Settling with Multiple International Regulators: What Has Standard Chartered Wrought?

"Tell me what can a poor boy do; 'Cept for sing for a rock 'n' roll band?"

As a teenager I often pondered those lyrics and wondered if Mick Jagger was really a closet radical who was ready to "let his freak flag fly" (to cross-mix musical metaphors) and take to the streets to protest as was so often done in the 1960s. That Stones lyric popped into my head more than once over the past week when I was trying to sort out the story of Standard Chartered Bank (SBC) and the New York state Department of Financial Services (DFS) in the context of an international company subject to many different international regulators. Quite simply, what is a poor company to do when it is being investigated by multiple regulatory agencies or government departments in many different countries and with even further differentiated jurisdictions within the same country, such as the role of the (DFS) and the US Department of Treasury or Federal Reserve?

Companies and Regulators-waiver of privilege and negotiations

This question clearly came up in the context of the SBC anti-money laundering (AML) fine announced earlier this week. In addition to the UK Financial Services Authority (FSA), SBC was under investigation by several US federal authorities including the Department of Treasury, Department of Justice (DOJ), Federal Reserve and Federal Bureau of Investigation (FBI). Who and how does an entity under investigation communicate? In an article in the Huffington Post, entitled (appropriately enough) "*Standard Chartered May Have Burned Itself By Waiving Attorney-Client Privilege In Probe*", reporters Aruna Viswanatha and Andrew Longstreth wrote that SBC "appears to have been burned by a decision to waive attorney-client privilege, a move that usually helps appease U.S. authorities."

In addition to the waiver issue, how does an institution negotiate with several over-lapping jurisdictions or multiple regulators within one jurisdiction? The Financial Times (FT), in an op-ed piece entitled "*StanChart rushes to unsettling deal*", said that "If banks are to be clear about their responsibilities and obligations, regulators have to establish coherent norms and processes." The piece went on to opine that it would "be perverse" if the DFS is applauded for "going it alone" even though the FT acknowledged that the DFS was "right to raise questions over the legality of wire-stripping".

Regulators and Regulators-who's on first?(International Division)

What about the relationship between international regulators, is it now damaged? In a Wall Street Journal (WSJ) article, entitled "*Trans-Atlantic Tensions Increase*", Dana Cimilluca and Victoria McGrane reported that "the special relationship between the financial authorities in the U.S. and U.K. is going through a rough patch." To underscore this point, they noted that after the DFS went public, the Governor of the Bank of England "chastised" US regulators. However, this chastisement did not sit well with all on this side of the pond. In another WSJ article entitled

"Bank Deal Rankles Regulators" Liz Rappaport quoted Neil Barofsky, former special inspector general in the US Treasury Department, who believes, "The FSA should stop griping about other regulators and focus on overseeing London's banks".

Regulators and Regulators-who's on first?(US Division)

What about the relationships between US federal and state regulators? Rappaport reported that the DFS met with all other US regulatory agencies investigating SBC conduct in April. The DFS seems to believe that it communicated that it was ready to move while the federal regulators "didn't feel that they had got any indication from Mr. Lawsky's office that he was going to pursue a case on his own. Rappaport quoted Mark Williams, a former Federal Reserve Bank examiner, who said that it was "unprecedented, from a regulatory perspective" for a state regulator to move without waiting for federal regulators to move fist. However, he was also quoted as saying "It will likely embolden other state banking commissioners". But the final word, at least from the US side, may have come from Senator Carl Levin (D-Mi.) who was quoted as saying, "Holding a bank accountable for past misconduct doesn't need to take years of negotiation over the size of the penalty. It simply takes a regulator with the backbone to act."

What Should Wal-Mart Do?

So what does all of this mean? Certainly in the financial services sector, counsel needs to tread carefully and have a clear understanding about turning over evidence and how that evidence may be presented. Companies also need to have clear understanding of who they are negotiating with and under what conditions. For those Foreign Corrupt Practices Act (FCPA) compliance practitioners, witness the release of the letter this week by two House members, Oversight and Government Reform Committee Ranking Member Elijah E. Cummings and Energy and Commerce Committee Ranking Member Henry A. Waxman, who sent a letter to Wal-Mart Chief Executive Officer (CEO) Michael Duke regarding the company's failure to provide Congress with information relating to the Wal-Mart bribery allegations. In the letter, they claim to have found evidence "of "questionable financial behavior" including tax evasion and money laundering in Mexico." Further, they threaten to make "public any documents we have obtained as part of the investigation." I probably do not need to remind the readers of this blog that Wal-Mart has announced it is conducting an internal investigation for allegations of FCPA violations in Mexico. So tell me "*What can a poor boy [bank, company, fill in the blank] do*?"

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