

**No. 08-01**

**Date: January 15, 2008**

## **Foreign Corrupt Practices Act Review**

### **Opinion Procedure Release**

The Department has reviewed the FCPA Opinion Procedure request and supporting materials, dated January 2, 2008 (the “Request”), submitted by a United States issuer (the “Requestor”) under the Foreign Corrupt Practices Act (“FCPA”) Opinion Procedure, 28 C.F.R. Part 80. The facts and circumstances are as follows:

#### Overview of the Request

The Requestor is a Delaware corporation with its principal place of business in the United States, and an issuer within the meaning of the FCPA, 15 U.S.C. §§ 78dd-1, *et seq.* The Requestor has requested that the Department of Justice issue an Opinion under the FCPA Opinion Procedure, 28 C.F.R. Part 80, stating its enforcement policy with respect to the prospective majority investment by a wholly-owned foreign subsidiary of the Requestor in a foreign company that is responsible for managing certain public services for a major foreign municipality. This anticipated investment (the “Proposed Transaction”) is described more fully below.

The Requestor notes that the Proposed Transaction is a matter of significant importance and urgency to the Requestor, this opportunity is highly valued, and delay by the Requestor in committing to the Proposed Transaction will likely forever preclude its consummation. Accordingly, the Requestor has asked that the Department of Justice consider this opinion request on an expedited basis. The Department of Justice has agreed to and conducted expedited review.

#### The Requestor: Background

The Requestor is a Fortune 500 company headquartered in the United States, located in over 35 countries, including the country at issue in this Request, and with worldwide annual revenues of several billion dollars. The Requestor’s relevant business unit is one of the largest providers of the relevant public services to governments worldwide.

#### The Investment Target and Other Relevant Parties

The Requestor has made the following representations regarding the operation and ownership of the investment target company in the foreign country (the “Investment Target”) and certain relevant parties:

Currently, the relevant public services for the foreign municipality are provided by the Investment Target. The Investment Target currently is jointly owned by a government-owned

entity of the foreign country (the “Foreign Government Owner”) and a foreign private company (the “Foreign Private Company 1”). A citizen of the foreign country (the “Investment Target Chairman”) is the Chairman and formal legal representative of the Investment Target.

The Foreign Government Owner, historically, is the majority owner of the Investment Target and currently holds a 56% ownership share in that company. The Foreign Government Owner’s indirect majority parent is the foreign country’s governmental entity generally responsible for the management, reform and restructuring of state-owned enterprises (the “State Enterprises Management Entity”). In particular, the State Enterprises Management Entity is responsible for determining from which state-owned companies the government should divest, and for effectuating public offerings or sales of state-owned assets through another governmental entity (the “State Enterprises Divestiture Entity”).<sup>1</sup> In addition to his role at the Investment Target, the Investment Target Chairman is also the General Manager and formal legal representative of the Foreign Government Owner.

Foreign Private Company 1, established under the laws of the foreign country, is the 44% minority owner of the Investment Target. The controlling and ultimate beneficial owner, and the formal legal representative, of Foreign Private Company 1 is a citizen of the foreign country (the “Foreign Private Company Owner”). The Foreign Private Company Owner has substantial business experience in the foreign municipality, and in particular, with the relevant public services provided by the Investment Target. Foreign Private Company 1 has appointed the Foreign Private Company Owner as its representative in the Investment Target. In this role, the Foreign Private Company Owner holds the title of General Manager of the Investment Target. However, the Foreign Private Company Owner is not an employee of the Investment Target and receives no salary or other direct compensation from the Investment Target. Further, the Foreign Private Company Owner has no other formal affiliation with the host country government other than through his involvement in the Investment Target as its General Manager.

#### The Investment Target Divestiture and The Requestor’s Business Opportunity

In its Request, the Requestor has described the origin of the investment opportunity as follows:

Some time prior to November 2007, the Foreign Government Owner and the State Enterprises Management Entity determined to divest the host country government’s interest in the Investment Target and, thus, fully privatize the business. Around November 2007, the Foreign Government Owner received formal approval of the State Enterprises Management Entity for such divestiture and, as required under foreign law, the public bid process managed by the State Enterprises Divestiture Entity was initiated for the purpose of selling the entirety of the Foreign Government Owner’s 56% share in the Investment Target. Pursuant to the host country government’s regulations, the bids themselves were subject to review by the State Enterprises

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<sup>1</sup> The State Enterprises Divestiture Entity is also owned and controlled by the State Enterprises Management Entity.

Divestiture Entity, the Foreign Government Owner, and the Foreign Government Owner's direct parent corporations. The Foreign Government Owner and its direct corporate parents have final authority to select and approve a final bid.<sup>2</sup>

After the announcement of the planned divestiture of the Investment Target shares, the Requestor engaged in substantial discussions with the Foreign Private Company Owner regarding the potential entrée of the Requestor into the market for the relevant public services in the foreign country. The Requestor determined that a potential controlling investment in the Investment Target presented an opportunity for a long-term, high-yield return of revenue and profit, and, perhaps more importantly, could provide an unparalleled competitive advantage by securing a foothold for the Requestor in the regional markets generally.

### Prior Negotiations

The Requestor has made the following representations regarding the Requestor's prior negotiations with the Foreign Private Company Owner regarding the Investment Target, and the Requestor's identification of, and responses to, FCPA concerns identified in connection with the Proposed Transaction:

In late 2005, the Requestor was first contacted by the Investment Target's representatives who were searching for a foreign investor with relevant expertise. In approximately June 2006, the Requestor began direct discussions with the Foreign Private Company Owner in connection with a possible joint venture through which the Requestor would purchase a controlling interest in the Investment Target following the government's anticipated sale of its portion of the entity. The parties considered a scenario whereby: (1) the Foreign Private Company Owner (through a new company controlled and beneficially owned by him, the "Foreign Private Company 2") would obtain 100% ownership of the Investment Target by bidding on and hopefully obtaining the Foreign Government Owner's shares of the Investment Target through the State-sponsored sale, and by transferring Foreign Private Company 1's 44% interest to Foreign Private Company 2; and (2) the Requestor would then purchase a controlling interest in the Investment Target from Foreign Private Company 2.<sup>3</sup> Thus, this transaction would result in the Requestor acquiring a controlling interest in the Investment Target, while Foreign Private Company 2 and the Foreign Private Company Owner would retain a minority ownership interest.

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<sup>2</sup> As described in more detail below, the bidding process is complete, but the divestiture has not yet been finalized.

<sup>3</sup> From a long-term financial perspective, the Requestor valued the potential controlling interest in the Investment Target at a significant premium above what the Requestor believed the Foreign Government Owner's shares would be sold for. Thus, the Requestor was prepared to purchase those shares at a substantial premium above their initial public purchase price.

## The Requestor's Initial FCPA Concerns and Due Diligence Efforts

The Requestor has represented the following with respect to the due diligence efforts undertaken by it in connection with its potential purchase of a controlling interest in the Investment Target from Foreign Private Company 2, and the Requestor's assessment of the attendant FCPA risks:

Prior to executing a joint venture agreement with the Foreign Private Company Owner, the Requestor conducted due diligence of the potential joint venture to assess, among other things, potential FCPA-related risk. In conducting its due diligence, the Requestor understood that, as General Manager of the Investment Target, a joint venture whose majority owner is a state-owned company, the Foreign Private Company Owner would be considered a "foreign official" for purposes of the FCPA, 15 U.S.C. § 78dd-1(f)(1)(A). Accordingly, the Requestor sought to assure itself that any payment to the Foreign Private Company Owner for the Foreign Private Company 2 shares of the Investment Target would not be in violation of the FCPA, and that the Foreign Private Company Owner did not obtain those shares improperly under foreign law.

The due diligence conducted, none of which identified any negative information regarding the Foreign Private Company Owner, Foreign Private Company 1, or the Investment Target, including the following:

1. The Requestor commissioned a report on the Foreign Private Company Owner by a reputable international investigative firm.
2. The Requestor retained a business consultant in the foreign municipality who provided advice on possible due diligence procedures in the foreign country.
3. The Requestor commissioned International Company Profiles on the Investment Target and Foreign Private Company 1 from the U.S. Commercial Service of the Commerce Department.
4. The Requestor searched the names of all relevant persons and entities, including the Foreign Private Company Owner, the Investment Target, and Foreign Private Company 1, through the various services and databases accessible to the Requestor's International Trade Department -- including a private due diligence service -- to determine that no relevant parties are included on lists of designated or denied persons, terrorist watches, or similar designations.
5. The Requestor met with representatives of the U.S. Embassy in the foreign municipality and learned that there were no negative records at the Embassy regarding any party to the Proposed Transaction.
6. Outside counsel conducted due diligence and issued a preliminary report. An updated report is being prepared, and will be completed before closing the Proposed Transaction.

7. An outside forensic accounting firm has prepared a preliminary due diligence report and a final report is being prepared, and will be completed before closing the Proposed Transaction.
8. A second law firm has reviewed the due diligence.

The Requestor identified two principal FCPA-related risks to be addressed prior to its consummation of the Proposed Transaction. First, the Requestor originally believed that, as General Manager of the Investment Target, the Foreign Private Company Owner was subject to foreign certain foreign privatization regulations (the “privatization regulations”), and as such he could only legally participate in the purchase of the Foreign Government Owner’s sale of its shares in the Investment Target if his ownership interests in Foreign Private Company 1 and Foreign Private Company 2 were adequately disclosed to the Foreign Government Owner and its State-owned parent organizations. Second, the Requestor believed that, as General Manager of the Investment Target, the Foreign Private Company Owner was legally prohibited from acting on corporate opportunities – for example, realizing the purchase price premium from the Requestor for the Investment Target shares – that arguably belonged to a government-owned entity (*i.e.*, the Foreign Government Owner), without first seeking approval from the Foreign Government Owner.

When presented with these issues by the Requestor in September 2007, the Foreign Private Company Owner, through counsel, declined to make or accede to disclosures to the Foreign Government Owner and its corporate parents regarding his various roles and beneficial interests for the stated reasons that in the foreign country it was neither necessary nor customary to do so. In addition, the Foreign Private Company Owner declined to disclose to the Foreign Government Owner and its corporate parents information concerning the premium the Requestor would agree to pay for the proposed controlling stake in the Investment Target. At the time, the Foreign Private Company Owner informed the Requestor that its disclosure requests were inconsistent with business practices in the foreign country and that competitive concerns prevented him from agreeing to disclose to the Foreign Government Owner and its corporate parents his bid price on the Investment Target or the spread between his bid and the price for which the Requestor would agree to purchase the controlling interest in the Investment Target.

Also at that time, the Requestor believed that the Foreign Private Company Owner’s bid for the government-owned shares in the Investment Target had been accepted and that the State Enterprises Divestiture Entity-run sale of those shares would be finalized in the immediate future. In light of the Foreign Private Company Owner’s reluctance to make what the Requestor believed were necessary disclosures, and because it did not appear to the Requestor that post-sale disclosures would be sufficient to bring the Foreign Private Company Owner’s acquisition within the strictures of the foreign country’s laws, the Requestor decided to abandon the proposed joint venture and so informed the Foreign Private Company Owner.

## Resumption of Negotiations and Renewed FCPA Due Diligence

The Requestor has stated the following with respect to the facts and circumstances of the Requestor's resumption of negotiations with the Foreign Private Company Owner and additional due diligence efforts undertaken by the Requestor:

After a period of approximately three weeks, on or about November 1, 2007, the Foreign Private Company Owner requested that the Requestor renew negotiations of the Proposed Transaction. Without engaging the Foreign Private Company Owner in substantive negotiations, the Requestor first reiterated its concern over disclosure and the Foreign Private Company Owner's compliance with the privatization regulations. The Foreign Private Company Owner still resisted such disclosure, but also indicated his belief that, based on a conversation he had with an attorney at the State Enterprises Divestiture Entity (the "Divestiture Entity Lawyer"), the privatization regulations did not apply to him because he was not a paid manager of the Investment Target, but rather a voluntary minority-owner representative at the Investment Target with no real control over that entity. In response, prior to agreeing to renew negotiations of the Proposed Transaction, the Requestor sought to conduct additional due diligence to determine whether, or to what extent, its initial analysis of the application of the privatization regulations had been incorrect as to the Foreign Private Company Owner, and to verify his claims as to both the facts of his involvement at the Investment Target and the foreign law ramifications of the same. The Foreign Private Company Owner did not object to the Requestor's pursuit of these additional due diligence steps.

As part of that additional due diligence, the Requestor learned from the State Enterprises Divestiture Entity officials that although the Foreign Private Company Owner's bid for the Investment Target shares had been accepted by the Foreign Government Owner, the State Enterprises Divestiture Entity, and the State Enterprises Management Entity,<sup>4</sup> the Foreign Private Company Owner was providing the purchase money in installments and that, therefore, his purchase of the Investment Target had not yet been consummated. The Requestor viewed this fact as an opportunity to take affirmative steps as part of its additional due diligence to disclose, prior to finalization of the sale, The Foreign Private Company Owner's beneficial ownership interest in Foreign Private Company 1 and Foreign Private Company 2 to legal representatives and high-ranking officials of relevant government-owned entities. The Foreign Private Company Owner did not object to the Requestor's disclosures to government-owned entities regarding his role and the Proposed Transaction.

Thereafter, the Requestor met with various high-ranking relevant government officials, confirmed certain information, and made certain disclosures (both orally and in writing). First, the Requestor's representatives met with a senior official in the State Enterprises Divestiture Entity (the "Divestiture Entity Senior Official"), who explained that the State Enterprises

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<sup>4</sup> The State Enterprises Divestiture Entity officials informed the Requestor that the Foreign Private Company Owner had submitted the only bid.

Divestiture Entity is responsible for managing the sales of government-owned assets, and that it reports to the State Enterprises Management Entity. As part of a State-owned asset sale, the State Enterprises Divestiture Entity is responsible for reviewing the forms required to be filed by the seller, including reviewing paperwork for purposes of determining compliance with the privatization regulations. The Requestor's representatives disclosed to the Divestiture Entity Senior Official that: (1) the Requestor had been negotiating with the Foreign Private Company Owner for over a year to purchase a majority interest in the Investment Target; (2) the Foreign Private Company Owner was in the process of buying the Foreign Government Owner shares in the Investment Target through a the State Enterprises Divestiture Entity-run State asset sale; (3) the Foreign Private Company Owner is the current minority beneficial shareholder of the Investment Target and is the General Manager of the Investment Target; and (4) the Requestor is offering the Foreign Private Company Owner a very substantial price premium over the price the Foreign Private Company Owner has agreed to pay for the Foreign Government Owner's shares of the Investment Target. During the meeting, the Divestiture Entity Senior Official expressed no reservations about the appropriateness of the Proposed Transaction and commented specifically that the premium described would not be unusual or unexpected. Subsequent to this meeting, the Requestor reiterated these disclosures by letter to the Divestiture Entity Senior Official.

Soon thereafter, the Requestor's representatives met with a lawyer for the State Enterprises Divestiture Entity (the "Divestiture Entity Lawyer") and disclosed the same details of the Proposed Transaction as had been relayed to the Divestiture Entity Senior Official. The Divestiture Entity Lawyer explained that the Foreign Private Company Owner had been selected as the winning bidder in the Investment Target tender, but that the Foreign Private Company Owner was making payments for the tendered shares in installments and that, as such, the sale and transfer of shares was not complete. Further, the Divestiture Entity Lawyer explained that the State Enterprises Divestiture Entity reviewed the Foreign Private Company Owner's bid in light of potential restrictions under the privatization regulations when the bid process formally began in September 2007, and that the State Enterprises Divestiture Entity had determined that the Foreign Private Company Owner was not a government official for purposes of those regulations because the Foreign Private Company Owner served as General Manager of the Investment Target only in his capacity as the representative of the minority, private owners of the Investment Target shares. The Divestiture Entity Lawyer represented that he personally had confirmed this interpretation of the privatization regulations with a senior official with the State Enterprises Divestiture Entity department responsible for ensuring that the public tender process is run consistent with the State Enterprises Divestiture Entity's procedures. Subsequent to this meeting, via letter to the Divestiture Entity Lawyer, the Requestor reiterated the disclosures noted above.

That same date, representatives of the Requestor met with the Investment Target Chairman. The Foreign Private Company Owner also attended this meeting. The Requestor disclosed to the Investment Target Chairman the same details of the Proposed Transaction as had been relayed to the Divestiture Entity Senior Official and the Divestiture Entity Lawyer. Specifically, the Requestor inquired whether the Investment Target Chairman was aware of the Foreign Private

Company Owner's various roles in the Investment Target and Foreign Private Companies 1 and 2, whether the Investment Target Chairman believed the privatization regulations applied to and precluded the Foreign Private Company Owner's participation, and whether the Investment Target Chairman was aware of the substantial premium the Requestor was prepared to offer the Foreign Private Company Owner. The Investment Target Chairman indicated that: (1) he was previously aware of the Foreign Private Company Owner's role as General Manager and minority shareholder of the existing joint venture; (2) he was previously aware of the Foreign Private Company Owner's role as the shareholder of the acquiring entity (Foreign Private Company 2); (3) he did not believe that the privatization regulations applied to the Foreign Private Company Owner in this context because he, the Investment Target Chairman, was the Senior Manager at the Investment Target, and not the Foreign Private Company Owner; and (4) he understood that the Requestor would pay a substantial premium for the Investment Target shares, and he had no objections.<sup>5</sup> Subsequent to this meeting, by letter to the Investment Target Chairman, the Requestor reiterated the oral disclosures and confirmed the substance of the parties' discussions.

Finally, representatives of the Requestor met with staff members of the State Enterprises Divestiture Entity and a supervisor in the State-Owned Asset Department of the State Enterprises Divestiture Entity. The Requestor's representatives disclosed to these officials the same details of the Proposed Transaction as had been relayed in each of the prior meetings described above. One staff member explained that her department at the State Enterprises Divestiture Entity was responsible for determining whether restrictions under the privatization regulations were implicated in the context of proposed sales of State-owned assets. She further explained that pursuant to the State Enterprises Management Entity definitions under privatization regulations, those regulations only apply to "Senior Managers," who are defined as an employee of a State-owned enterprise or an individual assigned by the government to work on behalf of a joint venture owned in part by the government. Based on the Requestor's representation that the Foreign Private Company Owner was the General Manager of the Investment Target, appointed as the minority-owner's representative, one staff member indicated that the Foreign Private Company Owner would not be considered a manager of sufficient authority to come within the privatization regulations because the Foreign Private Company Owner's position at the Investment Target did not convey any state or government status to him.<sup>6</sup> After reviewing the official State Enterprises Divestiture Entity files relating to the Investment Target tender, the staff member confirmed that the State Enterprises Divestiture Entity had explicitly determined that the privatization regulations do not apply to the Foreign Private Company Owner because he is not a

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<sup>5</sup> The Investment Target Chairman further explained that the government's decision to divest its shares of the Investment Target was made by the State Enterprises Management Entity, and that the decision was approved by the Foreign Government Owner's board.

<sup>6</sup> She further explained that the seller – here the Foreign Government Owner – was required to identify the Senior Managers of the government-owned entity being sold in its tender application to the State Enterprises Divestiture Entity.



government official within the meaning of those regulations, despite his status as the General Manager of The Investment Target.<sup>7</sup> The supervisor in the State-Owned Asset Department of the State Enterprises Divestiture Entity, who was the contact person and coordinator of the Foreign Government Owner share sale, concurred with this interpretation of the privatization regulations. Subsequent to this meeting, the Requester sent a letter to one of the staff members reiterating the same basic disclosures noted above, and specifically confirming the State Enterprises Divestiture Entity's determination that the privatization regulations do not apply to the Foreign Private Company Owner.

### Revised FCPA Considerations

Despite the initial FCPA risks identified by the Requestor, and the Foreign Private Company Owner's initial reluctance to make disclosures believed at that time necessary to alleviate those risks, based on the Requestor's original FCPA due diligence efforts together with its additional due diligence efforts described above, the Requestor has stated that it is prepared to proceed with the Proposed Transaction.

While the Requestor believes that the Foreign Private Company Owner is likely considered a "foreign official" under the FCPA, at least during the period when the Investment Target remains a government-owned entity and he is the General Manager of that entity, the Requestor notes and represents the following:

**The Foreign Private Company Owner is purchasing the Investment Target shares without financial assistance from the Requestor.** As represented by high-ranking officials at the State Enterprises Divestiture Entity, the Foreign Private Company Owner must provide the entirety of the funds required to purchase the Investment Target shares prior to finalization of the purchase. The Foreign Private Company Owner is in the process of doing so, through installment payments, without the assistance of the Requestor. A necessary and explicit predicate to the Requestor's participation in the Proposed Transaction is Foreign Private Company 2's full and legal ownership of 100% of the Investment Target. Thus, the Requestor will not close the Proposed Transaction until the Foreign Private Company Owner's purchase of the Foreign Government Owner's shares of the Investment Target shares is complete. Further, the Requestor has not made, and warrants that it will not make, any direct or indirect payment to the Foreign Private Company Owner to make possible his intended purchase of those shares.

**The Requestor will make no extra or unjustified payments to the Foreign Private Company Owner.** The Requestor confirms that it has not made any payments to the Foreign Private Company Owner to date. The Requestor further warrants that, in connection with the Proposed Transaction, it will not pay the Foreign Private Company Owner anything other than the agreed-

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<sup>7</sup> The Requestor's outside counsel has consulted with attorneys in its office in the host country who have confirmed that the determination whether a manager of a State-controlled enterprise is a covered person under the privatization regulations is within the discretion of the State Enterprises Divestiture Entity.

upon purchase price for the Investment Target shares, and reasonable fees in connection with the Foreign Private Company Owner's actual involvement in the management of the Investment Target joint venture as set out in the final joint venture agreement. The Foreign Private Company Owner has also assured the Requestor that he will not use any payments from the Requestor to pay government officials, and the Foreign Private Company Owner will be required to guarantee as much within the documentation of the Proposed Transaction.

**The Requestor will make no payments to any other foreign officials.** The Requestor believes, after reasonable inquiry, that no investor of Foreign Private Company 2 from whom the Requestor would purchase shares in the Investment Target, with the exception of the Foreign Private Company Owner, is a foreign official. Moreover, after reasonable inquiry, no owner, officer, director, consultant, representative or agent of Foreign Private Company 2, or close relative of the Foreign Private Company Owner, is known to be a foreign official. Further, under the joint venture agreement, the Foreign Private Company Owner will be required to inform the Requestor of any instances where the government status of those individuals changes.

**The premium between the Foreign Private Company Owner's purchase price of the Investment Target shares and the Requestor's purchase price is justified based on legitimate business considerations.** The Requestor has confirmed through various due diligence efforts, including conversations with high-ranking State Enterprises Divestiture Entity officials, that: (1) the Foreign Private Company Owner's bid price for the Investment Target shares was appropriate; (2) valuation methodologies in the foreign country differ, sometimes dramatically, from American valuation methodologies in that the foreign country valuations often do not include future value calculations for assets such as the Investment Target shares; and thus, (3) the Requestor's valuation and purchase of the Investment Target shares at a substantial premium over the Foreign Private Company Owner's purchase price is justified based on legitimate business considerations.<sup>8</sup> Lastly, in connection with and as an essential condition of the Proposed Transaction, the Requestor is receiving valuable concessions in the revised joint venture agreement which include, but are not limited to, services and hardware supply contracts between the joint venture and the Requestor's foreign subsidiary, a preferred return, and effective control of the joint venture board and appointment of all senior management.

**The Foreign Private Company Owner's status as a "foreign official" will soon cease.** The Requestor believes that, upon finalization of the Foreign Private Company Owner's purchase of the Foreign Government Owner's shares of the Investment Target, the Foreign Private Company Owner could no longer be considered a "foreign official" under the FCPA. At that point, the Requestor understands that the Foreign Private Company Owner will have no formal or actual role with any government-owned entity, further decreasing any FCPA risk.

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<sup>8</sup> Further to this point, the Requestor warrants that its valuation of the controlling interest in the Investment Target is based both on future anticipated revenue and profit streams from that investment and the significant derivative financial benefits associated with the acquisition of a competitively advantageous portion of the relevant regional public services market.

**The Foreign Private Company Owner's purchase of the Foreign Government Owner's shares is lawful under the foreign country's laws.** The Requestor has learned that the State Enterprises Divestiture Entity does not consider the Foreign Private Company Owner subject to the privatization regulations. This interpretation was stated orally (and confirmed by the Requestor in writing) by informed government officials specifically responsible for interpreting the privatization regulations, and appears to reflect the official State Enterprises Divestiture Entity determination on that issue. The conclusion apparently reflects the government's conclusion that the Foreign Private Company Owner is not a member of senior management for purposes of the privatization regulations and he does not otherwise have government official status by virtue of any other position he holds. The Requestor is not aware, after making reasonable inquiry, of any other formal connection between the Foreign Private Company Owner and the government aside from his current nominal role at the Investment Target. In light of these facts, the Foreign Private Company Owner's lack of practical control over any government entity, and the government's assertion that the Foreign Private Company Owner does not represent its interests, the Requestor is prepared to proceed with the Proposed Transaction.

**In pursuing the Proposed Transaction, the Foreign Private Company Owner is not illegally or inappropriately acting on a corporate opportunity belonging to the joint venture.** The State Enterprises Management Entity and the Foreign Government Owner made the decision to divest their shares in the Investment Target. As is required by law, the sale of State assets, in this case the shares in the Investment Target owned by the Foreign Government Owner, was conducted through the public tender process managed by the State Enterprises Divestiture Entity. Prior to concluding that transaction, the existence of the discussions between the Requestor and the Foreign Private Company Owner, his various roles and interests, and the details relating to the Proposed Transaction – including the fact that the Requestor was offering the Foreign Private Company Owner a substantial premium for a controlling interest in the Investment Target – were disclosed to high level officials at the State Enterprises Divestiture Entity and the Foreign Government Owner and its parent shareholders.

The State Enterprises Divestiture Entity officials also have been advised of the Proposed Transaction, including the fact that the Foreign Private Company Owner will receive from the Requestor a significant premium over the price at which he acquired the Investment Target, and such officials have expressed no reservations about the Foreign Private Company Owner's participation, the premium he is to receive from the Requestor on his shares, or otherwise. Even if the Foreign Private Company Owner was subject to the privatization regulations, disclosure has now been made to the relevant government entities. In particular, the Requestor explicitly informed high-ranking officials at the Investment Target, the Foreign Government Owner, and the State Enterprises Divestiture Entity that: (1) the Foreign Private Company Owner was the General Manager of the Investment Target; (2) the Foreign Private Company Owner was the ultimate beneficial owner of Foreign Private Company 1 and Foreign Private Company 2; and (3) the Foreign Private Company Owner, through Foreign Private Company 2, stood to receive a substantial price premium from the Requestor for a portion of his shares in the Investment Target. The government officials with whom the Requestor spoke expressed no reservations

about the propriety of the Foreign Private Company Owner's participation in and profit from the Proposed Transaction.

### Due Diligence Documentation and Contractual Provisions

The Requestor has represented in its request that it has fully documented all of the due diligence it conducted with regard to the Proposed Transaction, and will maintain such documentation in the Requestor's offices in the United States.

The Requestor has further represented that the Foreign Private Company Owner, as Chairman, will provide a representation and warranty on behalf of Foreign Private Company 2 that: (1) neither Foreign Private Company 2 nor its owners, directors, officers, employees, agents, or close family members thereof, have made any payment directly or indirectly in violation of relevant anti-corruption laws, including the FCPA; (2) no payment will be made in the future in violation of relevant anti-corruption laws, including the FCPA; and (3) it has an ongoing obligation to comply with relevant anti-corruption laws. The Requestor has further represented that under its joint venture agreement with Foreign Private Company 2, the Requestor will have the right to withhold payments to Foreign Private Company 2 and/or terminate the joint venture agreement and dissolve the joint venture entity in the event of a breach of the agreement, including violations of relevant anti-corruption laws. In addition, the agreement will contain provisions providing for one party to buy out the other in the event of breach of the agreement.

### Conclusion

Based upon 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 Proposed Transaction, a prospective majority investment by the Requestor in the Investment Target, an entity that would be responsible for providing certain public services to a municipality in the host country.

This determination is based on several important factors. First, the Requestor conducted and documented reasonable due diligence of the anticipated seller of privatized shares of the Investment Target, with attention to both FCPA risks and compliance with local laws and regulations, and will maintain such documentation in the United States. Second, the Requestor required and obtained transparency through adequate disclosures to the relevant government entities of the anticipated purchase at a significant premium from the Foreign Private Company Owner of the majority of shares in the Investment Target, following the Foreign Private Company Owner's completion of his purchase of the Foreign Government Owner's shares through the public tender process. Third, the Requestor will obtain from the Foreign Private Company Owner representations and warranties regarding past and future anti-corruption compliance. And fourth, the Requestor will retain the contractual rights to discontinue its business relationship with Foreign Private Company 2 in the event of breach of their joint venture agreement, including violations of anti-corruption laws.

This Opinion, however, is subject to the following important caveats: the FCPA Opinion Letter

and Release can be relied upon by you only to the extent that the disclosure of facts and circumstances in your Request is accurate and complete and remains accurate and complete. Additionally, this Opinion Letter and Release have no binding application on any party that did not join in the Request.