

No. 2001-01

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### **FCPA Opinion Procedure Release 2001-01**

The Department has reviewed the FCPA Opinion request by a U.S. company ("Requestor"), which plans to enter into a joint venture with a French company. The Requestor and the French company will each own 50% of the joint venture and will share the profits and losses of the joint venture equally. Both companies plan to contribute pre-existing contracts and transactions to the joint venture, including contracts procured by the French company prior to the effective date of the French Law No. 2000-595 Against Corrupt Practices ("FLAC").

The Requestor represents that it has taken a number of precautions to avoid a knowing violation of the Foreign Corrupt Practices Act ("FCPA"). The Requestor has asked whether, given the nature of these precautions, it will be deemed to have violated the FCPA by entering into the joint venture should it later become apparent that one or more of the contacts contributed by the French company were obtained or maintained through bribery.

With respect to the proposed joint venture, the Requestor has made the following representations:

1. The French company has represented to the Requestor that none of the contracts and transactions to be contributed by the French company were procured in violation of applicable anti-bribery or other laws. The Requestor has not represented any facts which would indicate that the French company's representation is, or may be, false.
2. In the event that the Requestor learns that the French company has breached the foregoing representation, the Requestor may, under the joint venture agreement, terminate the joint venture or refuse to satisfy obligations under the agreement in the following circumstances: (i) the French company is convicted of violating the FLAC; (ii) the French company enters into a settlement with an admission of liability under the FLAC; or (iii) the Requestor learns of evidence that the French company violated anti-bribery laws and that violation, even without a conviction or settlement, has a material adverse effect upon the joint venture.
3. The French company has terminated all agent agreements related to the contracts that it will contribute to the joint venture that were effective prior to January 1, 2000, and liquidated all payments obligations owed to those agents. None of the obligations for these agreements between the agents and the French company will be contributed to or retained by the joint venture. Accordingly, no funds contributed by the Requestor to the joint venture, nor any funds of the joint venture itself, will be expended to pay any compensation to the French company for the termination and liquidation of agent agreements for the period prior to January 1, 2000.
4. The French company has entered into agent agreements that came into effect after January 1, 2000. Although the French company will retain some obligations to pay commissions and other compensation to these agents for work done on contracts that will be contributed to the joint venture, none of these obligations will be contributed to or retained by the joint venture. Accordingly, no funds contributed by the Requestor to the joint venture, nor any funds of the joint venture itself, will be expended to pay any compensation to any agent of the French company for any existing agreements or obligations entered into in connection with contracts contributed to the joint venture.
5. The joint venture will enter into new agent agreements in accordance with a rigorous compliance program designed to avoid corrupt business practices. Pursuant to the joint venture agreement and the joint venture's compliance program, no party to the joint venture

will propose the hiring of an agent known to have engaged in illegal or unethical conduct. Both joint venture partners have the right to veto a proposed agent if the partner reasonably believes that the proposed agent has engaged in illegal conduct.

With respect to Requestor's entry into the Joint Venture with the French company, and absent any knowing act in the future on the part of Requestor in furtherance of a prior act of bribery (or the offer or promise to pay a bribe, or authorization thereof) on the part of, or on behalf of, the French company concerning the contracts contributed by the French company to the Joint Venture, and based on all the facts and circumstances, as represented by the Requestor, the Department does not presently intend to take any enforcement action with respect to the Requestor's proposed participation in the joint venture with the French company.

This opinion, however, is subject to several important caveats:

1. The Department specifically notes that the French company's representation is not limited to violations of the FLAC, and, for that reason, interprets the French company's representation to mean that the contracts were obtained without violation of either French law or the anti-bribery laws of all of the jurisdictions of the various government officials with the ability to have influenced the decisions of their government to enter into the contracts to be contributed by the French company to the joint venture. Should, however, the French company's representation in fact be limited to violation of then-applicable French law, the Requestor, as an American company, may face liability under the FCPA if it or the joint venture knowingly take any act in furtherance of a payment to a foreign official with respect to previously existing contracts irrespective of whether the agreement to make such payments was lawful under French law when the contract was entered into.
2. The Department is concerned that the "materially adverse effect" standard for terminating the joint venture agreement may be unduly restrictive. Should the Requestor's inability to extricate itself result in the Requestor taking, in the future, acts in furtherance of original acts of bribery by the French company, the Requestor may face liability under the FCPA. Thus, the Department specifically declines to endorse the "materially adverse effect" standard.
3. Although the Department views the Requestor's representations concerning the joint venture's compliance program's restrictions on the future hiring of agents to be a significant precaution to avoiding illegal payments to foreign government officials, the Department's opinion should not be deemed to endorse any specific aspect of the compliance program to be implemented by the joint venture.
4. The Department's opinion does not speak to prospective conduct by the Requestor following the commencement of the joint venture.