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Lessons from Recent Developments under the FCPA

By Claudius O. Sokenu

On December 21, 2007, in one of the rare stand-alone travel and entertainment cases under the Foreign Corrupt Practices Act (FCPA), the Securities and Exchange Commission (SEC) and the 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. 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 about 1,000 Chinese foreign officials who were employees of Chinese state-owned or state-controlled telecommunications enterprises. 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.[1] Perhaps fittingly, with the Lucent settlement, the SEC and the Justice Department closed 2007 with yet another landmark case in the area of FCPA enforcement.

In what can only be described as a record year for FCPA enforcement, the SEC and the Justice Department combined to celebrate the 30-year anniversary of the FCPA by breaking all previous enforcement records. First, the SEC and the Justice

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The French Supreme Court Decision That Will Affect Discovery Abroad

By Moze Cowper and Amor Esteban

Here is the scenario: You are an in-house lawyer who manages litigation for a large company in the United States. Your company, though, like so many companies, now does business all over the world. You have offices in Europe, Asia, the Middle East, and Australia. The employees at your company are technologically savvy. They demand iPhones and unified messaging. They want their voice mails delivered to their email inbox and wireless devices. They work on virtual teams, and most employees have not seen the inside of an actual office for years. In short, your company is a lot like every fast-moving, quick-thinking, and globalized company in the world: hungry for information and armed with the financial capital to make things happen.

Now imagine the following: Your company gets sued in the United States. You get sued in federal court by a competitor alleging that your company is engaging in anticompetitive behavior. Specifically, it alleges that your sales force is stealing customer lists and paying off local officials in foreign countries, and this hypothetical company of yours is stealing its market share. Rapidly. Aggressively. And in violation of United State antitrust laws. Millions, if not billions

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Highlights

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SECTION of LITIGATION
AMERICAN BAR ASSOCIATION

Message from the Cochairs

A theme frequently addressed in articles, seminars, and workshops is how to improve the relationship between in-house and outside attorneys. Issues such as billing, early case assessment, discovery, and the use of outside vendors are examined and discussed at great length and to the benefit of all. Indeed, at our committee's annual CLE, this relationship and these subtopics are always part of the discussion during the very popular and spirited program "Litigation Roundtable." Why so much discourse? Well, quite obviously, the relationship between in-house and outside counsel is critical and, unfortunately, does not always function as well as both sides would like. Because of the relationship's importance, I would like to devote a few more paragraphs to it as my last message as cochair of the committee. For this message, however, my primary source for guidance and the tips for improving the relationship that I want to relay fall slightly outside the traditional legal texts and periodicals. My resource and suggestions find their origin in a very popular talk given by Dr. Randy Pausch.

Dr. Pausch, a Carnegie Mellon University computer-science professor, gave a talk as part of a "last lecture" series at Carnegie Mellon in which top professors are asked to give hypothetical final lectures. In other words, what would you say to an audience if you knew it was your last chance to speak to them? In Dr. Pausch's case, the speech was more than a hypothetical exercise. Dr. Pausch, the audience quickly learned, has pancreatic cancer and expects to live for just a few months. Speaking for an hour or so, Dr. Pausch told the audience of his life and the wisdom he has gained, and closed with a heartfelt acknowledgment that the lecture was really not for them, but for his three young children.[1]

As I contemplated what I wanted to say in this message, I got to thinking about Dr. Pausch's "last lecture," the philosophies he espouses, and how so much of what he seeks to convey is a wonderful guideline for our personal and professional lives and the relationships we seek to foster in both. Do not worry; I am not interested in conveying my thoughts and opinions about how one should conduct one's personal life. There are far better people and resources than this message from me for that guidance. I do believe, however, that what Dr. Pausch has to say is applicable to improving the relationship between in-house and outside counsel. So without further fanfare, below are five substantive ideas Dr. Pausch suggests as road maps for life that I believe can be applied to both outside and inside counsel to improve their relationship with each other.

Tell the Truth

This is the simplest tip but also the toughest to follow consistently. If you are defending a case, make sure that you as in-house counsel let your attorney know all the facts—the good, the bad, and the ugly. Both sides must be forthright in the opinions and advice conveyed, even when a mistake is made, an argument is overlooked, or a deadline is missed. My experience has shown that when both parties are truthful in their business relationship

and in the projects they jointly share, the chances for success both in the case and in the long-term nature of the relationship increase dramatically.

Be Humble and Show Gratitude

We don't care if you have won the biggest defense verdict of the year, graduated number one from your law school, or written the treatise on your area of expertise. We care about what you can do for us and how you do it. Generally speaking, if you are arrogant about your accomplishments, nobody will want to work with you.

Apologize

With the exception of my perfect children, we all make mistakes. That is often how we learn our greatest lessons. When you make a mistake, whether you are in-house or outside counsel, apologize and acknowledge it was your fault. Please do not try to lay the blame elsewhere. And ask what you can do to make it better. In my experience, the last part—making it better—is the fastest way to achieve forgiveness. It also creates an even greater bond between both parties.

Accept Constructive Criticism as a Good Thing

This too is something that should go both ways. When I fail to live up to my end of the relationship, let me know. The fact that I am the client does not mean all I do is terrific. Accept constructive criticism from me as well. If I didn't care about you and a long-term partnership with you and your firm, I would remain silent, essentially having given up on you, and when the next matter comes along, you would not get the call. If I think you are doing a bad job and I point it out, it is because I care.

Don't Whine and Complain, Simply Work Harder

This idealism mirrors something my father often said to me and my siblings. "Take the *t* out of *can't* and make it *can*." Practicing law is tough. The hours can be brutal, the deadlines stressful, and the stakes high. So be it. If I am working with you, those realities are a given. How do we both overcome them? Work hard.

There you have it, a "top five" list to help all of us going forward. True, many of these "pearls of wisdom" are addressed in past "In-House Top 10 Lists" published in the *In-House Litigator* (I even wrote one) as well as in self-help books and one of my all-time favorite books: *All I Really Need to Know I Learned in Kindergarten* by Robert Fulghum. Nevertheless, I believe each item is something to keep in mind as we examine the billable hour, the bane of discovery, and other matters unique to the relationship between in-house and outside counsel. Enjoy the rest of the *In-House Litigator*, and I hope to see you all in Florida the weekend of February 12–16, 2009, for another wonderful CLE. ■

—Hob Jordan

Endnote

1. You can watch Dr. Pausch's "last lecture" in its entirety at http://download.srv.cs.cmu.edu/~pausch/ and read more in his book entitled *The Last Lecture*.

Message from the Editorial Board

The recent pay increases for first-year associates have sparked much discussion among members of the Committee on Corporate Counsel. Most of that discussion has related to how the salary increases have impacted the relationship between in-house and outside counsel. One perhaps overlooked issue is how starting law firm salaries compare with salaries for the federal judiciary. For example, federal district judges currently earn a salary of $165,200 per year, which is less than salaries earned by first-year associates in certain markets. Although many federal judges undoubtedly receive sufficient motivation from factors such as the opportunity to serve the public and the prestige of a federal judgeship, it seems reasonable to ask whether the comparatively low compensation of federal judges could impact morale in the federal judiciary or deter qualified candidates from accepting federal judicial positions.

This year, however, may present an opportunity for a meaningful increase in judicial salaries. In December 2007, the House Judiciary Committee approved House Bill 3753, which provides that federal judicial salaries will rise as follows: for federal district judges, from $165,200 to $218,000; for federal appellate judges, from $175,100 to $231,100; for Supreme Court associate justices, from $203,000 to $267,900; and for the Chief Justice of the Supreme Court, from $203,000 to $267,900. The proposed law would also repeal the existing requirement of explicit congressional approval for any cost-of-living adjustment for federal judges. On January 31, 2008, the Senate Judiciary Committee approved legislation adopting the same salary increases approved by the House Judiciary Committee.

The proposed judicial pay increases have received strong support from the federal judiciary and the ABA. In his 2007 Year-End Report on the Federal Judiciary, Chief Justice John G. Roberts Jr., emphasized the urgent need for adoption of pending legislation, which he said would restore judicial pay to the same level that judges would have received if Congress had granted them the same cost-of-living pay adjustments that other federal employees have received since 1989. Similarly, in a letter dated January 30, 2008, to members of the Senate Judiciary Committee, ABA Governmental Affairs Acting Director Denise A. Cardman noted that "public service has its own rewards," but wrote that "it should not be necessary for judges, once in office, to worry that the purchasing power of their salaries will continue to decline unabated." As of the publication deadline for this newsletter, no further action had been taken on the proposed legislation. Members of the committee may be interested in monitoring the fate of this proposed legislation. ■

Wage and Hour Litigation: Overtime Pay Class Actions by IT Employees

By Kara E. Shea

Litigation over misclassification of employees under wage and hour laws is one of the largest growing areas of employment litigation. Much of this activity is class litigation, with representative plaintiffs initiating lawsuits on behalf of hundreds or even thousands of coworkers. According to one recent report, wage and hour collective actions generated more rulings in 2007 than class actions for employment discrimination or under the Employee Retirement Income Security Act.[1]

A job category that has been targeted for particularly close scrutiny under wage and hour laws is information technology (IT) positions. Seemingly every few days there is news of a new wage and hour lawsuit involving IT employees who claim they were misclassified and wrongfully denied overtime. For instance, IT employees of Baker Hughes Oilfield Operations recently filed a lawsuit in a federal district court in Texas, on behalf of themselves and other employees whom they claimed had been misclassified as exempt from overtime. In allegations typical of such lawsuits, the employees claimed that they merely solved computer glitches and fixed equipment, and so should have been classified as nonexempt and paid overtime.[2] This article seeks to provide in-house counsel with an overview of the law underlying these cases as well as information and strategies to assist in avoiding or, if necessary, facing down such litigation.

Class Actions and IT Employees

The trend of challenges to the exempt classifications of IT professionals started during the technology boom of the 1990s and has only increased with the continuing growth in computer-related industries and positions. Some plaintiffs' law firms specifically target salaried computer professionals as potential class action participants, via media campaigns and online advertising. For instance, one national law firm touts its extensive experience in successfully seeking overtime compensation for IT workers, including system administrators, web administrators, help desk support workers, and systems analysts, and encourages current and former tech workers to "report in confidence their work experiences."[3]

Wage and hour class actions may be brought under federal or state law, or both. The federal law governing such claims is the Fair Labor Standards Act (FLSA),[4] which is applicable to virtually all employers. In addition, some states have their own wage and hour laws governing such claims. Some state wage laws, particularly the California Labor Code, place significantly more stringent requirements on employers than federal law does. It is no coincidence, then, that many of the headline-grabbing settlements in wage and hour cases arise from California litigation.

Plaintiffs proceeding under state wage laws typically initiate wage and hour class litigation under Federal Rule of Civil Procedure 23, which allows for an opt-out process, whereby anyone who does not wish to be part of the class must withdraw from it. This maximizes the number of people in the class and the size of the recovery, as almost all employees in the targeted job category will be bound by a Rule 23 order. By contrast, in collective actions under section 216(b) of the FLSA, if the court certifies the class, members must opt in to participate. An employer's exposure is typically significantly reduced in a 216(b) scenario as opposed to under Rule 23, as it has been estimated that no more than 20 percent of the eligible workforce in a case are likely to participate in an opt-in proceeding.[5] Plaintiffs also have the option of bringing claims under both federal and state law, creating what is known as a "hybrid" class action.

Factors contributing to the popularity of exemption lawsuits include the availability of liquidated damages under the FLSA and state law (meaning that backpay awards are typically doubled),[6] automatic recovery of attorney fees for plaintiffs who prevail, and the ease with which plaintiffs can point to a single, undisputed practice or policy (namely, an exempt pay designation) that instantly encompasses an entire category of employees. For this last reason, it is fairly easy for plaintiffs to obtain at least a conditional certification of a collective action under the requirements of federal law requiring a showing of "similarly situated" employees. Plaintiffs also benefit from the complexity of the FLSA and the uncertainty caused by the relative dearth of case law in most jurisdictions on the overtime exemptions. In many instances, the facts and legal issues being debated in exemption litigation have never been presented to a court or the U. S. Department of Labor for review. This is especially true with relatively new kinds of jobs, such as those found in the IT field. Employers are understandably uncomfortable being in the position of possibly making new law, and plaintiffs' attorneys are well aware of this fact and take full advantage of it in settlement negotiations. Finally, IT workers in particular are targeted as potential litigants because these workers are frequently paged during breaks and after regular work hours to address emergency issues and, for that reason, may work significant amounts of overtime.

Wage and hour class actions, once certified, present a troubling dilemma for employers. Such actions are very costly to defend, with the employer defendant typically bearing the lion's share of potentially enormous discovery costs. Nor does settlement come cheap. In January 2007, a California district court granted final approval of a settlement of $12.8 million for technology workers employed by Wells Fargo.[7] The case involved the claims that salaried employees with the job titles of

"business systems consultants" and "business systems analysts" who worked for the firm between 2001 and 2006 producing automated versions of paper forms and performing other "routine production" duties were misclassified as exempt from overtime pay.[8] Other notable recent settlements include $65 million approved by a Northern California District Court in January 2007, to settle the claims of approximately 37,000 system administrators, network technicians, and other technical staff of IBM.[9]

The Computer Employee Exemption

The FLSA and state wage laws establish minimum wage and overtime standards, while also exempting certain employees from these requirements.[10] The core question in any IT employee misclassification case is whether the positions at issue qualify for exempt status. Prior to 2004, employees who used computers could be classified as exempt from overtime under the FLSA only if they qualified for one of the so-called "white collar" exemptions: executive, administrative, or professional. All of these exemptions require a fixed salary and the exercise of discretion and independent judgment in carrying out the duties of the position. In addition, exempt executive employees must supervise other employees, whereas exempt professional employees typically must possess an advanced degree. In the 1970s and 1980s, computer employees were typically divided between "programmers" and "analysts," who had obtained advanced degrees and therefore qualified for the professional exemption, and "key punch" or data entry employees, who were typically deemed nonexempt. However, in the late 1980s and 1990s, with rapid development of the IT industry and the increasing role of computers in just about every kind of organization and the attendant increase in computer-related positions, it became clear that the realities of the workplace had overwhelmed the antiquated, industrial-era wage and hour regulations. The old programmer/data entry dichotomy was no longer a helpful guide. Employers began to rely more frequently on the administrative exemption to classify IT employees but were limited by the exemption's salary-basis requirements as well as the discretion and independent judgment requirement, which excluded employees engaged in high-level systems analysis or programming work who were not managing projects or making policy decisions. The administrative exemption also failed to cover highly skilled yet nonexempt "production" work[11] (such as designing software for sale to the employer's customers).

In 2004, partly in reaction to these changes in the American workplace, the Department of Labor revised the FLSA to create a separate exemption for computer professionals.[12] To qualify for the computer employee exemption, the employee must be compensated on either a salary or fee basis at a rate of not less than $455 per week or, in the case of an employee who is compensated on an hourly basis, not less than $27.63 an hour.[13] In addition, "the exemptions apply only to computer employees whose primary duty consists of" the following:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- A combination of the aforementioned duties, the performance of which requires the same level of skills.[14]

The Department of Labor intentionally avoided citing specific job titles as examples of exempt computer employees in light of rapidly changing technology and terminology in the computer field. Clearly, however, the computer employee exemption is applicable only to a narrow range of high-level, highly skilled jobs. It nevertheless covers positions missed by the other white-collar exemptions in that it does not require an advanced degree (or any academic degree), supervision of other employees, or the exercise of discretion and independent judgment, and may encompass production work. In addition, this exemption offers the flexibility of an hourly pay option, thus including employees who work part-time or flexible schedules or on a consulting or project basis.

It is important for employers to understand that while the Department of Labor has not spelled out all of the kinds of positions to which the computer employee exemption might apply, it has made some statements regarding categories of IT positions to which the exemption does *not* apply. For example, federal regulations state that the computer employee exemption does not apply to employees whose work is highly dependent upon, or facilitated by, the use of computers (i.e., engineers, drafters, and others skilled in computer-aided design software), or to employees engaged in the manufacture or repair of computer hardware and related equipment.[15] The Department of Labor has also issued an opinion letter taking the position that employees whose primary duties consist of educating and assisting computer users, such as "troubleshooters" or help desk personnel, generally do not qualify for the computer employee exemption.[16] The department explained that such employees usually cannot meet the primary duty test of the exemption because their duties do not include actual analysis

The computer employee exemption does not apply to employees whose work is highly dependent upon, or facilitated by, the use of computers.

of the employer's computer systems. Likewise, the department has opined that IT support specialists who spend a majority of time "conducting problem analysis, and researching and resolv[ing] complex problems" do not meet the computer employee exemption because such positions do not require development and analysis skills.

Only a few courts have considered the relatively new computer employee exemption, with mixed results. In *Martin v. Indiana Mich. Power Co.*,[17] for example, a computer help desk employee who provided computer maintenance and support was deemed not covered by the computer employee exemption. The employee did not do computer programming or software engineering, nor did he perform systems analysis, which would involve making actual analytical decisions about how the company's computer network should function. Instead, he was responsible for installing and upgrading hardware and software on workstations, configuring desktops, checking cables, replacing parts, and troubleshooting problems, all of which was held to be nonexempt work. By contrast, in *Berquist v. Fidelity Information Services*,[18] a Florida federal district court ruled that the computer employee exemption was applicable to an employee whose primary duties consisted of designing, developing, and modifying programs, requiring application of a high degree of specialized knowledge.

For some categories of IT employees, the exempt category most likely to apply may still be the administrative exemption.

The Administrative Exemption

For some categories of IT employees, the exempt category most likely to apply may still be the administrative exemption. With respect to the duties requirements for the administrative exemption, the regulations require that an employee's primary duty be "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers" and the employee's primary duty must include "the exercise of discretion and independent judgment with respect to matters of significance."[19] It is important for employers seeking to fit their employees into this classification to understand the true parameters (and limitations) of the administrative exemption. First of all, as previously explained, the exemption will not apply to IT employees who are engaged in production work. The principle is illustrated in *Eicher v. Advanced Business Integrators*,[20] in which a California appellate court ruled that an employee of a software company whose duties included installing and customizing the company's software product for customers and training customers on how to use the product, was not an exempt administrative employee. The court in *Eicher* ruled that because the employee worked on the core product of his employer's business—software—he was a "production" worker and therefore could not be classified as exempt. Employers in the software, hardware, and wi-fi industries, some of whose IT employees may be "production workers" similar to the employee in *Eicher*, need to be particularly mindful of the distinction between production and administrative work.

It is also important to remember that an employee will not qualify for the administrative exemption merely by performing exempt administrative work. In addition, the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.[21] Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; and whether the employee investigates and resolves matters of significance on behalf of management.[22]

Federal regulations further state that the "exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision."[23] The regulations also emphasize that "the exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards," and that it "does not include clerical . . . work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work."[24] This is an extremely important point, particularly with respect to IT positions. It means that, even if the task an employee is charged with completing is complex and requires a high level of skill to execute, and even if the task is very important to the organization, if the employee is merely applying preset rules and procedures to the issue presented, without the need, opportunity, and/or authority to deviate from these standards, the administrative exemption will not apply.

The issue of the applicability of the administrative position to IT personnel was addressed in some detail by the Department of Labor in a recent opinion letter. Asked to evaluate the status of an "IT Support Specialist" position, the department's administrator noted that

"[t]he fact that work may be unusually complex or highly specialized along technical lines, or that significant consequences or losses may result from improper performance of an employee's duties, do not automatically qualify the work as being significant to the management or general business operations of an employer."[25] The department further opined that, though a job may be viewed by an employer as "indispensable," it is not necessarily exempt, specifically stating that "although the upkeep of a computer system may be viewed as essential to an employer's business operations, the nature of the individual employee's particular work, and not the possible results or consequences of its performance, is the focus of the analysis for determining an employee's exempt status." Finally, the department pointed out that "performing highly skilled technical work in troubleshooting computer problems does not, by itself, demonstrate the exercise of discretion and independent judgment with respect to matters of significance."

Courts have also considered the administrative exemption as applied to IT employees. In *Bohn v. Park City Group, Inc.*,[26] the court held that there was not enough evidence in the record to support a finding that a computer professional was exempt from the FLSA. The court noted that even though the plaintiff's salary was sizeable, because he testified that much of his time was spent in routine clerical tasks, the employer failed to meet its burden of proof that the employee was exempt. Likewise, in *Turner v. Human Genome Science, Inc.*,[27] computer system support technicians were deemed not exempt because their primary duties, providing technical support by loading, monitoring, and troubleshooting general software programs, failed to satisfy the duties test for the administrative or any other exemption.

However, in *Combs v. Skyriver Communication*,[28] a California appellate court recently upheld a trial court's ruling that a start-up company's director of network operations was exempt from overtime pay under the administrative exemption. The employer in *Combs* was a start-up broadband Internet service provider that used an Internet network to sell its broadband services to customers. The employee, who held the title of "Director of Network Operations," testified at trial that he spent 60–70 percent of his time maintaining the well-being of the network. His tasks included overseeing day-to-day network operations, management of the integration and standardization of the company's networks, and reporting to the board. As with many start-up companies, the employee wore many hats and, in addition to performing high-level, discretionary functions, also performed the same tasks that would have been performed by nonexempt entry-level employees at a larger company. The court held that the fact that the employee was ultimately responsible for maintaining and improving the employer's network systems function was overriding and that, therefore, the employee had been correctly classified as an exempt administrative employee.

The fundamental question underlying administrative classification of an IT employee is whether the employee has true decision-making authority and accountability for some aspect of the employer's operations, or whether he or she merely applying an (albeit advanced) skill set to certain (albeit complicated) tasks, while someone else (such as a supervisor or department head) takes care of the "big picture" issues. Another very important concept to keep in mind is that of "primary duty." An employee must regularly spend a significant portion of his or her time performing exempt work to qualify for an exemption, and this is true of the computer employee exemption as well as the administrative exemption. For instance, an employee who mainly performs troubleshooting duties but is occasionally assigned projects involving exempt work (such as programming, designing software, or making significant financial decisions regarding purchase of equipment) most likely will not qualify as exempt, regardless of the importance of these isolated projects, because the exempt work is not his or her "primary duty."

Avoiding and Defending Wage and Hour Litigation

The best way of dealing with wage and hour litigation, obviously, is avoiding it altogether. In-house counsel are advised to take the lead in spearheading periodic internal audits of the company's classification of IT positions. Such audits should take into account differing standards in federal law and the wage and hour laws of any states in which the company has employees, bearing in mind that a position might qualify as exempt in one jurisdiction but not in another. The first order of business in such an audit is to review job descriptions and interview the management employees most knowledgeable about their employees' job functions.[29] Job descriptions should be revised to reflect current actual job duties for all employees—constant revisiting of job descriptions is particularly crucial in the rapidly changing world of IT. If employees are performing exempt functions, the functions should be listed at the top of the job description. Employees who have been classified as exempt who clearly do not meet the requirements (such as help desk workers, equipment repair personnel, personnel not meeting minimum salary or hourly pay requirements) should be promptly reclassified.

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Despite the most diligent auditing efforts, some IT positions will stubbornly remain in a gray area. For these, it is a good idea to conduct a cost/benefit analysis to determine whether it is worth the risk of classifying such positions as exempt. Are the arguments in favor of the exemption relatively weak or outweighed by the arguments on the other side? Can the positions be converted to nonexempt hourly positions without resulting in

significant additional expenditures for overtime? If the answer to either question is yes, reclassification is probably the best and certainly the safest course. If widespread reclassification has a significant economic downside, however, it may be worth it to take a chance, providing there are at least some factors supporting an argument in favor of the exemption. Employers choosing this course should consider consulting with outside labor and employment counsel for a second opinion regarding the merits of the proposed classification and the magnitude of the risk. Another option is to seek a formal opinion letter, from outside counsel, or even from the U.S. Department of Labor or a state department of labor. Such efforts will not immunize a company from being sued or even from receiving an adverse ruling in an exemption case, but they may reduce or even eliminate damages under certain "good-faith" defenses available under state and federal law.[30] Indeed, even wholly internal audits and evidence of thoughtful discussions within a company demonstrating attempts to understand and correctly apply exempt classifications may be offered as evidence that a company did not act willfully in misclassifying its employees, further reducing potential damages. The worst thing an employer can do is keep its head in the sand regarding classification issues. Ignorance of the law is no defense in the wage and hour arena.

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For employers already facing wage and hour litigation, the question becomes whether to settle or fight. Wage and hour class actions are so costly to litigate, even employers who feel strongly that they have classified their employees correctly enter settlements prior to receiving a ruling from the court on the exemption issue, simply to stop the bleeding. Early settlements may be a cost-effective solution in the short term. However, employers should bear in mind that, unless a settlement payout is accompanied by a reclassification of the targeted position, the same category of employees (indeed, the very same individuals) who sued and collected a nice windfall for minimal effort can turn around and do it again a few years down the line. The tendency of employers to settle wage and hour litigation also contributes to the problem that fuels this type of litigation to begin with, namely, the uncertainty engendered by the lack of binding legal authority on exemption issues. Indeed, the constant threat of wage and hour class litigation may eventually render perfectly legal exemptions essentially useless to employers who are too afraid to use them.

Employers who are willing to aggressively use the exemptions set forth in the law may wish to take a similarly aggressive approach to litigation and consider the merits of investing the resources necessary to see a meritorious exemption case through to the end, including an appeal, if necessary. A favorable ruling means that the employer is free to continue to classify the subject employees as exempt, with the attendant cost savings, for the foreseeable future, and is unlikely to be sued again regarding the issue, at least in the jurisdiction in which the opinion was rendered. If the court rules against the employer, at least the guesswork is over and the state of the law becomes a known quantity that the employer can factor into future business decisions. Another point to consider is that a court decision tends to level the playing field by forcing all employers within the jurisdiction (including the targeted employer's competitors) to classify their own employees in accordance with the dictates of the court's ruling. ■

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Endnotes

1. *See* Seyfarth Shaw, Annual Class Action Report, 2007 ed., *available at* http://www.seyfarth.com/index.cfm/fuseaction/publications.publications detail/object_id/375370ea-8813-4bb1-b964-5452548ad24a/SeyfarthShaw ClassActionReport2008Edition.cfm.

2. *See* Dreyer v. Baker Hughes Oilfield Operations, Inc., Case No. 4:08-cv-01212 (S.D. Tex. filed Apr. 21, 2008).

3. *See* the website of Lieff Cabraser Heimann & Bernstein, LLP, for cites to settlements in 2006 and 2007 of $26 million, $12.8 million, and $7.5 million in class actions involving IT employees, *available at* http://www.lieffcabraser.com/itovertime.htm.

4. *See* 29 U.S.C. § 201.

5. Bettina W. Yip, Daniel Turner, and Anthony Collins, *Defensive Strategies for Preventing Certification of Wage and Hour Class Actions*, Nat'l Conf. on Equal Emp. Opportunity L., at 2, n.2 (Mar. 23, 2006).

6. Massachusetts recently enacted an amendment to its wage and hour statute providing for *trebled* backpay awards in wage and hour cases. *See* S. 1059 (Mass.), amending Mass. Gen. Laws ch. 149, §148.

7. *See Gerlach v. Wells Fargo & Co.*, Case no. 05-cv-00585-CW (N.D. Cal.).

8. Plaintiffs sued under both state and federal law, and California workers received larger shares than employees in other states, presumably because of differences between California law and the FLSA or other state statutes regarding eligibility for, and calculations of, overtime pay.

9. Rosenburg v. IBM, Case No. C06-0430-PH (N.D. Cal.).

10. The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. In situations in which state or local governmental laws provide greater protections to workers than the FLSA, the state or local law governs. 29 U.S.C. § 218(a).

11. To qualify for the administrative exemption, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment. 29 C.F.R. § 541.201(a). This concept, known as the "production worker dichotomy," draws a distinction between production employees (whose primary duty is to produce the commodity, whether goods or services, of the business) and administrative employees (whose work relates to general business operations; in other words, the "behind the scenes" running of the business).

12. *See* Dep't of Labor, U.S. Wage and Hour Division, Fact Sheet #17E: Exemption for Employees in Computer-Related Occupations

(Continued on page 11)

Assessing Noncompetition Agreements and Minimizing Risk in the Hiring Process

By Monica Latin

Covenants not to compete have become an increasingly popular tool among employers for a variety of objectives: to protect trade secrets, to prevent the solicitation of customers, to discourage employees from seeking employment elsewhere, and to discourage competitors from hiring their employees. The legal treatment of noncompetition agreements varies widely from state to state and even from court to court. And misperceptions among employees and some lawyers about the enforceability of such agreements abound.

Companies who unwittingly hire employees with noncompetition agreements, or who misjudge their enforceability or the zeal with which the former employer is likely to seek to protect its interests, can find themselves the subject of a lawsuit alleging tortious interference. Such litigation is more than expensive; it can be particularly disruptive and invasive to the employer's business interests. One central area of inquiry involves the employee's day-to-day activities, an area that sometimes implicates customers or other third parties whom the hiring company will not want to see disturbed by subpoenas or exposed to allegations of misconduct by the new employer and employee. Another fundamental problem arises from the fact that the party seeking discovery is typically a competitor, to whom information about items such as competitive activities, revenue and profit margins, and hiring practices are not ordinarily (or happily) disclosed. Although protective orders are commonly used, they do not provide much comfort to the producing party.

A careful approach in the hiring process, particularly in industries that rely heavily on such agreements, can serve to protect the new employer, the new employee, and—in sales or professional services industries—customers who can be caught in the crossfire. Although no amount of preparation can prevent litigation by a former employer who wishes to disrupt competition, whether or not its reasons are legitimate, there are pitfalls that can be avoided and precautionary steps that can decrease the likelihood of litigation and better position a company to defend itself (and its new employee) if litigation ensues.

It should be part of a company's standard script to ask its prospective employees whether they have any type of employment agreement or other contractual relationships that could affect their acceptance of a position or their activities once hired. Many prospective employees do not know the answer to this question; covenants not to compete are often buried in generic employment agreements, employee handbooks, or even bonus or stock option awards, and for obvious reasons the applicant can be reluctant to ask his or her employer questions about the contents of his or her personnel file. The prospective employer takes a risk by hiring the employee without further information about restrictions that may exist. Upon learning that an agreement exists, the prospective employer should request a copy and have it reviewed by legal counsel. Particularly in cases involving high-level or sophisticated employees, the prospective employee should be encouraged to hire separate counsel to do the same.

Reviewing the Agreement

The first step in assessing a covenant not to compete is determining the applicable law. Many multistate employers have choice-of-law (and sometimes choice-of-forum) clauses in their form agreements. However, these clauses are not always enforceable.[1] Where the agreement is silent, many states (and most litigants) appear to assume that the agreement will be governed by the law of the state in which the employee has worked; others assess where the contract was formed or what state has the most significant relationship to the agreement. Where an employee has lived and/or worked in multiple states, the choice-of-law analysis can be particularly complicated.

Once the applicable law is determined, it is helpful to get an overview of the state's general attitude toward covenants not to compete, which are fairly easy to enforce in some states but nearly impossible to enforce in others. Understanding the underlying public policy determinations can inform the remainder of the analysis, the hiring decision, and any litigation that follows. Common underpinnings include fundamental public policy issues such as restraints of trade, "right to work," and protection of trade secrets.

The degree of specificity in state law varies widely as well. Some states rely on common law, with a rule that can usually be boiled down to something like this: A covenant not to compete is enforceable if reasonable under the circumstances.[2] Other states have statutes,[3] some of which are extremely detailed, establishing the requirements for enforceability based on a variety of factors and under a variety of circumstances.[4] Not all of the statutes are easy to interpret, and others have given rise to complex judicial wrangling.[5]

Assuming a covenant is generally enforceable, its scope merits careful scrutiny as well. Elements to consider include the duration of the restriction, the geographic scope of the restriction, the nature of the restricted activities, and how all of the restrictions relate to the interest the noncompete seeks to protect. Careful attention should be paid to whether the covenant prohibits the employee from engaging in any competition whatsoever or whether its restrictions are limited to the solicitation of customers and prospective customers of the former employer.[6] Some states differentiate between the two agreements as "noncompetition

agreements" and "nonsolicitation agreements." However, these definitions are not universally used, and a reference to a "noncompetition agreement" often refers to any type of restraint on competition, including the solicitation of customers,[7] while a "nonsolicitation agreement" can also refer to the common additional provision prohibiting an employee from soliciting former coworkers on behalf of the new employer.

The difficulty in analyzing the scope of a noncompetition agreement is that there are few bright-line tests to determine whether a covenant will or will not be enforceable. A few jurisdictions have statutory limitations or presumptions that are quite helpful to a hiring company in determining the risk associated with the hiring of the candidate.[8] But in most jurisdictions, the analysis is so fact-intensive that predicting how a particular judge will view the agreement in light of facts and positions that do not all even exist at the time of the assessment is akin to a simple roll of the dice.

> Local practice can be the single most important factor in assessing the risk associated with a covenant not to compete.

Assessing the Impact of Local Law and Practice

It is also helpful to determine the effect of a finding that the scope of a noncompetition agreement is overbroad. Some jurisdictions will invalidate a noncompete that is overbroad or unreasonable in scope.[9] Others give the trial court discretion to modify the terms so that the scope is appropriate. Others require the trial court to do so. And some permit the trial court to strike offending provisions but not to modify them. Such reformation is often referred to as a "blue pencil" doctrine.[10]

In fact, local practice can be the single most important factor in assessing the risk associated with a covenant not to compete. Relatively few noncompete cases go to trial, and even fewer end up on appeal. Most enforcement actions involve a request for a temporary restraining order and/or temporary or preliminary injunction. In determining whether to grant this relief, the trial court must make an early assessment of the enforceability and scope of the covenant. Whether the injunction is granted or denied, the vast majority of cases tend to resolve through settlement. First, by the time the case is reached for trial on the merits, the bulk of the period of restraint, if not all, may have passed. If the employee is to be restrained for that period of time, the initial victory by the former employer may constitute a de facto victory on the merits. Likewise, if the employee is not restrained, winning a permanent injunction at trial for the remainder of the time period may be of relatively insignificant benefit. And if the restraint is denied due to the trial court's concern over enforceability, the former employer's interest in pursuing either a permanent injunction or damages is necessarily dampened.

Knowing in advance the proclivities of the local judges can be invaluable. The author has encountered jurisdictions where it is said that local judges will never restrain more than the active solicitation of recent clients, no matter what state law provides. Other judges or groups of judges may be inclined to rubber-stamp any request for temporary relief that comes their way. In this area, more than in most other commercial or employment matters, local counsel with true experience with these disputes can be a critical asset.

Other Prudent Precautions

Due diligence can also include an investigation of the former employer's history with respect to noncompetition agreements. This includes whether the company tends to consistently enforce its agreements; inconsistency can be a powerful defense in many jurisdictions, because it evidences that the alleged "protectable interests" may not be as vital to the company in practice as asserted in court. It also includes whether the former employer has been consistent in its judicial positions. Where the former employer has been involved in litigation over its own hiring of employees, it may have taken legal or factual positions in its defense that are inconsistent with its efforts to enforce its own agreements.

Consistency is a two-way street. If the hiring company intends to assert that the former employer's noncompetition agreement is unenforceable, it should consider whether it intends to ask the new employee to sign its own noncompete and whether its form of agreement may suffer from the same alleged deficiencies. It makes for a powerful argument that the new employer actively uses the provisions in issue, and the new employer will find its defense of the present case used against it the next time it seeks to enforce its own noncompete against a departing employee.

A careful assessment (and insulation) of a potential new hire should also involve efforts to avoid ancillary claims. Litigation over noncompetition agreements often includes a related claim that the employee committed a pretermination breach of duty and/or misappropriated or misused the former employer's confidential information or trade secrets after departure. Where there is arguable merit to the factual allegations, it is frequently the result of the employee's failure to understand his or her legal obligations and the fact that the former employer may be scrutinizing his or her recent activities, which can sometimes appear suspicious even when done in the ordinary course of business with proper intentions.

Some employees believe that their work product is similar to a school term paper, that they are entitled to take or copy it for nostalgia's sake or use it as a reference for future projects. In some situations, this is perfectly true; in others, it can constitute conversion, theft, misappropriation of trade secrets, and breach of a nondisclosure agreement. Other employees cannot resist the urge to speak with customers about their plans to resign, seeking the comfort of knowing that the customers will "follow them" to a new opportunity. These situations can sometimes be avoided through clear, detailed direction by the hiring company.

It can be helpful to specifically instruct candidates for employment that

they should not discuss their job-hunting process with coworkers or customers and that they should not use or reveal confidential information belonging to their former employers either during the interview process or after they join the company. The downside to this approach occurs when an employee violates these instructions, often without bad intention, and the new employer must decide whether to terminate the interviews/job offer/employment or risk having the violation used as evidence of wrongdoing in litigation. The upside, of course, is that the instructions may prevent unfortunate actions from occurring in the first place, and that the new employer can defend itself against a subsequent claim by pointing to its instructions as evidence of its good faith.

At the time an offer of employment is made, it can also be beneficial to provide specific instructions concerning the employee's resignation and departure from the previous employer. Among other things, the employee should be told to take great care in the removal (including by email or downloading) of any information or even personal possessions from the office prior to resignation. These activities can suggest misconduct, even where none is present. Ideally, the employee will be instructed at the time of resignation as to whether and how the employee will be permitted to pack personal belongings. Sometimes the employer does this itself; others allow the employee to do so, with or without a witness. Even if an employee is allowed to pack alone, it can be helpful to have someone with authority "bless" the items being removed to avoid later speculation about what was taken.

The employee should also be told to diligently search his or her home and car for any business-related information that originated with the former employer. This includes information on a personal email account and home computer or personal laptop, cell phone or personal digital assistant, as well as in home offices and other places where the employee may have worked. The employer may be consulted about whether this information should be discarded or returned; with electronic information, the most reasonable way to "return" the information is to copy the information to a portable storage device such as a thumb drive and certify to the employer that the information has been deleted from the source. Others will accept the employee's assurance of deletion, comforted in part by the thoughtful and professional approach taken by the employee.

These types of instructions serve several purposes. They can help avoid inadvertent misconduct or misunderstandings. They also send a message to the former employer that the departing employee is taking care to comply with his or her duties. And in the event of litigation, they evidence an overt good-faith effort to protect the former employer's interests and to "play fair."

Conclusion

Implementation of these guidelines can require a "reorientation" of a company's employees who are actively recruiting new employees, often without regard to (or interest in) legal formalities. But a careful approach to the hiring process can help to minimize the chance of any litigation at all, and the assertion of meritorious claims in particular. ■

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Endnotes

1. *See, e.g.*, La. Rev. Stat. Ann. § 23:921(A)(2); Hostetler v. Answerthink, Inc., 599 S.E.2d 271, 274–75 (Ga. Ct. App. 2004); DeSantis v. Wackenhut, 793 S.W.2d 670 (Tex. 1990).
2. Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 32–33 (Tenn. 1984).
3. Tex. Bus. & Com. Code § 15.50; Okla. Stat. tit. 15, § 219A.
4. Fla. Stat. Ann. § 542.335; Cal. Bus. & Prof. Code § 16600.
5. *See, e.g.*, Light v. Centel Cellular Co., 883 S.W.2d 642 (Tex. 1994); Alex Sheshunoff Mgmt. Servs., Inc. v. Johnson, 209 S.W.3d 644 (Tex. 2006).
6. Palmer & Cay, Inc. v. Marsh & McLennan Cos., 404 F.3d 1297, 1306 (11th Cir. 2005).
7. Sevier Ins. Agency, Inc. v. Willis Corroon Corp. of Birmingham, 711 So. 2d 995, 998 (Ala. 1998), *overruled on other grounds by Ex parte* Howell Eng'g & Surveying, Inc., 2006 WL 3692536 (Ala. Dec. 15, 2006) (not yet released for publication).
8. Fla. Stat. Ann. § 542.335; Okla. Stat. tit. 15, § 219A.
9. White v. Fletcher/Mayo/Assocs., Inc., 303 S.E.2d 746, 748 (Ga. 1983); Lanmark Tech., Inc. v. Canales, 454 F. Supp. 2d 524, 529 (E.D. Va. 2006).
10. Valley Med. Specialists v. Farber, 982 P.2d 1277, 1286 (Ariz. 1999).

Wage and Hour Litigation

(Continued from page 8)

under the Fair Labor Standards Act (FLSA), Nov. 2007.

13. *See* 29 C.F.R. § 541.400(b). California law also contains an exemption for computer professionals, with more stringent requirements than its federal counterpart, including a discretion and independent judgment requirement and a variable minimum hourly rate higher than the federal rate, which is amended yearly. *See* Cal. Lab. Code § 515.5. The minimum hourly rate for work performed in 2007 was $49.77, whereas the rate for work performed in 2008 is $36.00.
14. Dep't of Labor, Fact Sheet #17E, *supra* note 12.
15. *See* U.S. Dep't of Labor, Field Assistance Bull. No. 2006-03 (Dec. 14, 2006) (citing 29 C.F.R. § 541.42).
16. Dep't of Labor, Wage & Hour Opinion Letter FLSA 2006-42 (Oct. 26, 2006).
17. 381 F.3d 574 (6th Cir. 2004).
18. 399 F. Supp. 2d 1320 (M.D. Fla. 2005).
19. 29 C.F.R. § 541.200(a).
20. 151 Cal. App. 4th 1363, No. CV51746 (June 12, 2007).
21. 29 C.F.R. § 541.202(a).
22. 29 C.F.R. § 541.202(b).
23. 29 C.F.R. § 541.202(c).
24. 29 C.F.R. § 541.202(e).
25. Dep't of Labor, Wage & Hour Opinion Letter FLSA 2006-42 (Oct. 26, 2006).
26. 94 F.3d 1457 (10th Cir. 1996).
27. 292 F. Supp. 2d 738 (D. Md. 2003).
28. 159 Cal. App. 4th 1242 (Jan. 2008).
29. A word of caution, however: Auditors should listen to management with an objective perspective, because many managers will "advocate" for the exempt status of their employees, to preserve their current labor costs and avoid paying overtime and in the belief that exempt status is a badge of merit for individuals whom they view as outstanding employees.
30. *See* 29 U.S.C. §§ 255(a), 259, 260.

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of dollars, are at stake.

Not long after the lawsuit is filed, your adversary requests a meaningful meet-and-confer under Federal Rule of Civil Procedure 26(f). They want to talk e-discovery. They want to talk location of servers, backup tapes, hold order systems, unified and instant messaging, and global retention and preservation policies. They are interested in the data created by your employees who sit in cafés in Paris, while sending messages to customers in Dubai and using a shared database that sits on a server in Singapore. Put simply, they know what they want. You know they are entitled to it under the federal rules and you also know it is going to cost you millions of dollars to preserve, collect, process, and review it.

What you may not know, however, is that collecting, processing, or transferring information and electronic data that are located outside the United States is not as easy as one might think. In October 1998, the European Commission's Directive on Data Protection went into effect and sought to prohibit the transfer of personal data to non–European Union nations that do not meet the European "adequacy" standard for privacy protection. Since then, almost all of the member countries of the European Union have adopted their own privacy laws as well as various "blocking statutes."[1] A blocking statute is a law enacted in one jurisdiction to obstruct the local (extra-jurisdictional) application of a law enacted in another jurisdiction. For instance, in 1980, France enacted its blocking statute to prohibit the disclosure of most business-related communications (if harmful to France) to a foreign public authority by persons having a presence in France, as well as to prohibit the gathering in France of business-related information to be used in foreign litigation.[2]

This, then, presents an interesting dilemma for the company faced with a lawsuit in the United States but requiring the discovery of information located abroad. Should the company and its counsel comply with the order of a United States judge that requires it to produce information and electronic data located abroad and risk violating a foreign privacy law or blocking statute? Or should the company and its counsel defy the federal judge and refuse to produce the requested discovery because it not only respects the privacy of the other country but also fears criminal penalties and civil liability that may come if one violates a blocking statute?

In 1970, the United States signed the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. Pursuing discovery through this treaty, it seemed, would eliminate the dangers of forcing foreign corporations to comply with U.S. discovery obligations in violation of foreign statutes. But that was not to be. In *Société Nationale Industrielle Aérospatiale v. United States District Court*,[3] the Supreme Court determined that the Hague Convention did not displace the federal rules in relation to foreign-based discovery; rather, it was a permissive supplement.

In *Aérospatiale*, a French aircraft manufacturer, defending a plane crash case in Iowa, argued that the convention was the sole means of gathering evidence within the territories of the contracting countries, including France and the United States.[4] After determining that the convention was not a preemptive replacement for the federal rules, the Supreme Court considered two possibilities: first, that international comity required "a first resort" to use of the convention's procedures; or, second, that the convention contains alternative procedures that American courts have the option of employing.[5] With a narrow 5–4 split, the Court rejected a rule requiring "first resort to Convention procedures" and instead held that in each case trial courts determine whether to apply convention procedures or the federal rules after considering three things: "(1) the particular facts, (2) sovereign interests, and (3) the likelihood that resort to [convention] procedures will prove effective."[6]

Ever since, this three-part test has guided lower courts in determining whether to require discovery to be sought via the convention or through the federal rules. Most case law suggests that the first and third parts of the test are the least influential and that the second part of the test, or "sovereign interest" prong, not only subsumes the other two considerations but also may alone be dispositive.[7] Under the "sovereign interests" prong, the Court turned to the Restatement of Foreign Relations and found five inexhaustive factors to be relevant considerations: (1) the importance to the litigation of the requested information; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of other means of gathering the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine interests of the country where the information is located.[8]

Over the years, lower courts have applied these five factors with conflicting results. Some courts have added two other factors supported by *Aérospatiale*: (1) the hardship of compliance on the party from whom the discovery is sought and (2) the good faith of the party resisting discovery.[9]

In analyzing two of these seven factors—the hardship of compliance and the conflicting interests between the United States and the country where the information is located—most courts have found it critical to examine whether a foreign blocking statute will ever be enforced. In these instances, courts have invariably found little likelihood that such a statute will be enforced.[10] In fact, blocking statutes such as France's have been seen as little more than paper tigers, whose speculative threat is insufficient to displace the Federal Rules of Civil Procedure in favor of the Hague Convention.[11]

Things, however, just got a little different. On December 12, 2007, the Criminal Chamber of the French Supreme Court upheld a conviction and fine of a French lawyer for violating the French blocking

statute. The matter arose out of an investigation that began in 1998. At that time, the California Insurance Commissioner launched an investigation against a French consortium for an alleged fraudulent takeover of the U.S. insurance company Executive Life and its assets during the early 1990s. The California Insurance Commissioner considered that the French consortium led by Crédit Lyonnais (a French publicly owned bank) hid the true identity of its controlling interest when it made an application for the Executive Life purchase (thus allowing it to violate California laws regarding foreign ownership of insurance companies).

In April and December 2000, the U.S. court issued a number of requests for evidence under the Hague Convention in order to obtain from Mutuelle d'Assurances Artisanales de France (MAAF, a major French mutual insurance company and a member of the acquiring consortium) certain documents located in France relating to the allegedly fraudulent purchase. As part of discovery, U.S. counsel for the California Insurance Commissioner retained a French local counsel to carry out some investigations on his behalf in France. In particular, the French counsel was required to ask questions of a former employee of MAAF in order to gather evidence proving that the MAAF executive board was aware of the fraud and consciously participated in it.

According to the underlying decision of the Paris Court of Appeal, the French lawyer telephoned one of the former members of the MAAF's board of directors and deceivingly informed him that the MAAF board had not been properly informed at the time of the purchase. Instead, he continued, the transaction was conducted in a "hallway" without any debate. In other words, the Paris Court of Appeal found, the French lawyer "told a lie in order to get at the truth." Subsequently, the ex-director denied the allegations in a letter to the court, and MAAF filed a criminal complaint against the French lawyer for violation of the French blocking statute.

The Paris Court of Appeal found that the gathering of this information by the French lawyer was a violation of the French blocking statute and fined the lawyer $10,000. The lawyer appealed the decision, but the French Supreme Court affirmed the Paris Court of Appeal finding that the information sought by the French lawyer was of an economic, financial, or commercial nature and was aimed at collecting evidence for use in a foreign judicial procedure.

So, what does this mean for the hypothetical in-house litigator discussed above? It means that for those who practice in the United States but often handle litigation outside the United States, the world is changing. It means that the above analysis under the "balancing test" of section 442 of the Restatement of Foreign Relations Law just got a little more tricky.[12] It means that other countries with similarly stringent privacy laws and similar blocking statutes (Switzerland, Japan, China, Canada, and Australia) may also begin to enforce these laws. We hope it means that U.S. judges will be more thoughtful about unilaterally ordering a U.S.-based company to produce information that is located abroad if doing so will mean subjecting that company's counsel to criminal or civil liability. We also hope that companies will be more creative about how they handle the disclosure of information located outside the United States.[13]

Ultimately, though, it means that, as in-house and outside litigators, we need to understand the risks of collecting, processing, and reviewing electronic information that no longer obeys geographic boundaries. The world, indeed, has become more flat. Let us hope, though, that our thinking about the transfer of information has not. ■

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Endnotes

1. An insightful look at data privacy as well as links to each European Union member's privacy law and/or blocking statute is available at www.dataprotection.eu.

2. French Penal Law No. 80-538 (July 16, 1980). A violation of the statute is punishable by six months in prison and/or a fine of up to $18,000.

3. 482 U.S. 522 (1987).

4. *Id.* at 524–25, 529.

5. *Id.* at 529, 533.

6. *Id.* at 538, 544.

7. *See, e.g.*, Columbia Pictures v. Bunnell, 2007 WL 2080419 (C.D. Cal. May 29, 2007).

8. *Id.* at 544 n.28 (citing Restatement (Third) of Foreign Relations Law § 442(1)(c)).

9. *See, e.g.*, Strauss v. Crédit Lyonnais, 242 F.R.D. 199 (E.D.N.Y. 2007). *See also* U.S. Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd., 2007 WL 2915647 (N.D. Ill. 2007) (stating that balancing factors to determine compliance should also include determination of whether the resisting party acted in good faith by seeking a waiver, if applicable, on the enforcement of a blocking statute from foreign holders of a particular privilege).

10. *See, e.g.*, *In re* Vivendi Universal S.A. Sec. Litig., 2006 WL 3378115, *3 (S.D.N.Y. 2006) (finding that French criminal blocking statute was "never expected nor intended to be enforced against French subjects" and that it does not subject defendants to a "realistic risk of prosecution"); United States v. First City Nat'l Bank, 396 F.2d 897, 904–5 (2d Cir. 1968) (noting that the chance German civil penalties will be enforced was "slight and speculative").

11. *See In re Vivendi*, 2006 WL 3378115, *3 (S.D.N.Y. 2006) ("United States' experience with the French Blocking statute teaches that there is little likelihood the [prosecution] threats will ever be carried out."); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 514 (N.D. Ill. 1984) ("[Defendant] has been unable to point to a single case in which France enforced its Blocking Statute.").

12. The Sedona Conference—Working Group 6—is currently working on a "Framework for Analysis of Cross Border Discovery Disputes," to be published in the summer or fall of 2008. More information is available at www.thesedonaconfernce.org.

13. *See, e.g.*, the Safe Harbor Program initiated by the U.S. Department of Commerce. The safe harbor (approved by the European Union in 2000) is an important way for U.S. companies to avoid experiencing interruptions in their business dealings with the European Union or facing prosecution by European authorities under European privacy laws. Certifying to the safe harbor will ensure that EU organizations know that your company provides "adequate" privacy protection, as defined by the directive, which allows the transfer of information from Europe to the United States. More information is available at www. export.gov/safeharbor/.

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Department filed a record number of 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 SEC and the Justice Department imposed a record $44 million in combined civil and criminal penalties against Baker Hughes, Inc.[3] Fourth, the SEC and the Justice Department commenced an unprecedented industry-wide investigation against oil and oil services companies with ties to Panalpina World Transport (Holding) Ltd.[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 anticorruption investigation ever, the 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 SEC, 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 SEC 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 15 cases against individuals—the largest number of individual prosecutions in any one given year in the entire 30-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.

> Lucent allegedly spent over $10 million in travel, lodging, and entertainment for about 1,000 employees of Chinese state enterprises to which Lucent was seeking to sell its equipment and services.

The Lucent Settlement

According to the Justice Department's non-prosecution agreement and the SEC's settled civil injunctive action, from 2002 to 2003, Lucent allegedly spent over $10 million in travel, lodging, entertainment, and related expenses for about 1,000 employees of Chinese state enterprises to which Lucent was seeking to sell its equipment and services, or from which Lucent was seeking business.[7] The traveling 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 was for the Chinese officials to inspect Lucent's factories and to train in using Lucent equipment. In reality, however, the officials 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 they spent little or no time visiting Lucent's facilities.[10] In fact, some of these trips were to cities where Lucent did not even have factories.[11] Employees of Lucent China, a Lucent subsidiary, based in Lucent's New Jersey headquarters, arranged the 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 state enterprise (pre-sale visit) or performing obligations under an existing contract (post-sale visit).[12]

Concerning pre-sale trips, from 2000 to 2003, Lucent allegedly provided about 330 Chinese employees of various levels with all-expenses-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 state enterprise 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 state enterprise]" and was improperly recorded as "[t]ransportation [i]nternational."[13] During the trip, the Chinese employees spent five days visiting Lucent facilities and nine days sightseeing in 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."

Post-sale trips were typically required by provisions in the contracts between Lucent and its state enterprise customers. These contracts typically obligated Lucent to provide its state enterprise customers with expense-paid trips to the United States and other countries for "factory inspections" or "training" purposes. Pursuant to these contracts, from 2000 to 2003, Lucent allegedly spent more than

$9 million on about 260 post-sale trips for more than 850 individuals.[15] Certain of these post-sale "factory inspection" trips occurred in countries where Lucent had no existing factories and consisted of entertainment and leisure activities.[16] Similarly, the "training" visits involved no legitimate training.[17] For example, in June 2001, Lucent paid for six Chinese 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."[18] 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 SEC'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 (1) 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; (2) payment of $21,687 for a deputy general manager of a state enterprise to obtain an MBA at Wuham University in China; and (3) a paid internship for 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.[19]

In authorizing payments for these trips, the government charged, Lucent 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. 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.[20] 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.[21] Additionally, notwithstanding the fact that the Chinese employees were identified by name, organization, and title, Lucent China's internal controls provided no mechanism for assessing whether any of the trips violated the FCPA.[22] Indeed, Lucent employees allegedly made little or no inquiry into whether the Chinese employees were government officials, or whether the Lucent-funded entertainment and leisure activities constituted "things of value" under the FCPA. 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. 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.[23] Thus, Lucent lacked the internal controls to detect and prevent trips intended for entertainment and leisure, rather than legitimate business purposes.

In settling the SEC'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. In addition, Lucent agreed to pay a monetary penalty of $1 million to the U.S. Treasury. The non-prosecution agreement further required Lucent to adopt new, or modify existing, internal controls, policies, and procedures to ensure that it can make and keep fair and accurate books, records, and accounts. In addition, Lucent agreed to implement a rigorous anticorruption compliance code, standards, and procedures designed to detect and deter violations of the FCPA and other applicable anticorruption laws.[24]

Other FCPA Cases Involving Travel and Entertainment

Although stand-alone travel, lodging, and entertainment cases are few and far between, the SEC 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.[25] Although 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" when the payments made are shown to be permissible under foreign law,[26] when payments are made directly to a service provider rather than first passing through the hands of government officials, and when the company does not have current or immediately pending business before the governmental agency whose employees' expenses are being covered.[27] Although by no means exhaustive,

the following enforcement actions contain allegations of FCPA violations based on illegal payments for travel and entertainment expenses.

In *In re Syncor International Corp.*, the SEC instituted and settled administrative proceedings against Syncor International Corp., a provider of radiopharmaceutical products and services, for violations of the anti-bribery and books and records provisions of the FCPA.[28] The SEC alleged that from the mid-1980s 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 SEC 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, during 2001 and 2002, Syncor 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 about 80 percent of the payments collected. The funds were then 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 percent and 3 percent 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.[29]

In re GE InVision, Inc., provides another example.[30] Here, the SEC alleged that, under the terms of a contract with an airport owned and controlled by the Chinese government, InVision was obligated to deliver two machines by mid-2003. However, due to problems in obtaining an export license from the U.S. 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.[31]

In *SEC v. Titan Corp.*, the SEC alleged, among other things, that Titan Corp. 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 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.[32]

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 OFFP.[33] 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.[34]

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

OPINION LETTERS AND COMPLIANCE

On September 11, 2007, the Justice Department issued an opinion release in response to a request from a U.S. insurance company 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. 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. The requestor represented further that:

- it would not pay any expenses related to the foreign officials' travel to or from the United States;
- it would not pay for the foreign officials' participation in the internship program;
- it has no nonroutine business under consideration by the relevant foreign government agency;
- 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;
- the routine business is guided by administrative rules with identified standards;
- its only work with other entities within the foreign government consists of collaboration on insurance-related research, studies, and training;
- the traveling foreign officials had no authority to make decisions that would affect the requestor's planned operations in the foreign country;

Lessons from Cases Involving Travel, Entertainment, and Lodging

The government's increasingly expansive view of the FCPA and its willingness to prosecute translate into a greater potential for liability and, therefore, the need for heightened sensitivity toward compliance. An environment in which small illicit payments, sometimes with partially legitimate purposes, is no longer tolerable. These cases, however, do not stand for the proposition that all travel or entertainment expenses 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 for legitimate business purposes that include 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.

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 also 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.

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. Although 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 noncontroversial issues such as who qualifies as a "foreign official"[40] and what it means to give "anything of value."[41] 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

- it intends to pay all costs directly to the service providers and properly record such payments on its books and records;
- branded souvenirs will be of nominal value (e.g., shirts or tote bags);
- 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
- it obtained a written legal opinion "that the requestor'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."[35]

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.[36]

In an analogous opinion issued on July 24, 2007, a U.S. company proposed to cover the domestic expenses 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.[37] 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 (1) would only pay for the domestic economy-class airfare of the delegates but not their international airfare; (2) would pay for lodging, transportation, and meal expenses during the single visit to the company's site; (3) had obtained a written assurance from an established law firm with offices both in the United States and the foreign country that the proposal does not violate the applicable law of the foreign country; (4) did not select the delegates for the visit; (5) would only host the delegates and one private government consultant; (6) would pay related costs and expenses directly to the service providers and record any such payments accurately; (7) would not give funds directly to the foreign government or the delegates; (8) would give souvenirs, if any, that would reflect the company's name and/or logo and would be of nominal value; and (9) 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.[38] 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."[39]

An ideal FCPA compliance program designed to detect travel and entertainment-related violations should include the following mechanisms to

- identify the recipient of the company-funded trip and note whether he or she is a foreign government official;
- if he or she is a foreign government official, ensure that the trip has a legitimate business purpose and consists of business-related activity;
- confirm that the trip is accurately recorded in the company's books and records;
- ensure that the trip receives the proper authorization from the company's legal and/or compliance departments; and
- document the approval process.

"foreign official." Concerning what qualifies as "anything of value," one can hardly argue that $10 million worth of travel is not something of value. Along with the Justice 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.

Post-*Akzo Nobel* and Post-*Flowserve*

Recent FCPA settlements are raising new questions about the potential exposure of foreign corporations and foreign subsidiaries of U.S. "issuers"[42] and "domestic companies"[43] under the FCPA. To the extent it takes place outside the territorial jurisdiction of the United States, the conduct of foreign corporations and foreign subsidiaries of U.S. entities has long been presumed to be beyond the reach of the FCPA.[44] Indeed, in passing the FCPA, Congress indicated a clear desire to avoid the diplomatic complications that might arise from such enforcement actions.[45] In recent years, however, foreign corporations and foreign subsidiaries of U.S. entities have found themselves staring more often at civil and criminal enforcement FCPA actions. Can these enforcement actions be squared with Congress's intent when it passed the FCPA? Stated differently, given Congress's express intent to exclude foreign subsidiaries of U.S. entities from the ambit of the FCPA, to what extent are the Justice Department and the SEC trying to sweep them back in through legal theories of general applicability such as vicarious liability?

Are Foreign Companies Subject to the FCPA?

Federal courts have consistently held that general principles of criminal liability—in particular, aiding and abetting—usually allow a person who is facially exempt from liability under a statute to be punished if he or she helps a covered person commit an act proscribed by the statute. The Third Circuit's decision in *United States v. Standefer*[46] represents a prime example of this general rule. In *Standefer*, the court rejected a criminal defendant's argument that, as a private citizen, he could not be charged with aiding and abetting the violation of a federal statute that was applicable only to IRS employees. As the court explained, the general aiding and abetting statute, 18 U.S.C. § 2, is not so limited.[47] It permits the punishment of "aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted."[48] Other federal courts have broadly agreed with the Third Circuit.[49] Accordingly, general criminal liability principles would ordinarily not bar prosecutors from charging entities that are not covered by the FCPA—such as foreign subsidiaries of U.S. issuers—with having aided and abetted an FCPA violation attributable to a covered party.

But that's not the end of the story. A court asked to consider whether a foreign subsidiary of a U.S. issuer can be charged with violating the FCPA, by virtue of conduct that does not touch on the instrumentalities of interstate commerce, would have to decide whether such an interpretation is consistent with general principles of statutory construction. The foremost of these principles, of course, is that courts must follow the intent of Congress, as revealed by the text, purposes, and legislative history of the relevant bill.[50] And on this point, we think the evidence strongly favors the conclusion that Congress did not intend to make the conduct of foreign corporations punishable under the FCPA, so long as that conduct does not take place on U.S. territory or use the instrumentalities of interstate commerce.

The only federal court to have directly considered this issue concluded that a foreign corporation cannot be held liable for violating the FCPA by acting as an "agent" of its domestic parent. In this private civil RICO action, the plaintiff charged that certain defendants—U.K. subsidiaries of a U.S. company—had violated the FCPA by making illicit payments to officials of the government of Saudi Arabia. Noting that the FCPA did not expressly cover these foreign entities, the court went on to consider whether Congress intended to extend the prohibitions of the FCPA to foreign subsidiaries by permitting them to be charged as agents of their U.S. parent company.[51] After reviewing the legislative history of the FCPA, the court found ample evidence to the contrary. In particular, the court noted that Congress, plainly concerned with the international comity implications of the FCPA, had "recognized the inherent jurisdictional, enforcement, and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill," and concluded that "the same concerns over diplomatic difficulties and jurisdictional contacts would apply whether a U.S.-owned foreign subsidiary or a foreign corporation was involved."[52] The *Dooley* court therefore concluded that Congress had not intended to allow foreign subsidiaries of U.S. issuers to be held liable for violating the FCPA.

Faced with a similar question, the Fifth Circuit likewise concluded that the government may not use general principles of criminal liability to extend the scope of the FCPA to foreign parties exempted by Congress. In *United States v. Castle*, the government charged certain U.S. citizens with having violated the FCPA by making illicit payments to Canadian officials.[53] Despite conceding that the foreign officials could not be directly charged with an FCPA violation, the government charged the Canadian officials under the general federal conspiracy statute, 18 U.S.C. § 371. The Fifth Circuit rejected this approach. It instead concluded that the government could not revert to general liability principles to "refute the overwhelming evidence of Congressional intent to exempt foreign officials from prosecution for receiving bribes, especially because Congress knew it had the power to reach foreign officials in many cases, and yet declined to exercise that power."[54] Like the *Dooley* decision, the *Castle* case demonstrates that federal courts generally have been reluctant to allow general liability principles to extend the reach of the FCPA to foreign parties expressly exempted from its reach.

But the most powerful evidence that the extraterritorial conduct of foreign corporations and foreign subsidiaries of U.S. issuers and domestic concerns cannot subject them to prosecution under the FCPA can be found in the 1998 amendments to the FCPA, which changed the blanket immunity that had previously shielded foreign corporations from FCPA liability. Foreign corporations can now be prosecuted for violating the FCPA's

anti-bribery provisions if they commit a prohibited act "while in the territory of the United States."[55] In other words, with the benefit of 20-plus years of experience with the FCPA, Congress reconsidered whether the acts of foreign corporations should fall within the ambit of the FCPA and decided to bring only acts taken within the territory of the United States within its scope. One hopes that federal prosecutors will pay close heed to this unambiguous expression of congressional intent and refrain from charging foreign corporations with violations of the FCPA based on conduct outside the territory of the United States or conduct with a tenuous nexus to the United States. If they do not, history strongly suggests that the federal courts will reject their efforts to alter Congress's carefully considered design.

Recent FCPA Settlements Involving Foreign Companies

Foreign corporations have faced indictment under the FCPA's anti-bribery provisions in three recent enforcement actions, raising concerns in at least some quarters that the government has adopted a newly aggressive view of the amenability of foreign corporations to suit under the FCPA.[56] On closer examination, however, this alarm seems somewhat overstated. In two of these three cases, the government's allegations plainly assert a violation of the FCPA by the foreign subsidiary in a manner that is wholly consistent with the FCPA's 1998 amendments.[57] The charging papers in the government's 2005 prosecution of DPC Tianjin, however, appear to construe the FCPA in an expansive and arguably unwarranted manner.

United States v. Syncor Taiwan, Inc.[58] Syncor Taiwan (a Taiwan corporation engaged in providing radio-pharmacy services and outpatient medical imaging services, and a wholly owned subsidiary of Syncor International Corporation, a Delaware corporation) was charged with having paid improper commissions to doctors who controlled the purchasing decisions for the nuclear medicine departments of certain hospitals, including some hospitals owned by the government of Taiwan, for the purpose of obtaining or retaining business with those hospitals. These allegedly improper commissions (typically 10–20 percent of sales) totaled at least $400,000 from the inception of Syncor Taiwan through September 2002. Syncor Taiwan pleaded guilty to violating the FCPA's anti-bribery provision and agreed to pay a $2 million fine, the maximum criminal fine for a corporation under the FCPA.[59]

At first glance, it may appear that Syncor Taiwan, a foreign corporation, pleaded guilty to violating the FCPA by committing entirely foreign conduct. A close review of the charging papers reveals, however, that Syncor Taiwan's allegedly illegal conduct had a meaningful domestic component. According to the government's allegations, Syncor Taiwan's chairman, who resided in California, approved the illegal payments while in California.[60] Because the allegedly violative conduct occurred while Syncor Taiwan, by its chairman, was "in the territory of the United States," the government's prosecution of Syncor Taiwan appears to represent a straightforward application of the FCPA's terms.[61]

United States v. SSI Int'l Far East, Ltd.[62] On October 16, 2006, SSI International Far East, Ltd. (SSI Korea), the Korean subsidiary of Schnitzer Steel, a U.S.-based company, pleaded guilty to FCPA violations and paid a $7.5 million fine. The parent company, Schnitzer Steel, entered into a deferred-prosecution agreement and settled an enforcement action with the SEC by agreeing to pay $7.7 million in monetary penalties and engage a compliance monitor for three years. Much like Syncor Taiwan, SSI Korea is a foreign subsidiary of a U.S. issuer that was charged with making illegal bribery payments in its country of incorporation. Again, the jurisdictional hook here was the presence of SSI Korea employees in the United States. The criminal information charged that SSI Korea employees in Tacoma, Washington, and Portland, Oregon, directly participated in the bribery scheme by making wire transfers from Portland, Oregon, to off-the-books bank accounts in South Korea affiliated with employees of defendant SSI Korea. These funds were then allegedly passed on to foreign officials in China and South Korea. Thus, it appears that SSI Korea, by the conduct of its domestic employees, engaged in conduct prohibited by the FCPA "while in the territory of the United States." For this reason, the SSI Korea prosecution appears to represent a relatively uncontroversial application of the expanded jurisdictional provisions of the FCPA.

United States v. DPC (Tianjin) Ltd.[63] Conversely, the jurisdictional rationale underpinning the government's prosecution of DPC (Tianjin) Ltd. is far from apparent. DPC Tianjin, a Chinese subsidiary of U.S.-based Diagnostic Products Corporation (DPC), settled charges that it violated the FCPA. The criminal information principally alleged that DPC Tianjin violated the FCPA by making payments to government employees at various Chinese hospitals, again raising the question of why the extraterritorial conduct of a foreign corporation was violative of the FCPA. Unfortunately, the government's charging document does little to answer this question.

> The *Lucent* settlement should be instructive to companies looking for guidance on how to structure their internal policies and procedures with respect to travel and entertainment.

The government's charging document appears to make clear that DPC Tianjin was not charged under 18 U.S.C. § 78dd-3, the expanded jurisdictional provision at issue in Syncor Taiwan and SSI Korea. Rather, the government charges that "Defendant DPC Tianjin acted as an *agent* within the meaning of the [FCPA]," apparently invoking the terms of 18 U.S.C. § 78dd-1. The factual assertions then veer in the direction of what appears to be 18 U.S.C. § 78dd-3 by charging conduct taken within the territory of the United States: "[I]n the Central District of California and elsewhere, defendant DPC Tianjin used electronic mail and other means and instrumentalities of interstate commerce corruptly in furtherance of an offer, promise to pay and authorization of the payment

of money. . . ." But the specific allegations concerning DPC Tianjin's conduct make no mention of the kind of domestic conduct that served as the basis for the prosecution of Syncor Taiwan and SSI Korea.

Instead, the charging document seems to allege that DPC Tianjin's domestic conduct in the Central District of California consisted of sending reports containing financial information "by electronic mail message and facsimile to DPC's principal place of business in Los Angeles, California." This is no throwaway line, as the very next paragraph seemingly makes clear the government's view of why this conduct was important: "DPC Tianjin caused approval of the proposed budgets to be sent by telephone, facsimile and electronic message from Los Angeles, California to Tianjin, China."[64] This prosecution is difficult to square with the text of the FCPA. As the *Dooley* court explained, Congress's clear intent was to *exclude* foreign corporations from prosecution altogether. Charging foreign corporations as "agents" of their domestic parent based on what can, at best, be described as tenuous jurisdictional grounds, would nullify Congress's intent. If Congress had wanted to lift this bar entirely, it could have done so in the 1998 amendments when it expressly reconsidered the applicability of the FCPA to the acts of foreign individuals and corporations. Instead, Congress chose to limit its expansion of the scope of the FCPA to the prosecution of foreign corporations only for acts that occur while the foreign entity or its agent is physically present in the territory of the United States. The apparent position of the government in the DPC Tianjin case that a foreign corporation may be charged with violating the FCPA for sending email and fax transmissions *into* the United States from *abroad* represents a departure from the FCPA's legislative history and judicial precedent.

> What seems clear from recent FCPA cases is that the Justice Department and the SEC appear to take the view that the jurisdictional scope of the FCPA is limitless.

To date, the DPC Tianjin case appears to be the only instance in which a foreign subsidiary has been criminally prosecuted as an "agent" of a U.S. issuer.[65] It also appears to stand alone in using a foreign subsidiary's contacts with its domestic parent as a basis to charge direct liability under the FCPA. Accordingly, it appears that there is little cause for concern at present that the government will adopt the DPC Tianjin model more broadly. The matter certainly merits close scrutiny as other enforcement actions involving foreign subsidiaries wind their way to conclusion.

Is the Government Finding Novel Ways to Prosecute Foreign Entities?

United States v. Akzo Nobel N.V.[66] This recently concluded joint Justice Department and SEC enforcement action features yet another foreign corporation as its primary target—this time Akzo Nobel N.V., a Dutch corporation with its headquarters in the Netherlands. According to the government's charges, Akzo Nobel, through two Dutch subsidiaries, made improper payments to Iraqi government officials with responsibility for aspects of the OFFP. Just as in the Syncor Taiwan and SSI Korea cases, however, there is no jurisdictional novelty here. The SEC's complaint makes it clear that Akzo Nobel, despite its foreign place of incorporation and foreign headquarters, was subject to liability under the FCPA because its American Depository Receipts were traded on the NASDAQ at the time when the alleged misconduct occurred and, therefore, was a U.S. issuer within the meaning of the FCPA.[67] Akzo Nobel paid about $3 million in civil penalties and disgorgement to settle the SEC's charges, and entered into a deferred prosecution agreement with the Justice Department.

The deferred prosecution agreement, however, contains an interesting and seemingly novel provision, which merits some attention from those concerned about the ability of the SEC and the Justice Department to reach foreign corporations under the FCPA. The Justice Department's press release recites that "within 180 days, N.V. Organon [one of the Dutch subsidiaries implicated in the misconduct] is expected to reach a resolution with the Dutch National Public Prosecutor's Office for Financial, Economic, and Environmental Offenses regarding its conduct under the OFFP, wherein it will pay a criminal fine of about $381,000 in the Netherlands. If N.V. Organon fails to reach a timely resolution with the Dutch Public Prosecutor, Akzo Nobel will pay $800,000 to the U.S. Treasury."[68] The non-prosecution agreement thus appears to impliedly concede that the United States lacks jurisdiction to impose direct punishment on N.V. Organon but nonetheless contemplates that the parent's punishment will be enhanced if the subsidiary (over which the United States has no jurisdiction) does not accede to punishment in its home country.

Somewhat similar to the Akzo Nobel settlement, the SEC's settlement (but not the Justice Department's announcement) calls for Flowserve B.V., a Dutch subsidiary of Flowserve, to "enter into a criminal disposition with the Dutch Public Prosecutor pursuant to which it will pay a fine." Other than the Akzo Nobel and Flowserve settlements, there are no other cases in the FCPA area where the Justice Department and the SEC are compelling entities over which they have no jurisdiction to settle criminal cases in their home country. Only time will tell whether this novel settlement structure is unique to these two cases or whether this kind of settlement will become commonplace as the SEC and the Justice Department continue their aggressive worldwide pursuit of companies believed to have violated the FCPA.

What seems clear from recent FCPA cases, and some of the ongoing publicly disclosed FCPA investigations, is that the Justice Department and the SEC appear to take the view that, notwithstanding Congress's stated intent to limit the jurisdictional reach of the FCPA to foreign corporations that take some action while physically present within the territory of the United States, the jurisdictional scope of the FCPA is limitless. The admittedly single litigated case that has confronted this question head-on appears to disagree

with the Justice Department's and SEC's position on the jurisdictional scope of the FCPA.[69] It remains to be seen whether a court will get a chance to clarify when, if ever, a foreign corporation can be prosecuted in the United States for conduct taken entirely outside the United States. ■

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Endnotes

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).

2. Press Release, Dep't of Justice, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines, 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); Press Release, Dep't of Justice, 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, Press Release No.07-296 (Apr. 26, 2007).

4. *Panalpina Launches Internal Bribery Inquiry after U.S. 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 Program, Manipulation of the Oil-for-Food Program 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); Press Release, Dep't of Justice, Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations, Press Release No. 07-1028 (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., Civ. Act. No. 1:07-cv-02301 (D.D.C. filed Dec. 21, 2007).

10. *Id.* at 6.

11. *Id.* at 12.

12. *Id.* at 4.

13. *Id.* at 8.

14. *Id.* at 11.

15. *Id.* at 4.

16. *Id.* at 2.

17. *Id.* at 12.

18. *Id.* at 5.

19. *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).

20. Complaint at 2, SEC v. Lucent Tech., Inc., Civ. Act. No. 1:07-cv-02301 (D.D.C. Dec. 21, 2007).

21. *Id.* at 14.

22. *Id.* at 6.

23. *Id.* at 2.

24. Press Release, Dep't of Justice, Press Release No. 07-1028 (Dec. 21, 2007), *supra* note 7.

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

26. 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.

27. *See* FCPA Op. Proc. Rel. 2004-01 (2004); FCPA Op. Proc. Rel. 2004-03 (2004).

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

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

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

31. *Id.*

32. 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).

33. SEC v. Ingersoll-Rand Co., No. 107- CV-01955 (D.D.C. filed Oct. 31, 2007), Litigation Release No. 20353 (Oct. 31, 2007).

34. Complaint at 2, SEC v. Ingersoll-Rand, Co. Ltd., (D. D.C. Oct. 31, 2007).

35. FCPA Op. Proc. Rel. 2007-02 (2007).

36. *Id. See also* 15 U.S.C. § 78dd-2(c)(2)(A).

37. FCPA Op. Proc. Rel. 2007-01 (2007).

38. The only meaningful distinction between the two opinion releases is that one requestor 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).

39. FCPA Op. Proc. Rel. 2007-01 (2007) (citing 15 U.S.C. §§ 78dd-1(c)(2)(A) and 78dd-2(c)(2)(A)).

40. 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) Co. Ltd., No. CR 05-482 (C.D. Cal. filed May 20, 2005) (classifying physicians and laboratory workers at government-owned hospitals as "foreign official[s]").

41. 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 also other tangible and intangible benefits given to a foreign official including (as in the Lucent matter) the payment of nonbusiness 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 June 27, 2007), Press Release, Dep't of Justice, Press Release No. 07-474 (June 29, 2007); SEC v. Wooh, No. 07-CV-957 ST (D. Or. filed June 27, 2007), Litigation Release No. 20174 (Jun. 29, 2007) (finding perfume to be a thing of value); *see also* United States v. York Int'l Corp.,

No. 07-CV-01750 (D.D.C. filed Oct. 1, 2007), Press Release, Dep't of Justice, Press Release No. 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").

42. An "issuer" is any entity "which has a class of securities registered pursuant to [15 U.S.C. § 78l] or which is required to file reports under [15 U.S.C. § 78o(d)]." *See* 15 U.S.C. § 78dd-1(a).

43. The term "domestic concern" encompasses "any individual who is a citizen, national, or resident of the United States," and "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States." *See* 15 U.S.C. § 78dd-2(h)(1).

44. *See, e.g.*, H. Lowell Brown, *Extraterritorial Jurisdiction under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?*, 26 N.C. J. Int'l L. & Comm Reg. 239, 259–60 (2001).

45. *See, e.g.*, Dooley v. United Tech. Corp., 803 F. Supp. 428, 438–39 (D.D.C. 1992) (discussing the legislative history of the FCPA and concluding that "the authors of the FCPA were concerned with international comity").

46. United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979).

47. *Id.* at 1085.

48. *Id.* (quoting S. Rep. No. 1020 (1951)).

49. *See, e.g.*, *In re* Nofziger, 956 F.2d 287, 290 (D.C. Cir. 1992) ("[T]he law is well-settled that one may be found guilty of aiding and abetting another individual in his violation of a statute that the aider and abettor could not be charged personally with violating.") (citing, inter alia, Coffin v. United States, 156 U.S. 432, 447 (1895); United States v. Smith, 891 F.2d 703, 710–11 (9th Cir. 1989); United States v. Lester, 363 F.2d 68, 72 (6th Cir. 1966)).

50. *See, e.g.*, Atl. Mut. Ins. Co. v. Comm'r of Internal Revenue, 523 U.S. 382, 387 (1998) (noting that in construing a statute, a court "must give effect to the unambiguously expressed intent of Congress"); Dole v. United Steel Workers of Am., 494 U.S. 26, 34 (1990) (noting that traditional tools of statutory construction include a statute's language, structure, and purpose).

51. *See* Dooley v. United Tech. Corp., 803 F. Supp. 428, 438–39 (D.D.C. 1992).

52. *Id.* at 439.

53. United States v. Castle, 925 F.2d 831 (5th Cir. 1991).

54. *Id.* at 835.

55. 15 U.S.C. § 78dd-3(a). *See also* S. Rep. No. 105-277 (July 30, 1998), at 5–6 ("It is expected that the established principles of liability, including principles of vicarious liability, that apply under the current version of the FCPA shall apply to the liability of foreign businesses for acts taken on their behalf by their officers, directors, employees, agents or stockholders in the territory of the United States, regardless of the nationality of the officer, director, employee, agent, or stockholder."); H.R. Rep. No. 105-802 (Oct. 8, 1998) (concurring that "this section limits its jurisdiction over foreign nationals and companies to instances in which the foreign national or company takes some action while physically present within the territory of the United States").

56. *See, e.g.*, Lawrence A. Urgenson & Audrey L. Harris, *Foreign Companies Prosecuted in the U.S. for Bribes Overseas*, 15 Bus. Crimes Bull. No. 2 (Oct. 2007).

57. *See* United States v. Syncor Taiwan, Inc., 1:02CV02421 (D.D.C. filed Dec. 10, 2002); United States v. SSI Int'l Far East, Ltd., No. Cr. 06-398 (D. Or. Oct. 10, 2006).

58. Press Release, Dep't of Justice, Press Release No. 02-707 (Dec. 10, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/ December/ 02_crm_707.htm.

59. In addition to the bribery payments in Taiwan, Syncor, the parent company, was alleged to have made illicit payments in Mexico, Luxembourg, Belgium, and France. To resolve these allegations, Syncor agreed to cease and desist from future violations of the FCPA, retain an independent compliance consultant, and pay a $500,000 civil penalty. Exchange Act Release No. 46979 (Dec. 10, 2002), *available at* http://sec.gov/litigation/ admin/34-46979.htm.

60. *See* Criminal Information, 02-CR-1244-ALL (C.D. Cal. filed Dec. 4, 2002).

61. *See* 15 U.S.C. § 78dd-3(a) ("Prohibited foreign trade practices by persons other than issuers or domestic concerns" states: "It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 or a domestic concern, as defined in section 104 of [the FCPA] or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value [to a foreign official, party, etc . . .].").

62. Press Release, Dep't of Justice, Press Release No. 06-707 (Oct. 16, 2006), *available at* http://www.usdoj.gov/criminal/pr/press_releases/_2006/10/2006_4809_10-16-06schnitzerfraud.pdf.

63. Press Release, Dep't of Justice, Press Release No. 05-282 (May 20, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/May/05_crm_282.htm.

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

65. *See* 15 U.S.C. § 78dd-1(a) (defining "issuer"); 15 U.S.C. § 78dd-2(a) (defining "domestic concern").

66. *See* Press Release, Dep't of Justice, Press Release No. 07-1024 (Dec. 20, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/_December/07_crm_1024.html.

67. *See* SEC Complaint ¶ 7, SEC v. Akzo Nobel, N.V., No. 07-2293 (D.D.C. filed Dec. 20, 2007), *available at* http://www.sec.gov/litigation/complaints/2007/ comp20410.pdf.

68. *See* Press Release, Dep't of Justice, Press Release No. 07-1024, *supra* note 72.

69. Dooley v. United Tech. Corp., 803 F. Supp. 428, 439 (D.D.C. 1992).

Practice Tip for Young In-House Lawyers

"When managing litigation, transmit all knowledge—whether good, bad, or indifferent—to your outside lawyers. Your lawyer should not have to guess or make assumptions about you. Make sure your lawyer has all the documents and talks to direct and indirect witnesses. The goal is to allow your lawyer to become an expert on your company and tell the most compelling story. A well-prepared lawyer, in a juror's mind, occupies the moral and emotional high ground."

By Thatcher Peterson, Product Safety Manager, Oshkosh Corporation

IN-HOUSE TOP 10

The *In-House Top 10* provides insightful comments from in-house counsel, past or present, put in David Letterman-esque list form. This edition's Top 10 comes from the gate group's legal team, including Kristin Brown, Hooman Yazhari, Susan Joe Stone, and Kevin Forjette.

Top 10 Tips for Selecting and Managing Outside Counsel

10. Ensure that the selection of outside counsel is always made by the law department and not through other business functions in the company. Any slippage on this point diminishes your ability to control expenditures within the legal budget and to leverage appropriately outside resources for the matter at hand.

9. Establish consistent requirements in retainer letters limiting the number of timekeepers, requiring advance notice of monthly statements, and limiting costs that can be billed for legal research, travel, and the like.

8. Perform due diligence in selecting outside counsel and interview the individual attorneys you will be working with in light of the job and tasks that will be required of them.

7. Work to develop personal relationships with the attorneys who serve as your outside counsel. These relationships will prove invaluable in ensuring that outside counsel give as much time, attention, and focus as possible to your legal issues, and help to increase your confidence that you are getting the right answers in an efficient and cost-effective manner.

6. Don't be afraid to admit that you've made a mistake in selecting outside counsel for a certain task. When you know there is a problem, make a change to another firm earlier rather than later.

5. Consider reducing the number of outside firms you rely upon and increasing your buying leverage with a few firms through increased reliance and workload.

4. Don't be afraid to challenge counsel on bills that seem excessive or for which sufficient detail is not provided. Such conversations can help you understand the full scope of the services being provided and can also help outside counsel better understand your position on these points.

3. Negotiate discounts and fee reductions wherever possible. It is important to use outside counsel who will assist you in identifying cost-saving opportunities, including the use of contract attorneys and related measures.

2. Reward good work with repeat business.

And the number one tip for selecting and managing outside counsel:

1. Set clear expectations from the very beginning in terms of the scope of work, priorities, timing, and staffing. In particular, senior in-house lawyers should work to manage outside counsel and in-house client expectations of what answers can be obtained from outside counsel and what answers must be driven from commercial/business functions.

If you are on the inside and would like to submit your own Top 10, please contact Christopher Akin, coeditor, at (214) 855-3081 or by email at cakin@ccsb.com. Topics can be instructive, humorous, or anything of interest to the committee's membership.

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