TROUTMAN SANDERS

Escalating Anti-Bribery Enforcement

Recently enacted anti-bribery laws in the U.K. and U.S. are having a profound impact on multinational financial institutions, particularly those doing business in developing countries like China.

The U.K. recently enacted stringent new anti-corruption legislation, which will give enforcement authorities there significantly more clout from early next year. In the meantime, the U.K.'s principal regulator for the financial sector, the Financial Services Authority ("FSA") has recently stepped up enforcement activities and published policy directives indicating that it plans to redouble its enforcement against bribery and corruption offenses in the financial sector.

In addition, enforcement agencies around the world have been more actively prosecuting bribery and corruption-related offenses and the U.S. has recently enacted new whistle-blower provisions under the Dodd-Frank Wall Street Reform and Consumer Protection Act, which increases the stakes for noncompliance with the Foreign Corrupt Practices Act.

Overview of the U.K. Bribery Act and Its Impact

The U.K. Bribery Act 2010 ("the Act") was enacted on April 8, 2010, and will come into effect in April 2011. The Act creates a new and consolidated scheme of bribery offenses that can be more easily enforced by the U.K. enforcement authorities:

- Offering, promising or giving a bribe
- Soliciting, agreeing to receive or accepting a bribe
- Bribing a foreign public official
- A new corporate office of failing to prevent bribery

The concept of a "bribe" under the Act is very wide. It includes any financial or other advantage which is intended to induce or reward the improper performance of a public function or business responsibility. Unlike the FCPA, the Act criminalizes both corrupt payments to government officials and private commercial entities and individuals. In addition, the Act has several novel features:

- Like the FCPA, it has extraterritorial reach, covering all U.K. corporations and partnerships carrying on business as well as any other corporation or partnership (wherever established) which carries on business in the U.K. Individuals and corporations that pay bribes in the U.K. (or anywhere else in the world) can be prosecuted. Non-British corporations can be liable if any act or omission forming part of the bribery takes place in the U.K.

- It creates a new corporate offence of failing to prevent bribery which imposes strict vicarious liability on any corporation where a person "associated" with the corporation commits any bribery offence for the purpose of obtaining or retaining business or an advantage for the company. The offence is designed to make businesses responsible for all bribery offences committed on its behalf. This clearly presents a key area of risk for financial institutions since many use third parties to introduce new business.

- The range of persons caught by the Act is wider than under the FCPA. Since the definition of "associated persons" is so wide, institutions will be liable for bribery and corruption committed by both employees and anyone else performing services for or on its behalf, including third parties such as agents, sub-contractors and vendors. The "associated person" need not have any link with the U.K. for this offence to be committed.

- The strict liability nature of the new corporate offence is unprecedented and means that the burden of proof rests with the accused institution. To be found guilty, executives need not have any knowledge of any bribery — it will be sufficient if the institution failed to prevent the bribery.

- There is no safe harbour under the Act, as there is under the FCPA, for so-called "facilitation" or expediting payments — ie: small payments to induce routine action by officials – so institutions may be prosecuted when these are paid.

- Penalties for bribery offences under the Act are exceptionally severe, with the maximum penalty increased from seven to 10 years in prison (per offence) and/or a fine. The amount of fines on institutions and individuals is unlimited and the Act is silent on how such fines will be assessed. Executives who participate in or have knowledge of bribery may be personally liable and directors convicted of bribery are likely to disqualified from acting as directors for long periods.

The Act will have far-reaching implications within the U.K. and beyond, and not just by U.K. citizens and U.K. institutions. The corporate offence applies to any corporate or partnership, wherever registered or incorporated Institutions that do business in or with the U.K. will also be impacted even if the U.K. connection is only a sales office or third party engaged to operate in the U.K. on the institution's behalf.

The extraterritorial reach of the Act means that since offences and parts of offences may be committed outside the U.K., financial institutions must ensure that both their U.K. and entire global operations are in compliance.

As required by the Act, on Sept. 14, 2010, the U.K.'s Ministry of Justice ("MOJ") published its long-awaited consultation paper on the Act, setting out draft non-statutory guidance on procedures that businesses can implement to prevent persons associated with them from committing bribery on their behalf. The six broad principles on which the guidance is based are:

- Risk assessment
- Top level commitment
- Due diligence
- Clear, practical and accessible policies and procedures
- Effective implementation
- Monitoring and review

Although the draft guidance is very general, it sheds some light on the legal grey area of "adequate procedures" that businesses must put in place to prevent bribery. This is critical because under section 7 of the Act, the only defense that institutions will have to the new corporate offence is if can show they have "adequate procedures" in place to prevent bribery.

The MOJ has also commenced a consultation exercise inviting responses from the business community on the draft guidance and will issue a final draft in January 2011; however that is not expected to vary much from the current draft.

Institutions may find that they have already put in place policies and procedures that satisfy the six principles and otherwise comply with the Act. If not, senior management should consider putting additional measures in place by April 2011, when the Act comes into force.

Recent Actions Taken by the FSA

Even before the Act was passed, the FSA and Britain's Serious Fraud Office carried out a number of high profile enforcement actions against U.K. and foreign corporations for bribery-related offences. In the most high profile case, the U.K. subsidiary of an international insurance company was fined £5.25 million for failing to establish and maintain effective anti-bribery systems and controls within its overseas operations. This was in the absence of any evidence that bribes had been paid.

The disqualification and prosecution of several individual brokers and agents in the U.K. over the past 14 months, for receiving commissions, also highlights the difficulties confronted by brokers and other firms that rely heavily upon discrete personal relationships. These difficulties will be heightened in April 2011 when the Act comes into force.

After April 2011, not only will such individuals be criminally liable for paying bribes and possibly be disqualified permanently, but under the Act, the broker employing him/her could itself face the prospect of conviction for failing to prevent bribery.

In its recent 2010/2011 business plan and subsequently published report, "Anti-bribery and corruption in commercial insurance broking," the FSA has indicated that it will continue to focus anti-bribery and corruption ("ABC") enforcement on the commercial insurance broking industry and will soon begin to expand its focus to cover investment banking and other sectors. The FSA's report states that many financial institutions in the U.K. do not currently have adequate measures in place to prevent bribery.

These policy directives should serve as a clear warning to financial institutions that they have until April 2011 to put their respective houses in order. FSA-regulated financial institutions are more likely to be targeted for enforcement because the FSA, like the Securities and Exchange Commission in the U.S., has a regulatory mandate for reducing financial crime and because the FSA appears to share the view that much of the responsibility for the recent financial crisis lies with the failure of risk management and misconduct in the financial markets.

Overview of the New FCPA Whistleblower Provisions

The Dodd-Frank Act includes expansive whistleblower provisions that are expected to greatly increase the number of reported cases of corruption and securities law violations of the FCPA, brought by the U.S. Securities and Exchange Commission against U.S. publicly traded companies, including many multinational financial institutions.

Among other provisions, the Dodd-Frank Act requires the SEC to pay any whistle blowers who voluntarily provide "original information" to the SEC if such information leads to the successful enforcement of a judicial or administrative action exceeding $1 million. Such payments are to be between 10 percent to 30 percent of monetary sanctions collected by the SEC. Whistleblowers are also now given a private cause of action to sue if they suffer any retaliation for tipping off authorities.

To qualify for payment, whistleblowers must provide information that is not known by the SEC from other sources and the whistleblower himself/herself cannot be liable to conviction in relation to the substance of the complaint.

The Dodd-Frank Act will likely result in a dramatic increase in the number and size of rewards paid for the following reasons:

- The whistleblower provisions expand the scope of situations where whistle blowers are eligible to receive rewards so whistleblowers and their counsel are now financially incentivized to report nearly any kind of illegal payment. Prior to enactment of the Dodd-Frank Act, the SEC could reward a whistleblower only for information concerning insider trading. Consequently, both the number and the size of those whistleblower awards were relatively insignificant. Whistleblowers will now receive a reward when their information results in monetary sanctions being imposed as a result of any judicial or administrative action brought by the SEC, including alleged FCPA violations. Monetary sanctions resulting from FCPA enforcement actions are frequently enormous. Recent investigations against several foreign and U.S. companies have resulted in settlements worth hundreds of millions of U.S. dollars being paid by those companies.

- The whistleblower provisions expand the scope of persons who can be whistleblowers to include essentially anyone. Prior to the enactment of the Dodd-Frank Act, whistleblowers were limited to employees of companies in the financial services industry.

- The Dodd-Frank Act incentivizes whistle blowers to report allegations directly to the SEC and bypass their companies' own internal compliance programs to ensure that the whistle blower is the "original source" of the information. By motivating whistleblowers to side-step internal reporting, the Dodd-Frank Act will likely result in many more complaints, including unfounded allegations, being reported to the SEC.

Given the extraterritorial reach of the SEC's jurisdiction and the prevalence of both corruption and whistleblowing in China, nowhere may U.S. and multinational financial institutions feel more exposed as a result of these new whistle blowing provisions than in their Chinese operations.

For financial institutions doing business in China, the Act and the whistle blower provisions present an especially dire risk. Firstly, because bribery and corruption are rampant in China and regarded by many as merely a cost of doing business. Secondly, the use of third parties for introducing new business and payment of commissions has become an essential part of the China business model for many financial institutions conducting business there. Thirdly, whistleblowing was prevalent in China even before the Dodd-Frank Act. With these new whistleblower provisions, institutions with U.S. reporting obligations will need to devote significantly more time and resources both to identifying potential areas of noncompliance, before whistleblowers do, and if a complaint is or may be filed, those firms will need to investigate and then respond to SEC inquiries. The U.S.'s complex plea bargaining and fine settlement process means that institutions will need to review if and when to self-report illicit payments.

Where Does This Leave Us?

Financial institutions and their counsel may need to endure several years of enforcement and court cases before knowing how much intervention is necessary to protect themselves in this more hostile enforcement climate. Already, corporations in a range of industries, including the financial sector, pharmaceuticals and oil & gas, are exercising greater caution when reviewing prospective acquisition targets. Private equity firms, in particular, appear to be investing in greater due diligence and insisting on more warranties and in some instances, abandoning deals to sidestep potential risks.

The clear message from lawmakers in the U.K. and the U.S. is that the business community will now be made to account for bribery. The steps to be taken will vary from business to business. For companies subject to the Act, the final draft guidance offered by the MOJ clearly does not provide a one-size-fits-all approach. Each company is responsible for ensuring that specific bribery risks in its operations, wherever it does business, are adequately assessed and suitable steps are taken to prevent bribery.

The new regulatory landscape needs to be understood by senior management and it may prudent to form an internal committee of senior officers or at least appoint one senior officer with overall responsibility for overseeing and monitoring compliance. We recommend carrying out a review of your institution's activities worldwide to identify areas at greatest risk of bribery. Based on this review, all existing ABC policies and procedures including financial controls, ethics guidelines, employment arrangements and procedures concerning third parties may then need to be re-assessed, updated and fully implemented, with training and evaluation for everyone concerned and internal safeguards tested to ensure that they provide adequate protection.

A top-down review may also be necessary for financial institutions subject only to FCPA compliance. Institutions will need to ensure that they have appropriate whistleblowing procedures in place, both for staff and outside parties such as consultants and sales agents. Banks and insurers doing business in bribery hotspot countries like China will need to carefully evaluate their policies and procedures for payments to third parties and consider preemptive action such as enhancing internal vigilance and self-reporting on suspect payments to hopefully thwart reward-seeking whistleblowing.

Given the penalties involved, failure to comply with this more rigorous regulatory environment is not an option and given that compliance with these developments will require time and significant changes to compliance programs, financial institutions need to address these developments immediately.

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CONTACTS

Richard Grams
Partner – Shanghai Office
Tel: +86.21.6133.8988
Fax: +86.21.6137.8188
Email: richard.grams@troutmansanders.com

Edward J. Epstein
Managing Partner – Shanghai Office
Tel: +86.21.6133.8998
Fax: +86.21.6137.8188
Email: edward.epstein@troutmansanders.com