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Preventing Corruption in the Financial Services Sector: The Role of the U.K. Financial Services Authority

ROBERT AMAEE, SIMON CURRIE, AND IAN REDFEARN

In this article, the authors describe the important role of the U.K. Financial Services Authority in relation to the prevention of corruption in the financial services sector. They provide an overview of the relevant legislative and regulatory framework, and assess some recent developments in the Authority's approach to anti-corruption enforcement.

The recent entry into force of the U.K. Bribery Act 2010 (the “Bribery Act”) and the enforcement activities of the U.K. Serious Fraud Office (the “SFO”) have attracted significant attention from lawyers and commercial organizations. The important role of the U.K. Financial Services Authority (the “FSA”) in combating bribery and corruption in the financial sector is only now starting to garner increasing attention.

The FSA is responsible for regulating the financial services sector in the United Kingdom, and it recently has strengthened its efforts to ensure that regulated entities implement appropriate systems and controls for the prevention of bribery and corruption. This article provides a brief overview of

Robert Amaee is of counsel at Covington & Burling LLP. Simon Currie is a partner at the firm and head of its European Financial Services Regulatory Group. Ian Redfearn is an associate in the firm's Dispute Resolution Practice Group. Resident in the London office, the authors may be contacted at ramaee@cov.com, scurrie@cov.com, and iredfearn@cov.com, respectively.

the legislative and regulatory framework for businesses in the U.K. financial services sector. Several significant developments in the FSA's approach to anti-corruption issues are then considered, including a fine imposed for failings in a regulated entity's anti-corruption systems and controls, 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.

THE LEGISLATIVE AND REGULATORY FRAMEWORK

The FSA has four statutory objectives under the Financial Services and Markets Act 2000 ("FSMA"):

- Promoting market confidence;
- Maintaining financial stability;
- Protecting consumers; and
- Reducing financial crime.¹

The FSA places a particular focus on risk management, and the need for regulated entities to take appropriate measures to prevent financial crime, including bribery and corruption.

The FSA Handbook sets out the obligations of regulated entities, including the Principles for Business that all regulated entities must adhere to. Principle 3 requires that firms take reasonable care to organize and control their affairs responsibly and effectively, with adequate risk management systems. This fundamental obligation is reiterated in more detailed provisions of the FSA Handbook, including Rule SYSC 3.2.6 R, which requires that:

A firm must take reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards under the regulatory system and for countering the risk that the firm might be used to further financial crime.

The FSA has very broad enforcement powers under Part XIV of FSMA. The potential penalties for regulatory infringements range from public censure,² to fines,³ to the suspension of permission to carry on regulated activities.⁴ As indicated by the developments described below, the FSA is increasingly ready to use these powers to “pursue the objectives of keeping crooks out of finance, encouraging industry to strengthen its defenses, and educating and warning consumers about the dangers they may face.”⁵

RECENT DEVELOPMENTS IN ENFORCEMENT

The Willis Fine

The FSA announced on July 21, 2011, that it had fined Willis Limited (“Willis”) for deficiencies in its anti-corruption systems and controls.⁶ Willis, an insurance broker and risk management firm, had made payments to third parties based in high-risk jurisdictions who had helped the company obtain or retain business from overseas clients. Business introduced to Willis by the third parties was valued at approximately £59.7 million; of that sum, the company paid the third parties approximately £27 million in commissions.

The FSA found that, between January 2005 and December 2009, Willis had failed to take reasonable care to establish and maintain effective systems for countering the risks of bribery and corruption associated with the third-party payments. In particular, the FSA found that the company had failed to:

- Establish and record an adequate commercial rationale to support its payments to overseas third parties;
- Conduct adequate due diligence on those parties;
- Regularly review its relationships with those parties, to confirm whether it was necessary and appropriate to continue the relationships; and
- Adequately monitor compliance with its existing systems and controls.

Although Willis had attempted to improve its policies in August 2008,

the FSA also concluded that the company had failed to ensure the new systems and controls were adequately implemented.

The FSA considered several factors before deciding upon an appropriate penalty, including the significant revenues attributable to the third parties, the company's leading position within the London insurance brokerage market, and the fact that the systemic failings principally related to the company's most important business units. It ultimately decided to impose a £6.895 million fine.

This is the largest fine ever imposed by the FSA in relation to inadequate financial crime prevention systems and controls. It follows the FSA's 2009 decision to fine Aon, another insurance brokerage firm, for similar failings.⁷ While two cases cannot, perhaps, be described as a trend, when considered alongside recent public statements by senior FSA officials,⁸ the FSA's intention to expand its anti-corruption enforcement efforts is clear.

The case also illustrates the FSA's focus on the adequacy of systems and controls. The FSA did not seek to determine whether any of the third-party payments actually were corrupt, nor did it find evidence to suggest that the company's conduct was deliberate or reckless. For purposes of taking enforcement action, it was sufficient that it had identified systemic weaknesses regarding Willis' anti-corruption measures.

Finally, the case demonstrates the advantages of cooperation with enforcement authorities during investigations. While Willis' failings in this instance justified a significant fine, the company still benefited from a 30 percent reduction on the fine imposed, in recognition of its willingness to reach a settlement at an early stage of the FSA's investigation. Without the discount, the fine would have been £9.85 million. Mitigating factors considered by the FSA included:

- 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;
- 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;
- The increased engagement in anti-corruption matters demonstrated by

the company's senior management; and

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

The SFO assesses many of the same factors when deciding whether to pursue criminal prosecutions or civil sanctions in overseas corruption cases.⁹

The Financial Crime Guide

In June 2011, there was further confirmation of the FSA's new focus on anti-corruption issues, when it published a consultation paper regarding a proposed new guidance document, *Financial Crime: A Guide for Firms* (the "Guide").¹⁰ The Guide provides numerous examples of good and poor practice regarding financial crime systems and controls, which can be used by firms to assess the adequacy of their own policies and procedures. Although the Guide is not intended by the FSA to be binding, the FSA has said that it expects firms to be aware of its contents, and "to consider how to translate it into more effective policies and controls."¹¹

Chapter 7 of the Guide deals with bribery and corruption issues and builds upon the FSA's earlier thematic review of bribery and corruption in commercial insurance brokering.¹² The chapter emphasizes the importance of compliance with the Bribery Act and with the U.K. Ministry of Justice's guidance regarding adequate anti-corruption procedures.¹³ In particular, the FSA will expect regulated entities' systems and controls to be informed by the six principles listed in the Ministry of Justice guidance:

- A commercial organization's procedures to prevent bribery by persons associated with it should be proportionate to the bribery risks it faces and to the nature, scale, and complexity of the commercial organization's activities. They also should be clear, practical, accessible, effectively implemented, and enforced.
- The top-level management of a commercial organization (be it a board of directors, the owners, or any other equivalent body or person) should be committed to preventing bribery by persons associated

with it. They should foster a culture within the organization in which bribery is never acceptable.

- The commercial organization should assess 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 should be periodic, informed, and documented.
- The commercial organization should apply due diligence procedures, taking a proportionate and risk-based approach, in respect to persons who perform or will perform services for or on behalf of the organization, in order to mitigate identified bribery risks.
- The commercial organization should seek 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.
- The commercial organization should monitor and review procedures designed to prevent bribery by persons associated with it and make improvements where necessary.

The FSA consultation regarding the Guide closed on September 21, 2011. The FSA has said that it intends to address comments received during the consultation process by the end of the year. At the same time, it will publish the final amended text of the Guide.

Cooperation with the SFO

As the FSA steps up its enforcement activities, it also will be cooperating more with other enforcement authorities, including the SFO. While the SFO has lead responsibility for prosecuting cases involving overseas corruption, it has published guidance regarding the criteria it will consider when deciding whether to refer cases to other enforcement authorities, including the FSA, the police, and the Crown Prosecution Service.¹⁴

The level of cooperation between the FSA and the SFO has been predicted to increase now that the Bribery Act has entered into force.¹⁵ It

is likely that regulated entities found by the FSA to have deficient anti-corruption policies and procedures will face additional scrutiny from the SFO. The publicity generated by FSA enforcement actions therefore carries with it a risk of investigatory action by the SFO, and potential criminal sanctions if specific instances of wrongdoing are identified.

The Financial Conduct Authority

Finally, in response to perceived weaknesses in the regulatory architecture for the financial services sector during the global economic crisis, the U.K. government recently has proposed some significant changes, including the creation of a new Financial Conduct Authority (the “FCA”).¹⁶ In June 2011, the government published a draft Financial Services Bill which, if enacted, would transfer responsibility for the prevention of financial crime within the financial services sector from the FSA to the FCA.¹⁷ A period of pre-legislative scrutiny is likely to conclude before the end of the year, at which point the government is expected to formally introduce a Bill to Parliament. Despite these proposals, however, the existing enforcement and financial crime team at the FSA has stated that there will be “a lot of continuity in [their] work to tackle financial crime.”¹⁸ Indeed, many FSA employees are expected to move to the FCA when it has been established.

CONCLUSION

There have been significant changes to the U.K. anti-corruption enforcement landscape in recent years. The Bribery Act has reformed the legislative framework of anti-corruption offenses, and there has been a renewed focus by enforcement agencies, including the FSA and the SFO, on individuals and corporations that are involved in corrupt conduct, or that turn a blind eye to corrupt behavior and allow it to go unchecked. The U.K. is now ranked by Transparency International as an “active enforcer” of the OECD Anti-Bribery Convention.¹⁹

Many firms in the financial sector, especially those who operate or invest in the United States, already are familiar with the requirements of the U.S. Foreign Corrupt Practices Act (the “FCPA”), and have imple-

mented policies and procedures to address their potential exposure under the FCPA. Many also have reviewed and updated their FCPA policies to address the additional requirements of the Bribery Act. Firms that have not done so should take stock of the new enforcement landscape and take any steps necessary to implement appropriate systems and controls as soon as possible.

NOTES

¹ FSMA, § 2(2).

² FSMA, § 205.

³ FSMA, § 206.

⁴ FSMA, § 206A.

⁵ FSA, *Financial Crime Newsletter* (September 2011).

⁶ FSA, *Final Notice to Willis Limited* (July 21, 2011).

⁷ FSA, *FSA fines Aon Limited £5.25 million for failings in its anti-bribery and corruption systems and controls* (January 8, 2009).

⁸ FSA, *FSA fines Willis Limited £9.895 million for anti-bribery and corruption systems and controls failings* (July 21, 2011): “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.”

⁹ SFO, *The Serious Fraud Office’s approach to dealing with overseas corruption* (July 2009).

¹⁰ FSA Consultation Paper CP11/12, *Financial Crime: a guide for firms* (June 2011).

¹¹ *Id.*, at Appendix 1, ¶ 1.4.

¹² FSA, *Anti-bribery and corruption in commercial insurance broking* (May 2011).

¹³ Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing* (March 2011).

¹⁴ SFO, *Annual Report and Accounts: 2010-2011* (July 14, 2011), at p. 26.

¹⁵ Financial Times, *FSA gears up for dual attack on Bribery Act* (June 30, 2011).

¹⁶ H.M. Treasury, *A new approach to financial regulation: building a stronger*

system (February 2011).

¹⁷ Draft Financial Services Bill, Part 2, Section 5. The government has chosen not to repeal FSMA; instead, the draft Bill makes amendments to FSMA and other existing legislative provisions. This approach apparently has been welcomed by those who have responded to Treasury consultations: H.M. Treasury, *A new approach to financial regulation: the blueprint for reform* (June 2011), at ¶ 1.18.

¹⁸ Speech by Tracey McDermott, Acting Director, FSA Enforcement and Financial Crime Division, *Financial Crime from the FSA to the FCA* (June 22, 2011).

¹⁹ Transparency International, *Progress Report 2011: Enforcement of the OECD Anti-Bribery Convention* (May 2011).