statements that he knew to be false and misleading, as they failed to disclose perks worth tens or hundreds of thousands of dollars, and that he used these proxy statements to solicit proxy votes for Polycom’s annual shareholder meetings. Miller also allegedly “signed and certified the company’s annual reports on Forms 10-K for the fiscal years 2010, 2011 and 2012,” knowing that each of them “incorporated by reference, on a prospective basis, portions of Polycom’s proxy statements for the upcoming annual meeting of stockholders, including the company’s compensation disclosures.” In addition, the SEC contends that on Polycom’s annual reports on Form 10-K and quarterly reports on Form 10-Q, Miller falsely certified that “he had designed disclosure controls and procedures to ensure that material information relating to the company would be made known to management” and that “he had disclosed to Polycom’s board of directors and its auditors ‘[a]ny fraud, whether or not material, that involves management ...’” The SEC concluded that “Miller knew, or was reckless in not knowing, that by falsifying corporate records to hide his personal

expenses he was misleading investors and violating the Commission’s executive compensation disclosure rules and regulations.”

Accordingly, the SEC claims that Miller is liable for:

- securities fraud;
- solicitation of proxies, and aiding and abetting Polycom’s solicitation of proxies, using false or misleading proxy statements;
- aiding and abetting Polycom’s failure to keep accurate books, records and accounts;
- circumventing internal accounting controls and falsifying books, records and accounts;
- aiding and abetting Polycom’s filing of annual reports with the SEC that contained materially misleading information or omissions; and
- signing false or misleading certifications.

The Administrative Cease-and-Desist Order Against Polycom

The SEC separately filed an administrative cease-and-desist proceeding against Polycom, which Polycom settled, without admitting or denying the SEC’s allegations, by agreeing to pay a \$750,000 civil penalty. The SEC’s order indicates that as a result of Miller’s conduct, Polycom omitted from its compensation disclosures Miller’s personal expenses of at least \$190,000 and also omitted “any description of the nature of the personal expenses that Miller had obtained.”⁴ The SEC found that Polycom violated the federal securities laws by:

- soliciting proxies without furnishing proxy statements that contain the executive compensation disclosures required by Item 402 of Regulation S-K and using proxy statements containing materially false or misleading statements or materially misleading omissions;
- filing materially misleading annual reports with the SEC;
- failing to keep accurate books, records and accounts; and
- failing to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are executed in accordance with management’s general or specific authorization and are recorded as necessary to maintain accountability for assets.”⁵ As evidence of Polycom’s allegedly inadequate internal controls, the SEC provided that “Polycom allowed Miller to

⁴ *In the Matter of Polycom, Inc.*, *supra* note 2, at 3.

⁵ *Id.* at 4.

approve his own expenses that were charged on his assistants' credit cards, and the company allowed him to book and charge airline flights without providing any descriptions of their purpose.”⁶

Significance of the Actions

As noted by Jina L. Choi, Director of the SEC's San Francisco Regional Office, “Miller allegedly exploited weaknesses in Polycom's controls [over executive compensation and expenses] to steer himself a series of perks to the detriment of shareholders.” The resulting actions brought by the SEC highlight the importance of implementing, maintaining and enforcing robust policies and procedures to reasonably ensure that executives' personal expenses are appropriately recorded and disclosed in accordance with the applicable rules and regulations of the SEC.

If you have any questions or would like additional information, please do not hesitate to contact **Yafit Cohn** at +1 212-455-3815 or yafit.cohn@stblaw.com, or any other member of the Firm's Public Company Advisory Practice.

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⁶ “SEC Charges Former Polycom CEO With Hiding Perks From Investors,” *supra* note 1.



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