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THE FINANCIAL SERVICES SECTOR AND THE BRIBERY ACT: THE ROLE OF THE UK FINANCIAL SERVICES AUTHORITY

> *"The action we have taken against Willis Limited shows that we believe that it is vital for firms not only to put in place appropriate anti-bribery and corruption systems and controls, but also to ensure that those systems and controls are adequately implemented and monitored."*
>
> Tracey McDermott, Acting Director of Enforcement and Financial Crime, Financial Services Authority

INTRODUCTION

While the role of the United Kingdom Serious Fraud Office (the "SFO") in enforcing the newly enacted Bribery Act 2010 (the "Bribery Act") and the UK Ministry of Justice's Bribery Act guidance have attracted much attention and commentary, the important role that the UK Financial Services Authority (the "FSA") has to play in this regard has received less coverage.

The FSA -- which regulates the financial services sector in the UK -- recently has stepped up its efforts to ensure that regulated entities have adequate measures in place to prevent bribery and corruption. In this note we consider several recent developments in the FSA's approach to anti-corruption enforcement, including a fine imposed on Willis Limited, the publication of a draft financial crime guide, indications from senior FSA officials about their approach to inter-agency cooperation with the SFO, and proposals for the creation of a new Financial Conduct Authority.

RECENT DEVELOPMENTS IN ENFORCEMENT

(a) Willis Limited

On July 21, 2011, the FSA announced that it had fined Willis Limited, an insurance broker and risk management firm, for failings in its anti-corruption systems and controls. The FSA found that, between January 2005 and December 2009, the company had failed to take reasonable care to establish and maintain effective systems for countering the risks of bribery and corruption associated with payments made to third parties -- based in high risk jurisdictions -- who had helped the company obtain or retain business from overseas clients. The gross commission earned by Willis Limited from business introduced by these third parties amounted to approximately £59.7 million. Willis Limited paid approximately £27 million of this in commissions to these third parties.

Specific problems identified by the FSA related to the company's failure to: (i) establish and record an adequate commercial rationale to support its payments to overseas third parties; (ii) conduct adequate due diligence on those parties; (iii) regularly review its relationships with those parties, to confirm whether it was necessary and appropriate to continue the relationships; and (iv) adequately monitor compliance with its existing systems and controls. Although Willis had improved its policies in August 2008, the FSA also concluded that the company had failed to ensure those new systems were implemented.

Having considered a number of factors -- including the significant revenues attributable to the overseas third parties, the company's position as one of the largest brokerage and risk management firms in the UK, and the fact that the failings principally related to two of the company's most important business units -- the FSA decided to impose a fine of £6.895 million.

The Willis case is significant for several reasons:

1. This is the largest fine ever imposed by the FSA in relation to failings in financial crime systems and controls. The case follows the FSA's 2009 decision to fine AON, another insurance broker, for similar failings. It would be an exaggeration to describe two cases as a trend, but when considered alongside recent public statements by senior FSA officials , it is clear that the FSA is intent on expanding its enforcement efforts in relation to bribery and corruption matters.

2. The case illustrates the FSA's focus on the adequacy of systems and controls, rather than on whether corrupt payments actually were made. The FSA did not seek to determine whether any of these payments were corrupt, nor did it find evidence to suggest that the company's conduct was deliberate or reckless. For the purpose of taking enforcement action, it was sufficient that it had identified failings in Willis' anti-corruption policies and procedures.

3. The case illustrates the value the FSA places on cooperation by firms and on early settlements. Although the company's failings in this instance were deemed to be sufficiently serious to justify a significant fine, the FSA stated that it had given Willis a 30 percent reduction on the fine imposed, in recognition of the company's decision to settle at an early stage of the FSA's investigation. Without the discount, the fine would have been £9.85 million. The FSA also took into account several mitigating factors, including:

   i. the significant steps taken by the company to address the failings identified by the FSA and its commitment to introducing more effective policies and procedures;

   ii. the company's decision to take disciplinary action in relation to staff alleged to have been involved in making potentially corrupt payments, or who failed to comply with the existing systems and controls;

   iii. the increased engagement in anti-corruption matters demonstrated by the company's senior management; and

   iv. the company's commitment to carrying out a review of past payments made to overseas third parties to identify any inappropriate payments.

It is striking that many of the same factors are considered by the SFO when deciding whether to pursue criminal prosecutions or civil sanctions in cases of overseas corruption.

(b) The Financial Crime Guide

Further confirmation of the FSA's focus on anti-corruption issues came in June, when it published a consultation paper entitled *Financial crime: a guide for firms* (the "Guide"). The Guide sets out examples of good and poor practice that can be used by firms to assess the adequacy of their own systems and procedures in reducing their exposure to financial crime. The FSA has said that it expects firms to be aware of the guidance it contains, and "to consider how to translate it into more effective policies and controls."

Chapter Seven of the Guide deals exclusively with bribery and corruption issues, and builds upon the FSA's May 2010 thematic review of bribery and corruption in commercial insurance brokering. The chapter emphasizes the importance of compliance with the Bribery Act, and with the Ministry of Justice's guidance regarding adequate anti-corruption procedures.

The consultation regarding the Guide closed on September 21, 2011. The FSA intends to publish a policy statement before the end of the year, which will address both the comments received during the consultation process, and the final amended text of the Guide.

(c) Cooperation with the SFO

As the FSA steps up its enforcement activity in respect of corruption matters, regulated businesses in the financial services sector should be mindful of the co-operation that exists between the FSA and SFO. According to the SFO "the agencies share information and continue to work closely together to prevent, deter and punish financial crime." The cooperation between the two agencies is likely to increase now that the Bribery Act has entered into force. While the SFO has lead responsibility for prosecuting cases involving overseas corruption, it has agreed criteria for referring cases between, among others, the FSA, the police, and the Crown Prosecution Service.

If the SFO is made aware of a company's deficient anti-corruption policies and procedures, there is a distinct likelihood that it will place the company under scrutiny. Exposure to an FSA fine for procedural and systems failures therefore carries with it the risk of an SFO investigation and a potential criminal sanction for the firm and the individuals involved.

(d) The Financial Conduct Authority

The UK Government recently has proposed significant changes to the architecture of financial services regulation, including the creation of a new Financial Conduct Authority (the "FCA"). A draft Financial Services Bill, published in June 2011, proposes the transfer of responsibility for the prevention of financial crime within the financial services sector from the FSA to the FCA.

Following a period of pre-legislative scrutiny of the draft Bill, it is expected that the Government will formally introduce a Bill to Parliament before the end of the year. Despite these anticipated changes, the existing financial crime team in the FSA has pledged that there will be "a lot of continuity in [their] work to tackle financial crime," and it is envisaged that many FSA employees will move to the FCA when it is established.

CONCLUSION

The anti-corruption enforcement landscape in the UK has changed significantly in recent years. The Bribery Act has reformed the legislative framework of anti-corruption offences, and several agencies, including the SFO and the FSA, have shown a renewed commitment to bringing enforcement actions against individuals and corporations involved in corrupt conduct and those who allow such practices to flourish unchecked.

The Bribery Act, which came into force on July 1, 2011, makes a company that carries on all or part of its business in the UK liable for failing to prevent bribes being paid by "associated persons" -- those performing services for or on behalf of the company -- unless the company can demonstrate that it had developed and implemented "adequate procedures" to prevent bribery. Guidance published by the UK Ministry of Justice under Section 9 of the Bribery Act sets out six principles that are intended to help organizations develop and implement such procedures. The FSA has indicated that, when considering the adequacy of their systems, regulated entities should have regard to these principles.

THE SIX PRINCIPLES

The UK Government considers that procedures put in place by commercial organizations to prevent bribery being committed on their behalf should be informed by six principles:

1. A commercial organization's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organization's activities. They are also clear, practical, accessible, effectively implemented and enforced.
2. The top-level management of a commercial organization (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organization in which bribery is never acceptable.

3. The commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.
4. The commercial organization applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organization, in order to mitigate identified bribery risks.
5. The commercial organization seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training, that is proportionate to the risks it faces.
6. The commercial organization monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

Many firms in the financial sector -- particularly those operating or investing in the US -- already have implemented policies and procedures to address their exposure under the US Foreign Corrupt Practices Act (the "FCPA"). Many also already have reviewed and updated their FCPA-related policies and procedures in light of the Bribery Act.

The firms that have not done so already, despite their UK presence or UK related investments, will need to review their existing policies and procedures to take account of their potential exposure under the Bribery Act and other legislation such as the UK Proceeds of Crime Act 2002. The following steps should be undertaken as swiftly as possible:

- Assess your risk - identify the corruption risks that arise by virtue of the nature of your global business activities and other investments.

- Design and implement an appropriate compliance program or modify an existing program to ensure compliance with the Bribery Act. You will need to pay attention in that connection to the principles set out in the "adequate procedures" guidance issued by the UK Ministry of Justice. As part of that process, firms in the financial sector should --
  - seek to identify the bribery related risks that they actually are facing as a result of their operations;
  - develop targeted approaches to mitigating such risks;
  - develop an appropriate due diligence program for use in connection with proposed acquisitions and investments and intermediaries;
  - review commercial agreements with third parties (such as intermediaries) whose actions may create liability for them;
  - develop a clear policy for dealing with bribery related issues that have been reported to them, whether the information comes from a whistleblower or some other source;
  - make sure that those within the firm that can affect the firm's bribery related risk profile understand their legal responsibilities and the firm's expectations of them; and
  - periodically re-evaluate their bribery related policies and procedures to ensure that they are, and will be deemed to be, fit for purpose in the event their adequacy is called into question.

Covington has developed a large and sophisticated cross-office practice to help clients prevent, detect and investigate bribery and enhance anti-corruption compliance. Our experience includes designing compliance programs for individual companies, investigating possible wrongdoing and conducting compliance GAP analyses with the goal of identifying deficiencies in the policies and procedures individual companies have implemented to ensure compliance with measures such as the US Foreign Corrupt Practices Act, UK Bribery Act 2010 and companion measures in other countries.

Approximately 25 Covington lawyers -- working from our offices in Beijing, Brussels, London, New York, San Francisco and Washington -- spend all or a very substantial part of their time working on bribery related matters. Covington's anti-bribery lawyers work closely with lawyers in the firm's financial services practice in assessing the particular needs of financial services clients.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our financial services and anti-corruption practice groups:

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