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REPORT

FOREIGN CORRUPT PRACTICES ACT

To Host or Not to Host: Approving Expenses For Travel and Entertainment Under the Foreign Corrupt Practices Act

By Claudius O. Sokenu

On December 21, 2007, in one of the rare standalone travel and entertainment Foreign Corrupt Practices Act ("FCPA") cases, the Securities and Exchange Commission ("SEC" or the "Commission") and the Department of Justice ("Justice Department") filed and settled charges against Lucent Technologies, Inc. ("Lucent"), a wholly-owned subsidiary of Alcatel-Lucent, a French company with headquarters in Paris.[1] Lucent, a provider of communications networks for telecommunications service providers, was alleged to have violated the books and records and internal controls provisions of the FCPA by authorizing and failing to properly record $10 million in travel and related expenses, for approximately 1,000 Chinese foreign officials who were employees of Chinese state-owned or state-controlled telecommunications enterprises (collectively, "SOE"). With the exception of the Metcalf & Eddy Inc. case in 1999, the author is unaware of any other prominent FCPA enforcement action that is focused solely on travel and entertainment practices. Perhaps fittingly, with the Lucent settlement, the Commission and the Justice Department closed 2007 with yet another landmark case in the FCPA enforcement area.

In what can only be described as a record year for FCPA enforcement, the Commission and the Justice Department combined to celebrate the thirty-year anniversary of the FCPA by breaking all previous enforcement records. First, the Commission and the Justice De-

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[1] *United States v. Metcalf &Eddy, Inc.*, No. cv-99-12566 (D. Mass. filed Dec. 14, 1999) (alleging unspecified travel advances and accommodation upgrades for the organization's chairman, his wife and two children for two trips to Europe and the United States).

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partment combined to file a record eighteen cases in 2007. Second, in February 2007, the Justice Department imposed a record $26 million criminal fine against three wholly-owned subsidiaries of Vetco Gray International companies, Vetco Gray Controls Inc., Vetco Gray Controls Ltd., and Vetco Gray UK Ltd (collectively, ''Vetco Gray'').[2] Third, in April 2007, the Commission and the Justice Department imposed a record $44 million in combined civil and criminal penalties against Baker Hughes, Inc.[3] Fourth, the Commission and the Justice Department commenced an unprecedented industry-wide investigation against oil and oil services companies with ties to Panalpina World Transport (Holding) Ltd. (''Panalpina'').[4] Panalpina is believed to be the ''major international freight forwarder and customs clearance agent'' that was referenced in the criminal information filed against Vetco Gray. Fifth, in what is conceivably the largest international anti-corruption investigation ever, the United Nations Oil-for-Food Program (''OFFP'') investigation conducted by the former Chairman of the Federal Reserve, Paul Volcker, implicated 2,253 companies worldwide and $1.8 billion in alleged ''kickbacks'' to the Iraqi regime of Saddam Hussein.[5] The OFFP investigation, with follow-on investigations by the Justice Department, the Commission, two U.S. Attorney's Offices, four congressional committees, the Manhattan District Attorney's Office, the Department of Treasury's Office of Foreign Asset Control, the United Nations, and at least six foreign governments, to date, has led to four Justice Department and six Commission FCPA actions in 2007 alone. All indications are that there are more OFFP cases to come in 2008. Sixth, 2007 also saw the government up the stakes in FCPA enforcement by filing an unprecedented fifteen cases against individuals; by a country mile, the largest number of individual prosecution in any one given year in the entire thirty-year history of the FCPA. Seventh, the SEC and Justice Department made inroads in confirming the extensive jurisdictional reach of the FCPA. For example, foreign subsidiaries of U.S. issuers that were expressly excluded from the FCPA, can now be brought in as ''agents'' of U.S. issuers.[6] Last, the ongoing investigations of Siemens AG and British Aerospace also demonstrate the extensive reach of the FCPA.

I. The Lucent Settlement. According to the Justice Department's non-prosecution agreement, and the Commission's settled civil injunctive action, from 2002 to 2003, Lucent allegedly spent over $10 million in travel, lodging, entertainment and related expenses for approximately 1,000 employees of Chinese SOE to which Lucent was seeking to sell its equipment and services, or from which Lucent was seeking business.[7] The traveling SOE employees, who qualify as foreign officials under the FCPA,[8] were identified as ''decision makers'' with respect to the awarding of new business for which Lucent was bidding or planned to bid.[9] Ostensibly, the purpose of the approximately 315 trips were for the SOE employees to inspect Lucent's factories and to train in using Lucent equipment. In reality, however, the SOE employees visited tourist destinations throughout the United States, such as Hawaii, Las Vegas, the Grand Canyon, Niagara Falls, Disney World, Universal Studios, and New York City where the Chinese officials spent little or no time visiting Lucent's facilities.[10] In fact, some of these trips were to cities where Lucent did not have factories.[11] Employees of Lucent China, a Lucent subsidiary, based in Lucent's New Jersey headquarters, arranged the trips' itineraries, which were reviewed and approved by Lucent China executives based in China. The approximately 315 trips were generally categorized as either ''pre-sale'' or ''post-sale,'' depending upon whether Lucent was seeking new business from the SOE (pre-sale visit) or performing obligations under an existing contract (post-sale visit).[12]

Concerning pre-sale trips, Lucent, from 2000 to 2003, allegedly provided about 330 SOE employees of various levels with all-expense paid visits to the United States and elsewhere to participate in conferences or seminars held or attended by Lucent employees, visit Lucent facilities, and engage in sightseeing, entertainment, and leisure activities. For these trips, Lucent spent more than $1 million on at least 55 pre-sales trips. In one such pre-sale trip, in April 2001, Lucent supposedly paid for six officers and engineers of an existing SOE customer to visit the United States for two weeks in order to negotiate a memorandum of understanding. In its books and records, the April 2001 pre-sale trip, which cost more than $73,000, was described as a ''gold[en] opportunity for Lucent to introduce [its] network operation center to [the SOE]'' and improperly recorded as ''[t]ransportation [i]nternational.''[13] During the trip, the SOE employees spent five days visiting Lucent facilities and nine days sightseeing to places as exotic as Hawaii and the Grand Canyon.[14] Other similar trips were improperly recorded as ''[s]ervices [r]endered-[o]ther [s]ervices.''

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[2] Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines, DOJ Press Release No. 07-075 (Feb. 26, 2007).

[3] *SEC v. Baker Hughes Inc.*, No. H-07-1408 (S. D. Tex. filed Apr. 26, 2007); *see also* Litigation Release No. 20094 (Apr. 26, 2007); DOJ Press Release No.07-296, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007).

[4] *Panalpina Launches Internal Bribery InquiryAfter US Requests Documents*, FORBES, July 25, 2007, *available at* http://www.forbes.com/business/feeds/afx/2007/07/25/afx3948674.html.

[5] Independent Inquiry Committee into the United Nations Oil-for-Food Programme, Manipulation of the Oil- for-Food Programme by the Iraqi Regime, *available at* http://www.iic-offp.org/story27oct05.htm.

[6] *United States. v. DPC (Tianjin) Co. Ltd.*, No. CR 05-482 (C.D. Cal. filed May 20, 2005).

[7] *SEC v. Lucent Tech. Inc.*, Civ. Act. No. 1:07-cv-02301 (D.D.C. filed Dec. 21, 2007); Litigation Release No. 20414 (Dec. 21, 2007); DOJ Press Release 07-1028, Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007).

[8] 15 U.S.C. § 78dd-1(f)(1) (''The term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.'').

[9] Complaint at 1, *SEC v. Lucent Tech. Inc.* (D.D.C. Dec. 21, 2007).

[10] *Id.* at 6.

[11] *Id.* at 12.

[12] *Id.* at 4.

[13] *Id.* at 8.

[14] *Id.* at 11.

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Post-sale trips were typically required by provisions in the contracts between Lucent and its SOE customers. These contracts typically obligated Lucent to provide its SOE customers with expense-paid trips to the United States and other countries for ''factory inspections'' or ''training'' purposes.[15] Pursuant to these contracts, from 2000 to 2003, Lucent allegedly spent more than $9 million on approximately 260 post-sale trips for more than 850 individuals.[16] Certain of these post-sale ''factory inspection'' trips occurred in countries where Lucent had no existing factories and consisted of entertainment and leisure activities.[17] Similarly, the ''training'' visits involved no legitimate training.[18] For example, in June 2001, Lucent paid for six SOE employees to go sightseeing in Niagara Falls, Las Vegas, the Grand Canyon and elsewhere as part of a ''factory expense'' amounting to more than $46,854. This trip was recorded on Lucent's books and records as a ''[l]odging'' expense.

These pre-sale and post-sale trips were funded through Lucent China's sales department. In booking a trip, a Lucent employee would prepare a ''Customer Visit Request Form'' that provided information about the proposed trip. The Customer Visit Request Form called for the disclosure of information about the identity of the travelers, the purpose of the trips, information about whether the travelers are ''decision-makers'' or ''decision-influencers,'' and whether ''sightseeing/entertainment'' was ''required.''[19] Completed Customer Visit Request Forms were then sent to Lucent China executives for approval. Upon approval, Lucent China employees based in Lucent's U.S. headquarters arranged the logistics of the trips.

The non-prosecution agreement, but not the Commission's complaint, included allegations that Lucent paid or offered to pay for educational opportunities for relatives or associates of Chinese government officials, some of whom were in a position to influence China's use of Lucent-compatible technologies. These educational opportunities included: (i) payment of over $71,000 to cover tuition and living expenses of an employee of a Chinese government ministry who was obtaining a master's degree in international management from the Thunderbird School of Management Training in Beijing, China; (ii) payment of $21,687 for a deputy general manager of a SOE to obtain an MBA at Wuham University in China; and (iii) providing a paid internship to the daughter of a Chinese government official, who was described in an e-mail as ''Lucent's key contact in China,'' working at the Chinese embassy in the United States. Lucent spent $5,000 to fund the internship and paid the official's daughter's travel expenses, lodging expenses, and a $3,600 stipend.[20]

In authorizing payments for these trips, Lucent, the government charged, violated the books and records and internal controls provisions of the FCPA in that it lacked the proper internal controls to detect and prevent trips intended for sightseeing, entertainment and leisure, rather than business purposes and improperly recorded many of these trips on its books and records.[21] For example, in addition to improperly recording pre-sale and post-sale trips as ''lodging,'' ''[t]ransportation [i]nternational,'' ''[s]ervices [r]endered-[o]ther [s]ervices,'' over 160 trips were booked to ''[f]actory [i]nspection [a]ccount'' even though the customers did not visit a Lucent factory at any time during the trip.[22] Allegedly, Lucent's use of these expense, and other, accounts to credit expenses did not conform with the purpose of the account.

Lucent was charged with failure to devise, maintain, and implement a system of internal accounting controls sufficient to provide reasonable assurances that payments were made in accordance with management's general or specific authorization.[23] Additionally, notwithstanding the fact that the SOE employees were identified by name, organization, and title in the Customer Visit Request Forms, Lucent China's internal controls provided no mechanism for assessing whether any of the trips violated the FCPA. Indeed, Lucent employees allegedly made little or no inquiry into whether the SOE employees were government officials, or whether the Lucent-funded entertainment and leisure activities constituted ''things of value'' under the FCPA.[24] These violations, the government charged, occurred because Lucent failed to properly train its employees to comprehend and appreciate the nature and status of its Chinese customers under the FCPA.[25] Supposedly, this level of improper training and knowledge permeated Lucent's ranks. Indeed, the chairman and president of Lucent China and other Lucent China executives authorized and funded these trips without appropriate oversight.[26] Thus, Lucent lacked the internal controls to detect and prevent trips intended for entertainment and leisure, rather than legitimate business purposes.

In settling the Commission's books and records injunctive action, Lucent, without admitting or denying the allegations in the complaint, consented to the entry of a final judgment permanently enjoining it from future violations of the securities laws, and agreeing to pay a civil penalty of $1,500,000. In its non-prosecution agreement with the Justice Department, Lucent admitted to all of the alleged conduct, as well as other instances of providing travel opportunities to Chinese government officials, and to the improper recording of those expenses in its corporate books and records.[27] In addition, Lucent agreed to pay a monetary penalty of $1 million to the United States Treasury. The non-prosecution agreement further required Lucent to adopt new, or modify existing, internal controls, policies and procedures so as to ensure that it can make and keep fair and accurate books, records, and accounts. Additionally, Lucent agreed to implement a rigorous anti-corruption compliance code, standards, and procedures

[15] *Id.* at 4.
[16] *Id.*
[17] *Id.* at 2.
[18] *Id.* at 12.
[19] *Id.* at 5.
[20] *See* Letter from Mark F. Mendelsohn, Deputy Chief, Fraud Section Criminal Division, Dep't of Justice (Nov. 14, 2007) (setting forth the Lucent Technologies Inc. Non-Prosecution Agreement).
[21] Complaint at 2, *SEC v. Lucent Tech., Inc.* (D.D.C. Dec. 21, 2007).
[22] *Id.*
[23] *Id.* at 14.
[24] *Id.* at 6.
[25] *Id.* at 2.
[26] *Id.*
[27] DOJ Press Release 07-1028 (Dec. 21, 2007).

designed to detect and deter violations of the FCPA and other applicable anti-corruption laws.[28]

II. Other FCPA Cases Involving Travel and Entertainment. While standalone travel, lodging and entertainment cases are few and far between, the Commission and the Justice Department have long signaled their concern that companies were improperly using the FCPA's affirmative defense that permits the payment for ''reasonable and bona fide'' expenditures such as travel and lodging expenses related to the promotion, demonstration or explanation of products or services, or execution or performance of a contract with a foreign government or agency thereof to fund travel, lodging and entertainment for foreign government officials.[29] While no court has ever reviewed this affirmative defense, opinions released by the Justice Department indicate that the government tends to view expenditures as ''reasonable and bona fide'' where the payments made are shown to be permissible under foreign law,[30] where payments are made directly to a service provider rather than first passing through the hands of government officials, and where the company does not have current or immediately pending business before the governmental agency whose employees' expenses are being covered.[31] Although by no means exhaustive, the following enforcement actions contain allegations of FCPA violations based on illegal payments for travel and entertainment expenses.

The government's increasingly expansive view of the FCPA, and its willingness to prosecute, translates into a greater potential for liability, and therefore the need for heightened sensitivity toward compliance.

In *In Re Syncor International Corp.*, the Commission instituted and settled administrative proceedings against Syncor International Corp. (''Syncor''), a provider of radiopharmaceutical products and services, for violations of the anti-bribery and books and records provisions of the FCPA.[32] The Commission alleged that from the mid-1980's through at least the latter half of 2002, several of Syncor's foreign subsidiaries made at least $600,000 in illicit payments to doctors employed by hospitals controlled by foreign authorities. The Commission charged that Syncor's subsidiaries violated the FCPA in multiple respects including the improper payment of commissions and referral fees, and ''over-invoicing'' arrangements with doctors. In addition to these violations, the SEC alleged that Syncor, during 2001 and 2002, gave some doctors generous gifts worth more than $750 each in the form of money directly transferred to the doctors' bank accounts, digital cameras, expensive wines, computers, wristwatches, and leisure travel. In addition, pursuant to agreements with certain doctors, Syncor occasionally sent inflated or fictitious invoices to medical practices and then rebated back to the doctors approximately 80% of the payments collected, with the funds then being used to finance personal travel and other gifts for the doctors. During 2001 and 2002, such illicit payments and gifts to doctors at government-owned hospitals totaled at least $45,000. Moreover, Syncor provided ''support'' to doctors with whom it did business, including many employed at government-owned hospitals. These support payments, generally between 1.5% and 3% of sales, mostly came in the form of sponsorships for the doctors' attendance at educational seminars, including payments for registration fees, travel, lodging, and meals.[33]

In *In re GE InVision, Inc.*, provides another example.[34] Here, the Commission alleged that, under terms of a contract with an airport owned and controlled by the Chinese government, GE InVision, Inc. (''InVision'') was obligated to deliver two machines by mid-2003. However, due to problems in obtaining an export license from the United States government, InVision did not deliver the machines until October 2003. During the delay, InVision's distributor in China informed the responsible Regional Sales Manager and the Senior Executive that the airport intended to impose a financial penalty on InVision. The distributor advised the Regional Sales Manager that, in order to avoid this penalty, it intended to offer foreign travel and other benefits to airport officials. The Regional Sales Manager notified the Senior Executive of the distributor's intention. The distributor requested financial compensation from InVision to pay for penalties and costs that, it claimed, would be incurred as a result of the delay in shipment. The distributor's request included compensation for benefits that the distributor intended to offer to airport officials. In October 2003, the Senior Executive agreed to pay the distributor $95,000. Based on information provided by the Senior Executive and the Regional Sales Manager, InVision's finance department subsequently authorized the payment, which was completed in April 2004. At the time of the payment, based on the information provided to the Regional Sales Manager and the Senior Executive, InVision was aware of a high probability that the distributor intended to use part of the funds it received from InVision to pay for foreign travel and other benefits for airport officials.[35]

In *SEC v. Titan Corporation*, the Commission alleged, among other things, that Titan Corp. (''Titan'') paid a Benin government official more than $14,000 in ''travel expenses'' from 1999 to 2001. Furthermore, Titan authorized the payment of an additional $20,000 to

[28] *Id.*

[29] *See* 15 U.S.C. §§ 78dd-1(c)(2); 78dd-2(c)(2); 78dd-3(c)(2).

[30] Of course, this is overkill to some extent. If the defendant can prove that the payment was permissible under the written laws of the foreign official's country, then liability will not attach even if the payment was not simply reimbursement for a reasonable expenditure. Conversely, nothing in the language of the ''bona fide expenditure'' clause appears to make the availability of the defense turn on the legality of the payment under foreign law.

[31] *See* FCPA Op. Proc. Rel. 2004-01 (2004); FCPA Op. Proc. Rel. 2004-03 (2004).

[32] *SEC v. Syncor Int'l Corp.*, 1:02CV02421 (D.D.C. filed Dec. 10, 2002); Litigation Release No. 17887 (Dec. 10, 2002).

[33] *Id.*

[34] *SEC v. GE InVision, Inc.*, No. C-05-0660 MEJ (N.D. Cal. filed Feb. 14, 2005); Litigation Release No. 19078 (Feb. 14, 2005).

[35] *Id.*

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certain government officials for attending four meetings. Although it is unclear whether the $20,000 was ultimately paid, the promise to pay supposedly triggered FCPA concerns.[36]

In *SEC v. Ingersoll-Rand Co. Ltd.*, the SEC alleged that the company violated the FCPA when its subsidiaries entered into contracts involving kickback payments in connection with sales of equipment to the Iraqi government under the United Nations Oil for Food Program.[37] Allegedly, Ingersoll-Rand also violated the books and records and internal controls provisions of the FCPA when its Italian subsidiary paid travel and hotel expenses for eight Iraqi government officials to visit Italy for six nights, a portion of which included a factory tour and training, and the remainder holiday travel.''[38]

Collectively, what these cases show is that the Commission and the Justice Department are growing increasingly wary of bribes masquerading as legitimate ''reasonable and bonafide'' travel and related expenses permitted under the FCPA.

III. Lessons Learned from Recent FCPA Cases Implicating Travel, Entertainment, and Lodging. The government's increasingly expansive view of the FCPA, and its willingness to prosecute, translates into a greater potential for liability, and therefore the need for heightened sensitivity toward compliance. No longer is an environment where small illicit payments, sometimes with partially legitimate purposes, tolerable. These cases, however, do not stand for the proposition that all travel or entertainment should be abolished. They stand for the proposition that a company dealing with foreign officials must institute and abide by a rigorous state-of-the-art FCPA compliance program to detect travel, lodging, and entertainment expenses that are of a disproportionately personal or questionable nature. Such trips may run afoul of the FCPA. Moreover, these cases do not stand for the conclusion that the FCPA prohibits all sightseeing, entertainment, or personal time on legitimate business trips. Rather, the government will focus on sightseeing and entertainment for foreign officials designed to gain or further the business relationships of the funding company. Trips with legitimate business purposes with modest and reasonable sightseeing and entertainment must be structured to ensure that, in addition to proper authorization and recording of the related expenses, the trips themselves are not disproportionately pleasure-related. Indeed, the practice of funding business trips has been blessed by the Justice Department in two recent opinion letters.

On September 11, 2007, the Justice Department issued an opinion letter in response to a request from a U.S. insurance company (''the Requestor'') that proposed to cover the domestic expenses for a six-day trip to familiarize six junior to mid-level foreign officials with the operations of the Requestor.[39] The Requestor proposed to pay for domestic economy class airfare, lodging, transportation, meals, a modest four-hour sightseeing tour of the city, and a fixed amount of incidental expenses of the foreign officials during their visit to the Requestor's headquarters. The officials, who were selected by their government without any involvement by the Requestor, were scheduled to participate in a six-week internship program for foreign insurance regulators sponsored by the National Association of Insurance Commissioners. At the conclusion of the program, the Requestor planned to host the foreign officials, but not their spouses, family, or other guests.

Companies doing business with foreign officials must not only implement rigorous FCPA internal controls, but must be certain that employees with responsibilities for areas that deal with foreign government officials are trained to appreciate the FCPA and its broad scope.

The Requestor represented further that: (i) it would not pay any expenses related to the foreign officials' travel to or from the United States; (ii) it would not pay for the foreign officials' participation in the internship program; (iii) it has no non-routine business under consideration by the relevant foreign government agency; (iv) the routine business before the relevant foreign government agency consists primarily of reporting of operational statistics, reviewing the qualifications of additional agents, and onsite inspections of operations; (v) the routine business is guided by administrative rules with identified standards; (vi) its only work with other entities within the foreign government consists of collaboration on insurance-related research, studies, and training; (vii) the traveling foreign officials had no authority to make decisions that would affect the Requestor's planned operations in the foreign country; (viii) it intends to pay all costs directly to the service providers and properly record such payments on its books and records; (ix) branded souvenirs will be of nominal value (e.g. shirts or tote bags); (x) it would not ''fund, organize, or host any entertainment or leisure activities for the [foreign] officials, nor [would] it provide [the foreign] officials with any stipend or spending money''; and (xi) it obtained a written legal opinion ''that the [R]equestor's sponsorship of the visit and its payment of the expenses described in the request is not contrary to the law of the foreign country.''[40]

Based on these representations, the Justice Department indicated that it would not take any enforcement action because the contemplated expenses are reasonable under the circumstances, directly relate to ''the promotion, demonstration, or explanation of [the Requestor's] products or services,'' and, thus, are within the scope of the FCPA's safe harbor for promotional expenses.[41]

In an analogous opinion issued on July 24, 2007, a U.S. company proposed to cover the domestic expenses

[36] *SEC v. Titan Corp.*, No. 05-0411 JR (D.D.C. filed Mar. 1, 2005); Litigation Release No. 19107 (Mar. 1, 2005). *See also U.S. v. Titan Corp.*, Cr. No. 05-314 (S.D. Cal. Mar. 1, 2005).

[37] *SEC v. Ingersoll-Rand Co.*, No. 107- CV- 01955 (D.D.C. filed Oct. 31, 2007); Litigation Release No. 20353 (Oct. 31, 2007).

[38] Complaint at 2, *SEC v. Ingersoll-Rand, Co. Ltd.*, (D. D.C. Oct. 31, 2007).

[39] FCPA Op. Proc. Rel. 2007-02 (2007).

[40] *Id.*

[41] *Id.*; *see also* 15 U.S.C. § 78dd-2(c)(2)(A).

of a six-person delegation of the government of an Asian country for a four-day educational and promotional tour of one of the requestor's U.S. operations sites.[42] The stated purpose of the visit was to familiarize the delegates with the nature and extent of the company's operations and capabilities and to help establish the company's business credibility. The company represented, among other things, that it: (i) would only pay for the domestic economy class airfare of the delegates, but not their international airfare; (ii) would pay for lodging, transportation, and meal expenses during the single visit to the company's site; (iii) obtained a written assurance from an established law firm with offices both in the U.S. and the foreign country that the proposal does not violate the applicable law of the foreign country; (iv) did not select the delegates for the visit; (v) would only host the delegates and one private government consultant; (vi) would pay related costs and expenses directly to the service providers and record any such payments accurately; (vii) would not give funds directly to the foreign government or the delegates; (viii) would give souvenirs, if any, that would reflect the company's name and/or logo and would be of nominal value; and (ix) would not fund, organize, or host any entertainment or leisure activities for the officials, nor would it provide the officials with any stipend or spending money. The company represented further that, although it does not currently do business in the Asian country in question, it is interested in doing business there in the future. The delegates, however, do not have direct authority over decisions regarding government contracts or requisite licenses in the foreign country. Based on the company's representations, the Justice Department advised that it did not intend to take any enforcement action with respect to the proposal described in the request.[43] The Justice Department reasoned that consistent with the FCPA's promotional expenses affirmative defense, the expenses contemplated in the request were reasonable under the circumstances and directly relate to ''the promotion, demonstration, or explanation of [the requestor's] products or services.''[44]

[42] FCPA Op. Proc. Rel. 2007-01 (2007).

[43] The only meaningful distinction between the two opinion releases is that one requester indicated that it intended to reimburse incidental expenses incurred by the visiting foreign officials ''up to a modest daily minimum, upon presentation of a written receipt,'' and provide a ''modest four-hour city sightseeing tour'' for the officials. *Compare* FCPA Op. Proc. Rel. 2007-02 (2007) *with* FCPA Op. Proc. Rel. 2007-01 (2007).

[44] *Id.* (citing 15 U.S.C. §§ 78dd-1(c)(2)(A) and 78dd-2(c)(2)(A)).

Note to Readers

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An ideal FCPA compliance program designed to detect travel and entertainment-related violations should include mechanisms to: (1) identify the recipient of the company-funded trip and note whether he/she is a foreign government official; (2) if he/she is a foreign government official, ensure that the trip has a legitimate business purpose, and is comprised of business-related activity; (3) confirm that the trip is accurately recorded in the company's books and records; (4) ensure that the trip receives the proper authorization from the company's legal and/or compliance departments; and (5) document the approval process. However, now more than ever, simply implementing these internal controls is not enough. In Lucent, it was alleged that a lack of training and education contributed largely to the FCPA violations. As a result, companies doing business with foreign officials must not only implement rigorous FCPA internal controls, but must be certain that employees with responsibilities for areas that deal with foreign government officials are trained to appreciate the FCPA and its broad scope. By implementing and taking steps to train and educate employees, a company doing business with foreign government officials will be on the road to ensuring FCPA compliance.

IV. Conclusion. Perhaps what is remarkable about the Lucent case, and the reason the government was compelled to bring it, was the size of the alleged bribe. Moreover, the pervasiveness of the illicit conduct was one that the government, in the current environment, could not leave unpunished. While the Lucent case was not charged as a bribery case, the facts as described clearly indicate that the government viewed these payments as bribes. One can only speculate as to how Lucent's remedial measures and cooperation with the government's investigation influenced the settlement. The Lucent settlement also shines a light on non-controversial issues such as who qualifies as a ''foreign official'' and what it means to give ''anything of value.'' With respect to who is a ''foreign official,'' the Lucent case does not break new ground. It merely confirms that the FCPA broadly defines the term ''foreign official.''[45] Concerning what qualifies as ''anything of value,'' one can hardly argue that $10 million worth of travel is not something of value.[46] Along with the Jus-

[45] *SEC v. Srinivasan*, 07-CV-01699 (D. D.C. filed Sept. 25, 2007) (imposing liability where the foreign officials were senior employees of two Indian energy companies that were partly government-owned); *United States. v. Young*, Crim. No. 07-609 (D. N.J. filed Jul. 25, 2007) (defining employees of state-owned telecommunications carriers as foreign officials under the FCPA); *United States v. DPC (Tianjin)*, *supra* note 7, (classifying physicians and laboratory workers at government-owned hospitals as ''foreign official[s]'').

[46] The term ''anything of value'' is not defined in the FCPA, and the statute's legislative history is not illuminating. The term, however, has been broadly construed and can include not only cash, but other tangible and intangible benefits given to a foreign official including (as in the Lucent matter) the payment of non-business travel expenses. Indeed, several recent FCPA enforcement actions have been based, in part, on the following ''things of value'' being given to a foreign official: jewelry, gift certificates, perfume, use of a corporate golf club membership and a condo time-share. *See United States v. Wooh*, No. 07-CV-957 ST (D. Or. filed Jun. 27, 2007); DOJ Press Release 07-474 (June 29, 2007); *SEC v. Wooh*, No. 07-CV-957 ST (D. Or. filed Jun. 27, 2007); Litigation Release No. 20174 (Jun. 29, 2007) (finding perfume to be a thing of value);

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tice Department's opinion letters discussed above, the Lucent settlement should be instructive to companies looking for guidance on how to structure or review their internal policies and procedures with respect to travel, lodging, and entertainment.

see also United States v. York Int'l Corp., No. 07-CV-01750 (D. D.C. filed Oct. 1, 2007); DOJ Press Release 07-783 (Oct. 1, 2007); *SEC v. York Int'l Corp.*, No. 07-CV-01750 (D.D.C filed Oct. 1, 2007); Litigation Release No. 20319 (Oct. 1, 2007) (laptop computers and electronics considered to be ''things of value'').