



Osofsky sheds new light on SFO enforcement

Naomi Jeffreys - 23 November, 2018

As the UK's Serious Fraud Office adapts to its new director, Lisa Osofsky has outlined her future enforcement strategies, highlighting the importance of knowledge and cooperation.

In a keynote address given at the New York University School of Law (NYU) last month, the United Kingdom's **Serious Fraud Office's** (SFO) director **Lisa Osofsky** expanded on her future focus for the agency.

Osofsky – a dual-qualified lawyer in the United States and the UK – joined the SFO in August, bringing experience from the **Federal Bureau of Investigation** and the US **Department of Justice** (DoJ), with her appointment coming at what is a critical time for the agency, given the impending Brexit and the political uncertainty attached to that, particularly in how the agency will cooperate with its European counterparties.

The agency has recently seen its veteran lawyers look beyond public service to exploring new ventures, including **Alun Milford**, head of the agency's organised crime division and proceeds crime unit, who will join **Kingsley Napley** in the New Year, and the former director **Sir David Green CB QC**, who was recruited to Magic Circle firm **Slaughter and May** as a senior consultant in September.

Green left the SFO in April, following six years at the helm, during which time he guided the agency through setbacks such as the failed *Tchenguiz* investigation and threats from Prime Minister Theresa May to disband the agency altogether, although under his watch the agency implemented deferred prosecution agreements (DPA), which have so far brought in tens of millions in fines, beginning with **ICBC Standard Bank** in 2015, as well as **Tesco** and **Rolls-Royce** in 2017.

The new director seems clear in her view forward, which was seemingly echoed in her recent speech, as **Nathaniel Barber**, a barrister at **Kobre & Kim** in London, tells *CDR*. She rejects “calls from some commentators that the SFO should shift its focus away from large, headline-grabbing cases to those which are causing greater damage to businesses”.

“Instead, Osofsky confirms that the SFO will pursue ‘bigger and better’ cases, and thus large-scale investigations on a scale comparable to *Rolls-Royce* should be expected,” he explains.

DPAs DISSECTED

Indeed, in this regard, Osofsky noted that the agency's cases are “becoming increasingly multi-jurisdictional and complex, so cooperation to achieve global settlements like *Rolls-Royce* are ever more important”.

Next, she explained differences in the approach towards DPAs in the US and UK, with Barber noting that the DoJ has

seconded a lawyer to the SFO, which hints that similar approaches could be made, while collaboration with agencies, particularly the DoJ, looking set to continue.

“In these types of high-profile, cross-border actions, the stakes tend to be higher and the stakeholders more complex, so potential targets will need to take a more aggressive, multi-jurisdictional defence,” he notes.

EMBRACING THE DIFFERENCES

Continued collaboration across jurisdictions, agencies and sectors, is another strategy Osofsky hopes to strengthen during the tenure, noting that that is the way to make strong cases with impact.

“The most complicated and difficult cases – the cases the SFO makes and will continue to make – require it,” she added.

In this regard, the relationship goes both ways, and she noted that she was interested in working with newcomers to the DPA, namely Argentina, Australia and Canada – to “share best practice and offer advice based on our experience”.

In building these bridges, she said, “one of the things we need to focus on is that prosecutors in different countries live by different rules. These rules affect how we conduct our own investigations, and how we interact with each other and with our targets”.

Providing examples, Osofsky explained that Europe’s data privacy rules are “far more stringent”, which cause frustration among US prosecutors “who are used to getting what they want quickly with a subpoena”, while also highlighting the differences in disclosure rules in the UK, particularly with reform on the horizon.

This knowledge, she stated, will help prosecutors in other jurisdictions better understand why agencies attack the same investigative problem in radically different ways.

RECIDIVISM

For businesses seeking DPAs in response to an investigation, Osofsky was clear that the SFO demands “evidence of reform; we do not want recidivists”, adding that the agency will want assurance that companies are doing everything they can to ensure the crimes of the past are not repeated after the prosecutor moves on.

Christine Braamskamp, co-chair of the investigations, compliance and defence practice at **Jenner & Block**, and partner **Paul Feldberg**, note that Osofsky’s reoccurring references “recidivism” are telling. “Although the word is new in the SFO vocabulary, it is often used in the context of a US DPA” and the DoJ Foreign Corrupt Practices Act (FCPA) corporate enforcement policy.

A prosecutor, they note, must also consider this point under the DPA Code of Conduct when analysing whether or not to offer a company a DPA.

While recidivism is new in the SFO context, the point has been raised before and given that Rolls-Royce was investigated in several jurisdictions and still obtained a DPA, Braamskamp and Feldberg do not think any current internal or external investigations into a company’s conduct, which are in addition to a formal investigation, would be a bar to a DPA under current SFO jurisprudence and guidance.

There is an expectation that a company seeking a DPA will be open, transparent and cooperative; and that includes informing the authorities of any significant recent or current investigations for similar conduct, they explain.

Noting that even if it could be argued that the conduct under investigation has not yet passed the test of criminality and does not relate to the business line already under investigation, a “failure to mention such an investigation may lead to accusations of a lack of cooperation at best and at worst an attempt to deceive the authorities as to the state of the company’s compliance programme”, they say.

The requirement for a prosecutor to consider whether or not the company has engaged in similar conduct when considering

factors for or against a DPA would require a positive statement from the company as to the state of any other conduct that is aware of.

In light of all this, they conclude, Osofsky's "comments are entirely in line with the UK DPA process and do not signal a radical change in approach".

In addition to what Braamskamp and Feldberg note on the FCPA, Osofsky is giving a keynote address at the annual FCPA conference in Washington, DC, next week; a further signal perhaps of the director's upcoming focus.

A WIN-WIN SITUATION

Cooperation is a valuable strategy for the SFO with Osofsky stating that it is "important to the regime and DPAs are only considered appropriate if a self-report or company has fully cooperated with the prosecutor".

Alluding to this, **Neill Blundell** the head of corporate crime and investigations at **Macfarlanes**, says the director wants to offer companies a non-prosecution route "in return for their genuine desire to improve their compliance programmes and for the help they can give in successfully prosecuting the individuals involved in the wrongdoing".

Osofsky knows that she cannot send a company to prison, Blundell states, so this is a great alternative – a win-win – where "she is therefore going to improve the experience of the SFO investigators in understanding compliance and in particular in what a good programme is so she can ensure these companies keep to their part of the bargain".

A notable development in this strategy occurred last week when Osofsky and **Sir Brian Leveson PC** spoke before the House of Lords Select Committee on the Bribery Act 2010, with Osofsky seeking the extension of the failing to prevent offences to all economic crime.

"If she can get this extension, it will be much easier for her to persuade companies to come forward on all areas of economic crime and not just bribery and the facilitation of tax evasion," Blundell concludes.