The FCPA, Financial Institutions and a *Rude Awakening*

As reported in today's FCPA Blog, the Wall Street Journal (WSJ) reported that the Securities and Exchange Commission (SEC) is investigating "whether bank and private equity firms violated the [FCPA] in their dealings with sovereign wealth funds. The WSJ article noted that banks, such as Citigroup, and private equity firms, such as Blackstone Group Ltd., had received letters from the SEC requesting that they retain documents relating to such activities. At this point, the SEC letters did not state any specific allegations of bribery but indicated that such investigation was in "the early stages".

The WSJ article noted that several sovereign wealth funds had invested in banks or private equity firms in the past few years and "in some cases, the sovereign funds helped stave off the firms collapse." The FCPA Blog quoted from itself by noting that in a 2008 post it had said:

> We've never seen empirical studies on the subject, but we've noticed that FCPA cases generally spring from industries that deal in scarce commodities -- whatever those happen to be at any moment in history. It could be energy, telecommunications licenses, access to hospital patients, metals, food, cash and so on. . . .
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> These days, a commodity in short supply is cash. Sovereign wealth funds have it and banks need it. Will the financial institutions succumb to market pressures? Will they abandon FCPA compliance to save their balance sheets? Some might . . . And if that happens, pin-striped tragedies are sure to follow.

However, the issue which struck us was just how omnipotent two of our colleagues have been regarding the possible Foreign Corrupt Practices Act (FCPA) exposure of entities which deal with sovereign wealth funds. We recently posted an article entitled "***Private Equity and the FCPA"***. In one of the comments to this post, our colleague Howard Sklar wrote,

> *"One potential flip side of this—to my knowledge not yet the subject of any enforcement action—is whether ownership by a sovereign equity fund would turn someone into a "foreign official." For example, Temasek Holdings is a Singapore government-owned fund. If it purchases a majority interest in a company, does that transform the employees of that company into "foreign officials?" It's an open question.*

It sounds like he nailed it.

In two posts in 2010, the FCPA Professor discussed the issue of sovereign wealth funds in the context of the FCPA. In one posting entitled, ***"Sovereign Wealth Funds and the FCPA"*** he stated:

> *While no FCPA enforcement action has yet involved a sovereign wealth fund, such funds and the investments these funds make in private companies, are clearly on the radar screen of the enforcement agencies as both DOJ and SEC officials have in the past publicly stated that sovereign wealth funds pose FCPA risks because the funds are government owned.*
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> *The next frontier of the enforcement agencies' dubious "foreign official" interpretation may thus be application to the investments made by sovereign wealth funds.*

It sounds like he nailed it too.

The FCPA journey that these banks and private equity firms have embarked upon may well be long and costly. We can only conclude by citing back to the WSJ article, which quoted our colleague Simeon Kriesberg, a FCPA lawyer in Mayer Brown's Washington DC office, who told the WSJ, *"Those [Financial Institutions] that do not have effective compliance programs in place may get a* ***rude awakening****."*