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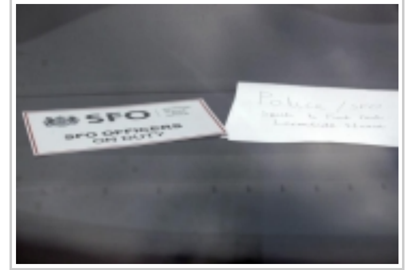
Five years on, UK Bribery Act raises AML concerns for overseas institutions

Aug 03 2016 Ajay Shamdasani, Regulatory Intelligence



Financial institutions should worry about the anti-money laundering (AML) issues that the UK Bribery Act (2010) gives rise to despite the law having been in effect for just over five years, lawyers said. The danger was thinking that because the law had existed since 2011, that compliance and legal staff have it figured out, they said.

The deferred prosecution agreement (DPA) reached with Standard Bank in late 2015, which was brought under Section 7 of the Bribery Act, should give firms pause to reflect, they said.

Barry Vitou, partner at law firm Pinsent Masons in London, said during a recent online seminar panel discussion that it was the wrong moment for compliance officers to think they had adequately dealt with the matter of anti-bribery and corruption policies.

"Standard Bank had [anti-bribery and corruption] policies, but it is not simply enough to tick the box and all is fine," he said.

The Serious Fraud office (SFO) was pursuing cases, of which only some were known in the public domain.

Vitou said the Bribery Act was the "other side of the money laundering coin". He expected the Fourth EU Money Laundering Directive to be implemented in the UK before June 2017.

On April 21, 2016, the British government set out its AML and counter-terrorism financing action plan. The document discusses what the government will do to combat money laundering, including new ways to improve data sharing between private sector organisations, the creation of new powers to allow money to be seized and the requirement for individuals to declare their sources of wealth.

For the financial sector, the most noteworthy Bribery Act prosecution was the Standard Bank case. At issue was a $6 million payment by a former sister company of Standard Bank, Stanbic Bank Tanzania, in March 2013, to a local partner in Tanzania, Enterprise Growth Market Advisors. The ultimate penalty was a $25 million fine. The case was significant because

it was the UK's first use of a DPA in such matters.

The Bribery Act took effect on July 1, 2011 and much like the U.S. Foreign Corrupt Practices Act 1977, it remains controversial because of its extraterritorial reach. Unlike the FCPA, however, the Bribery Act applies to both public and private sectors.

The British legislation also forbids facilitation payments, which are sometimes permitted under the FCPA, as per its 1988 amendments, to expedite transactions, most typically in developing markets. Although, practically speaking, most modern multinational corporations and financial institutions eschew using facilitation payments; so much so that their internal, organisation-wide policies often prohibit their employees from doing so, irrespective of the law.

Penalties under the Bribery Act include fines and up to 10 years' imprisonment.

AML implications for Asian firms

Given longstanding ties between the UK and Asia, jurisdictions that are part of the British Commonwealth should be concerned. They will, in all likelihood, if they lack a presence in the UK, have some manner of business dealings with UK entities, which means exposure.

"On the assumption that the institutions concerned have a business footprint in the UK, and undoubtedly they have, [compliance staff must] make absolutely ensure that anti-bribery policies and procedures are followed," said Vivian Robinson, partner with law firm McGuireWoods in London.

As the SFO's former general counsel, Robinson suggested foreign firms use the guidance that was published shortly after the Bribery Act came into force in 2011 as to what would be regarded as appropriate.

Financial institutions in Asia need to ensure their internal compliance programmes could deal with the Bribery Act and AML.

There is a potential crossover between money laundering and corruption as a transaction may be symptomatic of an underlying offence. In either case, be it an AML or anti-bribery and corruption investigation, the question to be answered is that of the identity of the beneficial owner.

"Can you identify the ultimate beneficial owner at the commencement of a [banking] relationship? If you do not apply the AML guidelines and [Wolfsberg] questions, then you are at risk not only of an AML offence, but also of a corruption offence because quite often, capital flows, particularly large ones, are routed in a way that is slightly opaque and can be symptomatic of an underlying offence," said Julian Glass, managing director at FTI Consulting in London.

He cited cases at London banks where ultra-high-net-worth individuals had their banking facilities shut down with little notice. "It happened because banks have woken up with a jolt to this ultimate beneficial owner problem in relation to large cash deposits," he said.

Further stressing the connection between the two, Vitou said: "If you have a bribe, you have the proceeds of crime. In which case, you have reporting obligation under the Proceeds of Crime Act, so clearly, a bribe triggers the money laundering legislation."

AML and corruption investigations may not necessarily intersect, because bribery investigations look at employees' activities and AML investigations look at customers' use of the financial institutions to move illicit funds. Hence, there is much convergence in the two areas' compliance programmes.

"This is relevant because any investigation of AML or [anti-bribery corruption] lapses by law enforcement will necessarily consider the strength of the AML or ABC compliance programme at the time the alleged bad activity took place," said Adam Kaufmann, partner at law firm Lewis Baach in New York.

Kaufmann, a former head of investigations for the Manhattan District Attorney's Office said the strength of a firm's compliance programme would ultimately determine whether a breach resulted in a regulatory enforcement action, a DPA or a criminal conviction.

Standard Bank

Financial firms in Asia should read the Standard Bank case as an example of what to do to offset their risks and potential fallout. It self-reported to the SFO before its own lawyers had even started their investigation.

"There are some interesting comments in there about their [Standard Bank's] compliance programme and some of the normal things you would expect were in there," Glass said.

For that reason Robinson said Asian firms should look with great care to the Standard Bank case for guidance in developing their anti-graft policies and procedures. He predicted more DPA activity in the UK.

Richard Kovalevsky, QC, a specialist in fraud and money laundering at 2 Bedford Row, agreed more DPAs were in the pipeline. "The SFO has been active … and prosecutors are getting smarter," he said.

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