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How to Self-Evaluate Your Anti-Corruption Compliance Program: Guidance from the FSA

Almost all US and UK banks are well aware of their obligations regarding money laundering and reporting under their respective countries laws. They routinely have robust compliance programs set up to review new customer prospects, ongoing customer relationships and transactions. If a Red Flag is raised in any of these areas it is elevated to an appropriate level for review and clearance. If warranted, a report can be made to the relevant government regulator. Investment banks also have anti-money laundering requirements in both countries and there is a high awareness of these requirements by those institutions. However the same may not hold for anti-corruption and anti-bribery laws such as the US Foreign Corrupt Practices Act (FCPA) and UK Bribery Act.

Indeed in a recent report by the UK Financial Services Authority, entitled, "Anti-bribery and corruption systems and controls in investment banks" noted there were several key areas of deficiencies in the measured companies, with regards to the management of bribery and corruption risks in their business. The FSA list of key deficiencies is certainly applicable to the wider banking industry and provides an excellent list which can be used to evaluate a compliance program based upon the FCPA, UK Bribery Act or other international anti-corruption regime.

In the UK, the Financial Services Authority regulates certain industries such as banks and insurance companies. While the numbers of FSA enforcement actions are relatively small in the area of anti-corruption and anti-bribery, the few such instances provide valuable lessons learned for companies implementing or enhancing their compliance program. This article will review the recent FSA publication and then the enforcement actions involving anti-corruption programs.

I. The FSA Report

1. Key Findings of Deficiencies

a. An assessment of the anti-bribery and anti-corruption laws in the countries where a business may operate. While the FCPA is seen as a robust law and a FCPA compliance program may certainly be a strong base, such a US law based compliance program may not cover every compliance regime. The Bribery Act has a broader sweep and different requirements which must be taken into account if your company conducts business in or through the United Kingdom.

b. Your program should begin with a risk assessment and most companies do not have an up-to-date or complete risk assessment.

c. Management information on company's compliance program was viewed as poor, making it difficult to see how senior management could effectively carry out the mandated oversight.

d. There was insufficient monitoring to determine the effectiveness of anti-corruption compliance controls. There were no internal audits of company compliance programs.

e. Employees had little or poor understanding of what constitutes bribery or corruption under relevant laws. Training needs to be increased and its effectiveness improved.

f. There were material weaknesses in company's dealing with third parties. This including having a documented business purpose for engaging the third party, performing the appropriate level of due diligence, having the requisite anti-corruption compliance terms and conditions and then managing and monitoring the relationship going forward.

g. Company policies regarding gifts, travel, entertainment, hospitality and expenses need to be tightened up with more senior management oversight. It was specifically noted that there should be adequate documentation to determine the cumulative spend in relations to specific clients and/projects.

h. Companies should have well-established vetting policies for anti-corruption/ anti-bribery risks in the hiring process. This should extend to consultants and other third party individuals retained by companies.

i. Training needs to be tailored to the risk levels. Employees who are in higher risk positions should have more and targeted training. There was also the note of lack ability to assess the effectiveness of training.

2. Guidance on Best Practices

The FSA has provided some examples of good practices which are quite useful in evaluating your anti-corruption compliance program. These examples can also be tailored to be utilized in your company's compliance regime.

A. Governance and management information

- There should be a clear, documented responsibility for anti-bribery and corruption assigned to either a single senior manager or a committee with appropriate terms of reference and senior management membership, reporting ultimately to the Board of Directors
- Regular and substantive information and metrics should be reported to the Board and other relevant senior management including an overview of the bribery and corruption risks faced by the business, systems and controls to mitigate those risks, information about the effectiveness of those systems and controls and legal and regulatory developments
- This information reported to the Board and senior management should specifically include information about third parties including new third-party evaluated and contracted with, their risk classification, and unusually high commission paid to third parties
- The information submitted to the Board ensures they are adequately informed of any external developments relevant to bribery and corruption
- Actions taken or proposed in response to issues highlighted by such information are triaged and acted on appropriately

B. Risk assessment

- The responsibility for carrying out a risk assessment and keeping it up to date is clearly assigned to an individual or a group of individuals with sufficient levels of expertise and seniority within the company
- The business should take adequate steps to identify the bribery and corruption risk, for example by using a range of expertise from both within and outside the business
- A risk assessment is a continuous process based on qualitative and relevant information available from internal and external sources

- Companies should consider the potential conflicts of interest which might lead business units to downplay the level of bribery and corruption risk to which they are exposed
- A risk assessment should inform the development of monitoring programs, policies and procedures, training and operational processes and not the reverse
- A risk assessment demonstrates awareness and understanding of the company's legal and regulatory obligations
- A company assesses where risks are greater and concentrates its resources based upon the assessed risks
- A company considers anti-corruption risk when designing new products and services or moving into a new geographic area

C. Policies and procedures

- A company clearly sets out the behavior expected of those acting on its behalf, whether this is employees or third parties
- Companies should have conducted a gap analysis of their existing anti-corruption procedures against applicable legislation, regulations and guidance and made necessary enhancements
- A company should have a defined process in place for dealing with breaches of policy
- The compliance department should engage with the business units about the development and implementation of anti-corruption systems and controls
- Anti-corruption policies and procedures will vary depending on a firm's exposure to bribery and corruption risk. But in most cases, companies should have policies and procedures which cover expected standards of behavior; escalation processes; conflicts of interest; expenses, gifts and hospitality; the use of third parties to win business; whistleblowing; monitoring and review mechanisms and disciplinary sanctions for any breaches
- There should be an effective mechanism for reporting issues to the company's appropriate Board committee and compliance department

A successful risk assessment process should not be a one-time event and should not be based on a single piece of data such as geography. Keys to successful risk assessment are based on the following:

1. In the onboarding process, risk assessment must begin with gathering as much critical data as possible on the third party to allow for risk assessment and proper identification of red flags:

Critical information to be gathered from the third party:

Names of all persons who manage or benefit from the relationship, you must have their complete name in your language of business and ideally their original script (Arabic, Chinese, etc.). Other pieces of data to help the process would include:

- Dates of Birth
- Home / Business address(es)
- National Identification Number
- Passport Numbers

Companies should give their legal name, location of business and their headquarters. They should be upfront with details on who are the persons that serve on their board or hold key positions in the organization, or direct you to the source of such information. In addition they must disclose all companies who own a significant ownership stake in the company

2. If your relationship with the third party is expected to continuous process, you should implement an ongoing due diligence process so that you have a way of knowing when the risk profile changes. Examples of events that would trigger a change in the risk profile of a third party would include: company or executive being investigated for corruption or third party being acquired by a state owned enterprise

Your risk assessment process should yield to a score or ranking (low, medium, high) for each third party that is simple and allows for staff around the world to be able to know what actions should be carried out for each designation.

D. Third-party due diligence

- As an absolute minimum, third parties relationships are subject to thorough due diligence and management oversight
- Third-party relationships are reviewed regularly, and in sufficient detail, to confirm that they are still necessary and appropriate to continue.
- There are higher, or extra, levels of due diligence and approval for high risk third-party relationships
- There is appropriate scrutiny of, and approval for, relationships with third parties that introduce business to your company
- A company's compliance function has oversight of all third-party relationships and monitors this list to identify risk indicators, such as a third party's political or public service connections
- You should have written evidence that a risk-based approach has been adapted to identify higher risk relationships in order to apply enhanced due diligence
- As a part of your due diligence procedure, your company should review of the third party's own anti-corruption controls
- Based upon your risk assessment, where appropriate, there should be anti-corruption training required of or provided to your company's third parties relationships
- There should be inclusion of specific anti-corruption clauses and appropriate protections in contracts with third parties

E. Gifts and hospitality policy

- Your policies and procedures clearly define the approval process and the limits applicable to gifts, entertainment, travel and hospitality
- There should be processes in place to allow for and record gifts, entertainment, travel and hospitality by employee, client and type of hospitality for analysis
- There should be processes for identifying unusual or unauthorized gifts, entertainment, travel and hospitality and deviations from approval limits for gifts, entertainment, travel and hospitality
- Company staff should be trained on gifts, entertainment, travel and hospitality policies to an extent appropriate to their role, in terms of both content and frequency, and regularly reminded to disclose gifts, entertainment, travel and hospitality in line with policy

- There should be an absolute prohibition on cash presented as gifts or cash-equivalent gifts, such as gift cards or other items readily redeemable as cash
- All political and charitable donations should be approved at an appropriate level in the company, with compliance department input, and subject to an appropriate level of due diligence

F. Staff recruitment and vetting

- The vetting of potential employees should be conducted on a risk-based approach, taking into account anti-corruption risk
- There should be enhanced vetting—including checks of credit records, criminal records, financial sanctions lists, and commercially-available intelligence databases—for staff in roles with higher bribery and corruption risk. This would include such vetting where an employee is considered for promotion into senior management or into a high risk position
- Where employment agencies are used, your company should periodically review and evaluate that the agency is adhering to agreed vetting standards

G. Training and awareness

- Your company should provide good quality, standard training on anti-bribery and corruption for all staff
- Your training should be an appropriate mix of live, web-based or other media based training
- High risk employees should receive enhanced training
- Your company should ensure that training covers relevant and practical examples
- You should keep your training material and staff knowledge up to date
- Awareness raising initiatives, such as special campaigns and events to support routine training, should be organized

II. FSA Enforcement Actions

There have been two significant FSA enforcement actions in the area of anti-corruption and anti-bribery. These involved the Willis Limited (Willis) a global insurance broker and Aon Ltd. (Aon), a global provider of risk management, insurance and reinsurance brokerage, and human resources solutions and

outsourcing services. In neither case did the FSA rely directly on anti-bribery law such as the Bribery Act or the previous Prevention of Corruption Acts. It didn't have to. Instead, the FSA relied upon on its own business principles, Principle 3, which states: "A firm must take reasonable care to organize and control its affairs responsibly and effectively, with adequate risk management systems." Like the books and records provisions of the FCPA, this can give regulators a very wide jurisdiction on which to hang an investigation or penalty in the field of anti-corruption and anti-bribery compliance. In its Press Release regarding the Aon enforcement action, the FSA stated: "The involvement of UK financial institutions in corrupt or potentially corrupt practices overseas undermines the integrity of the UK financial services sector. The FSA has an important role to play in the steps being taken by the UK to combat overseas bribery and corruption. We have worked closely with other law enforcement agencies in this case and will continue to take robust action focused on firms' systems and controls in this area."

A. Willis Limited

On July 21, 2011 the FSA announced an agreed £6.895 (approximately $13 million) million penalty against Willis for "failings in its anti-bribery and corruption systems and controls." The FSA release stated that "Between January 2005 and December 2009, Willis made payments to overseas third parties who assisted it in winning and retaining business from overseas clients, particularly in high risk jurisdictions. These payments totaled £27 million. The FSA investigation found that, up until August 2008, Willis failed: (1) to ensure that it established and recorded an adequate commercial rationale to support its payments to overseas third parties; (2) ensure that adequate due diligence was carried out on overseas third parties to evaluate the risk involved in doing business with them; and (3) adequately review its relationships on a regular basis to confirm whether it was still necessary and appropriate for Willis to continue with the relationship.

These failures contributed to a weak control environment surrounding payments to overseas third parties and gave rise to an unacceptable risk that these payments could be used for corrupt purposes, including paying bribes. In addition, between January 2005 and May 2009, Willis failed to adequately monitor its staff to ensure that each time it engaged an overseas third party, an adequate commercial rationale had been recorded and that sufficient due diligence had been carried out. Although

Willis did improve its policies in August 2008, it failed to ensure that its staff were adequately implementing them. Lastly, Willis' senior management did not receive sufficient information about the performance of its relevant policies to allow them to assess whether bribery and corruption risks were being mitigated effectively. During the FSA investigation, Willis identified as suspicious a number of payments totaling $227,000 which it made to two overseas third parties in respect of business carried out in Egypt and Russia." The nature of these payments could not be determined from Willis books and records.

The essence of Willis's wrongdoing was failure of its management, information, systems and controls in the company's relationships with overseas intermediaries who might have been paying bribes to win business. What is important about the Willis case is that the FSA obviously got into a very granular detail of how individual appointments were justified and examined by Willis. As with so much in anti-corruption and anti-bribery enforcement, what matters is the substance, not the form which matters.

B. Aon Ltd.

In January, 2009, the FSA fined Aon £5.25 million ($8.05 million) for failing to recognize and control the risks of overseas payments being used as bribes. Up to the Willis enforcement action, the Aon fine was the largest the FSA had levied for financial crimes. The involvement of UK financial institutions in corrupt or potentially corrupt practices overseas undermines the integrity of the UK financial services sector. The FSA has an important role to play in the steps being taken by the UK to combat overseas bribery and corruption. We have worked closely with other law enforcement agencies in this case and will continue to take robust action focused on firms' systems and controls in this area. The FSA Final Notice as to Aon revealed that Aon had failed to properly to assess the risks involved in its dealings with Overseas Third Parties and failed to implement effective controls to mitigate those risks. During the Relevant Period:

(1) Aon payment procedures did not require adequate levels of due diligence to be carried out either before relationships with Overseas Third Parties were entered into or before payments were made. Its authorization process did not take into account the higher levels of risk that certain parts of its business were exposed to in the countries in which they operated.

(2) Aon failed to monitor its relationships with Overseas Third Parties in respect of specific bribery risks. After the relationship had been approved and set-up for payment, neither were routinely reviewed nor monitored. Any failure in the acceptance process in (1) above was therefore allowed to continue without further checking.

(3) Aon did not provide its staff in business divisions which dealt with Overseas Third Parties with sufficient guidance or training on the bribery and corruption risks involved in such dealings.

(4) Aon failed to ensure that the committees it appointed to oversee these risks received relevant management information and/or otherwise routinely assessed whether bribery and corruption risks were being managed effectively.

The failures outlined in the Final Notice contributed to a weak control environment surrounding of Aon in making of payments to Overseas Third Parties. This gave rise to an unacceptable risk that Aon could become involved in potentially corrupt payments to win or retain business. As a result of this weak control environment, a number of payments were made by Aon to Overseas Third Parties in Bahrain, Bangladesh, Bulgaria, Burma, Indonesia and Vietnam both prior to and during the Relevant Period which. Aon failed adequately to question the purpose and nature of these suspicious payments in circumstances where it ought to have been reasonably obvious to Aon that there was a significant risk that the Overseas Third Party might bribe the insured, the insurer or a public official and/or that there was no genuine commercial purpose to making the payment to the Overseas Third Party.

III. Conclusion

Financial institutions, both public and private are coming under increasing regulatory scrutiny for their anti-corruption compliance programs; whether from the US Department of Justice or Securities and Exchange Commission or the UK Financial Services Authority, Serious Fraud Office or Ministry of Justice. This guidance provided by the FSA is substantive and practical. We recommend that you review and evaluate your compliance program based upon these suggestions.

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Client-focused, innovative attorney, with expertise in contracts, corporate law, international law, compliance, and small business affairs for major Fortune 500 corporations, such as Halliburton, Smith and Wesson, Exxon, Tesoro, and Texaco, as well as small and solo business owners. Thomas built an international reputation as the "Nuts and Bolts" compliance expert. He successfully managed legal involvement in cases using social media and blogging to educate the public. He is noted for providing superior and the most responsive legal services for the greatest value. He is a resourceful negotiator, with high integrity and good judgment who can provide direction and credible legal expertise.

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Ryan is the Anti-Corruption Specialist for WorldCompliance, offering his clients insight on risk evaluation, implementing effective due diligence policies, as well as best practices in protecting their company's reputation. In this position, Ryan works with some of the world's largest financial institutions, Fortune 500 companies, and governments to develop effective FCPA policies and procedures and help battle corruption and money laundering around the globe. In 2007, Ryan joined WorldCompliance where he began servicing financial companies in the US and the world. Mr. Morgan has attended industry conferences focused on preventing corruption, money laundering, and terrorism financing all over the world. In 2011, he was one of the speakers of the FCPA Blog Tour, where he discussed due diligence strategies for complying with the Foreign Corrupt Practices Act. He has also participated in workshops where he consulted the US government on ways to fight drug trafficking in the US and Latin America.

About WorldCompliance

WorldCompliance has created World-NEO to provide companies the ability to vet their third party vendors, suppliers, distributors and agents; directing them to register and complete a questionnaire with the NEO Network, a web-based portal. World-NEO automatically assigns a risk score to every agent and distributor, performing initial and on-going due diligence.

Suppliers who register are provided a risk score that determines whether they represent a risk to your organization. Their score is proof that they are compliant with the FCPA and UK Bribery Act.

To learn more go to www.worldcompliance.com
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