

## How Financial Services Firms Should Respond To Recent FINRA Focus On FCPA Compliance

Heavy-duty scrutiny of financial services firms to ensure their compliance with the Foreign Corrupt Practices Act ("FCPA") and similar enactments is now a reality. The purpose of this update is to describe the most recent pronouncements on the subject, and explain how financial services firms should consider responding to the new level of scrutiny in the area.

In recent legal updates and journal articles,<sup>1</sup> we have discussed how prosecutors and regulators – in the U.S. and elsewhere – have increased their focus on activities that may violate the FCPA<sup>2</sup> or similar anti-corruption measures adopted by other nations.<sup>3</sup> At the same time,

government officials consistently have identified the financial services industry as an area of concern.<sup>4</sup> These officials have pointed out that any entity that has a multinational presence – whether it manufactures heavy machinery or distributes financial products – may have to navigate murky situations. This state of affairs may be exacerbated by the global financial crisis. As managers and third party agents struggle to maintain performance while coping with constrained resources in a difficult financial environment, some may be tempted to engage in questionable conduct to protect their positions.

In this context, on March 9, the Financial Industry Regulatory Authority (FINRA) released a letter to broker-dealers and other financial

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<sup>1</sup> See, e.g., Michael J. Gilbert and Paul Huey-Burns, "Lessons for Business in an Era of Global Anti-Corruption Efforts," *The New York Law Journal*, February 5, 2009; David M. Howard and William Gibson, "'Rescued' Foreign Banks: A New Context for FCPA Compliance," *DechertOnPoint*, March 2009.

<sup>2</sup> For example, within the past few weeks, the SEC brought a civil action and the Department of Justice entered into a deferred prosecution agreement in one of their continuing investigations related to the U.N. Oil for Food Program. See *SEC v. Novo Nordisk A/S*, Civil Action No. 1:09-CV-00862 (D.D.C.) (EGS).

<sup>3</sup> For example, on March 25, 2009, a draft "Bribery Bill" was introduced in the Parliament of the United Kingdom. Among others things, the proposed legislation would make it an offense for a "commercial organisation" to "negligently fail to prevent bribery." The definition of "commercial organisation" is broad and may sweep into its scope domestic UK and international companies. If this provision is enacted, it will significantly increase the need for any entity whose business touches on the U.K. to be proactive in adopting effective anti-corruption compliance policies and procedures. The draft bill can be found at <http://www.justice.gov.uk/publications/draft-bribery-bill.htm>.

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<sup>4</sup> See, e.g., Remarks of Frederic Firestone, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, Foreign Corrupt Practices Act Seminar, October 7, 2008 (Sponsored by Securities Industry and Financial Markets Association).

firms that are subject to its examination authority. FINRA intended the letter to “highlight new and existing areas of particular significance to FINRA’s examination program for 2009.” For the first time, FINRA included FCPA issues among its examination priorities. The March 9 letter states:

FINRA reminds firms of their obligations under the [FCPA]. The FCPA prohibits any person or entity from giving or promising anything of value to a foreign government official, political party or party official with the intent to influence that official or to obtain or retain business. This applies to all U.S. individuals and companies, and includes the action of any agents working on their behalf. The FCPA also requires all companies that are publicly traded in the U.S. to maintain accurate books and records and to implement adequate internal controls to provide reasonable assurance that transactions are recorded properly.

FINRA suggested that firms use the letter “to help ... assess your firm’s compliance and supervisory programs.” The implicit message is that, if FINRA finds that a firm’s FCPA compliance program is deficient or if there is a breakdown in such a program in a particular instance, the firm will have difficulty claiming that it had not understood that FCPA compliance should be among its high priorities.

Given this confirmation of a regulatory focus on FCPA issues in the financial services industry, we offer our observations on the hallmarks of sound FCPA compliance programs for financial services firms. We begin by noting that any compliance program should be tailored to the business of the particular firm. Indeed, because one size doesn’t necessarily fit all in the area of FCPA compliance, firms should assess such issues as whether and in what areas they do business with the government or with state-owned enterprises, which geographic regions create the greatest risk, and the extent of reliance on third-party advisors. Such a risk assessment will help the firm identify the appropriate focus of its compliance efforts. Because such an assessment is an important part of the process, none of our observations below should be taken as a requirement or as establishing minimal standards for an appropriate program.

With this as background, based on a review of DOJ and SEC enforcement matters,<sup>5</sup> we suggest that firms

<sup>5</sup> A firm that is designing or revisiting its FCPA compliance program should review, among other sources, DOJ Opinion Procedure Release 04-02 (July 12, 2004) and the non-

consider the following as attributes of a well-designed program:

- *Essential elements.* Most FCPA compliance programs should contain certain basis elements, such as guidance on conducting due diligence of third-party agents or joint venture partners, policies on appropriate travel and entertainment expenses and procedures for reporting potential violations of the firm’s anti-corruption policies.
- *Clear identification of responsibility for FCPA compliance.* Firms should consider where FCPA compliance best fits within their management/reporting structure. For example, firms should ask whether this function should be combined with AML/OFAC compliance and, as appropriate, might consider appointing a dedicated “FCPA officer”. The answers to these questions should reflect the firm’s particular culture, the size and complexity of the organization and the extent to which the firm operates globally or in high-risk geographic or product areas. Government officials frequently discuss the importance of “tone at the top,” but this should be balanced with the need for “in the weeds” expertise.
- *Establishment of whistleblower channels.* What steps should be taken to ensure that whistleblower channels for FCPA issues are open and effective? Key issues include: “Who should monitor such channels?,” “Who has authority to investigate?” and “What resources should be devoted to such investigations?”
- *Establishment of an FCPA compliance training program.* Some of the keys to a sound training program are: (i) the program should be multi-channel (e.g., it should incorporate live meetings with e-mail or hard copy notices); (ii) training events should be periodic (i.e. substantial time should not elapse between events); and (iii) senior level executives should acknowledge the importance of a training program (by, e.g., stating their support openly and attending training events themselves).
- *Use of technology.* Because FCPA compliance involves monitoring of complex transactions in remote locations, it may be helpful to devote appropriate resources to information technology. Some firms use key-word monitoring programs to

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prosecution agreement in FARO Technologies (see Department of Justice Press Release available at <http://www.usdoj.gov/opa/pr/2008/June/08-crm-505.html>). Both provide good descriptions of the kinds of procedures that the government considers appropriate.

review e-mails, similar to the programs that many firms use to surveille e-mails for customer-protection issues. Other firms have developed programs to surface suspicious activity in regard to vendor contracts or consulting relationships. Our point is that firms should be aware of developments in the area of technology and consider incorporating these methods as appropriate.

- *Disciplinary procedures.* A sound compliance program for FCPA issues, as in other areas, frequently will include disciplinary guidelines for cases of potential breaches of policies. Such guidelines should be clearly established and should envision meaningful penalties for violations, although they need not be specific as to penalties and should allow for flexibility. The guidelines should be disseminated throughout the organization to maximize deterrent effect and should be applied consistently.
- *Focused monitoring.* Whatever group or individual is tasked with FCPA compliance should understand the statute and remain current as to developments. They should be aware of new government actions (regardless of whether they involve a financial services firm) and should consider their

potential applicability to their own firm. For example, several FCPA cases over the years have involved relationships between a U.S. company and non-U.S. joint venture partners or agents. An FCPA compliance program might focus on identifying and reviewing such relationships, especially if they exist in a geographic area with a reputation for corruption by government officials.

As is true of most compliance areas, the key to a sound FCPA program is that it be designed and equipped to identify and respond to red flags. With appropriate sensitivity, financial services firms should be able to prepare for FINRA and other regulatory examinations in this area.

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This update was authored by Paul Huey-Burns (+1 202 261 3433; paul.huey-burns@dechert.com); David M. Howard (+1 215 994 2218; david.howard@dechert.com); and Michael J. Gilbert (+1 212 698 3886; michael.gilbert@dechert.com).

## Practice group contacts

If you have questions regarding the information in this legal update, please contact the authors, one of the attorneys listed, or the Dechert attorney with whom you regularly work. Visit us at [www.dechert.com/securities](http://www.dechert.com/securities).

**Catherine Botticelli**  
Washington  
+1 202 261 3368  
catherine.botticelli@dechert.com

**Michael S. Doluisio**  
Philadelphia  
+1 215 994 2325  
michael.doluisio@dechert.com

**Michael J. Gilbert**  
New York  
+1 212 698 3886  
michael.gilbert@dechert.com

**Stephen D. Brown**  
Philadelphia  
+1 215 994 2240  
stephen.brown@dechert.com

**Joseph F. Donley**  
New York  
+1 212 649 8724  
joseph.donley@dechert.com

**Robert C. Heim**  
Philadelphia  
+1 215 994 2570  
robert.heim@dechert.com

**Robert A. Cohen**  
New York  
+1 212 698 3501  
robert.cohen@dechert.com

**Steven B. Feirson**  
Philadelphia  
+1 215 994 2489  
steven.feirson@dechert.com

**Frederick G. Herold**  
Silicon Valley  
+1 650 813 4930  
frederick.herold@dechert.com

**William K. Dodds**  
New York  
+1 212 698 3557  
william.dodds@dechert.com

**George K. Foster**  
New York  
+1 212 698 3827  
george.foster@dechert.com

**David S. Hoffner**  
New York  
+1 212 649 8781  
david.hoffner@dechert.com

**David M. Howard**  
Philadelphia  
+1 215 994 2218  
david.howard@dechert.com

**Paul Huey-Burns**  
Washington  
+1 202 261 3433  
paul.huey-burns@dechert.com

**Nicolle L. Jacoby**  
New York  
+1 212 698 3820  
nicolle.jacoby@dechert.com

**Robert J. Jossen**  
New York  
+1 212 698 3639  
robert.jossen@dechert.com

**Michael L. Kichline**  
Philadelphia  
+1 215 994 2439  
michael.kichline@dechert.com

**David A. Kotler**  
Princeton  
+1 609 955 3226  
david.kotler@dechert.com

**Cheryl A. Krause**  
Philadelphia  
+1 215 994 2139  
cheryl.krause@dechert.com

**Matthew L. Larrabee**  
San Francisco  
+1 415 262 4579  
matthew.larrabee@dechert.com

**Thomas H. Lee II**  
Philadelphia  
+1 215 994 2994  
thomas.lee@dechert.com

**Andrew J. Levander**  
New York  
+1 212 698 3683  
andrew.levander@dechert.com

**Daniel C. Malone**  
New York  
+1 212 698 3861  
daniel.malone@dechert.com

**Kathleen Massey**  
New York  
+1 212 698 3686  
kathleen.massey@dechert.com

**Edward A. McDonald**  
New York  
+1 212 698 3672  
edward.mcdonald@dechert.com

**Gary J. Mennitt**  
New York  
+1 212 698 3831  
gary.mennitt@dechert.com

**Kevin J. O'Brien**  
New York  
+1 212 698 3697  
kevin.obrien@dechert.com

**Charles I. Poret**  
New York  
+1 212 698 3532  
charles.poret@dechert.com

**Benjamin E. Rosenberg**  
New York  
+1 212 698 3606  
benjamin.rosenberg@dechert.com

**Louis M. Solomon**  
New York  
+1 212 698 3690  
louis.solomon@dechert.com

**Neil A. Steiner**  
New York  
+1 212 698 3822  
neil.steiner@dechert.com

**Claude M. Tusk**  
New York  
+1 212 698 3612  
claudem.tusk@dechert.com

**Adam J. Wasserman**  
New York  
+1 212 698 3580  
adam.wasserman@dechert.com