

Global Regulatory Enforcement

If you have questions or would like additional information on the material covered in this *Alert*, please contact one of the authors:

Rosanne Kay

Partner, London
+44 (0)20 3116 3414
rkay@reedsmith.com

Emma Osborne

Trainee, London
+44 (0)20 3116 3751
eosborne@reedsmith.com

Other contacts:

George Brown

Partner, London
+44 (0)20 3116 2849
gbrown@reedsmith.com

Charles Hewetson

Partner, London
+44 (0)20 3116 2976
chewetson@reedsmith.com

Simon Hart

Partner, London
+44 (0)20 3116 2966
shart@reedsmith.com

Robert Falkner

Partner, London
+44 (0)20 3116 2980
rfalkner@reedsmith.com

Sarah Wolff

Partner, Chicago
+1 312 207 6424
swolff@reedsmith.com

Steven Miller

Partner, Chicago
+1 312 207 3857
samiller@reedsmith.com

Eric Dubelier

Partner, Washington D.C.
+1 202 414 9291
edubelier@reedsmith.com

Amy Greer

Partner, New York/Philadelphia
+1 212 549 0294 / +1 215 851 8211
agreer@reedsmith.com

Wendy Schwartz

Partner, New York
+1 212 549 0272
wschwartz@reedsmith.com

James Sanders

Partner, Century City
+1 310 734 5418
jsanders@reedsmith.com

...or the Reed Smith lawyer with whom you regularly work.

Client Alert 12-048

February 2012

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Key role of senior management in the two largest ever FSA anti-bribery fines

Introduction

The UK Bribery Act 2010 has increased the focus placed on anti-bribery and anti-corruption not only by the Serious Fraud Office ('SFO') but also by the Financial Services Authority ('FSA'). Anti-bribery issues fall within the FSA's statutory objective to reduce financial crime and bribery continues to be a strategic priority for the FSA. The FSA has imposed fines on two insurance brokers, Aon and Willis, in relation to weaknesses in their anti-bribery systems and controls. Many will be quick to point out that the FSA has an easier time than the SFO. Its role is one of prevention, not prosecution. It does not need to prove that bribes have actually been paid, merely that the firm's systems and controls did not properly mitigate the risk of bribes being paid.

So far, the FSA's enforcement action relating to anti-bribery issues has concerned the insurance industry although both the Aon and Willis cases are instructive about the types of issues that the FSA is concerned about. However, in June 2011, the FSA announced its intention to carry out a thematic investigation of the policies and procedures that investment banks have in place to prevent their staff and agents from paying or receiving bribes. Whilst thematic reviews are not enforcement actions in themselves, they may lead to enforcement action against specific firms and individuals depending on what the FSA finds.

Details of the AON case

In 2009 the FSA levied a £5.25m fine against insurance broker, 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") in relation to failings in its anti-bribery systems and controls. The fine included a 30% early settlement discount. The FSA found that Aon failed to assess the risks involved in its dealings with overseas third parties ('OTPs') and failed to implement effective controls to mitigate those risks. In particular, Aon failed to:

- require adequate levels of due diligence on its relationships with OTPs
- monitor those relationships with respect to bribery effectively
- provide staff who dealt with OTPs with sufficient guidance or training
- ensure that committees appointed to oversee those risks received relevant management information and/or routinely assessed whether bribery and corruption risks were being managed effectively
- provide sufficient board oversight over specific bribery and corruption risks associated with OTPs (the FSA noted that these should have been specifically considered at board and committee meetings)

The FSA commented that even though there was a code of conduct and an annual certification process for senior management (which, among other things, required them to confirm that no funds would be used in violation of law or regulation), these were not in themselves sufficient controls and needed to be supplemented by: adequate written training; guidance; robust procedures for the authorisation of payments to OTPs; and adequate monitoring. Aon did later provide written guidance and the onus was placed on managers to distribute and enforce this. The extent to which this was done was, however, unrecorded.

Details of the Willis case

In July 2011, the FSA fined Willis £6.895m for breaching Principle 3 and rule 3.2.6 of SYSC ("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") in relation to similar failings as those of Aon. The fine included a 30% early settlement discount.

The investigation centred around payments made by Willis to OTPs between January 2005 and December 2009. The FSA stopped short of saying Willis had actually paid bribes but found that its failings contributed to a weak control environment surrounding payments to OTPs which gave rise to an unacceptable risk that payments to OTPs could be used for corrupt purposes. The FSA found that Willis' failings included:

- failing to ensure that it established and recorded adequate commercial rationale to support its payments to OTPs. The FSA expected Willis to document an adequate business case to demonstrate why it was necessary to use an OTP to win business and what services it would receive from the OTP in return for a share of its commission
- failing to ensure that adequate due diligence was carried out on OTPs, for example, to assess whether the OTP was connected with the insured, the insurer and public officials
- failing to review its relationships with OTPs on a regular enough basis to check whether it was still appropriate and necessary to maintain the relationships
- failing to adequately train and monitor its staff
- crucially, despite the introduction of new and improved policies and guidance in 2008, failing to provide its senior management with sufficient management information to assess whether bribery and anti-corruption risks were effectively managed

The FSA commented that, whilst senior management did consider anti-bribery systems and controls, the only management information provided to them was financial and failed to include sufficient information to enable board evaluation. Willis also agreed to carry out a review of past payments made to OTPs to identify any inappropriate payments. It would, potentially, be obliged to report any identified to the Serious Organised Crime Agency and also the SFO.

Comment

As is clear from the above, senior management engagement is a key theme in FSA enforcement in this area. In 2011, the FSA published *Financial Crime: a guide for firms* which includes guidance on combating bribery and corruption and which made clear that senior management should take "clear responsibility" for managing financial crime risks, emphasising the need for "evidence that senior management are actively engaged in the firm's approach to addressing the risks". The type of evidence that the FSA would expect to find would include the following:

- details of when senior management, the board or appropriate committees last considered financial crime issues and what action followed these discussions
- details of how senior management is kept up to date on financial crime issues
- details of the management information provided to senior management, which extends beyond merely financial information
- evidence of the firm's financial crime efforts and the rationales/drivers behind these
- practical examples and other evidence of how bribery and corruption are dealt with
- recorded adequate commercial rationales to support payments to OTPs

In both the Willis and Aon cases, the FSA was critical of the type of management information provided to the board and relevant committees. However, the following factors were taken into account in the FSA's decision making in these cases:

- the prompt reporting of issues to the Serious Organised Crime Agency and to the FSA
- the fact that dedicated committees were established and outside accountants appointed with overall responsibility for reviewing systems and controls relating to bribery and anti-corruption
- disciplinary action was taken against employees where necessary
- the fact that 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 bribery were introduced (including enhanced production of specific relevant management information and better evidencing of board and committee engagement)
- the provision of additional training and guidance for staff who deal with OTPs

In carrying out these steps, Willis and Aon incurred significant costs both in financial terms and in terms of management time. The action by the FSA demonstrated how seriously it takes firms having appropriate systems and controls in place and ensuring that those systems and controls are adequately implemented and monitored.

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