

July 23, 2011

Via Electronic Mail

Mr. Jose W. Fernandez
Assistant Secretary of State for Economic, Energy, and Business Affairs
U.S. Department of State
2201 C Street NW
Washington, DC 20520

Re: U.S. National Contact Point Advisory Board Recommendations

Dear Assistant Secretary Fernandez,

The undersigned coalition of civil society organizations and labor unions are pleased to hear that the U.S. National Contact Point (“NCP”) is creating an Advisory Board to assist the NCP. We appreciate your invitation from June 23, 2011 to provide input on the Advisory Board, and offer the following thoughts on possible goals, composition, and functioning of this multi-stakeholder body to assist the NCP and U.S. Government in effectuating the OECD Guidelines for Multinational Enterprises.

In a 2009 “Memorandum to the Heads of Executive Departments and Agencies,” President Obama stated that “democracy requires accountability, and accountability requires transparency.”¹ The creation of a meaningful Advisory Board will help achieve the goals of accountability and transparency by ensuring that interested groups have a role in advising the NCP on how to be more effective. While many of the consensus recommendations of the ACIEP subcommittee were not adopted in the U.S. NCP’s new policies and procedures, there remains an opportunity for the State Department to take a leadership position both globally and domestically by making the U.S. NCP a trustworthy institution.

Goals and Purpose of the Board

The Advisory Board should provide guidance to, review the performance of, and assist the U.S. government in fulfilling the “core criteria” of accountability, transparency, visibility, and accessibility described in the Procedural Guidance for NCPs. The Advisory Board should provide oversight and monitoring of the NCP’s policies, operations, and overall effectiveness, both on promotional activities and in efforts to resolve conflicts over Specific Instances under the Guidelines.

Composition

The Advisory Board should include stakeholders with experience with the OECD Guidelines and the 2011 U.S. NCP Update. We recommend a quadripartite board, with two

¹ See Barack Obama, Memorandum to the Heads of Executive Departments and Agencies; Subject: Freedom of Information Act, available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.

representatives each from non-governmental organizations (“NGOs”), labor, and business and one academic representative. In order to ensure the ability of the Board to function effectively and efficiently, the board should have seven (7) members.²

Appointments

Members should be solicited widely and publicly, including through the Federal Register, and on the NCP website. As an initial proposal, we recommend that representatives of each external stakeholder group (labor, NGOs, business, and academia) coordinate a nominations process for their respective group. The State Department shall select the members of the Advisory Board from applications received based on criteria enumerated in the Advisory Board’s charter, which could include experience working in the fields of: human rights, environmental issues, development, workers’ rights, collective bargaining, business, socially responsible investment firms, and/or corporate accountability.

Advisory Board members should be appointed for renewable two-year terms. We recommend that the Chair of the Advisory Board be elected by the members of the Board annually and that the seat rotate among the four stakeholder groups. After the initial Advisory Board is constituted, staggered terms or another process should be adopted to ensure continuity within this multi-stakeholder body.

Meetings

The Advisory Board should have regular quarterly meetings. In addition, the Board should meet when the Chair deems necessary, at the request of the NCP, or at the request of Advisory Board members based upon a process decided by the Advisory Board.

Confidentiality

Members of the Advisory Board should be required to maintain the confidentiality of all documents and communications received from the U.S. NCP and parties to a Specific Instance where such documents and communications are not in the public record. The Advisory Board shall have access to all documents and communications submitted to the U.S. NCP by parties to a Specific Instance. Where one party objects to the disclosure to the Advisory Board of a document or communication, or information within a document or communication, that party shall have the opportunity to request redaction of commercially sensitive or other confidential information. Approval of a request for non-disclosure or redaction to the Advisory Board shall be at the sole discretion of the NCP. The NCP shall, at its discretion, determine the scope and appropriateness of a request for redaction.

² We envision the Advisory Board as a feature of the NCP structure additional to the existing Interagency Working Group, which enables government agency feedback to the NCP. Further, we recognize that the Federal Advisory Committee Act (“FACA”) will apply to the Advisory Board and the Board should be required to comply with all FACA requirements.

Access to Confidential Communications

The Advisory Board should have access to all NCP decisions that terminate consideration of a Specific Instance and all final decisions or statements, as well as all submissions by parties to the NCP related to a Specific Instance, except in the circumstances described in the section above. The Advisory Board should be provided with internal policies and procedures of the office the U.S. NCP. The Advisory Board should have access, at its request, to internal communications within the U.S. NCP office, between the U.S. NCP and other NCPs, and between the U.S. NCP office and the Interagency Working Group that may assist the Advisory Board in fulfilling its mandate. Information relating to the following actions by the NCP should be available to the Advisory Board:

- transfer of a Specific Instance request to another NCP;
- determination that the Specific Instance request does not meet initial threshold requirements;
- determination that offering the NCP's good offices will not contribute to a positive resolution or to the purposes and effectiveness of the Guidelines;
- determination that the issues raised in a Specific Instance request are not *bona fide*/relevant to the Guidelines;
- determination that the issues raised in the Specific Instance request do no merit further consideration;
- termination of a Specific Instance request following an agreement reached by the parties through the mediation process;
- termination of a Specific Instance request following a failure to reach an agreement through the mediation process;
- termination of a Specific Instance request following withdrawal from the process by one of the parties; and
- any other rejection, completion, or termination prior to completion of a Specific Instance request.

Responsibilities

The Advisory Board should first assist the NCP in the development of internal operational procedures. Thereafter, the Advisory Board should review the NCP's functioning on both promotional efforts and its role in resolving conflicts arising under the Guidelines on a periodic basis to ensure that the NCP follows both its own internal operating procedures, its public operational policy, as well as the OECD Procedural Guidance for NCPs. The Advisory Board should assist the NCP in promoting the OECD Guidelines for Multinational Enterprises.

The Advisory Board should provide written guidance to the NCP, as requested, on technical or procedural issues, including any requests for clarifications or proposed changes to the OECD Guidelines for Multinational Enterprises that are brought before the OECD

Investment Committee.

Transparency of the Advisory Board

The Advisory Board should submit an annual report to the NCP, the public (via the NCP website), and the Assistant Secretaries of State of EEB and DRL. It should also provide other written reports, memoranda, or other guidance as appropriate. All written work product of the Advisory Board should be made public unless the NCP determines that it refers to or relies on confidential information relating to one or both parties to a request for assistance in a Specific Instance. If from time to time the Advisory Board provides guidance to the NCP in non-written form, a record of that guidance should also be made public. These transparency provisions are subject to the possibility of redaction as described above.

Internal Procedure

The Advisory Board should have the power to set its own rules of procedure, except that in no circumstances should a lack of consensus on the Advisory Board prevent Board members from requesting and receiving information from the NCP.

We hope you find these suggestions as to purpose, structure and composition useful. We look forward to continuing discussions with you regarding the NCP Advisory Board.

Sincerely,



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