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Financial Services Industry- Latest FCPA Target?

It has been widely reported that the SEC recently sent letters of inquiry to several banks and private equity firms requesting that they retain documents relating to their dealings with sovereign wealth funds. This may well signal an industry-wide FCPA inquiry similar to that launched against the pharmaceutical industry, which began when many pharmaceutical companies received similar letters.

Why the Financial Services Industry?

Neither the SEC nor DOJ have confirmed whether this is an industry-wide probe. However, financial services companies' dealings with sovereign wealth funds are certainly a logical place to begin a broad inquiry. Over the past several years, particularly in light of the financial crisis in the U.S., sovereign wealth funds have invested heavily with private equity funds and the largest Wall Street firms. They are by definition government owned and funded. Therefore, their employees are foreign government officials under the FCPA, which, broadly speaking, prohibits the paying, or offering to pay, money or anything of value, to a foreign government official to assist in obtaining or retaining business. The FCPA further requires companies, which are publicly traded in the United States to accurately reflect all payments in their books and records, and to maintain adequate FCPA internal controls. Recent violations have resulted in fines exceeding hundreds of millions of dollars and corporate employees and executives have been sentenced to significant prison terms.

The FCPA provides particular challenges to the financial services industry, and not only with respect to its dealings with sovereign wealth funds. What many consider typical client entertainment in the industry -- tickets to sporting events, payment of client travel to industry conferences, gifts, lavish closing dinners, and the like -- could be considered "something of value" under the FCPA, and may run afoul of the statute if the client is a foreign government official or political party official. Similarly, allowing friends and family participation in IPO's, and other similar benefits, for those deemed foreign government officials would likely also be a violation.

Additionally, successor liability issues are particularly acute for the financial services industry, as a company can literally buy another company's FCPA liability. This is amply demonstrated by GE's recent \$23.4 million FCPA settlement with the SEC where 14 of the 18 unlawful payments for which GE was held liable were made by subsidiaries GE purchased after the subsidiaries made the unlawful payments. Even minority stakes in companies can lead to FCPA liability if the investor is aware of FCPA issues or warning signs, yet takes no action. Furthermore, financial service companies frequently operate and invest in high corruption risk areas, such as India, China, the Middle East and other emerging markets, and will continue to do so at increasing levels in the years to come. Given these and other potential pitfalls for financial services companies, it is no surprise DOJ and the SEC have turned their attention to the industry.

How Can Financial Services Companies Protect Themselves From Potential FCPA Exposure?

- **FCPA Compliance Policy:** A comprehensive and rigorous FCPA compliance policy and program are essential to preventing and detecting unlawful conduct.
- **Global Implementation:** Corporate FCPA compliance programs must apply not only to the U.S. entity and its employees, but also to its non-U.S. subsidiaries, and agents, sales representatives, distributors, joint venture partners, or other business affiliates in any country in which the company is doing business.
- **Due Diligence Guidelines:** Devise specific FCPA due diligence guidelines for acquisitions and investments focusing on sales to foreign governments as well as foreign operations and the use of agents in high risk areas. Use FCPA counsel or other experts in the FCPA, working under counsel to maintain the attorney-client privilege, who know what to look for in conducting FCPA due diligence.
- **Training and Oversight:** Both the compliance and due diligence programs must include robust and effective training components, together with objective reviews and audits by those knowledgeable in FCPA compliance.

If you have any questions concerning the FCPA or how to protect your company against possible FCPA

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