

U.S. SENATE HEARING ON FOREIGN CORRUPTION MAY RESULT IN NEW ANTI-MONEY LAUNDERING RULES FOR SOME U.S. BUSINESSES

A two-year investigation by the Senate Permanent Subcommittee on Investigations (“PSI”) has revealed that current loopholes and weaknesses in U.S. anti-money laundering (“AML”) laws and regulations enabled certain government leaders from four African countries, or their families or associates, to launder significant amounts of money—allegedly the product of foreign corruption—through U.S. financial institutions and other businesses or entities. PSI’s 330-page report, released at a February 4, 2010 subcommittee hearing, also included a set of recommendations for strengthening U.S. AML laws and extending such laws to some businesses that are not currently subject to AML regulations. The subcommittee supports enacting its legislative recommendations through the proposed financial regulatory reform legislation currently pending in Congress.

The subcommittee’s recommendations include, among others, disclosure of the beneficial owners of newly formed U.S. corporations; additional controls over bank accounts opened by or for foreign government officials and related persons; new regulations requiring real estate and escrow agents, sellers of vehicles, and escrow agents for aircraft sales to implement formal AML programs; and certifications to financial institutions by law firms that attorney-client or other office accounts will not be used to circumvent AML laws or to conceal financial activity by foreign government officials. Some of these recommendations are quite controversial and will raise significant political opposition. Whether or not they all become law, the PSI report is indicative of heightened scrutiny by U.S. authorities. U.S. businesses and other entities should assess their risk of exposure to transactions involving foreign officials and their families—either directly or through intermediaries, such as nominee investors—and evaluate their internal policies and procedures to make sure that adequate controls are in place to identify and prevent transactions through which the entity might unintentionally be used to funnel illicit funds into the United States.

PSI’S FINDINGS

The subcommittee reported on four case studies involving Equatorial Guinea, Gabon, Nigeria, and Angola where government officials, members of their families, or other close associates—referred to as “Politically Exposed Persons” (“PEPs”)—either attempted to channel or succeeded in channeling over \$150 million in “suspect funds” into the United States by exploiting weaknesses in AML laws. Although in some cases the transactions were declined or eventually detected by U.S. banks through existing AML procedures, some transactions were effected through persons or entities that are not currently subject to AML regulations and therefore have no due diligence obligation to scrutinize such transactions. The PEPs moved funds into the United States using a variety of conduits, including banks, offshore corporations, U.S. shell corporations, real estate agents, escrow agents, lawyers, a lobbyist, and an educational institution.

CURRENT U.S. LAW

U.S. criminal law in general prohibits U.S. persons from knowingly dealing in the proceeds of “specified unlawful activity,” including the proceeds of foreign corruption. Under the AML regulations issued as a result of the 2001 USA PATRIOT Act, U.S. depository institutions, securities broker-dealers, futures commission merchants, and mutual funds that offer “private banking accounts” within the meaning of the regulations must maintain policies, procedures, and controls that are reasonably designed to enable the institution to detect and report money laundering or other suspicious activity conducted through the account. If a nominal or beneficial owner of such an account is a “Senior Foreign Political Figure” (an “SFPF”), the institution is required to engage in “enhanced scrutiny” of the account to detect or report transactions that may involve the proceeds of foreign corruption.¹ Apart from these financial institutions, no other U.S. business or entity has an affirmative obligation to scrutinize transactions with SFPFs.

PSI’S RECOMMENDATIONS

The subcommittee report makes eight recommendations based on its findings. They include proposals that the U.S. government work with the World Bank and the International Financial Action Task Force on Money Laundering to strengthen global anti-corruption and PEP controls. In addition, PSI recommended the enactment of U.S. legislation that would

- require persons forming U.S. corporations to disclose the names of the corporation’s beneficial owners;
- repeal the provision of U.S. AML law that exempts real estate agents, escrow agents, and sellers of vehicles—including escrow agents for aircraft sales—from having to maintain formal AML policies and procedures;
- require U.S. financial institutions to obtain certifications from attorneys maintaining accounts for clients and for their own law offices stating that such accounts will not be used to circumvent AML regulations, including PEP controls, or to “accept suspect funds involving PEPs, conceal PEP activity, or provide banking services for PEPs previously excluded from the bank”;
- direct the Treasury Department to issue new regulations requiring enhanced monitoring by financial institutions of accounts involving PEPs; and
- amend immigration laws to make it easier to prevent PEPs involved in foreign corruption from entering the United States.

¹ “Senior foreign political figure” is the term in U.S. law corresponding to “Politically Exposed Person,” a term used primarily in international agreements and foreign law.

The PSI report also urges professional associations, such as those representing attorneys, real estate agents, and lobbyists, to issue guidance discouraging member involvement in financial accounts or transactions involving PEPs engaged in suspect activity.

The PSI report also urges Congress to consider its legislative recommendations as part of Congress's ongoing drafting of financial regulation reform. The Senate Banking Committee is currently considering such reform legislation, and the House of Representatives has already passed its version of the bill without any provisions related to PSI's recommendations.

The financial reform bill faces a number of significant political challenges and it is unclear as to when—or whether—such legislation will be enacted. Moreover, the PSI recommendations will almost certainly be opposed by businesses and professions that would be brought under new compliance and enforcement regimes. The findings of the PSI investigation and the recommendations, in and of themselves, indicate that U.S. enforcement agencies are already under pressure to more carefully scrutinize the U.S. dealings of foreign officials and their families. In the meantime, the PSI report highlights the extent to which foreign officials may attempt to channel suspect funds into the United States. All U.S. entities having international business or other dealings should review their policies and procedures to safeguard their operations against such attempts.

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If you have any questions concerning the foregoing or would like additional information, please contact Martin J. Weinstein (202-303-1122, mweinstein@willkie.com), Robert J. Meyer (202-303-1123, rmeyer@willkie.com), Jeffrey D. Clark (202-303-1139, jdclark@willkie.com), Russell L. Smith (202-303-1116, rsmith@willkie.com) or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099 and has an office located at 1875 K Street, NW, Washington, DC 20006-1238. Our New York telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our Washington, DC telephone number is (202) 303-1000 and our facsimile number is (202) 303-2000. Our website is located at www.willkie.com.

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