

No. 95-03

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Foreign Corrupt Practices Act Review

Opinion Procedure Release

The Department has received an FCPA opinion request from an American company and several foreign entities and individuals with which the American company proposes to enter into a joint venture. The proposed Joint Venture would engage in cooperative ventures in the investment banking field in a foreign country. The Joint Venture would also apply for a license to do business in the foreign country. Formation of the Joint Venture was conditioned upon, in part, a favorable FCPA opinion from the Department.

One of the proposed Joint Venture partners of the American firm is an entity which is the family investment company of, among others, a relative of the leader of the country in which the Joint Venture will conduct business. The relative is represented to be a prominent businessperson with significant managerial experience and responsibilities and who holds public and political party offices. Without question, the relative is a "foreign government official" as that term is used in the FCPA, and it is this circumstance which has prompted the request under the FCPA Opinion Procedure.

The American company, which will provide 50 percent of the start-up capital for the Joint Venture, would have effectively irrevocable power to appoint the most senior official of the Joint Venture -- and any successors -- who would have extensive powers in the management of the business of the Joint Venture, including the power to appoint outside auditors. The Joint Venture official would also have the power to take such steps as he or she deemed necessary to ensure compliance with the FCPA, including the power to order an audit.

The role of the foreign government official and member of that official's immediate family in the Joint Venture would include assisting the Joint Venture in making important contacts in the country, providing investment advice and management consulting services, and development of new business for the Joint Venture.

Each of the parties to the FCPA request would receive a percentage of the gross or net profits received as a result of the government projects awarded to the Joint Venture. The foreign government official and the official's relative would also receive annual payments in the range of \$100,000 to \$250,000 for services rendered as officers of the Joint Venture.

The foreign government official and the official's relative have signed the FCPA Opinion Request, and have thus represented directly to the Department of Justice that they will comply with the FCPA as if they were subject to the Act. All the requestors, including the foreign official, further represent, among other things, the following:

1. Each requestor is familiar with the FCPA and its prohibitions; is in compliance with the laws of the foreign country and the FCPA as if they were subject to it and will remain in compliance for the duration of the Joint Venture.
2. No part of the payments received directly or indirectly by the requestors from the American company will be used for any purpose, nor will any action be taken by any requestor in connection with the business of the Joint Venture, which would constitute a violation of the laws of the foreign country or the FCPA.
3. The foreign official's government and political party duties do not involve any decisions to award business in connection with the government projects sought by the Joint Venture or in the appointment, promotion, or compensation of the government officials who will decide which companies will receive such business, nor are those duties related to any of the official's other duties on behalf of the Joint Venture or the interests of the American company.

4. Should the nature of the foreign government official's public offices or responsibilities change so that the official's representations in the FCPA Opinion Procedure request would no longer apply, the official will so notify the other requestors so that appropriate actions may be taken.
5. No meetings with government officials on behalf of the Joint Venture will be initiated by the foreign government official and all such meetings will be attended by no fewer than two Joint Venture representatives.
6. In connection with each meeting the official attends with a government official on behalf of the Joint Venture, the official will provide a letter to the Minister and most senior civil servant of the relevant government department, stating that the official is acting solely in the official's capacity as a participant in the Joint Venture.
7. No member of the Joint Venture will assign its rights under the Joint Venture to a third party without the prior approval in writing of the other Joint Venture members. The requestors acknowledge that such a transfer, if approved, may require consultation with the Department of Justice should the identity of the transferee implicate the FCPA.
8. Specific procedures will be in effect with respect to the operation of the Joint Venture, including requirements concerning the keeping of accurate expense, correspondence, and other records of the business of the Joint Venture, including a requirement that all payments by the Joint Venture will be by check or bank transfer and no payments will be made in cash or by bearer instruments. All payments owed to a requestor or Joint Venture party will be made directly to that party and all payments to foreign parties will be made in the foreign country in question.

Based upon all the facts and circumstances, as represented by the requestors, the Department does not presently intend to take any enforcement action with respect to the prospective Joint Venture described in the request.

The FCPA Opinion Letter and this Release have no binding application to any party which did not join in the request, and can be relied upon by the requesting parties only to the extent that the disclosure of facts and circumstances in the request is accurate and complete and continues to accurately and completely reflect such facts and circumstances.