

United States Senate

WASHINGTON, DC 20510

February 15, 2012

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder:

We write to you regarding the forthcoming Department of Justice guidance on the Foreign Corrupt Practices Act (“FCPA”), announced by Assistant Attorney General Lanny Breuer in November. In developing this guidance, we urge the Department of Justice to include sufficient information to provide clarity and predictability to companies subject to, and intent on complying with, the statute.

The FCPA is a vital tool in the fight against government corruption around the world and has helped establish the United States as the leader in global anti-corruption efforts, a role that we should not relinquish. Indeed, we applaud the Department of Justice’s increased commitment to FCPA enforcement in recent years. However, it has become apparent that too many companies are devoting a disproportionate amount of resources to FCPA compliance and internal investigations. To be clear, it is both necessary and desirable that companies pay adequate attention to compliance efforts, and in certain cases, adequate anti-corruption initiatives may require a significant corporate commitment. Over-compliance, however, can have a negative effect on product development, export promotion, and workforce expansion.

A culture of responsible corporate behavior begins with clear rules, which are fairly and transparently applied. It is our hope that effective guidance will allow law-abiding companies to comply with the FCPA more efficiently, while not diminishing the government’s ability to enforce the law. Clear guidance will further strengthen the FCPA by encouraging compliance, self-reporting, and cooperation with enforcement actions. To accomplish that goal, we believe that the Department of Justice must provide clear and concrete guidance on:

- the definition of “foreign official,” in particular, the term “instrumentality,” including under what circumstances an employee of an instrumentality who is not exercising the sovereign authority of the state may be considered a “foreign official;”
- the benefits, such as non-prosecution, deferred prosecution, and reduced fines, that will be granted in return for self-reporting of violations, cooperating with investigations, and maintaining an FCPA compliance program;
- the scope of internal investigations and other actions required of companies seeking to cooperate with the government in order to qualify for such benefits;
- the requirements for an adequate compliance program and how such requirements vary depending on the size and complexity of a company;

- the methodology used to calculate fines and disgorgements, including the extent to which the Department of Justice will take into account parallel Securities and Exchange Commission enforcement actions and the enforcement actions of competent foreign authorities for the same conduct at issue;
- the extent to which companies may be held liable for the actions of subsidiaries, predecessor entities, and acquired entities;
- the requisite levels of intent required to incur liability, including the circumstances under which the actions or knowledge of an employee will be imputed to the company;
- the methodology used to determine whether a payment is a “reasonable and bona fide expenditure . . . directly related to . . . the promotion, demonstration, or explanation of products or services;” and
- the applicability of the FCPA to transactions of de minimis value.

In order to provide adequate direction to companies, the guidance provided on each of the above topics should encompass civil and criminal enforcement, by the Department of Justice and the Securities and Exchange Commission, of both the bribery and recordkeeping provisions of the FCPA.

Finally, we encourage the Department of Justice to seek out the participation of U.S. corporate stakeholders when formulating its guidance. Engagement with the stakeholder community ought to occur prior to the release of guidance. In the alternative, guidance should be issued in draft form and finalized after a comment period of sufficient length.

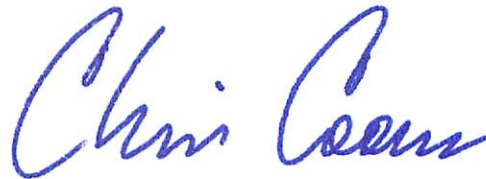
The United States is and must remain a global leader in anti-corruption efforts. Through an open and collaborative process, we are confident that the Department of Justice can issue guidance that will strengthen its critical enforcement mission while also minimizing the collateral burdens on businesses.

Thank you for your attention to this matter, and please do not hesitate to contact us or our staffs with any questions or concerns.

Sincerely,



Amy Klobuchar
United States Senator



Chris Coons
United States Senator

CC: Mary Schapiro, Chairman, U.S. Securities and Exchange Commission