

No. 95-02

Date: September 14, 1995

Foreign Corrupt Practices Act Review

Opinion Procedure Release

The United States Department of Justice has received an opinion request from two American companies (A and B) which seek to enter into two transactions in a foreign country.

Companies A and B have represented the following:

1. As a result of contracts entered into between Company A and the government of a foreign country, Company A has offset obligations it must fulfill in that country.
2. Offset obligations are handled on behalf of the foreign country by an Offset office. The office is run by a chairman and is responsible for administering guidelines and negotiating offset agreements with vendors. The office is a part of the foreign country's Ministry of Defense.
3. Company B is owned by a U.S. citizen who has established a program in the foreign country pursuant to which Company B could generate offset credits to sell. In October 1993, Company B received an oral agreement from the Offset office's chairman that Company B would receive millions of dollars in offset credits in exchange for the establishment of a new company (Newco) in the foreign country.

Company B will receive offset credits from Newco by meeting certain program milestones that are to be negotiated by Company B and the Offset office's chairman. The milestones triggering the credits will not be tied to Newco's profitability. Company B and the chairman of the Offset office will negotiate a written agreement stating that the offset credits will not be contingent upon the success of Newco and, once the program milestones are met, the credits will be granted.

Company A will pay Company B several million dollars for a certain amount of the offset credits generated from the development of Newco. Company A believes that this fee it is paying for the credits is consistent with fees paid by other U.S. contractors for similar services in the region. In addition, Company B may perform specific services, such as developing business strategies and administering the offset program, for which Company B will be compensated by Company A.

A majority of the investors in Newco will be foreign government officials. However, no official of the foreign country's Ministry of Defense will be an investor in the company. In addition, the investors are not in positions which enable them to grant or deny offset credits for this or any other program.

Company A understands the investors' role in Newco is that of shareholders. The investors will capitalize Newco and own 100 percent of its stock.

Company A will not be an investor in Newco.

Under a management services agreement, Company A will provide a general manager and will subcontract out the remaining services necessary to operate Newco. Company A will subcontract at arm's-length with Company C, another U.S. company which will provide certain services necessary to operate Newco. Company B will provide financing -- in the form of a loan

-- to Newco for its operations. The services and financing provided through Company A and its subcontractors is expected to approximately equal the shareholders' initial investment.

In return for services, Company A will receive, under a long-term management services agreement, a fee equal to a percentage of Newco's gross revenues and a percent of Newco's profits. Out of this fee, Company A will compensate Company C and Company B for their services and Company B's loan to Newco. Companies A, B, and C have certified that their compensation for the services and loans will be at a standard commercial rate and none will have an equity interest in Newco.

Company A and Company B have provided certain certifications, representations, and warranties to the Department of Justice including the following:

(A) Neither Company A nor Company B has made -- or will make -- any improper payments in violation of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd *et seq.*, in connection with the organization or operation of the proposed Newco.

(B) Neither Company A nor Company B has made -- or will make -- any payments to any government officials in connection with the proposed transactions.

(C) Company B has not paid and does not intend to pay any of the money it has received or will receive from Company A for the sale of the offset credits to any investors in Newco or to any government officials.

(D) Company A and Company B have not made and do not intend to make any payments to any person while knowing that all or any portion of that money will be paid to any foreign official in connection with Newco.

The shareholders of Newco -- some of whom are foreign government officials -- have provided certain certifications, representations, and warranties to the Department of Justice including the following:

(A) The shareholders will not take any actions that would result in a violation of the FCPA by Company A and Company B; use payments received by Newco in a manner that would violate the FCPA; use Newco's funds or assets to take any action that would violate the FCPA; request that any of the parties to this opinion request or any local official perform any service or action that would violate the FCPA.

(B) The shareholders are passive investors in Newco and will exercise no management control in Newco while holding a government office.

(C) The shareholders will recuse themselves from any government decision with respect to any matter affecting Newco or Company A; although a shareholder may hold a foreign government position, his official duties do not include responsibility for deciding or overseeing the award of business by that government to the parties to this request, and he will not seek to influence other foreign government officials whose duties include such responsibilities.

(D) The shareholders will notify Company A of any third-party assignment of rights (except the transfer of substantially all assets and liabilities to a third party where such transfer does not make it necessary to consult with the U.S. Department of Justice over whether the identity of the third party would give rise to a new filing under the FCPA Opinion Request Procedures) and if such assignment would violate the FCPA, permit Company A to withdraw as a management contractor without penalty.

(E) The shareholders will not take any act to oppose Newco manager's power to take such steps as necessary and appropriate under the circumstances to ensure compliance by Newco with the FCPA.

(F) If the nature of political positions or responsibilities of any shareholder changes so that the representations in the preceding paragraphs would not be correct if applied to such new positions or responsibilities, he will promptly notify Company A in writing. If, after consultation by Companies A and B and Newco shareholders, any such concerns cannot be resolved to the satisfaction of the U.S. Department of Justice, then the parties will be entitled, upon written notice to the other parties, to withdraw from or terminate Newco. In such event, each shareholder will cooperate in good faith with Company A during the period prior to the withdrawal or termination to avoid any violation of the FCPA.

(G) The shareholders represent and warrant that an opinion of a prominent and respected local counsel will be obtained to the effect that Newco and its proposed activities, including those of the shareholders, are lawful under local laws; that Newco will not be established without such an opinion; and that the opinion, when obtained, will be provided to the U.S. Department of Justice.

The shareholders agree to the following additional steps to address any potential FCPA-related concerns:

(A) Newco's Supervisory Board (board) will meet periodically, at least annually, and report on its activities and compliance with the FCPA. The board will cause a record of the meeting to be prepared and distributed to the parties to the opinion request in a timely fashion.

(B) The board will keep accurate expense, correspondence, and other records, including minutes of its meetings; the board will make financial records available to the auditors for Company A whenever requested.

(C) All payments by Newco to the shareholders in connection with Newco will be made solely by check or bank transfer, and no payments will be made in cash or bearer instruments. No payments in connection with Newco which are owed to a shareholder will be made to a third party.

(D) Any third parties retained by Newco to provide consulting, lobbying, or other professional services and assistance (excluding subcontractors hired to operate Newco) would be retained only with the express written permission of Newco's general manager and would be required to sign an FCPA compliance representation as part of the consultancy or retainer agreement.

Each of Newco's shareholders has certified that he understands that these representations have been submitted to the Department of Justice and acknowledges that the Department of Justice will rely on these representations in determining its response to the present request made under the FCPA Opinion Procedure.

Based upon all the facts and circumstances disclosed to us by the requestors, the Department does not presently intend to take enforcement action with respect to the purchase of offset credits by Company A from Company B or the proposed management services contract between Company A and Newco.

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.