What now for the SFO: New director, new direction?

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There look to be exciting times ahead for the Serious Fraud Office (SFO), with a new head, a higher budget, the imminent appointment of a new general counsel and several important cases coming to their denouement. These include Tesco, Alstom and Unaoil, among others.

Will Lisa Osofsky’s appointment as the SFO’s director change the status quo? The authors consider the likely answer to be yes — very much so.

In August 2018, Osofsky began her five-year term as director of the SFO. Osofsky, who has dual U.S. and UK nationality, joins the SFO with a broad range of public and private sector experience. Originally a federal prosecutor operating out of Chicago, she has spent time in the Department of Justice’s (DoJ) Fraud Division, as deputy general counsel, and as head of ethics at the Federal Bureau of Investigation. She has also held senior compliance roles at Goldman Sachs International and Exiger.

Osofsky recently appeared as a witness for the House of Lords Bribery Act 2010 Committee, during which she discussed the SFO’s current case list and added more colour to her vision for the SFO’s future. One thing we know for sure: Osofsky told the Lords that she is determined to “make it work”.

Focus on international cooperation

Considering that almost all of the SFO’s cases involve an international element, it follows that the new director expects to spend much of her time “working across jurisdictions, across agencies, across sectors”. While we know that the SFO has strong relations with European authorities, it is yet to be seen what impact Brexit will have on those contacts once the underlying EU framework is removed.
In contrast, given Osofsky's pre-existing associations with influential players across the pond, there is likely to be even greater and smoother cooperation with the U.S. authorities. Notably, further U.S. influence recently arrived at the SFO in the form of Peter Pope, a partner at Jenner & Block, on a year-long secondment.

As international liaison and investigations adviser, Pope is charged with building and consolidating relationships with authorities in other jurisdictions, participating in case reviews and advising on engagement with corporates and compliance issues.

In relation to the SFO's previous successes in securing deferred prosecution agreements (DPAs), Osofsky is keen to build closer ties with those jurisdictions also working to embed the DPA model: France, Argentina, Canada, Australia and Singapore. Such relationships will have benefits for the SFO when it comes to sharing intelligence and expediting the provision of evidence, and for companies, in potentially reducing the risk of double jeopardy as authorities take a joined-up approach to high-value global enforcement.

The overall message for corporates, as reiterated by Hannah von Dadelszen, head of fraud at the SFO, at a recent conference, is that "the world is getting smaller and there are fewer places to hide".

**Focus on punchy prosecutions**

Osofsky has previously described herself as an "avaricious prosecutor" and as being "greedy for cases". While beating her previous track record of 100 prosecutions for the U.S. federal government may be a little ambitious for a five-year tenure, Osofsky has welcomed the challenge of taking on "the big guys". Such "fair-fight opponents" may be a particular focus for the SFO in the next five years.

Aiding in this endeavour is the director's particular expertise in the money laundering arena and the new tools in her arsenal (such as unexplained wealth orders and asset recovery powers included in the Criminal Finances Act 2017). This fighting talk comes as Osofsky has spoken of wishing to lead an "emboldened" SFO, a sentiment that surely must have been reinforced by the recent increase to the SFO's core funding (from £34.3 million to £52.7 million — plus the scope to apply for additional blockbuster funding) and the restatement of the attorney general's support and commitment to maintaining the SFO's independence and prominence.

**Focus on sensible settlements**

Osofsky has repeatedly praised the DPA model for the flexibility it affords the SFO in being able to settle with companies who, upon discovering wrongdoing, have made proactive efforts to take stock, clean their houses and reform. The authors predict that the trend for sensible settlements will continue for companies that have self-reported and cooperated with the SFO, and have taken steps to remediate misconduct (whether by changing staff or fortifying existing procedures).

Recent comments by von Dadelszen flagged that compliance programmes are an area of increasing interest for the SFO, suggesting that a company being investigated should expect the SFO to go through its compliance architecture with a fine-tooth comb.

For those contemplating a self-report against a backdrop of strong policies and procedures, however, this may be seen as an olive branch. The focus on compliance is another area where Osofsky's and Pope's recent backgrounds will be invaluable to the SFO; her expertise in banks' compliance programmes and experience in the advisory sector no doubt will have made her a sure judge.

**Focus on legal changes**

In her first few public appearances, Osofsky has made it very clear that she would like to see a new "failure to prevent" offence to cover all economic crimes. Noting the current difficulty faced by the SFO of getting companies in the dock with the identification principle, she cited the corporate criminal liability offences introduced by the Bribery Act 2010 and the Criminal Finances Act 2017 as crucial in generating corporate awareness of, and engagement with, bribery and tax evasion.

When pressed by the Lords on the concept of vicarious liability of a corporation for the criminal acts of its employees (as favoured by the U.S. legal system), Osofsky advocated for the principle in situations where wrongdoing can be traced back to a substantial failure of controls, a real failure of leadership or where there is an endemic problem within the company, but she reaffirmed the SFO's commitment to the "failure to prevent" mechanism.
A more focused SFO overall

All of the above considered, it is the authors’ impression that the new director is aiming to achieve a more focused SFO overall: an organisation that takes on fewer cases but which, by narrowly channelling its resources, brings quicker resolutions and stronger prosecutions.

We have seen elements of this approach already:

- The creation and definition of the intelligence function, which is intended to drive a more proactive approach to sourcing new cases
- Once in the investigation phase, the increasing use of technology to speed up complex and data-heavy document review
- Where prosecution is necessary, the deployment of new asset recovery powers
- Where a company can show its past compliance, a DPA may be on the table — if it is unable to do so, but is otherwise complying well and taking steps to remediate, there is scope for settlement there too.

What does the arrival of the new director mean for companies?

Companies should take the opportunity to review their compliance programmes (across the spectrum: bribery and corruption, money laundering and terrorist financing, facilitation of tax evasion and business ethics) to ensure they bear scrutiny. If there are any pre-existing issues, the sooner they are discovered, the better: now may be a good time to disclose.

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