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Statement of TI-USA on FCPA Reform

The United States Chamber of Commerce has proposed changes in the Foreign Corrupt Practices Act, and these proposals are before the House Judiciary Committee.

Transparency International-USA believes the Chamber document fails to provide the proper context for consideration of any changes:

- Corruption is a scourge in both developed and developing markets.
- A critical element of any anti-corruption strategy is a prohibition on companies in developed nations from bribing officials in developing nations.
- The Foreign Corrupt Practices Act---and its enforcement---has been a vital element in the anticorruption efforts to date---and an example of what other developed nations should do under the OECD treaty (and what many are not doing). Indeed, prohibitions against foreign bribery are unpopular in foreign jurisdictions because they can impact illicit efforts to advance trade and create jobs---and any perceived weakness in the U.S. can undermine already weak enforcement in other jurisdictions.
- Many do not share the Chamber's view that the FCPA is being systematically misused by the Justice Department and the SEC (although people may differ about particular cases)-- or that the courts cannot, in egregious cases, impose appropriate limits on enforcement under the strictures of the original statute.
- Any changes in enforcement of the statute should have the goals of a) aiding, not weakening, governmental sanctions on wrong-doing, b) providing greater transparency, predictability, and consistency in administration of the statute, and c) providing incentives for corporations to have effective anticorruption programs in practice, not just in theory.
- Legislation, at this point in time, is too blunt an instrument for quite complex and fact bound issues. Discussions about FCPA enforcement should focus, for now, on the whether issuance of guidelines by the Department of Justice and the SEC is appropriate --- guidelines which would provide covered companies with better understanding of enforcement standards but would also allow the enforcement authorities the necessary flexibility to address new and complex attempts to circumvent the vital prohibitions of the FCPA.

The issues raised by the Chamber are not clearly problems which need to be remedied but are issues which should be the subject of a working group of government officials, affected companies, leading bar and corporate associations, appropriate members of the academy and non-governmental organizations, like TI-USA.

For example: FCPA issues raised by the Chamber, and others, are, in fact, quite complex and require systematic and careful consideration by a working group like the one described above.

- An affirmative compliance defense has a superficial appeal, especially if a single rogue employee far down the chain of command does something improper. But, a profound question is how would enforcement authorities or a court be able to establish that a strong compliance program existed in practice all across a multi-national company---and what kind of presentation would a company have to make, perhaps with third party verification, to demonstrate that a required standard had been met. Moreover, if the improper act is done by a middle or senior level executive, wouldn't that be *prima facie* evidence of the inadequacy of the compliance program? Further, DoJ already has the authority to consider the adequacy of a company's compliance program in making a prosecutorial decision. The compliance defense in the new UK anti-bribery law is untested and unclear.
- The circumstances under which an acquiring company's liability should be limited for the prior actions of an acquired are quite complex. If the acquiring company failed to do adequate due diligence, should it get a pass? If, during acquisition integration, the acquiring company did not adequately audit or examine foreign transactions and let improper acts continue for some time, should it get a pass? The variety and complexity of the issue of liability of the acquiring company indicates that this is a prime issue for detailed discussion and exploration of permutations among sophisticated players in a working group.
- Similarly, the question of limiting liability of a parent for acts of a subsidiary are quite complex, although the broad rule is clear: the liability of a parent for criminal acts of a subsidiary occurs when those acts are authorized, directed or controlled by one or more persons at the parent company. Applying that rule may turn on a variety of questions like formal ownership shares, actual management practices, the particular events in question. Again, multi-stakeholder analysis is necessary to determine if guidance is necessary regarding the application of the broad rule.
- In addition, when companies should get "credit"---and what that "credit" should entail---when companies make a "voluntary disclosure" of foreign bribery is a subject worthy of consideration.. Again, a systematic process in a sophisticated working group---drawing on other USG analogies--could help provide better understanding of what constitutes a "voluntary disclosure" and what types of

response from enforcement authorities are appropriate when such a genuine disclosure is made.

- Examination of the reach of other statutory concepts like *scienter* requirements and definitions of “foreign officials” in light of the purpose of the statute may also be appropriate subjects for discussion within such a working group and could inform any guidance that is issued by the enforcement agencies.

This response by TI-USA turns on DoJ and the SEC taking seriously concerns that a review of the FCPA may be appropriate at this time through a meaningful, well structured, well-organized, properly constituted working group. We urge the USG to respond explicitly and promptly by creating such a group with appropriate terms of reference and a realistic timetable.

This response ends with a historical note. More than 20 years ago, there were calls from some in the corporate community to weaken the FCPA because it was supposedly harming American competitiveness. The response of many others in the corporate community was to the contrary. They said: “we should level up, not level down.” Thus the American business community played an important role in drafting and enacting the OECD convention. And, the American business community played an important role in the founding of TI and of TI-USA.

It is in the spirit of leveling up, not leveling down that we believe any FCPA issues should first be addressed by a multi-party working group with the first set of possible actions being consideration of enforcement guidelines, not legislation.

While the FCPA is a maturing enforcement regime that may require refinement, clarification in certain respects and recalibration to reflect the internationalization of the field, the FCPA “ain’t broke.” It has, in fact, been a beacon to industrialized nations around the world showing how a major developed country can enforce strictures against bribery of foreign officials.