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2016 YEAR-END UNITED KINGDOM WHITE COLLAR CRIME UPDATE

To Our Clients and Friends:

The year 2016 has been another of continuing developments in the UK's white collar sector. These have ranged from the Competition and Markets Authority's largest ever fine, to the UK's second deferred prosecution agreement, to the continuing enforcement efforts of the Serious Fraud Office ("SFO"), National Crime Agency ("NCA") and the Financial Conduct Authority ("FCA"), as well as of a myriad range of other enforcement bodies. Fines and confiscations totaling over £130 million were imposed and sentences totaling over 115 years. The year also saw significant legislative changes in the forthcoming *Criminal Finances Bill* and the *Policing and Crime Bill*.

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1. Developments Relating to the White Collar Sector as a Whole

Panama Papers

Some measure of the current regulatory tone, the planned reforms and legislative developments result, from the controversy arising from the so-called "Panama Papers" and related press reporting. On April 4, 2016, it was reported that 11 million documents had been leaked from the Panamanian law firm Mossack Fonseca. This was not the first such data leak. Shortly before the first Panama stories emerged

the Monégasque company Unaoil – also discussed further below – was the subject of a data leak, and other offshore leaks have taken place over the last few years. Most recently 1.3m files from the Bahamian Company Registry have been leaked.

Panama, however, saw the swiftest response. On April 7, it was reported that the FCA had contacted 20 banks imposing a deadline of April 15 for the banks to report to the FCA on any links they had to Mossack Fonseca. In a *Freedom of Information Act* response the FCA has since confirmed that, in fact, the FCA had contacted 64 firms, all of which responded.

On November 8, 2016 Chancellor of the Exchequer, Philip Hammond, and Home Secretary, Amber Rudd, updated the House of Commons on the work of the Panama Papers Taskforce created by David Cameron in April 2016 with funding of £10 million. This included the announcement that the Taskforce is investigating more than 30 individuals and companies for civil and criminal offences linked to tax fraud and financial wrongdoing. The taskforce has also identified links to eight SFO investigations, and announced that a number of individuals have come forward to settle their affairs in advance of any action being taken against them.

Failure to prevent economic crime

As reported in our 2016 Mid-Year UK White Collar Crime Update, the British government in September 2015 announced that it would not proceed with the creation of a new strict liability offence of failure of a commercial organization to prevent economic crime. In the wake of the Panama Papers, this decision was reversed, and on May 12, 2016 the government announced a consultation on this new offence.

On September 5, 2016, remarks made by the Attorney General Jeremy Wright at the Cambridge Symposium on Economic Crime that the government would "*soon consult on plans to extend the scope of the criminal offence of a corporation 'failing to prevent' offending beyond bribery to other economic crimes, such as money laundering, false accounting and fraud*" led to a flurry of press reports. However, as the consultation has yet to be launched and no details of the proposed offence have been disclosed, it remains to be seen whether a strict liability corporate offence will ultimately be implemented.

Deferred Prosecution Agreements

The first half of 2016 has seen the UK's second deferred prosecution agreement ("DPA"). This was in relation to an unnamed company (named only as XYZ Limited) and will be discussed in detail below in the section on *Bribery Act* enforcement.

There continue to be questions and uncertainties over the extent and speed of co-operation that will be required by the prosecuting authorities to secure a DPA. There also continue to be questions asked as to the financial benefit, or otherwise, of a DPA.

As noted in our 2016 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs), and as discussed further below in the section of financial sanctions, the DPA regime is to be extended to cover financial sanctions offences under the *Policing and Crime Bill* that is currently before Parliament.

David Green and the Future of the SFO

On February 9, 2016 the SFO announced that its Director, David Green QC, had been given a two year contract extension.

Since then, the upheavals in British politics have resulted in Theresa May becoming Prime Minister. This may precipitate a period of uncertainty for the SFO as May, while Home Secretary, was reported to have been considering ways to abolish the SFO on a number of occasions.

Use of Judicial Review to challenge prosecutorial decisions

One feature of 2016 has been the use to which judicial review proceedings have been put. As discussed below, in both the Soma Oil and Unaoil investigations those acting for the companies sought to challenge decisions taken by the prosecutors by way of judicial review. While judicial review has been used before, such as when Corner House challenged the SFO's decision not to prosecute BAE, it does appear to be a tactic growing in frequency with the examples from 2016 building on those from 2015 mentioned in our 2015 Year End United Kingdom White Collar Crime Update.

The British authorities, however, may not be warming to this practice. Noteworthy is the service of a section 2 notice under the *Criminal Justice Act* 1987 on a partner of the law firm of Clifford Chance who had commenced the judicial review on behalf of Unaoil. It was reported in the press that the partner in question was threatened with personal criminal prosecution.

Privilege and the SFO's and FCA's approach to co-operation

On June 6, 2016 the SFO issued new guidance on the *Presence of interviewee's legal adviser at a section 2 interview* (in which a person is compelled to provide answers in furtherance of the SFO's investigation). This guidance continues the thread of the SFO seeking to diminish the prospects of legal privilege and advice interfering with an investigation, and follows on from the decision in *R (on the application of Jason Lord & others) v Director of the Serious Fraud Office* [2015] EWHC 865 (Admin), discussed in our 2015 Year End UK White Collar Crime Alert, in which the SFO's decision to bar the lawyers acting for the company from attending an interview with that company's employee was upheld.

The *Guidance* states that a lawyer "*will be allowed to attend the interview if the case controller believes it likely they will assist the purpose of the interview and/or investigation*" (emphasis added). It is the case therefore, that SFO policy gives discretion to the SFO itself as to whether a person being interviewed will be able to have a lawyer attend. This *Guidance* is significant and timely as the number of interviews conducted by the SFO went from 129 in 2014 to 177 in 2015.

In addition, the *Guidance* states that a lawyer must give undertakings to the SFO that they owe no duty of disclosure "*to any other person (natural or legal) who may come under suspicion during the course of the investigation, including the interviewee's employer*". If the lawyer cannot give such an undertaking "*they are unlikely to be allowed to attend the interview*".

Further, the *Guidance* places restrictions on what the lawyer may and may not do during the interview:

"*If a particular lawyer is allowed to attend the interview, it will be on the agreed understanding that certain ground rules apply. They may, if they are able to, advise the interviewee in the event that any matter of legal professional privilege (LPP) arises. Otherwise, they must not do anything to undermine the free flow of information which the interviewee, by law, is required to give. It is the duty of the interviewer to ensure that this rule is observed. In the event of any perceived infraction, or obstruction of the interview process generally, the lawyer will be excluded from the interview*".

While it is possible to sympathise with the SFO's desire to have unimpeded conduct of its investigation, the fact that access to legal advice for those being interviewed by the SFO is subject to restriction at the discretion of the SFO will not be welcome in all quarters.

Privilege in witness accounts obtained in investigations

In The RBS Rights Issue Litigation [2016] EWHC 3161 (Ch), the High Court applied the decision in *Three Rivers No 5* taking a narrow approach to the application of legal advice privilege. RBS had sought to withhold notes prepared by external counsel of interviews that had been taken in the context of a response to a sub-poena issued by the SEC and notes prepared by in house counsel of interviews conducted in the context of a separate internal investigation disclosure of which was sought by the claimant's in unrelated litigation. Given the decision in *Three Rivers No 5* ([2004] EWCA Civ 218), it is not surprising that Hildyard J was not willing to accept that the notes were subject to legal advice privilege. What is of note to those involved in global investigations is that Hildyard J would not accept that the notes in question were privileged as lawyer's working papers. RBS had argued that the notes were not verbatim transcripts, were produced by legal counsel for the purpose of providing legal advice to RBS, evidenced the impressions of the lawyer for the purposes of advising their client, and in the case of some of the notes explicitly stated that they reflect external counsel's mental impressions. However, RBS were not able to identify any respect in which the notes did in fact record lawyer's mental impressions. This should act as a reminder that under English law, unless litigation is in prospect or under way the circumstances in which privilege can be claimed are limited. As of December 12, 2016 RBS has been granted leave to appeal the judgment to the Supreme Court, leapfrogging the Court of Appeal.

The SFO's approach to the claims of privilege over witness interviews conducted in the context of internal investigations was addressed by Alun Milfurd, the SFO's general counsel on March 29, 2016. The SFO is primarily concerned to obtain first witness accounts which can give it a quicker route to understanding the facts as well as serving as an important tool for the SFO, as prosecutor, to fulfill its duty to assess witness credibility. While publicly stating that it is not concerned to obtain communications between lawyers and their clients which concern rights and liabilities, and that, in accordance with English law, it will not hold a well-made out claim of privilege against a company under investigation, it has also stated that it will consider it a "*significant mark of cooperation*" if a company is willing to give up witness accounts sought by the SFO notwithstanding a well-made out claim to privilege or if it structures its internal investigations in such a way as not to attract privilege over witness interviews. Mr Milfurd also stated that the SFO will review very carefully whether privilege does apply

over notes of witness interviews "*we will view as uncooperative false or exaggerated claims of privilege, and we are prepared to litigate over them*". In each situation the decision as to whether or not an attempt should be made to assert privilege over notes of witness interviews will involve a careful balancing of risk. However, it seems clear that the risks of asserting a weak claim to privilege will likely outweigh the consequences of disclosure of information in response to the initial request. Where there is a likelihood that notes of witness interviews will be handed over to prosecutorial authorities timely consideration should also be given to whether employees should be provided with their own counsel at the initial stages of an internal investigation.

Crown criticized for warrant to recover materials held by a law firm

In *Clyde and Co (Scotland) v The Procurator Fiscal, Edinburgh* [2016] HCJAC 93, the Scottish High Court criticised the Scottish prosecutor, known as the Procurator Fiscal, for its approach to seeking to enforce a search warrant to seize documents held by the Edinburgh office of the law firm, Clyde and Co. The case discusses the application of the principles laid down in an unpublished decision, *H Complainers*, which apply when executing search warrants at lawyers' offices.

The firm represented its client, "S", in civil proceedings, the underlying facts of which were also relevant to an investigation being conducted by Police Scotland. During the course of the representation S provided Clyde and Co with certain documents, which Police Scotland sought during its investigation. A representative of Police Scotland had calls with Clyde and Co, who explained that certain of the documents were protected by legal privilege and confidential. Clyde and Co explained that it would consider and take instructions regarding the extent to which anything could or should be released. In anticipation that an application for a warrant might be made, Clyde and Co wrote to the clerk of the Sheriff in Edinburgh requesting that they contact Clyde and Co in the event of any application to the sheriff with a view to S being represented at any hearing before the sheriff. Clyde and Co explained that the firm and client had provided such assistance to Police Scotland as they could within the confines of the Data Protection Act 1998, confidentiality and legal privilege.

Notwithstanding that, without first notifying the law firm, the Crown applied for and was granted a warrant to seize materials that may have been held by the firm. Clyde and Co's challenge to the warrant was upheld, in part because the Crown had failed to follow the unpublished decision in *H Complainers*. Taken together the two cases make it clear that:

The Crown has a duty to disclose to the Court that the subject of the warrant is a law firm that is unwilling to provide documents on the basis that they are subject to legal privilege. A police officer seeking a warrant must not provide information which he knows to be inaccurate or misleading and he should provide all relevant information.

If it is not alleged that the law firm is involved in any form of illegality, nor likely to destroy, or conceal, the relevant material, an application for a warrant to search its offices is likely to be oppressive (and therefore refused).

The Court has a duty to protect the importance of legal privilege, and must give that privilege due consideration in deciding whether it is appropriate to issue a warrant to search a law firm's offices.

Where a warrant is issued to search a law firm's offices and where legal privilege is being claimed, any warrant ought either to have provided for independent supervision of the police search by a court appointed representative or to have contained a requirement that any material seized should be sealed unread and delivered to the court to adjudicate upon the issue.

The case is a reminder that law firms' offices can be the subject of search warrants, but that such warrants will not be granted unless there is a suggestion that the firm itself was involved in some illegal conduct, or there is a risk the firm may conceal or destroy material. See our 2015 Year End United Kingdom White Collar Crime Update for a similar case where an order seeking the disclosure of 180,000 documents from law firms was upheld.

The FCA will not rely on internal investigations

Mark Rutherford, the FCA's director of enforcement and market oversight has publicly stated that the FCA will not rely on the content of internal investigations. Mr Rutherford was speaking at the American Bar Association's Fifth London White Collar Crime Institute on October 10, 2016. He explained that from the FCA's perspective it has a duty to carry out independent and comprehensive and independent investigations and "*There is an inescapable conflict of interest, either actual or perceived, in the way internal investigations are conducted*". Mr Rutherford stated that this should not prevent assistance being provided to the FCA and indicated that counsel who have carried out an investigation can provide valuable assistance in pointing the regulator in the direction of the most helpful witnesses. He also noted that internal investigations can be of assistance in relation to jurisdictions where the FCA has difficulties in obtaining information. Practitioners should therefore be aware that the value in internal investigations from an advocacy perspective may not arise until negotiations with the regulator begin, firstly as to whether a referral to enforcement should be made and secondly when the level and nature of sanction is discussed.

International co-operation between Regulators and Prosecutors

International co-operation in the area of white collar enforcement remains high, which is necessary given the number of cases with cross-border elements. David Green said earlier this year that the SFO has "*invested real effort in building strong cooperative relations with foreign agencies in key financial centres across the globe. This involves secondments, rolling discussions, exchange of information and coordinated activity*". At a Global Investigations Review (GIR) event in New York in September 2016, Patrick Stokes, the former head of the US Department of Justice's FCPA unit and new Gibson Dunn partner, engaged in a dialogue with Ben Morgan, the Serious Fraud Office's lead anticorruption enforcer, on "*cooperation, voluntary disclosures, deferred prosecution agreements and other aspects of the evolving transatlantic legal landscape*". This is worth reading in full. In the context of a company that self-reported to the US authorities but not the UK authorities, Ben Morgan had this to say: "*If they don't have the courtesy to come and talk to us about the risk they face, that's a pretty bad start. It goes without saying that any sophisticated company should realise that we speak several times a week, so the likelihood is that it would come back to us anyway, so it really is well worth having that conversation directly. It doesn't mean that we'll take it and it doesn't mean that you're committed to a definite penalty, but it sets the right start for the range of options*".

The FCA reports that international cooperation in the white collar area remains high. The NCA continues to work closely with national agencies in other countries as part of the Interpol and Euripol networks.

It was recently announced that the Criminal Division of the US DoJ is to second a lawyer to the UK for two years to work at the FCA and the SFO, "*to further cooperation between the jurisdictions and share best practice*". The secondee will spend one year at the FCA, one at the SFO, and one in Washington with the Fraud Section of the Criminal Division, investigating and prosecuting transnational economic crimes and training colleagues in the light of their experience in the UK. The recruitment process was announced on 9 December 2016. A DoJ representative said that "*To address crime on a global scale, we are forging deep coalitions with our international enforcement and regulatory counterparts, and our relationship with the United Kingdom's Financial Conduct Authority (FCA) and the Serious Fraud Office (SFO) is vitally important in these efforts"*. David Green, Director of the SFO, added: "*This is a concrete demonstration of the close and valued relationship we have built with our American colleagues, which has been so evident in our casework*".

FCA's proposal for New Whistleblowing Regime

As noted in our 2015 Year End UK White Collar Crime Update, in October 2015 the FCA and PRA published new rules in relation to whistleblowing, primarily directed at UK firms' internal whistleblowing procedures, which were due to be implemented by September 7, 2016. On September 28, 2016, the FCA published a consultation paper proposing to extend its whistleblowing regime to UK branches of overseas banks. The consultation closes on January 9, 2017.

Modern Slavery Act

On July 31, 2016 the British government published its Modern Slavery Act Review, covering the first 12 months of the act. This made 29 recommendations for further and better reporting, training and prosecution. It also noted that 289 offences were prosecuted during 2015 of which 27 were under the Modern Slavery Act itself and 262 under the pre-existing human trafficking legislation.

April 2016 also saw relevant companies issue their first slavery and human trafficking statements pursuant to section 54 of the Modern Slavery Act. Under section 54, commercial organisations that supply goods or services and have a total turnover of £36 million or more are required to issue publically a board-approved slavery and human trafficking statement that details "all the actions" the company has taken to eliminate slavery and human trafficking from their business and supply chain during the financial year.

Health and Safety and Corporate Manslaughter

On February 1, 2016 the new sentencing guidelines in relation to health and safety, corporate manslaughter, food safety and food hygiene came into force, with the aim of creating a more consistent approach to prosecutions in this field. These guidelines allow for higher fines to be given to larger companies because their turnover is given substantial weight when determining the level of fine. An illustration of the guidelines at work was shown in the Merlin Case arising from an accident on a theme

park roller coaster. In this case culpability and harm were regarded as very high, creating a starting point which was adjusted in relation to both aggregating and mitigating factors. Merlin was fined £5,000,000, a substantial reduction from the £7,500,000 fine that they would have faced had it not been for the early guilty plea. Merlin was viewed as a large organisation due to its high turnover. A medium sized organisation with a turnover between £10 million and £50 million would have been fined £2,000,000 for the same conduct.

The new guidelines allow for focus to be given to the risk of harm, as opposed to just the actual harm caused. This has led to a substantial increase in the level of fines and may also lead to a higher number of prosecutions being taken in this area going forward. An example of this was the sentence imposed upon ConocoPhillips (UK) Limited where despite no actual harm being caused as a result of the breaches a £3,000,000 fine was given. Other substantial fines under the 2016 guidelines have ranged from £800,000 to £2,600,000 (plus costs), showing the growing trend for increased fines and a shift from the thousands bracket to the millions. To date there have been no appeals regarding any sentences given under the new guidelines. In addition, there have been 4 (reported) sentences handed down for corporate manslaughter during 2016. The largest fine was £600,000.

2. Bribery and Corruption

Enforcement of the UK's anti-corruption laws has continued apace during 2016. A total of 14 individuals have been convicted, 6 of whom for offences under the *Bribery Act*. This brings the total number of individuals convicted since 2008 to 89.

Fewer companies have been the subject of concluded enforcements in 2016, but this may be only a temporary blip as a significant number of enforcements are expected to conclude during 2017, and a number of trials against corporate defendants are already scheduled for the coming year.

Based on these enforcements, a number of trends are visible. Firstly, the UK's second DPA for **XYZ Limited** is illustrative of the expanding role for this prosecutorial tool. Secondly, we are seeing the continuing emergence of other enforcement bodies alongside the Serious Fraud Office. For example, the International Corruption Unit (the "ICU") set up during 2015 within the National Crime Agency has started to flex its muscles. The ICU now has 50-60 staff and we are aware that it has started to conduct raids in relation to *Bribery Act* offences.

Other prosecutorial bodies currently with bribery and corruption investigations or prosecutions on foot include the NCA more broadly, the Metropolitan Police Complex Fraud Team, the City of London Police, the Insurance Fraud Enforcement Department of the City of London Police, the Surrey and Sussex Economic Crime Unit, and Leicestershire Police.

With the passage of time, we are seeing a growing number of instances where charges are being laid under both the *Bribery Act* and the pre-*Bribery Act* legislation. During 2016 this can be seen in the examples of **XYZ Limited**, as well as **Wesley Mezzone**, **John Reynolds**, and the individuals from **Sarclad Limited**.

Despite this, research from Henley Business School published during 2016 conducted over 12 years and based on interviews with over 900 business leaders suggests that more than 85% of UK business managers are involved in international bribery on a monthly basis. The research also found that 80 percent of board-level executives admited to being aware of the practice.

Enforcement: Bribery Act section 7

Braid Logistics (UK) Limited

In April 2016, **Braid Logistics (UK) Limited** ("**Braid**") became the latest company to enter into a civil settlement with Scotland's Civil Recovery Unit under the amnesty program run by Scotland's Crown Office and Procurator Fiscal Service. Under the terms of the agreement with the Scottish authorities Braid will pay the Crown £2.2 million, its total gross profit resulting from the unlawful conduct.

Having become aware of potentially-improper activities in relation to two freight forwarding contracts in 2012, Braid voluntarily made a self-report to the Crown Office accepting responsibility for contraventions of both the section 1 (paying a bribe) and section 7 (failing to prevent an associated person from paying a bribe) offences under the *Bribery Act*. Only limited information has been released on the underlying conduct that gave rise to this self-report as the authorities are considering whether to prosecute the individuals involved.

In relation to the first of the contracts, what is known is that a Braid employee and the employee of a customer agreed a scheme whereby unauthorised expenses incurred by the customer's employee were funded by the dishonest inflation of invoices provided to that customer. The expenses included personal travel, holidays, gifts, hotels, car hire and cash. During the investigation into this contract, separate bribery concerns in relation to a profit-sharing arrangement with a director of a second customer were discovered. Under this arrangement the profit achieved on services provided to the customer was split in return for orders continuing to be placed with Braid.

XYZ Limited

On July 11, 2016, the SFO announced that it had concluded the UK's second DPA with a company named only as **XYZ Limited**, a wholly-owned subsidiary of a US parent company named only as **ABC Companies LLC**.

XYZ Limited is described in the *Serious Fraud Office v XYZ Limited* (Case no. U20150856) as a "*small to medium sized enterprise ("SME") which between June 2004 and June 2012 was involved, through its controlling minds, in the offer and/or payment of bribes to secure contracts in foreign jurisdictions*". Further it was held that "*in total, of 74 contracts which were ultimately examined, 28 are said to be "implicated"*", and that these contracts represented 15.81% of XYZ's turnover and 20.82% of its gross profit during that period.

In 2012 the parent company instituted a new global compliance program which resulted in the discovery of the bribes. An internal investigation was launched and the company self-reported to the SFO and then

continued to co-operate. The company is unnamed because of "*ongoing criminal proceedings*" against individuals related to the company.

The offences were a mixture of giving corrupt payments under the *Prevention of Corruption Act*, as well as the section 1 and section 7 offences under the *Bribery Act*.

For an in-depth discussion of the terms of the DPA, see our 2016 Mid-Year United Kingdom White Collar Crime Update.

Enforcement: Bribery Act sections 1-2 – giving/receiving bribes

In addition to the above-mentioned enforcements against Braid and XYZ Limited for the section 1 offence, there have been a number of other instances during 2016 of the enforcement of this offence.

Saeed Shakir and Muzaffar Hussain

On March 15, 2016, sentences of 20 months and 3 years were handed down to **Saeed Shakir** and **Muzaffar Hussain** for offering a bribe of £500, and a promise of a further payment to a local government official in the UK. These were the 11th and 12th convictions of individuals under the *Bribery Act*.

Wesley Mezzone and John Reynolds

On September 26, 2016, sentences of 20 months and 30 months were handed down to **Wesley Mezzone** and **John Reynolds** respectively. The charges related to offences committed between 2010 and 2013, when Mr Reynolds worked as an IT network manager at East Sussex Fire and Rescue Service ("ESFRS"). During this period, he had disclosed rival bids for computer equipment supplies to Mr Mezzone's company, Mason IT Limited, recommended that the ESFRS buy from Mason IT, and received personal payments from Mason IT. Mr Reynolds earned more than £30,000 from this relationship. Mr Reynolds was also convicted of stealing some £70,765 worth of computer and telecom equipment and a pager from ESFRS.

Mr Reynolds was found guilty of theft by employee, fraud by abuse of position, and false accounting as well as of the section 2 offence of receiving a bribe under the *Bribery Act*, and the offence of receiving a corrupt payment under the *Prevention of Corruption Act*. Mr Mezzone was found guilty of paying a bribe under the *Bribery Act*, and of making a corrupt payment under the earlier legislation. These were the 13th and 14th individuals convicted under the *Bribery Act*.

Aisha Elliot and Stephen Oates

As reported in our 2016 Mid-Year United Kingdom White Collar Crime Update, the City of London Police's Insurance Fraud Enforcement Department brought its first case under the *Bribery Act* against **Aisha Elliot** and **Stephen Oates**. Ms Elliot, who worked at a claims management company, was charged with offering a bribe (section 1) and Mr Oates with receiving a bribe (section 2). On December 20, 2016 each was sentenced to 12 months' imprisonment. These were the 15th and 16th individuals

convicted under the *Bribery Act*. The conduct related to the sale of confidential information by Mr Oates for £150 for each sale.

These cases demonstrate the continuing appetite of the British authorities to prosecute individuals for fairly small-scale acts of bribery.

Sarclad Limited - individuals

Charges have been brought against Sarclad Limited's former director **Michael Sorby** and former sales manager, **Adrian Leek**. Mr Sorby and Mr Leek were charged with one count of conspiracy to bribe under section 1 of the *Bribery Act*, and also one count of conspiracy to corrupt contrary to section 1 *Prevention of Corruption Act*. The press release from the SFO dated February 25, 2016 has now been removed from its website.

Gary West and Stuart Stone

As reported in our 2014 Year End FCPA Update, in December 2014 the SFO secured its first convictions under the *Bribery Act* of **Gary West** and **Stuart Stone**. In March 2016 Mr West applied to the Court of Appeal for permission to appeal his 4-year sentence. Permission was refused. A similar application had earlier been made by Mr Stone regarding his 6-year sentence which was also refused. On July 29, 2016, the SFO announced that it had secured confiscation orders against the two defendants. Gary West was ordered to pay £52,805 and Stuart Stone was ordered to pay £1,141,680. The SFO has reported that Mr Stone has so far paid £835,589.07 towards this confiscation, and been granted an extension to pay the balance until 28 January 2017. Mr West has paid £15,663.78.

Enforcement: Prevention of Corruption Act

Simon Davies and Robert Gillam

At a hearing on June 3, 2016, **Simon Davies** and **Robert Gillam** each pleaded guilty to the making of a corrupt payment in 2009 of £122,000 to Robert Gannon, a British national who pleaded guilty to related charges in the U.S. in November 2015. Mr Gannon was jailed for one year in the US. The payment was made in return for confidential information in relation to a £5m contract to supply bomb disposal equipment in Afghanistan.

Mr Gillam and Mr Davies were sentenced to two years and eleven months' imprisonment and were disqualified from acting as company directors for five and two years respectively. They are to be the subject of confiscation proceedings under the *Proceeds of Crime Act*.

Four convicted in relation to corruption of a member of the Royal Household

On August 9, 2016 the second of two trials concluded resulting in convictions of three individuals and the guilty plea of a fourth for offences of conspiring to give and receive corrupt payments. **Ronald Harper** was a member of the British Royal Household entrusted with overseeing the award of works contracts. He accepted payments from **Christopher Murphy** and **Aseai Zlaoui** on behalf of one

company, and **Stephen Thompson** on behalf of a second company in return for awarding them contracts. At a hearing on September 28, 2016 the four were sentenced. Mr Harper was sentenced to 5 years' imprisonment; Mr Murphy to 18 months; Mr Zlaoui to 12 months suspended for 2 years and 200 hours unpaid work; and Mr Thompson to 15 months for his corruption offence.

Richard Moxon and Peter Lewis

The IT director of an NHS trust – **Peter Lewis** – pleaded guilty on November 21, 2016 to one count of receiving corrupt payments totalling £80,970 in return for awarding a contract valued at £950,000. His co-defendant – Richard Moxon – had earlier pleaded guilty at a hearing in March 2016. On January 6, 2017 Mr Lewis was sentenced to 3 and a half years' imprisonment, and Mr Moxon to 14 months'.

Enforcement: Ongoing Foreign Bribery Prosecutions

F.H. Bertling Limited

On July 13, 2016 the SFO announced charges against **F.H. Bertling Limited**, and seven individuals (**Peter Ferdinand**, **Marc Schweiger**, **Stephen Elmer**, **Joerg Blumberg**, **Dirk Jürgensen**, **Giuseppe Morreale**, and **Ralf Peterson**). The charges relate to an alleged conspiracy to "*bribe an agent of the Angolan state oil company, Sonangol, to further F.H. Bertling's business operations in that country*". The offences are alleged to have taken place in 2005 and 2006. The Pre-Trial Review is scheduled for July 20, 2017.

[Withheld]

Enforcement: Ongoing Foreign Bribery Investigations

Rolls Royce

In May and November 2016, it was reported that the SFO had extended its investigation into **Rolls Royce plc** over suspicions that Rolls Royce made corrupt payments via intermediaries to secure contracts in Nigeria and Iraq. These fresh allegations are added to the existing SFO investigation, which commenced in 2012, concerning suspicions that Rolls Royce paid bribes to agents in China, Brazil and Indonesia.

Part of the investigation is focused on the relationship between Unaoil and Rolls Royce. Unaoil represented Rolls Royce in several countries, and whilst Unaoil itself is the subject of a separate on-going SFO investigation it denies any impropriety in its relationship with Rolls Royce.

Rio Tinto

On November 9, 2016 it was reported that **Rio Tinto** had discovered multi-million-dollar payments to a contractor relating to its Simandou iron ore project in Guinea. Rio Tinto said it became aware of email correspondence relating to the payments in August 2016, and notified the authorities in the UK, the US and Australia on November 8, 2016.

GlaxoSmithKline

In April 2016 it was reported that **GlaxoSmithKline** is conducting an internal investigation into the conduct of staff in Yemen. For further information, see our 2016 Mid-Year UK White Collar Crime Update. This is alongside the investigation regarding allegations of improper conduct in China.

Airbus

On August 8, 2016 the SFO announced that it was opening a criminal investigation into "*allegations of fraud, bribery and corruption in the civil aviation business of Airbus Group. These allegations relate to irregularities concerning third party consultants*". For further information, see our 2016 Mid-Year UK White Collar Crime Update.

Eurasian Natural Resources Corporation / Eurasian Resources Group

On September 9, 2016 it was reported that the SFO had conducted further interviews in this ongoing investigation. The reported interview was of the company's former head of African operations. This follows an application by the SFO to the government for so-called "blockbuster" funding for this investigation.

Unaoil

The SFO's investigation into **Unaoil** continues following the SFO's request for mutual legal assistance to the Monégasque authorities and a raid of Unaoil's premises. The allegations against Unaoil relate to claims of corruption and bid-rigging in the global oil and gas industry. Following the commencement of the SFO investigation, it was reported in October 2016 that a former Unaoil executive is now cooperating with the UK authorities, and is claiming to have paid historical bribes on Unaoil's behalf.

For further discussion, see our 2016 Mid-Year UK White Collar Crime Update. Since then **Unaenergy Group Holding PTE Ltd**, **Unaoil Monaco S.A.M.**, **Ata Ahsani**, **Cyrus Ahsani** and **Saman Ahsani** have brought judicial review proceedings against the Serious Fraud Office which were heard on 1 December 2016. Judgment is awaited.

Soma Oil and Gas

As reported in our 2016 Mid-Year UK White Collar Crime Update, **Soma Oil and Gas Holdings Limited** was unsuccessful in its attempt to have the SFO's investigation of it terminated.

However, on December 14, 2016 the SFO announced that it had closed its investigation into Soma Oil and Gas on the basis of "*insufficient evidence to provide a realistic prospect of conviction*". The SFO noted that, whilst there were "*reasonable grounds to suspect the commission of offences involving corruption*", the evidence obtained during the investigation would be unlikely to meet the evidential burden required in mounting a successful prosecution.

R v A Ltd & others

In its judgment of July 28, 2016, the UK Court of Appeal has held that the diary entries of an absent company executive can be used to establish corporate criminal liability: *R v A Ltd & others* [2016] EWCA Crim 1469.

A Ltd, a company incorporated in England Wales and part of a multinational conglomerate operating in the power generation and transport sectors, was being prosecuted by the SFO for allegedly paying bribes to officials of foreign companies in several countries to secure contracts via two senior executives, X and Y. In the course of the SFO's prosecution, the judge at the Southwark Crown Court had held that the diaries of BK, a former director of A Ltd and not a defendant in the case, was inadmissible as evidence. While both prosecution and defence both agreed that BK was the "*directing mind and will of the company*", they disagreed over whether his diaries could be used as evidence.

On appeal, the Court of Appeal held that the lower court had misdirected itself in law. The reliance by the prosecution on BK's diary entries to prove BK's guilty state of mind, and thus the guilty state of mind of the company, was "*entirely orthodox and unobjectionable*". The case will now be referred back to Southwark Crown Court pending a jury trial.

Enforcement: Ongoing Domestic Bribery and Corruption Prosecutions and Investigations

Barratt Developments PLC

On October 19, 2016, the London chief of **Barratt Developments PLC**, the UK's largest housebuilder, was arrested by the London Metropolitan Police on suspicion of bribery offences. **Alistair Baird**, the managing director was arrested along with an unnamed former employee.

These detentions form part of an ongoing inquiry by the Metropolitan Police's Complex Fraud Team into the awarding of contracts by the company. They follow an internal investigation by Barratt which began in August 2015 and resulted in a referral by the group to the police in April 2016.

National Assets Management Agency ("NAMA")

The National Crime Agency on October 6, 2016 provided an update on its investigation into the sale by **NAMA** of its Northern Ireland property portfolio to Cerberus Capital Management (a US investment fund) in 2014. Six people are under criminal investigation for bribery, corruption and fraud amongst other offences. More than 40 witnesses have been interviewed, and the NCA has also conducted eight searches of properties.

By way of background, the Irish state asset agency sold the property portfolio to Cerberus Capital Management in 2014. In July 2015, it was alleged that £7.5m in fees paid to Tughans, a Belfast law firm engaged by Cerberus, had been moved to an Isle of Man bank account, reportedly to facilitate a payment to a Northern Ireland politician or political party. The NCA began its investigation shortly thereafter. In September 2016, the Irish government also announced its intention to set up an investigation into the NAMA deal.

Metropolitan Police officer

On November 1, 2016 it was reported that a serving **Metropolitan Police** officer and four other men had been arrested on suspicion of bribery. The 49-year-old constable, a member of Scotland Yard's Specialist Operations team – which covers counter-terrorism, airport security and protecting public figures – was accused of misconduct in public office and bribery. The four other men were held on suspicion of bribery and aiding and abetting misconduct in public office. Scotland Yard has not released further information at this stage in order to protect the investigation by the Independent Police Complaints Commission.

Bribery in football

On November 17, 2016 the City of London Police announced its decision to begin a criminal investigation into a single suspected offence of bribery, following its review of the material gathered by a Daily Telegraph investigation into suspected corruption in football.

R v Alexander & others

Trial against six defendants commenced on September 5, 2016. Three of these – **Stephen Dartnell**, **Kerry Lloyd**, and **Simon Mundy** – are charged with conspiracy to make corrupt payments in connection with the purchase of agreements by KBC Lease (UK) Limited and Barclays Asset Finance from Total Asset Limited. The trial is ongoing.

Mark Dobson, David Mills, Alison Mills, Michael Bancroft, Jonathan Cohen, John Cartwright

In September 2016, the trial of **Mark Dobson**, **David Mills**, **Alison Mills**, **Michael Bancroft**, **Jonathan Cohen**, **John Cartwright** for corruption offences and other offences began at Southwark Crown Court. The defendants had all been arrested and charged in 2013. The alleged offences relate to dealings at the Reading Branch of the former Halifax Bank of Scotland which led to losses to the bank estimated at upwards of £266m. The trial is expected to last for 6 months.

3. Fraud

Lower profile prosecutions naturally continue in relation to fraud, such as the school staff members jailed for defrauding the government of £69,000. The focus for this update, however, is on the continuing efforts of the major UK prosecutors and regulators.

Investigations: SFO

Barclays

Reports from November 14, 2016 reveal that the SFO is planning to decide by March, 2017, whether to press charges in its criminal probe of **Barclays**' 2008 Qatar fundraising. The agency is investigating £322 million in 'advisory fees' paid by Barclays to the Qatar Investment Authority in a financial crisis-era deal to avoid a government bailout of Barclays. The SFO is investigating whether money was

secretly invested back into Barclays without proper disclosures. Many, including former senior Barclays management, have been interviewed as part of the probe.

In a related £1 billion civil claim filed by **PCP Capital Partners**, a private equity firm, the High Court was reportedly told that the SFO has re-interviewed various people in the case and has been continuing its interviews throughout December 2016 and January 2017. Matthew Parker QC, for the SFO, told the High Court that the agency was "*broadly on course*" to make a charging decision by March 2017.

Foreign Exchange

On March 15, 2016, the SFO formally announced that it was closing its investigation into allegations of fraudulent trading in the forex market. In its statement the SFO explained that following an investigation lasting over one and a half years and involving more than half a million documents, it had been unable to identify sufficient evidence to meet the test required to bring a prosecution under English law. The investigation had been commenced in July 2014 after the FCA had referred material to the SFO.

Enforcement: SFO

Tesco Supermarkets

On September 9, 2016, the SFO announced that it was charging **Carl Rogberg**, **Christopher Bush** and **John Scouler** each with one count of fraud by abuse of position contrary to sections 1 and 4 of the *Fraud Act 2006*, and one count of false accounting contrary to the *Theft Act 1968*. The three individuals were senior executives of **Tesco Supermarkets**, and the alleged activity occurred between February 2014 and September 2014. The SFO's press release added that the investigation into the company was ongoing. Rogberg, Bush and Scouler are reported as having pleaded not guilty to the fraud charges at a preliminary hearing which took place on September 22, 2016.

The charges follow an investigation commenced by the SFO in October 2014 after the company admitted that it had overstated profits by £263 million because it had incorrectly booked certain payments. The scandal came to light after irregularities were reported by a whistleblower to the company's new chief executive.

Saunders Electrical Wholesale Limited

On May 24, 2016, **Michael Dean Strubel**, **Spencer Mitchell Steinberg** and **Jolan Marc Saunders**, were convicted of conspiracy to defraud following an investigation by the SFO. The three fraudsters took almost £80 million from London investors and spent the money on yachts, cars and expensive property. The three were sentenced to a total of 21 years: Mr Saunders was sentenced to seven years for conspiracy to defraud with one year to run concurrently for acting as a director of a company whilst disqualified; Mr Strubel was sentenced to seven years' imprisonment and Mr Steinberg was sentenced to six years and nine months' imprisonment.

The three men had induced wealthy individuals to invest significant sums (in some cases millions of pounds) in an electrical supply business which purported to be a supplier to blue chip hotel chains. The

actual trade carried out by the business concerned was significantly below the levels portrayed to potential investors. They also falsely claimed to be the preferred supplier of the Olympic village ahead of the 2012 Games.

Tata Steel

On April 8, 2016, the SFO announced that it had opened a criminal investigation into the activities of Specialty Steels, which is a business unit of **Tata Steel (UK) Limited**. The investigation has been underway since December 2015. On the same day the UK's Daily Telegraph newspaper reported that police officers are investigating allegations that certificates setting out the composition of products were falsified. The company reportedly suspended nine employees and referred itself to the SFO following an internal audit. The *Daily Telegraph* also noted that there is a separate trading standards investigation underway.

Football Apprenticeships

The SFO has charged six men in connection with the SFO's investigation into **Luis Michael Training Limited** which is alleged to have claimed payments from several further education colleges for training and football apprenticeships that were never provided. On May 4, 2016 the six men appeared at Westminster Magistrates Court. All six were charged with one count of conspiracy to commit fraud by false representation under section 1(1) of the *Criminal Law Act 1977*, five individuals were charged with a further count under the same section and one individual was also charged with one count of fraud under section 1 of the *Fraud Act 2006* and of using a false instrument under section 3 of the *Forgery and Counterfeiting Act 1981*. Further case management hearings are scheduled for March 2017.

Bank of England Liquidity Auctions

In our 2015 Year End UK White collar Crime Update we reported that the SFO had opened an investigation into the **Bank of England's** liquidity auctions carried out during the financial crisis in 2007 and 2008. In August 2016 Bloomberg reported that the SFO will decide whether to pursue charges by the end of 2016 and that the SFO is in the process of conducting interviews. Charges have yet to be pursued. The investigation relates to the operation of the Bank of England's Extended Collateral Long-Term Report Operations in 2007 and its Special Liquidity Scheme in 2008. Both schemes allowed banks to swap assets for liquidity funding. Bloomberg's report stated that the SFO's investigation centers around whether officials at the Bank of England had told lenders the level at which they should bid in advance of the liquidity auctions.

Enforcement: FCA

On November 1, 2016, in a case brought by the FCA, **Scott Crawley**, **Daniel Forsyth**, **Adam Hawkins**, **Ross Peters**, **Aaron Petrou** and **Dale Walker** were banned from performing any function in relation to any regulated activity following their involvement in the operation of an unauthorized collective investment scheme. The scheme led to over 100 investors losing just under £4.3 million. The individuals who operated the scheme received sentences totaling more than 30 years. Between them, the individuals were convicted of offences including: conspiracy to defraud; breaching, or aiding and

abetting the breach of, the general prohibition against carrying on a regulated activity without authorisation; possessing criminal property; and providing information knowing it to be false or misleading.

On November 18, 2016, following an investigation by the FCA, **Charanjit Sandhu** was charged before the City of London Magistrates Court with conspiracy to defraud, together with offences under the Financial Services and Markets Act 2000 and the Fraud Act 2006. The offences relate to the promotion and sale of shares through a succession of four alleged 'boiler room' companies. In June 2016, five other individuals had already been charged as a result of the investigation: **Michael Nascimento, Hugh Edwards, Stuart Rea, Ryan Parker** and **Jeannine Lewis**.

Confiscation orders

The SFO continues to pursue confiscation orders and to seek significant penalties in the event of default of payment.

On November 14, 2016, **David Gerald Dixon**, the founder and creator of now defunct companies Arboretum Sports (UK) Limited and Arboretum Sports (USA), was ordered to pay a confiscation order of £275,000. Through the Arboretum companies, investors were persuaded to invest into what they were told was a no-risk gambling syndicate with the potential for dramatic rates of return. In reality, however, the scheme was a dishonest vehicle for Mr Dixon to appropriate its members' funds. The compensation will be apportioned equally between known victims of the fraud. Mr Dixon will face a two-year default imprisonment sentence if he fails to satisfy the order within three months.

On September 27, 2016, **Alex Hope** was sentenced to 603 days' imprisonment for failing to pay the full value of a *Proceeds of Crime Act 2002* confiscation order made against him on February 12, 2016 in the amount of £166,696. This sentence is in addition to the 7 years' imprisonment imposed on him on January 30, 2015 following his conviction by a jury on January 9, 2015 for defrauding investors of significant sums and operating a collective investment scheme without authorization. Alex Hope used over £2 million of the £5.5 million investors entrusted to him to fund his lifestyle. **Raj von Badlo,** who was also involved in the scheme, had been sentenced to 2 years' imprisonment for recklessly making false representations to investors and operating a collective investment scheme without authorization. He paid in full the confiscation order made against him in the amount of £99,819. In total, investors should receive in excess of £2.9 million (approx. 55% of the capital sums owed to them), which is the largest sum returned to victims of crime following an FSA/FCA prosecution.

As we reported in our 2016 Mid-Year United Kingdom White Collar Crime Update, on June 17, 2016, **Richard Clay** and **Kathryn Clark** were ordered to pay a total of £562,766.07 for fraud charges under the *Fraud Act*, having defrauded investors through Arck LLP, a company which created and marketed financial products. On October 25, 2016, Mr Clay and Ms Clark were banned from carrying on any function in relation to any regulated activities.

On April 19, 2016, **Jeffery Revell-Reade** was ordered to pay a confiscation order of £10,751,000 within three months failing which he would face an additional prison sentence of 10 years for default of payment. Mr Revell-Reade is currently serving an eight-and-a-half-year prison sentence following his

conviction in connection with one of the UK's largest ever boiler room schemes. A further individual, **Anthony May** who is currently serving a seven years and four months' prison sentence was ordered to pay £250,000 within three months.

4. Financial and Trade Sanctions

Please note that a more detailed analysis of financial and trade sanctions developments prior to September 22, 2016 is set out in our 2016 Mid-Year United Kingdom White Collar Crime Update.)

Brexit

Half a year on from the UK's June 23, 2016 vote to leave the European Union and still much of the original political and legal uncertainty persists, including in relation to the world of financial and trade sanctions. As we have already set out in more detail in our Mid-Year Update, the following observations about Brexit can nonetheless be made:

- Until the UK leaves the EU, EU law remains in force and the UK is obliged to give effect to EU legislation, including sanctions legislation.

- The UK's underlying obligation to implement United Nations Security Council sanctions will continue, but the mechanics (namely implementation first at EU level, then by regulation in the UK) will need to change.

- The easing of sanctions against Iran through the Joint Comprehensive Plan of Action ("JCPOA"), (cf. our client alert "Implementation Day" Arrives: Substantial Easing of Iran Sanctions alongside Continued Limitations and Risks), will not be affected.

- The UK's departure from the EU may have significant practical ramifications in respect of the EU's political stance on the imposition and targets of sanctions. By way of example, the bloc's approach to sanctions against Russia may undergo a policy shift.

- Once no longer an EU member, the UK will have a number of policy options as to how to address sanctions issues, such as moving in step with US sanctions policy, adopting EU sanctions wholesale, following the Swiss model of adopting watered-down versions of EU sanctions or adopting an autonomous sanctions regime.

The Office of Financial Sanctions Implementation and Policing and Crime Bill

Two important developments over the past year, which will greatly impact the UK's sanctions enforcement landscape are firstly the passage of the *Policing and Crime Bill* through Parliament and secondly the formation of the Office of Financial Sanctions Implementation ("OFSI") within HM Treasury in March 2016.

Policing and Crime Bill

The *Policing and Crime Bill*, which continues to work its way through the legislative process, will significantly strengthen sanctions enforcement in the UK and empower the recently-created OFSI (see below). Presented to Parliament in February 2016, the Bill completed its passage through the House of Commons in June, before moving on to the House of Lords. The House of Lords committee stage began in September, with a fifth sitting occurring on November 11 and report stages taking place on November 30, 2016 and December 7 and 12, 2016. On January 10, the amendments proposed by the House of Lords were considered by the House of Commons. While not all Lords' amendments were accepted, meaning that there will now be a process of "ping-pong" between the Houses, the amendments in relation to sanctions, most importantly a new right of appeal to the Upper Tribunal, were accepted by the Commons. After all the proposed amendments have been resolved, the next stage is Royal assent and the passing of the bill into law. OFSI's consultation, mentioned below, provides an estimated timetable for the act coming into force in April 2017.

Part 8 of the Bill, which has remained largely unchanged since introduction, will bring about the following key developments (presented in more detail in the 2016 Mid-Year United Kingdom White Collar Crime Update):

Increase in maximum custodial sentences

The maximum custodial sentence for violating UK financial sanctions rules will be substantially increased from two to seven years (on indictment) and to two years (on summary conviction), in line with sentences for offences under the *Terrorist Asset-Freezing Act 2010*.

Imposition of civil monetary penalties

As an alternative to criminal prosecution for non-compliance with financial sanctions, OFSI will be able to impose civil monetary penalties of the greater of £1 million or 50% of the value of the funds or resources involved. The Bill envisions that senior officers and managers of companies can be fined on the same scale.

Availability of Deferred Prosecution Agreements (DPAs) and Serious Crime Prevention Orders (SCPOs)

Under the Bill, financial sanctions breaches will be added to the list of offences for which DPAs and SCPOs are available (by amendment to the *Crime and Courts Act 2013* and the *Serious Crime Act 2007*, respectively). For discussion of the UK's DPA regime see our 2013 Mid-Year Update on Corporate DPAs and NPAs). An SCPO is a court order which can be imposed as part of a criminal sentence and which prevents involvement in serious crime by imposing prohibitions, restrictions or requirements on individuals or entities. Breach of an SCPO is punishable by a fine and/or imprisonment of up to five years.

Rapid implementation of UN sanctions

The Bill also seeks to address the delay between adoption of sanctions by the UN Security Council and their implementation by the EU, which can take up to a month. OFSI will be empowered to adopt temporary regulations that would give immediate effect to the UN's resolutions and which would then fall away once the EU publishes its regulation (this mechanism will of course have to be adapted post-Brexit).

The Bill also allows HM Treasury to extend its temporary regulations to the Channel Islands, the Isle of Man and British Overseas Territories. However, this power will not be used in relation to any Crown dependency or overseas territory that has implemented its own legislative measures to implement sanctions without delay. At present, the Government of Jersey is the only one to have taken such steps and therefore, at its request, Jersey has been omitted from the clause of the Bill dealing with rapid implementation.

OFSI: creation and enforcement policies

An important development that goes hand-in-hand with the Policing and Crime Bill is the formation of a new government body to oversee sanctions enforcement in the UK. OFSI, established within HM Treasury and headed by Rena Lalgie, became operational on March 31, 2016.

Since its creation, OFSI has published on its website numerous guidance papers, including in relation to current lists of designated persons in various countries, general guidance on financial sanctions obligations and the approach it will take when issuing licences and considering compliance. It has also taken responsibility for HM Treasury's annual frozen assets reporting and issued a reminder in October 2016 for all persons holding or controlling funds belonging to sanctioned persons to provide details of these funds to OFSI.

When the *Policing and Crime Bill* comes into force, OFSI and the UK's prosecuting authorities will have a multi-faceted and flexible enforcement regime. As promised by Ms. Lalgie in a May 2016 speech, and as required by the Bill, a public consultation was launched in early December 2016 to seek views on the draft guidance relating to the imposition and determination of monetary penalties. In summary, this guidance explains OFSI's powers under the Bill, its compliance and enforcement approach, how it will assess whether or not to apply a monetary penalty and, if so, what factors will be taken into account, as well as the procedure for deciding and imposing details of penalties. In particular:

Determination of penalty amount

The guidance states that OFSI will assess each case "*fairly and proportionately*", basing its approach on the relevant facts. Each factor is weighted by reference to OFSI's strategy, policy, guidance and processes and to the case facts. The following mitigating and aggravating factors will all be taken into account for the purpose of determining penalty levels:

- direct provision of funds or economic resources to designated persons;
- circumvention of sanctions;
- severity;
- knowledge and compliance standards in the relevant sector;
- behavior;
- failure to apply for a licence/breach of licence terms;
- professional facilitation;
- repeated, persistent or extended breaches;
- reporting of breaches to OFSI (see "Expectation of cooperation", below);
- public interest, strategic priority and future compliance effect; and
- other relevant factors.

Penalty imposition procedure

When it comes to the procedure for penalty imposition, the guidance suggests that OFSI will begin by writing to the relevant person(s) and setting out the reasons for and the amount of the penalty. The person(s) will then be able to make representations about "*any relevant matters*", including matters of law and fact, OFSI's interpretation of the facts, whether OFSI has followed its processes and whether the penalty is fair and proportionate. Thereafter, the person(s) will have the chance to request ministerial review of both the fact of a penalty or the amount of the penalty. While the bill was passing through the House of Lords a further right of appeal to the Upper Tribunal was added. Whilst both OFSI and the Minister's decisions would of course be subject to judicial review, recourse to the Upper Tribunal would "*ensure that there can be a full-merits hearing on points of law and fact*", whereas a judicial review hearing before the High Court would only allow an examination of points of law (as observed by Baroness Chisholm of Owlpen during the December 7, 2016 House of Lords report stage).

No penalty will be imposed where: (i) it would have no meaningful effect (e.g. the value is too low to act as a deterrant or provide restitution for the wrongdoing); (ii) it would be "*perverse*" (e.g. if it arose as a result of improper coercion or blackmail); or (iii) it is not in the public interest to impose a penalty.

"*UK nexus"*

For a sanctions breach to come within OFSI's auspices, there must be a UK connection. However, according to the draft guidance, this does not mean that a breach must occur within the UK. A sufficient "*UK nexus*" could be created by factors such as: (i) a UK company working overseas; (ii) an international

transaction clearing or transiting through the UK; (iii) action by a local subsidiary of a UK parent company; or (iv) financial products or insurance bought on UK markets but held or used overseas. The extension of the UK's enforcement jurisdiction to cover foreign subsidiaries is noteworthy and a significant change to the current law.

Expectation of co-operation

A further key point to draw from the guidance is that OFSI expects all persons involved in a breach to co-operate, even if doing so would result in their being subject to enforcement action. Failure to co-operate will be taken "*very seriously*" and result in the imposition of a monetary penalty. The guidance also makes clear that OFSI places a "*premium*" on voluntary disclosures. As a result, where a person makes a prompt and complete voluntary disclosure, a reduction of up to 50% of the final penalty amount may be available.

Publication of penalty decisions

One of OFSI's main goals is deterrence and, as such, details of all monetary penalties imposed will be published and include details including the person(s) fined, a case summary, the values of the breach and penalty and "*compliance lessons OFSI wishes to highlight*" to help others avoid committing a similar breach.

DPAs

Given that the guidance focuses on monetary penalties, OFSI's approach to DPAs is not covered. However, one can look to Ms. Lalgie's May 2016 speech for guidance on this point. In particular, Ms. Lalgie noted that the terms of a DPA should be expected to include a fine, disgorgement of profits and possibly the imposition of a compliance monitor.

We will be responding to the consultation in due course and will keep our clients and friends updated on further developments.

Key Developments in Sanctions Regimes

North Korea

The United Nations Security Council has strengthened its existing sanctions regime against North Korea by introducing UNSC Resolution 2321. These new measures, referred to by Secretary-General Ban Ki-moon as the "*toughest ever*" against the country, include: (i) prohibiting North Korean exports of copper, nickel, silver, zinc, new helicopters and vessels, and statues; (ii) imposing an annual cap on North Korean coal exports (reducing their volume by over half); and (iii) imposing further asset freezes and travel bans on 11 individuals and 10 entities thought to be connected to the regime's nuclear and ballistic missile programs. In addition, UN Member States must limit North Korean diplomatic missions to one bank account each and suspend scientific and technical cooperation with persons sponsored by or representing North Korea (other than for medical exchanges).

These measures follow a raft of other measures imposed during 2016. In March 2016, the UN imposed and the EU implemented (see here also), new far-reaching sanctions on North Korea, including amongst others: inspection of cargo leaving or entering North Korea; asset freezes and travel bans; bans on the import and export of certain goods; the closure of North Korean banks in UN member state jurisdictions and termination of certain banking relationships; prohibiting new branches, subsidiaries or representative offices of North Korean banks in member states; and prohibiting financial institutions from establishing new joint ventures or establishing or maintaining correspondent relationships with North Korean banks.

Further sanctions followed in May 2016, including the introduction of a €15,000 threshold for all financial transfers to or from North Korea. In the UK, any such transfer will require prior written authorization from OFSI (Regulation 2016/841 and OFSI Guidance).

In addition, UK financial institutions must refrain from commencing certain banking activities and joint ventures in North Korea and terminate existing banking activities and joint ventures in North Korea where HM Treasury has determined that they could contribute to North Korea's illicit programmes.

Other sanctions prohibit the provision of financial support for trade with North Korea, investment by North Korea in the EU's mining, refining or chemical sectors, and the import of petroleum products, dual-use goods and technology and luxury goods (Financial Sanctions Notice and Council Decision 2016/849).

Russia

As mentioned in our August 2014 client alert Bear Baiting - EU Sectoral Sanctions Against Russia, there are currently three main sanctions regimes in respect of Russia, namely asset freezes and travel bans relating to Ukrainian sovereignty; sanctions imposed in relation to Crimea and Sevastopol; and sectoral sanctions, including the restrictions on accessing EU capital markets and prohibitions in the energy and arms sectors.

Each of these regimes has recently been extended. In March and September 2016, the EU extended asset freezes and travel bans (Decision 2016/359 and Decision 2016/1671). In June, the EU renewed its sanctions on Crimea and Sevastopol until June 23, 2017 (Council Decision (CFSP) 2016/982), and in July the general sectoral sanctions against Russia were extended for six months, until January 31, 2017 (Council Decision 2016/1071).

Iran

For more detailed analysis of the changes to the EU's Iran sanctions post-Implementation Day, see our client alert Implementation Day Arrives: Substantial Easing of Iran Sanctions alongside Continued Limitations and Risks.

In March 2016, the UK introduced an Order in Council which gives effect to the JCPOA reduced sanctions regime to the UK's Overseas Territories, including the British Virgin Islands and the Cayman Islands. Bermuda and the UK's three offshore Crown Dependencies (Guernsey, Jersey and the Isle of

Man) gave effect to the JCPOA through local measures. See our 2016 Mid-Year UK White Collar Crime Update for more detail.

Additional Powers for FCA

In a July 2016 Policy Statement, the FCA outlined its intention to introduce an annual "Financial Crime Return", as part of which firms subject to money laundering regulations (including banks, building societies, investment firms and mortgage lenders) above the minimum £5 million revenue threshold will be asked to provide information to help the FCA systematically assess their financial crime systems and controls. Returns will have to be filed beginning March 2017 and contain information including firms' sanctions screening systems, frequency of screening and the number of sanctions matches detected.

Enforcement

As part of its announcement of the above-mentioned consultation, on December 1, 2016 HM Treasury issued a release stating that during 2016 HM Treasury had dealt with over 100 suspected breaches of financial sanctions rules, the highest-value of which was worth around £15 million.

Case Law

In our Mid-Year Update, we detailed three judgments involving key developments in the field of sanctions and enforcement, namely:

- the Royal Court of Guernsey's final judgment in *Bordeaux Services (Guernsey) Limited & Ors v Guernsey Financial Services Commission* (unreported, May 11, 2016), an appeal by Bordeaux Services against the length and level of certain penalties imposed on it and three of its directors by the Commission in July 2015;

- the Supreme Court of Bermuda's judgment of January 29, 2016, upholding the decision of Cornhill Natural Resources Fund Limited to deny the Libyan Investment Authority ("LIA") the ability to redeem investment shares held in the fund by the LIA's nominee (*Cornhill Natural Resources Fund Limited v Libyan Investment Authority* [2016] SC Bda 9 (Com)); and

- the English Court of Appeal's judgment in *Libyan Investment Authority v Maud* [2016] EWCA Civ 788 on the EU regulatory exemption concerning the treatment of frozen funds.

Clients and friends interested in learning more are invited to refer to the 2016 Mid-Year UK White Collar Crime Update

5. Money Laundering

On October 21, 2016, the Financial Action Task Force ("FATF") issued statements which reaffirmed its blacklisting of Iran and the Democratic People's Republic of Korea. The FATF also updated statements regarding the jurisdictions it has committed to working with to improve their anti-money laundering or counter terrorist financing frameworks. These jurisdictions are: Afghanistan, Bosnia and Herzegovina,

Iraq, Laos, Syria, Uganda, Vanuatu and Yemen. Guyana was named as a jurisdiction no longer subject to the FATF's ongoing global anti-money laundering/counter terrorist financing compliance process.

As reported in our 2016 Mid-Year White Collar Crime Update, money laundering continues to be a priority issue for the UK government. The government has continued to push for greater transparency, with particular focus exerted on introducing *The Criminal Finances Bill* ("CFB"), which we discuss below.

Legislation: Criminal Finances Bill

The CFB was published on October 13, 2016 and is likely to be subject to amendment before becoming the *Criminal Finance Act 2017*. The CFB contains provisions to amend the *Proceeds of Crime Act 2002*, which forms the basis for UK money laundering legislation. The Bill aims to strengthen law enforcement powers against money laundering and corruption, provide greater scope for recovery of the proceeds of crime, and counter terrorist financing.

Unexplained wealth orders

The CFB creates unexplained wealth orders ("UWO"), which may be used to require those suspected of corruption (individuals or companies) to explain the origin of certain assets. The High Court needs to be satisfied that "*there are reasonable grounds for suspecting that the known sources of a respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property*". Failure to provide a satisfactory explanation can lead to the presumption that the property is "*criminal property*". Property can include precious metals, stones and other high value assets such as watches.

The assets in question must be located in the UK and valued over £100,000. There is no requirement for the subject of an UWO to be resident in the UK. UWOs will also apply to property acquired before the coming into force of the act. The UWO provisions are backed up in the CFB by a provision for interim freezing orders and by a specific offence for knowingly or recklessly making a false or misleading statement in response to a UWO.

UWOs are targeted at foreign politicians or officials, and their family members or close associates. In an interview given to a London newspaper, Donald Toon, the NCA's Director of Prosperity (Economic Crime and Cyber Crime), gave the example that an UWO may be used if a non-European politically-exposed person is identified as the owner of property in London with significant value (he offered the example of £5-6 million), and there is no obvious means by which the person was able to fund the property. In the same interview Mr Donald stated that the NCA had identified £170 million in laundered property in London.

The NCA, Crown Prosecution Service, FCA, SFO and HM Revenue and Customs will all be able to apply for a UWO by making an application to the High Court.

In November 2016, the Home Office published its assessment of the CFB, and estimates that the use of 20 UWOs each year would result in a benefit to the UK through seized property in the region of between £3 million and £9 million.

New offence of failure to prevent the facilitation of tax evasion

The CFB also creates the new offence of failure to prevent tax evasion. This offence is similar but wider to the offence of failing to prevent bribery under section 7 of the Bribery Act 2010. This measure introduces two new criminal offences: a domestic tax evasion offence and an overseas tax evasion offence. The latter criminalises corporations carrying out a business in the UK which fail to put in place reasonable procedures to prevent their representatives facilitating tax evasion in another jurisdiction, where such conduct would also amount to an offence in the foreign jurisdiction in question. Importantly, there is no requirement for the corporation to have benefited from the tax evasion. The only defence available is one of "*prevention procedures*" being in place that are reasonable in all the circumstances and which are designed to prevent the conduct in question. A detailed explanation of what such procedures might encompass is expected before the act comes into force.

It is notable that prior to the publication of the CFB there was discussion about the introduction of an offence of failure to prevent economic crime which would include offences such as fraud, money laundering and false accounting. While this offence may yet be introduced, it is not found within the CFB.

Suspicious activity reporting regime

The CFB will give the NCA the opportunity to extend the "*moratorium period*" in which a transaction cannot proceed in situations where the NCA has refused consent after a suspicious activity report ("SAR") has been made. The moratorium period is currently 31 days and, under the Bill, can be extended by up to a further 186 days pursuant to a court order. The current 31-day period is sometimes not sufficient, especially where the law enforcement agency needs to obtain evidence or to secure responses to formal letters of request from overseas authorities.

This new provision could prove burdensome as advisors would have to be careful of committing the "tipping off" offence and a 6-month delay could be fatal to a transaction. Some discussion, however, indicates an extension of the 31 day period will be rare in practice and the Home Office estimates that there would be 173 extensions per year.

Disclosure orders

The CFB extends the use of disclosure orders from their current use in the POCA for corruption and fraud investigations, to money laundering and terrorist financing investigations. The CFB will also simplify the existing process to make it easier for law enforcement agencies to use. A disclosure order will require a person to answer questions and disclose information in relation to the investigation. These orders may also be served on a third party such as a bank, but the information disclosed cannot be used against the third party in criminal proceedings.

Information sharing

The CFB will create a provision under the *Proceeds of Crime Act 2002 to* explicitly allow information sharing between regulated companies relating to money laundering prevention. This provision may be useful as there was previous concern that companies could be at risk of breaching confidentiality by sharing such information. The information sharing will result in a joint disclosure report which brings together information from more than one reporter into a single SAR.

Legislation: Guidelines on risk-based supervision under the Fourth Money Laundering Directive

On November 16, 2016, the Joint Committee of the European Supervisory Authorities published the final version of its guidelines on risk-based supervision. The guidelines are addressed to national competent authorities who have responsibility for supervising compliance with anti-money laundering and counter-terrorist financing obligations. The guidelines require the authorities to identify the risk of money laundering and terrorist financing in their sector and adjust the focus and frequency of supervisory actions in line with the risk based approach. The guidelines aim to provide a common EU basis for the application of the risk based approach to anti-money laundering and counter-terrorist financing supervision.

Legislation: Beneficial Ownership Register

As discussed in our 2016 Mid-Year UK White Collar Crime Update, at the global Anti-Corruption Summit held in London in May 2016, David Cameron announced a requirement for foreign businesses owning land and property in Britain to join a public register of beneficial ownership, which will cover the 100,000 UK properties already under foreign ownership. Further, foreign companies seeking government contracts must publish details of who owns and controls their business on a beneficial ownership register. In this vein, in June 2016, the UK government established a PSC Register (a public register of persons with "*significant control*" over a company), requiring companies to make PSC filings with Companies House on an annual basis. Non-compliance can result in criminal sanctions for the company, its officers, and the PSCs themselves.

On November 15, 2016, the *European Union* (*Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016* took effect. These regulations are the result of the Fourth Anti-Money Laundering Directive. One of the aims of the directive is to increase transparency in relation to the real ownership of corporate vehicles. The Government will consult later this year on the measures that it proposes to bring forward to meet the Directive's requirements, including changes to the PSC legislation where required.

Enforcement: United Kingdom

Deutsche Bank

On October 29, 2016, Reuters reported that **Deutsche Bank** could settle allegations of money laundering with the US DOJ and the FCA by early 2017. The allegations relate to "*mirror trades*" in Russia and may have allowed customers to illegally move money from one country to another in possible violation

of money laundering controls. Although the German financial regulator BaFin concluded in October 2016 there was no evidence of wrongdoing, Deutsche Bank has reportedly set aside €1 billion in connection with this case.

Tariq Carrimjee

On October 20, 2016, the Upper Tribunal upheld the FCA's decision to ban **Tariq Carrimjee** of Somerset Asset Management LLP from carrying out the compliance oversight and money laundering reporting in relation to any regulated activity, but not barred from the financial sector entirely. Mr Carrimjee had received the ban after the FCA's 2013 decision notice found that he had failed to act with integrity in failing to escalate the risk that one of his clients might have been intending to engage in market manipulation. The Tribunal found that the FCA's decision to impose a partial prohibition order was not affected by any improper considerations and the decision was one which was reasonably open to the FCA to make.

Sonali Bank (UK) Limited

On October 12, 2016 the FCA announced it had imposed fines and restrictions on **Sonali Bank (UK) Limited** ("SBUK") and its former money laundering reporting officer ("MLRO"), **Steven Smith**, for serious anti-money laundering systems failings. These failings occurred despite SBUK having received clear warnings about weaknesses in its anti-money laundering controls which resulted in its failure to maintain adequate systems between August 20, 2010 and July 21, 2014. SBUK was fined £3,250,600 and was prevented from accepting deposits from new customers for 168 days. Mr Smith was fined £17,900 and prohibited from performing the MLRO or compliance oversight functions at regulated firms. Both SBUK and Mr Smith agreed to settle at an early stage and therefore qualified for a 30% discount on the penalty.

Herbert Austin

As mentioned in our 2016 Mid-Year United Kingdom White Collar Crime Update, **Herbert Charles Austin**, 66, who had been sentenced to over five years in prison in December 2011 for being the mastermind of an organised crime group that conspired to launder more than £12 million stolen from Commerzbank in 2000, was in January 2016 ordered to pay back almost £5 million within 12 months. In September 2010 £2.5 million was restrained in the UK by the High Court with additional sums being restrained in Spain and Portugal.

Elena Kotova

Further, in April 2016, **Elena Kotova**, former executive director of the European Bank for Reconstruction and Development, was ordered by the High Court to comply with a civil recovery order to surrender suspected criminal assets. The NCA seized property worth £1.5 million along with £230,000 that was held in two bank accounts.

Diezani Alison-Madueke

In October 2016, the former Nigerian petroleum minister **Diezani Alison-Madueke** and her mother **Beatrice Agama** were told by a London court they may have a case to answer regarding a £27,000 money laundering investigation conducted by the NCA. This is a global investigation. In September 2016, a seven-person team from the NCA had travelled to Nigeria to interview associates of Mrs Alison-Madueke, and in Switzerland the billionaire businessman **Kola Aluko** had his home searched and was questioned at the NCA's request. Mr Aluko owns Atlantic Energy and signed a contract in 2011 with Nigerian National Petroleum Corporation. The contract had an estimated value of US$7 billion and was signed during the period when Mrs Alison-Madueke was petroleum minister.

Phillip Rudall

On November 14, 2016, **Phillip Rudall**, a former solicitor cleared of money laundering charges, won the right to a trial in a claim against his prosecutors. The High Court dismissed the application of the Crown Prosecution Service and the Chief Constable of South Wales Police to strike out claims by Mr Rudall for misuse of process, malicious prosecution, misfeasance in public office and breach of section 6 of the Human Rights Act in respect of Mr Rudall's alleged involvement in money laundering and other criminal offences. Mr Rudall was charged with nine money laundering offences but these charges were dismissed in 2013.

Finally, the SFO failed to secure convictions for two individuals accused of laundering money from a £83 million investment ("boiler room") fraud in the wake of a nine-year investigation. On March 17, 2016, both were found not guilty of one count under s. 328 of the *Proceeds of Crime Act 2002* following a nine-week trial.

Enforcement: Offshore

British Virgin Islands

On November 11, 2016, the British Virgin Islands Financial Services Commission imposed a fine of US$400,000 on **Mossack Fonseca & Co (B.V.I.) Limited.** The fine was for eight breaches of anti-money laundering regulations, and related to failures in record keeping, risk assessment and adequate updating of customer due diligence. This is the largest penalty ever issued by this regulator and followed a fine of US$31,500 imposed on Mossack Fonesca on April 11, 2016 for similar breaches.

Jersey and Guernsey

As reported in our 2016 Mid-Year United Kingdom White Collar Crime Update, Jersey company **Windward Trading Limited** pleaded guilty to four counts of money laundering at Jersey's Royal Court in relation to corrupt activities taking place between 1999 and 2001 in Kenya, where Windward's beneficial owner, and CEO of the government utility Kenya Power and Lighting Company, **Samuel Gichuru**, is resident. The global investigation lasted nine years and involved legal assistance from twelve jurisdictions, including the UK and the US. More than £3.6 million in company assets were confiscated from an offshore account and are due to be repatriated to Kenyan authorities.

On January 18, 2016 the Guernsey Financial Services Commission imposed fines on **Provident Trustees (Guernsey) Limited**, as well as on two directors and the company's MLRO, for anti-money laundering and anti-terrorist finance systems and controls violations. These fines were reduced as the company and the individuals concerned had co-operated with the investigation and agreed to settle at an early stage.

6. Competition

2016 was a ground-breaking year in terms of competition enforcement in a number of respects. The Competition and Markets Authority ("CMA's") enforcement record for the year includes the first director disqualification and the highest ever fine imposed on an undertaking, as well as a number of cases in the online sector and a continued focus on bringing criminal cartel cases. The SFO, meanwhile, has seen significant developments in the LIBOR and EURIBOR cases.

Enforcement

Online poster supplies

In December 2016, the CMA secured the first disqualification of a company director found to have infringed competition law. **Mr Daniel Aston** (managing director of an online poster supplier **Trod Limited** ("Trod") was given a disqualification undertaking not to act as a director of any UK company for 5 years.

The disqualification follows the CMA's decision of August 12, 2016 that Trod breached competition law by agreeing with **GB eye Limited** ("GBeye") that they would not undercut each other's prices for posters and frames sold on Amazon's UK website. The CMA also imposed a fine on Trod of £163,371. GBeye reported the cartel to the CMA under the CMA's leniency policy and obtained immunity from fines.

As well as the enforcement action against Trod and Mr. Aston, the CMA launched a campaign to ensure online sellers know how to avoid breaking UK competition law and wrote to a number of online companies that it considered may be denying customers the best available deals to remind them of their competition law obligations.

Online refrigeration sales

In May 2016, the CMA imposed a fine of just over £2 million on fridge supplier, **ITW Limited**, for engaging in resale price maintenance (RPM) in internet sales of its Foster commercial fridges from 2012 to 2014. It had operated a 'minimum advertised price' policy and threatened dealers with sanctions (including threatening to charge them higher cost prices for Foster products or stopping supply) if they advertised below that minimum price.

As well as the enforcement action against ITW, the CMA sent warning letters to 20 other businesses in the commercial catering equipment sector which it suspected may have been involved in similar internet sales practices.

Online golf club sales

In June 2016, the CMA issued a statement of objections to **Ping Europe Limited** ("Ping") alleging that it has breached the competition rules by imposing a ban on retailers selling Ping golf clubs online. The statement of objections is a provisional decision only and does not necessarily lead to an infringement decision. Ping will have the opportunity to respond before the CMA makes a final decision.

Online hotel bookings

In July and September 2016, the CMA continued its monitoring of online hotel bookings, by sending questionnaires to a large sample of hotels in the UK. The monitoring project is looking at how changes to room pricing terms, and other recent developments, have affected the market. In particular, the project is examining whether the Europe-wide removal by online travel agents Expedia and Booking.com of certain "*rate parity*" or "*most-favoured nation*" clauses in their standard contracts with hotels in July 2015 has affected the market. The CMA is working in partnership with the European Commission and competition agencies of 9 other EU member states.

Online price comparison websites

In September 2016, the CMA launched a market study into digital comparison tools ("DCTs"), in particular looking at whether consumers would benefit from being made more aware of how DCTs earn money, and the impact this might have on the services they offer and whether arrangements between the comparison tools and the suppliers that sell through them might restrict competition. An interim report is expected in March 2017.

Steel Tanks industry

As reported in GDC's 2015 Year End UK White Collar Crime Update, the CMA's criminal prosecutions in relation to an alleged cartel in the galvanised steel tanks industry came to an end, with one defendant being convicted following a guilty plea and sentenced to six months' imprisonment, suspended for 12 months, and completion of 120 hours of community service. The other two defendants were acquitted.

In parallel to the criminal prosecutions, the CMA has been carrying out a civil investigation. In March 2016, as detailed in the 2016 Mid Year UK White Collar Crime Update three of the five companies under investigation agreed to pay fines totalling more than £2.6 million for taking part in the cartel. On December 19, 2016, the CMA issued its infringement decision imposing these fines on the three settling suppliers. The fourth participant in the cartel received immunity. In a separate infringement decision, the CMA also found that three of the suppliers and one other supplier (who was not part of the cartel) exchanged information about current and future pricing intentions at a single meeting in July 2012. The three cartel participants were not fined for this separate infringement. However, the non-cartel member was fined £130,000.

Building and Construction Industry

Following an investigation into suspected cartel conduct in respect of the supply of precast concrete drainage products on March 7, 2016, the CMA confirmed that **Mr Barry Cooper** had been charged with dishonestly agreeing with others to divide supply, fix prices and divide customers between 2006 and 2013 in respect of the supply in the UK of precast concrete drainage products. The alleged arrangements related to the businesses Stanton Bonna (UK) Limited, FP McCann Limited, CPM Group Limited and Milton Pipes Limited.

The CMA is carrying out a related civil investigation into whether businesses have infringed the *Competition Act 1998*.

Fashion Industry

Following dawn raids carried out in early 2015, the CMA issued on May 25, 2016 a statement of objections to five modelling agencies (**FM Models, Models 1, Premier, Storm** and **Viva**) and a trade association (the Association of Model Agents ("AMA")), alleging that the agencies agreed to exchange confidential, competitively sensitive information, including future pricing information, and in some instances agreed a common approach to pricing. The CMA also alleged that the AMA played an important role in the alleged conduct. The CMA noted that this is its first enforcement case in the creative industries and that it shows the CMA's commitment to enforcement across all sectors of the economy.

Pharmaceuticals

In December 2016, the CMA imposed a record £84.2 million fine on **Pfizer**, the manufacturer of phenytoin sodium (an anti-epilepsy drug) and a £5.2 million fine on its distributor **Flynn Pharma**. Prior to September 2012, Pfizer manufactured and sold phenytoin sodium capsules to UK wholesalers and pharmacies under the brand name Epanutin and the prices of the drug were regulated. In September 2012, Pfizer sold the UK distribution rights for Epanutin to Flynn Pharma, which de-branded (or 'genericised') the drug, meaning that it was no longer subject to price regulation. After de-branding, Pfizer supplied the drug to Flynn Pharma at prices between 780% and 1,600% higher than Pfizer's previous prices. Flynn Pharma then sold on the products to UK wholesalers and pharmacies at prices between 2,300% and 2,600% higher than those they had previously paid.

The CMA found that both companies held a dominant position in their respective markets for the manufacture and supply of phenytoin sodium capsules and each had abused that dominant position by charging excessive and unfair prices. The CMA found that the conduct was a deliberate exploitation of the opportunity offered by de-branding to increase the price of the drug, in the absence of any recent innovation or significant investment in the drug. The size of the fine was intended to send "a clear message" to the pharmaceutical sector that the CMA is determined to protect customers, including the NHS, and taxpayers from being exploited.

The Pfizer case is not the CMA's only investigation in this area. During 2016, the CMA opened three new investigations into alleged anticompetitive practices in the pharmaceutical industry and is continuing to investigate another case opened in 2015.

Financial services

2016 also saw a number of UK developments regarding ongoing enforcement action against banks and their employees for alleged manipulation of financial benchmarks.

LIBOR

In January 2016, six individuals charged with conspiracy to defraud in connection with the criminal investigation into manipulation of the LIBOR benchmark were acquitted by a jury at Southwark Crown Court. The SFO had alleged that the six defendants had conspired with **Tom Hayes**, the first individual found guilty after a trial for the manipulation of LIBOR.

In June, three individuals (**Jonathan Mathew, Jay Merchant** and **Alex Pabon**) were convicted of conspiring to defraud in connection with the manipulation of US Dollar LIBOR. A senior LIBOR submitter, **Peter Johnson**, had also pleaded guilty in October 2014. The four were sentenced in July to a total of 17 years in prison (four years; six and a half years; two years and nine months; and four years, respectively). The jury was unable to reach verdicts on two other defendants, **Stylianos Contogoulas** and **Ryan Reich**, and the SFO is seeking a retrial for those defendants.

EURIBOR

The SFO issued criminal proceedings against 11 individuals accused of manipulating the Euro Interbank Offered Rate (EURIBOR). Six individuals appeared at Westminster Magistrates' Court on January 11, 2016, where they were charged with conspiracy to defraud. Five individuals declined to appear, and the SFO obtained arrest warrants for these individuals. The SFO is in the process of enforcing the warrants.

7. Insider Trading and Market Abuse and other Financial Sector Wrongdoing

Market Abuse Regulation and Criminal Sanctions for Market Abuse Directive

On July 3, 2016, the *Market Abuse Regulation* 596/2014 ("MAR") came into force and consequential changes have been made to the FCA Handbook, the details of which were published by the FCA in April 2016. Changes have been made to the following Handbook sections: the Glossary, SYSC, COCON, APER, GEN, FEES, COBS, MAR, SUP, REC, LR, DTR, SERV, BENCH and the Financial Crime Guide. By a separate instrument amendments have also been made to the Decisions Penalties and Procedures Manual and to the Enforcement Guide. We set out a detailed account of the changes to the UK's civil market abuse regime arising from MAR coming into force in our 2015 Year End UK White collar Crime Update.

Firms should be aware that although it is unclear what effect the eventual departure of the UK from the EU will have on the UK civil market abuse regime the global trends since the financial crisis of 2008

have been for an enhancement of the mechanisms available to regulators to sanction market abuse and a significant relaxation of the regime in the UK would be contrary to this. In fact, in its 2015/2016 Annual Report the FCA stated that MAR "*will bring real benefits to the functioning and reputation of UK financial markets, and work in these areas will remain a priority for us in the coming year*". Firms should also remember that until the UK formally leaves the EU the European civil market abuse regime set out in MAR will remain good law. The FCA's statement following the referendum result on June 24, 2016 reiterated that firms operating in the UK must continue to comply with their obligations under EU law and there is no reason to believe that the FCA will take a more relaxed approach to enforcement activity deriving solely from the EU.

On July 3, 2016 the *Criminal Sanctions for Market Abuse Directive* 2014/57/EU ("CSMAD") came into force. Although the UK has opted out of CSMAD it will apply to the operations of UK firms in other member states as well as to trading activity on European exchanges carried out from London.

FCA Enforcement - Insider Dealing

Operation Tabernula

As we covered in our 2015 Year End UK White Collar Update, Operation Tabernula has been the FCA's most complex and high-profile insider-trading probe, aimed at demonstrating the FCA's dedication to combatting insider trading.

In January 2016, a twelve-week trial commenced against **Martyn Dodgson**, a senior investment banker and former executive of a number of lending investment banks, and his associate and close friend **Andrew Hind**, a businessman, property developer and Chartered Accountant. The case involved serious and sophisticated offending over a number of years whilst Mr Dodgson held senior investment banking positions. Mr Dodgson sourced inside information from within the investment banks at which he worked, either by working on transactions himself or by gleaning sensitive market information in relation to his colleagues' transactions. He then passed this inside information on to Mr Hind.

It was held that Mr Dodgson had been entrusted by his employers with sensitive and valuable information, which he and Mr Hind exploited for their own benefit in order to deceive the market. The two used a number of elaborate techniques designed to avoid detection, including payments in cash and in kind, and the use of unregistered mobile phones. After eight days of jury deliberations, Mr Dodgson and Mr Hind were convicted of conspiring to insider deal between November 2006 and March 2010. **Iraj Parvizi**, **Ben Anderson** and **Andrew Harrison** – whose charges we covered in our in our 2015 Year End UK White collar Crime Update – were acquitted.

At their sentencing hearing on May 12, 2016, His Honour Judge Pegden described Mr Dodgson and Mr Hind's offending as being "*persistent, prolonged, deliberate, dishonest behaviour*". Mr Dodgson was sentenced to four and a half years' imprisonment: the longest ever handed down for insider trading in a case brought by the FCA. Mr Hind was sentenced to three and a half years' imprisonment on the same day. Confiscation proceedings will also be pursued against both defendants for their wrongful gains in the amount of an estimated £7.4 million.

Damian Clarke

On June 13, 2016, **Damian Clarke**, a former equities trader, was sentenced to two years in prison for insider dealing over a nine-year period between 2003 and 2012. He pleaded guilty to seven charges of insider dealing in July 2015, and to two more charges in March 2016, just two weeks before his trial was to commence.

Mr Clarke was employed as a fund manager's assistant and subsequently as an equities trader. In these roles, he received inside information including anticipated public announcements about mergers and acquisitions. He used this information to place trades using accounts in his name and in the names of his close family members, earning profits of at least £155,161.98.

The nine charges brought against Mr Clarke were "sample counts" from multiple instances of suspicious trading. Eight of the nine charges related to potential takeovers in companies in which his employer was a shareholder. Mr Clarke was found to have carried out trades within minutes of receiving information on deals in which his employer was involved, such as draft press releases. He would use a shared office computer in a staff tearoom to carry out those trades. He was arrested at his desk in 2013.

Judge Joanna Korner held that it was necessary to give Mr Clarke a prison sentence given the length of time over which he had used insider information and his nefarious use of his family members' trading accounts (which had in fact led to their arrest) in an attempt to avoid detection. On one occasion he even impersonated his father-in-law on the phone in order to gain access to his account. Judge Korner found that he had "*deliberately and dishonestly*" misused his position, and therefore sentenced him to two years' imprisonment. The FCA has reported that confiscation proceedings will also be commenced against Mr Clarke for his wrongful gains.

Mark Lyttleton

On November 2, 2016, **Mark Lyttleton**, a former Equity Portfolio Manager, pleaded guilty to two counts of insider dealing. This followed his arrest in 2013 and his having been charged with three counts of insider dealing in September 2016.

The FCA alleged that during 2011 Mr Lyttelton was able to discover and act on inside information either by working on the deals concerning stocks or being party to conversations conducted by colleagues. Mr Lyttleton was able to use the inside information to inform his purchase of shares a short time before any public announcement was made about the stocks concerned. The trading was conducted by Mr Lyttleton through an overseas asset manager trading on behalf of a Panamanian registered company.

On 21 December 2016 Mr Lyttleton was sentenced to twelve months' imprisonment.

Civil enforcement for Market Abuse

Mark Taylor

On May 5, 2016, the FCA issued a final notice against **Mark Taylor**, who was at the relevant time employed by a British wealth management company, for market abuse contrary to section 118(2) FSMA. Mr Taylor had traded on inside information that had been circulated inadvertently within his employer. The following day Mr Taylor had contacted his broker asking if it was possible to reverse the trade as he was concerned that he may have been insider dealing. Mr Taylor did not report this to his employer's compliance department but the incident was reported to the FCA by his broker.

Mr Taylor was ordered to pay a financial penalty of £36,285 (reduced from £78,819 as a result of financial hardship) and is subject to a ban on performing any function relating to any regulated activity carried out by an authorised or exempt person for two years.

Gavin Breeze

On July 15, 2016 the FCA issued a final notice against **Gavin Breeze** as a result of trading on the basis of inside information which amounted to market abuse contrary to section 118(2) FSMA and improper disclosure of inside information contrary to section 118(3) FSMA.

Mr Breeze, a Jersey resident, was a non-executive director and shareholder of MoPowered Group Plc. In September 2014 he was made an insider in respect of a potential share placing by MoPowered. Mr Breeze forwarded this information to another shareholder. Mr Breeze also instructed his broker to sell his shares in MoPowered. Illiquidity in the market meant that Mr Breeze was not able to sell all his shares. However, when the inside information became known to the market MoPowered's share price fell. The final notice records that Mr Breeze avoided a loss of £1,900. Had he been able to sell all his shares he would have avoided a loss of £242,000.

Mr Breeze was ordered to pay a financial penalty of £59,557, pay restitution of £1,850 and interest of £59 to be distributed by the FCA to those who had suffered loss as a result of his actions.

WH Ireland Limited

On February 23, 2016 the FCA issued a final notice to **WH Ireland Limited** as a result of a failure to have in place proper systems and controls to prevent market abuse amounting to a breach of Principle 3 as well as a breaches of the SYSC rules (i.e. Systems and Controls) relating to conflicts of interest. WH Ireland was fined £1.2 million and restricted from taking on new clients in its corporate broking division for 72 days.

This serves as a further reminder that the FCA's enforcement activities in relation to market abuse are not solely focused on instances of market abuse offences having been committed and that the FCA will continue to use the Principles of Business to pursue a prevention agenda ensuring that firms have sufficient controls in place.

Bermuda Monetary Authority – Barrington Investments Limited

In March 2016, the Bermuda Monetary Authority – the island's financial services regulator – announced a new policy whereby it would publish all uses of its disciplinary and enforcement powers on its website. This signaled a more pro-active enforcement stance. On August 29, 2016 the Bermuda Monetary Authority published its first such notice. **Barrington Investments Limited** was fined $50,000 for serious failings in relation to corporate governance, the prudent conduct of business and risk management. In addition, restrictions were placed on Barrington's licence.

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