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When being hospitable can land you in trouble (Part 4)



01 July 2009 8:57 AM

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In the first two articles, [we introduced](#) the Foreign Corrupt Practices Act (FCPA), discussing its basic provisions, its growing importance as a law enforcement tool by U.S. authorities and [its general application](#) to the hotel industry. There are many opportunities for members of the hospitality industry to run afoul of the FCPA, which generally prohibits giving anything of value to a foreign official to acquire an unjustified benefit. In [last week's article](#), the third in this series, we provided some pointers on developing an FCPA compliance program. As we noted, companies with strong FCPA compliance programs that are fully integrated into business practices and audited may be treated more

leniently by enforcement authorities when problems arise. As Confucius said, "Be not ashamed of mistakes and thus make them crimes," so if you have a problem, now is the time to act before you become the government's next FCPA poster child. The risk of mammoth fines and criminal sentences is too substantial to ignore. To conclude this series, we offer a few concrete examples of where others have gone astray.

Costly construction contracts: Halliburton and KBR

On 11 February 2009, the United States Justice Department and the Securities and Exchange Commission announced separate settlements with Halliburton and its former affiliate, KBR, Inc., and KBR's wholly owned subsidiary, Kellogg Brown & Root LLC, in their long-running investigations into US\$6 billion in contracts on Bonny Island, Nigeria. According to the plea documents, a joint venture, operating through three Portuguese special-purpose companies, conspired to violate the FCPA by authorizing and promising to pay bribes via intermediaries to several Nigerian officials to secure procurement and construction contracts. Six days later, the

two UK nationals who allegedly served as the agents in this bribery scheme were indicted by a grand jury in Texas.

Under the terms of the DOJ plea agreement, a former subsidiary of Halliburton pleaded guilty and KBR LLC agreed to pay a US\$402 million criminal fine (comprised of an initial payment of US\$52 million and seven subsequent installments of US\$50 million each), retain an independent compliance monitor for a three-year period, and to continue cooperation with the DOJ. Separately, the SEC charged KBR and Halliburton with books and records and internal control violations in relation to the bribery scheme. To settle the SEC charges, KBR and Halliburton jointly agreed to pay US\$177 million in disgorgement of profits from the transaction. The settlement with the DOJ represents the second-largest fine ever in an FCPA prosecution, and the largest for a U.S. company. One moral of the story: hiring others to do your dirty work doesn't keep you clean.

Generous junkets: Lucent Technologies

On 21 December 2007, the DOJ and SEC settled enforcement actions with telecommunications company Lucent Technologies Inc. Pursuant to the settlements, Lucent agreed to pay US\$1 million in fines and US\$1.5 million in civil penalties for asserted FCPA violations in connection with Lucent's sponsorship of officials of Chinese state-owned telecommunications companies to travel to the U.S. and other countries. These trips consisted primarily of sightseeing, entertainment and leisure, and were approved with the consent of the highest officials at Lucent China.

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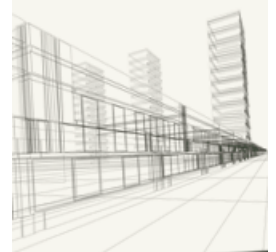
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Lucent alleged that the majority of the trips were designed to allow the Chinese foreign officials to inspect Lucent's factories, pursuant to contracts between Lucent and the Chinese state-owned companies. However, during many of these trips, the officials spent little or no time visiting Lucent's facilities and instead visited tourist destinations such as Hawaii, Las Vegas, the Grand Canyon, Disney World, Los Angeles and New York City. The SEC and the DOJ noted that Lucent began outsourcing its manufacturing in 2001, leaving few factories to visit. Internal emails revealed that Lucent employees were aware that trips did not involve "factory tours" but used the term to help Chinese customers obtain visas and get through U.S. immigration controls. Lucent also provided the officials with per diems of US\$500 to US\$1,000 per day, even though it covered all lodging, transportation, food, and entertainment expenses. Most of the trips were recorded in Lucent's books and records as "Marketing Expenses," "Services Rendered – Other Services," "Transportation International," and "Lodging Expenses," though none of these accounts was meant to record customer travel. A lesson learned: be careful of supporting government travel, and don't use your resorts to sell limited service.

Rough sailing for smooth subsidiaries: Con-Way

The SEC continues to hold parent issuers responsible for the activities of its foreign subsidiaries, even for small but recurring operating payments. The Con-Way case, announced in late August 2008, involved allegations that a former majority-owned subsidiary of Con-Way in the Philippines, Emery International, a company engaged in the freight forwarding business, made a large number of small payments to Philippine customs officials and to officials of state-owned airlines in connection with freight forwarding and customs brokerage activities in that country. The payments totaled US\$417,000. Con-Way was prosecuted by the SEC for violations of the FCPA's books and records and internal control provisions. It agreed to pay a civil penalty of US\$300,000 to settle the allegations. The payments were made not to expedite the shipment of cargo, but to induce actions that would lower shipping costs or cause the officials to overlook violations of law or regulations, or to resolve disputes. Tip of the day: even small payments can fall under the government's FCPA microscope.

Comedian Steven Wright said it best: "Experience is something you don't get until just after you need it." Consider yourself forewarned—educate yourself and your employees about the FCPA, ensure compliance and audit your efforts, or you may find yourself writing big checks to the U.S. Treasury for something other than taxes, or even residing in a taxpayer-funded "hotel" with door locks that work only from the outside.

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