

Foreign Corrupt Practices Act Updates

Department of Justice Issues Opinion on U.S. Company Participation in Joint Ventures That Involve Foreign Government Officials

The Department of Justice (DOJ) issued Opinion Release 2001-02 on July 18, 2001. It provides guidance to companies that wish to engage in joint ventures with foreign companies in which a foreign government official is a principal. DOJ permitted the company to participate in the venture because the official's government responsibilities were unrelated to the venture's business and because the official agreed to recuse himself from any business dealings that involved his country's government. The Opinion Release builds on several similar releases over the past several years in which DOJ has approved joint ventures between U.S. companies and foreign government officials when the government duties of the officials were unrelated to the contemplated business of the joint venture. The release was issued on the heels of several recent FCPA cases brought by DOJ. This flurry of activity may signal an increased FCPA enforcement pace.

BACKGROUND

The FCPA's Antibribery Provisions

The FCPA's antibribery provisions make it unlawful for any issuer, domestic concern, or person acting within the United States corruptly to make or offer to make a payment of anything of value directly or indirectly to a foreign official, international organization official, political party or party official, or any candidate for public office for the purpose of influencing any official act to assist in obtaining or retaining business. 15 U.S.C. § 78m(b). Indirect payments include payments that are made by foreign

agents on behalf of a company if the company knowingly participates in or authorizes the payments.

The FCPA's antibribery provisions do not apply directly to foreign ventures in which U.S. companies are partners so long as the joint venture itself is not an issuer or a U.S. company and so long as no acts in furtherance of any corrupt payment take place in the United States. Although joint ventures with foreign government officials raise substantial FCPA issues, they are not always impermissible, as Opinion Release 2001-02 indicates. A key to a permissible joint venture with a foreign government official is that the official not receive the financial benefits of participation for anything done in his or her official capacity. The FCPA prohibits three types of payments to a government official: (1) payments to influence the official acts or decisions of the official; (2) payments to induce an official act or omission of the official in violation of lawful duty; and (3) payments to induce the official to influence a government act or decision. Only the third of these prohibitions arguably reaches payments to government officials for actions unconnected to their official duties.

The DOJ Opinion Request Procedure

The DOJ's opinion request procedure allows companies to describe a set of facts to DOJ and to obtain an opinion whether DOJ will seek enforcement action against the company based on the representations in the request. If DOJ states that it does not intend to seek enforcement action,

the company may proceed with the transaction described in the letter with no risk of DOJ prosecution, provided that the facts described in the request accurately depict the transaction.

OPINION RELEASE 2001-02

A U.S. company advised DOJ that it had plans to form a consortium with a foreign company that would bid on prospective business with the government of the foreign company's home country. (The U.S. company planned to enter the consortium through an offshore company in which it held a 50% ownership interest.) The company informed DOJ that a chairman and shareholder of the foreign company acts as an advisor to one of his country's senior officials and is himself a senior government official in the field of public education. The U.S. company and the chairman of the foreign company together made the following representations to DOJ:

- The chairman's government duties do not involve acting in an official capacity with respect to the award of the project on which the consortium planned to bid. (The requestors also submitted a legal opinion from counsel in the foreign country that stated that the tender for the project was issued by government agencies that are not under the charge of the chairman in his official duties.)
- The chairman will not initiate or attend any meetings with his country's government on behalf of the consortium. (In fact, the requestors represented that such actions would be prohibited under local law.)
- The chairman will recuse himself from any discussion, consideration, or decision about the award of the business and the consortium's bid submissions will inform the relevant government agencies of this recusal.
- The chairman's position as a senior government official in the field of public education cannot affect or influence the bid.

- The consortium's formation and the participation of the chairman does not violate the laws of the foreign country.
- The agreement to form the consortium will include FCPA representations and warranties and any breach by a consortium member of these provisions will grant the non-breaching member the right to terminate the agreement.

SIGNIFICANCE OF DOJ OPINION

Opinion Release 2001-02 provides valuable guidance on structuring a joint venture in which a foreign government official is a principal. Consistent with previous DOJ pronouncements on the subject, *see, e.g.*, Releases 95-3 & 94-1, such ventures will generally be permissible so long as the official's government responsibilities are not related to the business of the joint venture and so long as the official recuses him or herself both from government decisions that involve the venture and from the venture's contacts with his or her country's government.

Although the release did not say so explicitly, it appears that the consortium's business was not related to the field (education) in which the chairman held his government post. The foreign company was described as a "diversified trading, manufacturing, contracting, service, and investment organization." With respect to the chairman's government contacts, this joint venture arrangement went even further than previous arrangements approved by DOJ in requiring that the chairman not attend any meetings with his government on behalf of the venture. The release also underscored the importance of written FCPA representations and warranties in joint venture agreements to ensure that the venture's participants understand and abide by the FCPA.

PRACTICAL ADVICE

U.S. companies should take care in entering into joint ventures with foreign government officials. The more facially questionable the arrangement —

if, for example, the foreign official planned to attend government meetings or make contacts with government officials on behalf of the venture — the more protections against FCPA violations would likely be required in the joint venture arrangement. Among the protections companies should consider are:

- An agreement that all joint venture partners, including the government official participant, abide by the FCPA as if it were subject to it.
- A requirement that the official not initiate any meeting with his or her government concerning the venture's business and that the official either not attend such meetings that are initiated by others or attend only in conjunction with at least one U.S. representative of the joint venture.
- Assurance that the government duties of the official do not include any ability to influence decisions on the award of business to the venture or the appointment, promotion, or compensation of officials with such influence.
- A requirement that the venture maintain appropriate books and records, make all payments by check or bank transfer directly to the party owed, and make no third-country payments.
- An agreement that the U.S. company may disassociate itself from the venture if it uncovers an FCPA violation by one of its partners.

OTHER RECENT ENFORCEMENT ACTIVITY

The past few months have seen other FCPA enforcement activity by DOJ. On August 3, 2001, DOJ agreed to plea bargains for some of the principals in OWL Securities & Investments, who were charged with FCPA violations in a conspiracy to bribe public officials in Costa Rica to obtain a concession to build and operate airport, marina, canal, and port facilities in that country. *See United States v. Halford*, No. 01-00221-01-CR-W-1 (W.D. Mo., filed Aug. 3, 2001); *United States v. Reitz*, No. 01-00222-01-CR-W-1 (W.D. Mo., filed

Aug. 3, 2001). The agreements required that the defendants cooperate in the prosecution of others charged in the conspiracy. On July 18, 2001, DOJ unsealed an indictment against Joshua Cantor, the Executive Vice President and General Manager of American Bank Note Holographics, who had been charged with violations of the FCPA's books-and-records and antibribery provisions resulting from a scheme to pay bribes to officials of the Saudi Arabian Monetary Agency. *See United States v. Cantor*, Information 01 Cr. (S.D.N.Y., unsealed July 18, 2001). Finally, on June 13, 2001, DOJ accepted a plea agreement from Daniel Ray Rothrock in exchange for his promise to cooperate in the prosecution of his former employer, Allied Products Corporation, for payments made to a consultant that were ultimately passed on to a Russian government official. *See United States v. Rothrock*, Crim. No. SA01CR343OG (W.D. Tex. filed June 13, 2001). This relatively significant number of cases in a short period may signal increased FCPA enforcement activity at DOJ.

For a fuller discussion of these and other FCPA issues, see Stephen F. Black and Roger M. Witten, *Complying with the Foreign Corrupt Practices Act*, 11 Business Law Monographs (Matthew Bender 2000) (2001 edition forthcoming). If you have any questions or need additional information, please contact:

Stephen Black - (202) 663-6880
SBlack@wilmer.com

Roger Witten - (202) 663-6170
RWitten@wilmer.com

Kimberly Parker - (202) 663-6897
KParker@wilmer.com

This letter is for informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments.