WILLKIE FARR & GALLAGHER (UK) LLP

AUGUST 2018

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 U.S. with respect to financial crime and regulatory enforcement, including bribery and corruption, fraud, sanctions, money laundering, market abuse and insider dealing.

CONTACTS

Peter Burrell | Rita D. Mitchell

Martin J. Weinstein | Simon Osborn-King

RELATED LINKS

Recent Publications

Compliance, Investigations & Enforcement Practice

I. UNITED KINGDOM

a. Bribery & Corruption

Unaoil

After an investigation lasting over two years, on 26 June 2018, the Serious Fraud Office commenced criminal proceedings against Unaoil Monaco SAM and Unaoil Ltd relating to alleged corrupt payments to secure the award of contracts in Iraq. The proceedings follow on from charges brought against four individuals in late 2017 for alleged conspiracy to make corrupt payments to secure Iraqi oil pipeline contracts between 2005 and 2011.

The official news release can be found here.

First Unexplained Wealth Order

The National Crime Agency successfully secured its first two Unexplained Wealth Orders in February 2018. The power to issue Unexplained Wealth Orders was introduced by the Criminal Finances Act 2017, and allows agencies such as the NCA to demand an explanation as to the source and interest in properties. In this case, the properties involved were worth approximately £22 million and were suspected to be ultimately owned by a politically exposed person.

The official news release can be found here.

In July 2018, the National Crime Agency faced its first challenge in the High Court to these Unexplained Wealth Orders. Judgment is awaited.

Skansen Interiors Limited

In February 2018, Skansen Interiors Limited was found guilty of failing to prevent bribery under section 7 of the Bribery Act 2010. The jury did not accept the company's "adequate procedures" defence. As the company was dormant and without assets, the court imposed an absolute discharge. This was the first contested trial of this offence since the Bribery Act came into force in 2011.

Willkie partner Peter Burrell and associate Amanda Azarian's commentary on the case can be found here.

EURIBOR

The Serious Fraud Office has successfully prosecuted two senior bankers for the manipulation of the EURIBOR rates during the financial crisis. Christian Bittar (formerly a trader at Deutsche Bank) and Philippe Moryoussef (formerly a trader at Barclays Bank) were sentenced to a total of 13 years and 4 months imprisonment. Three other traders, for whom the jury were unable to reach a verdict, are due to be retried in January 2019.

The official news release can be found here.

b. Legal Updates

Sanctions and Anti-Money Laundering Act 2018

The Sanctions and Anti-Money Laundering Act 2018 (the "Act") received royal assent on 23 May 2018. Given the UK's fast-approaching withdrawal from the European Union in March 2019, the Act is designed to enable the UK government to continue to implement UN sanctions regimes in order to further national security and foreign policy objectives; and to prevent money laundering and terrorist financing in line with international standards. Currently, as an EU Member State, any UN sanctions passed by the Security Council are directly passed into UK law through EU regulations. Following Brexit, the UK government will require a framework in place to implement its own sanctions regime. Importantly, the Act not only gives the UK government the power to remove and/or impose new sanctions but also to operate its own sanctions regime.

If you were not able to attend our seminar in June 2018 to hear Willkie partners Simon Osborn-King and Peter Burrell consider the Act, and have any questions about it, please contact them at pburrell@willkie.com or sosborn-king@willkie.com.

Court of Appeal Hears Arguments on Privilege in ENRC

In July 2018, the Court of Appeal heard the appeal of the High Court decision in *Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017 (QB)* which ruled in favour of the SFO and ordered ENRC to disclose various documents, including internal interview notes, on the grounds that legal privilege did not apply to those documents. Given the potential impact of the decision, the Law Society was

granted permission to intervene in the appeal. The SFO has argued that the "dominant purpose" test, which is used to determine whether litigation privilege exists, should also apply to assessments of whether legal advice privilege exists. The SFO has argued that the dominant purpose for the creation of the interview notes in question was to provide them to the SFO, but counsel for ENRC have argued that the notes were created for the purpose of obtaining legal advice. Judgment is expected during the fourth quarter of 2018.

See Willkie partner Simon Osborn-King's commentary on the Court of Appeal hearing in "ENRC ruling 'won't be the death knell'" here.

Fifth Anti-Money Laundering Directive

The Fifth Anti-Money Laundering Directive came into force on 9 July 2018 and Member States have until 10 January 2020 to implement the changes into their national legislation. The core aim of the Directive is to fight terrorism and uncover the beneficiaries of trusts and offshore structures. A key measure of the Directive is the creation of a register, to be maintained by Member States, containing details of the beneficial owners of trusts. The Directive also extends the current anti-money laundering rules to cover providers of services in relation to virtual currencies and reduces the threshold for the identification of the holders of pre-paid cards from €250 to €150.

The official news release can be found here.

II. UNITED STATES

a. FCPA and Hiring Practices

On 5 July 2018, it was announced that Credit Suisse Group AG ("Credit Suisse") and its Hong Kong unit have agreed to pay the sum of $76.7 million to the DOJ and the SEC to settle alleged violations of the Foreign Corrupt Practices Act. Credit Suisse has been under investigation for its hiring practices in Asia and was alleged to have "award[ed] employment to friends and family of Chinese officials" in order to win banking business.

The official news releases can be found here and here.

Further Impact of *Kokesh* on SEC Enforcement Actions

The SEC's enforcement authority has been further limited in a ruling by U.S. District Judge Nicholas Garaufis in the Eastern District of New York. In *SEC v. Cohen*, Judge Garaufis dismissed the SEC's enforcement action in its entirety against defendants Michael L. Cohen and Vanja Baros on statute of limitations grounds. The SEC had alleged that between 2007 and 2012, the defendants "orchestrated a 'sprawling scheme' to bribe public officials in exchange for business" for hedge-fund management firm Och-Ziff Capital Management LLC. The Court agreed with the defendants that the claims, which all accrued more than five years before the SEC filed suit, and were at least partly penal, were time-barred. In dismissing the case, the Court relied on the

U.S. Supreme Court's 2017 *Kokesh* decision, which held that disgorgement is a penalty subject to a statutory five-year limitation period. In so doing, the Supreme Court rejected the SEC's long-held position that as an equitable remedy, the SEC could pursue disgorgement claims free of any such time limitations. Significantly, in *Cohen*, the Court applied *Kokesh* not only to the SEC's disgorgement and penalty claims, but also to the SEC's claim for an "obey the law" injunction. The Court explained that the injunction sought by the SEC "would function at least partly to punish Defendants and is therefore a penalty." Consequently, the SEC had missed the applicable five-year deadline to sue the defendants.

The *SEC v. Cohen* decision is available here.

Distinction between Agency and Principal Relationships

The U.S. Court of Appeals for the Second Circuit reversed former bond trader Jesse Litvak's conviction on one count of securities fraud for making misrepresentations in the purchase and sale of residential mortgage-backed securities ("RMBS"). The Second Circuit held that the district court had erred in admitting testimony from a counterparty concerning that counterparty's mistaken understanding of Litvak's role in the RMBS transaction. The counterparty's trader erroneously believed that Litvak was acting as the counterparty's agent in the sale of the RMBS, rather than acting as principal.

Litvak appealed his 2017 jury trial conviction, arguing that his misstatements to the counterparty were immaterial to a reasonable investor. While the Second Circuit rejected Litvak's argument that such misstatements were immaterial, it held that where the transaction was at arm's length and it was undisputed that Litvak owed no fiduciary duties to the buyer, the evidence was prejudicial and its admission required reversal. This opinion reinforces the added challenge that the government faces when it tries to bring fraud cases based on alleged misrepresentations by traders in principal-to-principal transactions when no fiduciary duties are owed.

Please refer to our recent client alert entitled "Second Circuit Reverses RMBS Fraud Conviction: Highlights Distinction Between Agency and Principal Relationships," available here.

b. Sanctions

Iran and EU Blocking Statute

On 8 May 2018, the U.S. government announced that it would withdraw from the Joint Comprehensive Plan of Action (the "JCPOA"). The JCPOA was concluded on 14 July 2015 in relation to Iran's nuclear programme. Following this decision, previously waived Iranian sanctions (including secondary sanctions) will be re-imposed by the United States from August 2018.

In response, on 6 June 2018, the European Commission updated Council Regulation (EC) 2271/96 to include the U.S. measures on Iran. This regulation is known as the "Blocking Statute." Since neither the European

Parliament or the Council objected to the update, as of 7 August 2018 the updated Blocking Statute entered into EU law. The Commission has indicated that it will publish a Guidance Note to facilitate understanding of the Blocking Statute in due course.

The Blocking Statute's aim is to protect EU businesses "against the effects of the extraterritorial application of legislation adopted by a third country" by, among other things, (i) prohibiting compliance with the U.S. measures in respect of Iran; (ii) rendering non-EU court or Tribunal judgments unenforceable to the extent they give effect to the U.S. Iranian sanctions; and (iii) requiring a report be made to the European Commission in circumstances where economic or financial interests are affected by the U.S. Iranian sanctions.

In June 2018, we conducted a seminar on Sanctions and Export Controls from a U.S. and UK perspective, discussing in particular the impact of the Blocking Statute on existing policies and procedures.

If you were unable to attend the seminar but would like a copy of the slides, or to further discuss the impact of these sanctions and controls, please contact Peter Burrell or Simon Osborn-King in London at pburrell@willkie.com or sosborn-king@willkie.com, or David Mortlock in Washington, D.C. at dmortlock@willkie.com.

The European Commission's press release can be found here.