THE YFLA SPRING NEWSLETTER 2017

Young Fraud Lawyers Association

Dear members,

Welcome to the YFLA Spring newsletter. Spring has sprung, and as you all bask in glorious sunshine, the YFLA prepares itself for another busy period. Details of our upcoming events can be found on our new and improved website www.yfla.com We hope you enjoy the Newsletter.

In this issue:

White collar crime under a Trump administration: "terrific" or a "total disaster"?

Whilst Donald Trump's presidential campaign banged the drum on issues such as immigration, economic growth and healthcare, his position on white collar crime was notable by its absence.

Trump's stance on financial crime is difficult to predict, although the position taken by his administration will have a global impact. Trump self-describes as pro-business and anti-Wall Street, but he is an erratic leader and his comparatively recent entry into the political arena means that legal spectators have little to go on. He rode a populist wave to victory, fuelled in part by public outrage that no banking executives were imprisoned for their role in the financial crash, but Trump himself is considered part of the 'big business' that many of his supporters decry.

Within moments of stepping inside the Oval Office, Trump revived the term 'Government Sachs' by securing top governmental positions for ex-Goldmans executives, tasked with overseeing America's national economic policy. He has stated publicly that he believes heavy fines on banks are inappropriate, and is vocally opposed to the increased regulation of the financial industry ushered in under the Dodd-Frank Act.

"deregulating the financial industry allows white collar crime to flourish"

Historically, centralising the interests of the banks whilst deregulating the financial industry allows white collar crime to flourish. Bill Black,

Associate Professor of Economics and Law at the University of Missouri, states that "this is going to be the most criminogenic environment since the days of Harding". Robust enforcement becomes that much harder in a deregulated environment, as the purpose of a properly functioning regulatory system is to bring corporate malfeasance to light.

However, when malfeasance does come to light, the alleged perpetrators will come head-to-head with a Department of Justice led by Attorney General Jeff Sessions. Sessions prosecuted bankers during the 1980s savings and loans crisis whilst a federal prosecutor in Alabama. In 2009, he co-sponsored the SAFE Markets Act which would have authorised the Director of the FBI, the Attorney General and the Securities Exchange Commissioner to hire additional staff to investigate and prosecute financial markets violations. The legislation was not ultimately enacted, but it reflects the intolerance towards white collar crime that Sessions has shown throughout his career. He has publicly endorsed both the prosecution of individuals involved in financial fraud and the imposition of custodial sentences. At a 2002 Judiciary Committee hearing he stated that "there is a lot better behaviour in banking today because people went to jail over [the savings and loans] cases".

Despite Sessions' apparent zeal, white collar crime enforcement will be significantly impacted if the relevant authorities are under-resourced. Trump's headline enforcement priorities are likely to dominate the Department of Justice and Security Exchange Commission budgets. With resources expected to be directed towards the prosecution of companies that hire illegal labour, violate import and export laws or fraudulently avoid the payment of duties or tariffs, white collar crime investigations may find themselves starved of the essential funding and personnel necessary to bring a case to court.

The Trump administration's approach to corporate malfeasance under a Sessions-led Department of Justice is conflicted and unclear. A deregulated industry under the guidance of Wall Street executives increases the risk of financial fraud. However, robust enforcement is likely to be hampered by the re-allocation of resources towards the more emotive issues that won Trump the election. Whilst Sessions has a track record of taking a hard line on white collar cases, Trump's own stance remains to be seen.

Kate Parker, 5 Paper Buildings

Disclose me the money: the ever expanding powers of disclosure orders

Since the decision in Re O [1991] 2 Q.B. 520, which recognised the inherent jurisdiction of the Court to order disclosure of a Defendant's assets in support of restraint orders, there has been a steady shift in the burden of proof onto a Defendant, where financial crime is concerned. Whilst this decision turned on its own facts to some degree, its effect was to widen the use of disclosure orders against third parties and defendants.

This trend is reflected in the Criminal Finances Bill, which includes proposals to allow disclosure orders to be made in investigations concerning money laundering and the funding of terrorism. The motivation for these proposals is clear; as technology develops, it is necessary for the legislation to reflect the increasing complexity and sophistication in financial crime and increased threat from, for example, cyber terrorism, equipping the relevant agencies with the means to address it.

"the present overall cost of 'fraud' to the UK economy is £193 billion per year"

Money laundering is therefore an obvious area to include, as it is estimated by the Annual Fraud Indicator that the present overall cost of 'fraud' to the UK economy is £193

billion per year, roughly equivalent to £6,000 every second . The determination to redress the balance is shown by extending powers to investigators and creating new offences such as failure to prevent tax evasion.

So how does the Bill go about redressing this balance? The Bill now removes the need for an application for a disclosure order to be made only by a Prosecutor. Instead, it can now be made by an 'appropriate officer', defined in section 378 of POCA 2002. The test to be met in granting a disclosure order largely remains the same as set out at section 358 of POCA 2002:

"Where it is a money laundering investigation, the person specified in the application must have benefitted from his criminal conduct; there must be reasonable grounds for believing that information, which may be provided if compliance is likely, to be of substantial value and there must be reasonable grounds for believing that it is in the public interest for the information to be provided."

Disclosure orders can continue to be made against third parties, in accordance with restraint orders. Third parties include solicitors, who can be required to provide names and addresses concerning their client, or of assets known to them. This presumably can include the details of bank accounts from which a Defendant or an affected third party has paid their solicitor's fees for example. This begs the question as to whether these new provisions compromise the privileged nature of the relationship between a Defendant and the Solicitor.

Furthermore, whilst it is still an offence to fail to comply with a Disclosure Order without reasonable excuse, the rule against self-incrimination is still retained as defendants and third parties are not required to provide any privileged information, documents or excluded material. Despite this, defendants and affected third parties should be advised of the exceptions to the rule, as outlined in section 360, which are wide reaching.

Given the proposed changes, what will be the costs to defendants? It is arguable that these provisions represent a subtle attack on the burden of proof to which we must be alive. Given the apparent expectation that, unless a Defendant keeps anything other than an exemplary record of transactions, his actions must represent criminal behaviour, a Defendant would appear to be left entirely unable to remain steadfast in requiring the Crown to prove the case against him.

Whilst it is right that these matters should be tackled, they must always be countered with safeguards and should not result in the overturning fundamental legal principles such as the presumption of innocence famously enunciated in Woolmington v DPP [1935] AC 462.

Clyde Darrell &
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Democracy and deception: Electoral fraud in the twenty-first century

From duplicitous battle buses to suspected Russian hacktivism in the US presidential race, almost every public election in recent years appears to have been seriously compromised by scandal and accusations of fraud. Perhaps this is a reflection of a heightened scepticism or mistrust of government. It could also be the result of an increased awareness of electoral crimes. Certainly, the last few elections have attracted intense media coverage on the issue of electoral fraud. But what exactly is the nature of this seemingly 'catch-all' offence of electoral fraud and what are the new threats to the integrity of our political process from developments in technology?

Electoral fraud covers a range of different offences. For instance, the Representation of the People Act 1983 ('RPA') encompasses crimes such as personation (voting as someone else) and false application to vote by post or by proxy (eg. with the intention

of depriving someone else of a vote).

Convictions for these offences can result in imprisonment for up to two years and/or a fine. Prosecutions under the RPA must be brought within 12 months. However, no such time limit applies to other substantive electoral fraud offences. These include making a false statement under the Perjury Act 1911; forgery; conspiracy to defraud; or offences under the Fraud Act 2006.

The implications for an allegation of electoral fraud are significant and can even threaten the election result itself. In the Tower Hamlets case, Labour Mayor Lutfur Rahman was prosecuted by the Electoral Commission for double-casting ballots from false addresses, as well as making false statements against another candidate. His election was nullified.

Such crimes can, however, be difficult to prosecute. Orkney and Shetland's successful Liberal Democrat candidate was able to avoid conviction for making false statements of fact regarding his own personal character by demonstrating that they were made due to ignorance of a "political machination". More recently, the Commission fined the Conservative party £70,000 for incorrectly recording 'battle bus' expenditure as a national rather than local campaigning cost in the 2015 general election. A police investigation is on-going.

"an increased reliance on technology could render our elections vulnerable to cyber-attacks"

In terms of running elections in the future, some have advocated a better use of technology rather than relying on fallible (and possibly corruptible) central authorities. One option is 'Blockchain technology' - a secure network of databases currently used to keep track of Bitcoin ownership. However, following allegations that Russian hackers were behind the successful election of US President Donald Trump, an increased reliance on technology could render our elections vulnerable to cyber-attacks. A large database containing people's voting history also has privacy and data protection implications, presenting an attractive target for potential fraudsters.

Electoral fraud is an innately political offence. As such, if we do not treat it seriously and adapt to the new and innovative ways in which it can be committed, particularly by bolstering our cyber-security technology, it will pose a very real and very grave threat to our democratic process.

Katherine Galza,
Kingsley Napley LLP

What does Rolls Royce have to do with Human Rights and bringing criminals to account?

One of the most significant actions against a company in the UK for criminal conduct has shifted the use of Deferred Prosecution Agreements ("DPA") up a gear. In January this year, the Serious Fraud Office ("SFO") completed its £497.25m DPA with Rolls-Royce Plc ("Rolls"), propelling the use of DPAs and their wide reaching and global ramifications further into public and global discussion.

One of the terms of the Rolls DPA was that, in order to avoid prosecution for bribery and corruption spanning three decades of misconduct in the US, the UK and Brazil; Rolls would assist in the prosecution of any individuals involved.

The SFO conducted its four year investigation collaboratively with 'trusted global partners' in order to secure the DPA. Investigations into Rolls by other jurisdictions, however, are hampered by their failure to conform to international human rights standards and, as such, the transparency and accountability achieved by the DPA risks being tarnished by the limitations to achieving justice which have subsequently come to light.

The investigation and prosecution of the individuals

involved in the payment of bribes to intermediaries and foreign officials to win tenders from 1989 to 2013 across the seven jurisdictions involved in the Rolls case (Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia) is far more problematic than one might think. The consequences of international information sharing to aid investigation could go much further than piercing the corporate veil.

We have learnt that the SFO is stalling the handover of information from its corruption investigation into Rolls to Thai authorities because of concerns that the country may pursue the death penalty against individuals should they be found guilty. Rolls, quite correctly, doesn't appear to be assisting any investigations in Thailand either, commenting for Bloomberg: “We will comply with our obligations to co-operate under the agreements reached in the U.K., U.S. and Brazil and cannot comment further on any actual or potential investigations in other countries."

Robert Amaee, former head of anti-corruption at the SFO explains:

"It’s no secret that agencies speak to one another, and often share information, both formally and informally (…) Underpinning all of this is the need for the agencies to balance their desire to assist each other with their fundamental obligation to safeguard the human rights of suspects."

"investigations into criminal offences are only really achievable in circumstances where the jurisdictions involved covenant to uphold international human rights law standards"

It follows that multijurisdictional investigations into criminal offences are only really achievable in circumstances where the jurisdictions involved covenant to uphold international human rights law standards. The failed investigation of Julian Assange is a further example of justice being impeded by a global failure to catch up.

Over 160 Members States of the United Nations with a multiplicity of legal systems, traditions, cultures and religious backgrounds, have either abolished the death penalty or do not practice it. Corporations and the individuals they shield are more likely to be investigated properly and fairly when the world recognises the link between human rights, transparency and accountability.

Julia Wookey,
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Spotlight on the Reach of the FCPA

The appeal focuses on who may be prosecuted under the FCPA. If the appeal by the U.S. prosecutors is unsuccessful, the scope of the class of people to whom the FCPA applies will be limited.

The case is an appeal of the August 2015 decision of the Connecticut District Court, which held that prosecutors had to prove that Hoskins, a British national, was “an agent of a domestic concern” in order to prosecute him under the FCPA.

In 2014, Alstom SA, the French power and transportation company, pleaded guilty and paid a US$772 million fine to settle foreign bribery charges in relation to the payments of bribes in countries such as Egypt, Indonesia, Saudi Arabia and Taiwan. Hoskins, who was arrested walking off a boat in the U.S. Virgin Islands in 2014, was a Senior Vice President for the Asia region of Alstom SA during the time of the bribery scheme. It is in relation to this alleged bribery scheme that Hoskins is facing charges in the United States.

It is alleged that Hoskins, together with others, paid bribes to officials in Indonesia with the hope of winning a US$118 million coal-to-steam boiler contract.

Oral arguments in the appeal were heard on Thursday, 3 March 2017. In considering whether the scope of the FCPA encompasses foreign nationals, Hoskins's counsel argued that the U.S. Congress didn't expressly include foreign nationals such as Hoskins (namely, foreign nationals with no obvious, direct ties to the United States) in the provisions of the FCPA that outline potential defendants. Judges Katzmann and Pooler noted that Congress "could have listed them. They didn't".

The third judge hearing the appeal, Judge Lynch, expressed concern, however, that the District Court's ruling would allow companies to protect their employees from FCPA liability and could motivate companies to conduct bribery schemes through foreign employees who are not covered directly under the FCPA.

While the statements of Judges Katzmann and Pooler appear to favour Hoskins and a ruling in line with the District Court's August 2015 ruling, Judge Lynch's comments seem to endorse an argument at the heart of the prosecutor's appeal, namely that the District Court's ruling risks creating an "unwarranted anomaly in the law" that exempts "foreign national ring-leaders" who orchestrate foreign bribery schemes while punishing the "foreign national underlings" who carry them out.

"this will impact the application of the FCPA to those outside of the United States and limit the prosecuting powers"

If the Court of Appeals confirms that the District Court was correct to rule the FCPA only applies to agents of domestic concerns, this will impact the application of the FCPA to those outside of the United States and limit the prosecuting powers of the U.S. Department of Justice and Securities and Exchange Commission.

As commentators have noted, judicial scrutiny of the FCPA is rare, making this one to watch.

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We would like to extend our heartfelt appreciation to all our contributing authors.