

U.S. NCP PROCEDURES FOR SPECIFIC INSTANCES UNDER THE OECD MNE GUIDELINES

NOVEMBER 2011

INITIATING A REQUEST

Target timeline: 1 week

- ✓ Upon receipt, the U.S. NCP reviews the specific instance request and, when receiving a specific instance review request by email, acknowledges receipt of the request by email immediately.
- ✓ The U.S. NCP sends a letter acknowledging receipt of the request to the requestor by trackable mail (DHL, FedEx, UPS, for example) and, if possible, by email. The letter describes the Guidelines and explains the role of the U.S. NCP and its procedures, the role of other NCPs, if applicable, and requests a designated point of contact for further correspondence.
- ✓ The U.S. NCP sends a letter to the multinational enterprise about which the concern was raised informing the company of the request, forwarding a copy of the request and asking for the enterprise's view of the matter. The letter describes the Guidelines and explains the role of the U.S. NCP and its procedures, the role of other NCPs, if applicable, and requests a designated point of contact for further correspondence.
- ✓ The U.S. NCP circulates the requests to members of the interagency working group (IWG) including, within the State Department, the Bureau of Democracy, Human Rights and Labor (DRL), the Legal Advisor's office, the State Department regional desk officer for the countr[ies] involved, and any other State Department Bureau with an interest in the matter, and also to the Departments of Commerce, Treasury, and other USG agencies or sub-agencies, as appropriate, including, but not limited to, Labor, EPA, USTR, and Justice. Interested agencies then check to see if the issue raised is pending in any other proceeding involving their agency (e.g., in a labor matter, whether there is a related request pending before the National Labor Relations Board) and inform the U.S. NCP.
- ✓ The U.S. NCP informs both parties that, once the specific instance proceedings begin, which would include the submission of the specific instance, complete confidentiality of communications with the U.S. NCP and with each other and of sensitive business information is expected. The U.S. NCP will treat as confidential all information which is communicated to the U.S. NCP by a party to a specific instance (including parties to the submission, the enterprise concerned, and other parties with whom the U.S. NCP consults), subject to any disclosures required by U.S. law, except that the information provided by a party to the U.S. NCP will be communicated to the other part[ies] to the specific instance, unless the providing party expressly requests that the information, or any part of the information, not be disclosed to any other party and provides a compelling reason to the U.S. NCP for such nondisclosure. The parties shall further be informed that at the conclusion of the proceedings, if they have reached agreement on the issues raised, they are free to communicate about and discuss those issues publicly by mutual agreement; however, any views, communications, or information provided during the proceedings shall remain confidential unless the other party agrees to its disclosure or unless this would be contrary to national law.

A failure to honor confidentiality expectations will be considered bad faith and may lead to the immediate termination of the U.S. NCP's involvement in a specific instance.
- ✓ The U.S. NCP informs any other relevant NCPs (host country NCP/ home country NCP) of the receipt of the request, forwards a copy of the request to any such NCP, and requests its views on how best to proceed, referring to the Procedural Guidance to the Guidelines. If it is determined that the U.S. NCP should not take the lead, the U.S. NCP informs the parties of this fact and refers them to the appropriate lead NCP. The U.S. NCP will continue to consult with the lead NCP and provide assistance, as appropriate.

INITIAL ASSESSMENT

Target timeline: 3 months

✓ In consultation with the IWG, the U.S. NCP determines whether the specific instance request meets initial threshold requirements under the Guidelines (e.g., whether the matter is international in nature). If not, the U.S. NCP informs the parties by written response that the matter does not fall under the Guidelines. Questions on the interpretation of requirements under the Guidelines may be referred to the OECD Investment Committee, if appropriate.

✓ In consultation with the IWG, the U.S. NCP investigates the request in order to make an “initial assessment” as to whether the issues raised merit further examination under the Guidelines and whether offering its good offices to assist the parties to reach a consensual resolution would contribute to a positive resolution of the issues raised and to the purposes and effectiveness of the Guidelines. In making the initial assessment, the U.S. NCP may request and will consider and evaluate information and documentation provided by the parties and, in addition to consulting with the IWG, may independently consult with such other experts within and without the USG, including at posts abroad, employee organizations, representatives of the business community, and other sources as may be appropriate and as resources allow.

✓ In making an initial assessment, the U.S. NCP, in consultation with the IWG, determines whether the issues raised are *bona fide* and relevant to the implementation of the Guidelines, taking into account

- The identity of the party concerned and its interest in the matter;
- Whether the issue is material and substantiated;
- Whether there seems to be a link between the enterprise’s activities and the issue(s) raised;
- The relevance of applicable law and procedures, including court rulings;
- How similar issues have been or are being treated in other domestic or international proceedings;
- Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.

✓ If the issues raised are also being considered in another forum, the U.S. NCP determines, on a case-by-case basis and in consultation with the IWG, whether offering its assistance at this time would make a positive contribution to the resolution of the issues raised and would not create serious prejudice for any party involved in this or any other proceeding or cause a contempt of court situation. In making this determination, factors that the U.S. NCP and the IWG may consider include, but are not limited to,

- the extent of overlap between the issues raised with the U.S. NCP and those in the other proceedings,
- the stage of the other proceedings and the likelihood of a timely resolution,
- the legal authority of the other forum to make a final and binding determination on the issues, and
- whether resolution of the issues raised relies upon an interpretation or application of domestic law or regulation by a competent judicial or administrative authority.

In accordance with the 2011 Commentaries to the Procedural Guidance for the Guidelines, neither the existence nor the availability of a “parallel proceeding” to resolve the issues raised presents a bar to the U.S. NCP’s involvement where the U.S. NCP determines that offering its good offices would contribute to a positive resolution and to the purposes and effectiveness of the Guidelines.

✓ If the U.S. NCP determines, in consultation with the IWG, that the issues raised merit further consideration under the Guidelines and that offering its good offices would contribute to a positive resolution of those issues and to the purposes and effectiveness of the Guidelines, the U.S. NCP offers its good offices to both parties and requests their participation in efforts to arrive at a consensual resolution to the issues raised, seeking their views on the best way to facilitate a consensual resolution.

- ✓ If the U.S. NCP determines, in consultation with the IWG, that the issues raised do not merit further consideration under the Guidelines or that offering its good offices would not contribute to a positive resolution of the issues raised and to the purposes and effectiveness of the Guidelines, the U.S. NCP informs the parties of its decision not to offer its good offices and makes public its decision in a statement that describes the issues raised and the reasons for the U.S. NCP's decision, after consultations with the parties and the IWG, taking into account the need to preserve the confidentiality of sensitive business and other information. The statement will include the identities of the parties unless the U.S. NCP determines, in consultations with the parties, that it would be unfair to publicly identify a party.

MEDIATION

Target timeline: 6 months

- ✓ If both parties agree to participate in efforts to arrive at a consensual resolution to the issues raised, the U.S. NCP assists with mediation or otherwise facilitates a resolution to the issues raised through its good offices. Mediation or facilitation can take any form the parties and the U.S. NCP agree would be beneficial to reaching a consensual resolution.

CONCLUSION OF PROCEEDINGS

Target timeline: 3 months

- ✓ Where the parties reach agreement on the issues raised, the U.S. NCP makes public a report, in consultation with the parties and the IWG, that describes the issues raised, the procedures the U.S. NCP initiated in assisting the parties, and when agreement was reached. Information on the content of the agreement will only be included to the extent both parties agree upon its public disclosure, including whether the identity of the parties will be publicly disclosed.
- ✓ Where the parties fail to reach agreement, or where the U.S. NCP finds that a party is unwilling to participate in good faith, the U.S. NCP issues a public statement, in consultation with the IWG, that describes the issues raised, the reasons the U.S. NCP determined the issues merited further examination under the Guidelines, and the procedures the U.S. NCP initiated to assist the parties. The U.S. NCP's statement will include recommendations on the implementation of the Guidelines, as appropriate, and will identify the parties. If appropriate, the statement could also include the U.S. NCP's observations on the reasons agreement could not be reached.
- ✓ Final statements and reports will be posted on the U.S. NCP website at: www.state.gov/usncp.
- ✓ Following the conclusion of the proceedings, the U.S. NCP may consider requests by the parties to follow-up or monitor the implementation of an agreement reached or recommendations made by the U.S. NCP. However, such monitoring will be entirely within the discretion of the U.S. NCP and will only be done on an exceptional basis, if the U.S. NCP determines this appropriate, and only as the U.S. NCP's resources allow.
- ✓ NOTE: Participation by any party in the U.S. NCP specific instance process is voluntary, and any party may withdraw its decision to participate at any time prior to conclusion of the proceedings, or choose not to participate. A failure to respond (to a request for information or for mediation, for example) will be considered a choice not to participate, and will be considered a failure to reach agreement.