Fines by UK's Financial Services Authority Show the Importance of Anti-Bribery Policies

by Raymond L. Sweigart

Much has been written about the Bribery Act's new strict liability corporate offence of failure to prevent bribery and the advisability of having in place a comprehensive anti-bribery policy adopted and enforced by senior company management as the only recognized defence available against the spectre of criminal prosecution and potentially unlimited fines. However, it is not just the criminal prosecutors at the Serious Fraud Office (SFO) but the regulators of the financial services industry in the UK at the Financial Services Authority (FSA) who will be reviewing the adoption and implementation of adequate internal management procedures to combat corporate corruption.

In the UK, anti-bribery issues are not only a matter for the prosecutors but also fall within the FSA's regulatory objectives of reducing financial crime and bribery in the financial services industry. The fines that the FSA imposed on two well-known international insurance brokers, Aon and Willis, underscore that anti-corruption remains a strategic priority of that agency. It levied a £5.25m fine against Aon for breaching Principle 3 of the FSA's Principles for Businesses *("A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems")* with respect to failings in its anti-bribery systems and controls. The FSA found that Aon failed to assess the risks involved in its dealings with overseas third parties and failed to implement effective controls to mitigate those risks. The FSA also fined Willis £6.895m for breaching Principle 3 and rule 3.2.6 of FSA's Senior Management Arrangements, Systems and Controls *("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")* as a result of management failings similar to those found at Aon.

What should not escape notice is that the FSA in its role of regulatory prevention and not criminal prosecution has a significantly lower burden than do the SFO and the Crown Prosecution Service. The FSA in levying fines does not even need to prove that any bribes have actually been paid, but merely that a company's systems and controls do not properly protect against the risk of such payments.

In December 2011, the FSA published a policy statement *Financial Crime: a guide for firms.* This guidance on combating bribery and corruption makes clear that, in the FSA's collective mind, senior company management play a key role in the anti-corruption process. More specifically, the FSA guidance states that senior management should take *"clear responsibility"* for managing financial crime risks in the same manner as other risks faced by the business, and that the FSA would look for *"evidence that senior management are actively engaged in the firm's approach to addressing the risks"*. The FSA makes it clear that it expects to find evidence as to:

- senior management, the board or appropriate sub-committees' timely consideration of financial crime issues and actions following discussions;
- senior management's keeping up to date on financial crime issues such as receiving regular reports on the firm's performance in this area as well as ad hoc briefings on individual cases or emerging threats;
- the motivating factors and rationale behind the firm's efforts on financial crime issues and the outcomes it seeks to achieve;
- senior management's setting the right tone and demonstrating leadership on financial crime issues;
- proactive rather than reactive steps to prevent criminals taking advantage of the firm's services; and
- a strategy for self-improvement in policing financial crime.

In both the Willis and Aon cases, the FSA was quite critical of the type and timeliness of management information provided to the board and relevant upper management committees. However, the FSA also appears to have taken the following mitigating factors into account in setting the fines and allowing a 30% early settlement discount:

- The issues when recognized were promptly self-reported to the SFO and to the FSA.
- Dedicated internal management committees were established and outside accountants were appointed with overall responsibility for monitoring the systems and controls relating to anti-bribery and anti-corruption.
- Appropriate disciplinary action was taken against employees.
- Outside law firms were engaged to carry out detailed investigations into potentially improper payments.
- New and enhanced systems and controls in relation to anti-corruption and anti-bribery were introduced, including enhanced reporting of relevant management information and better evidence of board and committee involvement and oversight.
- Provision was made for additional training and guidance of employees.

Nevertheless, in addition to fairly substantial monetary penalties, both Willis and Aon clearly incurred considerable additional costs in addressing these issues, both in the expense of outside attorneys and accountants as well as internal management time and distraction from other business. The fines imposed by the FSA demonstrate that it takes quite seriously that firms have in place satisfactory management systems and controls and that senior management ensures that those systems and controls are adequately implemented and monitored at the highest levels. Even for companies in industries other than

financial services, the Aon and Willis cases are instructive as to just what anti-corruption procedures may be considered by UK Regulators as adequate and expected in well-managed firms.

If you have any questions about the content of this advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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