Financial Institution Liability under the FCPA

As was recently reported in the FCPA Blog, the Securities and Exchange Commission (SEC) is now investigating "whether bank and private equity firms violated the [FCPA] in their dealings with sovereign wealth funds. A 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".

In in the Q4 2010 issue, of Ethisphere Magazine, in an article entitled, "*FCPA and UK Bribery Act Risks Facing Financial Institutions*," authors Alan Brudner, Palmina Fava and Mor Wetzler, [all attorneys at **Paul, Hastings**] explored some of the sources of liability for banks under the FCPA and UK Bribery Act. The authors began by noting that financial institutions face multiple anti-money laundering regulations in multiple jurisdictions. Under these various regulations, financial institutions are required to identify customers and the sources of funds. These requirements, coupled with the FCPA best practice of heightened scrutiny of transactions involving high risk countries, led the authors to opine that financial institutions may face liability under the FCPA and other anti-corruption legislation such as the UK Bribery Act.

The authors noted that although banks face the same risks of liability for paying of bribes under the FCPA which other companies are subject to, there are other avenues of potential liability. They authors discussed potential liability based upon the conscious indifference standard used to convict Frederick Bourke. Under this standard, the jury found that Bourke had been willfully blind, i.e., that "he was aware of circumstances in which illegal payments were highly probable but consciously avoided looking any further." The authors also cited to the SEC enforcement action involving two executives from Nation's Sunshine. In this case, the SEC did not allege that the executives had actual knowledge of improper payments but "rather that they were liable as control persons…". This provides another avenue by which a company or its senior officers "can be held responsible [under the FCPA] for improper payments without participation or actual knowledge."

This question regarding the source of funds was recently by the FCPA Blog. In a post entitled, "*Tesler's $148.9 Million Forfeiture Raises Big Questions*" the FCPA Blog raised several questions regarding the source(s) of the money, that defendant Jeffrey Tesler had in multiple bank accounts around the world. This money was forfeited to the US government in conjunction with his guilty plea. The FCPA Blog noted

The forfeiture order raises questions that haven't yet been answered in court. What are all of the sources of Tesler's cash? Who besides Tesler may have held beneficial interests in the bank accounts -- such as Nigerian or other government officials? And did the banks holding the accounts do any due diligence to know Tesler and the source of his funds?

Another source of potential liability for financial institutions is through transactions involving sovereign wealth funds. Once again recognizing that financial institutions risk FCPA liability directly for bribery or other violations of the FCPA in their dealings with sovereign wealth funds, such as the lack of due diligence in determining a business partner or improper payments, there are other potential sources of FCPA liability. This can include an "offset requirements" where "some percentage of contract funds is invested back into the foreign country, sometimes as a direct investment, or as a requirement to use a particular foreign component in a deal." The financial institution may not know who all the parties to such a transaction are, "thereby creating the potential for anti-corruption liability."

The FCPA journey that these financial institutions 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****."*