

## Foreign Corrupt Practices Act

### FINRA Reminds Firms of Their Obligations Under the Foreign Corrupt Practices Act

#### Executive Summary

The Foreign Corrupt Practices Act of 1977 (FCPA) was enacted to prohibit bribery of foreign officials and restore public confidence in the integrity of the American business system. This Notice provides a brief overview of the FCPA and discusses the application of the anti-bribery prohibitions to member firms.

Member firms that are considered to be “issuers” under the FCPA also must comply with the FCPA’s accounting provisions, which generally require an “issuer” to make and keep books and records that accurately and fairly reflect the company’s transactions and to devise and maintain an adequate system of internal accounting controls.

FINRA advises member firms to review their business practices to ensure they are complying with all of their obligations under the FCPA. A member firm’s failure to comply with its FCPA obligations will be considered conduct inconsistent with high standards of commercial honor and just and equitable principles of trade in violation of FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade).

Questions concerning this *Notice* should be directed to Patricia Albrecht, Associate General Counsel, Office of General Counsel, at (202) 728-8026.

#### Background and Discussion

The FCPA was enacted to prohibit bribery of foreign officials and to restore public confidence in the integrity of the American business system. The FCPA includes anti-bribery and accounting provisions. The anti-bribery provisions make it unlawful to bribe foreign officials to obtain or retain business in a foreign country. The accounting provisions generally require each company considered to be an “issuer” under the FCPA to make and keep books and records that accurately and fairly reflect the company’s transactions and to devise and maintain an adequate system of internal accounting controls.

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#### Notice Type

- ▶ Guidance

#### Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Operations
- ▶ Registered Representatives
- ▶ Risk
- ▶ Senior Management

#### Key Topics

- ▶ Accounting
- ▶ Anti-Bribery
- ▶ Books and Records
- ▶ Domestic Concerns
- ▶ Foreign Corrupt Practices Act
- ▶ Foreign Members
- ▶ Internal Controls
- ▶ Issuers

#### Referenced Rules & Notices

- ▶ FINRA Rule 2010
- ▶ NASD Rule 3110
- ▶ SEA Rule 17a-3
- ▶ SEA Rule 17a-4

## I. Anti-Bribery Provisions

### A. Applicability

The FCPA's anti-bribery prohibitions apply to "issuers" and "domestic concerns" (and their officers, directors, employees, agents and any stockholders acting on their behalf).<sup>1</sup> An "issuer" is any company that is registered pursuant to Section 12 (Registration Requirements for Securities) of the Securities Exchange Act of 1934 (Exchange Act or SEA)<sup>2</sup> or that is required to file reports with the SEC pursuant to Exchange Act Section 15(d) (Supplementary and Periodic Information).<sup>3</sup> A "domestic concern" is any U.S. citizen, national, resident or business (other than an issuer).<sup>4</sup> The FCPA also contains an anti-bribery provision that applies to foreign nationals or businesses (other than an issuer) (and their officers, directors, employees, agents and any stockholders acting on their behalf) while they are in the territory of the U.S.<sup>5</sup>

### B. Enforcement

The FCPA's anti-bribery provisions for issuers are incorporated into the federal securities laws as Exchange Act Section 30A (Prohibited Foreign Trade Practices by Issuers), and the SEC is responsible for its civil enforcement. The FCPA's anti-bribery provisions for domestic concerns and for foreign nationals and businesses are not incorporated into the Exchange Act. The U.S. Department of Justice is responsible for all criminal enforcement of the FCPA and for civil enforcement of the anti-bribery provisions regarding domestic concerns and foreign nationals and businesses.<sup>6</sup>

### C. General Prohibitions

An (1) issuer, (2) domestic concern or (3) foreign national or business while it is in the territory of the U.S. (and their officers, directors, employees, agents and any stockholders acting on their behalf) generally violates the FCPA's anti-bribery prohibitions when it makes use of the mails or any means or instrumentality of interstate commerce:<sup>7</sup>

- ▶ corruptly;<sup>8</sup>
- ▶ in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give or authorization of the giving of anything of value to any:
  - foreign official;
  - foreign political party or party official;
  - candidate for foreign political office; or
  - person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to any foreign official, political party, party official or candidate;

- ▶ for the purpose of:
  - influencing any act or decision of the foreign official, political party, party official or candidate in his or its official capacity;
  - inducing the foreign official, political party, party official or candidate to do or omit to do an act in violation of his or its lawful duty;
  - securing any improper advantage;<sup>9</sup> or
  - inducing the foreign official, political party, party official or candidate to use his or its influence with a foreign government or instrumentality to affect or influence any act or decision of such government or instrumentality;
- ▶ in order to assist in obtaining or retaining business for or with, or directing business to, any person.<sup>10</sup>

#### **D. Affirmative Defenses and Exception for Facilitating Payments for “Routine Governmental Actions”**

The FCPA provides two affirmative defenses to an anti-bribery violation. One is if a payment, gift, offer or promise of anything of value that was made to a foreign official, political party, party official or candidate was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s or candidate’s country.<sup>11</sup> The other is if the payment, gift, offer or promise of anything of value that was made was a reasonable and bona fide expenditure (*e.g.*, travel and lodging expenses) incurred by or on behalf of the foreign official, political party, party official or candidate and was directly related to the promotion, demonstration or explanation of products or services or the execution or performance of a contract with a foreign government or agency.<sup>12</sup>

The FCPA also provides an exception to the anti-bribery prohibitions for facilitating or expediting payments to a foreign official, political party or party official to expedite or secure performance of a “routine governmental action” by a foreign official, political party or party official.<sup>13</sup> Examples include:

- ▶ obtaining permits, licenses or other official documents to qualify a person to do business in a foreign country;
- ▶ processing governmental papers (*e.g.*, visas and work orders);
- ▶ providing police protection, mail pickup and delivery or scheduling inspections associated with contract performance or related to transit of goods across country;
- ▶ providing phone service, power and water supply, loading and unloading cargo or protecting perishable products or commodities from deterioration; or
- ▶ actions of a similar nature.<sup>14</sup>

A “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or continue business with a particular party or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.<sup>15</sup>

## II. FCPA Accounting Provisions

Exchange Act Section 13 codifies the FCPA's accounting provisions for issuers,<sup>16</sup> and the SEC is responsible for their civil enforcement. Generally, these provisions require every issuer that has securities registered pursuant to Exchange Act Section 12 to file:

- ▶ such information and documents as the SEC shall require to keep reasonably current the information and documents required to be included in or filed pursuant to Exchange Act Section 12; and
- ▶ such annual reports (certified by independent public accountants if required by the SEC's rules and regulations) and quarterly reports as the SEC may prescribe.<sup>17</sup>

The accounting provisions also require every issuer that has securities registered pursuant to Exchange Act Section 12 or that is required to file reports pursuant to Exchange Act Section 15(d) to:

- ▶ make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the issuer's assets; and
- ▶ devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:
  - transactions are executed in accordance with management's authorization;
  - transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or other applicable criteria, and to maintain accountability for assets;
  - access to assets is permitted only in accordance with management's authorization; and
  - the recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any differences.<sup>18</sup>

## III. Application of the FCPA to FINRA Member Firms

The FCPA's anti-bribery prohibitions apply to every FINRA member firm (and its officers, directors, employees, agents and any stockholders acting on its behalf). Specifically, FINRA member firms that are considered issuers pursuant to the FCPA must comply with both the FCPA's anti-bribery provisions for issuers and the accounting provisions that are incorporated into the Exchange Act.<sup>19</sup> FINRA member firms meeting the definition of "domestic concern" and that are not considered issuers must comply with the FCPA's anti-bribery provisions for domestic concerns. Any FINRA member firms that are foreign broker-dealers registered with the SEC may be considered foreign businesses that must comply with the FCPA anti-bribery provisions for foreign businesses.<sup>20</sup> Member firms that are considered either domestic concerns or foreign businesses should be aware that

the FCPA's anti-bribery prohibitions apply to them under the statutory terms of those provisions even though they are not incorporated into the Exchange Act, as is the case for members that are issuers.

FINRA advises all member firms to review the FCPA's provisions and their business practices to ensure they are complying with their applicable obligations under the FCPA. A member firm's failure to comply with its FCPA obligations will be considered conduct inconsistent with high standards of commercial honor and just and equitable principles of trade in violation of FINRA Rule 2010.

## Endnotes

- 1 *See generally* 15 U.S.C. §§ 78dd-1 (Prohibited foreign trade practices by issuers) & 78dd-2 (Prohibited foreign trade practices by domestic concerns).
- 2 15 U.S.C. § 78l.
- 3 15 U.S.C. § 78o(d). Certain foreign companies are considered "issuers" within the meaning of the FCPA, and therefore subject to the FCPA provisions applicable to issuers. *See, e.g., In the Matter of Statoil*, Securities Exchange Act Release No. 54599, 2006 SEC LEXIS 2321, at \*3-4 (Oct. 13, 2006) (cease-and-desist order against foreign issuer found to be violating the FCPA's anti-bribery and books and records provisions).
- 4 *See* 15 U.S.C. § 78dd-2(h)(1)(B) (defining "domestic concern" to mean "(A) any individual who is a citizen, national, or resident of the United States; and (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States").
- 5 *See generally* 15 U.S.C. § 78dd-3 (Prohibited foreign trade practices by persons other than issuers or domestic concerns); *see also* 15 U.S.C. §§ 78dd-3(f)(1) (the foreign national or business anti-bribery provisions apply to "any natural person other than a national of the United States ... or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof") and 78dd-3(a) (requiring compliance while a foreign national or business is "in the territory of the United States").
- 6 *See* U.S. Department of Justice, *Lay-Person's Guide to FCPA* (overview of the FCPA's anti-bribery provisions, including enforcement authority).
- 7 A foreign national or business (and its officers, directors, employees, agents and any stockholders acting on its behalf) may also violate the FCPA while in the territory of the U.S., irrespective of whether it makes use of the mails or any means or instrumentality of interstate commerce. *See* 15 U.S.C. § 78dd-3(a). In addition, the FCPA's provisions for issuers and domestic concerns include provisions addressing

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- alternative jurisdiction for acts taken by U.S. issuers and domestic concerns outside of the U.S. irrespective of whether such parties make use of the mails or other means or instrumentality of interstate commerce. See 15 U.S.C. §§ 78dd-1(g) and 78dd-2(i).
- 8 See *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B. V. v. Schreiber*, 327 F.3d 173, 183 (2d Cir. 2003) (referring to the FCPA's legislative history to conclude that the term "corruptly," as used in the FCPA, signifies, in addition to the element of "general intent" present in most criminal statutes, a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position). See also Department of Justice, *Lay-Person's Guide to FCPA*, *supra* note 6 (explaining that the person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payor or to any other person).
  - 9 See *U.S. v. Kay*, 359 F.3d 738, 743 (5th Cir. 2004) (noting that the FCPA criminalizes payments that are intended to: (1) influence a foreign official to act or make a decision in his official capacity; (2) induce such an official to perform or refrain from performing some act in violation of his duty; (3) or secure some wrongful advantage to the payor).
  - 10 See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).
  - 11 See 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).
  - 12 See 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).
  - 13 See 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).
  - 14 See 15 U.S.C. §§ 78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4) (defining "routine governmental action").
  - 15 *Id.*
  - 16 See 15 U.S.C. §§ 78m(a), (b)(2)(A)-(B), (b)(3)-(7).
  - 17 See Exchange Act Section 13(a).
  - 18 See Exchange Act Section 13(b)(2)(A)-(B).
  - 19 Member firms are reminded that they must comply with FINRA's books and records obligations and other applicable federal securities laws and regulations, including NASD Rule 3110 (Books and Records) and SEA Rules 17a-3 (Records to Be Made By Certain Exchange Members, Brokers, and Dealers) and 17a-4 (Records to be Preserved by Certain Exchange Members, Brokers, and Dealers), irrespective of their compliance obligations under the FCPA's books and records provision. See also Securities Exchange Act Release No. 63784 (January 27, 2011), 76 FR 5850 (February 2, 2011) (Order approving the adoption of certain paragraphs of NASD Rule 3110 as FINRA Rules in the Consolidated FINRA Rulebook; File No. SR-FINRA-2010-052). FINRA will announce the effective date of the consolidated books and records rules in a *Regulatory Notice*.
  - 20 A foreign FINRA member firm also may need to consider whether it would be an issuer for purposes of FCPA compliance.