GIBSON DUNN

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2015 YEAR-END UNITED KINGDOM WHITE COLLAR CRIME UPDATE

To Our Clients and Friends:

2015 has been a year of unprecedented white collar enforcement, both in absolute terms, and in terms of the variety and broad base of enforcement actions taken. As a result, Gibson Dunn is issuing this year end alert on white collar crime in the United Kingdom ("UK") consistent with our alerts in other subject matters. It covers criminal and regulatory enforcement action relating to key financial and business crimes, and significant legal and legislative developments across the white collar crime field in the UK.

The pace and extent of white collar and regulatory developments justifies a bespoke UK update in addition to specific alerts on key developments such as our recent alert on the UK's first deferred prosecution agreement ("DPA"), and our continuing UK input to the firm's Mid-Year and Year-End, FCPA, Sanctions, NPA and DPA, and Criminal Antitrust updates.

This update covers developments in a number of key fields:

i) developments relevant to the white collar crime sector as a whole

ii) bribery and corruption

iii) fraud

iv) financial and trade sanctions

v) money laundering

vi) competition

vii) insider dealing and market abuse

Each of these sections is broken down into sub-sections (see the hyperlinked table of contents below).

In the last year, the UK's prosecutors and regulators have imposed nearly a billion pounds worth of fines, penalties, confiscation orders, and civil recovery orders in relation to financial crimes and related activities; a total of over £933 million. The largest portion of this sum was levied as fines by the Financial Conduct Authority ("FCA") for regulatory failings by banks, but major penalties and resolutions have also been secured by the Serious Fraud Office ("SFO"), including through the criminal courts.

Looking ahead, a key question will be the impact of DPAs on enforcement following the SFO's achievement in securing the first such agreement in late December. In the sanctions field, 2016 will see the commencement of operations of the new Office of Financial Sanctions Implementation, which may well bring with it an uptick in the UK's enforcement of the European Union's ("EU") financial and trade sanctions. 2016 is also likely to bring major prosecutions in relation to insider dealing and financial misconduct.

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1. Developments Relevant to the White Collar Crime Sector as a Whole

No new offence of failure to prevent economic crime

On 28 September 2015, the Government announced, after a review, that it would not proceed with the proposed creation of a new strict liability criminal offence of failure by a commercial organisation to prevent economic crime, similar to the section 7 offence in the *Bribery Act 2010*. This review had been announced as part of the Government's December 2014 Anti-Corruption Plan. The Government cited the existing legal framework, the lack of prosecutions under the section 7 offence and the fact that "*there is little evidence of corporate economic wrongdoing going unpunished*".

Going forward, to pursue companies for criminal offences involving requirements of *mens rea*, UK prosecutors will continue to have to establish the relevant *mens rea* on the part of senior executives in order to satisfy the existing "directing mind and will" test for corporate criminal liability. This does not, of course, apply to strict liability offences, such as the section 7 offence under the *Bribery Act*.

Deferred Prosecution Agreements

2015 has seen the first of what prosecutors hope will be many DPAs in the UK. We provided an analysis of the first case in our client alert of December 4, 2015, Serious Fraud Office v Standard Bank Plc: Deferred Prosecution Agreement. In our 2015 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements, we provided a comparative analysis of the Standard Bank DPA and the typical content of DPAs in the United States.

SFO's approach to legal privilege and representation in internal investigations

We reported in our 2014 Year-End FPCA Update that the SFO "*views a privileged company investigation as indicative of non-cooperation in its own investigation*", and has indicated that it may be prepared to challenge broad claims of privilege over investigation materials.

In the context of the SFO's ongoing investigation of GlaxoSmithKline ("GSK"), the SFO served notices under section 2 of the *Criminal Justice Act 1987* (essentially the SFO's subpoena power) on a number of individual GSK employees requiring them to attend for interview. The individuals, who were explicitly stated not to be suspects, wished to be accompanied by lawyers acting for the company. The SFO initially refused to allow any lawyers to attend the interviews, but agreed to lawyers attending on the condition that those lawyers not be from the same firm as that which was acting for GSK itself.

This decision by the SFO to insist on another firm to represent the individuals was judicially reviewed in *R (on the application of Jason Lord & others) v Director of the Serious Fraud Office* [2015] EWHC 865 (Admin). In a February 2015 judgment, the High Court held that the SFO's decision was lawful and proper and in line with its published policy that "*it is not generally appropriate for an employer's solicitor to be present at an employee interview*".

On January 27, 2016 the High Court ruled on another case concerning the SFO and legal privilege. The case is reported as *R (on the application of Colin McKenzie) v Director of the Serious Fraud Office* [2016] EWHC 102 (Admin). This case arose in the context of the arrest in June 2015 of **Colin McKenzie** on suspicion of paying a bribe contrary to section 1 of the *Bribery Act*. Two mobile phones, a laptop and USB stick were seized at the same time, and further material was recovered later. The SFO subsequently requested a list of search terms to enable the isolation of material that might be subject to legal professional privilege, so that it could be reviewed by "independent counsel". It was not contested that the actual review of potentially privileged material had to be done by lawyers independent of the SFO. Mr McKenzie refused the request on the basis that the SFO's procedure was unlawful.

The SFO's policies require its Digital Forensics Unit ("DFU") to first run search terms, and if material which is thought to be subject to legal professional privilege is identified it is quarantined from the investigation team. The Attorney General's Guidelines on *Digitally Stored Material* require the running of such search terms to be "*done by someone independent and not connected with the investigation*". It was contended against the SFO that this meant that someone outside the SFO had to conduct this first filter for privileged material. The Court held that the SFO's procedures for running the filters and

search terms internally were in compliance with the Attorney General's *Guidelines* and lawful as the DFU was not part of the investigation team.

The FCA and PRA's New Senior Managers' Regime

On March 7, 2016, the first phase of the Prudential Regulation Authority's ("PRA") and FCA's new regime for regulation of financial services in the UK will come into force. It comprises three parts: (i) the 'Senior Managers' Regime', (ii) a 'Certification Regime' for individuals exercising key roles and responsibilities; and (iii) new 'Conduct Rules' focusing on integrity, compliance, cooperation with regulators and client care.

The changes were brought in under the *Financial Services (Banking Reform) Act 2013*, following the recommendations of the Parliamentary Commission on Banking Standards in the wake of the LIBOR scandal. The focus of the new regime is on defining the allocation of responsibilities within the management of financial services firms and enhancing the individual accountability of senior managers.

The new regime will initially apply to UK-incorporated banks, building societies, credit unions and PRA-designated investment firms and branches of foreign banks operating in the UK. There are plans to extend the regime to a broader range of financial services firms in due course. In addition the FCA has announced a consultation on the application of the regime to individuals in charge of firms' legal function.

The Senior Manager's Regime will apply to all individuals exercising a "Senior Management Function" ("SMF"). SMF replaces the Significant Influence Function ("SIF") under the prior regime. A person exercising an SMF is responsible for managing one or more aspects of the firm's affairs (insofar as it relates to regulated activities) and those aspects involve, or might involve, a risk of serious consequences for the firm or the causing of harm to business or other interests in the UK SMFs include Board members including the Chairman and certain other non-executive directors (but not standard non-executive directors).

Those exercising an SMF must be pre-approved. Applications for approval must include a "statement of responsibilities" setting out the aspects of the firm's affairs that the individual will be responsible for managing. These statements must be updated and resubmitted whenever there is a significant change to the senior manager's responsibilities. The regime includes new statutory powers to place conditions on any approvals given. Firms have to prepare a "management responsibilities map" setting out the allocation of responsibilities and reporting structures in place across the firm. In the event that the firm contravenes any regulatory requirement, the authorities will be able to take enforcement action against an individual exercising an SMF if they can show that the individual failed to take the steps that it would be reasonable for a person in that position to take in order to prevent a regulatory breach from occurring.

The regime includes a duty to notify the FCA and/or PRA wherever a firm takes disciplinary action against a senior manager. Disciplinary action is widely defined and includes a formal written warning, suspension, dismissal or docking or recovery of remuneration. Firms must conduct a formal "annual

review" to ensure that there are no grounds upon which the FCA or PRA might withdraw their approval of its senior managers, or notify any grounds identified.

The limitation period for the regulators to bring disciplinary action against all individuals (and not just SMFs) is extended from three to six years.

There is some extra-territorial application to the extent that any senior managers located overseas exercise significant influence over activity in the UK.

Section 36 of the *Financial Services (Banking Reform) Act* introduces a new criminal offence relating to reckless decisions causing a financial institution to fail. The new offence carries a maximum penalty of 7 years imprisonment or an unlimited fine.

The FCA's new Whistleblowing Rules

In October 2015 the FCA and PRA published new rules in relation to whistleblowing. These build on an existing framework of regulatory obligations applicable to whistleblowing. The rules, which take full effect from September 2016, apply to deposit-taking firms (i.e. banks, building societies and credit unions) with £250 million or more in assets, PRA-designated investment firms (i.e. large investment banks), insurance and reinsurance firms subject to the EU Solvency II directive (2009/138/EC), and to the Society of Lloyd's and managing agents. The rules constitute non-binding guidance for any other firms regulated by the FCA/PRA.

The new rules are primarily directed at internal whistleblowing procedures. They require those firms to which they apply by September 2016, to:

- put in place internal whistleblowing arrangements able to handle "*all types of disclosure*" from "*all types of person*". This duty is widely worded and extends beyond employees, *inter alia,* to whistleblowing disclosures from third parties, such as the employees of suppliers or competitors;

- include in settlement agreements wording explaining that workers have a right to blow the whistle even after leaving and signing a settlement agreement;

- inform UK-based employees about the FCA and PRA whistleblowing services;

- require its appointed representatives and tied agents to tell their UK-based employees about the FCA whistleblowing service;

- put in place training for UK-based employees, managers of UK-based employees (including managers based abroad), and employees responsible for operating the whistleblowing procedure, as well as internal whistleblowing procedures which ensure that genuine reportable concerns are dealt with appropriately and properly escalated, including, where appropriate, to the FCA or PRA;

- present a report on whistleblowing to the board at least annually and inform the FCA if they lose an employment tribunal whistleblowing claim;

- ensure that whistleblowing procedures make arrangements for cases where the whistleblower has requested confidentiality or made an anonymous report, including reasonable measures to prevent victimisation and keeping appropriate records.

From March 7, 2016, firms must appoint a "whistleblowers' champion", who will have responsibility for oversight of whistleblowing procedures and for whistleblowing under the new FCA Senior Managers Regime, making them individually accountable to the regulators for any failings. From March to September 2016 whistleblowers' champions must oversee the implementation of appropriate whistleblowing procedures.

Notwithstanding the absence of financial incentives for whistleblowers in the UK, whistleblowing in the UK financial sector has been increasing in recent years. The FCA has noted that its dedicated whistleblowing team processed 1,340 cases in the financial year 2014/2015, against 1040 in 2013/14 and 138 in 2007/08.

FCA review of banking culture

In December 2015, it was reported that the FCA would not be continuing its thematic review into banking culture in the UK. This review had been targeted at "*whether culture change programmes in retail and wholesale banks are driving the right behaviour, in particular focusing on remuneration, appraisal and promotion decisions of middle management, as well as how concerns are reported and acted on*".

Modern Slavery Act 2015

The UK's *Modern Slavery Act 2015* has this year revised and consolidated the offences relating to modern slavery (which includes servitude and forced or compulsory labour) and human trafficking, and also introduced a disclosure requirement for commercial organisations with an annual turnover exceeding £36 million and carrying out business or part of a business in the UK (the latter a test similar to the jurisdictional threshold for the offence under section 7 of the *Bribery Act*).

Section 54 of the *Modern Slavery Act* requires such commercial organisations to publish a board-approved "slavery and human trafficking statement", signed by a director, either setting out what the organisation has done in the last financial year to ensure that slavery and human trafficking are not taking place in its supply chains or in any part of its own business, or stating that the organisation has taken no such steps. Section 54 does not prescribe the required content of such a statement, although it does provide an indication of the kind of content such a statement might contain.

Due to the low jurisdictional threshold, many businesses with global operations will be subject to the obligation to publish a statement; many such businesses may in practice wish to coordinate the statement satisfying section 54 with any statements made under the Californian legislation from which the inspiration for section 54 was derived, the *Transparency in Supply Chains Act 2012*. The section

54 requirement will apply to financial year-ends finishing after 30 March 2016, so the first statements can be expected in the weeks and months following that date. The Government's guidance on the publication requirement can be found here.

2. Bribery and Corruption

2015 has seen the UK's enforcement of its anti-corruption laws reach an unprecedented level of activity. The number of individuals convicted under the *Bribery Act* has now reached double figures, the first enforcement actions have successfully been brought under the section 7 corporate offence of failing to prevent bribery, including the UK's first Deferred Prosecution Agreement (see above), and the first arrests have been made under the *Bribery Act* section 6 offence of bribing a foreign public official.

At the same time the enforcement of the pre-*Bribery Act* legislation continues. Moreover, the FCA has completed two enforcement actions against regulated firms in relation to failures to manage bribery and corruption risks.

The combined total of the fines, penalties, and disgorgements in the bribery and corruption sphere imposed in the UK since the beginning of 2015 is just short of £100 million.

Also see our *2015 Year-End FCPA Update*.

Enforcement: Bribery Act

Bribery Act section 7 – the corporate offence of failing to prevent bribery

After several years of waiting for the first company to be charged with the section 7 offence of a corporation failing to prevent bribery, the latter part of 2015 has seen three successful enforcement actions under this section, each with a different outcome: one a civil recovery order, one a DPA, and the third a guilty plea and conviction.

Brand-Rex Limited

In September 2015, **Brand-Rex Limited** entered into the first ever resolution of the section 7 offence, conducted under Scotland's amnesty program, which we described in our 2012 FCPA Year-End Update. This program allows for civil settlements for companies which self-report to the Scottish authorities. Under the resolution the Scottish Civil Recovery Unit recovered £212,800 from Brand-Rex Limited after the company accepted that it had benefited from unlawful conduct by a third party. This sum represented the company's entire gross profit earned as a result of this conduct.

Between 2008 and 2012 **Brand-Rex**, a cabling firm, operated a scheme which offered rewards, including free holidays, to incentivise its installers and distributors to meet or exceed sales targets. The scheme was not in itself unlawful. However, an employee of an independent installer offered his company's tickets to an employee of a customer. This went beyond the intended scope of the scheme,

as the beneficiary, the person who ultimately received the tickets, worked for an end user and had the ability to influence purchasing decisions.

A noteworthy feature of this case relating to the interpretation of the *Bribery Act* is that an employee of an independent installer of Brand-Rex's equipment was deemed to be an "associated person" for the purposes of the commission of the section 7 offence. Under section 8 of the *Bribery Act*, an "associated person" is "*someone who performs services for or on behalf of*" a company, and "*the capacity in which"* the person *"performs services for or on behalf of [the company] does not matter*". This case puts an unexpectedly broad interpretation onto an "associated person". The two other section 7 cases discussed below involved companies within the same corporate groups, and are thus uncontroversial instances of "associated persons".

Standard Bank

On November 30, 2015 judgment was handed down in *Serious Fraud Office v Standard Bank plc: Deferred Prosecution Agreement*. This judgment provided judicial approval for the SFO to enter into a DPA (the first in the UK) with **Standard Bank** in relation to an offence contrary to section 7 of the *Bribery Act*. We have issued a detailed Client Alert in relation to this case that deals with the issues arising from this case in relation to DPAs, expected levels of co-operation with the SFO, and also in relation to the scope of the section 7 offence, the defence of "adequate procedures", and the quantification of the penalty under the sentencing guidelines for bribery offences.

The conduct related to a bond sale for the government of Tanzania in which certain Tanzanian officials were paid a percentage commission on the transaction. The penalties imposed on Standard Bank under the DPA were: a fine of $16.8 million; payment of $6 million compensation to Tanzania plus interest of just over $1 million; disgorgement of all of Standard Bank's profits on the transaction being $8.4 million, and the SFO's costs of £330,000. In total, the financial resolution amounted to nearly $33 million.

Sweett Group Plc

On December 9, 2015 the SFO announced that it was charging **Sweett Group Plc** with an offence under section 7(1) of the *Bribery Act*. The SFO said the offence was committed between 1 December 2012 and 1 December 2015, and involved Sweett Group Plc failing to prevent bribery committed by an associated person of Sweett Group Plc, namely **Cyril Sweett International Limited** (a Dubai company). On December 18, 2015 the SFO announced that Sweet Group Plc had formally pleaded guilty to the offence, and is due to be sentenced on February 12, 2016.

The bribe was paid to secure and retain a contract for project management and cost consulting services in relation to the building of a hotel in Dubai. Further details of the offence have not yet been published. It is noteworthy that no attempt was made by Sweett Group to rely on the "adequate procedures" defence.

The initial investigation into the Sweett Group also related to another project, reported to be for the construction of a hospital in Morocco.

One factor in the decision to prosecute may have been that at least one individual at Sweett Group engaged in the destruction of evidence. On October 26, 2015 **Richard Kingston** appeared in court charged by the SFO with the offence of destroying evidence knowing or suspecting that it was relevant to an SFO investigation contrary to section 2(16) of the *Criminal Justice Act 1987*. The SFO's press release states that this incident related to an ongoing investigation into Sweett Group's business in Iraq. Mr Kingston's trial is due to begin in December 2016.

Enforcement: Bribery Act section 6 – bribing a foreign public official

As reported in our 2015 Mid-Year FCPA Update, the Overseas Anti-Corruption Unit of the City of London Police arrested two men--and Norwegian authorities arrested a third--in connection with $150,000 allegedly paid to a Norwegian government official to procure the sale of six decommissioned naval vessels. These are the first arrests for the section 6 offence under the *Bribery Act* of bribing a foreign public official. The investigation is ongoing.

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

As reported in our 2015 Mid-Year FCPA Update, in April 2015 **Delroy Facey** and **Moses Swaibu** were convicted of taking bribes under section 1 of the *Bribery Act*. These were the ninth and tenth convictions of individuals under the *Bribery Act*. The offences were in the context of fixing professional soccer matches for betting purposes. The two were sentenced to 30 months and 16 months respectively.

On May 11, 2015 it was reported that **John Reynolds** and **Wesley Mezzone** were each charged with eight counts of bribery (as well as nine counts of corruption under the pre-*Bribery Act* legislation). The offences arise out of alleged improper payments made to secure contracts from a local government official in the UK. Both have pleaded not guilty and await trial.

Enforcement: Prevention of Corruption Act 1906

Because there is no statute of limitations for most criminal offences in the UK, enforcement under the pre-*Bribery Act* legislation has continued, and will do for some time. Indeed, the period since the introduction of the *Bribery Act*, while seeing, until recently, only limited enforcement action under that Act, has been marked by unprecedented levels of enforcement under the pre-existing corruption offences.

Smith & Ouzman Limited

Most notably the SFO this year achieved a landmark conviction against **Smith and Ouzman Limited**. This was the first conviction by the SFO against a corporation for foreign bribery following a contested trial. Two of the company's senior managers, **Nicholas Smith** and **John Smith**, were also convicted and sentenced to three years and eighteen months jail, respectively, the latter suspended for two years. The two men have also been ordered to pay costs of £75,000 each, and to satisfy respective confiscation orders of £18,693 and £4,500.

On January 8, 2016, the company received its sentence ordering it to pay a fine of £1,316,799, to satisfy a confiscation order of £881,158 (constituting the profits won by Smith and Ouzman on the contracts) and defray the SFO's legal costs of £25,000.

The convictions related to corrupt payments made to foreign officials in Kenya and Mauritania. The two men made payments totalling just under £400,000 both directly to government officials and indirectly via intermediaries.

Graham Marchment

In May 2015, **Graham Marchment** pled guilty to three counts of conspiracy to corrupt under section 1(1) of the *Criminal Law Act 1977* for conspiring with four others to obtain payments for supplying confidential information on oil and gas engineering projects estimated to be of around £40 million in value in Egypt, Russia and Singapore. As featured in our 2012 FCPA Year-End Update, the four others had previously been convicted. Marchment was sentenced to 30 months imprisonment on each of the three counts, to be served concurrently.

UN Officials: Sijbrandus Scheffer and Guido Bakker

In July 2015, after an eight year investigation, the Overseas Anti-Corruption Unit of the City of London Police secured the conviction of **Sijbrandus Scheffer**, a Danish national, for receiving bribes of nearly $1 million to rig contracts worth $43 million to supply drugs under a United Nations program to the Democratic Republic of Congo ("DRC"). Another Danish national, **Guido Bakker**, had pled guilty in 2012 for the same offences.

The two consultants obtained contracts from a UN Development Programme to combat HIV and malaria in DRC and then leaked crucial details to Missionpharma, a Danish supplier of generic pharmaceuticals, to assist that company in winning supply contracts. The consultants charged 5 per cent of the contract price using English and Jersey companies to receive the payments, and Missionpharma overcharged the UN to recoup its costs. The consultants were convicted, *inter alia*, of accepting or obtaining corrupt payments under the *Prevention of Corruption Act*, and were sentenced to 15 and 12 months respectively.

Individuals at Swift Technical Solutions Limited acquitted

As reported in our 2015 Mid-Year FCPA Update, on June 2, 2015 a jury at Southwark Crown Court acquitted **Trevor Bruce**, **Bharat Sodha**, and **Nidhi Vyas** of foreign bribery charges brought under the *Prevention of Corruption Act 1906*. The three defendants, plus a fourth - **Paul Jacobs**, whose charges were dismissed pre-trial due to ill health - were arrested in 2012 (as reported in our 2012 Year-End FCPA Update) on suspicion of engaging in a conspiracy to make nearly £200,000 in corrupt payments to officials of the Nigerian Boards of Revenue in 2008 and 2009. The employer of these four individuals, UK oil and gas manpower services company Swift Technical Solutions Ltd., cooperated in the SFO's investigation and was not charged.

Enforcement: the FCA and systems and controls

This year the FCA reached two settlements with firms relating to failings in relation to bribery and corruption risks. One of these settlements resulted in the largest fine the FCA has imposed on a firm for systems and controls weaknesses relating to financial crime. These settlements followed findings by the FCA in November 2014 that weaknesses persisted in some parts of the sector in relation to anti-money laundering and anti-bribery systems and controls. Neither case includes a finding that financial crime was facilitated by the control failings at the banks. However, the FCA is clearly of the view that the risk of financial crime is enough to endanger the integrity of the UK financial system, such that it will take action against firms who fail to have systems in place to address those risks and indeed against those who do have systems in place but fail to adhere to their requirements.

Bank of Beirut

In March 2015 the FCA fined the **Bank of Beirut (UK) Limited** £2.1 million and imposed restrictions after it misled the FCA about concerns regarding its financial crime systems and controls. At the same time the FCA imposed fines of £19,600 and £9,900 on **Anthony Wills** and **Michael Allin**, respectively the bank's former compliance officer and internal auditor for their role in the bank's failings.

According to the FCA's Final Notice, concerns about the culture within the Bank became apparent following supervisory visits in 2010 and 2011. The FCA had observed that the culture of the Bank was one of insufficient consideration of risk and regulatory requirements with insufficient focus on governance and controls. Relevant for these purposes, the FCA was concerned about the Bank's lack of a compliance monitoring plan designed to help ensure the Bank's compliance with its regulatory obligations to counter the risk that it might be exploited to facilitate financial crime. The FCA identified various failings regarding due diligence and ongoing monitoring to address risks of money laundering and terrorist financing.

The FCA sent the Bank a remediation plan designed to address the FCA's concerns. The Bank failed to implement the remediation plan by the required deadline and then made inaccurate communications to the FCA about the status of its remediation work. The FCA found that in failing to deal with the FCA in an open and cooperative manner and to disclose to the FCA information of which it would reasonably expect notice, the Bank breached Principle 11 of its Principles for Businesses. In addition to the financial penalty of £2.1 million, the FCA imposed a restriction on acquiring new customers for regulated business for a period of 126 days. This penalty included a 30 per cent discount for early settlement under the FCA's settlement procedures.

Barclays Bank Plc

In November 2015 the FCA published a Final Notice fining **Barclays Bank PLC** £72,069,400 for breaching one of the FCA's Principles for Businesses arising from its failures relating to the management of risks of financial crime. The failings relate to a £1.88 billion transaction that Barclays arranged in 2011 and 2012 for ultra-high net worth clients and from which Barclays generated £52.3 million in revenue.

According to the FCA, the clients concerned were politically exposed persons (PEPs) and should therefore have been subject to enhanced levels of due diligence and monitoring by the bank. That, coupled with the circumstances of the transaction, indicated a higher level of risk and should have resulted in a higher level of due skill, care and diligence by Barclays. Instead, Barclays applied a lower level of due diligence than its policies required for clients with a lower risk profile.

The fine imposed on Barclays comprised a disgorgement of £52.3 million - the revenue generated from the deal - and a penalty of £19,769,400. This is the largest fine that the FCA has imposed on a firm for failings in connection with systems and controls relating to financial crime. The penalty element included a 30 per cent discount for early settlement under the FCA's settlement procedures.

The FCA was at pains to point out that it made no criticism of the clients involved and that it had no evidence that Barclays was either involved in nor guilty of facilitating any financial crime, nor that the revenue that Barclays generated from the deal was derived from any financial crime. Barclays stated that they had cooperated with the FCA throughout and "to apply significant resources and training to ensure compliance with all legal and regulatory requirements".

Enforcement: Ongoing Foreign Bribery Prosecutions

Alstom Group

The SFO has charged two companies within the **Alstom Group**, and six employees, with corruption under the *Prevention of Corruption Act 1906*. The charges relate to allegations of corruption to win contracts in India, Poland, Tunisia, Hungary and Lithuania. Three trials are currently listed over these charges to be heard in May 2016 and January and May 2017.

An important judgment on a preliminary issue arising out of the Alstom prosecutions was handed down on January 15, 2016 by the Criminal Division of the Court of Appeal (*R v AIL, GH and RH* [2016] EWCA Crim 2). The judgment concerned whether the pre-*Bribery Act* legislation made it an offence (in the period before February 2002, when the *Anti-Terrorism, Crime and Security Act 2001* came into force) to bribe a foreign principal. The 2001 statute had given effect to the UK's obligations under the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions by making express the extension of the legislation to cover foreign bribery. The SFO's long-held position, as seen in the Mabey & Johnson prosecution in which the defendant did not challenge the point, has been that the offence of bribing a foreign principal existed prior to 2001.

This was the issue put to the Court of Appeal in *R v AIL*. At first instance the judge agreed with the defendants that, before the coming into effect of the 2001 Act, offences under the *Prevention of Corruption Act 1906* could not be committed in circumstances where the bribes targeted the agent of a foreign principal, even if all the relevant parties were present and all the conduct took place within the UK. Overturning this decision in favour of the SFO, the Court of Appeal held that, even prior to the coming into force of the 2001 Act, it was an offence under s.1 of the *Prevention of Corruption Act 1906* to corrupt an agent of a foreign principal or a foreign body

This decision is significant in clarifying the territorial effect of Britain's anti-corruption legislation in the period before 2002. That the SFO took the point to the Court of Appeal underlines the fact that the enforcement of pre-*Bribery Act* corruption offences remains a key tool in the SFO's armoury. The SFO will continue to charge for bribery of a foreign agent or official which occurred prior to 2001 whether or not the *actus reus* occurred outside the UK.

Total Asset Limited – individuals charged with corruption

On January 8, 2015 the SFO laid further charges against three individuals, **Stephen Dartnell**, **Kerry Lloyd** and **Simon Mundy**, for conspiracy to make corrupt payments under the *Prevention of Corruption Act 1906* in relation to inflated receivables agreements by KBC Lease (UK) Ltd ("KBC") and Barclays Asset Finance from Total Asset Limited. The relevant agreements were self-reported to the SFO by KBC. A trial of these three individuals and three others is scheduled to begin in September 2016.

Enforcement: Ongoing Foreign Bribery Investigations

In addition a large number of foreign bribery investigations are currently ongoing at the Serious Fraud Office, as well as the National Crime Authority and the Overseas Anti-Corruption Unit of the City of London Police. A new foreign bribery investigation which the SFO announced in July 2015 is that against **Soma Oil and Gas Limited** and related companies, relating to possible improper payments being made to government officials in Somalia.

Enforcement: domestic bribery and corruption

The UK's prosecuting authorities continue to enforce the UK's anti-corruption laws in domestic contexts. Such enforcement tends to receive substantially less press but more than 30 individuals have been convicted during the course of 2015.

All of these enforcement actions were in the context of public corruption such as paying/receiving bribes to win public contracts, or making payments to receive preferential treatment from public officials. Many of the defendants, however, were not charged under the *Bribery Act* or its antecedents. Instead, a range of offences was used including misconduct in public office, perverting the course of justice, money-laundering offences, fraud, or simply theft.

The convictions in 2015 include 22 people who had paid money to Mr. Munir Patel to secure preferential treatment in relation to traffic offences. As set out in our *2011 Year-End FCPA Update* Mr Patel was the first person convicted under the *Bribery Act*.

Another nine individuals were convicted in relation to bribes paid to local council officials in Edinburgh and Exeter. In the Edinburgh case the four individuals all pled guilty to offences under the *Public Bodies Corrupt Practices Act 1889*. In the Exeter case the charges were all for non-corruption offences, even though the actions were the paying and receiving of improper payments to and by public officials.

In *R v Chapman, Gaffney and Panton; R v Sabey* [2015] EWCA Crim 539, the Court of Appeal reviewed the test for the common law offence of misconduct in public office in relation to public officials accused of passing information obtained in the course of their duties to the media in return for payment, and a journalist who paid officials for news stories. The Court of Appeal held that a jury must be directed to determine whether the defendants' conduct had the effect of harming the public interest as a step in deciding whether the conduct had been so serious as to amount to an abuse of the public's trust, essentially articulating a "public interest" defence.

As a result of this decision the Crown Prosecution Service reviewed its pending cases against UK-based journalists, against whom there were pending charges for aiding and abetting misconduct in public office, and in some cases conspiracy, and announced on April 17, 2015 that, while it would be continuing the cases against various officials who were paid money, it would be dropping future prosecutions in relation to Mr. Andy Coulson and eight other journalists who were due to face trial over leaks from public officials. This statement effectively shut down half of Operation Elveden, the investigation into payments made by newspapers in exchange for stories arising out of the disclosure of documents by News International in the context of the phone-hacking scandal. The last two journalists prosecuted as a result of Operation Elveden were cleared in October 2015.

Mutual Legal Assistance: the UK working with foreign governments

Nigeria

As reported in our 2015 Mid-Year FCPA Update on May 4, 2015, a Nigerian court authorised the extradition of the former head of the Nigerian Security, Minting and Printing Company, **Emmanuel Okoyomon**, to face corruption and money laundering charges in the UK based on his alleged receipt (through a UK bank account) of bribes from Australian company Securency International, allegedly to secure currency printing contracts in Nigeria.

On October 3, 2015 it was announced that the National Crime Agency ("NCA") had arrested five Nigerians on suspicion of bribery and money laundering. One of these individuals was **Deziani Alison-Madueke**, the former Nigerian Minister for Oil. Raids in relation to these arrests were conducted simultaneously in Nigeria and London.

In November 2015 **Dan Ete**, another former Nigerian Oil Minister, brought an application to unfreeze $85 million held in English accounts pursuant to a mutual legal assistance request from the Italian authorities. The funds are alleged to be the corrupt proceeds of a deal under which a company called Malabu Oil and Gas (partly owned by Mr Ete and partly by Royal Dutch Shell and Italy's ENI) acquired a valuable oil concession from the Nigerian government. The application was refused, and the funds remain frozen.

Macau

In November 2015 it was announced that the UK would be repatriating $44 million dollars to Macau. The funds had been confiscated from a former Macau government official who had been convicted in

Macau of bribery and money laundering in 2008. The government of Macau successfully applied to have the official's UK assets frozen after his conviction.

Brazil

While generally outside the scope of this alert, a recent civil fraud judgment has significant implications for international bribery clawback cases. The Privy Council (the final court of appeal for certain Commonwealth jurisdictions) confirmed that "backward tracing" (equitable tracing into an asset already held by defendant) is available where there has been "*a coordination with the depletion of the trust fund and the acquisition of the asset which was the subject of the tracing claim*" (see *Federal Republic of Brazil v Durant International Corporation et al.* (Jersey) [2015] UKPC 35).

The claim was brought by the Municipality of Sao Paolo (under the name of the Federal Republic of Brazil) against two BVI companies said to have been used to launder bribes paid to the former mayor of Sao Paolo which had then been transferred to his son. The Royal Court of Jersey had found that these funds had been laundered through the defendant BVI companies, giving rise to a constructive trust over those funds to the benefit of the municipality. The defendants did not dispute the existence of the trust but disputed the value of assets that could properly be traced to it.

In this case certain of the transfers into the accounts into which the claimants had sought to trace assets had been made *before* the final payment of bribes into the account from which these transfers had been made.

The Privy Council approved the *dicta* of Sir Richard Scott V-C in *Foskett v McKeown* [1998] Ch 265, that the "*The availability of equitable remedies ought, in my view, to depend upon the substance of the transaction in question and not upon the strict order in which associated events happen*." Delivering the judgment of the Privy Council Lord Toulson stated: "*The development of increasingly sophisticated and elaborate methods of money laundering, often involving a web of credits and debits between intermediaries, makes it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect*."

While this decision is not binding on the English courts it is strongly persuasive, and binding in all jurisdictions that continue to send appeals to the Privy Council, such as the British Virgin Islands, the Cayman Islands, the Channel Islands, Gibraltar and the Isle of Man.

Chad / United States / Canada

In July 2015 the SFO secured judgment in its favour in *Serious Fraud Office v Ikram Saleh* [2015] EWHC 2119 (QB), successfully defending a freezing order it had obtained pursuant to a Mutual Legal Assistance request from the U.S. The assets were shares in the Canadian oil company **Caracal Energy Inc.**, held through a UK account by **Ikram Saleh**. Mrs Saleh was a member of staff at Chad's embassy in Washington, with the allegation being that she had corruptly obtained 800,000 shares in Caracal Energy as part of a corrupt scheme to improperly promote the interests of Caracal Energy in Chad. The judgment is currently subject to appeal with a hearing listed for November 2016. As reported in our 2015 Mid-Year FCPA Update, related confiscation proceedings have been ongoing in the U.S. courts.

Republic of Guinea

In late 2014 the SFO served section 2 Notices on two London law firms – Mischon de Reya and Skadden, Arps, Slate, Meagher & Flom LLP, seeking approximately 180,000 documents on behalf of the Republic of Guinea pursuant to a Mutual Legal Assistance request regarding allegations of corruption relating to mining concessions in Guinea operated by a client of the two firms.

In response, the recipients of the Section 2 Notices challenged the SFO's decision to assist Guinea's investigation on the basis that the Guinean investigation was politically motivated, and that the English courts should not be assisting such an investigation. On April 30, 2015 the Administrative Division of the High Court rejected the application trying to block the SFO from assisting in the Guinean investigation, leaving the SFO free to enforce the Section 2 Notices against the two law firms and another party. This case is a reminder not only of the ability of the SFO to use its powers in aid of foreign investigations, but also that the SFO need not restrict its requests to the subjects of investigation and may issue requests to professional advisers.

3. Fraud

Enforcement

Magnus Peterson

On January 19, 2015 Magnus Peterson, the founder of hedge fund Weavering Capital, was convicted of eight counts of fraud, forgery, false accounting and fraudulent trading following a three month trial. The SFO has stated that this is one of the first hedge fund prosecutions of its kind to arise out of the 2008 financial crisis. The charges were brought under the *Theft Act 1968*, the *Companies Act 1985*, the *Companies Act 2006*, the *Forgery and Counterfeiting Act 1981* and the *Fraud Act 2006*. The SFO received assistance from authorities in the British Virgin Islands, Cayman Islands, Germany, Luxemburg, Republic of Ireland, South Africa, Sweden, and Switzerland.

Over six years Mr Peterson had inflated the performance of the Weavering Macro Fund using interest rate swaps entered into with another offshore company owned by him, misleading investors into putting $780 million into the fund over this period. The fund collapsed in March 2009 when it was unable to make repayments to investors requesting the return of their funds from December 2008 onwards. At the time of its collapse the entire value of the fund was made up of the bad debt arising from the interest rate swaps with the related party. Mr Peterson was sentenced to 13 years imprisonment.

LIBOR and EURIBOR benchmarks

The SFO continues to use the common law offence of conspiracy to defraud to prosecute those involved in the manipulation of the LIBOR and EURIBOR benchmarks. These are discussed further below in the Competition section. On 13 November 2015 the SFO announced that it had charged ten individuals with conspiracy to defraud in connection with its ongoing investigation into the

manipulation of EURIBOR. A further individual has since also been charged. Six of these individuals made their first appearance at Southwark Crown Court on January 11, 2016.

Bank of England Liquidity Auctions

In March 2015 the SFO announced that it was investigating material provided to it by the Bank of England in connection with liquidity auctions carried out during the financial crisis in 2007 and 2008. The material was referred to the SFO by the Bank of England following the results of an independent review conducted by Lord Grabiner QC in 2014.

A company cannot commit an offence under s501(1) of the Companies Act 2006 (the offence of making misleading statements to a company's auditor)

On November 10, 2015 the SFO offered no evidence in its case against Olympus Corporation and its wholly owned UK subsidiary Gyrus Group Ltd, effectively bringing to an end the prosecution in connection with alleged misleading statements made to auditors for the years 2009 and 2010.

Both companies had been charged under section 501(1) of the *Companies Act 2006,* which makes it an offence to make misleading statements to an auditor of a company. This follows a Court of Appeal judgment made in February 2015 to the effect that the only persons who can commit an offence under section 501 are those required to provide information to an auditor under section 499 of the 2006 Act, which does not include the company itself.

4. Financial and Trade Sanctions

Implementation Day and the lifting of most of the EU's Iran sanctions

2015 and early 2016 have seen two key developments in the sphere of financial and trade sanctions. The first is the lifting of the vast majority of the EU's sanctions against Iran. We have provided a detailed analysis of this development in our recent Alert: *Implementation Day Arrives: Substantial Easing of Iran Sanctions alongside Continued Limitations and Risks*. The UK has now issued *The Iran (European Union Financial Sanctions Regulations* (SI 36/2016) to give effect to this and repeal much of the pre-existing network of sanctions.

The Office of Financial Sanctions Implementation

The other key development is the formation of a new government body to oversee sanctions enforcement in the UK – the Office of Financial Sanctions Implementation ("OFSI"). This body will form part of HM Treasury and is due to become operational in April 2016. The stated purpose of OFSI is that it "*will provide a high quality service to the private sector, working closely with law enforcement to help ensure that financial sanctions are properly understood, implemented and enforced*" (HM Treasury Policy paper, Summer Budget 2015, Published July 8, 2015).

The creation of the OFSI was first made public in the UK's budget in March 2015. There it was stated that this body would "*review the structures within HM Treasury for the implementation of financial*

sanctions and its work with the law enforcement community to ensure these sanctions are fully enforced, with significant penalties for those who circumvent them. This review will take into account lessons from structures in other countries, including the US Treasury Office of Foreign Assets Control".

While it remains to be seen exactly what powers the OFSI will be granted with respect to sanctions enforcement, if OFAC is the model to be followed the intensity and aggressiveness of sanctions enforcement may be about to undergo a radical sea-change.

Further sanctions against Russian individuals

The publication of the report into the killing of Russian dissident Alexander Litvinenko has led to the UK Government issuing a travel ban and asset freeze against the two individuals suspected of committing the murder. The *Andrey Lugovoy and Dmitri Kovtun Freezing Order 2016* (SI67/2016) came into force on January 22, 2016.

Enforcement

We are not aware of any criminal investigations or prosecutions in the UK arising out of sanctions violations during 2015. In November 2015, however, Standard Chartered Bank confirmed that it was the subject of an investigation by the FCA in relation to sanctions compliance. The results of this investigation are as yet unknown.

In addition, the Guernsey Financial Services Commission imposed a financial penalty of £150,000 on Bordeaux Services (Guernsey) Limited and also fined its three directors **Peter Radford**, **Neal Meader** and **Geoffrey Tostevin** (£50,000, £30,000 and £30,000, respectively) in connection with a number of failings including a failure to have in place effective sanctions training. Bordeaux was the designated manager and administrator of Arch Guernsey ICC Limited (now known as SPL Guernsey ICC Limited) and its incorporated cells, into which two UK OIECS that were suspended by the then Financial Services Authority in 2009 had invested. The public statement notes that "*the sanctions training at Bordeaux did not cover the types of considerations raised by the nature of investments invested in by Arch FP, such as a ship, which may be hired or chartered by a party subject to a sanction*". This is a reminder that training should be more than a tick box exercise, and that consideration should be given to the issues that staff may encounter in the course of their employment when designing training.

5. Money Laundering

Legislative Reforms

On March 3, 2015 the *Serious Crime Act 2015* ("SCA") received Royal Assent, though a date has not yet been set for its entry into force. The SCA has made a number of amendments to the *Proceeds of Crime Act 2002* ("POCA") which forms the basis for UK money laundering legislation, made amendments to the *Computer Misuse Act 1990* and introduced a new offence of participating in the activities of an organised crime group.

Section 37 of the SCA amends section 338 of POCA to include an exemption from civil liability for those who make disclosures of suspicions of money laundering under POCA in good faith. This will provide protection for regulated institutions which are unable to act on client instructions while awaiting consent from the NCA to continue with a transaction about which they have made a disclosure to the NCA. This legislation is a result of cases such as *Shah v HSBC Private Bank (UK) Limited* [2012] EWHC 1283, in which litigants have sought damages from banks arising from suspicious activity reports filed by the banks. Section 37 will now provide immunity from such suits.

POCA is also amended to strengthen the asset freezing regime, to extend investigatory powers, and to strengthen the sentencing and confiscation order regime for offences under POCA.

New Offence of participating in the activities of an organised crime group

A new offence of participating in the activities of an organised crime group has been created by section 45 of the SCA, with a maximum penalty of five years' imprisonment.

The threshold for the mental element of the offence is relatively low, requiring an individual to have knowledge or reasonable suspicion only that he is participating in an activity which constitutes criminal activity of an organised crime group, or which will help an organised crime group to carry on criminal activities. The UK Government factsheet on the Serious Crime Bill stated that an "*active relationship*" with the organised criminality must be proved and cites examples of delivering packages, renting warehouse space or writing contracts. The UK Government has confirmed that that the intention is for the existing offence of conspiracy to continue to be used in order to prosecute organised crime, the new offence being broader in scope and designed to capture those who "ask no questions".

Criminal activities, for the purposes of the offence, are those conducted with a view to obtaining direct or indirect benefit, and constituting an offence in England & Wales punishable by seven years' imprisonment or more. The offence has extra-territorial scope and will encompass activities outside England and Wales where:

- those activities constitute an offence under the law of the jurisdiction where they are carried out;
- if committed in England & Wales, those activities would constitute an offence attracting a sentence of seven years' imprisonment or more; and
- one of the acts or omissions comprising participation in the group's criminal activity took place in England & Wales.

Enforcement

Enforcement of money-laundering offences under POCA continued unabated during 2015. Over 30 custodial sentences were handed down, varying from four months to 11 years, with 16 of these sentences forming part of a single NCA investigation. Already during 2016 there have been two further convictions.

2015 saw the first ever (although unsuccessful) criminal prosecutions in Jersey under the *Proceeds of Crime (Jersey) Law 1999*, the Jersey equivalent of POCA. These prosecutions were brought against **Michelle Jardine** and **STM Fiduciaire Limited**, each for failing to report to the Jersey Financial Services Commission a transaction involving a politically exposed person (PEP) from a high-risk jurisdiction that they had reasonable grounds for suspecting was money laundering. The two were acquitted.

Not to be outdone, the Guernsey Financial Services Commission ("GFSC") has imposed penalties of £50,000 each on the executive directors of Confiànce Limited: **Rudiger Falla**, **Richard Garrod**, **Leslie Hilton** and **Geoffrey Le Page**, in connection with the significant failings in anti-money laundering and countering terrorist financing systems and controls which were identified in the course of an inspection by the Financial Crime Supervision and Policy Division in April 2015. Similar failings had been identified during a 2010 visit after which Confiànce Limited was required to undertake remedial action. An independent person was also appointed to review Confiànce Limited's monitoring arrangements and governance following an on-site visit by the GFSC in 2013.

The GFSC made orders prohibiting Messrs Falla, Garrod, Hilton and Le Page from performing the functions of director, controller, partner and money laundering reporting officer in relation to business carried on by an entity licensed under the Regulatory Laws for a period of five years. **Kenneth Forman**, a non-executive director of Confiànce Limited, was fined £10,000.

In addition, the Guernsey authorities obtained convictions against **Michael Doyle** and **Belinda Lanyon** for money laundering offences in September 2015 following a four year investigation conducted with the assistance of agencies from the U.S. and seven other countries. The couple had pleaded guilty to carrying out an act intended to pervert the course of public justice in relation to the disposal of evidence connected with the money laundering investigation. They were also convicted of carrying out regulated activities in the Bailiwick of Guernsey without a licence. Doyle was sentenced to seven years and six months' imprisonment and Lanyon was sentenced to three years and six months' imprisonment.

6. Competition/Antitrust Violations

As discussed in more detail in our *2015 Year-End Criminal Antitrust and Competition Law Update,* the second half of 2015 proved to be a relatively subdued period in terms of civil cartel decisions in the UK. While the UK Competition and Markets Authority (CMA) commenced and continued a number of horizontal enforcement investigations, there was only one instance of a concluded investigation resulting in penalties, which related to the private ophthalmology industry.

On the criminal cartel front, there were several developments in court proceedings involving individuals accused of cartel activity, notably in the galvanised steel tanks industry and the banking sector.

Enforcement

Steel Tanks Industry

As reported in our 2015 Mid-Year Criminal Antitrust and Competition Law Update, the CMA suffered a setback in its prosecution of the criminal cartel offence in June 2015, when a jury acquitted two defendants charged in relation to an alleged cartel in the galvanized steel tanks industry. These were the first contested prosecutions brought under the criminal cartel offence in which the trial was completed and a jury verdict rendered.

Subsequently, in August 2015, a sentencing judgment was handed down for a third defendant, the former Managing Director of Franklin Hodge Industries, **Peter Nigel Snee**, who had already pleaded guilty. The court imposed a sentence of six months' imprisonment, suspended for 12 months, and ordered Mr. Snee to complete 120 hours of community service. The sentence took into account Mr. Snee's early guilty plea, certain personal mitigation, and the extent of his cooperation (including his appearance as a witness for the CMA in the trial of the two other defendants).

The CMA's civil investigation into suspected cartel conduct in the galvanised steel tanks industry is continuing, with the CMA indicating there would be a further update on the investigation by the end of January 2016.

LIBOR and EURIBOR

Enforcement action in the banking sector during the second half of 2015 has focused on individuals alleged to have been involved in the conduct. In August, **Tom Hayes**, the first individual to stand trial in the UK for conduct relating to the LIBOR benchmark, was convicted and sentenced to 14 years in prison. He was convicted of conspiracy to defraud. Mr. Hayes appealed the conviction. On December 21, his appeal against conviction was rejected, but the Court of Appeal reduced his sentence to 11 years, finding the original sentence was longer than necessary to punish Mr. Hayes and deter others. Nonetheless, lenient treatment in future cases should not be assumed. In its judgment the Court of Appeal stated that it "*must make clear to all in the financial and other markets in the City of London that conduct of this type, involving fraudulent manipulation of the markets, will result in severe sentences of considerable length*". Confiscation proceedings against Mr. Hayes are ongoing.

Twelve other traders and brokers have been charged with conspiracy to defraud in respect of LIBOR. One of these, as yet unnamed, pled guilty in late 2014.

Over the course of January 27 and 28, 2016, and after a lengthy trial, six of those charged were found not guilty by a jury.

The trial of the six former employees of Barclays, charged in connection with the manipulation of USD LIBOR in April 2014, is scheduled to begin in February 2016.

In addition to these cases, in November 2015, the SFO instituted proceedings against 10 individuals formerly employed by Deutsche Bank and Barclays on charges of manipulating the EURIBOR

benchmark. A further individual formerly employed by Société Générale has also since been charged. All 11 individuals were due to make a first appearance on January 11, 2016. Six of these individuals attended Southwark Crown Court and were bailed with **Christian Bittar**, a former employee of Deutsche Bank ordered to pay bail security of £1 million. The SFO is considering its position in relation to the five individuals who declined to appear. The trial is scheduled to begin in September 2017.

In March and July 2015 the FCA issued notices excluding two former Rabobank traders, **Lee Stewart** and **Paul Robson** from employment in the UK financial services industry on the basis that they lack honesty and integrity, following their convictions for LIBOR-related fraud in the U.S.

Other enforcement actions

Further to our 2015 Mid-Year Criminal Antitrust and Competition Law Update reporting on dawn raids in the clothing, fashion, and footwear sectors in early 2015, the CMA has decided to proceed with a formal investigation. The nature of the suspected conduct and the identities of the parties involved have not been made public. The CMA is expected to decide by March 2016 whether any further investigatory steps are required.

In addition, the CMA has commenced several civil investigations in the second half of the year in relation to UK online sales of licensed sports and entertainment merchandise, and in the sports equipment and leisure sectors. In December 2015, as part of its investigation into online sales of licensed sports and entertainment merchandise, the CMA conducted searches of a UK company, **Trod Limited**, and the home of one of its directors. The CMA's searches were coordinated with searches on behalf of the U.S. Department of Justice.

7. Insider Dealing, Market Abuse and other Financial Sector Wrongdoing

Overview of MAR/CSMAD

In 2016, the European market abuse regime will undergo significant expansion in scope with the implementation of the EU's *Market Abuse Regulation 596/2014* ("MAR"). Accompanied by the *Criminal Sanctions for Market Abuse Directive* (2014/57/EU) ("CSMAD"), MAR will replace the 2003 Market Abuse Directive (2003/6/EC, "MAD"). The objective of MAR is to increase market integrity and investor protection, while harmonising market abuse regimes across the EU.

As an EU regulation MAR will be directly applicable in the UK. It will replace the existing civil market abuse provisions in the *Financial Services and Markets Act 2000* ("FSMA"). MAR will also apply across all other EU Member States and the other European Economic Area ("E.E.A.") states of Iceland, Norway and Liechtenstein.

The UK will not opt into CSMAD, but instead will introduce UK criminal sanctions for market abuse, although individuals based in the UK who are conducting cross-border trading or trading in instruments in other EU member states could incur criminal liability in those jurisdictions under domestic criminal provisions implementing CSMAD.

MAR and CSMAD were developed in the wake of the financial crisis, as part of a wider range of measures aimed at regulating markets and financial instruments, extending the reach of the European regulatory regime, and specifically addressing abusive algorithmic and high-frequency trading.

Implementation in the UK

The majority of the provisions under MAR will come into force on July 3, 2016 and cover insider dealing, market manipulation and the improper disclosure of inside information. Large parts of the UK civil market abuse framework will be amended or repealed to make way for the new directly applicable MAR. This includes Part VIII of FSMA, the Code of Market Conduct and the Disclosure and Transparency Rules. This EU legislation will also require substantial changes to the FCA Handbook. The FCA has launched a consultation (CP15/35) in relation to the proposed changes and implementation of MAR generally.

Key provisions

The practical effect of MAR is to widen the UK's civil market abuse regime. MAR extends the range of instruments covered from financial instruments admitted to trading on EEA-regulated markets to those admitted to trading on multilateral trading facilities ("MTFs") and organised trading facilities ("OTFs"), and financial instruments the price or value of which depends on or has an effect on the price or value of a financial instrument traded on a regulated market, MTF or OTF.

The regulation sets out specific examples of behaviours and activities that are considered to be market manipulation under the regime such as, *inter alia*, acting in collaboration to secure a dominant position over the supply or demand of a financial instrument, and certain algorithmic trading strategies or high-frequency trading behaviour which disrupt the functioning of a trading venue. Investment professionals will now be required to report suspicious *orders* as well as suspicious transactions.

Benchmarks are also brought within the scope of the European market abuse regime, although making certain false or misleading statements relating to LIBOR, or engaging in a course of conduct that creates a false or misleading impression as to the price or value of an investment or interest rate that may affect the setting of LIBOR, has been prohibited in the UK under Part VII of the *Financial Services Act 2012* since April 1, 2013. As of April 1, 2015, the scope of the offence was widened by the *Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2015* to include seven further benchmarks used in the fixed income, commodity and currency markets.

Subject to a number of new formalities and procedural conditions, MAR permits inside information to be legitimately disclosed to a potential investor in the course of market soundings before a significant securities transaction. Notably, detailed records must be taken and the recipient must consent to being made an insider and be informed of the restrictions that this will involve. It is also now clarified that recommending or inducing another person to transact on the basis of inside information amounts to unlawful disclosure of inside information. Further, the market manipulation offence has been extended to capture attempted manipulation.

The definition of inside information is, for the most part, unchanged, but has been widened to capture inside information for spot commodity contracts.

The use of inside information to amend or cancel an order is now considered to be insider dealing, although the UK regime already prohibits certain behaviour that a regular user of the market would be likely to regard as a failure to observe the standards of behaviour reasonably expected of a person in his position (section 118(1) FSMA).

MAR sets new E.E.A.-wide minimum standards for the investigatory and sanctioning powers of the relevant enforcement authorities, requiring that the enforcement authorities for all member states of the EU and E.E.A. countries have the power to impose fines of up to at least €5 million for an individual and €15 million or 15 per cent of annual turnover for a firm.

FCA Enforcement - Insider Dealing

After a number of quiet years during which it appears that the bulk of its enforcement resources were deployed in high profile benchmark manipulation investigations, the FCA pursued insider dealing prosecutions with renewed vigour in 2015.

Operation Tabernula

The long-delayed high-profile prosecution of the FCA's insider dealing investigation, 'Operation Tabernula', is finally being tried at Southwark Crown Court before HHJ Jeffrey Pegden QC. This case first hit the headlines more than five years ago when over 100 investigators executed dawn raids across the City of London and residential addresses, arresting six men from a number of financial institutions.

In the trial, which commenced in January 2016 and is expected to last for 12 weeks, five defendants, including two senior City bankers, face a single count of conspiring together to commit insider dealing on six occasions between November 2006 and March 2010, making an alleged financial gain of £7.4 million. **Martyn Dodgson**, a former Managing Director banker, and **Grant Harrison**, who held a senior position at Panmure Gordon and previously Altium Capital, are alleged to have recruited a close friend of Mr Dodgson, **Andrew Hind**, a director of Deskspace Offices, as a middleman to record the trades and split the profit. It is alleged that Mr Hind in turn used two private day traders, **Ben Anderson** and **Iraj Parvizi**, to execute the trades. A further defendant, **Richard Baldwin**, a former business partner of Mr Hind, was removed from the indictment for health reasons in October 2015.

Prosecutors, who intend to rely upon covert recordings of telephone conversations, allege that the defendants used encrypted memory sticks, pay-as-you-go mobile phones, nicknames and passwords named after luxury cars. The defendants face up to seven years in prison if convicted.

In 2015, three other men pleaded guilty to insider dealing prosecutions for conspiracies investigated as part of Operation Tabernula but not linked to the ongoing trial. **Julian Rifat**, a former execution trader at hedge fund Moore Capital Management LLC, admitted eight instances of insider trading in March 2015, which involved profits exceeding £250,000. He was sentenced to 19 months in prison.

Rifat admitted passing inside information, obtained during the course of his employment, to **Graeme Shelley**, a former broker at Novum Securities, who then placed heavy spread-bet and contract-for-difference trades via his brokers for their joint benefit. Rifat's plea followed those of Shelley and **Paul Milsom**, a former equities trader at the investment arm of Legal & General Insurance Management Ltd who admitted to improperly disclosing inside information to Shelley leading to joint profits of £560,000. Shelley and Milsom were sentenced to two years' suspended imprisonment and two years' imprisonment, respectively.

Other insider dealing convictions and orders

The FCA had a series of successful individual prosecutions for insider dealing during the course of 2015, all involving guilty pleas.

Paul Coyle, the former Group Treasurer and Head of Tax at WM Morrison Supermarkets Plc, pleaded guilty to two counts of insider dealing between February 12 and May 17, 2013. Coyle, through his role at Morrisons, was regularly privy to confidential price sensitive information about Morrisons' ongoing talks regarding a proposed joint venture with Ocado Group Plc. He admitted trading in Ocado shares on that information using two online accounts which were in the name of his partner. He was sentenced to 12 months imprisonment and ordered to pay £15,000 towards prosecution costs and a confiscation order in the sum of £203,234.

A number of convictions arose out of market manipulation linked to the takeover of Logica Plc by CGI Group in 2012. In February 2015, **Ryan Willmott**, formerly Group Reporting and Financial Planning Manager for Logica Plc, pled guilty to three instances of insider dealing relating to the takeover, which was publicly announced on May 31, 2012 causing the share price to increase dramatically. Willmott set up a trading account in the name of a former girlfriend, without her knowledge, to carry out the trading. He also admitted disclosing inside information to a family friend, who then went on to deal on behalf of Willmott and himself. Willmott was sentenced to ten months' imprisonment and made subject to a confiscation order in the sum of approximately £23,000.

The family friend, retired accountant **Kenneth Carver**, purchased 62,000 shares in Logica on the basis of information provided to him by Willmott, and sold all of them shortly after the announcement, making a profit of over £24,000. In light of significant co-operation with the FCA at an early stage of the investigation and evidence of serious financial hardship, Carver was fined only £35,212 for market abuse in breach of section 118(2) FSMA.

In April 2015, **Pardip Saini**, convicted of six counts of insider dealing in 2012 as part of 'Operation Saturn', was sentenced to 528 days imprisonment for failing to pay a Confiscation Order in the sum of £464,564.91 made against him in September 2014.

The FCA also secured a High Court judgment awarding the regulator permanent injunctions and penalties totalling £7,570,000 against **Da Vinci Invest Ltd**, **Mineworld Ltd**, **Szabolcs Banya**, **Gyorgy Szabolcs Brad** and **Tamas Pornye** for committing market abuse. The defendants were found to have committed market abuse in 2010/2011 relation to 186 UK-listed shares using a manipulative trading strategy known as "layering", which involves the entering and trading of orders in relation to

shares traded on the electronic trading platform of the London Stock Exchange ("LSE") and MTFs in such a way as to create a false or misleading impression as to the supply and demand for those shares and enabling them to trade those shares at an artificial price.

Pending prosecutions

In April 2015, the FCA also charged **Manjeet Singh Mohal**, a business analyst at Logica Plc, with passing on inside information in 2012. There were further charges in relation to **Reshim Birk** and **Surinder Pal Singh Sappal**.

A probe by the FCA into hedge fund managers at Man Group's GLG and Lodestone Natural Resources was dropped in 2013, while another involving a former fund manager at BlackRock is ongoing.

The trial of **Damien Clarke**, a former equities trader at Schroders, who in 2014 was charged with insider trading over a nine-year period between October 2003 and November 2012, is due to start in March 2016.

FCA's regulatory enforcement

As was the case in the last few years, 2015 saw a number of very large fines imposed by the FCA. Firstly, on April 15, 2015, the FCA announced a fine of £126,000,000 against **Bank of New York Mellon** for failure to adequately ensure safe custody of client assets.

Then, on April 23, 2015, the FCA announced a fine of £226,800,000 against **Deutsche Bank** for its part in LIBOR and EURIBOR-related misconduct markets. Deutsche Bank was also fined and criticised for providing misleading and inaccurate information to the FCA, and for being tardy in responding to the FCA's enquiries.

A third very large fine was imposed by the FCA on May 20, 2015. Under this **Barclays Bank Plc** was fined £284,432,000 for failing to control certain practices in its London foreign exchange business.

In addition to these **Aviva Investor Global Services Limited** was fined £17,607,000 for failing to properly manage conflicts of interest in its fund management business; **Merrill Lynch International** was fined £13,285,900 for poor transaction reporting; **Threadneedle Asset Management Limited** was fined £6,038,504 for a lack of controls, and for providing inaccurate information to the FCA; and **Asia Resource Minerals Plc** (formerly **Bumi Plc**) was fined £4,651,200 for breaching the UK's Listing Rules through the inadequate reporting of related party transactions.

2015 also saw the largest ever retail fine of £117,430,600 imposed on **Lloyds Banking Group** for failing to treat customers fairly in connection with complaints regarding payment protection insurance, **Clydesdale Bank Plc** was also fined £29,540,000 for failings in the handling of complaints regarding payment protection insurance.

It is worth noting that three of the fines imposed in 2015 include amounts for breaches of Principle 11 attributable to the conduct of the firms' investigation and the quality of communication with, and information provided to, the FCA.

The road ahead

Although the FCA can point to a growing number of individual convictions in the financial sector since 2008, Operation Tabernula is the first FCA investigation to target alleged rings of City traders, and the first contested multi-defendant prosecution for insider dealing since 'Operation Saturn' in 2012.

Looking ahead, the demands on the FCA's enforcement resources resulting from the large investigations into matters relating to LIBOR and forex benchmark rates should diminish. Patrick Spens, the head of the FCA's market monitoring team, told the *Financial Times* in July 2015 that he expected to send a higher number of cases to the FCA's enforcement division as resources are freed up, and that "*we have not taken our eye off the ball*".

The following Gibson Dunn lawyers assisted in preparing this client alert: Patrick Doris, Mark Handley, Rebecca Sambrook, Frances Smithson, Steve Melrose and Deirdre Taylor, with further assistance from Emily Beirne, Tiernan Fitzgibbon, and Ryan Whelan.

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