

FCPA Alert

New FCPA Investigation in Banking Industry; Investigation Apparently Targets Banks, Private Equity Firms and Sovereign Wealth Funds

January 31, 2011

Recent press suggests that the government has initiated an investigation into whether there have been violations of the Foreign Corrupt Practices Act (FCPA) by banks and private equity firms that deal with sovereign wealth funds (“SWFs”). While there is little information publicly available about this investigation, experience suggests that the U.S. Securities and Exchange Commission (SEC) and U.S. Department of Justice (DOJ) often broadly target entire industries when investigating possible FCPA violations. Examples include the government’s far-reaching investigations of the oil services industry, as well as recent statements by government enforcers regarding possible investigations of the pharmaceutical industry. Therefore, we advise that banks and private equity firms take this opportunity to ensure that they have an up-to-date compliance policy in place.

The Government Investigation

SWFs, investment funds owned and often operated by foreign governments, have increased their contact with the U.S. financial services industry in recent years. SWFs, are invested in some of the largest banks and private equity firms on Wall Street. But because SWFs are government-owned, foreign representatives of SWFs may well be considered “foreign officials” under the FCPA. Thus, companies that deal with representatives of SWFs may fall under scrutiny in the government’s investigation.

As part of the investigation, the SEC is reported to have sent formal requests for information to at least ten financial institutions, including both banks and private equity funds, regarding the institutions’ business dealings with SWFs. The investigation could signal a new area of inquiry by the SEC, and the potential for increased scrutiny of the entire U.S. financial services industry, including hedge funds. This could be especially important for hedge funds that are either SEC registered or are about to become registered due to the passage of the Dodd-Frank Act since investigative sweeps such as this are usually followed by SEC examiners being on the lookout for potential violations involving the same subject matter when conducting on-site examinations of registered advisers.

Background on the Foreign Corrupt Practices Act

The FCPA gives the government authority to investigate, and potentially prosecute, payments made to foreign government officials in order to obtain or retain business. In addition to authorizing the SEC to investigate and initiate civil enforcement proceedings, the FCPA gives the DOJ criminal authority to prosecute violations of the FCPA by both individuals and companies. The anti-bribery provisions of the FCPA cover not only money paid to foreign government officials, but anything of value such as gifts, entertainment and travel.

Both the SEC and DOJ have been very active in recent years in exercising their investigatory and enforcement powers under the FCPA, extracting not only large fines from violators, but also—in the case of the DOJ—securing jail time for individual offenders of the statute.



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The Importance of FCPA Compliance Programs

Companies should have a policy in place that seeks to ensure compliance with the FCPA. Several risks are especially apparent when dealing with SWFs. First, any compliance policy should contain procedures for doing business with government-owned entities, such as SWFs. When a company knows it will be doing business with a foreign government official, it must be especially diligent to avoid running afoul of the FCPA. Second, extra care is also warranted when a company does business in so-called “high risk” countries in which the incidence of government corruption is known to be high. Thus, doing business with an SWF of a high-risk country presents multiple challenges.

In light of the SEC’s new investigation—and the potential for involvement by the DOJ—now is an excellent time for firms across the U.S. financial service industry to update (or implement) their FCPA compliance policy. The benefits of a compliance policy are several. First, it is the best way to educate employees and deter problematic conduct. Many problems might be avoided if employees know what they can and cannot do in dealings with foreign government officials. In addition, if a company runs into trouble, a good compliance policy will help detect the problem. It is always easier to deal with a problem if the company with the problem discovers it, instead of first learning about a problem from the government. Finally, if a company ever should find itself on the receiving end of an FCPA inquiry by the government, having an effective compliance program is good way to demonstrate the company’s seriousness about its obligations, and may go a long way towards helping the company resolve the issue with the government.

CONTACT INFORMATION

If you have any questions concerning this alert, please contact —

J. Brady Dugan

bdugan@akingump.com

202.887.4152

Washington, D.C.

James J. Benjamin Jr.

jbenjamin@akingump.com

212.872.8091

New York

Samidh Guha

sguha@akingump.com

212.872.1015

New York

Mark J. MacDougall

mmacdougall@akingump.com

202.887.4510

Washington, D.C.

Peter I. Altman

paltman@akingump.com

212.872.8085

New York

Michael A. Asaro

masaro@akingump.com

212.872.8100

New York

Paul W. Butler

pbutler@akingump.com

202.887.4069

Washington, D.C.

Robert H. Hotz

rhotz@akingump.com

212.872.1028

New York

Thomas McCarthy Jr.

mccarthyt@akingump.com

202.887.4034

Washington, D.C.