February 19, 2013

Hon. Lanny A. Breuer Assistant Attorney General Criminal Division U.S. Department of Justice 950 Pennsylvania Avenue, NW Washington, D.C. 20530-0001	George S. Canellos Acting Director of Enforcement U.S. Securities and Exchange Commission 100 F Street, NE Washington, D.C. 20549

FCPA Resource Guide

Dear Messrs. Breuer and Canellos:

On behalf of the millions of businesses and organizations whose interests we represent, we write to express our appreciation to the Department and the SEC for the November 14, 2012 release of *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "*Resource Guide*") and to identify several areas of continuing concern for businesses seeking in good faith to comply with the FCPA. The Department and the SEC clearly devoted tremendous effort to the preparation of the *Resource Guide*, which helps clarify a range of issues regarding the enforcement of the FCPA and provides a single central source of information for compliance officers and others in need of guidance with regard to the views of the Department and the SEC. Many of us appreciated the opportunity to meet with you and your teams on April 11, 2012 to further elaborate on the concerns articulated in our letter of February 21, 2012. Many, but not all, of those concerns were addressed in the guidance. As issues relating to FCPA compliance evolve, we look forward to regular updates to the *Resource Guide* and to further discussion with you and your colleagues regarding the enforcement of the FCPA, including the issues identified in this letter.

Compliance Programs and Voluntary Disclosures

We encouraged the Department and the SEC to identify the components of what they consider an effective FCPA compliance program. While noting that the Department and the SEC "have no formulaic requirements regarding compliance programs," the *Resource Guide* includes an extensive discussion of what the enforcement agencies

consider to be the key elements or characteristics of a robust compliance program.[1] The *Resource Guide* also appropriately recognizes that these elements should "be tailored to an organization's specific needs, risks, and challenges" based upon a "company's own assessment."[2] However, even if a company had in place a state-of-the-art compliance program that was well-designed to prevent FCPA violations and that was aggressively enforced, it remains exposed to liability if the program is circumvented by even one employee. The *Resource Guide* offers little assurance that the company's pre-existing, strong compliance program will be given sufficient weight in the charging decisions of the Department and the SEC. Such assurance should be provided through legislative reform of the FCPA to add an affirmative defense that would permit a company, if charged with an anti-bribery violation, to rebut the imposition of criminal liability if the individuals responsible for the violation circumvented compliance measures that were otherwise reasonably designed to identify and prevent such violations and implemented with appropriate vigor.

We also sought a description of how the enforcement agencies evaluate voluntary disclosures when making enforcement decisions. In the *Resource Guide*, the Department and the SEC emphasize that they place a "high premium on self-reporting" when determining whether and how to pursue a case.[3] However, the *Resource Guide* then simply reiterates relevant provisions of the Department's Principles of Federal Prosecution of Business Organizations and the SEC's Enforcement Manual and Seaboard Report.[4] It would be more helpful to provide some discussion of the application of those principles to real-life circumstances, including through illustrative hypotheticals and examples of actual enforcement decisions. Such a discussion also could strengthen and clarify the incentives in favor of self-reporting for businesses seeking to comply in good faith with the FCPA but concerned that their self-reporting of a violation will be given short shrift in any eventual enforcement decision by the agencies. The inclusion in the *Resource Guide* of examples of declinations, as discussed below, is laudable but does not fully respond to this concern – particularly insofar as those examples involve relatively limited violations and, by their nature, do not encompass situations in which self-reporting and related remedial measures make the difference between, for example, a plea and a deferred prosecution agreement or non-prosecution agreement.

---

[1] U.S. Department of Justice & U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Nov. 14, 2012) at 56-63.

[2] *Id*. at 57.

[3] *Id*. at 54.

[4] *Id*. at 54-56.

Definitions of "Foreign Official" and "Instrumentality"

In our previous communications, we urged the Department and the SEC to provide detailed guidance regarding the meanings of "foreign official" and "instrumentality," including by identifying the percentage ownership or level of control by a foreign government that ordinarily will qualify an entity as a government instrumentality. We recommended a threshold of majority ownership or control of voting majority of outstanding shares. We also sought clarification that, in order to be an instrumentality, an entity ordinarily must perform governmental or quasi-governmental functions.

On this issue, the *Resource Guide* includes the welcome clarification that majority ownership typically is the threshold for instrumentality status, stating that "as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares."[5] However, the *Resource Guide* also endorses an extremely fact-specific analysis that relies on a lengthy yet non-exclusive list of factors. Those factors include some that may be impractical or impossible for another company to discern or determine, such as "the foreign state's characterization of the entity and its employees," "the circumstances surrounding the entity's creation," "the purpose of the entity's activities," "the exclusive or controlling power vested in the entity to administer its designated functions," "the level of financial support by the foreign state" and "the entity's provision of services to the jurisdiction's residents."[6] Whether an entity performs governmental functions is only one of the many factors on this list and is evidently not considered dispositive by the Department or the SEC. We continue to believe that if the entity does not perform a governmental function, it should not be considered a government instrumentality. We also find it regrettable that, in contrast to the more robust sections concerning successor liability and business-related hospitality, the discussion of the definitions of "foreign official" and "instrumentality" does not contain a single hypothetical to help illustrate the enforcement agencies' approach to this critical issue. The *Resource Guide* is likely to perpetuate uncertainty in the business community regarding the meaning of these terms and make it more difficult for businesses to determine when they are interacting with "foreign officials."

Parent-Subsidiary Liability for Anti-Bribery Violations

We appreciate that the *Resource Guide* clarifies that the SEC shares the Department's position on when a parent company may be liable for a subsidiary's violations of the anti-bribery provisions of the FCPA. The *Resource Guide* states, on behalf of both agencies, that a parent may be liable for bribes paid by its subsidiary under either of two theories: (1) the parent directly participated in the bribe scheme; or (2)

---

5 *Id*. at 21.

6 *Id*. at 20.

"traditional agency principles" would impute the subsidiary's conduct to the parent. The *Resource Guide* goes on to provide that "DOJ and SEC evaluate the parent's control – including the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of the specific transaction – when evaluating whether a subsidiary is an agent of the parent. . . . [I]f an agency relationship exists between a parent and a subsidiary, the parent is liable for bribery committed by the subsidiary's employees."[7] This description of parent-subsidiary liability appears consistent with the "authorized, directed or controlled" standard previously endorsed by the Department in the *Layperson's Guide to the FCPA*. We ask that the Department and SEC confirm that this was not intended to alter the Department's preexisting approach but rather to make clear that both agencies adhere to that view. We also ask that the Department and the SEC clarify that under the agency theory of liability, in order for the parent to be liable for the wrongdoing of the subsidiary's employees, that conduct would need to be within the scope of the agency relationship.

Successor Liability

We sought guidance clarifying that enforcement action ordinarily will not be pursued against an acquiring company for pre-acquisition violations by an acquiree, if the company conducted reasonable due diligence prior to the acquisition. We also encouraged the Department and the SEC to address the level of pre-acquisition diligence that would be considered "reasonable" – emphasizing that such diligence should not require a full internal investigation – and provide reasonable standards for post-acquisition diligence where pre-acquisition diligence could not be undertaken or was significantly limited.

The *Resource Guide* suggests that if a company conducts appropriate pre-transaction FCPA diligence (or post-transaction diligence, if pre-transaction diligence is impractical), voluntarily reports any discovered violations to the Department and the SEC, and takes prompt remedial actions, including implementing robust compliance programs and internal controls, the likelihood of an enforcement action against the successor company is low: "DOJ and SEC have only taken action against successor companies in limited circumstances, generally in cases involving egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition."[8] This statement of policy is appreciated. However, in discussing the necessary components and breadth of pre- or post-acquisition diligence, the *Resource Guide* essentially reiterates the Department's past opinion releases on this topic and relies in part on Opinion Release 08-02, which required the company in question to conduct post-acquisition diligence on a scale equivalent to a massive internal investigation in order to avoid prosecution for any FCPA

---

[7] *Id*. at 27.

[8] *Id*. at 28.

violations committed by the acquired company prior to the transaction.[9] We urge the Department and the SEC to clarify that the sweeping expectations set forth in Opinion Release 08-02 are not the norm and that ordinarily a more reasonable, less extensive course of diligence will be sufficient.

We also note that in the first set of successor liability hypotheticals in the *Resource Guide*, Scenario 1 states that Company A, after identifying several potentially improper payments by an acquisition target in the course of its pre-acquisition due diligence, disclosed the misconduct to the Department and the SEC immediately following the acquisition. However, as the scenario makes clear, the target was not previously subject to the FCPA, so the conduct, which did not continue following the acquisition, did not violate the FCPA. By including disclosure in the factual scenario, the Department and the SEC give the impression that your agencies expect disclosure even where there has been no violation of U.S. law. We ask that the Department and the SEC clarify their expectations with regard to voluntary disclosure in this context. In addition to addressing due diligence with respect to acquirees, we suggest that it would be helpful for the Department and SEC to provide hypotheticals or examples of actual decisions regarding the level of due diligence for third parties such as vendors, agents, and contractors. The *Resource Guide* provides a short list of common red flags associated with third parties but does not provide examples that illustrate due diligence efforts designed to identify these red flags or which apply to non-acquirees, although this is an area of frequent interaction for businesses.

***Mens Rea* Standard for Corporate Criminal Liability**

We asked the Department to indicate whether its view is that a company may be criminally sanctioned for anti-bribery violations of which the company had no direct knowledge. The *Resource Guide* states that "[p]roof of willfulness is not required to establish corporate criminal or civil liability, though proof of corrupt intent is."[10] The *Resource Guide* also recognizes that "corrupt intent" means "an intent or desire to wrongfully influence the recipient."[11] We welcome this emphasis by the Department that, in order for a corporation to be held liable for an anti-bribery violation, the corporation must act with "corrupt intent," which we understand to mean that corporate criminal liability cannot be established absent knowledge of the violation. We trust that the Department will adhere to that standard in future enforcement actions.

---

[9] *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.

[10] *Id*. at 14.

[11] *Id*.

Declination Decisions

We welcome the decision by the Department and the SEC to include in the *Resource Guide*, without using company names or identifying information, six examples of actual matters in which the agencies have declined to pursue prosecution or enforcement action, together with brief descriptions of the factors that influenced the declination decisions.[12] We hope that the agencies, as part of their ongoing efforts to offer useful guidance to businesses seeking to comply with the FCPA, will continue to provide information regarding their declination decisions, and we urge the agencies to consider making this disclosure a routine practice. We do not share the view expressed by some in the Department and SEC that because the agencies do not routinely provide information on declinations in other types of cases, FCPA cases should not be treated any differently. The FCPA is exceptional in that: (i) it is over 30 years old, not a brand new law; (ii) it is very aggressively enforced, in terms of the number of pending investigations initiated each year and in the massive fines and penalties that are sometimes imposed; and (iii) it lacks a material body of case law through which it can be interpreted by the business community. Other statutes, including ones targeting financial fraud, antitrust violations and money laundering, have been extensively construed by the courts. As the Department and SEC recognize in the *Resource Guide*, it is the courts and not the agencies that have the final say. However, until such time as a significant body of case law is developed, we encourage and would welcome regular release of anonymized information on declinations.

Our understanding is that a "declination" is a decision by the enforcement agencies to exercise their discretion, ordinarily on the basis of mitigating factors, not to pursue prosecution or enforcement action despite having evidence of a violation that they consider sufficient to prove their case. By contrast, a decision not to bring a case where the evidence of a violation simply is lacking should not be considered a "declination." We remain concerned that the Department and the SEC may be defining "declination" to include both circumstances. In order to provide useful guidance and positive incentives to companies seeking to comply with the FCPA, the Department and the SEC should continue to provide information – on an anonymized basis – regarding matters in which the agencies found sufficient evidence of an FCPA violation but nevertheless declined to pursue prosecution or enforcement action on the basis of other circumstances, such as the company's voluntary disclosure, cooperation and remedial measures. The incentives in favor of self-reporting and remediation are greatly reinforced when the Department and the SEC are able to demonstrate through actual examples that cooperation and remedial measures can result in a declination for a company even when certain employees or agents of that company have committed a meaningful violation of the FCPA.

---

[12] *Id*. at 77-80.

We look forward to continuing our dialogue.

Sincerely,

U.S. Chamber of Commerce
U.S. Chamber Institute for Legal Reform
American Chamber of Commerce in Cambodia
American Chamber of Commerce in China
American Chamber of Commerce in Indonesia
American Chamber of Commerce in Singapore
American Bankers Association
American Gaming Association
American Institute of Certified Public Accountants
American Insurance Association
Arkansas Cattlemen's Association
Arkansas Farm Bureau
Arkansas Rice Federation
Asia-Pacific Council of American Chambers of Commerce
BusinessEurope
California Manufacturers and Technology Association
Civil Justice Association of California
Delaware State Chamber of Commerce
Generic Pharmaceutical Association
International Association of Drilling Contractors
International Stability Operations Association
Iowa Association of Business and Industry
Mouvement des Entreprises de France
National Association of Manufacturers
National Foreign Trade Council
Organization for International Investment
Pharmaceutical Research and Manufacturers of America
Professional Services Council
Technology Hampton Rhodes
The Financial Services Roundtable
The Poultry Federation
United States Council for International Business
Virginia Biotechnology Association