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Publisher
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General Chapters:

Country Question and Answer Chapters:

Maintaining Privilege in U.K. Regulator-Facing Investigations: Issues For Company Advisers

Matthew Cowie

Matthew Banham

Dechert LLP

Introduction

The recent judgment approving the Rolls-Royce ("**Rolls**") deferred prosecution agreement ("**DPA**") demonstrates that no company is too big for the U.K.[1] Serious Fraud Office ("**SFO**") to pursue. Whereas the SFO has previously finalised two relatively small DPAs, the Rolls case, led by the SFO, is the first truly global U.K. DPA enforcement proceeding. Reportedly, the SFO has further similar DPAs in its casework pipeline. As demonstrated by the settlement figure in Rolls of just under £500 million – including a fine of almost £240 million – the SFO is no longer the junior partner in the growing number of multi-jurisdictional settlements in which it has had a role, but a major player on the global enforcement stage.

To date, the steps taken in lawyer-led white-collar corporate investigations have often been driven by the expectations of the U.S. Department of Justice ("**DOJ**") or other dominant regulators. Now that the U.K. regulators have apparent sentencing parity with the U.S. in white-collar enforcement proceedings, particular care is required when advising companies where the U.K. has primacy in an investigation or is the *de facto* dominant regulator.

One important defence right that is available to a company in the U.K. is the right to maintain privilege over legal advice in compliance or regulatory matters or where the company faces a declared or contemplated enforcement proceeding. This right has been characterised by the Court in England as a "fundamental condition on which the administration of justice as a whole rests".[2] Nonetheless, in Rolls there was limited waiver of privilege by the company, in favour of the SFO, over certain investigation documents, specifically (and most importantly) those related to witness interviews. This chapter explores the context in which a company may elect, or in other instances feel strategically compelled, to abrogate privilege rights.

The SFO has publicly stated that it will challenge illegitimate claims to privilege in corporate investigations. Further, the extent to which a company in English proceedings can or should claim privilege, in a compliance or regulatory context, is further complicated by recent decisions concerning the scope of legal advice privilege (which, as outlined further in section 1 below, protects confidential communications between lawyers and their clients including in the context of internal investigations). The most significant recent case is the high-profile *RBS Rights Issue Litigation*[3] (also considered further in section 1 below). The SFO's stance and the *RBS* litigation raise issues regarding the extent to which a company can claim privilege in the U.K. over certain key investigation materials, most particularly those related to interviews with employees and/or third parties, including documents created by external lawyers.

Why is this important? Corporate investigations are, by definition, "fact-centric". The lawyers have to establish facts in order to advise on potential liability. Facts, however, have never been subject in and of themselves to legal privilege. The SFO has publicly stated that it does not regard itself as constrained from asking for facts or the accounts of witnesses in corporate investigations, even if the documents in which the facts are embedded are privileged. Further, the SFO's developing perspective regarding disclosure of facts relating to lawyer-led witness interviews is beginning to be articulated and reinforced in the emerging U.K. DPA jurisprudence.

Subject to the particular circumstances of each case, failure to properly recognise how the SFO might react to the manner in which facts are gathered in U.K.-led enforcement proceedings will have an effect on the company's relationship with the SFO and can affect the ultimate determination of a corporate enforcement action. Finally, as demonstrated in Rolls, the SFO is not working in a vacuum: it is co-operating and working in partnership with other European and U.S. enforcement agencies, each with different systems and laws of privilege or professional secrecy.

As the landscape for U.K. corporate investigations rapidly evolves, how should a company and its advisers navigate privilege issues to best effect? This chapter addresses the following issues:

(1) What is the current scope of a company's right to claim U.K. privilege in corporate investigations?

(2) How has the U.K. regulatory landscape developed in relation to privilege, with regard to recent enforcement outcomes and the SFO's stated view on privilege and witness interviews?

(3) Recognising the importance of privilege in corporate investigations, how should a company structure a fact investigation to best preserve privilege in the U.K.?

(4) Understanding that pragmatic and strategic issues can influence adviser thinking regarding maintaining claims to privilege in U.K. enforcement proceedings, when might a company decide that electing not to rely on its legal rights to privilege, in order to obtain a favourable enforcement action outcome, will be in its long-term best interests? As discussed below, the overall legal strategy in this regard will typically involve careful consideration of: (i) the prospect of obtaining credit in the ultimate disposal of an enforcement proceeding; and (ii) whether other factors may force loss of privilege in any event or weigh against maintaining a credible claim to privilege.

1. The current scope of a company's right to claim U.K. privilege in corporate investigations

Under English law, there are two types of legal professional privilege: legal advice privilege and litigation privilege. Legal

advice privilege covers confidential communications between lawyers and their clients for the purpose of giving or obtaining legal advice, including advice as to what should prudently and sensibly be done in the "relevant legal context". The "legal context" will be clearly defined in most investigations, where companies require the particular skills of law firms to manage and advise upon relevant issues and (if necessary) liaise with the investigating regulator. Provided communications between the company and its lawyers are confidential and fall within this legal context (in other words, form part of the information exchange relating to the investigation), they will be privileged regardless of whether they contain any actual "legal" advice *per se*.

Litigation privilege is broader than legal advice privilege because it extends, in applicable circumstances, to communications with third parties. Specifically, litigation privilege covers (i) communications between clients and their external lawyers, (ii) communications between external lawyers or clients and relevant third parties, and (iii) documents created by or on behalf of clients and/or their external lawyers, provided the communications or documents were made for the "dominant purpose" of litigation, which is either ongoing or in reasonable contemplation. In terms of when litigation will be "in reasonable contemplation", the clearest indication was provided in a case involving Tesco and the Office of Fair Trading ("**OFT**"), where circumstances that followed a formal accusation of wrongdoing against Tesco by the OFT were said to give sufficient rise to a valid claim for litigation privilege.[4] Where the potential ramifications for a company arising from the matters under investigation are severe (such as the prospect of serious financial damage) or where there is a criminal dimension to the investigation, it should be possible to claim litigation privilege. Indeed, subject to the fact circumstances, in matters involving the SFO, the circumstances of a self-report of conduct to the SFO should give rise to a valid claim for litigation privilege.

As documents are often created for more than one purpose, careful thought needs to be given as to whether the dominant purpose for creating the document is truly a litigation purpose. Applying U.K. laws, confidential communications pertaining to an SFO or other law enforcement investigation are likely to be subject to litigation privilege. However, during the course of white-collar regulatory investigations, documents are frequently created as part of company projects which may relate in some way to the matters under investigation – for example during the course of a discrete review of books and records issues, a review of a business or regional area, or a pre-acquisition due diligence exercise. If such projects are ongoing and extend to other areas of the company outside the scope of the regulatory investigation or, in a more general sense, if the projects would have been undertaken despite the regulatory investigation, then it may be more difficult to demonstrate that communications with legal advisers relating to these projects were created for the dominant purpose of litigation and are therefore protected by litigation privilege.

Where a company has a robust litigation privilege claim, it can structure any investigatory communications and create any documents (including with third parties) as privileged. For instance, witness interviews with relevant individuals (whether within or outside the company) will be covered by the privilege, provided they are for the dominant purpose of the relevant litigation. The company should ensure it clearly considers and marks the purpose of each communication which it considers to be privileged, to minimise the potential for dispute about the purpose for which the communication was created. As a general matter, an overly-broad privilege claim may weaken the company's credibility before the regulator and expose the claim to challenge before the courts.

The applicability of litigation privilege is more likely to be the subject of regulator challenge in an investigation (i) which lacks an identified criminal dimension, and (ii) in which a formal accusation of wrongdoing has not yet been made. A company structuring an investigation should consider the extent to which *legal advice* privilege attaches to documents generated by such investigations and should seek to minimise creating documents which do not attract legal advice privilege, to avoid an undesirable situation where documents become discoverable. In the context of an investigation (which should certainly provide a relevant legal context), any confidential communications between the company and its lawyers relating to the investigation will form the basis of a good legal advice privilege claim, even if they contain no specific legal advice, as privilege applies to the exchange of information which forms the basis of the advice.

Subject to fact circumstances, communications with third parties are less likely to be protected in situations where there is no litigation contemplated. The current position under English law, held since the landmark 2003 Court of Appeal judgment in *Three Rivers (No.5)*,[5] sets large companies at a real disadvantage in treating the "client" as only comprising the narrow group of individuals within the company responsible for providing instructions to the lawyers. The extent of this group is less straightforward to define, but the risk is that those (such as employees) who may have relevant information for the investigation – which, if communicated, would be privileged – fall outside this group and therefore communications with them, including witness interviews, will not be privileged. It had long been thought that *Three Rivers No.5* might come under successful challenge, but the essential principle of treating the client as a narrow group was very recently upheld by the High Court in the *RBS Rights Issue Litigation*. The absence of an appeal by RBS means that the opportunity for the Supreme Court to review the narrow interpretation of "the client" is deferred. Until then, a company wishing to retain control over its work product and minimise the risk of disclosure in the future will need to think very carefully about how it wishes to structure any non-contentious internal investigation.

Even if communications (most relevantly witness interviews) with company employees or external third parties are not subject to legal advice privilege, there may still be a way to preserve privilege over documents generated in the course of an investigation that record those underlying, non-privileged oral communications. The question is really one of relevance and purpose: are the documents created as part of the confidential information flow between lawyer and client, falling within the relevant legal context? Recent case law, again involving RBS,[6] has confirmed that the source of information contained within a document does not determine whether the information is privileged, so the reporting of non-privileged facts gleaned from a third party meeting (including a witness interview) will be privileged if the document which contains those facts is privileged. The claim depends on the form of the document: a bare transcript of a non-privileged meeting will likely not attract privilege but a summary generated by a lawyer for a client will be privileged.

2. How has the U.K. regulatory landscape developed in relation to privilege, with regard to recent enforcement outcomes and the SFO's stated view on privilege and witness interviews?

Despite certain commentators suggesting that regulators are "attacking" privilege rights in corporate investigations, the law on privilege in the U.K. has not changed. The SFO has never

requested legal advice provided by external lawyers to a suspect company under investigation – only the facts revealed as part of the company's internal investigation. The regulator has requested that companies under investigation be transparent in their dealings with the regulator and co-operate with the SFO's own investigation. The SFO requires transparency because the SFO not only has to preserve the best evidence for any prospective individual prosecution but, in accordance with the DPA Code of Practice, must also be satisfied that the "full extent of the alleged offending has been identified" by a fact investigation.[7] The General Counsel of the SFO has made it clear that the regulator has a legitimate interest in the internal work product of a company's lawyers derived from internal investigations, "including the accounts of witnesses spoken to in corporate investigations" and has affirmed: "We do not regard ourselves as constrained from asking for them even if they are privileged".[8] The General Counsel is not asking for companies to waive or otherwise give up legitimate claims to privilege: he is asking for facts to be extracted from privileged documents.

In the second U.K. DPA proceeding, *Serious Fraud Office v XYZ Limited*, the company had self-reported and "provided oral summaries of first accounts of interviewees and facilitated the interview of current employees, and provided timely and complete responses to requests for [other] information and material".[9] As underlined by *XYZ*, the Court and the SFO do respect genuine legal privilege claims and in *XYZ* the Court approved full co-operation credit in circumstances when the company withheld responsive material that was "subject to a proper claim of legal professional privilege".[10]

Such an approach to privilege is also consistent with DOJ practice. The DOJ has made it clear to companies and their advisers that waiving attorney-client and work product protections is not a pre-requisite under the DOJ's prosecution guidelines for a corporation to be viewed as co-operative.[11] As with the SFO, what is important to the DOJ is obtaining the relevant facts in lawyer-led investigations. The "Yates Memorandum", dated September 2015, provides policy guidance to DOJ attorneys when investigating a company. Importantly, Yates states, amongst other things, that "to be eligible for any cooperation credit, corporations must provide all relevant facts about the individuals involved in corporate misconduct".[12] Whether there is an emerging consensus of approach to fact "read-downs" or whether tensions between U.K. and U.S. approaches to privilege remain is discussed more fully in section 4 of this chapter in the context of the Rolls judgment, where the Court gave co-operation credit for Rolls' limited waiver over witness memoranda that the company viewed as privileged.

3. Structuring a fact investigation to best preserve privilege in U.K. corporate investigations

Legal privilege is sometimes referred to as a "shield" because it protects a company when it seeks legal advice or is subject to an enforcement proceeding. Consequently, it is important for the company to consider how to structure an engagement to maximise privilege as soon as it discovers an issue of concern that may lead to regulatory or enforcement proceeding. Taking time to consider privilege issues at the outset of a representation will mean that a company has a better chance of confidentially controlling its work product and retaining the ability to choose whether future disclosure to external parties will be in its best interests. Failure to do so can be irrecoverable.

Once a U.K.-headquartered company has identified the nature of the wrongdoing and determined that it needs to investigate, it should engage the advice of external lawyers. Privilege will more clearly apply to external lawyers' advice and work product than to the work product and advice of its own legal department – the privilege status of which is somewhat less secure, given that in-house lawyers often perform a broad range of roles extending beyond purely "legal" advice.

A company should also take practical steps to clearly demarcate categories of privileged material. Such steps include in some cases physically segregating privileged material, as well as separating or identifying legal advice within documents themselves. This can be particularly important where the investigation extends to jurisdictions which apply a widely-drawn work product privilege doctrine. In the U.S., for instance, U.S. privilege laws distinguish between two types of lawyer "work product": fact work product and opinion work product. In broad terms, factual witness accounts will fall into the former category, while a lawyer's mental impressions, theories and tactics will fall into the latter category. Opinion work product is afforded greater protection, because protecting opinion work product is likely to be more important to the company. Separating fact and opinion work product reduces the risk of inadvertent loss of privilege over opinion work product. Such demarcation is a particularly important consideration when a company is considering waiving privilege (as discussed further below). On the other hand, and underlining the complex issues in play in multijurisdictional investigations, weaving fact and opinion in witness accounts will – as mentioned above – only serve to strengthen any claim to privilege under U.K. law. A company and its external counsel need to carefully manage such tensions to ensure the right balance is struck.

Consequently, at the very outset of an investigation a company should map out its potential international exposure to regulatory proceedings and seek advice in each jurisdiction from suitably qualified local lawyers, including in relation to potential substantive offences and privilege issues. Privilege protections are not uniform, even within Europe. While a company wishing to preserve privilege over its investigation may succeed in one jurisdiction, this may be of no consequence if there is no claimable privilege over the same class of documents under the laws of another jurisdiction. The prospect of differing privilege protections across jurisdictions is not the sole reason a company may ultimately have to forgo its U.K. privilege rights, however. As discussed further in section 4 below, there might be compelling reasons for a company to voluntarily elect to give up its privilege rights, most commonly to gain co-operation credit with a regulator.

Appropriately, structuring witness interviews as privileged ensures protection but also requires a company to consider whether to waive that privilege. As discussed further in section 4 below, this is especially important where the case involves a U.S. regulatory dimension because the company risks waiving privilege over a broader class of privileged documents under the so-called U.S. "subject matter waiver" rule. Under this privilege rule a company which selectively waives privilege may be considered, on challenge, to have waived privilege over some or all of its privileged communications.

Setting up a non-privileged witness interviews, while avoiding the issue of waiver, risks that materials including witness interview accounts will become disclosable in all relevant proceedings. Indeed, structuring an investigation in this way is a bold approach which essentially entails giving up privilege protection where the company may not yet have had the opportunity to weigh up apparent or unanticipated risks. When an investigation is conducted in privileged circumstances the company at least preserves a position which may be softened later (for instance by waiver), rather than immediately adopting a position without privilege protections. As

a general matter, decisions in long and complex multi-jurisdictional investigations are best reviewed and considered on an ongoing basis.

4. Departing from claims to privilege in corporate investigations

For companies under investigation by the SFO or other U.K. regulators the most favourable outcome available to a company might be to enter into a DPA, thereby avoiding prosecution and ancillary consequences of conviction. The SFO has made it clear that a key component to obtain a DPA is full co-operation with the SFO during its investigation.

Indeed, a clear theme emerging from the Rolls DPA is that in big cases there is a "tipping point" where co-operation with the U.K. regulator trumps self-referral. Rolls' failure to self-report relevant conduct did not bar the company from securing a DPA. Lord Justice Leveson held that, whilst such a failure would "usually be highly relevant in the balance" regarding whether or not a DPA is in the interests of justice, Rolls' "extraordinary" co-operation meant that he "should not distinguish between [Rolls'] assistance and that of those who have self-reported from the outset".[13] Leveson LJ cited a number of examples of Rolls' extraordinary co-operation, amongst which was "genuine cooperation with the SFO in the conduct of Rolls-Royce's own internal investigation".[14] Particular instances cited of Rolls' co-operation in this respect included that Rolls agreed to (i) make audio recordings of witness interviews at the SFO's request, and (ii) disclose all interview memoranda (on a limited waiver basis), despite Rolls' view that such memoranda were privileged.[15]

As discussed above, in *XYZ* the company chose to preserve privilege and this approach was endorsed by the Court. However, in *XYZ* the company had pro-actively self-reported. In Rolls, it had not. As demonstrated in Rolls, waiving privilege over investigatory materials, most particularly facts from witness interviews, will be a clear-plus point on the regulator co-operation scale, despite the initial "deficit" of co-operation credit arising out of a late, incomplete or arguably not entirely genuine self-report. A company can therefore use co-operation credit to mitigate its own misconduct and to "tip the balance" in favour of a DPA. The worse the misconduct, as seen in the Rolls case, the more a company must do to demonstrate it has adequately co-operated, both to the SFO and then to the Court.

Waiving privilege, as the Court recognised in Rolls, therefore represents a genuinely proactive and co-operative case strategy. However, before taking the decision to waive privilege, a company needs to consult with its advisers about the potential wider ramifications – both real and prospective – which flow from the waiver. This will be particularly relevant in cases touching upon multiple jurisdictions, where the principle of "selectively" waiving privilege to one party may not be recognised or upheld in any ongoing or follow-on proceedings which concern the same facts, and therefore the same material over which privilege has been waived may be liable to production. In the U.S., for instance, a party (including a regulator) may challenge a partial waiver of privilege by a company under U.S. laws, as being an irreversible and absolute waiver of privilege to all parties – the principle of "selectively" waiving privilege to one party, while maintaining privilege against all other parties (in ongoing or future proceedings) is not generally recognised.

Cases with a U.S. dimension present another significant issue for a company considering a waiver of privilege. Not only is a waiver of privilege to one party (for instance, the SFO in England) likely to be taken by U.S. courts to be an absolute and irrevocable waiver of privilege to all parties but the company may also be taken to have waived privilege over other materials as well, under the principle of "subject matter" waiver. The extent of such waiver will depend on the circumstances of the case, in particular whether the privilege selectively waived extends only to "fact" or also to "opinion" work product. Greater risks attach to waivers of opinion work product, which represents the formal advice provided to a company by its external lawyers on a company's rights, liabilities and obligations.

A company structuring an investigation must therefore work worth with its external lawyers to devise careful strategies for managing all these risks. In particular, and subject to the fact circumstances of each case, in proceedings with a U.S. dimension the company and its advisers should, in light of the potential ramifications of subject matter waiver, consider whether not to waive privilege in the first place (which does little good for U.K. co-operation credit) or to structure the investigation as non-privileged, at least so far as the accumulation of facts is concerned. Abrogating the protection of privilege over the investigatory process will of course greatly diminish the company's control over the subsequent distribution of documents detrimental to the interests of the company. The consequences of waiving privilege without a proper assessment of these risks, or otherwise generating non-privileged material, may be damaging for financial, commercial and reputational reasons.

So how might a company find the balance between these competing issues, in the context of a multi-jurisdictional investigation, whilst simultaneously balancing the risk of waiver against the rewards of co-operation? The issue of subject matter waiver may drive considerations of how the company organises its reporting to a regulator. A middle way might be feasible, through which a company can take care to preserve privilege by providing oral "read-downs" during its investigation. Any witness interview account given to a U.K. regulator in this fashion, if carefully organised, should not stray into a waiver of privilege itself. Moreover, and significantly, regulator read-downs or oral fact summary presentations have been accepted by the DOJ in the U.S. as not amounting to a waiver of attorney-client and work product protections. It would therefore seem unlikely that the DOJ would view read-downs of witness interviews to U.K. regulators as affecting a subject matter waiver because such a position would go beyond its own policy on such "read-downs", namely that they will not be viewed by the DOJ as constituting a subject matter waiver.[16]

What is clear from this analysis is that determining the relevant jurisdictions early on in an investigation will be crucial in determining the right strategy for the company in dealing with the U.K. regulator, and a failure to take stock in this fashion may have serious consequences down the line. The jurisdiction that exposes the company to the highest degree of enforcement and litigation risk will likely dictate the approach taken by the company to privilege, on the basis that a company will be best placed across jurisdictions if it ensures it complies with the requirements of the "lowest common denominator".

If a company does decide that the potential upside before a U.K. regulator in waiving privilege is ultimately desirable, then it should consider what it can do to control the potential breadth of the waiver. The U.K. regulator may not be minded to accept the provision of oral read-downs as sufficiently "co-operative" conduct – for instance, where the regulator considers that provision of written records are important for prospective follow-on criminal proceedings against relevant individuals implicated in the relevant conduct, who fall within the U.K. regulator's jurisdiction. In this scenario, other practical steps a company could consider include, for instance, seeking the regulator's formal consent to a tightly-worded confidentiality agreement which ensures the regulator shall accept the material as privileged, not disclose it to other third parties (save as required by law), and only use the material for the specific

remit of its investigation. Such an agreement may not be acceptable in all jurisdictions (including the U.S.), but putting it in place is a practical step that will, at the very least, set up a prospective defence to counter a later claim that a broader waiver than was envisaged by the company has taken place.

Conclusion

Increased co-operation between the SFO and other government agencies, and an expectation from the SFO that companies disclose fact findings from witness interviews in lawyer-led investigations in order to obtain co-operation credit, means that it is more important than ever that companies consult external lawyers at the earliest opportunity to structure their investigations in a manner which will best protect their interests in relation to their approach to privilege.

Endnotes

1. Throughout the chapter we refer to U.K. when in fact primarily we are referring to England and Wales.
2. *R v Derby Magistrates Court, ex parte B* [1996] AC 487. 507.
3. [2016] EWHC 3161 (Ch).
4. *Tesco Plc v Office of Fair Trading* [2012] CAT 6.
5. *Three Rivers District Council & Ors v The Governor & Company of the Bank of England Rev 1* [2003] EWCA Civ 474.
6. *Property Alliance Group Limited v The Royal Bank of Scotland plc* [2015] EWHC 3187 (Ch).
7. Crown Prosecution Service, Serious Fraud Office, "Deferred Prosecution Agreements Code of Practice" (Crime and Courts Act 2013), paragraph 2.2.ii.
8. Alun Milford, SFO General Counsel, speaking to an audience of compliance professionals at the European Compliance and Ethics Institute, Prague on 29 March 2016: https://www.sfo.gov.uk/2016/03/29/speech-compliance-professionals/.
9. *Serious Fraud Office v XYZ Limited*, Case No: U20150856, 8 July 2016, per Leveson LJ at paragraph 27.
10. *Ibid*.
11. US Attorney's Manual 9-28.710.
12. Sally Quillan Yates, Deputy Attorney General, "Individual Accountability for Corporate Wrongdoing", 9 September 2015, p. 3.
13. *Serious Fraud Office v Rolls-Royce PLC and Rolls-Royce Energy Systems Inc*, Case No. U20170036, 17 January 2017, per Leveson LJ at paragraph 22.
14. *Ibid,* at paragraph 20.
15. *Ibid.*
16. US Attorney's Manual 9-28.720.

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Matthew Cowie
Dechert LLP
160 Queen Victoria Street
London, EC4V 4QQ
United Kingdom

Tel: +44 20 7184 7417
Email: matthew.cowie@dechert.com
URL: www.dechert.com

Matthew Cowie, partner in Dechert's White Collar practice, has extensive experience advising on fraud and corruption issues including internal investigations and government enforcement matters. Noted as having an "excellent knowledge of the regulatory agencies" (*Chambers UK 2016*), Mr. Cowie also advises on compliance best practices for UK and multi-national corporates, particularly with regard to anti-corruption and other corporate governance policies and procedures. He has broad industry sector experience, having worked on internal and government investigations in the pharmaceutical, financial institutions, defence, oil & gas and telecoms sectors.

Before moving to private practice in 2010, he spent 11 years in the Serious Fraud Office where he successfully brought the first two overseas corruption prosecutions of UK corporates whilst working alongside the Department of Justice, the Securities and Exchange Commission and the Office of Foreign Assets Control.

Matthew Banham
Dechert LLP
160 Queen Victoria Street
London, EC4V 4QQ
United Kingdom

Tel: +44 20 7184 7687
Email: matthew.banham@dechert.com
URL: www.dechert.com

Matthew Banham, senior associate in Dechert's white collar practice, specialises in corruption, fraud and financial services regulatory enforcement. He focuses his practice on white collar crime and regulatory and enforcement investigations, providing compliance advice on the Bribery Act and representation before regulators.

He has worked on many of the UKs most significant and landmark white collar cases including SFO corruption cases and the manipulation of both LIBOR and spot FX.

Prior to joining Dechert, Mr. Banham served as the senior vice president of Barclays Bank's litigation investigations and enforcement division where he advised and managed external investigations and regulatory risks for the investment bank. He has also had substantial tenures working for both the SFO and FCA.

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Email: info@glgroup.co.uk

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