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Summary of the U.S. Chamber's FCPA Reform Initiative

The Foreign Corrupt Practices Act ("FCPA") is a valuable and important statute that helps reduce corruption and reinforce public and investor confidence in markets throughout the world. The primary aim of Congress in enacting the FCPA was to prohibit U.S. companies and companies listed on U.S. exchanges from paying or offering bribes to foreign government officials and political parties for the purpose of obtaining or retaining business advantages. The U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform ("The Chamber") strongly support this goal and believe that the FCPA properly targets foreign bribery and the corrupt business practices that enable and facilitate such bribe schemes.

That being said, more than three decades of experience with the statute have revealed several ways in which it could be improved and clarified. The Chamber has proposed several specific reforms, summarized below, with the goals of providing more certainty to businesses seeking in good faith to comply with the FCPA and ensuring that the statute and its enforcement are consistent with fundamental principles of criminal justice, while preserving existing enforcement tools. The Chamber's call for greater transparency and clearer standards has received bipartisan support in Congress and was validated by the Department of Justice's announcement last November that it planned to issue formal FCPA guidelines aimed at clarifying enforcement policy for the regulated community.

Contrary to certain press reports, the Chamber is not seeking to decriminalize foreign bribery or to repeal the FCPA. Rather, the following proposals would strengthen compliance and result in more effective use of limited enforcement and compliance resources.

- **Compliance Defense:** The Chamber has recommended adding an affirmative compliance defense, similar to that already available under the U.K. Bribery Act, that would permit a company to rebut criminal liability for violations if the person or people responsible had circumvented compliance measures that were otherwise reasonably designed to identify and prevent such violations. The

goal of this reform is to ensure that a company that already had in place a robust FCPA compliance regime is not held criminally liable for the acts of a rogue employee who evaded that compliance structure.

- **Definitions of Foreign Official and Instrumentality:** The FCPA prohibits corrupt payments or offers of payment to foreign officials, including any employees of any “instrumentality” of a foreign government. However, the FCPA does not define “instrumentality.” In many countries, businesses are wholly or partially owned or controlled by the government. From the perspective of the U.S. enforcement agencies, every employee of such a business, no matter how limited the government’s stake in the business or how junior the employee, is a “foreign official” within the ambit of the FCPA. The Chamber has recommended providing a statutory definition of “instrumentality” (and thereby clarifying the meaning of “foreign official”) by indicating the specific criteria that will qualify an entity as an “instrumentality” of a foreign government, with majority ownership or control as the most plausible threshold.
- **Parent-Subsidiary Liability:** The U.S. Department of Justice has stated that it interprets the FCPA to permit a parent company to be held liable for anti-bribery violations by a subsidiary only where the parent authorized, directed or controlled the improper activity in question. The Chamber has proposed that the U.S. Securities and Exchange Commission be held to the same standard as the Department of Justice when charging and prosecuting a parent company for anti-bribery violations by its subsidiary.
- **Successor Liability:** Currently, a company may be held criminally liable under the FCPA not only for its own actions, but for the actions of a company that it acquires, even if those acts took place prior to the acquisition and were entirely unknown to the acquiring company. The Chamber has recommended that a corporation should not be subject to liability for pre-acquisition violations by an acquired company, at least if the acquiring company conducts thorough due diligence at the earliest possible point.
- **“Willfulness” Requirement for Corporate Criminal Liability:** An individual may be held criminally liable for violating the FCPA’s anti-bribery provisions only if he or she acted “willfully.” However, the FCPA does not contain any similar “willfulness” requirement for corporate criminal liability, even though a corporation may act only through its individual employees or agents. Accordingly, the Chamber has recommended clarifying that a company

may be held criminally liable under the FCPA only if it acts “willfully,” the same standard that already exists for individual criminal liability.

- **De Minimis Threshold:** Corporate compliance officers routinely are called upon to address questions relating to minor, ordinary hospitality and gifts, including lunches or transportation to site visits, that may run afoul of the FCPA. The fact that even the most modest measure of hospitality— a meal, a taxi ride—may, if provided to a government official or employee of a state-owned enterprise, give rise to criminal liability under the FCPA for the bestowing company has resulted in a serious misallocation of finite compliance resources. The Chamber therefore has recommended that there should be a clear de minimis threshold below which very modest gifts and hospitality ordinarily will not be subject to enforcement action.
- **Improving Guidance from the DOJ and SEC:** The Chamber has recommended that the Department of Justice and Securities and Exchange Commission provide more detailed and transparent FCPA guidance, including through opinion releases and disclosure of information concerning declinations. The U.S. enforcement agencies recently committed to providing detailed written guidance in 2012, thereby acknowledging the need for greater clarity and the likely benefits of such guidance.