SERIOUS FRAUD OFFICE

Lisa Osofsky's Keynote Speech at 39th Annual FCPA Conference

Good afternoon.

It's good to be back with you. For those I've not met before, I am Lisa Osofsky and I am the Director of the UK's Serious Fraud Office, a position I have held for over four years.

I'd like to talk to you today about three topics.

Conscious of what you all do and the roles you all play in your organisations or for your clients, once I've made the most of this opportunity to give you an update on our successes this summer, I want to talk about global resolutions and the importance of international co-operation.

I will then give you examples of how the SFO works with offending corporates, how we apply the public interest test in determining what approach to take in a case, and the sliding scale we adopt – from no action if we don't have the evidence, to prosecution, to DPAs – but I really want to hone in on what we look for in compliance.

Before wrapping up, I will give you a flavour of what the current appetite is for tackling fraud in the UK, and legislative amends we are expecting to see or are pushing for, to give you a good idea of direction of travel – also using my experience of both to compare the UK system to the US.

I'm going to speak for approximately 25 minutes, leaving time to hear your views and discuss any of the points that I have raised.

Let's begin.

I have spoken to you a number of times before so I am going to keep my introduction to the SFO to just one sentence. We investigate and prosecute the largest and most complex cases of economic crime in England, Wales and Northern Ireland (Scotland has its own distinct legal system) – the top 1%, if you will.

But what sort of leader would I be if I didn't use a platform like this to give you a quick run-down of our recent results? It has been an extraordinary year for us.

The size of our cases means it's not unusual for us to have maybe only one or two trials in a year. For the majority of you who work in the US, I recognise this number will seem extremely low.

I use the word extraordinary to describe this year because – by comparison – we have eight trials at court this financial year. Three of those cases have already concluded and resulted in successful convictions (3 out of 3), meaning we have delivered justice for over 10,500 victims. Four individuals - responsible for $500 million of fraud - have been sentenced to a total of 48 years' imprisonment. In each case, the sentences were in the double digits, which is very unusual in our cases, where the typical sentence is 2-5 years.

And, just a few weeks ago we successfully prosecuted the UK subsidiary of commodities giant Glencore for conduct across five countries in Africa – essentially bribing its way to the best oil contracts.

Glencore received the biggest corporate sentence in UK history. It's not the biggest penalty ever —that was the Airbus DPA in 2020 — but both had something in common. They were both part of global action; we worked closely with the US DOJ and other countries to divide and conquer when exposing endemic corruption by Glencore.

The financial penalty of approximately $400 million was not only the largest ever seen in the UK following a corporate criminal conviction, it also contained $150 million in confiscation, again, the largest amount ever to be confiscated from a corporate.

It was also the first time the UK has ever seen a corporate prosecuted for a substantive bribery offence under the Bribery Act 2010, meaning we were able to prove senior individuals at Glencore authorised the bribery, rather than simply failed to prevent it, which has been the common way we approach it in the UK. In the UK, we don't have *respondeat superior* (vicarious liability) if we want to charge a corporate with a crime, typically we need to prove the most senior corporate officers—the controlling mind of the company—were involved.

I don't need to tell you, this was a good day in the office for us. We worked seamlessly with our international partners, we took on a titan, we used legislation never used before in the UK to achieve record-breaking penalties.

I'm an advocate for co-operation in all its forms and that's why I have spent the last four years investing in the SFO's relationships with our counterparts around the world.

International relationships in law enforcement are imperative and critical to our success. The sort of crime we pursue doesn't just happen in one jurisdiction. Indeed, we have only one case on our docket at the moment, that DOES NOT have an international component.

The proof that a collaborative approach works is visible for all to see. Without our ability to communicate about our different approaches and, nonetheless, develop ways to work effectively in parallel with our international partners, our record-breaking resolutions like Glencore or Airbus, would not have been possible.

At this point, I want to touch briefly on how a global resolution – like the one we did with Airbus – works from our perspective.

Like the US, we have double jeopardy (also known as autre fois convict). If both the UK and the US - and likely a few other countries - have jurisdiction over a crime, we

need to divide it up among us. We cannot prosecute the same conduct. It's that simple. The last thing I want is for my team to be working on a case for years and years only to see another country swoop in with a conviction for the same crimes. We also need to coordinate carefully so that we don't accidentally kill a case for another enforcement agency.

How do we determine the boundaries to parallel cases? We might look at where subsidiaries are incorporated. In Rolls Royce, the energy division was in Ohio, so you can guess where the US DPA was filed. Or, we might look at where bribery has taken place in a large number of countries and divide those countries between us. We also consider the time frames—which actions are caught by which laws? For us, does the conduct pre- or post-date the UKBA 2010, which came into force on 1 July 2011. If it's earlier, we need the UK Attorney General's consent to proceed. We will consider which law actually applies. We are led by the evidence and where the witnesses are located; whatever division gets us to the end goal most effectively, that's the route I try to take. And no matter how we divide up a case with our international partners, we always want to ensure we collaborate early, before we get to a point where it's too late or we have few choices.

It's not always smooth-sailing - there are some challenges in international collaboration.

Some procedures in the England and Wales system are more time-consuming than in the US. We don't have some of the tools you have: wire taps can't be used as evidence, immunity is only granted in the most extreme of cases so we can't rely on co-operators or offenders coming forward to give evidence. To add to that, we are facing a significant backlog in our courts. If you're working with us, I ask that you are patient; if our hearing isn't listed for twelve months, or even longer, rest assured we are doing everything we can, trust me - we aren't trying to hold you up. All cross-jurisdictional cases are inextricably linked, so when we embark upon these cases with international partners, we need to trust each other that we are committed, even when we come across hurdles in our differing systems.

In the last 12 months we hosted Kenneth Polite and his team at our annual UK/US symposium. The SFO also met with delegations from all over the world – from Australia and New Zealand to Singapore, Kenya and South Korea. We also have open over 100 cases calling for international assistance, playing our part in doing what we can to help close international loops holes that criminals will otherwise exploit.

Many of you work in compliance – I know the pressures only too well. As in house counsel at Goldman Sachs, I remember when it sunk in that, under the Proceeds of Crime Act 2002, if I failed to report suspicious transactions in which Goldman's bankers were engaged, I faced up to 14 years in jail.

You have a tough job and I want to touch on one of the toughest elements, which is highly relevant to my job. What steps should you take when an issue arises? How do you ensure your voice is heard when you are the person putting a question mark on a new opportunity for your business to make money? How do you ensure your advice isn't ignored? Add this to the DoJ certification requirements and the exponential rise in fraud, and your job just got a lot tougher.

But we need the best of you to keep working to make your organisations compliant, or to bring us in when you see non-compliance of a criminal variety.

We want you, your companies or those you represent – if you discover potential criminality – to make a prompt referral, following a targeted internal investigation to determine the scope of the problem, engaging with law enforcement as early as possible. Your level of cooperation *will* affect how we approach your case.

At the SFO, we don't have the same variety of options that you have, we've only got three broad tools, which are:

1) to convict;

2) since 2014, we have had the option of entering into deferred prosecution agreements with corporates who are willing to hold their hands up and improve their compliance programmes; in our jurisdiction, DPAs are very, very carefully scrutinised by the courts; the judge is essential to the resolution and there are no NPAs; and no DPAs with individuals.
3) recoup the proceeds of crime, with or without a conviction.

I know you'll want to know makes us choose a DPA over a prosecution but there is no hard and fast rule. There is only a guiding principal – a north star if you will. Some would say a DPA has to be earned, and there is a lot of truth in that – no one is automatically eligible, whether they willingly co-operated with us or even immediately self-reported.

For me, it is the genuine demonstration of reform.

Clean business is good for individual economies. It's good for free and fair markets. It's good for democracy. We want to reward those corporates who are genuinely and demonstrably improving their corporate compliance culture.

Factors we take into consideration when inviting a corporate into a DPA negotiation include:

Compliance, which I've already touched on. You bet we look at your compliance programme when we consider a DPA and we judge a corporate's compliance programme and commitment in the same way we always have. Step 1: are the right processes and policies in place? Step 2: are these being implemented, enforced and abided by in practice? Step 3: what is the corporate response when they are not?

Compliance is one of the key determining factors when we are considering a corporate's eligibility for a DPA and what the terms of a DPA will be. It is important for us that companies have experienced compliance personnel who know the issues when they see them, functions that are properly resourced and reporting lines

available to them, to raise issues – both big and small. And the appetite to have these issues heard at the very top of the house.

We do not want to see the equivalent of compliance cramming as we reach the end stages of DPA negotiations. We need to see good corporate behaviour from the get go. And we want assurance that the compliance focus will hold—even after, say, a monitor has left.

If a corporate under investigation by the SFO can demonstrate significant compliance enhancements and changes over the course of our investigation and resulting DPA negotiations (bearing in mind that these processes can take years to accomplish) – that goes a long way to both supporting a DPA and including fewer compliance reporting obligations during the DPA period.

In addition to all of our compliance expectations, DPAs don't come cheap in lots of other ways too. Our terms often include significant financial penalties, disgorgement of profit, including allocations for the compensation of victims, and you have to pay our costs—though they frequently pale by comparison to the costs of the company's legal team. I'll remind you that Airbus had to pay about $1 billion. And the check was written within 30 days of the resolution. Companies are also obligated to report to the SFO on progress made against their compliance overhaul. We haven't imposed real monitorships in our jurisdiction yet. The corporate must own the responsibility for the offence, and must co-operate with any future investigation which seeks to prosecute individuals.

I hope you never find yourselves in this position, but, we also have the tools we need to prosecute corporates if they do not meet the DPA requirements, or engage with us at all. Our most recent examples of this are the defence company GPT and Petrofac. They did not co-operate, they did not demonstrate substantial reform; they didn't get DPAs.

If a company does not plead guilty, it is given the “full whack” by the judge with no reduction in the financial penalty. In England and Wales, you can expect up to 1/3 off at sentencing for a guilty plea, and you can avoid a costly protracted trial.

You will of course all know this, but if convicted, you also run the significant risk of being excluded from being able to bid or win public sector contracts, not just in the UK but also in Europe and in some instances, the US, which ultimately affects your organisation’s bottom line.

Conviction also results in *the* most damaging long-term reputation for the company, though we have all seen share prices that shoot up once long-standing investigations are resolved, even if the resolution is a conviction.

There’s also no hiding from us, once you’re in our cross hairs. Our exclusive use of Section 2 Powers meant we were able to obtain the information we needed as we investigate Gupta’s GFG Alliance – the UK’s largest business group in the steel and metals sector – with co-ordinated operations in sites around the country earlier this year, without any co-operation from the other side.

My recommendation for you in your professional roles is: speak to us and be aware of the powers that we have at our disposal if you don’t.

I want to move on to give you some recent updates on our operating environment in the UK.

I think the first thing to mention is: fraud isn’t going anywhere. We are seeing an exponential rise. It accounts for around 41% of all crime in our jurisdiction. The explosion of the internet and then cryptocurrency, globalisation driving fierce competition but also giving us more excuses to move assets globally. Throw in recessions, political instability and then a global pandemic – it’s no surprise that we have seen a 288% rise in the number of cases before the courts in the UK, with values of over £100 million, relating to fraud charges.

The UK government knows there is a growing problem and has committed $500 million to tackle it. We also now have a former Chancellor as our Prime Minister of the UK, an individual who has had to answer the challenging questions about fraud against the public sector during the pandemic, which are likely to continue to be asked.

In a nutshell, I anticipate both the heightened media and political interest we are currently seeing in tackling fraud, to continue.

I've already mentioned a few of the key differences between the US and the UK systems. As a dual citizen, qualified in both jurisdictions, I've had a great insight in to both legal systems and I've had the chance to reflect on the merits of each and I want to point out a few for those of you who are studying and looking at global resolutions.

1. Disclosure. This is by far the most pressing mountain to climb for the SFO and all other prosecution and law enforcement bodies, both in terms of getting it right in our cases, and in lobbying for change. More on lobbying for change in a bit. The SFO has an affirmative obligation to pursue all reasonable lines of enquiry in a case, then identify all relevant material that stemmed from that pursuit, and provide that material to the defence. It is up to the prosecution not only to turn over the material, but to schedule it, or list it in detail—typically, piece by piece. I fear I won't adequately be able to convey how time consuming and resource intensive this is, and how fraught with risk it is - one slip and you can lose a case - but I will try. In one of our LIBOR cases, we had 2.2 million documents. Of that 2.2 million, we scheduled 200,000 and turned over 3000 to the defence. 20 were used at trial. Two, zero. The man or woman hours we spend on our disclosure exercises for each of our cases can last years.

In the US, prosecutors can keep cases narrow; they are not under obligation to explore every angle; and the prosecution is not required to list out in painstaking

detail all unused material that may, arguably, be relevant. I am not saying the US system is better, but it certainly is quicker.

2. Access to data. You have the CLOUD Act. I remember when the Act came in to force thinking 'I wish we had that!' But now things are looking up for us. As of October, we also have the US-UK Data Access Agreement, a game changing capability that will transform the ability of relevant UK public authorities to prevent, detect, investigate and prosecute serious crime. It means we will be able to access data held by telecommunications providers in each-others' jurisdictions. But we are not there yet; the 'overseas production orders' cannot be made yet, so we are still relying on Mutual Legal Assistance instead.

3. Corporate criminal liability. If we want to prosecute a corporate, we need to identify the "directing mind and will" and pin the crime on those individuals. That's called the identification doctrine. In a large multinational corporation, where responsibilities are diffuse throughout the globe and corporate governance is complex how easy do you think that is? We know from the Barclays case that you can have the group CEO in the doc, the head of Barclays Wealth, the head of IB at BarCap and you still don't meet the test. The corporate was let off. In the Barclays case, the problem was the board had some responsibilities. Effectively, because we didn't have the board in the dock, we couldn't prove directing mind and will. In the US, *respondeat superior* or vicarious liability obviates this challenge. When I testified before them, the Lords didn't think vicarious liability was the right approach for the UK - it's a big leap for our businesses; but I would love to be able to prosecute more corporates without being hamstrung by the identification doctrine.

One construct we have in the UK, which avoids the issues of the identification doctrine, is "failure to prevent." Section 7 of the Bribery Act 2010 makes it an offence for a corporate to fail to prevent bribery. This is a specific corporate offence, so there is no need to find the directing mind and will. And the only defence is having 'adequate procedures' in place to prevent bribery; in other words, good compliance. The ABC landscape changed radically in the City of London when UKBA came into

effect. And the evidence shows that compliant companies—companies that do not bribe their way into business—have commercial advantages. Playing by the rules can help the bottom line.

We have had FTP in health and safety since 1973 and in facilitation of tax evasion (in the Criminal Finances Act) since 2017. I and many of my colleagues in law enforcement have been asking the UK Government to expand this offence to encompass fraud and economic crime more generally.

This summer, the Law Commission of England and Wales published a paper that suggested creating a 'failure to prevent fraud' offence was a viable means of improving our ability to prosecute corporates. It also noted that the identification doctrine is a big hurdle. Watch this space as we watch legislation make its way through parliament now. I remain optimistic that we may well see a change.

We've recently seen something of a milestone moment with the introduction of the Economic Crime and Corporate Transparency Bill. The SFO has been active in adding recommendations for what could be included and I was particularly pleased to see an expansion of our unique Section 2A powers referenced in the Bill – meaning we will be able to use our powers to compel people to provide us with information while a case remains in the intelligence gathering stage, rather than having to wait until I formally open an investigation. It allows us a "look see" window, something we use to move ABC cases quickly. It will speed up our ability to detect fraud and better inform what cases I choose to pursue. It would help us conserve scarce resource and focus on those cases that are going to get somewhere.

I've already talked about failure to prevent and corporate criminal liability. All I will add is, the UK law currently isn't favourable to prosecuting companies and their CEOs, and it should be.

I am also a vocal advocate for overhauling the UK's outdated disclosure framework, which came into effect in 1997 in the Criminal Procedure and Investigations Act. This

was before the smartphone was invented. It simply is not equipped to accommodate mass digital data or the millions of documents we handle on every one of our cases. Forty million, thirty-three million in the Rolls-Royce case, twenty million documents is standard for us and these figures are only set to increase. We have a groundswell of support for this among law enforcement and, increasingly, among members of government, for the first time in our country's history. There is no simple or immediate fix in sight but we have identified some quick wins that could make the system work better in the short term.

I'm happy to discuss these or any of the other points I've raised with you further.

Thank you for your attention.