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JUST NOT GOOD ENOUGH - FSA SLAMS BANKS' RESPONSE TO THE BRIBERY ACT

FRAUD AND FINANCIAL CRIME

INTRODUCTION

The UK Financial Service Authority (FSA) has recently published the results of its review into anti-bribery and corruption systems and controls implemented by investment banks since the Bribery Act 2010 (the Act) came into force in July 2011. The FSA was disappointed to find a serious lack of effective anti-bribery controls within the financial sector.

MORE WORK TO DO

Investment businesses have a regulatory duty to implement effective anti-bribery and corruption systems and controls in order to mitigate financial crime risk. However, the FSA found that the majority of firms it visited during its review had more work to do in regard to bribery and corruption risk (which is defined as the risk that the firm or anyone acting on its behalf is engaging in bribery and corruption).

THE FINDINGS

The FSA conducted its review from August 2011 until January of this year. It visited 15 firms, including eight major global investment banks and a number of smaller operations. The FSA found a number of common weaknesses. Among these were:

- A failure to take account of the FSA's rules covering bribery and corruption, either before or following the implementation of the Act.
- Approximately half of the firms reviewed did not have an adequate anti-bribery and corruption risk assessment.
- Management information on anti-bribery and corruption was poor, such that senior management could not provide effective oversight.
- Only two firms reviewed had either started or carried out specific anti-bribery and corruption internal audits.
- There were significant issues in firms' dealings with third parties which were used to win or retain business (in fact none of the firms visited had sufficient detailed information on its third party relationships). This is a serious factor because all commercial organisations are potentially strictly liable under the Act for the corrupt actions of their associated persons, including third parties and consultants.
- Few of the firms had reasonable procedures in place to ensure that gifts and expenses in relation to particular parties and projects were reasonable on a cumulative basis.

TOO SLOW AND REACTIVE

In the review's conclusions, the FSA was concerned that the investment banking sector has been too slow and reactive in managing bribery and corruption risk. It noted that many of the firms had purported to have a "zero tolerance" to bribery and corruption, yet, in reality their anti-bribery and corruption systems had historically been inadequate in identifying and controlling the risks to which they were exposed. In some cases it was only the FSA's visit and the introduction of the Act that had prompted the firms to rethink their systems. The FSA believes that some of the firms still have significant work to do in order to have an adequate control framework in place.

As a result of its review the FSA has stated that it is considering whether regulatory action is needed in relation to certain firms reviewed. This raises the possibility that fines may be levied against these firms in due course. However, the FSA did also recognise that many firms had made significant progress in improving their anti-bribery and corruption controls. The FSA has also stated in response to this review that it will consult on proposed amendments to its "Financial crime: a guide for firms". The guidance will apply to all investment businesses regulated by the FSA, and not just investment banks.

COMMENT

It is clear from this review that firms within the financial sector are still not doing enough to combat the risk of bribery and corruption. The report, therefore, offers a stark reminder of the need for firms to fully assess their risk control systems in order to ensure that they are compliant with their obligations under the Act. The findings of the review are also surprising; although not obligatory under the Act, it is a defence for firms charged with failing to prevent bribery to show that they had adequate ant-bribery procedures in place. The Ministry of Justice has published guidance on what adequate anti-bribery procedures can be. That guidance can be found through the following link http://www.justice.gov.uk/legislation/bribery

It is also clear from the review that the increased crack down on anti-bribery and corruption the Act has introduced, is not going to go away. Tracey McDermott, the FSA's acting director of enforcement and financial crime, reiterated the point, stating that *"firms across all sectors must have appropriate controls to manage their financial crime risks, whether related to bribery and corruption or otherwise. The FSA and, from next year, the Financial Conduct Authority, will continue to focus on financial crime risks in this sector and beyond to ensure firms are meeting their legal and regulatory obligations"*.

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