SFO
SERIOUS FRAUD OFFICE

Lisa Osofsky's Keynote Speech at the 2022 International White Collar Crime Symposium

Good evening.

As that very kind introduction stated, 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.

Today I'd like to talk to you about three broad topics.

First, I'll focus on how the SFO works with offending corporates. I will tell you a bit about how we apply the public interest test in determining what approach to take in a case, the sliding scale we adopt – from no further action if we don't have the evidence to proceed, to DPAs, to prosecution – and what you can and should do, if you ever find yourself considering whether to refer your organisation to us.

I'd then like to give you a flavour of what's happening in the UK in terms of economic crime legislation – including the amends we are expecting to see or are actively pushing for. Before I conclude, I'd like to touch very briefly on how we work with international partners and why this is such an important part of my job.

I am very aware that you are all practising legal experts and a number of you will likely therefore be well aware of the work of the Serious Fraud Office. So, I am going to keep my introduction to our work brief.

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).
I have a team of approximately 600 dedicated individuals who are a mix of all the disciplines you need to deliver a successful investigation into a suspected case of fraud, bribery, corruption or money laundering, from developing intelligence right the way through to a successful outcome – be that a prosecution or a DPA. We have intelligence expertise, investigators, lawyers, forensic accountants and digital forensic experts – all under one roof. This is uncommon in our jurisdiction. The usual model is—the police investigate and turn over the file to the prosecution.

We have our own intelligence team – something I introduced not long after I started - which not only develops cases at the earliest stage, but effectively handles co-operators and whistle blowers and analyses emerging trends in fraud, bribery and corruption. I then decide what we take on, based on the public interest, including the potential damage to victims – and we consider the UK economy as a victim.

Under the guise of bringing that quick description of our work to life, allow me to give you a run-down of our recent results.

This summer, we landed convictions in three out of three of our prosecutions. The four fraudsters we convicted committed large-scale fraud - £350 million (about $500m) in total. In these cases alone we delivered justice for over 10,500 victims. Each defendant received double digit sentences—totalling 48 years in all. Sentences in our jurisdiction for white collar cases are typically 2-5 years so these were outliers—and garnered significant attention, all good for deterrence.

If you work in the US – as I know the majority of you do – I recognise that three trials over a whole summer will seem extremely low to you. But, for the SFO it was a record. We have two more trials ongoing as we speak and expect another three to start before April (the end of our financial year). Because we only go after the top 1% of economic crimes, our cases are large and sprawling, meaning a usual year for us would be one trial or maybe, at a push, two in a year. By comparison, by the end of this financial year, we will have had eight.

Last month we were recognised as the number one agency (of over 180 in our jurisdiction) for securing assets through confiscation, beating enforcement agencies over 130 times our size. Then, to cap off a busy year, the start of this month saw the sentencing of the UK subsidiary of mining giant Glencore. In that case we successfully proved Glencore bribed its way into securing preferential oil contracts.

Glencore was given the biggest corporate sentence in UK history, which included the largest amount ever in confiscation following a corporate conviction. The title for the biggest penalty ever continues to be held by our global resolution with Airbus in 2020. In both cases, we worked closely with the DOJ and other countries to divide and conquer. I will talk about the importance of international co-operation in a little bit.

Glencore was the first time the UK has ever seen a corporate charged with a substantive bribery offence under Section 1 of the UK Bribery Act 2010 – the top executives didn't simply fail to prevent bribery on this occasion, we were actually able to prove senior individuals at Glencore authorised the bribery.

Do, how do you respond when your client or company unearths potential economic crime?

At the SFO, we want companies – when they discover potential criminality – to make a prompt referral, engaging with law enforcement as early as possible, once you have determined the scope of the problem. How willing a corporate is to engage, how committed they are to reform, what compliance programme is in place, all play a vital role in influencing how we approach a case.

For those of you who have not had an SFO case, I know that in order to do what you do, you need the knowledge of how we handle our cases, what we seek to achieve and what options are available to you.

As a guide: at the SFO, 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, meaning (as in the US), we can halt prosecution and subject the corporate to certain terms for a set period, rather than taking the conviction route; unlike in the US, in our jurisdiction there is close judicial oversight of the DPA process from start to finish. There are no DPAs with individuals and there are no NPAs.
3) to recoup the proceeds of crime, with or without a conviction.

The question I get asked the most by corporates is, what makes us choose a DPA over a prosecution. Well, there is no one hard and fast rule. There are a series of factors and the guiding principal is whether demonstrable steps have been and are being taken to generate significant reform.

The City of London has a global reputation as a beacon of financial excellence, and the work of my organisation helps to enshrine that reputation. One law that encourages corporates to

play their part is s7 of the UK Bribery Act – failure to prevent bribery, where the sole defence is "adequate procedures". The onus is on the company to show it has "adequate procedures" to prevent bribery. This is a sea change in ABC compliance in the UK.

To illustrate our approach, I'm going to give you through three examples that depict what I am going to call our "sliding scale of enforcement", and detail how each option is implemented.

Let's start at the bottom.

If you don't co-operate with us, if you don't demonstrate meaningful steps towards reform and we find out about the crime, we will prosecute you. We will not seek to agree a DPA as it's not in the public interest. Our most recent examples of this are the defence company GPT and energy services company Petrofac. They did not co-operate, they did not demonstrate substantial reform, so they didn't get a DPA.

If a company does not plead guilty, and is convicted, it will be given the "full whack" by the judge with no reduction for a guilty plea. 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 you go down the non-cooperative route and end up convicted, you face a 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 of course detrimentally impacts your organisation's bottom line.

Moving up a rung, you may not be in a position to seek a DPA, but that doesn't mean a costly trial will follow.

Glencore did not get a DPA and I won't go in to details about my decision-making process. They did avoid a trial and they got a 1/3 reduction for pleading – as I say, this is the biggest reduction you can get in our legal system.

In addition, this case was one example where a conviction that draws a line under a long standing investigation can boost the company's share price. Markets like certainty.

At the top of the tree, by way of resolution, is the DPA—as, again, there is no NPA in the UK.

As an initial matter, I must determine whether it is in the "public interest" to pursue a DPA. If you co-operate with us, if you demonstrate significant steps towards reform, this will weigh heavily in your favour, in which case, I will invite you in for DPA negotiations. These involve extensive exploration of the facts of the case and the compliance measures that a company has instituted (and – we would hope—implemented and embedded successfully) since the crimes were committed. Justice plays a significant role in determining whether a DPA is appropriate.

So, what constitutes best practice when it comes to dealing with the SFO?

When you are doing your own internal review, do not do anything that would make it harder for us to eventually step in and conduct our own investigation. We all know what real cooperation is—and what it is not. We need you to preserve and protect the evidence—hold orders and careful document management. Proactive engagement will include providing first accounts and permitting witness interviews—where witnesses have not been coached and have not received wind of an investigation that causes them to flee the jurisdiction.

Second, help us to see what's been going on. No one wants a multi-year investigation hanging over their heads but without your help that's what will happen. At the beginning of my speech, I impressed on you the extraordinary year we've had with 8 trials, when our average is maybe just one or two. This is because the scale of what we do means our cases on average last four years—and some have been ongoing for quite a bit longer.

No one wants that hanging above them for that length of time. It's disruptive for the company, for shareholders if they exist, for victims and its bad PR.

As a practical matter, what it's meant for me as Director, is that I have spent the vast majority of my time in the role managing the cases opened by my predecessor and the predecessor before him. The one case that I have opened and seen through to conviction in the courts is Glencore.

There are ways we can work together to come to a quicker resolution. Like Glencore, which – for us and our judicial system - was light speed.

I opened the SFO investigation into Glencore in 2019. We formally charged Glencore in June, they pleaded guilty in June and were sentenced in November.

One of the ways we can collaborate and speed up the process is if you engage with us proactively, particularly when it comes to disclosure. Providing us with a list of all the key “search terms” or files that help us quickly see the complete story of what’s taken place.

A further word on disclosure. Our cases generate millions of documents - 20 million, 40 million, these numbers aren’t unusual for us. This is because the SFO has an affirmative obligation to pursue all reasonable lines of enquiry in a case. We then have to identify all relevant material that stemmed from that pursuit, and provide that material listed (or scheduled) to the defence. That means we are often in the position where 2 million documents actually results in just 20 being used at trial, but the process to get to that point is lengthy, resource-heavy and fraught with risk: one slip and you can lose a case.

By comparison in the US, the prosecution has the ability to keep cases more narrow; it is not under obligation (as we are) to explore every angle (“all reasonable lines of enquiry”). It is also not the responsibility of the prosecution to list or “schedule” individual items it will not use as evidence on the theory that they might be considered relevant (in our jurisdiction, material is irrelevant only if it is “incapable of having any impact on the case”). And these disclosure exercises are largely manual and incredibly resource intensive. Frequently we must proceed without input from or engagement by the defence. I am not necessarily saying the US system is better, but it certainly is quicker.

I’m a strong (and vocal) advocate for overhauling the disclosure system in the UK, but for the purposes of what you do and what you should be advising your client or organisation if you ever find yourself working with us: help us sift quicker through the troves of information you provide. Point us to the evidence we need in a digestible form to help us get to the bottom of what happened.

Together, we can shrink the investigation time, aiming for Glencore or faster. This helps keep disruption to a minimum, it helps to keep your client’s costs low. The sooner you draw a line under it, the sooner your client can get back to business.

Third and finally, self-reporting. Again, a regular question I get asked is: can I get a DPA if I don't self-report?

We want you to have the compliance practices in place that allow you to spot a crime, look in to it and make a prompt self-referral. But I am not naïve, I know you would need time to investigate, time to understand the bigger picture—conduct an internal investigation of your own.

If in that time we open an investigation on our own accord - remember, we have our own Intelligence Division and strong relationships with law enforcement partners - a DPA will not be taken off the table—but it will not militate in your client's favour. For sure, if you do self-report, this is great and in most circumstances could make a DPA more likely. But, to give you an example, Rolls Royce did not self-report, and they still got a DPA. This reflected not only their reforms, but their significant collaboration with the SFO throughout the lifetime of the case. And, as an aside, Rolls Royce was a blue chip British brand, emblematic of British business and employing many thousands throughout the world.

I also promised I would relay to you my take on the current appetite in the UK on tackling fraud, and what legislation we are expecting – or lobbying for – to help strengthen our enforcement toolkit.

In relation to our current operating environment, the first thing to mention is: fraud isn't going anywhere. We are seeing an exponential increase, with 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 know there is a growing problem and have committed $500 million to tackle it. We also now have a former chancellor as our Prime Minister of the UK, someone who's had to answer challenging questions about fraud against the public sector during the pandemic, which are likely to continue to be asked.

It's a fair assumption therefore that both the heightened media and political interest we are currently seeing, in tackling fraud, will continue.

But, our laws are yet to rise to meet the challenge. I've lobbied hard for reform and, now focus on three key areas for us:

First, we've recently seen something of a milestone moment with the introduction of the Economic Crime and Corporate Transparency Bill. The SFO has been actively pressing for inclusions that help us 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 already to move bribery and corruption cases quickly. It will speed up our ability to detect fraud and better-inform what cases I choose to pursue.

However, the current and proposed legislation doesn't go far enough for us. We want to see the UK Government create a new corporate offence of "failure to prevent fraud".

The success of the failure to prevent model in bribery cannot be understated – 9 of our 12 DPAs include the offence, including the $1bn Airbus DPA.

To prosecute a corporate for fraud, we must identify the "directing mind and will" of the company. That may have made sense in an earlier era, when one or two people ran the show, but, in today's international business world, where responsibilities are diffuse and scattered throughout the globe, the 'identification doctrine' limits our ability to prosecute companies. As we learned in the Barclays case, all you need is some decision making authority vested in the Board—rather than in the Group CEO, who was in the dock along with the Head of Barclays Wealth, and Head of IB of BarCap—and you cannot hold the corporate to account. Successfully linking the directing mind and will to the crime does not happen often. We successfully met this test in Glencore, but it is very rare.

When I testified before the Lords on this topic, it was clear that they thought the US model (of *respondeat superior or* vicarious liability) was too big a leap for the UK. But failure to prevent has been accepted in our jurisdiction in contexts including facilitation of tax evasion (Criminal Finances Act 2017) and health and safety (as far back as 1973). As "failure to prevent bribery" is a specific corporate offence, we don't need to meet the directing mind and will test. This is why it's so useful, and why we've used it so often.

The Law Commission of England and Wales – the body set up to review the most complex legislation and make recommendations for reform - published a paper earlier this year setting out a range of options to reform corporate criminal liability, including— creating a "failure to prevent fraud" offence. They also acknowledged that the identification doctrine creates a barrier to effectively prosecuting corporates. I wholeheartedly agree.

Looking ahead to the coming weeks and months, I would suggest you watch this space, and see what the Government does in response to the Law Commission's paper.

I've already voiced my opinions on the UK disclosure framework which was designed in the 90s – before the smartphone – and not equipped to accommodate mass digital data or the millions of documents we handle on every one of our cases.

We want to see changes to the disclosure regime that level the playing field, incentivising the defence to engage with us sooner. That would mean we can focus on the key issues in a case much earlier and avoid pursuing unnecessary inquires or reviewing and scheduling large volumes of material that is of marginal relevance but hugely time consuming.

Before I conclude, I would like to touch very briefly on our international engagement at the SFO.

I've focussed on co-operation with our domestic and international partners over the last four years, and we have the proof that a collaborative approach works. Our record-breaking resolutions with Glencore and Airbus would not have been possible if we had not invested in the relationships that enabled us to have frank discussions and identify effective ways of working side by side with our international partners.

In the last 12 months we have hosted the annual US and UK symposium, welcoming Kenneth Polite and his team last April. We've also met with delegations from all over the world – from Australia and New Zealand to Singapore, Kenya and South Korea – exchanging ideas and case work knowledge. Our docket includes over 100 cases that call for international assistance. Indeed, at last count there was only one case that DID NOT have an international component. We are proud to play our part in doing what we can to help close international loops holes that criminals will otherwise exploit.

Thank you for your attention. If Michelle and Henry would like to join me on stage, we would be very happy to take any questions you might have.