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Re: Draft Recommendation of the Council on Public Integrity - Online Public Consultation

Thank you for the opportunity to provide comments on the Draft Recommendation of the Council on Public Integrity (“Recommendation”). We are compliance and ethics professionals who have had experience working in private industry and in supporting public integrity initiatives. We fully support the Council on Public Integrity (“Council”) in its ongoing program to combat corruption and misconduct in the public sector and throughout society.

In our comments on the Recommendation we address the following points:

1. The Council should use the concept of a compliance and ethics (“C&E”) program, as widely applied globally, as a starting point and model
2. The Council should consider using the OECD Working Group on Bribery’s Good Practice Guidance modified to address public integrity and public sector entities
3. The Recommendation should include a model or models (examples) to illustrate how the suggestions in the Recommendation would work on a best practice basis
4. The Council should Include public international organizations, such as the OECD, in the scope of the Recommendation
5. The Recommendation should call on the public sector to promote C&E in the private sector to protect public integrity
6. The Council should advise states not to take actions that undercut C&E programs anywhere, whether in the private sector or the public sector
7. The Council should form an ongoing working group to promote and implement this Recommendation
8. The Rutgers Center for Government Compliance and Ethics offers an important resource for development of public integrity programs

We agree with the approach of the Recommendation to be both value-based and compliance-based, covering principles and practices. We also support the emphasis on managing ethics and enhancing integrity. Focusing on “managing” is essential if this effort is to have a real impact, and move beyond mere words to taking effective action. We have experienced this same shift in the private sector, moving from high-

sounding but ineffective words, to a focus on practical, management steps to get results.

1. The Council should use the concept of a compliance and ethics program, as widely applied globally, as a starting point and model

As the Recommendation makes clear, the goal of this initiative is to create a culture of compliance and ethics in organizations, or as it says, “cultures of integrity.” In organizations this is done through leadership and effective management steps. That is what a compliance and ethics program is: the commitment by management to do the right thing, and effective management steps to make this happen. While the specific methods of implementing these management steps will vary based on the type of organization and other factors, the basic steps themselves are common for all organizations, whether public or private, non-profit or business, religious or secular. We recommend that the Recommendation include and embrace this focus. While the names used in the private sector vary to some degree, the reference to compliance and ethics (“C&E”) programs will make clear that this is common ground.

We believe it will vastly facilitate reaching the Council’s objectives to recognize this reality, and not appear to be reinventing things that already exist. Treating integrity in public sector entities as entirely separate from integrity in the private sector will be wasteful and create confusion and duplication of efforts.

We recommend that, as is the case in other organizations and sectors, the programs should cover all areas of law and ethics that apply to public sector entities. As set out in the Recommendation, the focus is broad – “corruption and misconduct.” However, we note that conflicts of interest are defined separately. For ease of reference and to keep this practical, we recommend making it clear in the definitions on page 5 that “misconduct” includes conflicts of interest.

Why is it important to take a consistent and practical approach to C&E efforts in the public and private sectors? It is clear in the Recommendation that the breadth of “public sector entities” covers many types of entities, including state-owned enterprises (“SOE”). These are frequently very similar to private sector entities, sometimes to the point of being indistinguishable. Many such SOEs already have C&E programs; in some instances, such as healthcare in the United States, these programs may be legally required. Thus a large number of public sector entities are already familiar with the operation of C&E programs and the terms and sources used in this area; they apply them every day.

As another example, there are a number of universities that are operated by government agencies. In the US it is common for such universities to have C&E programs already. They, too, apply C&E concepts every day.

But this use of C&E programs is not limited to public entities that have direct peers in the private sector. Even government agencies as more traditionally defined have compliance and ethics programs. As spelled out in a white paper published by the Rutgers Center on Government Compliance and Ethics (Compliance and Ethics Programs for Government Organizations: Lessons from the Private Sector http://rcgce.camlaw.rutgers.edu/sites/rcgce.camlaw.rutgers.edu/files/rcgce_white_paper.pdf), examples in the United States include the Federal Bureau of Investigation (“FBI”) and the National Security Agency (“NSA”). Counties and cities have also implemented such programs.

The Recommendation, at page 6, item 2.b), wisely calls for those doing this work to have “expertise and resources”. Where are they to get this? There is a great deal of expertise and resources available in the C&E field, and this already includes participation by those who do C&E work in government. It is better not to leave people adrift, but to add clarity by using consistent terminology.

There is much experience, learning, and assistance already available in the C&E field. A number of enforcement agencies have also offered models and guides for regulated entities on how to develop their C&E programs. In the private sector there is broad experience applied in an enormous variety of circumstances by organizations of all types. As a result there is much learning in the C&E field about what do to and what to avoid to create effective programs.

Endorsing the established field of C&E serves as a key guide and framework, but with sufficient freedom to add the various points of emphasis included in the Recommendation. It is relatively easy to tie the various points in the draft into the elements of an accepted C&E framework such as the one set out in the Good Practice Guidance (OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Appendix II, <http://www.oecd.org/daf/anti-bribery/44884389.pdf>) (“Good Practice Guidance”).

The alternative of separate silos and unnecessary duplication will hurt all involved and waste resources. Instead, there is great value in having people in the private and public sectors speaking the same language when they are talking about the same concepts.

Toward this objective, we suggest the following specific changes:

- a. Add on page 4, “Having regard to the work done in the private sector to implement effective compliance and ethics programs, based on guidance and incentives provided by the public sector”
- b. In III 5. d), insert at the end: “, through the promotion of compliance and ethics programs.”
- c. We believe the draft underestimates the risk and impact of retaliation, and recommend stronger coverage of that topic. Retaliation is endemic in organizations and quickly undercuts compliance and ethics efforts. To better emphasize this important point we

recommend having the prevention of retaliation be identified as a core element of any integrity program.

- d. The definition of “misconduct” seems to reflect a bias toward rules-based compliance. There is also a concern that, in some circumstances, the concept of sovereign immunity might mean that governmental wrongdoing may not be sanctionable with the practical consequence that the underlying individual misconduct might also escape formal punishment. It is better just to have misconduct defined as behavior that breaches law, standards or rules, without the qualification that it be formally sanctionable.
- e. Also, the approach seems to be narrowly on individuals, without recognizing the concept of organizational culpability. But in the private sector organizations themselves tend to be subject to sanction. An organization can, unfortunately, have a culture that encourages misconduct. While this does not relieve individuals of responsibility, it does recognize the need to change organizations. Thus the scope of the Recommendation should be expanded to include sanctions against public sector entities. For example, such an entity that had engaged in pervasive misconduct would at least be subject to having an enhanced C&E program required and the implementation checked by an appointed monitor.

2. The Council should consider using the OECD Working Group on Bribery’s Good Practice Guidance modified to address public integrity and public sector entities

All parties will gain if the effort to promote public integrity uses the language and concepts that are widely understood and applied. In this respect, the OECD Working Group on Bribery has already done excellent work in providing a guidance standard on compliance programs. The OECD’s Good Practice Guidance spells out the basic elements that make a compliance program effective. While the Guidance was specifically written for the fight against corruption in the private sector, it can easily be converted for use to promote public integrity.

The Good Practice Guidance has the enormous advantage of being applied to corruption, an area that is global in scope and at the top of the list for companies seeking to promote cultures of ethics and compliance. As is obvious, bribery is a crime that involves at least two entities: a private sector entity and a public one. The Good Practice Guidance thus sets a strong model that is familiar to governments and companies around the world.

We have provided a draft of the Good Practice Guidance modified to address public sector compliance and ethics programs, in Appendix I.

3. The Recommendation should include a model or models (examples) to illustrate how the suggestions in the Recommendation would work on a best practice basis

The Recommendation covers many good and important points, but as written, parts are somewhat conceptual and general. It is important that the Recommendation be practical and something that those in the public sector can start applying. One of the best ways to facilitate this is to offer models of how the Recommendation might be applied.

One of the advantages of a model is that it is just an example. Thus it is not directive, but can be nevertheless very instructive. An excellent example of this can be seen in the Canadian Competition Bureau's guidance on compliance programs (Competition Bureau Canada, Bulletin - Corporate Compliance Programs (June 3, 2015), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/\\$FILE/cb-bulletin-corp-compliance-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/$FILE/cb-bulletin-corp-compliance-e.pdf)), which provides positive and negative examples as guidance.

It would be ideal if such examples could be included in the Recommendation, but if the Council creates a mechanism for following up on its Recommendation this task could be delegated to such a working group.

4. The Council should include public international organizations, such as the OECD, in the scope of the Recommendation

To build a society of integrity it is important that all players participate. One of the lessons of the United States Foreign Corrupt Practices Act was the importance of including public international organizations within the scope of restrictions on foreign bribery. We propose that the Recommendation be expanded to include public international organizations such as the OECD and the United Nations. They should all step up to the fight against corruption and public entity misconduct.

This step could be accomplished simply by adding such organizations into the definition of "public sector" on page 5.

With this change the OECD itself could develop a full-throated C&E program for itself and its staff that could serve as a reference model for other public sector entities. There is nothing that inspires confidence more than having those who offer advice follow the same advice they are offering others.

5. The Recommendation should call on the public sector to promote C&E in the private sector to protect public integrity.

The Recommendation, page 4, recognizes the integrity risks from interaction between the public and private sectors and calls for an integrative approach. This

makes enormous sense, and also fits in with the established global movement toward having companies and other private sector entities adopt effective C&E programs.

Given the importance of this goal, it makes enormous sense for the public sector to promote C&E programs in the private sector. These programs are how organizations put their commitment into action. To fight things like corruption it is essential to have both sides fighting this battle.

Moreover, it is important to recognize that C&E not only affects the organization where it takes place, but is also an important vehicle for getting the broader public policy message out to the public. Every employee who is reached with a compliance message has a personal network of family, friends, colleagues, etc. The more these people are exposed to effective communications on the policy message the more it helps to change the broader culture. Thus, for example, employee training on gender discrimination helps spread the message that this is an important value in society.

How can the public sector promote C&E programs in the private sector? There has been much work done in this field and many examples to follow. Through a mix of incentives and models, the private sector is increasingly being recruited into the battle against corruption and other offenses that undermine the integrity of societies and entire countries.

Just to give some examples, public sector entities could have the existence of an effective C&E program as a factor in selecting contractors. At minimum, government procurement agencies could at least ask providers if they have C&E programs. (In work the authors have done for various government agencies we have never even been asked this question by an agency.) Such entities could follow the lead of the OECD Working Group on Bribery's recommendation that governments:

“... consider, where international business transactions are concerned, and as appropriate, internal controls, ethics, and compliance programmes or measures in their decisions to grant public advantages, including public subsidies, licences, public procurement contracts, contracts funded by official development assistance, and officially supported export credits.” Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, X.C.vi., available at <http://www.oecd.org/daf/anti-bribery/44176910.pdf>.

Those recommendations also contain other useful guidance for governments in promoting private sector C&E programs. See Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, X.C. available at <http://www.oecd.org/daf/anti-bribery/44176910.pdf>.

One of the most, if not the strongest, incentives is to have the existence of an effective C&E program as a factor in determining culpability or the degree of culpability when an organization does break the law. In the United States, for example, sentences for organizations committing federal crimes may be reduced if an organization has such a program. At the initial stage, enforcement and regulatory agencies that are focused on prevention (as opposed to simple revenue generation through fines) will take the existence of such programs into account in determining whether and to what extent to take enforcement actions against organizations.

While some public sector entities only issue empty statements saying they support C&E programs but take no actions to back up the rhetoric, others that want to drive corporate activity and know that actions matter more than mere words, offer real, tangible benefits as an incentive.

Finally, public sector entities can set a model for the private sector by implementing effective C&E programs that apply to their own staff and operations. This serves both to prevent corruption and misconduct in the public sector, and to provide a model for the private sector.

6. The Council should advise states not to take actions that undercut C&E programs anywhere, whether in the private sector or the public sector

If public sector entities are to commit to the fight against corruption and misconduct and to champion integrity efforts in organizations, then at minimum they should not be taking steps that attack the very foundations of these efforts. Yet sadly there is a virulent history of exactly this type of action by agencies, enforcement authorities and courts. Such hostility can severely undercut the effectiveness of efforts to raise the level of integrity throughout the public and private sectors.

We will not attempt to catalog this completely here, but focus on some outstanding examples. In the EU, privacy laws have been used to undercut speak-up systems that protect workers and prevent retaliation against those who raise integrity concerns. This application of privacy laws occurred only when companies tried to get serious about C&E programs in Europe and implement reporting systems, i.e., helplines. Before this there were no existing restrictions on the ability of workers to raise issues related to integrity. But immediately upon the efforts by multinationals to apply the compliance program elements of the United States Sarbanes-Oxley Act and implement reporting systems, companies were threatened with privacy-related enforcement actions. In some countries they were subject to potential punitive enforcement merely for enabling workers to report criminal conduct anonymously. Even though the same employees had exactly the same ability to report exactly the same misconduct before these C&E programs were introduced, when they were designated as compliance and ethics programs with helplines they were attacked.

Privacy laws also pose threats that undercut organizational self-policing as applied to such steps as investigations, audits, and other essential compliance and ethics functions.

In another area, labor laws have similarly been used to undercut compliance efforts. In the United States the National Labor Relations Board has attacked standard language in company codes of ethics and conduct, making almost whimsical arguments about their impact on collective bargaining, even in the absence of any evidence of a negative impact. This is not to say that such codes and other compliance efforts should be above regulation, but that the hostile approach by agencies such as the NLRB reflects an almost complete disregard for the societal value and importance of organizational C&E programs. Agencies such as the NLRB and European privacy enforcers appear to assign organizational self-policing almost no value as compared to the agency's enforcement agenda.

In the public sector in the United States, open records laws/Freedom of Information Act provisions have also been used to undercut helpline operations. In one case, for example, a state university that had implemented a speak-up line had to disclose all of its sensitive reporting records in response to mere expressions of curiosity. Immediately thereafter the reporting system was shut down.

Of course, as anyone who has ever worked in the fight against corruption can attest, enabling employees to report corrupt acts safely and to reach quickly those positioned to take effective action against corrupt acts is essential if corruption is to be defeated.

In all of these examples it is patently obvious that the public sector is giving little or no consideration to the important public policy role played by organizations that undertake C&E programs. But as the Recommendation makes clear, to create integrated cultures of integrity all sectors must participate. Organizations use management techniques – i.e., C&E programs – to achieve this. To the extent the public sector undermines these efforts it hurts this effort on all levels.

This is, of course, not to say that privacy, labor rights or open records are not important values. But in fact in each of these circumstances very little weight was given to the C&E efforts. A government cannot honestly claim it believes in an integrated approach to integrity and then turn around and attack the very efforts it claims it supports.

The Recommendation should send the message that all aspects of an effective C&E program in both the private and public sectors should be valued and protected; they should be regulated and limited only to the minimum extent necessary to protect core public interests. Integrity in society should not be sacrificed to the special interests of any one regulatory body.

7. The Council should form an ongoing working group to promote and implement this Recommendation

The Council is undertaking an extremely important initiative that offers enormous potential value. For example, in the painful fight against corruption, it is essential that both the private sector and the public sector strongly support this effort. The Council's initiative could mark a monumental step in this direction.

This makes it a priority to prevent the tragedy of wasted effort and enthusiasm. There are too many thoughtful and valuable initiatives of this nature that die a slow, silent death after they are released. We therefore believe it is essential that there be a mechanism to bring the Recommendation to life.

We believe it is an enormous task to implement this Recommendation, since governments will have many offices, agencies, etc., and many if not most will remain completely ignorant of this initiative. In the United States, for example, it is highly unlikely that even a minority of federal agencies will have heard of this Recommendation, let alone given it serious thought. It is as likely that absolutely no state governmental office and no local government will have even a clue that it exists. As for following it, even those agencies that hear of it will likely believe they have more important things to do and will totally ignore the Recommendation.

Thus, because we believe this likely result to be unacceptable, we recommend these specific steps to follow up on the Council's Recommendation:

- a. Form a working group of participating countries charged with promoting this Recommendation.
- b. Conduct reviews of each country's efforts and results to implement the Recommendations. Publish these results.
- c. Form a public/private partnership to promote these C&E programs in the public sector. Include organizations that promote C&E as a profession on a global basis, like the Society of Corporate Compliance & Ethics (www.corporatecompliance.org). Include business groups that have shown support for C&E, like the International Chamber of Commerce. The Rutgers Center for Government Compliance and Ethics would be another appropriate and supportive partner.
- d. Include a specific requirement that member countries at minimum inform all of their national governmental entities of the Recommendation – merely informing would be the least that should be expected of the member countries if they believe what they are publishing.

8. The Rutgers Center for Government Compliance and Ethics offers an important resource for development of public integrity programs

To our knowledge, the Rutgers Center for Government Compliance and Ethics (<http://rcgce.camlaw.rutgers.edu/>) is the first and only resource dedicated to the development of C&E programs in the public sector. The Center offers an important white paper, (Compliance and Ethics Programs for Government Organizations: Lessons from the Private Sector, available at http://rcgce.camlaw.rutgers.edu/sites/rcgce.camlaw.rutgers.edu/files/rcgce_white_paper.pdf), which has served as a starting point for government agencies implementing programs. The Center provides a resource and clearinghouse for ideas in this area. We believe the Center would be an excellent ally of the Council in its mission.

All those interested in this important topic are welcome to visit the site, use the white paper, and also share their experiences for the benefit of others working in this area to promote public integrity.

We fully support the initiative of the Council and the direction of the Recommendation. We believe it can be strongly empowered through the suggestions we offer here. We stand ready to assist the Council in this effort.

Respectfully submitted,

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APPENDIX I

Good practice guidance on ethics and compliance programs to promote public integrity

This Good Practice Guidance acknowledges the relevant findings and recommendations of the Council on Public Integrity in its ongoing programme to combat corruption and misconduct in the public sector; contributions from the private sector and civil society; and previous work on promoting public integrity by the OECD as well as international private sector and civil society bodies. It also acknowledges the groundbreaking work of the Working Group on Bribery in International Business Transactions in developing a guidance for the analogous fight against foreign bribery.

Introduction

This Good Practice Guidance (hereinafter “Guidance”) is addressed to public sector entities for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programmes or measures for preventing and detecting corruption and misconduct, and to the private sector, which plays an essential role in assisting the public sector in these efforts. It recognises that to be effective, such programmes or measures should be interconnected with a public sector entity’s overall compliance framework. It is intended to serve as non-legally binding guidance to public sector entities in establishing effective internal controls, ethics, and compliance programmes or measures for preventing and detecting corruption and misconduct.

This Guidance is flexible, and intended to be adapted by public sector entities according to their individual circumstances, including their size, type, legal structure, purpose and sector of operation, as well as the jurisdictional and other basic legal principles under which they operate.

A) Good Practice Guidance for Public Sector Entities

Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting corruption and misconduct should be developed on the basis of a risk assessment addressing the individual circumstances of a public sector entity, in particular the corruption and misconduct risks facing the entity. Such circumstances and risks should be regularly monitored, re-assessed, and adapted as necessary to ensure the continued effectiveness of the entity’s internal controls, ethics, and compliance programme or measures.

Public sector entities should consider, *inter alia*, the following good practices for ensuring effective internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting corruption and misconduct:

1. strong, explicit and visible support and commitment from public officials, leaders and senior management to the public sector entity's internal controls, ethics and compliance programmes or measures for preventing and detecting cartels;
2. a clearly articulated and visible policy prohibiting corruption and misconduct;
3. compliance with this prohibition and the related internal controls, ethics, and compliance programmes or measures is the duty of individuals at all levels of the public sector entity;
4. oversight of ethics and compliance programmes or measures regarding corruption and misconduct, including the authority to report matters directly to independent monitoring bodies, is the duty of one or more senior entity officers, with an adequate level of autonomy from management, resources, and authority;
5. ethics and compliance programmes or measures designed to prevent and detect corruption and misconduct, applicable to all public officials, leaders, directors, officers, and employees, and applicable to all entities over which a public sector entity has effective control, on, *inter alia*, the following areas:
 - i) corruption;
 - ii) conflicts of interest; and
 - iii) other misconduct.
6. ethics and compliance programmes or measures designed to prevent and detect corruption and misconduct applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, contractors and suppliers, consortia, and joint venture partners (hereinafter “transactional partners”), including, *inter alia*, the following essential elements:
 - i) properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of transactional partners;
 - ii) informing transactional partners of the public sector entity’s commitment to abiding by laws on the prohibitions against corruption and misconduct, and of the entity’s ethics and compliance programme or measures for preventing and detecting such corruption and misconduct; and
 - iii) seeking a reciprocal commitment from transactional partners.
7. a system of internal controls, compliance audits, monitoring, and other steps reasonably designed to detect and reduce the opportunities for corruption and misconduct;

8. measures designed to ensure periodic communication, and documented training for all levels of the public sector entity, on the entity's ethics and compliance programme or measures regarding corruption and misconduct;

9. appropriate measures and incentives to encourage and provide positive support for the observance of ethics and compliance programmes or measures against corruption and misconduct, at all levels of the public sector entity;

10. appropriate disciplinary procedures to address, among other things, violations, at all levels of the public sector entity, of laws against corruption and misconduct, and the entity's ethics and compliance programme or measures regarding corruption and misconduct;

11. effective measures for:

i) providing guidance and advice to public officials, leaders, directors, officers, employees, and, where appropriate, transactional partners, on complying with the public sector entity's ethics and compliance programme or measures, including when they need urgent advice on difficult situations;

ii) internal and where possible confidential reporting by, and protection of, public officials, leaders, directors, officers, employees, and, where appropriate, transactional partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for public officials, leaders, directors, officers, employees, and, where appropriate, transactional partners, willing to report breaches of the law or professional standards or ethics occurring within the public sector entity, in good faith and on reasonable grounds; and

iii) undertaking appropriate action in response to such reports;

12. periodic reviews of the ethics and compliance programmes or measures, designed to evaluate and improve their effectiveness in preventing and detecting corruption and misconduct, taking into account relevant developments in the field, and evolving international and public sector standards.

B) Actions by Business Organisations and Professional Associations

Business organisations and professional associations may play an essential role in assisting public sector entities in the development of effective internal control, ethics, and compliance programmes or measures for the purpose of preventing and detecting corruption and misconduct. Such support may include, *inter alia*:

1. dissemination of information on issues related to corruption and misconduct, including regarding relevant developments in international and regional forums;

2. making training, prevention, due diligence, and other compliance tools available;
3. general advice on diligence in carrying out compliance and ethics programmes; and
4. general advice and support on resisting opportunities for corruption and misconduct.