

## SEC's Foreign Corrupt Practices Spotlight Shines On PE

By Kaitlyn Kiernan

*Law360, New York (January 09, 2015, 2:07 PM ET)* -- Private equity firms can add foreign corruption to their laundry list of concerns as U.S. watchdogs systematically scrutinize about 1,500 newly regulated investment firms, paying particular attention to how they secure sovereign wealth investments, experts say.

The U.S. Securities and Exchange Commission has made private equity firms a focus for Foreign Corrupt Practices Act violations as they up their enforcement of both the private equity industry and the FCPA, experts say, with a number of private equity shops receiving requests for additional information.

The enforcement efforts in the private equity industry are a "shot across the bow," said Charles Whitehead, a professor of corporate law at Cornell University and the former general counsel for banks Citigroup Inc. and Nomura Securities. "It forces the industry to self-evaluate and to clean itself up without forcing the regulators to investigate every possible entity within the industry."

The move comes as the SEC cracks down on private equity firms more broadly as it continues to bring them under their regulatory scope. About 1,500 new investment advisers linked to private funds have registered with the SEC under the Dodd-Frank Act since 2010, leaving the regulator with the task of systematically inspecting all the new registrants in a series of so-called presence exams.

In April, the SEC created a new private fund unit headed by industry veteran Igor Rozenblit. Though the group has largely been focused on five key topics, including fee disclosures, conflicts of interest and marketing, Rozenblit in November warned private equity attorneys to broaden their focus.

"The SEC is now in-house," said Laurence Urgenson, former DOJ acting deputy assistant attorney general and current co-leader of Mayer Brown's global anti-corruption and FCPA practice. "While they are there for bread-and-butter issues like disclosure, they might as well rummage around for FCPA issues as well."

A spokeswoman for the SEC declined to comment on the matter.

One of the key areas of concern for private equity groups and the FCPA revolves around the practices they use to raise money for new investment funds from sovereign wealth funds — the employees of which are considered government officials for the purpose of the FCPA. Often, private equity groups use middlemen, who might commit violations of the FCPA without their knowledge.

Dan Fetterman, chairman of the investigations and white collar defense practice at Kasowitz Benson Torres & Friedman LLP, said he isn't surprised that regulators are looking at private equity firms for possible FCPA violations.

"The FCPA generally is huge," he said. "It's a priority for the Department of Justice and the SEC right now."

"Anybody who does business in high-FCPA risk parts of the world has to be aware of and sensitive to these issues," Fetterman said. "PE funds are not immune to the FCPA."

Whitehead also said it makes sense that the private equity industry would be caught up in the broader regulatory focus on FCPA enforcement. But while he said it will require that buyout shops exercise greater caution, he doesn't see the spotlight limiting the ability to raise cash from sovereign wealth funds.

"You don't have to redline certain countries, but rather just run transactions with those countries through a compliance check," he said. "It becomes a diligence process versus a red line."

But the risks also extend beyond fundraising, experts say, as many of the biggest private equity groups dip into new, high-risk markets. The investment process in those countries will require careful compliance controls.

Private equity investment in Africa, an FCPA high-risk area, surged to a record last year thanks largely to a number of mega-deals — by the continent's standards — by private equity heavyweights including KKR & Co. Inc. and the Carlyle Group LP.

As much of the investment in Africa remains tied to infrastructure projects, which often include sizeable government contracts, that region will require vigilance on the part of U.S. private equity funds.

China, another high-risk area, remains attractive as a market to put private equity dollars to work as the government continues to shed assets as it looks to make the economy less dependent on state-owned enterprises. Investments in that country can be particularly risky for funds that also accept commitments from China Investment Corp., one of the world's largest sovereign wealth funds.

Vigilance is required not only when securing the bid, experts say, but also when doing initial due diligence on a target company, experts say. If FCPA violations are uncovered after a deal is sealed, the resulting fine and legal costs could threaten the economics of the investment.

More broadly, experts say it was only a matter of time before private equity got caught up in the FCPA crackdown.

"With increased enforcement efforts, a fine is almost inevitable," Urgenson said. "It is just the when, the who and the how that remains uncertain."

--Editing by John Quinn and Philip Shea.