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Osofsky's American Dream for the SFO

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Lisa Osofsky, a U.S./U.K. dual citizen who has served as a U.S. prosecutor joined the Serious Fraud Office as Director in September 2018, a challenging time for the SFO. However, her efforts during her first five months promise increased strategic focus with a side of stars and stripes.

Since taking on her new role, Osofsky has conducted a thorough review of the SFO's live cases and reorganised her management team. Many of the public statements she has made show the influence of her U.S. legal and compliance background and suggest that she will seek to bring a U.S.-style approach to future SFO cases. However, considering the challenges associated with prosecuting individuals and companies in this jurisdiction, it remains to be seen whether this new approach will reap rewards.

In this article, we set out our predictions for the SFO under Osofsky's tenure, focusing on the desire to swiftly bring companies and individuals to account, using methods tried and tested across the pond.

Wins and Losses

The SFO has recently experienced several large wins. It secured convictions against four individuals following a three-year investigation into FH Bertling relating to bribes paid to secure a £16-million contract. Additionally, it successfully concluded its first deferred prosecution agreement (DPA) with Standard Bank PLC.

However, there have been some setbacks as well. In the much-anticipated legal privilege battle with ENRC, the Court Of Appeal confirmed that documents created during an internal investigation, including interview memoranda, are protected by legal privilege. Osofsky was faced with the decision of whether to take the matter to the Supreme Court and decided in October not to mount an appeal. This is perhaps a reflection of her experience working as a prosecutor in the U.S., where privilege protections are stronger.

In another blow to the SFO, in May 2018, following a five-year investigation, the Crown Court dismissed the SFO's case against Barclays PLC and Barclays Bank PLC before the trial had even started. Despite a swift challenge by the SFO, the decision was upheld by the High Court.

Finally, the SFO closed out 2018 suffering defeats in two high profile re-trials within the space of a month. In November, Alstom Network U.K. Ltd and three of its directors were acquitted of corruption charges. In December, the Court threw out charges against two former Tesco executives who were prosecuted following the 2017 DPA entered into with the company. No doubt under

Osofsky's direction, the SFO subsequently offered no evidence against a third individual, and he was also acquitted. Commentators have subsequently questioned the SFO's decision to prosecute some of those cases and questions are also being raised regarding Tesco's decision to enter the DPA, the naming of relevant individuals in DPA documents and, more broadly, whether DPAs have any future in cases which do not involve the offence of failing to prevent bribery or failing to prevent facilitation of tax evasion (Fail to Prevent Offences).

See "What Does a 'Bigger and Stronger' SFO Mean for Companies?" (Nov. 28, 2018).

Cooperation, Cooperation, Cooperation

Increased Inter-Agency Cooperation

Prior to joining the SFO, Osofsky was a federal prosecutor for the U.S. Department of Justice, Deputy Counsel at the FBI, and a managing director at global compliance firm Exiger. She has made it clear that she intends to leverage the contacts she has made in other jurisdictions to strengthen the SFO's ability to investigate the most complex cases, which are often international in scope. Her strategy relies in part on the "shared use of important intelligence information," which she hopes will help "crack open" cases, she explained while giving oral evidence before the House of Commons Justice Committee in December 2018.

Osofsky also wants to build on the SFO's cooperation with other agencies and civil society to share best practices. She has brought in the U.S.-qualified co-head of Jenner & Block's London investigations practice, Peter Pope, to spend a year at the SFO, to "assist with building and consolidating relationships with authorities in jurisdictions and to act as an adviser in case reviews on compliance issues," according to a press release issued in September 2018. Prior to Osofsky's arrival, the DOJ had already seconded a lawyer to the SFO, who will take his experience back to the DOJ with a view to training and sharing U.K. best practices with the SFO's U.S. counterpart. Given the U.S.'s success holding companies to account for criminal conduct, this kind of close relationship is likely to continue under Osofsky.

See "Is the Pie Getting Bigger? Double Jeopardy in the Age of International Cooperation" (Sep. 5, 2018).

DPAs

As a former U.S. prosecutor, Osofsky is likely to be comfortable using DPAs to settle large corporate investigations, and we predict an increase in their use for appropriate future cases, particularly following the landmark Rolls-Royce DPA in 2017.

We predict that cooperation by corporate defendants will also continue to be the driving factor in any decision to offer a company a DPA. Joint Head of Bribery & Corruption Matthew Wagstaff, speaking at a conference in November 2018, acknowledged that lawyers and corporates want more guidance on what is expected, particularly following the decision in ENRC, and indicated that the SFO is willing to provide this.

Speaking at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act in November 2018, Osofsky explained that corporate

cooperation means "making the path to a case easier" for the prosecutor. This means that companies will be expected to provide the SFO with evidence it does not already have, but it also means that Osofsky will expect companies to help guide the SFO's investigation to help it focus on the most relevant lines of enquiry.

Based on these statements, we expect to continue to see requests for interview notes and real credit given where those are shared, but we may also see a greater respect for companies who wish to retain privilege. Although the official stance under Osofsky's predecessor, David Green, was that the SFO's position on companies refusing to waive privilege was neutral, anyone who has dealt with the SFO on this point can testify to the pressure brought to bear on cooperating companies to waive privilege.

Prior to joining the SFO, Osofsky led the Europe, Middle East and Africa branch of the monitorship for HSBC Bank under its DPA with the DOJ. While all of the SFO's DPAs have included terms which require remediation and the implementation of enhanced compliance, we expect to see an enhanced focus on remediation and compliance in the SFO's decision making process on whether it is appropriate to offer a company a DPA, and predict that Osofsky's tenure is also likely to see the requirement to appoint an independent monitor during the life of the DPA to be included in future DPA terms.

Towards Global Settlements

Increased international cooperation will reinforce the trend we have seen in recent years of agencies working together and coordinating sanctions against companies where criminal activity has been committed in multiple jurisdictions. In addition to its DPA with the SFO, Rolls-Royce reached settlements with the DOJ and the Brazilian authorities, following a coordinated investigation by the three agencies. The finality of a global settlement is an incentive for companies to cooperate with agencies, particularly in jurisdictions where the option of a DPA is available. As we see more jurisdictions introducing DPAs, (France and Canada introduced DPAs in 2016 and 2018, respectively, and the Australian Senate is currently considering draft legislation which would introduce DPAs in Australia) we are likely to see more of these types of global settlements, with companies entering simultaneous global settlements in multiple jurisdictions.

See "Corruption Enforcers Discuss Benefits and Pitfalls of Increasing International Cooperation" (Jan. 9, 2019)

Brexit

Osofsky confirmed that the SFO is preparing for a no-deal Brexit during her testimony before the House of Commons Justice Committee in December 2018. In the event that the U.K. leaves the European Union in March without a deal, the SFO will have to rely on pre-existing multi-lateral treaties for the continued sharing of information and cooperation, and could lose access to some European intelligence-sharing programmes. However, there is a shared benefit to continuing cooperation and intelligence sharing, and it is likely that international agencies will work together with the SFO to find workable solutions. A no-deal Brexit is therefore unlikely to stop access to European information and intelligence, but it may slow down the process and make it more expensive.

See "Compliance Implications of Brexit" (Apr. 26, 2017).

Strategic and Streamlined Investigations

Speaking at the Cambridge International Symposium on Economic Crime 2018, Osofsky declared that she is committed both to creating opportunities for companies to enter into DPAs and to "taking on and cracking the most complex and difficult crimes and bringing these cases to trial." Additionally, at a conference at NYU School of Law, she explained that she wants to see a "renewed dedication to moving cases more quickly," and, at the ACI Conference, she said she wants the SFO "investigating and charging at pace" and "bringing resolution to cases in real time." To that end, she has appointed a separate chief of intelligence to alleviate pressure on the current chief investigator, who was being "pulled in too many directions," she told the House of Commons Justice Committee. Separately, she said during her testimony that she wants her new General Counsel to concentrate solely on "case review and case check" and not on managing people, taking on more of a case "quality assurance" role.

Investment in Talent and Technology

Recent changes to the SFO's funding structure have seen its core funding increased by 45 percent to £54 million. This means the SFO will have to rely less on so-called "blockbuster" funding, which required the SFO to apply to the Treasury for additional funds in cases where the cost exceeded a certain limit and left the SFO "hamstrung" in how it ran its cases, Osofsky explained to the Justice Committee. Increased core funding will enable the SFO to invest in permanent staff instead of relying on short-term contractors. This, in turn, should mean a more engaged and motivated workforce, leading to better quality investigations and prosecutions. It is also likely to bolster the recent trend of lawyers seeking prosecutorial experience before entering private practice, mirroring the U.S. legal market. U.S. firms have traditionally valued prosecutorial expertise and London firms are following suit, which means the SFO's increased core funding could make it a more attractive career stepping-stone for aspiring junior talent.

Increased funding should also allow the SFO to invest further in technology to increase efficiency and speed up investigations. Osofsky will be leveraging the SFO's existing artificial intelligence (AI) capability, which has been used in all of its new casework since April 2018, according to an SFO press release. In data-rich global cases, Technology Assisted Review (TAR) will be vital to whittling down thousands of terabytes of data, including emails, instant messaging records and smartphone data, to quickly identify relevant documents. Rolls-Royce was the first U.K. case to use TAR, enabling the SFO to analyse some 30 million documents for legal privilege, and Osofsky has already confirmed that the SFO will continue to use TAR.

An increased reliance on TAR is likely to lead to enhanced judicial scrutiny when the court comes to approve the terms of a DPA, and potential issues in prosecution cases. Judges and defence lawyers will want to ensure that the SFO has complied with its obligations to pursue all lines of enquiry and make full disclosure, particularly in the wake of the Tesco trial. The courts are likely to scrutinise

how TAR has been used and will want comfort that any investigation carried out has been comprehensive and thorough. Companies seeking a DPA who have used TAR in internal investigations will have to consider this issue, as one of the key factors the judge is likely to take into account when approving a DPA is whether the TAR process has been carried out diligently. The judge will want to test the AI process followed.

See "Real Risks, Artificial Intelligence: The Next Wave of Anti-Corruption Compliance?" (Feb. 21, 2018).

"Flipping the Perp"

In the U.S. it is common practice to encourage individuals to assist during criminal investigations in exchange for reduced sentences or immunity from prosecution. This practice is less common in the U.K., and was not popular with Osofsky's predecessor, David Green, who preferred prosecuting over cutting deals.

The Serious Organised Crime and Police Act 2005 (SOCPA) enables U.K. prosecutors to give a "restricted use undertaking," which is an agreement not to use someone's testimony against them in any prosecution, if they comply with conditions set by the prosecutor. In both her testimony to the Justice Committee and her speech at the ACI Conference, Osofsky has indicated that she intends to make greater use of this tool to speed up investigations. This could prove popular with individuals involved in global investigations. The penalties for white collar crime in the U.S. are notoriously steep, so individuals may be more inclined to cooperate with the SFO in order to secure a reduced sentence or immunity in the U.K. (so-called "forum shopping"). Defendants considering this tactic would be well-advised to try and reach a collective agreement involving all agencies with jurisdiction to prosecute, before testifying under a SOCPA agreement.

However, there is reason to be cautious. Tom Hayes, convicted of rigging LIBOR in 2015, famously cooperated with the SFO under a SOCPA agreement, before withdrawing from the agreement, claiming that he had only made admissions to avoid being extradited to the U.S. Having withdrawn from the agreement, Hayes could not stop the SFO using his testimony as evidence against him. He is one of only a handful of individuals successfully prosecuted in connection with LIBOR, and is currently serving a prison sentence of 11 years.

Proceeds of Crime

With echoes of the DOJ's Kleptocracy Asset Recovery Initiative, Osofsky has also indicated a renewed interest in "recovering" or forfeiting criminal property, saying at the Cambridge Symposium that this will be a priority for the SFO during her tenure. One of the ways she will do this is through Unexplained Wealth Orders (UWOs), which are a powerful new tool placing the burden on the person named in the order to prove property was acquired legitimately, rather than on the investigator to prove it was acquired illegitimately. So far, the only agency to obtain a UWO is the National Crime Agency (against Zara Hajiyeva), but the SFO is already looking for appropriate cases in which to use them, according to Wagstaff.

See "Joint Head of Bribery at the SFO Discusses the Agency's Priorities" (May 30, 2018).

2019 and Beyond

Following the collapse of the trial against the Tesco executives (on charges which were the basis of the corporate DPA), companies may now be more hesitant to accept a multi-million-pound DPA – especially in cases which are not predicated on Fail to Prevent Offences. However, the commercial value to a corporate of achieving finality and certainty through a DPA should not be underestimated. In contrast to the process in the U.S., the case also raises interesting questions about the level of judicial scrutiny to be applied to the underlying evidence in English DPA cases. The SFO sought a DPA with Tesco on the basis that it had sufficient evidence to provide a realistic prospect of convicting the company. But Osofsky could find future DPA cases receiving far more judicial scrutiny with regards to the underlying evidence upon which the SFO relies – including evidence regarding corporate attribution of the offence.

At the NYU conference, Osofsky expressed frustration with how difficult it is under English law to prosecute companies compared to in the U.S. English prosecutors have long struggled to successfully prosecute companies using the "identification principle," and the Tesco DPA is a case in point. The DPA relied on the identification principle and, since the collapse of the prosecution against the individual directors, the validity of the DPA has been questioned. In contrast, section 7 of the Bribery Act 2010 has proved invaluable to the SFO when used together with the incentive of a DPA in persuading companies such as Rolls-Royce and Standard Bank to proactively cooperate with an investigation. Naturally, the SFO would like to see this model extended to other offences such as fraud and money laundering. The U.K. government conducted a consultation on extending the "failure to prevent" model in March 2017, but it is unlikely that there will be any developments in this area until Brexit has been resolved.

Separately, section 46 of the Criminal Finances Act 2017 has created a new corporate offence of failing to prevent the facilitation of foreign tax evasion with SFO named as its lead prosecutor. Considering the length of time it takes for misconduct to come to light and to investigate and prosecute new offences, it is likely to be some time before we see the first SFO prosecution in this area.

Conclusion

Based on Osofsky's actions and statements in her first five months on the job, we predict that we will see more reliance on intelligence led investigations, greater cooperation with other international agencies and sharing of expertise leading to an increase in coordinated global investigations and resolutions. Osofsky will continue to push for a broader approach to corporate liability but, in the meantime, increased reliance on SOCPA agreements to build clear and coherent case theories might improve the SFO's prospects of success in contested criminal trials. These efforts will be bolstered by the increase in core funding, which should mean a better resourced and more effective SFO. The SFO will continue to embrace technology, and we are likely to see the efficacy of TAR and AI robustly tested in the courts in future cases. In accordance with its mandate, the SFO will continue to tackle the biggest and most complex cases, and to that end, it looks like Osofsky is ensuring the SFO is ready to rise to the challenge.

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