The UK Softens Its Approach to Senior Banker Regulatory Liability

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The aftermath of the financial crisis saw regulators worldwide tighten rules and launch large-scale enforcement investigations, particularly directed at the banking sector. The U.K., notwithstanding the importance to it of its financial services industry, was no exception, as its lawmakers reacted to significant public anger directed against the banking industry.

For example, the U.K. helped develop the bank leverage ratio and was instrumental in ensuring that Basel 3 implementation resulted in significant increases in bank regulatory capital requirements. Martin Wheatley was appointed as the U.K.'s top conduct regulator and was quoted in 2012 as saying that U.K. regulators would "shoot first, ask questions later."

The U.K. also introduced a senior managers regime for banks and insurer, which is due to come into force in March 2016. This included a provision in the Financial Services and Markets Act 2000 (FSMA) that applied to senior managers of banks and large U.K. broker-dealers who managed business areas where contravention of U.K. regulations had arisen. In those circumstances the burden of proof would be reversed, and a senior manager would have to prove that s/he had taken all "such steps as a person in their position could reasonably be expected to take to avoid the contravention from occurring."[1] A failure to do so would result in the senior manager being fined or banned following civil regulatory enforcement action.

Reversing the burden of proof in regulatory proceedings is unusual because generally a prosecutor must prove fault to the required standard. The provision, therefore, triggered deep market concern. It also led some to question whether the U.K. would remain a relatively welcoming jurisdiction for international banks.

There have been a number of recent tentative signs of a thawing in the U.K. regulatory environment. This now includes the Bank of England and Financial Services Bill, which the U.K. Treasury published on October 15, 2015. Although largely concerned with changes to how the Bank of England is run, the bill also included a measure deleting the provision requiring bank senior managers to prove that misconduct arising in the business areas that they managed was not their fault. Senior managers will still be required to take such steps as could be reasonably expected to prevent a regulatory breach.[2] This, however, represents a return to a more normal position where a regulator needs to prove the steps that the senior manager was reasonably required to, but did not in fact, take.

The U.K. government and regulators have indicated that deletion of the measure reversing the burden of proof does not amount to a weakening of required high banking industry standards. Nevertheless, when added to a more lenient U.K. bank ringfencing approach announced last week, Mr. Wheatley's recent departure and the U.K.'s declared keenness to become a Chinese renminbi trading hub, the deletion is another sign that the U.K. regulatory pendulum is swinging away from "banker-bashing" and industry confrontation.

[1] S.66A(6) and S. 66B(5) FSMA

[2] S.22 (2)(f) and S.22 (3)(f) Bank of England and Financial Services Bill, respectively.