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Lessons from the prosecution of an MLRO

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The recent prosecution of Ms Michelle Jardine and STM Fiduciaire ("STM") for offences under the Proceeds of Crime (Jersey) Law 1999 ("POCJL") caused considerable concern across the Channel Islands for all those involved in the regulatory and compliance industry.

It is unsurprising that the case of Jardine generated so much interest, being the first prosecution of its kind across the Channel Islands. Ms Jardine was acquitted, but her actions as STM's Money Laundering Reporting Officer and Money Laundering Compliance Officer ("MLRO" and "MLCO") did not escape the scrutiny of the Jersey Financial Services Commission ("JFSC"), resulting in an indefinite employment ban (without prior JFSC approval) in any regulated financial service business in Jersey. Given the serious repercussions which Ms Jardine could have faced had the prosecution been successful, it is important to reflect on what lessons the compliance and regulatory industry of Guernsey can take from this example.

Background

Ms Jardine was STM's MLRO between May 2010 and March 2012, she also acted as the Company's MLCO during this time. Between May 2011 and June 2011, STM was involved in a transaction which involved a politically-exposed person ("PEP") from a high-risk jurisdiction (the "Transaction"). What is more, the funds involved in the Transaction were remitted to STM by an unknown third party.

As a consequence of the Transaction, Ms Jardine and STM were prosecuted for offences under both article 34A and 34D of the POCJL: for failing to disclose knowledge or a suspicion of money laundering which either came to their attention in the course of their trade, profession, business or employment, or which came to their attention during the course of carrying on a financial services business.

Guernsey legislation

The Sections 34A and 34D of the POCJL largely reflect sections 1 and 3 of The Disclosure (Bailiwick) of Guernsey Law, 2007 (the "Disclosure Law"): failure to disclose knowledge or a suspicion of money laundering which arises in the course of the business of a financial services business or a non-financial services business. Additionally, under section 2 the Disclosure Law, it is an offence for a nominated officer to fail to disclose knowledge or a suspicion of money laundering which came to him as a result of an internal disclosure. As is the case under the POCJL, a person found guilty of sections 1, 2 or 3 of the Disclosure Law could face up to 5 years imprisonment.

It is therefore possible that an individual in Guernsey could face a similar prosecution to that of Ms Jardine. However, decisions of whether or not to prosecute are dependent on the circumstances of each individual case and on the decision of the individual tasked with that determination. It is therefore not possible to say whether or not similar prosecutions will arise in Guernsey in the near future.

Comment

The Disclosure Law and POCJL are not dissimilar to the relevant legislation of most European on shore jurisdictions. This is because they are based on the same EU directive on Anti-Money Laundering that European jurisdictions must implement into domestic legislation. MLROs in Guernsey and Jersey do not therefore necessarily face any greater regulatory challenge than those in most EU jurisdictions. However, in practice it would appear that the Channel Island jurisdictions are held to a particularly high standard in respect of anti-money laundering. This is perhaps largely due to the need to ensure high standard are upheld to mitigate against the unfavourable opinion some politicians and individuals may have of the offshore financial services industry.

There may be a sense of injustice on reading that Ms Jardine was acquitted of all criminal charges but received significant sanctions from the JFSC. Such apparently divergent results can often be the case where different standards of proof apply. It should be remembered that the criminal prosecution of Ms Jardine and the JFSC investigation are different processes, carried out by different bodies and to different standards. It should also, however, act as a further warning to MLROs. Even if an MLRO escapes conviction, they could face the devastating impact of regulatory sanctions.

Lessons

The prosecution of Jardine stands as a stark reminder that it is essential to have a systematic and robust system in place to address concerns of money-laundering. Without such a system, companies and individuals alike may be left vulnerable, not only to regulatory sanctions, but also prosecutions.

MLROs must ensure that they adequately document their thought processes and actions in respect of any suspicion that is brought to their attention. Adequate, accurate and contemporaneous documentation could prove essential in defending a potential conviction under the Disclosure Law.

MLROs should also consider cross checking their individual understanding of what constitutes as a "suspicion" for the purposes of their regulatory obligations. This may be more difficult in a small company where they may be the only appropriately qualified individual to determine whether a suspicion has arisen. However, if possible, an MLRO should regularly discuss and cross check their understanding of a suspicion with an appropriately qualified work colleague or professional.

Conclusion

The Disclosure Law is quite clear, if you know or have reasonable suspicion to believe that a person is engaged in money laundering, you must make a disclosure as soon as is reasonably possible. Appropriate checks may dispel initial concerns but unless those checks are sufficient and adequately documented, a Jardine prosecution could arise. The costs, stresses and irreparable reputational damage which could arise as a result of such a prosecution are best mitigated against by prevention. If companies and individuals wish to avoid similar prosecutions, they must ensure not only do they understand their regulatory obligations but that a robust compliance system is implemented to ensure those obligations are met.

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