

A Bad Exchange?

24 Sep 2014

The foreign exchange market is the latest major institution to be suspected of fraud. With the Serious Fraud Office (SFO) talking of charges being likely, what are the prospects for those involved in the market?

The SFO's opening of a criminal investigation into allegations of fraudulent conduct in the foreign exchange market (forex) looks to be the latest example of joined-up, worldwide thinking by the authorities.

SFO Director David Green has indicated that the first individuals could be charged as early as next year, in connection with a global investigation into alleged manipulation of currency markets. Mr Green is on record as saying that the SFO will join U.S. prosecutors and other regulators around the world to investigate allegations of misconduct in the £3.1 trillion-per-day foreign exchange market. He has said that he has reasonable grounds to suspect that an offence of serious or complex fraud was involved.

In stating his organisation's stance, he added: "I think it would be ambitious to expect charges this year but ... I wouldn't discount that possibility (next year) at all.

"We're having a fairly focussed inquiry into a limited number of individuals and a limited number of financial institutions, including banks, and we'll take that as the first phase and see where we go from there."

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After extensive internal investigations, banks including Deutsche Bank, Barclays, Citigroup, UBS and HSBC have dismissed, suspended or placed on leave around 40 foreign exchange traders who worked in various countries. Mr Green has so far declined to comment on whether the forex scandal will be bigger in scale than the fall-out from the Libor rigging; which saw fines totalling around £3.5 billion and led to 17 people facing criminal charges.

At this stage, it would be wrong to be lauding the SFO for a job well done. This is for a number of reasons. First, and most importantly, the SFO is a long way from producing a result for all its legwork. Nobody has been charged, let alone put on trial or convicted. Secondly, this is not an issue that the SFO has discovered and developed all by itself. The Financial Conduct Authority (FCA) began investigations into foreign exchange pricing and has already been in detailed discussions with regulators in Europe, Asia and the US to check the veracity of claims that banks have been rigging forex benchmarks. It began its inquiry ten months ago after receiving information that bank traders were sharing information with counterparts at other banks in an attempt to manipulate the rate used by fund managers to buy foreign currencies. It has been understood for some time that a number of banks have been in discussions with the FCA about this.

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We cannot be 100% sure of the tone or the exact content of those discussions between the banks and the FCA. At this stage, we also cannot say for definite who will face charges and what the final outcome will be in terms of admissions of wrongdoing, guilty verdicts and custodial or financial punishments. What we can, however, claim with some degree of certainty is that we know the main thrust of any conversations that may happen from now on between the banks and the FCA and SFO. The investigating agencies will wish to know two things: how the alleged wrongdoing was allowed to happen and just how many people were involved. And for once in an investigation, it may well be that those under suspicion will want to know the answers to the same questions as the investigators. For although we cannot say precisely what the scale of this problem is, we know that the banks under investigation will now be desperate to determine both the scale of the problem and the cause of it.



It is a basic issue of compliance. That quite simply means having systems in place to ensure your staff are complying with UK and international law. Are they being monitored while acting for the company? And are systems in place to flag up any wrongdoing?

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As a legal firm specialising in business crime, we assist companies and organisations of all sizes and locations to create and run internal systems that remove the potential for wrongdoing. While companies may vary hugely – after all, an engineering giant differs greatly from a bank – they are all risking prosecution, fines, imprisonment, loss of reputation and business and huge legal costs if they ignore the need for compliance. Forex may be a niche sector (albeit a very wealthy one) but it is like any other area of business in that its employers need to know exactly what their employees, representatives and third parties are doing in the name of the company. Legislation in the UK now includes the Bribery Act, the Fraud Act 2006, Money Laundering Regulations, the Companies Act and the Enterprise Act. The Bribery Act’s jurisdiction covers the activities of any company with a UK connection anywhere in the world. In the US, the Foreign Corrupt Practices Act carries similar far-reaching powers.



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To put it in its simplest terms, it does not matter whether you are a major bank with massive forex involvement or a factory exporting paper clips: hoping your employees behave themselves isn't good enough. Those banks fearing for their futures over forex may well be the latest converts to the need for compliance procedures that should be introduced, enforced, monitored regularly and amended when necessary. Those banks are huge, historic institutions but they are still vulnerable. Investigating authorities now have more legal tools in their toolkit than ever before. If any institutions are brought to court over forex, their only genuine defence could be that they can demonstrate that they took all possible steps to ensure they were legally compliant. And any steps taken have to be in-depth, well thought out and subject to review. A spot of window dressing for appearance's sake is never enough.

Forex is the latest in a series of high-level financial scandals. These are scandals that compliance could have prevented or, at the very least, made much harder to have been carried out. Forex may turn out to be the latest Libor.

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