

SEC Rankles Financial Firms With FCPA Probe

By Hilary Russ

Law360, New York (January 14, 2011) -- News that the U.S. Securities and Exchange Commission has launched its first-ever foreign bribery inquiry into the financial sector has some wondering if the deep-pocketed industry could be the one to fight back against what defense attorneys say is an aggressive, overbroad and unchecked use of the law.

"If there's ever an area where we might really see some law on this, it might be here, because [the industry has] defendants who can pay the freight of handling an investigation," said Solomon L. Wisenberg, co-chair of the white collar crime defense practice group in the Washington office of Barnes & Thornburg LLP.

"It may just be an opportunity for the defense bar," he said. "Not every client wants to be the guinea pig, but here you've got very, very solvent and wealthy entities."

The SEC reportedly is looking into whether U.S. banks and private equity firms have violated the Foreign Corrupt Practices Act in soliciting investments from sovereign wealth funds, which are investment funds owned by foreign governments.

Collectively, they've currently got about \$3.8 trillion in assets under management, according to Eliot Kalter, a senior fellow at Tufts University's Fletcher School of Law and Diplomacy. Conservative projections show that figure increasing to \$5.5 trillion by 2012, Kalter said.

Under the FCPA, it is against the law for U.S. companies to bribe foreign officials — in some cases, even by wining and dining them as a money manager might do when looking for investors — in order to get business overseas.

U.S. authorities have long been cracking down on such practices in other industries. But it's not clear if such methods have been running afoul of the law when used by U.S. private equity firms in their quest to secure investors through state-owned funds overseas.

The new probe was reported by the online publication Main Justice on Monday and received widespread attention after the Wall Street Journal reported Friday that Citigroup Inc. and Blackstone Group LP received brief letters from the SEC instructing them to preserve documents and asking them generally about their dealings with sovereign wealth funds.

As many as 10 financial firms have received the letters in the past week, the Journal reported.

Spokesmen for the SEC and Citigroup declined to comment. A representative for Blackstone did not immediately return a call for comment.

White collar attorneys say that based on the brevity and reported content of the letters, the inquiry appears to be in an initial phase and doesn't even constitute an official investigation. The letters were believed to be similar to those received by pharmaceutical companies last year when regulators launched an industry sweep into FCPA matters that still has not resulted in any big public settlements.

As such sweeps have become more common, they have rankled lawyers and the business lobby in Washington, who have increasingly complained about several aspects of the government's enforcement of the FCPA.

In particular, attorneys balk at the way the SEC and U.S. Department of Justice define exactly who qualifies as a "foreign official" under the law, and about whether certain small "facilitation payments" to customs agents and other state actors really constitute bribes.

Such definitions have gone unchallenged in the courts, with no judge ever writing an opinion on the matter, because battling the government is extremely expensive and could damage a company's reputation. That leaves most FCPA cases to be resolved outside the public eye.

"It's a point of substantial controversy and disagreement as to whether employees of state-owned enterprises are foreign officials under the FCPA," said Mike Koehler, an assistant professor of business law at Butler University, who has testified on the matter before Congress.

"[This new inquiry] potentially could be another aggressive stance that enforcement agencies are taking," he said.

It could be possible for a company — or industry — with the clout, money and chutzpah to one day go up against regulators in an FCPA case, which could prompt a judge to reign in the way the government applies the law, he and others said.

"The thing that really bugs people about the SEC and DOJ [is] their expansive definition of what a foreign official is," Wisenberg said. "The SEC has benefited from the fact that everybody wants to cave in."

But battling regulators and prosecutors is still a long shot, he acknowledged. Some think it would be downright ludicrous for a company in the financial sector — a generally conservative and heavily regulated arena — to go up against the government.

There is "no way" that investment banks and hedge funds will stand up to the government, according to Michael Volkov, a partner at Mayer Brown LLP.

"From a regulatory standpoint, the application of the FCPA to sovereign wealth funds is a no-brainer," he said. "This is not an example of overreaching."

Mayer Brown hosted a call Friday morning for 250 financial institutions who were concerned about news of the SEC's inquiry.

"The implications of this for financial institutions are just huge," Volkov said.

"What we told everybody today is, don't think that just because you're not involved in any significant way with sovereign wealth funds that you're in the clear," he said. "This is going to mushroom and it's going to get into more areas, and they're going to find bad actors."

The inquiry, which almost resembles an international pay-to-play scenario, could of course go nowhere. But it's more likely that the probe will balloon to other firms and include a criminal investigation by the Justice Department down the road, several attorneys said.

Because the gestation period for this kind of FCPA industry sweep is 18 to 24 months — including the time it will take for companies to hire law firms and launch internal investigations — it could take a while to learn what the consequences will be, according to Peter Henning, a law professor at Wayne State University Law School.

Either way, the financial industry will have to get up to speed quickly on what oil companies and medical device manufacturers have long known: a good compliance program works wonders.

"Everybody is worried, and they have to reevaluate their compliance efforts immediately," Volkov said. "They have a window here, and they better take advantage of it."