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Opinion Procedure Release 04-02

No. : 04-02
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Foreign Corrupt Practices Act Review Opinion Procedure Release

The Department has reviewed the FCPA Opinion Procedure request of an investment group consisting of, among others, JPMorgan Partners Global Fund, Candover 2001 Fund, 3i Investments plc, and investment vehicles ["Newcos"], all of which are hereinafter referred to as the "Requestors." The Requestors are acquiring certain companies and assets from ABB Ltd. ["ABB"] relating to ABB's upstream oil, gas, and petrochemical businesses ["OGP Upstream Business"].

On July 6, 2004, the Department announced guilty pleas to violations of the Foreign Corrupt Practices Act ["FCPA"] entered in the United States District Court for the Southern District of Texas by ABB Vetco Gray, Inc. and ABB Vetco Gray (UK) Ltd., two of the entities being acquired by the Requestors. On the same date, the U.S. Securities and Exchange Commission filed a settled enforcement action in the United States District Court for the District of Columbia charging ABB with violating the anti-bribery, books and records, and internal accounting and controls provisions of the FCPA relating to transactions involving business in several foreign countries, including Nigeria.

Previously, after the Requestors and ABB had executed a Preliminary Agreement dated October 16, 2003, relating to the acquisition of the OGP Upstream Business, they agreed to mutually conduct an FCPA compliance review -- through separately-engaged counsel -- of the OGP Upstream Business for the prior five-year period. ABB and the Requestors separately engaged forensic auditors to assist in the review and analysis of financial information, and ABB provided the Requestors with access to witnesses and records related to its OGP Upstream Business.

Requestors have represented that the review of OGP Upstream Business involved more than 115 lawyers and over 44,700 man-hours. Requestors conducted a manual review of over 1,600 boxes of printed e-mails and other documents, CD-ROMs, and hard drives of electronic records, amounting to more than 4 million pages. Over 165 interviews of current and former employees and agents of the OGP Upstream Business were conducted. In addition, the forensic accountants visited 21

countries, assigning more than 100 staff members to review and analyze hundreds of thousands of transactions. Counsel for the Requestors also produced 22 analytical reports of OGP Upstream Business operations, with supporting evidence. All documents and witness interview memoranda were provided to the Department and the SEC as they were produced.

The requestors represent that they have taken, and will continue to undertake, a number of precautions to avoid, in the future, a knowing violation of the FCPA. The Requestors have represented and undertake, on behalf of their newly acquired entities, to:

1. Continue to cooperate with the Department and the SEC in their respective investigations of the past payments and to cooperate with other interested U.S. government agencies, as well as foreign law enforcement authorities, as may be applicable;
2. Ensure that any employee or officer of the OGP Upstream Business who continues to be employed by Newco and who is found to have made or authorized unlawful or questionable payments to foreign officials is appropriately disciplined;
3. Disclose to the Department any additional pre-acquisition payments to foreign officials relating to the OGP Upstream Business made by ABB that it discovers after the acquisition;
4. Ensure that Newco adopts a system of internal accounting controls and a system designed to ensure the making and keeping of accurate books, records, and accounts; and
5. Cause Newco to adopt a rigorous anti-corruption compliance code ("Compliance Code"), as described further below, that is designed to detect and deter violations of the FCPA and foreign anti-corruption laws. Newco's anti-bribery Compliance Code will consist of the following elements:

(A) A clearly articulated corporate policy against violations of the FCPA and foreign anti-bribery laws and the establishment of compliance standards and procedures to be followed by all directors, officers, employees, and all business partners, including, but not limited to, agents, consultants, representatives, and joint venture partners and teaming partners, involved in business transactions, representation, or business development or retention in a foreign jurisdiction (respectively, "Agents"; and "Business Partners") that are reasonably capable of reducing the prospect that the FCPA or any applicable foreign anti-corruption law of Newco's Compliance Code will be violated;

(B) The assignment to one or more independent senior Newco corporate officials, who shall report directly to the Compliance Committee of the Audit Committee of the Board of Directors, of responsibility for the

implementation and oversight of compliance with policies, standards, and procedures established in accordance with Newco's Compliance Code;

(C) The effective communication to all shareholders' representatives directly involved in the oversight of Newco ("Shareholders") and to all directors, officers, employees, Agents, and Business Partners of corporate and compliance policies, standards, and procedures regarding the FCPA and applicable foreign anti-corruption laws, by requiring (i) regular training concerning the requirements of the FCPA and applicable foreign anti-corruption laws on a periodic basis to all Shareholders, directors, officers, employees, Agents, and Business Partners and (ii) annual certifications by all Shareholders, directors, officers, employees, including the head of each Newco business or division, Agents, and Business Partners certifying compliance therewith;

(D) A reporting system, including a "Helpline"; for directors, officers, employees, Agents, and Business Partners to report suspected violations of the Compliance Code or suspected criminal conduct;

(E) Appropriate disciplinary procedure to address matters involving violations or suspected violations of the FCPA, foreign anti-corruption laws, or the Compliance Code;

(F) Clearly articulated corporate procedures designed to assure that all necessary and prudent precautions are taken to cause Newco to form business relationships with reputable and qualified Business Partners;

(G) Extensive pre-retention due diligence requirements pertaining to, as well as post-retention oversight of, all Agents and Business Partners, including the maintenance of complete due diligence records at Newco;

(H) Clearly articulated corporate procedures designed to ensure that Newco exercises due care to assure that substantial discretionary authority is not delegated to individuals whom Newco knows, or should know through the exercise of due diligence, have a propensity to engage in illegal or improper activities;

(I) A committee consisting of senior Newco corporate officials to review and to record, in writing, actions relating to (i) the retention of any Agent or subagents thereof, and (ii) all contracts and payments related thereto;

(J) The inclusion in all agreements, contracts, and renewals thereof with all Agents and Business Partners of provisions: (i) setting forth anti-corruption representations and undertakings; (ii) relating to compliance with foreign anti-corruption laws and other relevant laws; (iii) allowing for internal and independent audits of the books and

records of the Agent or Business Partner to ensure compliance with the foregoing; and (iv) providing for termination of the Agent or Business Partner as a result of any breach of applicable anti-corruption laws and regulations or representations and undertakings related thereto;

(K) Financial and accounting procedures designed to ensure that Newco maintains a system of internal accounting controls and makes and keeps accurate books, records, and accounts, and;

(L) Independent audits by outside counsel and auditors, at no longer than three-year intervals, to ensure that the Compliance Code, including its anti-corruption provisions, are implemented in an effective manner.

Based upon all the facts and circumstances, as represented by the Requestors, the Department does not presently intend to take an enforcement action against the Requestors or their recently-acquired entities, for violations of the FCPA committed prior to their acquisition from ABB.

This opinion is subject to the following caveats:

1. Although the Department views the Requestors' representations concerning a compliance program to be significant precautions against future violations of the FCPA, the Department's opinion should not be deemed to endorse any specific aspect of the Requestors' program.
2. The Department's opinion does not speak to any prospective conduct by the Requestors or any of the entities acquired from ABB following the acquisition.

The FCPA Opinion Letter referred to 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 parties only to the extent that the disclosure of facts and the circumstances in their request is accurate and complete and continues to accurately and completely reflect such facts and circumstances.

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