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FCPA Enforcement: Paying for Trips by Foreign Officials

On December 21, 2007, the Department of Justice ("DOJ") announced that it had entered into a two year non-prosecution agreement with Lucent Technologies, Inc. to resolve a multi-year investigation into Lucent's practice of providing travel to the United States and other things of value to Chinese governmental officials in connection with the sale of its communications products. Lucent agreed to pay a $1 million fine to the DOJ and $1.5 million to the Securities and Exchange Commission ("SEC") to resolve allegations that it violated the foreign corrupt payments and books and records provisions of the Foreign Corrupt Practices Act ("FCPA"). The conduct alleged involved approximately 315 trips to the U.S. by these officials, at least 160 of which were recorded under a "Factory Inspection Account." However, the government alleged that these trips "became primarily sightseeing, entertainment and leisure trips." The Chinese officials who traveled at Lucent's expense were described in Lucent's documents as "decision-makers" regarding future business.

The FCPA broadly prohibits U.S. issuers and "domestic concerns" (U.S. citizens, residents and corporations located in the U.S.), directly or indirectly, from offering, paying, promising to pay or authorizing the payment of money or anything of value to a foreign official, foreign political candidate, party official or officer/employee of an international organization to corruptly influence a governmental decision relating to obtaining, retaining or directing business.[1] The FCPA permits "reasonable and bona fide" expenditures related to the "promotion, demonstration, or explanation of products or services" or the "execution or performance of a contract."[2] The books and records provisions require all U.S. issuers to make and keep books, records and accounts which "in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[3] Both provisions can give rise to civil and criminal liability.

In recent years, there has been increased emphasis on FCPA enforcement. In part as a consequence of the Sarbanes-Oxley Act of 2002 which requires certification by CEOs and CFOs of the accuracy and truthfulness of financial statements and the reporting of deficiencies in internal controls, more U.S. issuers have found it necessary to thoroughly investigate and self-report to the DOJ and the

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1 15 U.S.C. § 78 dd-1, dd-2.

2 15 U.S.C. § 78 dd-1 (c).

3 15 U.S.C. § 78 m (b) (2) (A).

SEC all potential violations of the FCPA which come to management's attention. These disclosures have provided a steady stream of matters for the DOJ and the SEC to investigate, with the SEC tending to focus on books and records issues. The enforcement agencies also have uncovered violations from other sources, including whistleblowers and participating intermediaries.[4]

The Lucent case illustrates several recent trends in FCPA enforcement. It shows that the enforcement agencies will look past pretextual efforts to disguise corrupt payments as legitimate expenses to promote or explain capabilities or products, such as attempting to disguise the gift of a luxury vacation to a government official as a trip to inspect a factory. They will examine closely the surrounding circumstances and the correspondence (including emails) relating to such trip to uncover its probable purpose. Where little time was spent at the company's factory and comparably more time spent on reimbursed leisure activities, the agencies likely will conclude that the payment for the trip was for a corrupt purpose, and if such an expense was recorded on the company's books as a "Factory Inspection Trip," they will conclude that the record is false.

The Lucent case also illustrates that the DOJ frequently resolves FCPA cases by entering into an agreement with the potential defendant not to prosecute (or to defer prosecution), provided such person or entity does not engage in any more unlawful conduct during the term of the agreement and provided the defendant promises to provide full cooperation to the DOJ. Lucent also agreed to adopt a specified set of internal controls, including a compliance code and compliance standards and procedures. In a number of cases, the DOJ has required the defendant to agree to retain an approved third-party monitor to ensure future compliance with the law and the terms of the non-prosecution agreement with the DOJ.

While the Lucent case does not represent the largest FCPA fine in recent years, it does provide warning that care must be taken when dealing with foreign governmental officials in the U.S. and abroad to avoid payments for travel and entertainment activities that are not authorized by law. The DOJ and the SEC will look at all the circumstances and available documentary evidence to determine whether the purpose of a trip paid for by the U.S. person was to lawfully educate foreign officials regarding a company's products or whether it was to improperly influence the foreign governmental entity's purchasing decision.

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If you have any questions about the issues addressed in this memorandum, please do not hesitate to call or e-mail Rand McQuinn at (202) 862-8932, mcquiR@cgrdc.com or Kathy Silberthau Strom at (202) 862-8944, stromk@cgrdc.com.

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[4] In the largest FCPA criminal fine to date, three subsidiaries of Vetco International Ltd. plead guilty and paid a collective fine of $26 million for corrupt payments to Nigerian customs authorities made via a major freight forwarding and customs clearance company, which has led to other investigations relating to such intermediary.