

Client Alert.

April 13, 2012

Top Enforcement Officials Meet with U.S. Chamber of Commerce Regarding FCPA Guidance

By **D. Anthony Rodriguez**

BACKGROUND

The United States Department of Justice and the Securities and Exchange Commission are preparing guidance regarding the Foreign Corrupt Practices Act, but have not set a deadline for releasing that guidance. Assistant Attorney General Lanny Breuer and SEC Enforcement Director Robert Khuzami have been silent about how much new ground, if any, the guidance will break. While they are saying little about what the guidance will say, they are hearing a lot about what it should say.

A prominent advocate for what the guidance should say is the U.S. Chamber of Commerce. On February 21 of this year, the Chamber's Institute for Legal Reform, with several other prominent business groups, sent a long letter to Messrs. Breuer and Khuzami, outlining what the Chamber and other business groups would like to see in the guidance. On April 11, AAG Breuer and Director Khuzami, along with Commerce Department General Counsel Cameron Kerry, participated in a legal roundtable hosted by the U.S. Chamber Institute for Legal Reform, signaling that they are acknowledging the Chamber's voice and giving it respectful consideration. Whether and to what degree that will translate into features in the guidance that meet with the Chamber's approval remains to be seen.

THE U.S. CHAMBER OF COMMERCE'S ADVOCACY FOR CLEAR AND MEANINGFUL GUIDANCE

The Chamber's letter focused on seven issues that the guidance should address:¹

- Seeking detailed descriptions of what makes an entity an "instrumentality" of a foreign government, and what makes a person a "foreign official."
- Calling for specific standards that businesses "may adopt and incorporate as part of their compliance programs," and that "identify the specific components that the DOJ and the SEC consider to be essential to a robust FCPA compliance program." The Chamber also advocated that the guidance describe how the DOJ and the SEC factor voluntary disclosures of FCPA violations into enforcement decisions, reflecting a sense in the business community that the benefits of self-reporting are uncertain.
- Requesting that parent company liability under the FCPA's anti-bribery provisions should extend "only to circumstances in which the parent actually authorized, directed or controlled the improper activity of its subsidiary."
- Calling for reasonable standards for pre-acquisition due diligence, and for a statement that the DOJ and the SEC "ordinarily will not pursue an enforcement action against a company for pre-acquisition violations by an acquiree." The Chamber also called for "realistic standards for post-acquisition due diligence where pre-acquisition due diligence

¹ The letter can be downloaded at <http://www.instituteforlegalreform.com/doc/letter-to-the-doj-and-sec-regarding-forthcoming-guidance-on-the-foreign-corrupt-practices-act>.

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could not be undertaken or was significantly limited,” referring to the SEC’s Opinion Release 08-02 (commonly called the “Halliburton” release) as setting “sweeping expectations” that “are unrealistic and unduly punitive.”

- Advocating for a clear *de minimis* standard for gifts and hospitality expenses that ordinarily will not trigger an enforcement action. The Chamber noted that the United Kingdom Ministry of Justice has provided guidance regarding the UK Bribery Act that states that it is not the intent of the Bribery Act to prohibit “reasonable and proportionate hospitality and promotional or other similar business expenditure.”
- Noting that an individual must have committed FCPA violations “willfully,” and calling for the same standard for corporate liability.
- Asking the DOJ to reconsider its practice of not making information available about its “declination decisions” — when the DOJ decides to close an FCPA-related investigation without enforcement action.

NO GUIDANCE ABOUT THE GUIDANCE

The president of the U.S. Chamber Institute for Legal Reform called the discussion “frank and productive,” and described the Institute as “encouraged by the thoughtful dialogue that helped us reach a mutual understanding on many of these important issues.”² For their part, AAG Breuer and Director Khuzami have not made any publicly reported comments about the meeting as of the publication of this alert. Just how much of a “mutual understanding” was reached remains to be seen.

Notably, just two days before meeting with the Chamber, AAG Breuer stated in an interview that the commitment to enforcing the FCPA has never been greater, and that he sees this trend continuing. AAG Breuer also discussed the guidance, stating that he is hopeful that observers will credit the DOJ and the SEC with having worked hard and having taken concerns into mind. He did not discuss any specifics, and did not set a date for releasing the guidance.

LOOKING AHEAD

By jointly attending a Chamber roundtable, AAG Breuer and Director Khuzami signaled that they are at least giving respectful attention to the Chamber’s call for new and meaningful guidance. It would be remarkable if the guidance were to have everything that the Chamber has proposed, but a failure to meet any of the Chamber’s recommendations likewise would be a major event. One thing that is certain is that when the DOJ and the SEC release the guidance, the plaudits and the critiques quickly will follow.

² See <http://www.uschamber.com/press/releases/2012/april/business-coalition-engages-discussion-administration-regarding-foreign-cor>.

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