February 21, 2012

The Honorable Lanny A. Breuer
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U.S. Department of Justice
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Guidance Concerning the Foreign Corrupt Practices Act

Dear Messrs. Breuer and Khuzami:

In a speech on November 8, 2011 to the 26th National Conference on the Foreign Corrupt Practices Act, Assistant Attorney General Breuer stated that "in 2012, in what I hope will be a useful and transparent aid, we expect to release detailed new guidance on the Act's criminal and civil enforcement provisions." On behalf of the more than three million businesses and organizations whose interests we represent, we the undersigned organizations, write to request that this guidance address several issues and questions of significant concern to businesses seeking in good faith to comply with the FCPA. Detailed, authoritative guidance on these matters will enhance companies' compliance with the FCPA by clarifying the "rules of the road" and by mitigating the significant interpretive challenges that companies face when applying the text of the statute to complex real-world circumstances.

Definitions of "Foreign Official" and "Instrumentality"

The FCPA prohibits corrupt payments or offers of payment to foreign officials, but it does not provide adequate guidance on who is a "foreign official." Although a "foreign official" is defined as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public

international organization,"[1] the statute does not provide any definition of "instrumentality." It is therefore unclear what types of entities are "instrumentalit[ies]" of a foreign government such that their employees are considered "foreign officials." As a result, it is often difficult for companies to determine when they are dealing with "foreign officials," particularly in markets in which many companies are at least partially state-owned.

Your agencies have interpreted the terms "foreign official" and "instrumentality" broadly but, as yet, have not provided a clear, uniform definition to which companies may conform their conduct. Courts have treated the issue as multi-faceted and highly fact-specific, holding recently that Congress did not intend either to include or to exclude *all* state-owned enterprises from the ambit of the FCPA,[2] and that whether a state-owned enterprise qualifies as an "instrumentality" is a question of fact for the jury to decide based on a variety of factors, including the level of investment in the entity by a foreign state, the foreign state's characterization of the entity and its employees, the foreign state's degree of control over the entity, the purpose of the entity's activities, the entity's obligations and privileges under the foreign state's law, the circumstances surrounding the entity's creation and the foreign state's extent of ownership of the entity.[3]

This highly fact-dependent and discretionary approach to which foreign companies qualify as "instrumentalities" of foreign governments and who may be a "foreign official" engenders tremendous uncertainty and risks serious misallocation of resources by U.S. businesses seeking to sell their goods and services in foreign markets, with the result that either transactions are forgone or insufficient resources are available to vet transactions that warrant attention. Without a clear understanding of the parameters of "instrumentality" and "foreign official," companies have no way of knowing whether the FCPA applies to a particular transaction or business relationship, particularly in countries like China where most if not all companies are at least partially owned or controlled by the state. The result of these circumstances has been a chilling effect on legitimate business activity (as companies perceive a real risk of prosecution even in scenarios involving only the most remote and attenuated connection to foreign governments) and a costly misallocation of compliance resources (as companies dedicate resources to policing and investigating even such remote and attenuated situations).

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1 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

2 *U.S. v. Noriega, et al.*, No. 02:10-cr-01031-AHM, Criminal Minutes – General (C.D. Cal. Apr. 20, 2011), ECF No. 474, at 2, 14.

3 *U.S. v. Carson, et al.*, No. 08:09-cr-00077-JVS, Criminal Minutes – General (C.D. Cal. May 18, 2011), ECF No. 373, at 5.

The forthcoming guidance therefore should address the meanings of "instrumentality" and "foreign official" in at least the following respects:

- The guidance should identify the percentage ownership or level of control by a foreign government that ordinarily will qualify a corporation as an "instrumentality." Majority ownership or control of a voting majority of outstanding shares would be appropriate standard thresholds, and would be entirely consistent with the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The OECD Convention defines "foreign public official" as "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization."[4] The OECD Convention goes on to define "public enterprise" as "any enterprise, regardless of its legal form, over which a government or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, inter alia, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board." Similar principles of majority ownership and dominant influence should apply to the interpretation of "instrumentality" under the FCPA.

- The Department and the SEC should clarify that, in order for a company to be considered an "instrumentality," it typically must perform governmental or quasi-governmental functions. The guidance also should provide a detailed list of what those functions may include.

- The guidance also should identify exceptions, if any, to the foregoing general principles. For example, does majority ownership of a company by a sovereign wealth fund necessarily render employees of that company "foreign officials"? What if the majority ownership by a foreign government is indirect, e.g., the individual is employed by a subsidiary of a subsidiary of a company whose majority owner is a foreign government – or a sovereign wealth fund? What if an individual works only part time for a government entity (e.g., a doctor with dual practices, both public and private) – is that individual a "foreign official" and if so, when?

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[4] 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article I, Paragraph 4(a) & Commentary.

Consideration of Compliance Programs in Enforcement Decisions

Under the current FCPA enforcement regime, the business community lacks confidence that the Department and the SEC will give sufficient consideration to potential defendant companies' strong, pre-existing compliance programs when making enforcement decisions. The Department's Principles of Federal Prosecution of Business Organizations provide that when determining "the proper treatment of a corporate target," prosecutors "should consider," among other factors, "the existence and effectiveness of the corporation's pre-existing compliance program…."[5] The SEC, in its Seaboard factors, also advises that its staff should consider a company's compliance program when making enforcement decisions.[6] However, the guidance under both the Principles of Federal Prosecution and the Seaboard factors regarding compliance programs is presented in a manner so general that it provides little concrete aid to companies attempting to implement or enhance compliance programs.

Accordingly, we respectfully request that the Department and the SEC provide guidance regarding what would be considered an effective FCPA compliance program that would merit favorable consideration in enforcement decisions. If the forthcoming guidance on this issue consists merely of a recitation in summary form of specific corporate compliance programs that have been adopted pursuant to deferred prosecution agreements, non-prosecution agreements or SEC settlements, the marginal utility of such guidance to the cause of FCPA compliance in the business community will be limited. Instead, the guidance should establish standards that businesses may adopt and incorporate as part of their compliance programs, and identify the specific components that the Department and SEC consider to be essential to a robust FCPA compliance program.

The guidance also should describe how the Department and the SEC factor companies' voluntary disclosures of FCPA violations by their employees into enforcement decisions.

Parent-Subsidiary Liability

The FCPA itself does not set forth circumstances when a parent company may be held liable for a foreign subsidiary's violations of the anti-bribery provisions of the FCPA. This lack of statutory clarity has been compounded by an apparent difference in

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5 *See* Principles of Federal Prosecution of Business Organizations, Title 9, Chapter 9-28.300 and 9-28.800, UNITED STATES ATTORNEY MANUAL, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

6 Exchange Act Release No. 44969 (Oct. 23, 2001) (informally known as the Seaboard report).

enforcement policy between the Department and the SEC. The Department takes the position that a parent corporation "may be held liable for the acts of [a] foreign subsidiar[y] [only] where they authorized, directed, or controlled the activity in question."[7] By contrast, the SEC has charged parent companies with civil violations of the anti-bribery provisions based on actions by a subsidiary of which the parent is entirely ignorant.[8] The SEC's approach appears to be contrary not only to well-established common law principles of corporate liability, but also to the statutory language of the anti-bribery provisions, which require evidence of knowledge and intent for liability. It is also contrary to the position taken by the drafters of the FCPA, who recognized the "inherent jurisdictional, enforcement and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill" and who made clear that an issuer or domestic concern generally should be liable for the actions of a foreign subsidiary only if the issuer or domestic concern engaged in bribery by acting "through" the subsidiary.[9] At most, the drafters indicated that if a parent company's ignorance of the actions of a foreign subsidiary resulted from conscious avoidance of knowledge, the parent "could be in violation of section 102 requiring companies to devise and maintain adequate accounting controls."[10]

The SEC's theory that a parent company can be liable for a subsidiary's violations of the anti-bribery provisions even where the subsidiary's improper acts were undertaken without the parent's knowledge, consent, assistance or approval also has not been tested in court. In the absence of any judicial guidance on the contours and the limits, if any, of this potential parent-company liability, it remains a source of significant concern for U.S. companies with foreign subsidiaries. Accordingly, we respectfully request that the forthcoming guidance clarify and confirm that both the Department and the SEC consider parent company liability under the FCPA's anti-bribery provisions to extend only to circumstances in which the parent actually authorized, directed or controlled the improper activity of its subsidiary.

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7 Department of Justice, *Layperson's Guide to FCPA*, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

8 *See, e.g.*, *In re* United Industrial Corp., Exchange Act Release No. 60005, 2009 WL 1507586 (May 29, 2009), *available at* http://www.sec.gov/litigation/admin/2009/34-60005.pdf; SEC Litig. Rel. No. 21063, 2009 WL 1507590 (May 29, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr21063.htm.

9 *See* H.R. Conf. Rep. 95-831, at 14 (1977).

10 *See* S. Rep. No. 95-114, at 11 (1977).

Successor Liability

Under the FCPA, a company may be held liable for the actions of a company that it acquires or merges with – even if those actions took place prior to the acquisition or merger and were entirely unknown to the acquiring company. While a company in certain circumstances may mitigate its risk by conducting due diligence prior to an acquisition or merger (or, in certain circumstances, immediately following the transaction),[11] such due diligence is only a factor that the Department or the SEC may consider when deciding whether to exercise their discretion not to prosecute or file claims. Even when an acquiring company has conducted exhaustive due diligence and immediately voluntarily reported suspected violations of the target company, for example, the benefits of such diligence are uncertain and usually unknowable.

The threat of successor liability even if a thorough investigation is undertaken prior to a transaction has had a significant chilling effect on mergers and acquisitions, and therefore clearer parameters for successor liability under the FCPA are needed. The Department and the SEC should clarify that they ordinarily will not pursue an enforcement action against a company for pre-acquisition violations by an acquiree. If the successor company inherits employees who continue to commit FCPA violations, such new or continuing conduct may, of course, be imputed to the new company.

At the very least, if a company conducts reasonable due diligence prior to an acquisition, the company ordinarily should not be subject to any enforcement action for pre-acquisition conduct by the acquired entity. What constitutes sufficient due diligence may vary depending on the risks in a given transaction – e.g., whether the target company does significant business in regions that are known for corruption – the size and complexity of the transaction, and the existence or absence of legal or structural impediments to reasonable pre-acquisition diligence. But sufficient pre-acquisition due diligence should not require a full internal investigation and the expenditure of significant resources by the company. Instead, the government's forthcoming guidance should outline reasonable standards for such diligence and identify factors that will be considered in determining whether diligence was adequate.

The guidance also should provide realistic standards for post-acquisition due diligence where pre-acquisition due diligence could not be undertaken or was significantly limited. Although the Department addressed this topic in Opinion Release 08-02, the Department's guidance required the company in question to conduct diligence on a scale equivalent to a massive internal investigation in order to avoid prosecution for any FCPA violations committed by the acquired company prior to the transaction. For

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[11] *See* Department of Justice FCPA Opinion Procedure Release No. 08-02 (Jun. 13, 2008), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html.

example, the company was advised that it should retain outside counsel and forensic accountants to conduct a full examination of the acquiree's emails and financial and accounting records and to interview the acquiree's personnel, and to accomplish all of this on a rigid and aggressive schedule spanning less than six months (with high risk issues to be identified, investigated and reported to the Department within 90 days of the transaction closing).[12] The sweeping expectations set forth in Opinion Release 08-02 are unrealistic and unduly punitive. They merit thorough reconsideration.

De Minimis Gifts and Hospitality

The Department has stated that it does not prosecute conduct involving de minimis gifts and hospitality to foreign officials. For example, during a June 14, 2011 hearing before the House Subcommittee on Crime, Terrorism and Homeland Security, when Acting Deputy Assistant Attorney General Greg Andres was asked "Are de minimis cases ever brought?" he testified, "They're not, sir. And just to clear the record, the Department of Justice has never prosecuted somebody for giving a cup of coffee to a foreign official, a martini, two martinis, a lunch, a taxi ride or anything like that."[13] Notwithstanding the Department's assurances, such gifts and hospitality remain subject to prosecution at the whim of the government. They are therefore a subject of considerable concern both for business personnel who regularly encounter situations involving such hospitality – the business lunch, the site visit that includes transportation for guests, the pitch meeting that includes gifts of company trinkets – and for companies' compliance personnel, who frequently must devote disproportionate resources to investigating, analyzing and attempting to resolve such situations.

Compliance officers routinely are called upon to address questions relating to how much can be spent on a meal, how many meals in a year may an official be invited to attend, and similar issues. The risk that the Department could prosecute de minimis gift and hospitality cases, in combination with the absence of any guidelines from the government regarding the threshold below which it ordinarily will not bring those cases, has resulted in a serious misallocation of compliance resources to detect and address potential breaches that should fall below any reasonable threshold.

While we recognize that exceptional circumstances may exist in which the Department or the SEC concludes that a de minimis gift nevertheless merits charges, we submit that it should be possible to identify a clear standard for gifts and hospitality that ordinarily will not be subject to enforcement action and to address common scenarios that arise in the course of business interactions with foreign officials. For example, in what

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12 *Id.*

13 Hearing of the Crime, Terrorism and Homeland Security Subcommittee of the House Judiciary Committee (June 14, 2011), Tr. at 16-17.

circumstances would it violate the FCPA to provide foreign officials with tickets to a sporting event or concert? In what circumstances would it violate the FCPA to pay for business class or first class flights, car services, hotel accommodations, meals or other travel expenses for foreign officials in connection with business-related travel? In what circumstances would it violate the FCPA to pay for meals or travel expenses for relatives of foreign officials (e.g., inviting a foreign official and his or her spouse to attend a dinner with employees of the business)? In addition to providing much-needed clarity with respect to commonplace business activities, such guidance also will help companies avoid wasting resources on internal investigations of technical but inconsequential breaches (e.g., the taxi ride or business lunch) and instead allocate those resources to detecting, investigating, and preventing those more serious instances of corruption that the FCPA was intended to address.

As you know, the U.K. Ministry of Justice already has provided such guidance regarding the application of the U.K. Bribery Act. According to that guidance, "Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour. The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes."[14] The Ministry of Justice cites, as examples of ordinarily legitimate hospitality, "the provision of airport to hotel transfer services to facilitate an on-site visit," "dining and tickets to an event," or "reasonable travel and accommodation to allow foreign public officials to visit [a company's] distant mining operations so that those officials may be satisfied of the high standard and safety of the company's installations and operating systems…."[15] Similar concrete examples in your forthcoming guidance would be extremely useful to the business community.

<u>*Mens Rea* Standard for Corporate Criminal Liability</u>

Although the FCPA expressly limits an individual's liability for violations of the anti-bribery provisions to situations in which the individual has committed those violations "willfully," it does not contain any similar language with regard to corporate criminal liability.[16] This inconsistency in the statutory language appears to expose companies to criminal penalties for violations of the FCPA even if there is no identifiable person of authority who knew that the conduct was unlawful or even wrong. Because

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14 U.K. Ministry of Justice, *The Bribery Act 2010 – Guidance*, at ¶ 26.

15 *Id*. at ¶¶ 30-31.

16 15 U.S.C. § 78dd-3(a)(2).

corporations act only through their employees or agents and therefore can be liable only if an individual for whom the corporation is liable has committed the criminal act, it should not be possible to convict a corporation unless the employee is liable. Such individual liability requires willful conduct, and so should corporate liability. Given that the statute does not explicitly address the *mens rea* standard for corporate criminal liability, we request that the Department clarify its position on that standard, including by stating whether the Department's view is that a company may be criminally sanctioned for FCPA bribery violations of which the company had no direct knowledge.

Declination Decisions

We also request that the Department reconsider its practice of not providing information about its decisions to close FCPA-related investigations with no enforcement action. An understanding of the real-world circumstances that result in a declination would be tremendously useful to companies seeking to comply with the FCPA. In particular, to the extent that a declination decision is based on the robustness of a company's compliance program, information about that program would help provide a standard against which other companies may measure their own programs. The Department could and should make information about its declinations available without identifying the companies or individuals at issue – just as it already does in its Opinion Releases.

Other Recurring Issues

Given the complexity of the FCPA and the modern business environment, compliance officials at companies regularly confront many issues of interpretation and application in addition to those identified above. Among those recurring situations are the following, and we respectfully request that the forthcoming guidance address these scenarios.

- Companies that enter into business relationships with relatives of government officials face risks under the FCPA, but it should not be the case that such relationships are never appropriate. Accordingly, the guidance should outline recommended "best practices" and examples of prophylactic measures that would be expected by DOJ and SEC with regard to business relationships with relatives of foreign officials. In addition, the guidance should address those circumstances where a company has no knowledge of a family member's connections to government or are unlikely to have any business before or with applicable government bodies.

- Charitable organizations and institutions in many nations have significant government ties. What standards should govern corporate donations to

charities that have connections with foreign governments? What level of diligence is required or expected when making charitable donations?

- How are U.S. companies to treat apprentice programs or secondment arrangements in which their employees are assigned to work for a foreign customer in which a foreign government holds an interest, with the salaries of the apprenticed employees paid by the U.S. company? Under the FCPA, are such apprenticed or seconded employees treated as employees of a foreign "instrumentality" such that their salaries are viewed as bribes?

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As you know, we believe that modest legislative revisions and clarifications of the FCPA remain the best option for providing the certainty needed by the regulated community. Nevertheless, the formal guidance that we understand you will provide in 2012 should carry sufficient precedential weight to be reliable and meaningful for businesses seeking to comply with the FCPA. For example, it should have the same force as other policies of the Department and the SEC, such as the Principles of Federal Prosecution of Business Organizations and the SEC Enforcement Manual. Additionally, in order to avoid conflicting interpretations and ensure a uniform policy, the guidance should be issued by (or at least adopted by) both your agencies and should apply, as Assistant Attorney General Breuer's remarks appeared to indicate, to both criminal and civil enforcement. Guidance that the Department and the SEC are entirely free to disregard in future enforcement decisions would foster only greater uncertainty, not greater compliance.

We appreciate your consideration of this letter, and we would welcome an opportunity to meet with you, at your convenience, to discuss our requests.

Sincerely,

US Chamber of Commerce
US Chamber Institute for Legal Reform
Advanced Medical Technology Association
American Gaming Association
American Institute of Certified Public Accountants
American Insurance Association
Arkansas Cattlemen's Association
Arkansas Farm Bureau
Bay Area Council

California Manufacturing and Technology Association
Civil Justice Association of California
The Coalition of Service Industries
Faulkner County Farm Bureau
The Financial Services Roundtable
Generic Pharmaceutical Association
International Association of Drilling Contractors
International Stability Operations Association
Iowa Association of Business and Industry
National Association of Criminal Defense Lawyers
National Association of Manufacturers
National Foreign Trade Council
Pharmaceutical Research and Manufacturers of America
The Poultry Federation
Professional Services Council
Retail Industry Leaders Association
Southern California Biomedical Council
TechAmerica
Technology Hampton Roads
Virginia Biotechnology Association
Virginia International Business Council
Western Independent Refiners Association
West Virginia Bankers Association
West Virginia Manufacturers Association
West Virginia Farm Bureau