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Standard Bank PLC: First U.K. Deferred Prosecution Agreement and Settlement with the SEC

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On 30 November 2015, Standard Bank PLC ("Standard") entered into the first ever Deferred Prosecution Agreement ("DPA") with the Serious Fraud Office ("SFO") for failing to prevent bribery under the Bribery Act 2010. Standard simultaneously entered into a settlement with the U.S. Securities and Exchange Commission ("SEC") for violations of the anti-fraud provisions of the Securities Act of 1933.

Standard was investigated after self-reporting to the SFO following an internal investigation into third-party payments in Tanzania. During 2012 and 2013, Standard was engaged with its Tanzanian affiliate, Stanbic Bank Tanzania, to raise $600m of sovereign debt to finance electricity, water, and other infrastructure. After a failed attempt to raise this money, Standard engaged a local third party, Enterprise Growth Market Advisors ("EGMA"). EGMA was to receive a 1% fee, which was added to Standard's fees. Due diligence was not conducted on EGMA who, it turned out, was closely associated with the Commissioner of the Tanzania Revenue Authority. Standard became concerned when $6m of public money, paid to EGMA, quickly went missing.

Settlement with the SFO

In the U.K., Standard and the SFO agreed a DPA whereby Standard would: (1) fully co-operate with the SFO; (2) pay compensation and interest of just over $7m to Tanzania (indirectly through the SFO); (3) disgorge profits of $8.4m; (4) pay a financial penalty of $16.8m; (5) pay the SFO's costs of £330,000; and (6) enter into a review and monitorship of the bank.

This order, which was approved at a public hearing by Lord Justice Sir Leveson on 30 November, is the first of its kind since legislation permitting DPAs was passed in February last year. In many ways the contents are unsurprising. Had this misconduct been proven at trial, a financial penalty, disgorgement of profits, compensation (with interest), and payment of prosecution costs would all have been expected. The additional monitorship requirements are commonplace in settlements in the U.S. Equally, the penalties are at the level you would expect from English authorities. It is unlikely that we will see penalties for breaching the Bribery Act reach the dizzying heights of those now commonly agreed for breaching the U.S. FCPA in the near future.

Settlement with the SEC

The U.K. DPA was part of a global settlement of Standard's misconduct. In the United States, the SEC settled fraud charges with Standard relating to its failure to disclose the payments made to Stanbic in connection with debt securities issued by the Government of Tanzania. The SEC found that Standard violated Section 17(a)(2) of the Securities Act.

As part of the settlement agreement, the SEC ordered Standard to cease and desist from committing or causing any violations or future violations of Section 17(a)(2) and imposed a $4.2 million civil money penalty. In the SEC's announcement of the charges, representatives from the Commission highlighted the SEC's determination to take action against parties who make "suspicious" payments anywhere on the globe that may result in "tainted" securities offerings in the United States. Notably, the SEC pointed out in its press release that it did not have jurisdiction to charge Standard under the Foreign Corrupt Practices Act of 1977, as amended, because Standard was not an "issuer" as defined by the books and records and internal controls sections of the FCPA.

In considering Standard's overall cooperation with authorities, the SEC emphasised Standard's prompt and voluntary reporting to the SFO upon learning from employees of potentially improper activities. The order also notes Standard's significant cooperation with the SEC as well as Standard's willingness to conduct its own internal investigation.

Moreover, the SEC clearly considered the penalties Standard received in the U.K. matter before imposing its own sanctions on Standard. For example, the SEC also ordered $8.4m in disgorgement but said that this obligation will be satisfied with the SEC upon payment of the entire $8.4 million to the SFO. However, if Standard fails to pay the entirety of the $8.4 million owed in disgorgement of profits in the U.K., then it will owe any remaining balance to the SEC.

Conclusion

While the first DPA is broadly in line with what practitioners have been expecting, particularly noteworthy in this case is the cooperation between the SFO and SEC. While, at the investigation level, the trend has been towards greater cross border co-operation, it is interesting that the SEC and SFO clearly worked together in formulating the total settlement. This avoided the injustice of double disgorgement but included fines for both regulators. The SEC also made no order for ongoing monitorship, probably because it was included in the U.K. DPA.

More DPAs in the U.K. will probably be announced during 2016 and, on the evidence of the Standard case, companies can expect to see ever closer cooperation between regulators and enforcement authorities in the U.K. and U.S.

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