

**SEC INVESTIGATING FINANCIAL INDUSTRY'S COMPLIANCE WITH THE
FOREIGN CORRUPT PRACTICES ACT WHEN DEALING WITH SOVEREIGN
WEALTH FUNDS**

As you may have read in the press recently, the Securities and Exchange Commission (the "SEC") has sent investigative requests to various financial institutions in the past week seeking information about the institutions' relationships with sovereign wealth funds. The central lesson for financial firms is clear – financial firms doing business internationally are subject to the strictures of the U.S. Foreign Corrupt Practices Act (the "FCPA"), as well as other international anti-corruption legislation. This memo focuses on FCPA compliance and enforcement in the financial services context.

The FCPA generally prohibits U.S. companies and business entities, as well as their employees and agents, and U.S. citizens from paying or promising to pay, directly or indirectly, money or anything of value to a "foreign official" for the purpose of obtaining or retaining business. With respect to the FCPA's antibribery provisions, the SEC has civil jurisdiction over those companies and entities to the extent their securities are registered for trading on U.S. markets. The U.S. Department of Justice (the "DOJ"), on the other hand, has criminal jurisdiction over them, and both civil and criminal jurisdiction over all other persons and entities covered by the antibribery provisions. The SEC has a host of other provisions of the federal securities laws, including the internal controls, books and records and antifraud provisions, which it uses to enforce the FCPA.

The SEC's interest in sovereign wealth funds brings together two potent strains of recent enforcement interest. First, the SEC has been keenly focused on the role of third parties and placement agents in investments made by funds sponsored by states and municipalities in the United States, most recently in the various "pay-to-play" cases. Second, U.S. regulators continue to show interest in industry-wide FCPA compliance reviews and enforcement actions, which largely developed in the context of settlements from industries other than financial services.

Sovereign wealth funds are an important source of investment capital for money managers today, but those funds bring with them the burden that they, and perhaps their agents and intermediaries, are encompassed by the FCPA. The FCPA provisions that are particularly burdensome for financial institutions include the FCPA's gift as well as travel and entertainment provisions, which place considerable constraints on the type, value and purpose of such expenditures. Additionally, many of the largest sovereign wealth funds are in countries where the government's role in the economy is extensive and the risk of corruption has traditionally been viewed as high.

Some key points about the SEC and DOJ's interpretations of the FCPA are set out below:

- Giving “anything of value” to a “foreign official” to obtain or retain business can be an FCPA violation. The FCPA’s prohibitions are not limited to payments, and there is no *de minimis* threshold. A thing of value can take many forms, including discounts, promises of future employment, entertainment, transportation and meals. Employees must be cautioned to think carefully and critically before giving anything to a representative of a sovereign wealth fund. Additionally, providing items of value to relatives of a foreign official may be viewed as an FCPA violation.
- The SEC and DOJ interpret “foreign official” broadly to include employees of state owned or controlled entities, including those where the entity is not wholly-owned by the state. Any individual acting in an official capacity on behalf of a governmental entity is likely to be covered, according to the U.S. regulators.
- Payments need not be consummated in order to violate the FCPA. Offers or promises to pay are also violations.
- Payments need not be made directly to a foreign official. Payments made indirectly through third-party representatives or consultants may be FCPA violations if a firm knew or had reason to know that a payment would make its way to a government official. Appropriate, continuing and documented due diligence when conducting business through or with a third party representative or consultant is critical.
- Promotional and marketing expenses can easily cross the boundaries of what is permissible under the FCPA. To minimize FCPA compliance issues:
 - Gifts should be of nominal value and promotional in nature.
 - Travel and related expenses need to be reasonable in light of routine travel expenses incurred in the course of business, and need to be in connection with the sale, promotion or demonstration of a firm’s products or services. Travel expenses for a foreign official’s family are unlikely to be considered reasonable and may be viewed as an FCPA violation.
 - Gifts and travel for foreign officials should be carefully tracked by a firm’s compliance group.
- Political and charitable contributions can easily run afoul of the FCPA and should be regulated under a firm’s policies and procedures.

Financial institutions and investment funds may have extensive and well-developed compliance policies in place to address traditional trading and investing issues such as insider trading, best execution, conflicts of interest and confidentiality. Revisiting a firm’s FCPA and anti-corruption policies and training, however, is critical in light of this industry-wide probe. The SEC and DOJ

have each announced major increases in staffing levels for FCPA enforcement. The financial services industry should understand that FCPA scrutiny will be a continuing compliance issue in the future.

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January 20, 2011

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