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# Anti-Money Laundering

## Former FinCEN Director James H. Freis, Jr. Discusses the Intersection between Anti-Money Laundering and Anti-Corruption Law (Part One of Two)

By Rebecca Hughes Parker

One way prosecutors have pursued the FCPA's broad jurisdictional reach and overcome some of the inherent challenges in corruption cases has been the use of a set of powerful tools – anti-money laundering laws. The FCPA Report spoke with the nation's former top anti-money laundering regulator, James H. Freis, Jr., about a range of issues, including how prosecutors use anti-monetary laundering laws in FCPA cases, how financial regulators are working together across the globe to combat corruption and the corruption challenges facing the gaming industry.

Freis was the director of the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) from 2007-2012 and is now Counsel at Cleary Gottlieb Steen & Hamilton LLP. As Director of FinCEN, Freis led the development and enforcement of regulations, fighting not only money laundering and corruption, but also terrorist financing, fraud and other financial crimes applicable to a broad range of financial institutions, including banks, securities and futures industry participants and insurance companies.

We are publishing our interview with Freis in two parts. In the first part, Freis discussed, among other things, what companies should focus on when conducting corruption and anti-money laundering risk assessments and audits; how the DOJ and SEC work with FinCEN on corruption cases; and details regarding the formation, operation and future of the Egmont Group, a 130-member organization of international financial intelligence units.

### *Interconnectedness of FCPA and Anti-Money Laundering Laws*

**FCPAR: What are typical ways that money laundering is implicated in a domestic corruption case?**

Freis: When it comes to corruption, the monetary payment – the bribe – almost always is the crime. When it comes to money laundering, by definition it's the proceeds of crime that are at issue; in fact, money laundering laws are often called the "Proceeds of Crime Act." The movement of that bribe through the financial system is money laundering. They are integrally related. A corrupt official takes an envelope full of cash and then as soon as he deposits it in a bank, that's money laundering.

**FCPAR: The money laundering charge, then, is a useful tool for prosecutors?**

Freis: When prosecutors are building a case and showing the corruption, the movement of money is the best evidence that they often have, because money trails don't lie. People don't send money to people that they don't know, so evidence of that activity is compelling. The movement of money is one of prosecutors' most important and consistent tools in anti-corruption cases, and frankly, it is pretty convincing to a jury when there are unexplained funds moving forward.

Also, when you look at the prevalence and the size of the U.S. economy and use of the dollar in the global market,

the money laundering reach is actually one of the broadest globally that the U.S. has.

**FCPAR: Are there other ways money laundering charges are helpful in prosecuting foreign bribery cases in particular?**

Freis: There may be cases where the U.S. jurisdictional presence under the FCPA to charge someone with actually paying the bribe is lacking, and prosecutors can bring a money laundering charge instead. If you are a corrupt official in a foreign country receiving bribes and you try to hide the evidence in your home country, you might have your hard assets in a financial center such as New York, for example. Then, U.S. authorities may have the ability to go after that corrupt foreign official or the underlying assets on a money laundering charge, even if they do not have the U.S. jurisdictional presence under the FCPA to charge anyone with actually paying the bribe.

**FCPAR: So you'd say it is common for U.S. officials to use anti-money laundering laws to go after a foreign official they think is taking bribes?**

Freis: It is extremely common. In financial crimes generally, but particularly in corruption cases, you have not just the FCPA charge, but you have a money laundering charge and often also a wire transfer – a wire fraud charge under federal jurisdiction. And in a lot of criminal cases, especially when they are settled, you will actually have a plea to the money laundering charge as a lesser crime together with a forfeiture of the funds. That is one of the fundamental aspects of the money laundering authority: it allows you to go after the money even if you might not necessarily be able to assert jurisdiction over the corrupt foreign official or persons outside the country; you can seize the assets directly.

In the "Resource Guide to the Foreign Corrupt Practices Act" issued by the DOJ and SEC, there are examples of FCPA cases that also involve violations of anti-money laundering statutes. [Editor's note: See page 48 of the Guide, which discusses the Haiti Teleco case, and references others.]

## *Go Beyond the Public Face of the Company When Strengthening Financial Controls*

**FCPAR: What are steps companies can take to proactively prevent foreign officials from exploiting vulnerabilities in the international financial system that allow them to hide their bribes? [See "Anti-Corruption Audits, Risk Assessments, Transaction Testing and the Dangers of Petty Cash: An Interview with Leaders of Ernst & Young's Fraud Investigation & Dispute Services Practice," The FCPA Report, Vol. 1, No. 2 (Jun. 20, 2012).]**

Freis: Essentially, it all gets back to the financial controls. The first level of vulnerability and therefore the first area in which there should be extreme attention is any type of cash payment. By definition, cash is an anonymous form of payment and that is why it is preferred by corrupt officials as well as criminals generally. Other forms of payment such as by check or wire transfer are not anonymous and thus require additional steps to attempt to disguise the nature of the payment. This all underscores my fundamental point, that in fighting corruption, the aspects of financial focus are so important from an investigatory purpose as well as in gathering evidence, because the payments leave trails behind.

**FCPAR: What is a common mistake companies make when it comes to financial controls? [See "Designing Effective FCPA Compliance Programs and Monitoring Third Parties After the Guidance," The FCPA Report, Vol. 2, No. 2 (Jan. 23, 2013).]**

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Everyone tends to focus on the highest level official, whether that's the president, the CEO, or head of a line of business – i.e., the person who's out there making the sales pitch or the pitch for the business; but more important in some of these cases can be a lower level or a lower profile employee – the one who is actually signing the invoices inside the institution and has signature authority over the checks. Companies should look very carefully at the people who control the payments as they are very different from those who might be the public face of the company. As part of their controls, companies need to consider how those two components work together.

**FCPAR: Does this advice to focus on the people who have the authority over the money flow apply to proactive audits? [See "Integral Elements of Proactive and Pre-Merger Anti-Corruption Forensic Audits," The FCPA Report, Vol. 1, No. 14 (Dec. 12, 2012).]**

Freis: Exactly, companies should focus on the people who control the payments or the people who have the implementation ability. In fact, the international financial system is focused on this.

Prudent controls in this area are not unlike what companies should be watching for when it comes to fraud – the company should know what normal payments look like, in terms of normal internal procedures, the documentation that would be required, and also the normal ways in which employees would respond to invoices. For example, funds get paid into a company's corporate account, not into an individual's personal bank account. That is the type of red flag companies should be looking for.

## *DOJ and SEC Coordination with FinCEN*

**FCPAR: In the past decade, as SEC and DOJ enforcement of the FCPA has increased dramatically, how did FinCEN, the agency you previously led, work with those agencies regarding foreign bribery?**

Freis: Fundamentally, FinCEN was established to support law enforcement agencies with respect to their criminal investigations and prosecutions. In addition, FinCEN has a responsibility to help protect the integrity of the financial system: both participating financial institutions as well as ultimate consumers and the economy generally. That market integrity area is where the civil authorities, the financial regulators, including the SEC as well as the banking supervisors come into play.

FinCEN is the agency that collects the greatest amount of financial transaction data across the country, from all kinds of financial services providers, for the purpose of helping law enforcement agents detect, investigate and prosecute financial crimes.

## *FinCEN Supports Prosecutors Both Proactively and Reactively*

Freis: FinCEN has both a reactive component – when authorities have begun a case, they will come to FinCEN to further their investigation, gather evidence on the money trails side – and also a proactive component – FinCEN also collects information and develops on a proactive basis indicia that they then will refer directly to an appropriate criminal investigator or prosecutor to open an investigation.

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**FCPAR: On a proactive basis, what would you look for before referring the case to the DOJ or SEC?**

Freis: The pattern of activity generally would not just be a one-off event, but indicia of some type of an organized criminal scheme. Nearly anyone who successfully is involved in accepting a bribe or other type of financial crime is usually tempted to do it again and again. You want to focus limited government resources to go after those significant actors in that repeat area of risk.

**FCPAR: In terms of process, the bad actors often set up a "sham" business and sign a consulting agreement that pays the "sham" business repeatedly? [See "Nordam Agrees to Pay $2 Million – All It Can Pay – in Non-Prosecution Agreement with the DOJ Based on Chinese Bribes," The FCPA Report, Vol. 1, No. 4 (Jul. 25, 2012).]**

Freis: Exactly. There are professional money launderers out there that set up sham corporations that move money back and forth between jurisdictions that hide the ownership of the accounts. And those professional money launderers are indifferent to whether their customers (if you want to use that term) are corrupt officials or drug dealers or even drug traffickers or terrorist financers or white collar criminals involved in Ponzi schemes stealing customer assets or embezzling within a company.

We see again and again in all types of financial crimes that organized criminal networks will rely on a series of intermediaries to try to hide that money trail. Those intermediaries are professional money launderers.

## *FIUs Working Together in the Egmont Group*

**FCPAR: FinCEN is designated as the financial intelligence unit (FIU) of the U.S, and is a part of a global network of FIUs known as the Egmont Group. Can you tell us more about how Egmont Group operates?**

Freis: The Financial Intelligence Unit is a single agency within a country that collects financial transactions information, analyzes it, and helps law enforcement pursue financial crimes. The United Nations Convention against Corruption calls for every country in the world to establish financial intelligence units to help in anti-corruption efforts. That is quite unique to have an international agreement prescribing specific functions to be carried out within the structure of a specific government agency.

The Egmont Group is the association of these financial intelligence units in jurisdictions around the world – currently more than 130 jurisdictions. It is so important because by definition, law enforcement authority stops at the border. So, think of the chase scene with the county sheriff who cannot cross the border. Certainly at the borders of our country, even the FBI cannot get on a flight into another country and just go arrest somebody there. But criminals do not respect the law; they certainly do not respect borders. They try to take advantage of the limits on the jurisdiction of individual law enforcement agencies.

Members of the Egmont Group have specific legal authority notwithstanding other aspects of the law (including privacy and confidentiality provisions) to share information with their foreign counterparts in furtherance of a criminal investigation.

**FCPAR: Can you give us an example of how the FIUs work together?**

Freis: As a specific example of what happens day in and day out at FinCEN: a Financial Intelligence Unit in a foreign

country has some suspicion that there is a corrupt official in that foreign country and thinks he or she may be hiding assets in the United States. The FIU would put it in a request to FinCEN to do some research to see if FinCEN has any indicia of that person holding assets within the United States. FinCEN would share back responsive information at what is known as an intelligence level, meaning information that can only be treated as an early lead (not the type of evidence you could use in a court). Again and again I saw examples where only because it had that lead, the foreign FIU would be emboldened and able to actually open up a full-blown investigation and go through the rigorous legal process of trying to hold that corrupt official accountable and recover the assets.

**FCPAR: Could a corporate enforcement action that we see frequently in the United States be a result of the scenario that you just laid out?**

Freis: Certainly. An FCPA investigation against a corporation may be the result of tracing that money trail backwards from the corrupt official to the entities that made the payment in the first place. And that investigation can work in both directions. Obviously you have two people that are criminally culpable, the person paying the bribe and the person soliciting and receiving it. Ideally you would want both to be held accountable, but the one thing that ties them together is the money trail.

**FCPAR: You said there are 130 members of the Egmont Group. Has that been a static number, or is it growing?**

Freis: The Egmont Group has seen consistent growth, with FIUs admitted from additional jurisdictions each year. The U.S. was one of the fifteen founding members back in 1995 and has been one of the most active proponents of the group and FinCEN among the most actively involved FIUs since its very beginning. FinCEN plays an active role in all of the Egmont working groups and has hosted global meetings. I personally attended annual plenary meetings the last six years and have met with my counterpart FIUs on every continent. Most importantly, at FinCEN, I oversaw the exchange of information on an annual basis with over 100 jurisdictions in furtherance of over 1,000 criminal investigations.

**FCPAR: Why do you think the Egmont Group has been successful?**

Freis: One of the key reasons why the Egmont Group has been so important in our global effort to fight financial crime, including corruption in particular, is that it establishes a common set of standards, expectations and protections for working together. The United States has an interest in dealing with essentially every other country in the world and the Egmont Group framework gives us the ability to do that in a centralized fashion rather than bilaterally with between 100 and 200 countries around the world: the sum of those efforts are much greater than the individual parts.

You never know where the next criminal investigation will lead. Money can be transferred between jurisdictions in nanoseconds, so we need the ability to help follow that trail wherever the money goes and not have it go into black holes which allow the criminals or corrupt officials to win.

The Egmont Group has been focused on money laundering and a broad range of financial crimes, but I think the two areas in which it has had the greatest success and made the most difference are in combating the financing of terrorism and in fighting corruption of public officials.

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**FCPAR: Why, specifically, has it been successful in fighting corruption?**

Freis: In October 2012, the Egmont Group published a white paper entitled "The Role of FIUs in Fighting Corruption and Recovering Stolen Assets." That report describes numerous successful examples of FIU anti-corruption efforts, including contributions from my former agency, FinCEN, but also underscores the potential for further transnational cooperation to fight corruption.

Consider the case of an isolated jurisdiction that has a corrupt official involved in significant abuse or misappropriation of public funds. If the corrupt official is in any way intelligent, he or she is not going to have trails and records of how he or she solicited corrupt payments in that country, and often will not keep all of the misappropriated assets locally in that country. The evidence and the assets will be outside of that jurisdiction and local law enforcement cannot succeed in following that trail without the assistance of others.

Another aspect that has been so critical in the success of the Egmont Group and the member FIUs is that information shared is for lead development purposes. This means for information and intelligence purposes, not the much more complicated and time consuming process of gathering evidence that can be used in court, such as through a Mutual Legal Assistance Treaty (MLAT), or actually recovering and repatriating assets. But often the intelligence gathering is a critical step that allows the more formal legal procedures to be set in motion. For example, if the FIU to FIU communication has identified specific bank accounts at specific banks in a foreign jurisdiction that have proceeds of corruption from a corrupt official, then the FIU can work with its law enforcement partners to initiate a very tailored, narrow, specific request to the Justice Department through an MLAT or through the courts following what is known as the letters rogatory process to obtain evidence and eventually recover those assets. In contrast, consider how almost hopeless it can be for a victimized country (or even for another jurisdiction that in principle is willing to help) to try to recover assets that a corrupt official has hidden without any idea of where to start looking.

**FCPAR: The presence of international backing of anti-corruption efforts for a country where the enforcement regime is not as strong as ours or the U.K.'s, for example, is crucial.**

Freis: Absolutely. It gives a little bit of light in a very dark environment. Egmont's best practice is to return information in no more 30 days, while other governmental approaches can take years.

**FCPAR: Are FIUs in other countries with different government structures than the U.S.'s set up in a similar way to ours?**

Freis: Yes. The model of FinCEN has actually become one that the majority of countries in the world have adopted in what is known as an administrative FIU. Regardless of where within a government an FIU is housed, either as a quasi-independent unit of an existing authority or as autonomous agency, it must be able to carry out its intelligence-gathering and investigative functions without interference from the rest of government. If you are investigating potential corruption and some senior minister had discretion to approve or disapprove every investigation and decide whether you can disseminate relevant information back to another country or receive information, then that would not be a very effective investigative body.

**FCPAR: And it would take longer than 30 days.**

Freis: If it happened at all. But, that is one of the aspects of the internationally recognized standards for FIUs and one of the aspects of the background type of vetting before an FIU can be accepted into the Egmont Group. All member FIUs must have that aspect of operational autonomy in carrying out their investigations and have access to relevant information within their country – which can be everything from bank records to judicial records to public source information to tax records, or even land registries to investigate real property assets – for analysis in a centralized way that virtually no other agency would have. That is the role of the FIU, to connect the dots in terms of all kinds of financial flows and financial assets to track down criminal movement of funds.

**FCPAR: Are there countries where it's been challenging to set up FIUs that meet these standards?**

Freis: Absolutely. It is not an easy job. In particular as countries these days are facing fiscal pressures and there are competing priorities in serving their peoples. The World Bank and other development agencies have put a focus on helping emerging economies develop FIUs and the areas of the world that now have well-established FIUs in most jurisdictions include virtually all of the Americas, Caribbean, Latin America, Europe and Australia/Oceania, but areas like Africa are still developing and that is a priority of the Egmont Group and other development organizations in terms of capacity building. Some parts of Central and Southeast Asia are also a focus.

Some countries have, in name, an FIU in a startup phase, so we can help build the capacity, the skills and the level of operational autonomy so that the FIU can have the ability to function in an operational way and then become a participating member of the Egmont Group.

**FCPAR: Corruption is rife in many countries in Africa because of the resources they have that many industries, notably the extractive industries, need. Do weak government structures provide a challenge to setting up an FIU in Africa? [See e.g., "In Possible Sign of Escalation of Canadian Anti-Bribery Enforcement, Griffiths Energy Agrees to Pay $10.35 Million to Resolve CFPOA Charges," The FCPA Report, Vol. 2, No. 2 (Jan. 23, 2012).]**

Freis: No question. And part of that is building the overall governance structures with the economy. Building an FIU is often closely related to other efforts to build a law enforcement capacity within the country, an independent judiciary, investigative agencies and prosecutors, to operate under rule of law. Of course having a strong rule of law encourages all companies to feel that they can operate in appropriate ways on the basis of competition as opposed to some type of crony capitalism or feeling that everyone else is involved in these types of payments outside the normal course of business. The rule of law is also critical in terms of having some comfort that for whatever you negotiate in your contracts, you can get the benefit of that bargain.

So, the FIU is internationally recognized as one of those important components in terms of the rule of law within the country that will encourage aspects of foreign direct investments.

**FCPAR: When you are doing business with a country that doesn't have a strong rule of law or an established FIU, should red flags go up in terms of keeping track of where the money's going? [See "How Private Fund Managers**

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**Can Manage FCPA Risks When Investing in Emerging Markets," The FCPA Report, Vol. 2, No.1 (Jan. 9, 2013).]**

Freis: I think that is something that is significantly correlated, whether you have a functioning FIU and related rule of law components with those general risk factors that you would see in almost any corruption index, whether it's from Transparency International or some of the other widely-cited ones. In fact, for some of these indices, that is part of their methodology: looking at the functioning of the institutions within the country which would include aspects of independent investigative functions and an FIU.

**FCPAR: Do you expect that more countries will join the Egmont Group?**

Freis: Absolutely. It's part of the expectations, the globally recognized standards in terms of fighting money laundering and terrorist financing, to have an FIU that joins the Egmont Group. The International Monetary Fund and the World Bank have resolved that every country should have an FIU. The G-20 countries, which represent 80% of the world's population and 90% of the economy, have repeatedly endorsed the need to create these structures, including the FIU, for fighting corruption and other risks.

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# Anti-Money Laundering

## How Can Anti-Money Laundering Laws Affect an FCPA Compliance Program? An Interview with Former FinCEN Director James H. Freis, Jr. (Part Two of Two)

By Rebecca Hughes Parker

Though motivated by different statutes, anti-money laundering compliance programs and FCPA compliance programs deal with related risks. Anti-money laundering laws are also integrally related to FCPA charges, and prosecutors use them frequently in FCPA enforcement actions across industries and geographies.

The FCPA Report recently spoke with the nation's former top anti-money laundering regulator, James H. Freis, Jr., about a range of issues, including the role anti-money laundering laws play in FCPA cases, how financial regulators are working together across the globe to combat corruption and the corruption challenges facing the gaming industry in particular.

Freis was the director of the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) from 2007 through 2012, and is now Counsel at Cleary Gottlieb Steen & Hamilton LLP. As Director of FinCEN, Freis led the development and enforcement of regulations, fighting not only money laundering and corruption, but also terrorist financing, fraud and other financial crimes applicable to a broad range of financial institutions, including banks, securities and futures industry participants and insurance companies.

In this, the second part of our interview, Freis discussed, among other things: the connection between anti-bribery laws and broader financial reforms around the globe; how financial institutions can integrate their AML and FCPA compliance programs; the similarities and differences between Politically Exposed Persons and foreign officials; and the importance of high-profile FCPA enforcement.

In the first article in this series, Freis discussed, among other things: what companies should focus on when conducting corruption and anti-money laundering risk assessments and audits; how the DOJ and SEC work with FinCEN on corruption cases; and details regarding the formation, operation and future of the Egmont Group, a 130-member organization of international financial intelligence units. See "Former FinCEN Director James H. Freis, Jr. Discusses the Intersection between Anti-Money Laundering and Anti-Corruption Law (Part One of Two)," The FCPA Report, Vol. 2, No. 3 (Feb. 6, 2013).

### *Anti-Bribery Efforts Tied to Other Global Anti-Corruption Efforts*

**FCPAR: Aside from the Egmont Group, are there other intergovernmental initiatives that play a role in preventing bribery that you were involved with during your time at the Treasury Department?**

Freis: One important way to look at it is the interrelationship of bribery with other risks. It has been a long-standing position of the U.S. government, together with the other G-20 governments, that corruption, money laundering, terrorist financing – but also tax evasion,

sanctions issues in terms of national security threats, and even prudential financial supervision – are not isolated issues to be dealt with separately, but rather are mutually interdependent issues. The focus is positive – it is mutually reinforcing to protect the integrity of the financial system and therefore the economy of a country to raise standards in each of these areas. But, predominantly, the focus has been with respect to failures in one area being mutually reinforcing in terms of risk and a race to bottom.

Without a safe and sound financial system, a country cannot maintain a strong economy and sufficient growth for its people. That is the most important aspect from a policy perspective I would like to reinforce: that anti-bribery efforts are not isolated and should not be looked at in an isolated way.

Part of tying those aspects of risks together and the acknowledgement of their interdependence is that it strengthens the recognition in jurisdictions that are corrupt either in reality or perception, that if they want to have access to the global economy and the financial markets, they need to change that perception or reality. No single corrupt official who is making a profit from the corruption would necessarily find an incentive to just change that behavior as a result of an anti-corruption initiative. But the fact that the anti-corruption initiative is tied to other aspects that serve to prevent foreign investment, prevent access to global payments – this really affects the country, and the mutually reinforcing act of applying pressure is much more effective at heading off the corruption.

Another aspect of the initiative that merits mention is the StAR initiative at the World Bank – Stolen Asset Recovery Initiative. It is important after the corruption has occurred to recover those assets from the corrupt officials for the people. That initiative is not just limited to the narrow aspect of fighting corruption but is engaged in capacity building of all the different government entities, and law enforcement authorities for the rule of law structure within that country.

## *Integrating AML and FCPA Compliance*

**FCPAR: Are there ways a company can integrate both AML and FCPA compliance in its compliance program?**

Freis: First, let me make clear that the detailed anti-money laundering program requirements only apply in relevant part to financial institutions (broadly defined to include banks, securities, insurance, other non-traditional financial services providers, including money transmitters and emerging online payment mechanisms, as well as casinos, precious metals and jewelry dealers exchanging fungible commodities with highly liquid value). That is of course different from the FCPA issues, which can apply to any U.S. company.

The AML requirements for a compliance program come directly from the law itself – the USA PATRIOT Act of 2001 – and are fleshed out in greater detail in regulations and in guidance that has developed over the past dozen years. But those now well-established compliance principles that underscore the anti-money laundering framework are essentially the model on which we have seen compliance develop in other areas, such as compliance best practices or guidance that you have in the FCPA context.

There are aspects of compliance programs that companies can leverage in terms of using that same framework: in particular, the risk assessment to combat bribery and money laundering.

A company has to examine the nature of its business and the internal risk areas in terms of who controls the payments, or what are the points of contact with the foreign officials that could lend themselves to a corruption payment or a bribe being sought or paid.

The risk assessment is the key component – in carrying out that assessment you'll see a great deal of overlap between the AML and FCPA.

Training is another area that is important in terms of risk of financial crimes generally. It is more efficient and effective to train holistically rather than do it as a part of compartmented, one-off area.

Internal investigation techniques to look into a potential allegation of corruption or bribe, money laundering, or internal or external fraud are also related. Even if a company has separate units that would deal with these crimes, it is extremely efficient to build off of the existing framework and the learning that is done over the years in those other areas. It is helpful for companies to leverage in particular what they have already done in fighting fraud for the anti-money laundering and corruption space, which might not affect a company's bottom line as directly as fraud.

## *Identifying Senior Political Figures and Foreign Officials*

**FCPAR: When you led FinCEN, one of the approaches you explained that FinCEN uses to combat foreign bribery is requiring financial institutions to identify and apply enhanced due diligence to private banking accounts held by or for the benefit of senior foreign political officials. Please explain that initiative and what it requires financial institutions to do.**

Freis: There is a specific legal requirement that comes from the USA PATRIOT Act (amending the Bank Secrecy Act anti-money laundering framework) that requires a greater level of scrutiny or enhanced due diligence in a number of areas. In particular, it applies to what is known as "senior foreign political figures." The purpose for which this exists is to combat corruption.

As a generic global matter, the "senior foreign political figures" as defined in U.S. law and regulations are generally known as PEPs (Politically Exposed Persons). If you step back for a second, consider the term from a financial institution perspective, "senior foreign political figure" – the senior gets to the level of influence; the political figure gets to the aspect of public corruption; the foreign gets to the aspect of dealing with people from overseas having an account in the United States.

It is not at all odd for myself, as a U.S. citizen and a former senior figure in the U.S. government, to have bank accounts in the United States, where I live and where I am from, but it would be somewhat odd if I had a series of bank accounts around the world, and that is what banks look for.

PEPs also include associates of the political figures. This complicates things for the financial institutions because they are not only looking at the named individual but they are looking at associates, and that gets at the risk of the way corrupt officials may try to hide their assets. Maybe they put it in the name of their minor children; maybe they put it in the name of a notary, a lawyer or an accountant who is holding shell accounts on behalf of them for which they are

the beneficial owner, because the PEPs are trying to hide the fact that they are the ones controlling this money.

When you get down to those levels, red flags should be raised: Why is this senior foreign political figure holding accounts through straw persons in other countries around the world? If their public salary is $10,000 a year, why are they able to buy a $10 million home on the coast or a hold an overseas bank account with $20 million in assets? The obligations begin from the point of opening an account, to identify these persons from this higher risk category of corruption, and throughout the lifetime of that arrangement to put a higher level of scrutiny on it, for the sole purpose of trying to detect and deter corruption payments going through.

**FCPAR: Has that resulted in more enforcement actions or prosecutions?**

Freis: It certainly has. It has been some of the best lead information – banks, reporting to FinCEN as a result of that due diligence, put the leads in our database, and then we use those leads for domestic anti-corruption actions, or the FCPA investigations, as well as for helping foreign governments track down the proceeds of corruption around the world.

**FCPAR: What are the challenges when it comes to tracking the money of PEPs?**

Freis: It's not an easy thing to track down assets without some level of asking questions (with the exception of looking at public databases). In the wake of these legal requirements to pay greater attention to PEPs, there are a whole lot of vendors, service providers that provide databases and information to screen. Although that framework has been developed specifically in reaction to these legal requirements in the anti-money laundering area for financial institutions, those screening tools are increasingly utilized by corporations as they are screening some of the parties that they may be working with overseas for risks of foreign corruption.

**FCPAR: Would those tools be used as part of routine due diligence on third parties?**

Freis: Absolutely. The debate over who is a PEP or who are these associates for anti-money laundering purposes is very similar, or analogous, to the debate that is ongoing in the FCPA area of defining who is a foreign government official. Consider someone who runs a government instrumentality or is on a commission or is appointed by a minister in a foreign jurisdiction: is he a foreign official for FCPA purposes? Is he a PEP for anti-money laundering purposes?

As you know, one of the areas of FCPA uncertainty and liability and risk is for companies engaging in economies where the government plays a much larger role in commercial life, from running the government airline, the government telecom company to controlling the land and the extractive resources and the shipping lines and ports. It might be much more difficult to avoid dealing with government officials in such a country than here, in the United States, where you might be dealing entirely in the private economy.

**FCPAR: Would you say the definition of a PEP for AML purposes is narrower or broader than the definition of foreign official for FCPA purposes? [See "U.S. Government Counters Foreign Official Challenge in the Eleventh Circuit," The FCPA Report, Vol. 1, No. 7 (Sep. 5, 2012)].**

Freis: The Senior Foreign Political Figure term also includes family members and close associates. Another aspect of

the debate that occurs in the banking framework is: if you are once a PEP, are you always a PEP? Consider a parliamentarian after the term of service, where she no longer holds office in a country? Technically, that person is no longer a government official, but that does not necessarily mean that she is not still a very influential person such as within the ruling political party. Therefore, a person may still be a PEP for a generation, subject to that aspect of increased scrutiny and viewed to be at higher risk for corruption, even if that person might not nominally be a current government official as relevant for FCPA purposes.

## *Casinos and Gaming Industry Risks*

**FCPAR: Aside from financial institutions, casinos and the gaming industry need to be acutely aware of the potential for financial crimes. Some major gaming companies are re-training their staffs on the FCPA and on ways to avoid doing business with people and entities on the U.S. sanctions list. What are some key pieces of advice you could give to casinos on the risks that they face?**

### *Rapid Growth and Big Profit Margins*

Freis: The fundamental reality for casinos and the gaming industry is that there is extremely rapid rate of growth outside the United States. Most notably in Macau, which has a multiple of the annual revenue of the entire gambling industry now in the United States. Singapore has also a robust gaming industry, and it is growing in Latin America, too – and this in addition to online gambling.

Gaming is a licensed industry that has some of the same indicia of risk of trying to establish licenses or enter into a market in any jurisdiction. There might be a temptation to pay a bribe or there might be a solicitation of a bribe. So clearly that's an area of risk. In conjunction with the growth, some may view it as an extremely profitable industry as well. When people do a risk/reward calculation, you can see there is a risk of bribes there.

### *Lots of Money Movement*

The other aspect, aside from international expansion, is the nature of the business and the customer. Casinos by definition are a place where a lot of money moves. Of course it is a legitimate business. People engage in gaming for recreation. But there have been many high profile cases where criminals, including corrupt officials, have taken the proceeds of their crime, which they otherwise may have trouble laundering and integrating into their financial system, and spend them at casinos.

As a business model, the gaming industry certainly does not want to turn down people who bring in a lot of money with the intent to lose it and leave it behind at the casino. But that's exactly what the anti-money laundering rules are about: to get at the proceeds of crime and to tell all financial intermediaries, including casinos, to turn down business if you have reason to suspect that it could involve the proceeds of crime. They cannot turn a blind eye to that.

In significant part, the business model is that a gambler will come in and bring funds with them, but another significant part is that a gambler will be given a credit line, a "marker," from the casino or gaming house. They set that credit line, for example, whether they let the customer lose a million dollars or more before they cut him or her off, based on some type of assessment of the creditworthiness of that individual. In doing so, under their anti-money laundering obligations, they should look not only at whether the gambler is able

to pay back his or her debt, but also be vigilant as to any concerns that might arise over why he or she has so much money to lose.

### *Casinos Should Be Alert to the Same Red Flags as Financial Institutions*

As a fundamental level, some aspects of keeping an eye out for red flags about the source of funds are no different from the model that the banks have long since had. You have a foreign official, you have his passport, you've done some check into the background of the wealth, you realize this is a high profile foreign official who makes $10,000 a year with no obvious connection to other sources of wealth, yet he shows up at a casino and is set up to lose a million dollars in a weekend? That should raise a red flag to the casino.

**FCPAR: One measure casinos can take is to not allow gamblers to transfer funds from their own accounts under an alias.**

Freis: Exactly. That gets back to the same methods that are used to obscure the source of the funds. And also the related aspects such as when funds come in from a certain source, a certain bank account; followed by minimal gambling, most casinos have anti-money laundering controls to make sure they are returned back to that same bank account. Such controls seek to prevent someone bringing funds into a casino and then transferring them out to somebody else, effectively laundering funds through the casino, obscuring the original source. Casinos have that risk. They can serve as financial intermediaries and that is the reason why, to some extent they are regulated for anti-money laundering purposes.

**FCPAR: What's the best argument to convince casinos to spend money on these safeguards?**

Freis: Getting back to the premise behind corruption: we are trying to establish a level playing field. If truly all competitors are subject to same rules and they implement them in the same way, then it is not a game where you should risk losing business to a competitor. Same thing on the corruption side. You want to remove that argument where a business says, "all my competitors are doing this so if I don't pay the bribe I know that I will be the one losing." And that's an aspect not just within individual jurisdictions, but part of the global efforts that I described before, to raise anti-corruption expectations around the world.

There are many ways of doing that in a licensed industry. Casinos, banks, securities dealers and insurance companies are all highly regulated industries that have licensing requirements, including "fit and proper" tests for directors before they allow you to enter into a market to explain where the investment capital is coming from. Who are the people involved? Do they have a criminal record or are they upstanding citizens looking to engage in good business models?

The United States, both by exercising enforcement in its own jurisdiction and also in aiding other countries to build their respective enforcement capacity, is following mutually reinforcing steps designed to raise the level to the top. Governments and the private sector working together can further isolate those jurisdictions that have not taken appropriate steps. And over time, the taint of being viewed as a jurisdiction that has all these risks – from corruption to money laundering, to tax evasion, etc. – should impact the ability of such jurisdictions to access the markets and therefore the profitability on their economy and business models. But it takes time.

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### *The Importance of High-Profile FCPA Enforcement*

Freis: If you have a law on the books, and people assume that they'll never get caught, then they may be trying to rationalize the business decision to move ahead without following all the rules. If you show them that not only is there a direct economic penalty, that they can lose any profits – but also that it would have a reputational impact, that it would be devastating to their legitimate business interests – then that changes the whole rational economic incentive for how they approach that.

**FCPAR: It certainly has with the FCPA in the past six years or so.**

Freis: That's crucial. Even though the U.S. has been very active in this area and certainly aggressive in the enforcement side, the U.S. is not just doing it alone.

That is probably one of the best takeaways to leave behind with people in the companies who are trying to figure out how to comply. Don't just focus on the details of minimum requirements: "I must do A. I must do B. I must do C." Understand what is the purpose behind the FCPA. What are the risks that it is trying to address? Assess that in your company's business model and your company's culture for dealing with risks.

The law doesn't always tell you what to do in every situation, but keeping in mind the purpose of the FCPA, and other laws like it, can help companies match the realities to the executive management team's aspirations.