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CORPORATE CRIME BULLETIN

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Welcome to Willkie Farr & Gallagher's Corporate Crime E-Bulletin. This publication provides an update on recent developments in the UK and the U.S. with respect to financial crime and regulatory enforcement, including bribery and corruption, fraud, sanctions, money laundering, market abuse and insider dealing.

I. UNITED KINGDOM

a. Bribery, Corruption & Fraud

The Serious Fraud Office ("SFO") concludes two further Deferred Prosecution Agreements ("DPAs"): Rolls-Royce and Tesco Stores Limited

The first quarter of 2017 saw the SFO agree to two new DPAs, bringing the total the SFO has entered into to four since the regime was introduced in February 2014.

Rolls-Royce

Rolls Royce Plc and Rolls Royce Energy Systems Inc. ("Rolls-Royce") entered into a DPA in January 2017 in relation to counts alleging that bribery offences were committed across seven jurisdictions. The company agreed to pay £497 million to the UK authorities. That figure included disgorgement of £258 million, a financial penalty of £239 million plus interest, and the SFO's investigation costs of £13 million. Rolls Royce also agreed to pay fines to the US Department

of Justice and Brazilian authorities, as part of a coordinated global settlement, bringing the total settlement to over £670 million.

The conduct identified in the DPA included:

- Conspiracy to corrupt in relation to sale and supply contracts in Indonesia, Thailand and Russia. The range of conduct identified occurred between 1989 and 2009 and involved agreements to make corrupt payments through third party agents and/or intermediaries.
- Failure to prevent bribery by third party intermediaries and employees in Nigeria, Indonesia, and Malaysia where the conduct occurred after the commencement of the Bribery Act 2010.
- Failure to prevent bribery by its employees who provided a US $5 million cash credit to a customer in return for the customer showing favour to Rolls-Royce in the purchase of Rolls Royce engines. Some, or all of the funds were intended to be used by the customer to pay for a two-week course in New York, which was to be attended by various customer employees and which including four-star hotel accommodation and lavish extra-curricular leisure activities. This conduct occurred after the commencement of the Bribery Act 2010.
- Failure to prevent bribery by its employees who provided a customer with credits worth US $3.2 million to be used to pay for the maintenance of a private jet. This credit was given at the request of an executive, in return for his showing favour towards Rolls-Royce in the purchase of products and services. The conduct occurred after the commencement of the Bribery Act 2010.
- False accounting in relation to the concealment or obfuscation of the use of intermediaries to facilitate its defence business in India between 2005 and 2009 when the use of intermediaries was restricted by the Indian authorities.

Despite the extent of the conduct identified, the court agreed that a DPA was in the interests of justice. A key factor for the judge in deciding to approve the DPA was the cooperation provided by Rolls Royce in the investigation, which included bringing new avenues of enquiry to the SFO's attention and providing the SFO with copies of the company's written accounts of interviews it had conducted as part of its own internal investigations. Rolls Royce received cooperation credit notwithstanding the fact that it did not self-report the misconduct in the first instance.

The DPA, a statement of facts and the detailed judgment approving the DPA are all on the SFO's website, available here.

The Rolls Royce DPA with the US Department of Justice is available here.

Tesco Stores Limited

On 28 March 2017, Tesco Stores Limited agreed to enter into a DPA with the SFO in relation to allegations of false accounting between February and September 2014. That DPA was subsequently approved by the Crown Court on 10 April.

Under the terms of the DPA, Tesco Stores Limited will pay a financial penalty of £129 million. The full terms of the DPA and associated documents are yet to be made public because of reporting restrictions in place. However, the Regulatory News Service issued by Tesco made it clear that cooperation with the SFO was a key factor in securing a DPA as opposed to a criminal prosecution.

The UK High Court refused to impose a "domestic common law duty of disclosure or candour" on the SFO when it applies for and executes a Letter of Request.

On 29 March 2017, the UK High Court rejected a challenge to a Letter of Request ("LOR") the SFO had issued on 23 March 2016 to the authorities in Monaco. The Claimants, individuals and entities connected to Unaoil, submitted that the LOR was unlawful because (i) it failed to disclose key information and (ii) it was impermissibly wide; namely it was a fishing expedition, and constituted an improper exercise of the SFO's statutory power under Section 7 of Crime (International Cooperation Act) 2003.

The SFO had relied upon a forthcoming media publication of allegations relating to the Claimants as a justification for the urgent invasive action that they requested from the authorities in Monaco. The Claimants submitted that the LOR was unlawful because it had, by omitting references to an ongoing investigation by the Australian authorities, overstated the risk of destruction of evidence and the need for urgent action. The court was not persuaded by this argument.

The Claimants also argued that there should be a "heightened procedural obligation" on the SFO when it makes such a LOR application. The court did not think that it would be right to superimpose a domestic common law duty of disclosure or candor or a procedural requirement in an area covered by a comprehensive international scheme. In relation to the second ground of the application, namely that the LOR was a "fishing expedition", the court was equally not persuaded.

The court was reluctant to interfere with the international process by which LORs are submitted and executed. The court repeatedly referred to international legal instruments that govern the LOR process and the checks and balances that are already in place to ensure fairness.

The SFO's new release can be found here.

The judgment can be found here.

b. Market Abuse, Insider Dealing & Financial Conduct Authority ("FCA") Enforcement

Changes to the FCA Enforcement Procedure

On 1 March 2017, the FCA introduced a new procedure for disciplinary cases. The FCA's Enforcement Information Guide has been updated to reflect these recent changes. A copy of the updated guidance is available here.

The key points of the new enforcement procedure are as follows:

- The initial meeting at which the FCA shares the scope of its investigation (the scoping meeting) has historically been held when the FCA is in a position to share its initial views on its investigative work. In an effort to enhance the transparency of the process, the scoping meeting will be held only when the FCA is in a position to share the reasons why investigators have been appointed; the scope and direction of the investigation, and the likely timing of key milestones and next steps.
- There are now three additional options available to parties looking to resolve partly contested cases at an early stage in proceedings (Stage 1), once the FCA has completed its Preliminary Investigation Report. These are:
    - The firm (or individual) agrees all relevant facts and issues and accepts that the facts amount to regulatory breaches, but disputes the penalty that the FCA intends to impose. In these circumstances the firm or individual will be eligible for up to a 30% discount for early resolution;
    - The firm (or individual) agrees all relevant facts, but disputes whether they give rise to regulatory breaches and, as a consequence, the penalty that the FCA intends to impose. In these circumstances the firm or individual will be eligible for a discount of 15-30% at the discretion of the Regulatory Decisions Committee (""RDC""); and
    - The firm (or individual) partially agrees to some of the facts, liability and penalty, but disputes a number of other issues. In these circumstances the firm or individual will be eligible for a discount of 0-30% at the discretion of the RDC.
- A full agreement of facts, liability and penalty at Stage 1 is still eligible for a 30% discount.
- The penalty discounts of 20% and 10% for settling cases after Stage 1 are no longer available.
- The firm (or individual) can now refer a case to the Upper Tribunal on an expedited basis without involving the RDC. This referral can be made before a warning notice is issued by the FCA.

As a result of the above, settlement discounts will be available in a wider range of circumstances allowing regulated firms an opportunity to challenge aspects of the Enforcement Team's findings before the RDC rather than the "take it or leave it" approach previously available.

The FCA orders Tesco plc and Tesco Stores Limited (together "Tesco") to pay redress for market abuse

On 28 March 2017, Tesco agreed that it committed market abuse in relation to a trading update it published on 29 August 2014, which gave a false or misleading impression regarding the value of publicly traded Tesco shares and bonds. Tesco agreed to pay compensation to investors who purchased Tesco securities on or after 29 August 2014 and who still held those securities when the statement was corrected on 22 September 2014.

This is the first time the FCA has used its powers to require restitution under S.384 of the Financial Services and Markets Act (2000) to order a listed company to pay compensation for market abuse. Under the compensation scheme, Tesco is required to pay to each investor an amount equal to the inflated price of each security. The FCA estimated that the total amount of compensation payable under the scheme is likely to be in the region of £85 million, plus interest.

The FCA did not impose an additional financial penalty on Tesco in light of the DPA that the company entered into with the SFO regarding the same conduct, described above.

A copy of the FCA's press release can be found here.

Two former Barclays traders acquitted of Conspiracy to Defraud charges in relation to LIBOR Manipulation

On 6 April 2017, two former Barclays employees were acquitted by a jury at Southwark Crown Court of Conspiracy to Defraud charges relating to the manipulation of US$ LIBOR.

So far 19 individuals have been charged in relation to Libor and Euribor manipulation. Of these, one (Peter Johnson) pleaded guilty; four have been convicted (Tom Hayes, Jonathan Mathew, Alex Pabon and Jay Merchant); and eight have been acquitted, including six inter-dealer brokers in addition to the two former Barclays employees.

The trials of the remaining six former traders from Deutsche Bank AG, Barclays Plc and Societe Generale are scheduled to stand trial in London in September 2017 for offences relating to the manipulation of Euribor and Libor. They allegedly attempted to manipulate the euro interbank offered rate between 2005 and 2009.

In February of this year, former Societe Generale SA trader, Stephane Esper, won a French court ruling blocking a request by UK prosecutors to extradite him to face charges for rigging a key interest-rate benchmark. The Paris appeals court rejected the arrest warrant, ruling that the alleged conduct was not outlawed in France, where the conduct took place. French prosecutors said that they would not appeal the decision on behalf of the UK's SFO.

A copy of the SFO press release can be found here.

c. Anti-Money Laundering

UK Money Laundering Regulations 2017

On 15 March 2017, the Government published the draft Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. The Regulations, which are still subject to revision, are set to come into force on 26 June 2017. The Regulations will replace the 2007 Money Laundering Regulations and transpose the European Union's Fourth Anti-Money Laundering Directive into English law.

The new Regulations make significant changes to the Customer Due Diligence ("CDD") requirements imposed on firms in the regulated sector. There are also additional and more detailed requirements in relation to risk assessments and internal controls. For example, regulated firms will have to keep an up-to-date record of the steps they take to assess the money laundering risks affecting their business, and carry out screening of relevant employees and agents where appropriate. The extent of CDD measures applied will need to reflect the results of a firm's risk assessments, as well as its assessment of risk in individual business relationships.

Consistent with this approach, there will no longer be categories of clients to which Simplified Due Diligence ("SDD") measures can be automatically applied. Under the new Regulations, a firm will only be entitled to apply SDD measures where it determines that the business relationship in question is low risk, taking account of the factors specified in the Regulations. Similarly, Enhanced Due Diligence ("EDD") must be applied in high-risk business relationships and transactions. The firm must then decide upon the extent of any SDD/EDD measures to be applied, having regard to guidance issued by the European Supervisory Authorities, currently published in draft. The Joint Money Laundering Steering Group has also published draft revisions to its guidance to reflect the 2017 Regulations.

Draft Money Laundering Regulations 2017

European Supervisory Authorities draft Joint Guidelines on SDD and EDD

Joint Money Laundering Steering Group

Criminal Finances Act 2017

On 27 April, the Criminal Finances Act 2017 (the "Act") received Royal Assent. The Act is intended to significantly improve the ability of enforcement authorities to "*tackle money laundering and corruption, recover the proceeds of crime, [and] counter terrorist financing*". The Act introduces, among other measures, two new corporate offences of failing to prevent tax evasion, and provides enforcement authorities with the authority to seek the recovery of the proceeds of crime with the introduction of Unexplained Wealth Orders ("UWOs"). The Act also extends the time period for enforcement authorities to investigate suspicious transactions, and allows private entities to share information relating to money laundering and terrorist financing. The provisions of the Act will come into force on the publication by the UK Government of commencement regulations.

Corporate Tax Evasion Offences

The Act introduces strict liability corporate offences for failing to prevent a person associated with the entity from facilitating a UK tax evasion or a foreign tax evasion offence. An employee, agent or person performing services for or on behalf of the entity may be an "*associated person*" for the purpose of these offences. This is similar to the test under the Bribery Act 2010 (the "Bribery Act"). These offences do not require the "*associated person*" to intend for the entity with which they are associated to obtain or retain an advantage or benefit, in contrast to the Bribery Act offence which does require the additional criteria to be met.

The UK tax evasion offence may be committed by a non UK entity acting entirely extra-territorially, provided that the entity facilitates the evasion of UK tax laws. The foreign tax evasion offence requires a UK nexus.

It is a defence to both offences for the entity to have "*prevention procedures*" in place that were reasonable in the circumstances. It would also be a defence to show that it was not reasonable in all the circumstances for the entity to have "*prevention procedures*". Again, this is similar to the "*adequate procedures*" defence under the Bribery Act, albeit the procedures required will not all be the same. These procedures should include:

- Due diligence on third parties;
- Representations, warranties and audit rights in contracts with third parties;
- Policies that are clearly communicated, both internally and externally (where appropriate);
- Regular training, as appropriate, of employees to identify any risks and escalate potential breaches;
- Oversight of the risk assessment by senior management and sufficient allocation of resources to the detection and monitoring of the risk;
- Periodic assessment of policies and procedures to ensure that they are suitable, appropriate and proportionate.

Unexplained Wealth Orders

The Act also introduces new provisions into the Proceeds of Crime Act 2002 ("POCA"), allowing the High Court, to make a UWO.

The relevant enforcement authority can make an application to the High Court for a UWO, with respect to property held by a foreign politically exposed person or a person about whom there are reasonable grounds to suspect that they have been involved in serious crime. There must also be evidence that the individuals' known sources of lawful income are insufficient for them to have obtained the property in question. The court will need to be satisfied of the above on the "balance of probabilities", the civil standard of evidence.

d. Financial and Trade Sanctions

The New Enforcement Regime for UK Sanctions Breaches

Part 8 of the Policing and Crime Act 2017 (the "2017 Act") came into force on 1 April 2017 and introduced a new financial sanctions regime to the UK. The Act significantly changes the way in which the UK authorities will enforce the sanctions regime and reflects the UK Government's intention to incorporate aspects of U.S. sanctions enforcement, which allows the U.S. Office of Foreign Asset Control to swiftly impose substantial financial penalties without recourse to the criminal courts.

The key new provisions of Part 8 of the 2017 Act are as follows:

Powers were created for Her Majesty's Treasury ("HMT") to impose monetary penalties for breaches of financial sanctions.

Whether or not there has been a breach of financial sanctions can now be determined in accordance with the civil evidential test for liability ("on the balance of probabilities"), as determined by the Office of Financial Sanctions Implementation ("OFSI"), part of HMT. Only the more serious cases will be referred for criminal prosecution.

- The criminal penalties for breaches of financial sanctions have increased.
- Breaches of financial sanctions are now on the list of offences for which DPAs can be applied.
- Serious Crime Prevention Orders can now be applied to financial sanctions breaches.
- The HMT can implement a UN Security Council Resolution on a temporary basis until its implementation through EU legislation.

A copy of the 2017 Act can be found here.

OFSI issued guidance setting out what its powers are, how they will be used, and a person's rights in the event of having a monetary penalty imposed. OFSI also updated its general guidance on financial sanctions, covering its approach to compliance and the issuing of licences, and taking into account case law and EU guidance. A full copy of the guidance can be found here.

HM Treasury to Give Direct Effect to UN Sanctions Listings

HM Treasury has confirmed that, in line with the new powers described above, it will add all new UN financial sanctions listings made by UN sanctions committees to the consolidated list of sanctions targets in the UK within one working day of their listing by the UN. Those UN listings will remain in force for:

- 30 days, or
- until the EU adds the new listing to an existing sanctions regulation (whichever is sooner).

HM Treasury Public Consultation on Post-Brexit Legal Framework for Sanctions

HM Treasury is currently undertaking a public consultation into the legal powers it will require to impose and implement sanctions following the UK's withdrawal from the EU. Details of the consultation, which closes on 23 June 2017, are available here.

Changes to North Korea Sanctions Regime

On 1 March 2017, the EU Council Regulation 329/2007 imposing financial sanctions on North Korea was amended so that it is now prohibited to open a new bank account held or controlled by a North Korean diplomatic mission, consular post or North Korean members of those missions. Further, by 11 April 2017 existing bank accounts held or controlled by such individuals or entities must have been closed.

Renewal of EU Arms Embargo on Myanmar

The EU has extended its embargo on providing arms and goods that might be used for internal repression to Burma/Myanmar until 30 April 2018. The more extensive trade and financial sanctions against Burma/Myanmar were lifted in April 2013.

II. UNITED STATES

a. The Foreign Corrupt Practices Act ("FCPA")

The Department of Justice's ("DOJ's") Extension of the FCPA Pilot Programme

On 10 March 2017, a DOJ official announced that the DOJ Fraud Section would temporarily extend its FCPA enforcement pilot programme while it assesses the programme's effectiveness. The programme, which launched last year and was set to expire on 5 April 2017, gives companies "credit" for voluntary self-disclosure, cooperation, and timely and appropriate remediation in FCPA matters. If a company meets each of the three general requirements, the Fraud Section may offer up to a 50% reduction off of the lower end of the otherwise applicable U.S. Sentencing Guidelines fine range, and may also consider a declination of prosecution. The DOJ has issued five declination letters under the programme so far.

A copy of the announcement can be found here.

New DOJ Guidance on Corporate Compliance Programmes

On 8 February 2017, the Fraud Section of the DOJ's Criminal Division published a list of "important topics and sample questions that the Fraud Section has frequently found relevant in evaluating a corporate compliance program". The Fraud Section grouped its sample questions into 11 topics: (1) analysis and remediation of underlying misconduct, (2) senior and middle management, (3) autonomy and resources, (4) policies and procedures, (5) risk assessment, (6) training and communications, (7) confidential reporting and investigation, (8) incentives and disciplinary measures, (9) continuous improvement, periodic testing and review, (10) third party management and (11) mergers and acquisitions.

The existence and effectiveness of the corporation's pre-existing compliance programme and the corporation's remedial efforts to implement an effective corporate compliance programme or to improve an existing one are among the specific factors that U.S. federal prosecutors are instructed to consider when investigating corporate entities (known as the "Filip Factors").

A copy of the evaluation can be found here.

b. U.S. Sanctions Enforcement

New Office of Foreign Assets Control ("OFAC") Guidance Concerning SDN List Removal Process

On 20 April 2017, OFAC published practical guidance for applying to be removed from the Specially Designated Nationals and Blocked Persons List ("SDN List"). In issuing the guidance, OFAC noted that it removes hundreds of entities and individuals from the SDN List each year and that the "ultimate goal of sanctions is not to punish, but to bring about a positive change in behavior".

A copy of the guidance can be found here.

ZTE Agreed to Pay $1.19 Billion Fine for U.S. Sanctions Violations

On 7 March 2017, after a five-year investigation, Chinese telecom company ZTE Corporation agreed to plead guilty to conspiring to violate the International Emergency Economic Powers Act ("IEEPA") by illegally shipping U.S. technology to Iran, as well as to obstructing justice and making a material false statement. The United States Attorney General stated that ZTE "lied to federal investigators and even deceived their own counsel and internal investigators about their illegal acts".

As part of its plea agreement with the DOJ and its simultaneous settlements with other U.S. agencies involved in the investigation, ZTE agreed to pay a combined $1.19 billion in criminal and civil penalties. If the plea is approved by a federal judge, the criminal fine will be the largest to be imposed in an IEEPA prosecution.

For more information, please see our client memorandum, "ZTE Penalized $1.19 Billion for Sanctions and Export Control Violations, a Record Fine Against a Non-Financial Institution," available here.

A copy of the DOJ's press release can be found here.

c. Securities and Exchange Commission ("SEC") Enforcement

United States Supreme Court Considers Whether Limitations Period Applies To SEC Disgorgement Claims

On 18 April 2017, the Supreme Court of the United States heard oral argument in *Koresh v. Securities and Exchange Commission* concerning whether the five-year statute of limitations that applies to government actions "for the enforcement of any civil fine, penalty, or forfeiture" also applies to SEC disgorgement claims.

Kokesh, who was found guilty of federal securities laws violations and ordered to disgorge $34.9 million in funds that he misappropriated between 1995 and 2006, argued that the five-year limitations period applies because disgorgement is both a penalty and a forfeiture within the meaning of the applicable statute. The SEC brought its claim against Kokesh in the Tenth Circuit in 2009, meaning that if the Supreme Court agrees with Kokesh, the SEC would be limited to seeking his ill-gotten gains from 2004 to 2006, or $5 million of the $34.9 million sought. The SEC argued that disgorgement is neither a penalty nor a forfeiture because under the applicable statute, those terms "refer to something imposed in a punitive way" and the "disgorgement remedy in SEC actions is not punitive". Accordingly, the SEC maintains that it is not constrained by a limitations period in seeking disgorgement.