

No. 96-2

November 25, 1996

The Department has reviewed the request on behalf of a U.S. company, which is a wholly owned subsidiary of another U.S. corporation. The requestor is engaged in the manufacture and sale of equipment used in commercial and military aircraft.

The requestor proposes to renew, with modifications, an existing marketing representative agreement (Agreement) with a state-owned enterprise of a foreign country (Enterprise). No business was done pursuant to the original Agreement. Under the modified Agreement, the Enterprise would serve as the requestor's exclusive sales representative in the foreign country. According to the requestor, the Enterprise would assist the requestor by using its manufacturing expertise and experience in the foreign country to identify those entities that might be in the market for the parts and services currently available from the requestor. The requestor would provide these parts and services directly to the ultimate purchasers with the Enterprise receiving a commission based upon a percentage of net sales.

The Enterprise, which is a state-owned enterprise of the foreign country, develops, manufactures, and sells machinery and equipment. It also provides technical consultation and information services.

Requestor's counsel and the Enterprise have represented that the Enterprise is not in a position to influence the procurement decisions of the requestor's potential future customers. The Enterprise is under the regulatory control of a ministry-level entity in the foreign country. The requestor's potential customers, however, are under the regulatory control of a different and separate ministry-level organization. According to the requestor, the Enterprise is not in a position to influence the procurement decisions of the requestor's potential customers because the Enterprise and the requestor's potential customers are under the control of separate regulatory governmental entities.

The requestor states that the Agreement with the Enterprise will include the following terms and conditions.

1. All commission payments will be made to a designated bank account held in the name of the Enterprise in the foreign country, and all payments will be made in U.S. dollars in nonbearer form.
2. The Enterprise warrants that it is under the regulatory control of a ministry-level organization that is separate and different from the ministry-level organization that has regulatory control over the requestor's potential customers; that it has no governmental connection to any ultimate customer of the requestor; and that it has been designated by its government as a preferred representative for foreign companies.
4. (*sic*) The Enterprise warrants that it has the authority to act as a marketing representative for foreign corporations, and that it is not in a position to and will not improperly influence any sales transaction of the requestor.
5. The Enterprise warrants its familiarity and compliance with local laws and with the "Code of Ethics and Standards of Conduct" of the requestor's parent.
6. The Enterprise warrants its familiarity and compliance in all respects with the FCPA, as amended.

7. The requestor may terminate the Agreement at any time without prior notice if the Enterprise fails to comply with the above-listed warranties.

In addition, the requestor has made the following affirmative representations:

(1) the commission rate payable to the Enterprise under the Agreement is commensurate with commission rates paid by the requestor and its parent company to other marketing representatives around the world;

(2) the Agreement with the Enterprise will include a certification by the Enterprise - to be filed with the Department of Justice - which states the following:

that [the Enterprise] will not, directly or indirectly, in connection with its agreement with [the requestor] and the business resulting therefrom, offer, pay, promise to pay, or authorize the giving of money or anything of value to any government official [as defined in the FCPA, as amended], to any political party or official thereof or to any candidate for political office, or to any person, while knowing or being aware of a high probability that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to any government official, to any political party or official thereof, or to any candidate for political office, for the purposes of

(a) influencing any act or decision of such official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

(b) inducing such official, political party, party official, or candidate to use his or its influence with the government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist [the requestor] or [the Enterprise] in obtaining or retaining business for or with, or directing business to [the requestor] or [the Enterprise].

(3) the Enterprise will immediately advise the requestor if future developments make the Enterprise's certifications inaccurate or incomplete.

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 any of the prospective contractual relationships described in this request.

The FCPA Opinion Request herein, 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 party 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.