

## **ICE and the Alcatel-Lucent DPA: A Pandora's Box for Settling FCPA Defendants**

In what my colleague Howard Sklar called the “opening of Pandora’s Box” and as reported by the FCPA Blog with what are “new issues raised in a FCPA case”, Costa Rica's Instituto Costarricense de Electricidad (ICE), filed a Petition last week for relief and objections to Alcatel-Lucent's plea agreement and proposed Deferred Prosecution Agreement (DPA), regarding its settlement of charges that it violated the Foreign Corrupt Practices Act (FCPA). This Petition was filed in the federal district court where the settlement and proposed DPA will be passed upon.

As reported in the FCPA Blog, in December, 2009, Alcatel-Lucent S.A. agreed to pay \$137 million for bribing officials in Costa Rica, Honduras, Malaysia, and Taiwan. The company and three subsidiaries will pay \$92 million to resolve criminal charges with the Department of Justice (DOJ) and \$45 million in disgorgement to the Securities and Exchange Commission (SEC). By agreeing to plead guilty, Alcatel-Lucent escaped substantive bribery charges. In a two-count criminal information, the DOJ charged the company with violating the internal controls and books and records provisions of the FCPA.

ICE claimed in its Petition that it was a victim of Alcatel-Lucent and that as such it was entitled to protection by the DOJ in the settlement of the matter. ICE objected the Plea Agreement and DPA for three reasons:

1. The proposed settlement is inconsistent with 18 USC 3771;
2. The proposed settlement is inconsistent with the interests of justice, the public’s interest and public policy; and
3. The Defendants have already violated the DPA.

### ***I. 18 USC 3771***

ICE alleges that 18 USC 3771, the “Crime Victims’ Rights Act”, give ICE the right to be kept informed by the DOJ, the right to be heard in court and the right to “full and timely restitution.” These rights are mandatory and ICE claims that it has the full right to be heard at any hearing resolving the matter regarding Alcatel-Lucent. ICE claims that it is a victim of over-priced products and services from Alcatel-Lucent due to the bribery that Alcatel-Lucent admitted to in the court filings related to the DPA. Additionally, ICE makes separate business interruption and related losses that are all subject to restitution under the Crime Victim Rights’ Act.

### ***II. Not in the Interest of Justice or Public Policy***

In this claim ICE makes several arguments. (1) The DPA fails to satisfy the fundamental requirements of law because it is too lenient and hence it is not in the interest of either the public or in the interest of justice. (2) The plea agreement fails to reflect the actual offense conduct. (3) The methodology used to calculate the sentencing is flawed and fails to take into account victim

losses. (4) The plea agreement does not punish any officers or directors of Alcatel-Lucent despite several references in the documents to their criminal conduct. (5) The failure of the plea agreements to follow standard mandatory pre-trial services.

### ***III. The Defendants Continue to Violate the DPA***

In a very interesting section, ICE claims that Alcatel-Lucent has already and is continuing to violate the DPA. ICE alleges that under the DPA, Alcatel-Lucent is prohibited from making statements “contradicting their supposed acceptance of responsibility.” However, ICE claims that Alcatel-Lucent went into court in Costa Rica and announced, in a criminal case involving Alcatel-Lucent’s former agents, that Alcatel-Lucent had no knowledge of the agents’ actions and indeed Alcatel-Lucent “*was a victim of these ex-employees.*” (italics mine)

Although ICE claims that it has been in contact with the DOJ and SEC regarding its allegations and claims, we are not aware of any public statements made by these agencies regarding ICE’s claims. Therefore, we do not know the DOJ or SEC position on these matters. However, if ICE does successfully assert a claim under the Crime Victims’ Rights Act, it could well open up court review of any DPA or other agreement, both in this case and going forward. This could truly be a Pandora’s Box for many settling defendants if the people of Costa Rica can assert such a claim through ICE.

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This week, Howard Sklar and I will discuss the ICE filing as well as other topics. Please check us out at ***This Week in the FCPA***.

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*Wednesday, May 3 from 8-10 AM PDT at the Renaissance Meadowlands Hotel, in Rutherford, NJ. For information and registration details click [here](#).*

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