WILLKIE FARR & GALLAGHER (UK) LLP

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CORPORATE CRIME BULLETIN

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

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Recent Publications

I. UNITED KINGDOM

a. Bribery & Corruption: Serious Fraud Office Investigations

Rio Tinto

On 24 July 2017, the Serious Fraud Office ("SFO") opened an investigation into suspected corruption by the Rio Tinto Group in the Republic of Guinea. The SFO joins the US Department of Justice ("DOJ") and the Australian Federal Police in investigating $10.5 million in payments to a consultant in relation to the company's negotiations with the Guinean President on an iron ore project in 2011.

The SFO's news release can be found here.

Amec Foster Wheeler Plc

The SFO has joined the DOJ and the Securities and Exchange Commission ("SEC") in their investigation of alleged overseas bribery by London-based engineering company Amec Foster Wheeler Plc. The investigation relates to the historical use of agents by Amec Foster Wheeler Plc, primarily in the Middle East, and certain of the company's other business counterparties in that region.

The SFO's news release can be found here.

b. Money Laundering

UK Money Laundering Regulations 2017 Brought into Force

The UK Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the "Regulations") came into force on 26 June 2017. The Regulations replace the 2007 Money

Laundering Regulations, and transpose the European Union's Fourth Anti-Money Laundering Directive into English law. Meanwhile the Joint Money Laundering Steering Group has published updated guidance incorporating the Regulations. The European Supervisory Authorities have also finalised their Joint Guidelines on Simplified Due Diligence ("SDD") and Enhanced Due Diligence ("EDD"). Credit and financial institutions are obliged under the Regulations to take these Joint Guidelines into account when deciding what SDD and EDD measures to implement.

The Regulations have imposed additional and more detailed requirements in relation to risk assessments and internal controls. For example, regulated firms must keep an up-to-date written record of the steps taken to assess the money laundering risks affecting their business, and carry out screening of relevant employees where appropriate. Supervisory authorities must take appropriate measures to review the risk assessments carried out by firms, and must develop written risk profiles for each regulated firm in their sector.

Other changes of note include:

- The Customer Due Diligence ("CDD") measures applied to a client must reflect the results of a firm's risk assessments, as well as its assessment of risk in individual business relationships.
- Firms are permitted to apply SDD only if they determine that the business relationship or transaction in question presents a low AML risk. There are no longer categories of relationship to which SDD can automatically be applied (although there are exceptions to certain of the CDD requirements in relation to clients that are listed on regulated markets).
- EDD is required in all cases identified as high-risk as a result of the firm's risk assessment, and for transactions with clients established in countries identified by the European Commission as high-risk.
- Transactions that are not conducted face-to-face will not necessarily require EDD to be carried out, although this is a high-risk factor unless safeguards are in place.
- There is a specific list of information which must be obtained where the client is an incorporated company.
- There will be a register of beneficial owners of trusts, so that trustees of UK trusts (and non-UK trusts with UK tax consequences) must retain certain details of the trust and the identity of the beneficial owners. Trustees must provide the information to firms where it is needed for CDD.
    - Money Laundering Regulations 2017
    - European Supervisory Authorities Guidance
    - Joint Money Laundering Steering Group Guidance

In June 2017, we conducted a seminar on the new regulations, which have since been finalised. If you were unable to attend the seminar, but would like a copy of the slides, or to further discuss the impact of these new regulations, please send us an email at pburrell@willkie.com, rmitchell@willkie.com, or pfeldberg@willkie.com.

FCA Guidance on the Treatment of PEPs

The Financial Conduct Authority (the "FCA") has published guidance for firms on how they treat Politically Exposed Persons ("PEPs") for Anti-Money Laundering Purposes. The guidance supplements the existing obligations firms have under the Money Laundering Regulations 2017 to assess the level of risk associated with individual PEPs, and the extent of EDD measures which should be applied. The guidance addresses: who should be treated as a PEP or a family member of a PEP, identifying higher-risk and lower-risk PEPs, and suggests EDD measures for firms to take in higher-risk and lower-risk situations.

Of particular note:

- The FCA expects that firms will not decline a business relationship merely because the customer is a PEP (or a family member/close associate of a PEP). Only if having carried out the risk assessment and concluded that the risks posed by the PEP are higher than the firm can effectively mitigate would it be appropriate for a firm to decline or close that relationship.
- In the FCA's view, a PEP entrusted with a prominent public function in the UK should be treated as a low-risk PEP, unless the firm has assessed that other risk factors not linked to their position mean they pose a higher risk.
- Whilst EDD will still be required for lower risk PEPs, the measures should be less extensive. For example, as to the obligation to establish the source of wealth and source of funds, the steps should be "less intrusive and less exhaustive". A firm could opt to only use information already available to them (such as transaction records or publicly available information) and need not make further inquiries of the individual unless anomalies arise.
- The list of characteristics which may indicate a higher-risk PEP includes when the PEP is responsible for, or is able to influence, allocation of scarce government licences or grant permission for significant construction projects.

A copy of the guidance can be found here.

c. Regulatory

FCA to Extend Senior Managers Regime

On 26 July 2017, the FCA announced a proposal to extend its Senior Managers and Certification Regime to almost all financial services firms. The purpose of the proposal is to reduce harm to consumers and

strengthen market integrity by making individuals more accountable for their conduct and competence. A consultation paper has been released, with feedback requested by 3 November 2017.

The proposed regime will affect almost every firm offering financial services, including those approved by the FCA and those firms subject to the Approved Persons regime. From March 2016, the FCA's Senior Managers and Certification Regime replaced the Approved Persons regime for banks, building societies, credit unions and PRA designated investment firms. The new proposal intends to replace the regime at almost all financial services firms.

To reflect the fact that different types of firms will have different risk factors, the FCA has proposed that it applies the three main elements of the Senior Managers and Certification Regime to all firms as a baseline. These are:

- **Senior Managers Regime**: Senior Managers are required to be FCA approved and suitable for the role in question. A "Statement of Responsibilities", setting out the scope of senior managers' accountability, must be provided to the FCA with their application for approval, and when there is a major change to their responsibilities. Senior Managers will also have a "Duty of Responsibility", such that if something goes wrong in an area for which they are responsible, the FCA will assess whether they took "reasonable steps" to prevent it. The FCA has also proposed new "Prescribed Responsibilities" that firms will need to give to their Senior Managers. These "Prescribed Responsibilities" will not apply to some firms such as sole traders and EEA branches.
- **Certification Regime**: firms are required to certify individuals who are not Senior Managers, but who may have a big impact on customers, markets or the firm. These individuals will be certified for their fitness, skill and propriety at least once a year.
- **Conduct Rules**: these rules will apply to almost every person working in financial services. The rules require individuals to act with integrity, care, skill and diligence, be open and cooperative with regulators, pay due regard to customer interests and treat them fairly, and observe proper standards of market conduct. The FCA executive director of supervision for retail and authorisations, Jonathan Davidson, has said that "[t]his is about individuals, not just institutions. The new conduct rules will ensure that individuals in financial services are held to high standards, and that consumers know what is required of the individuals they deal with".

The FCA has proposed to tailor additional requirements to reflect the different risks, impact and complexity of firms subject to the proposed extension to the regime. For example, the largest and most complex firms (described as "enhanced firms" in the consultation paper) will be required to have a Responsibilities Map (a document setting out management and governance arrangements).

The firm will also need Handover Procedures (such that a person becoming a senior manager has all the information and material that he or she could reasonably expect in order to do his or her job), and they will need to ensure that there is a Senior Manager with overall responsibility for each area of the firm. This is described as the "enhanced regime".

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

Please also refer to our recent client memorandum, entitled "Extension of the Senior Managers and Certification Regime by the UK's FCA", available here.

UK fines compliance officer for his firm's bad advice

On 14 July 2017, the FCA announced that it had fined a compliance oversight officer for failing to exercise due skill, care and diligence whilst performing this function at two firms: FGS McClure Watters ("FGS") and Lanyon Astor Buller Ltd. ("LAB"). The individual held a CF10 (compliance oversight) controlled function, as well as other controlled functions. The FCA found that the individual had failed to take reasonable steps to ensure that the processes at both FGS and LAB for giving advice on pension transfer exercises were adequate and met regulatory standards. According to the FCA, this led to a serious risk of unsuitable advice being given to customers about the merits of transferring their pension from a defined benefit to a defined contribution scheme, as part of an Enhanced Transfer Value pension transfer exercise.

d. Sanctions UK

Inquiry launched by the UK Parliament into UK sanctions policy after Brexit

The EU External Affairs Sub-Committee (the "Committee"), which is part of the House of Lords Select Committees, has launched an inquiry into UK sanctions policy after Brexit. The inquiry will consider the advantages and disadvantages of future co-operation between the UK and the EU on sanctions policy, and how such co-operation might take place. The Committee will consider examples of co-ordination by the EU with non-Member States on sanctions, the current sanctions regime and the way it will be transposed into UK law, and how a separate UK sanctions regime could impact on the UK's ability to achieve its foreign policy goals.

Updates on the inquiry can be found here.

Requirement to inform HM Treasury of known or suspected sanction breaches will be extended to certain businesses and professions not connected with financial institutions

Until very recently, the sanctions regime in the UK required certain financial institutions to inform HM Treasury of known or suspected sanctions breaches. The European Union Financial Sanctions (Amendment of Information Provisions) Regulations 2017 (the "EUFS Regulations"), which entered into force on 8 August 2017, imposes those requirements on certain other businesses, including independent legal professionals, law firms, auditors, external accountants, estate agents, tax advisers, and trust or company service providers

operating in the UK. The EUFS Regulations do not alter the schedules to the original regulations. Therefore, there is no requirement for lawyers to disclose any privileged information held by them in their capacity as lawyers. However, in its updated Guidance to Financial Sanctions (please see below), the Office of Financial Sanctions Implementation ("OFSI") has pointed out that lawyers must "carefully ascertain whether legal privilege applies, and which information it applies to" and that OFSI may challenge "a blanket assertion of legal professional privilege".

The businesses and professions caught by the new regulations can commit an offence if they do not inform HM Treasury if they know or suspect that a "relevant person" has committed a financial sanctions offence or is a designated person under the relevant regime. "Relevant person" includes (a) a customer of the business or profession; (b) a person who has been their customer at any time starting from a date that is set forth in each of the amended regulations; or (c) a person with whom the business or profession has "had dealings" in the course of its business on or after that date.

As mentioned above, OFSI has recently updated its Guidance to Financial Sanctions in order to take into account the EUFS Regulations. In the Guidance, OFSI has clarified that the reporting requirement for a financial institution or business is triggered when the knowledge or suspicion is based on information obtained in the course of carrying on their business. The report to OFSI must include the information or other matter on which the knowledge or suspicion is based, as well as any identifying information about that person. In the event that the report relates to a designated person who is a customer of the institution or business, the nature and amount or quantity of any funds or economic resources held by the institution or business for that customer must also be reported.

As outlined in the Guidance, OFSI has statutory powers to require information, including powers to (a) establish the extent of funds and economic resources belonging to, owned, held or controlled by or on behalf of a designated person, (b) request information concerning any disposal of such funds or economic resources, (c) obtain evidence of the commission of an offence, and (d) require the production of documents.

The European Union Financial Sanctions (Amendment of Information Provisions) Regulations 2017 are available here.

The updated OFSI guidance is available here.

New UK Sanctions Bill

The UK government has announced that it will seek to pass a new Sanctions Bill (the "Bill"). The UK currently negotiates and imposes non-UN sanctions against specific countries through EU laws. The Bill aims to ensure that the UK will have the necessary legal power to implement these sanctions after Brexit, and that the UK government will have greater flexibility in choosing when and how to introduce new measures. The government has stated that the UK will continue to play a central role in negotiating global sanctions as a member of the UN Security Council. The government has published its White Paper in response to its

consultation on the UK's legal framework for imposing and implementing sanctions post-Brexit. The government's response to the nine-week public consultation of these new powers is, in summary, to:

- Create new powers to impose, implement and enforce sanctions regimes, drawing on the current EU model;
- Introduce an annual review of regimes to ensure that they remain appropriate;
- Ensure individuals and organisations can challenge any sanctions imposed on them;
- Enable the government to issue exemptions when needed, for example, in delivering humanitarian aid in regions affected by sanctions; and
- Make it easier to stop suspected terrorists from accessing their money.

The full consultation outcome can be found here.

II. UNITED STATES

a. Market Abuse

Willkie wins reversal and complete dismissal of all charges in a cornerstone LIBOR manipulation case before the United States Court of Appeals for the Second Circuit

In a decision dated 19 July 2017, the Second Circuit reversed the judgments of conviction and dismissed the indictment of Willkie clients Anthony Allen and Anthony Conti, former Rabobank traders, in the first London Interbank Offered Rate ("LIBOR") manipulation case to be considered by a US court of appeals. On appeal, the Second Circuit focused on the question of whether the Fifth Amendment of the US Constitution permits "testimony given by an individual involuntarily under the legal compulsion of a foreign power" to be used "against that individual in a criminal case in an American court".

As of 2013, defendants Allen and Conti, both UK citizens and residents, were being investigated by UK and US enforcement agencies in connection with their roles in Rabobank's LIBOR submission process in the 2000s. Allen and Conti were compelled to testify in interviews conducted by the FCA, and the FCA subsequently disclosed that compelled testimony to one of the defendants' coworkers, Paul Robson. Robson, who had "closely reviewed that testimony, annotating it and taking several pages of handwritten notes", became an important co-operator for the DOJ in its case against Allen and Conti.

The Second Circuit held that "the Fifth Amendment's prohibition on the use of compelled testimony in American criminal proceedings applies even when a foreign sovereign has compelled the testimony" and that "when the government makes use of a witness who had substantial exposure to a defendant's compelled testimony, it is required under *Kastigar v. United States*, 406 US 441 (1972), to prove, at a minimum, that the witness's review of the compelled testimony did not shape, alter, or affect the evidence used by the

government". The Court found that the prosecution did not meet that burden here, that the defendants' compelled testimony was impermissibly used against them, and that "this impermissible use . . . was not harmless beyond a reasonable doubt".

b. Money Laundering

FinCEN fines foreign cryptocurrency exchange $110 million for money laundering

On 26 July 2017, the US Treasury's Financial Crimes Enforcement Network ("FinCEN") imposed a civil penalty of $110 million against BTC-e, a foreign-located online money transmitter which supports Bitcoin and other cryptocurrencies, for the wilful breach of anti-money laundering laws. Alexander Vinnik, one of the company's operators, was arrested in Greece and fined $12 million for his involvement in the breaches.

BTC-e was found to have committed numerous violations. These included a failure to obtain required customer information; the offering of advice to customers about the processing of illegal money on dark net market sites; the processing of over 300,000 Bitcoin transactions found to have taken place involving funds stolen from a Bitcoin exchange between 2011 and 2014; and the facilitation of at least $3 million in transactions related to ransomware attacks.

According to FinCEN, many of BTC-e's tens of thousands of transactions in convertible virtual currencies were undertaken with recipients located in the United States. FinCEN said that although BTC-e hid its locations and ownership, the company was "required to comply with US AML laws and regulations as a foreign-located money services business including AML program, MSB registration, suspicious activity reporting, and recordkeeping requirements".

A copy of the assessment can be found here.

c. SEC Enforcement

SEC announces $2.5 million whistle-blower award to government employee

On 25 July 2017, the SEC awarded almost $2.5 million to a whistle-blower employee of a US government agency. According to the SEC, the tip-off "helped launch a SEC investigation" and, with continued assistance, "enabled the SEC to address a company's misconduct". The whistle-blower's identity was protected by law, and the SEC also withheld the identity of the employer or government agency involved.

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

d. FCPA Enforcement

US seeks to recover $144 million in Nigerian oil industry bribery case

On 28 July 2017, the DOJ filed proceedings in an effort to recover assets including a $50 million apartment in Manhattan and an $80 million yacht that the DOJ claimed were purchased with monies stemming from a bribery scheme involving a former oil minister of Nigeria.

Two Nigerian businessmen are alleged to have entered a conspiracy with others to pay bribes to the minister responsible for Nigeria's state-owned oil company. In return, the minister is alleged to have secured lucrative contracts for the benefit of companies owned by the two businessmen, who in turn are alleged to have laundered their ill-gotten gains in the US, using the revenues to buy $144 million in luxury assets.

The lawsuit has been brought as part of the DOJ's Kleptocracy Asset Recovery Initiative, by which forfeiture of the proceeds of foreign corruption is sought.

Halliburton agreed to pay $29.2 million to settle FCPA charges brought by the SEC in relation to service contracts in Angola

On 27 July 2017, the SEC charged Halliburton with violating the FCPA's books and records and internal accounting control provisions. The SEC claimed that Halliburton used a local Angolan company to help it secure contracts with Angola's state oil company Sonangol, making profits of approximately $14 million. According to the SEC, the local Angolan company was owned by "a friend and neighbour of the Sonangol official who would ultimately approve the award of the contract".

An Associate Director of the SEC stated that "Halliburton committed to using a particular supplier that posed significant FCPA risks and a company vice president circumvented important internal accounting controls to get the deal done quickly". Those controls included determining the services required before selecting a supplier, conducting a competitive bidding process, substantiating the need for a single source of supply, and obtaining approval of a special committee for contracts valued at more than $10,000 in countries with high corruption risks. Halliburton agreed to pay $29.2 million in penalties, disgorgement, and prejudgment interest to settle the charges.

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

e. Sanctions Enforcement

New US sanctions on Russia, Iran, and North Korea

The US government has imposed additional sanctions on Russia, Iran, and North Korea. The new sanctions have come into force as part of the Countering America's Adversaries Through Sanctions Act. The Act will

limit the President's executive powers to amend or vary these sanctions, by requiring the President to obtain approval from Congress before the US sanctions on Russia can be lifted.

Among other things, the new Russia sanctions shorten the maturity periods for the debt that is subject to the existing restrictions under Directives 1 and 2 of Executive Order 13662 to 14 and 30 days, respectively. The sanctions also prohibit support by US persons for certain oil projects outside Russia in which listed Russian firms have at least a 33% interest.

For more information, please see our client memorandum "President Trump Signs Omnibus Sanctions Bill into Law, Tightening Sanctions Against Russia, but Leaving Open Questions on Implementation", available here. Willkie will be publishing an additional briefing on the new provisions shortly. If you have questions in the interim, please contact David Mortlock at dmortlock@willkie.com, or the Willkie attorney with whom you usually work.

OFAC fines AIG

On 26 June 2017, OFAC fined AIG $148,698 for violating US sanctions on Cuba, Iran, and Sudan. The mitigated fine reflects AIG's cooperation with OFAC, its sanctions compliance program at the time of the apparent violations, remedial actions taken in response, and the fact that it self-disclosed the violations and OFAC determined the case to be non-egregious. However, the OFAC decision highlights the importance of exclusion clauses in global insurance policies. OFAC noted that whilst AIG's compliance program included recommendations for when to use exclusion clauses in the policies it issued, most of those clauses were too narrow in their scope and application to be effective. According to the OFAC notice, "the best and most reliable approach for insuring global risks without violating US sanctions law is to insert in global insurance policies an explicit exclusion for risks that would violate US sanctions laws".

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