

A NEW FACET TO THE SPECIAL RELATIONSHIP:
COOPERATION IN WHITE COLLAR INVESTIGATIONS
BETWEEN THE U.S. AND THE U.K.

Robert H. Hotz, Jr.
Akin Gump Strauss Hauer & Feld LLP

Rod Fletcher
Russell Jones & Walker
Solicitors

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I. Introduction

The United Kingdom and the United States have enjoyed what Winston Churchill coined “the special relationship” for many, many years. The two allies have much in common – a common language, the common law, and common enemies. Arguably, no two nations have ever enjoyed such a special relationship.¹ The last several years have witnessed a new facet to the special relationship – ever closer cooperation between the two nations in white collar investigations. In 2006, the U.S. Securities and Exchange Commission (SEC) and the U.K. Financial Services Authority (FSA) signed a Memorandum of Understanding to “cooperate with each other in the interest of fulfilling their respective regulatory mandates”² Transatlantic collaboration between U.S. and U.K. enforcement has become increasingly commonplace. On June 27, 2012, the U.S. Department of Justice (DOJ), the U.S. Commodity Futures Trading Commission (CFTC), and the FSA announced a ground-breaking \$453 million settlement with a major U.K. bank for attempting to manipulate various benchmark interest rates including the London Interbank Offered Rate (LIBOR); the probe is ongoing and future actions against other banks are anticipated.³ More broadly, in 2011-12, the FSA received over 1,085 formal requests for assistance in regulatory and criminal investigations from other countries including the U.S.⁴ The FSA made approximately 70 requests for legal assistance to foreign governments in the same period and is “seeing an increase in requests and cooperation with overseas counterparts as the number of cases which are being conducted jointly rises.”⁵

¹ Truth be told, the relationship was not always so special. Ironically, this paper will be published in 2012 – the 200th anniversary of the War of 1812 between the U.S. and the U.K. which might be considered the nadir of Anglo-American relations. Among other not so special things, the British blockaded the eastern seaboard, bombarded Baltimore, seized the U.S. capital, and burned the White House. For its part, the U.S. also did some not so special things. The U.S. invaded Canada and burned a number of Canadian cities, including York (present day Toronto). General Andrew Jackson won the Battle of New Orleans after the peace treaty ending the war had been signed. *See generally* Edward Rothstein, *A Legacy Far Beyond The National Anthem*, N.Y. TIMES at C1 (June 26, 2012), available at http://www.nytimes.com/2012/06/26/arts/design/1812-a-nation-emerges-at-national-portrait-gallery.html?_r=1&ref=arts. A ballad of the battle, recorded by Johnny Horton and released in 1959, became a number one hit in the U.S. and, oddly enough Canada, and even reached number 16 on the U.K. charts, which speaks to mankind’s ignorance, love of a catchy tune regardless of the lyrics, or both. *See* Wikipedia, *The Battle of New Orleans*, http://en.wikipedia.org/w/index.php?title=The_Battle_of_New_Orleans&oldid=498085199 (last visited June 28, 2012).

² Memorandum of Understanding: Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight and the Supervision of Financial Services Firms, U.S.-U.K., at 1, Mar. 14, 2006, available at http://www.sec.gov/about/offices/oia/oia_multilateral/ukfsa_mou.pdf; *see also* Press Release, SEC, SEC and FSA Hold Strategic Dialogue Meeting (Oct. 13, 2011), <http://www.sec.gov/news/press/2011/2011-206.htm>. (According to the press release, “[t]oday’s meeting provided an opportunity for the SEC and the FSA to restate their commitment to working together and continue discussions in the areas of common regulatory interest including cross-border enforcement cases”)

³ Ben Protess & Mark Scott, *Barclays Settles Regulators’ Claims Over Manipulation of Key Rates*, N.Y. TIMES at B1 (June 27, 2012), available at <http://dealbook.nytimes.com/2012/06/27/barclays-said-to-settle-regulatory-claims-over-benchmark-manipulation/>; Simon Nixon, *Lie Bores Into Barclays’s Credibility*, WALL ST. J. at C12 (June 28, 2012), available at http://online.wsj.com/article/SB10001424052702304830704577492963344243348.html?mod=WSJ_Markets_LEFT_TopStories (titled as *Lie Bores Into Credibility of Barclays and the City*).

⁴ FSA, ENFORCEMENT ANNUAL PERFORMANCE ACCOUNT 2011/12, at 10 (2012), available at <http://www.fsa.gov.uk/static/pubs/annual/ar11-12/enforcement-report.pdf>.

⁵ *Id.*

This paper provides a brief overview of the authorities in the U.K. charged with the enforcement of the laws against white collar crime, comments on the similarities and key differences with their U.S. counterparts, and offers some practice tips for those representing individuals and corporations in such investigations.

II. An Overview of the U.K. System From the Perspective of an American Lawyer⁶

Currently, the U.K. system entrusts the enforcement of the laws against white collar crime principally to three entities: (1) the Serious Fraud Office (SFO); (2) the FSA; and (3) the Crown Prosecution Service (CPS). Although this paper focuses on the SFO and the FSA, which have investigated and prosecuted significant white collar matters in collaboration with the U.S. authorities, the CPS deserves mention. The CPS “is effectively the largest law firm in the U.K., dealing exclusively with criminal cases and casework issues arising from them” and employs roughly 8,300 people.⁷ The CPS prosecutes the entire gamut of crimes including white collar crime. The CPS has had a unit devoted to fraud cases for many years. In its most recent restructuring in April 2010, the CPS created the Central Fraud Division to prosecute fraud.⁸

A. The FSA and the SFO

The FSA is an independent non-governmental body created by statute, the Financial Services and Markets Act of 2000, to enforce the U.K. securities laws. The FSA functions both as a securities regulator and enforcer of the securities laws. The FSA’s counterpart in the U.S. is the SEC. Unlike the SEC which only has authority to bring civil actions for violations of the federal securities laws, the FSA has the power to bring either criminal or civil charges against individuals and corporations. However, the FSA is a prosecutor of limited remit and is not a general prosecutor of fraud or business crimes.⁹ Historically, the FSA has not brought many criminal enforcement proceedings. The FSA’s criminal enforcement powers are limited by statute and, as a general matter, are confined to “insider dealing,” “misleading statements and practice offences,” and money laundering.¹⁰ However, where the FSA uncovers criminal conduct beyond its statutory remit, it will refer the matter to the SFO or CPS.¹¹

The FSA is set to be abolished in early 2013 and its authority will be divided between two new agencies: the Prudential Regulation Authority (the “PRA”) and the Financial Conduct Authority (“FCA”). It is anticipated that of the two new agencies the FCA will be responsible

⁶ The discussion of the U.K. enforcement system is not an exhaustive treatment of the subject and the comparative analysis that follows undoubtedly suffers from some degree of over-simplification.

⁷ CPS, *Facts about the CPS*, <http://www.cps.gov.uk/about/facts.html> (last visited June 28, 2012).

⁸ For a discussion of the Central Fraud Division, see CPS, *Central Fraud Division*, http://www.cps.gov.uk/your_cps/our_organisation/cfg/index.html (last visited June 28, 2012).

⁹ Margaret Cole, Director, Enforcement and Financial Crime Division, FSA, *The FSA’s Agenda for Fighting Financial Crime*, Speech Before the British Bankers Association (Nov. 19, 2009), available at http://www.fsa.gov.uk/library/communication/speeches/2009/1119_mc.shtml.

¹⁰ See generally, FSA, HANDBOOK, *Prosecution of Criminal Offences – The FSA’s General Approach* at Ch. 15, Sec. 15.4, available at <http://fsahandbook.info/Archive/2004/11/html/vhb/html/ENF/enf15.4.html>.

¹¹ See Cole, *supra* note 9.

for the majority of white collar investigations and enforcement proceedings.¹² Whether and to what extent the FCA and PRA will retain the practices, procedures, and enforcement priorities of the FSA remains to be seen. 2013 will be an important year for both the PRA and the FCA. Given the uptick in enforcement actions brought by the FSA in recent years and the priority the British government has placed on enforcement, it is anticipated that the FCA and PRA will continue to be aggressive.

The SFO was established in April 1988¹³ and is an independent government agency charged with the prosecution of serious or complex fraud and corruption. The SFO has jurisdiction in England, Wales, and Northern Ireland. Of note, the SFO does not have jurisdiction in Scotland, the Isle of Man or the Channel Islands.¹⁴ The SFO derives its powers from the Criminal Justice Act of 1987. The SFO is headed by a Director who is appointed by and reports to the Attorney General. At the time of its founding, the SFO was seen as an innovation in U.K. law enforcement by combining investigation and prosecution functions in one office.¹⁵ The SFO has an annual budget of £38 million and a staff of 300 lawyers, accountants, investigators, technical specialists and support staff.¹⁶ By contrast, the FSA's annual budget is about 13 times the size of the SFO's; for 2011-12 the FSA budget was £492 million.¹⁷

B. A Comparison of UK and US Enforcement Processes

1. Initiation of Proceedings

The FSA Enforcement Information Guide provides a solid overview of the FSA's enforcement powers and a flow chart of FSA enforcement procedure.¹⁸ The FSA commences its investigations by appointing a team of investigators. Often, the FSA will send a notice of appointment to the firm or individual being investigated. This process is analogous to the SEC practice of allowing counsel for corporations and individuals who have been compelled or requested by the SEC Staff to provide documents or testimony to request a copy of the

¹² FSA, THE FINANCIAL CONDUCT AUTHORITY: APPROACH TO REGULATION, at 5-6 (June 2011), *available at* http://www.fsa.gov.uk/pubs/events/fca_approach.pdf. According to the FSA, “[t]he FCA will continue to build upon the success of the credible deterrence strategy agenda across the whole range of market regulation. It will pursue this strategy vigorously in relation to conduct which puts integrity at risk, such as insider dealing and market manipulation. This will be supported by the government’s decision to confer on the FCA the FSA’s powers to bring criminal prosecutions as well as civil action.” *Id.* at 35.

¹³ SFO, *History & Legislation*, <http://www.sfo.gov.uk/about-us/history--legislation.aspx> (last visited June 28, 2012).

¹⁴ The SFO website provides an overview of the SFO’s jurisdiction and powers. *See* SFO, *Who We Are*, <http://www.sfo.gov.uk/about-us/who-we-are.aspx> (last visited June 28, 2012).

¹⁵ Richard Alderman, Director, SFO, *Enforcing the Law on Fraud and Corruption: Does Self-reporting Pay?*, Presentation Before the Saïd Business School, (Mar. 6, 2012), *available at* <http://www.sfo.gov.uk/about-us/our-views/director-s-speeches/speeches-2012/enforcing-the-law-on-fraud-and-corruption-does-self-reporting-pay.aspx>.

¹⁶ *Id.*

¹⁷ FSA, BUSINESS PLAN 2012/13, at 61 (2012), *available at* <http://www.fsa.gov.uk/static/pubs/plan/bp2012-13.pdf>.

¹⁸ *See* FSA, ENFORCEMENT INFORMATION GUIDE (Oct. 2010), *available at* http://www.fsa.gov.uk/pages/doing/regulated/law/pdf/enf_procedure.pdf.

Commission's Formal Order of Investigation authorizing the Staff to issue subpoenas and take testimony in the matter.¹⁹ Unlike SEC practice, the FSA holds a so-called "scoping meeting" between the FSA investigators and the individuals or corporations under investigation to discuss the parameters of the investigation. The scoping meeting can present defense counsel with an opportunity to learn about the investigation and the FSA Staff's views of the issues.

The SFO commences an investigation upon a finding by the Director of the SFO that there are reasonable grounds to suspect an offense has been committed involving serious or complex fraud or corruption. Given its limited resources, the SFO takes relatively few new cases, on average roughly 30 to 40 per year.²⁰ In deciding whether to commence an investigation, the SFO considers a number of statutory factors including:

- "[W]hether the sum at risk is estimated to be at least £1 million;"
- "[W]hether the case is likely to give rise to national publicity and widespread public concern;"
- "[W]hether the case requires a highly specialist knowledge of, for example, financial markets and their practices;"
- "[W]hether the case has a significant international dimension;"
- "[W]hether legal, accountancy and investigative skills need to be brought together;" and
- "[W]hether the suspected fraud appears to be complex and one where it would be appropriate to use Section 2 powers [of the Criminal Justice Act]."²¹

The SFO and FSA work together closely and have agreed to criteria for referring cases where it appears regulatory or administrative penalties, rather than criminal prosecution, are a more appropriate resolution.²²

The Director of the SFO has extensive investigative powers under the Criminal Justice Act. He may require witnesses to submit to interviews and produce documents. According to the SFO, written notice is always given in connection with the exercise of investigative powers and the failure to comply with such notice can result in prosecution.²³ SFO investigations are conducted by a specific case team assigned to the matter which consists of a case manager, a case lawyer, investigative lawyers, financial investigators and administrative support staff.²⁴

¹⁹ See SEC DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL, at 20-21 (March 19, 2012), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

²⁰ SFO, *How We Work – 2. Assessment*, <http://www.sfo.gov.uk/about-us/how-we-work/2-assessment.aspx> (last visited June 28, 2012).

²¹ SFO, ANNUAL REPORT AND ACCOUNTS 2010-11, at 7 (July 14, 2011), available at <http://www.sfo.gov.uk/media/175084/resource-accounts-2010-11.pdf>.

²² *Id.*

²³ SFO, *Section 2 and Legislative Tools*, <http://www.sfo.gov.uk/about-us/history--legislation/section-2--and-legislative-tools.aspx> (last visited June 28, 2012).

²⁴ SFO, *Case Teams within the Operational Business Areas*, in OPERATIONAL HANDBOOK (2012), available at http://www.sfo.gov.uk/media/105998/case_teams_within_the_operational_business_areas_sfo_operational_handbook_topic.pdf.

2. Similarities and Differences in Evidence Gathering Techniques

Once an investigation is begun in the U.K., the FSA and SFO investigators will gather documents and interview witnesses. In many respects, this process is similar to the way the SEC or DOJ operates in the U.S. with certain important differences. While the SEC often proceeds by taking on the record testimony of witnesses which is similar to how the FSA proceeds as described more fully below, the SEC, CFTC and DOJ have the ability to interview witnesses more informally by way of a proffer agreement. Especially when there are parallel civil and criminal investigations, the SEC, CFTC and the DOJ often interview witnesses pursuant to a standard form proffer agreement.²⁵ The proffer has benefits to both the government and the witness. The witness is allowed the opportunity to present his or her version of events to the government without fear of being prosecuted for his or her statements unless, of course, he or she lies in the proffer. The government gets the benefit of evaluating the credibility of the witness and the value of his or her testimony before making a decision on whether or not to prosecute or to enter into a cooperation agreement. Unfortunately, neither the FSA nor the SFO has a proffer system as we do in the U.S. While the SFO does have the ability to enter into immunity deals with cooperating witnesses, the process of negotiating such a disposition in the U.K. requires a leap of faith by the witness and submitting to an interview without any protection at all. The FSA has similar powers to grant immunity, but we are not aware of it ever having been exercised. This lack of a proffer system in the U.K. can make cooperation between the U.S. and U.K. authorities difficult in cross border investigations. Practically speaking, an individual in a joint investigation could submit to a joint U.K.-U.S. interview in which his or her statements could be protected under the U.S. proffer agreement and yet subject to no protection at all in the U.K. The difference can also present unique and difficult challenges for defense counsel.

There are also important practical differences in the way the U.K. and U.S. investigators gather evidence from witnesses. As a general matter, the FSA records all witness interviews and then generates a formal written transcript which differs from the proffer process in the U.S. Proffers are done in an informal setting with no transcript prepared. Instead of a transcript, a memorandum of the proffer is prepared by an FBI agent (what is referred to as a memorandum of interview or an FBI “302”) or other federal agent if an agency other than the FBI is conducting the interview. Furthermore, both the FSA and SFO make extensive use of written witness statements which differs considerably from U.S. practice where written witness statements, as a general matter, are not done.²⁶

Like U.S. white-collar investigations, FSA and SFO investigations typically involve massive numbers of documents. According to the SFO’s Annual Report, they have made various

²⁵ See SEC DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL, *supra* note 19, at 83-84. Generally speaking, proffer agreements are written agreements providing limited immunity to a witness being interviewed by the government which prevents the government from using any statements made by the witness against the witness in a later court proceeding. Proffers typically have certain exceptions permitting the government to use such statements in certain circumstances: (a) to gather leads to discover additional evidence; (b) to introduce the statements in a subsequent prosecution for perjury, false statements or obstruction of justice; and (c) to introduce the statement to impeach the witness or rebut argument offered by counsel for the witness.

²⁶ SFO, *Witness Statements*, in OPERATIONAL HANDBOOK (2012), *supra* note 25, available at http://www.sfo.gov.uk/media/106646/witness_statements_sfo_operational_handbook_topic.pdf.

“e-Discovery” improvements to improve the speed of gathering and reviewing documents and emails increasing the amount of information the SFO can handle by 2,000% over the previous year.²⁷ Like that of its U.S. law enforcement counterparts, the SFO Operational Handbook has a section devoted to a discussion of covert investigative techniques including obtaining a warrant for the interception of telecommunications.²⁸ Given the use of wiretaps and other covert investigative techniques in the US in white collar cases, it remains to be seen whether the U.K. will follow suit.

3. Differences Concerning Cooperation by Individuals and Corporations

In theory both the U.S. and U.K. seek to foster cooperation by individuals and corporations. In the U.S., there is a rich and robust tradition of cooperation by individuals and corporations in enforcement actions. Counsel in the U.S. are no doubt familiar with the DOJ’s Principles of Federal Prosecution of Business Organizations that set forth various factors federal prosecutors are to consider when deciding whether to bring criminal charges against a corporation and what credit, if any, to assign cooperation by the corporation.²⁹ The DOJ’s policies also set forth the factors to consider with respect to cooperation from individuals.³⁰ The SEC’s Enforcement Manual approach to cooperation closely parallels that of the DOJ.³¹ Cooperation in the U.S. can take various forms such as cooperation agreements, deferred prosecution agreements, non-prosecution agreements, and immunity agreements.

While cooperation in the U.S. has existed for decades, by contrast, cooperation in the U.K. is in its infancy. For example, it was only on April 6, 2010 that the FSA was authorized to enter into U.S.-style cooperation agreements and immunity agreements.³² The FSA entered into its first cooperation agreement with Anjam Saeed Ahmad, a former hedge fund trader, who provided information in connection with an insider dealing investigation. Ahmad was sentenced on June 22, 2010 to 10 months imprisonment, suspended for two years, 300 hours of community service, a fine of £50,000 and financial penalty representing disgorgement of £131,000.³³ In the

²⁷ SFO, ANNUAL REPORT AND ACCOUNTS 2010-11, *supra* note 21, at 4.

²⁸ SFO, *Covert Investigative Techniques*, in OPERATIONAL HANDBOOK (2012), *supra* note 25, available at http://www.sfo.gov.uk/media/106970/covert_investigative_techniques-RIPA_sfo_operational_handbook_topic.pdf.

²⁹ DOJ, U.S. ATTORNEYS’ MANUAL 9-28.100 (2008), *Principles of Federal Prosecution of Business Organizations – Duties of Federal Prosecutors and Duties of Corporate Leaders*, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.100.

³⁰ DOJ, U.S. ATTORNEYS’ MANUAL 9-27.600 (1997), *Principles of Federal Prosecution – Entering into Non-prosecution Agreements in Return for Cooperation – Generally*, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.600.

³¹ SEC DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL, *supra* note 19, at 119-24.

³² FSA, ENFORCEMENT ANNUAL PERFORMANCE ACCOUNT 2009/10, at 7 (2011), available at http://www.fsa.gov.uk/pubs/annual/ar09_10/enforcement_report.pdf. See also Laurence Lieberman, Paul Glass & Howard Fischer, *FSA Enforcement Procedure: Leniency & Co-operation: Co-operation Agreements: A Transatlantic Comparison*, BLOOMBERG LAW REPORTS Vol. 3, No. 8 (2011), at 1 (Discussing how after sustained lobbying by the FSA, the FSA was finally given the power to issue immunity notices and to enter into plea agreements by the Coroners and Justice Act of 2009), available at <http://www.taylorwessing.com/fileadmin/files/docs/fsa-enforcement-procedure-august-2011.pdf>.

³³ Press Release, FSA, Ex-Hedge Fund Trader Sentenced for Insider Dealing (June 22, 2010), <http://www.fsa.gov.uk/library/communication/pr/2010/104.shtml>; see also FSA, *Final Notice to Anjam Saeed Ahmad* (June 22, 2010), available at <http://www.fsa.gov.uk/pubs/final/ahmad.pdf>.

FSA press release announcing the settlement, then Director of Enforcement Margaret Cole stated, “This is the first time that we have used our powers under [the Serious Organised Crime and Police Act] SOCPA to enter into an agreement with a co-operating defendant. [Mr.] Ahmad’s decision to co-operate with the FSA has resulted in a significant reduction of his sentence. This may encourage others to provide the FSA with information that could assist in the investigation and prosecution of suspected cases of insider dealing and market abuse.”³⁴ As of the date this article went to press, to our knowledge, the FSA has not entered into an immunity agreement.

At the present time, there is no U.K. equivalent of the non-prosecution or deferred prosecution agreements that are routinely used in the U.S. to resolve white collar matters involving corporations or businesses. In May of 2012, the U.K. Ministry of Justice published a lengthy Consultation Paper on adopting U.S.-style deferred prosecution agreements.³⁵ Whether the U.K. will adopt this approach will likely be decided in the coming months. U.K. prosecutors seem to be in favor of such a system. In a recent speech, Richard Alderman, then Director of the SFO, expressed his desire for the U.K. to pass laws permitting U.K. prosecutors to enter into deferred prosecution agreements with corporations to resolve criminal matters.³⁶ Alderman stated deferred prosecutions would “bring about a major advance in the investigation and prosecution of criminal conduct by corporations.”³⁷

The FSA has another avenue to compel cooperation by in civil cases corporations and to some extent individuals as well – its Principles. The FSA has 11 high-level Principles for Business which apply to all firms subject to FSA regulation. Violations of the Principles can give rise to civil enforcement actions. According to the FSA, these Principles “are a general statement of the fundamental obligations of firms under the regulatory system.”³⁸ The FSA also has a separate set of Principles that apply to individuals. These so-called Statements of Principle and Code of Practice for Approved Persons (“Approved Person Principles”) apply to “approved persons,” in other words those who are subject to FSA regulation. Business Principle 11 and Approved Person Principle 4 require cooperation with the FSA and require appropriate disclosure of “any information of which the FSA would reasonably expect notice.”³⁹ In a recent high-profile case, the FSA imposed a financial penalty of £17.5 million for, among other things, breaching Principle 11, against Goldman Sachs International for its inadvertent failure to disclose

³⁴ *Id.* at 1-2.

³⁵ U.K. Ministry of Justice, *Consultation On a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements*, CP2/2012 (May 2012), available at <https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements>.

³⁶ Alderman, *supra* note 15.

³⁷ *Id.*

³⁸ FSA, HANDBOOK, The Principles § 1.1.2 (2007), available at <http://fsahandbook.info/FSA/html/handbook/PRIN/1/1>.

³⁹ See FSA, *The Benefits to Firms and Individuals of Cooperating with the FSA*, <http://www.fsa.gov.uk/pages/doing/regulated/law/focus/co-operating.shtml> (last visited June 28, 2012). Business Principle 11 states “[a] firm must deal with its regulator in an open and cooperative way, and must disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice.” Approved Person Principle 4 states “[a]n approved person must deal with the FSA and with other regulators in an open and cooperative way and must disclose appropriately any information of which the FSA would reasonably expect notice.”

to the FSA that the SEC had issued a Wells Notice contemplating an enforcement action against Fabrice Tourre, an employee of Goldman Sachs International and an FSA approved person.⁴⁰ The FSA Final Notice found that even though the SEC's Wells Notice involved issues of U.S. law and not U.K. law, the Wells Notice was a matter which the FSA would reasonably expect notice under Principle 11 because the information "was material to the assessment of Mr. Tourre's fitness and propriety to hold a controlled function" by the FSA.⁴¹ In one sense, the result in the Goldman Sachs International matter seems sensible. But from the perspective of defense counsel, the standard leaves much to be desired. Both Business Principle 11 and Approved Person Principle 4 provide little meaningful guidance and are inherently circular – a firm or approved person is required to disclose to the FSA anything "which the FSA would reasonably expect notice." This standard requires a firm or individual to step into the shoes of the FSA and guess whether the FSA would reasonably expect notice of a particular fact or facts – something they are ill-equipped to do. When reduced to its essence, the standard amounts to nothing more than "tell us what you think we want to know."

The SFO has also created incentives for cooperation, particularly in the area of overseas corruption. In 2011, the SFO published guidance for self-reporting in overseas corruption cases.⁴² As that guidance makes clear, the benefit of self-reporting is the prospect of a civil resolution rather than a criminal resolution of the matter although there are no guarantees upfront about whether a company that self-reports will receive a civil rather than a criminal disposition. To a U.S. lawyer, the guidance is similar to the type of U.S.-style corporate cooperation with prosecutors and regulators. To what extent the SFO has the ability to enter into agreements with corporations after the Crown Court's decision in *Regina v. Innospec Ltd.* remains a subject of considerable debate. In an effort to obtain a global resolution of various government investigations arising out of its payment of bribes to foreign government officials, Innospec had entered into plea agreements with the DOJ and the SFO as well as civil settlements with the SEC and the Office of Foreign Assets Control (OFAC). Pursuant to its plea agreement with the SFO, Innospec pleaded guilty to conspiracy to make corrupt payments in violation of U.K. law. Under its plea agreement with the DOJ, Innospec pleaded guilty to a twelve-count information charging violations of the Foreign Corrupt Practices Act and wire fraud. In the U.S., the plea agreement with the DOJ and the civil settlements were approved by the U.S. District Court for the District of Columbia.⁴³ In the U.K. the result was quite different, Lord Justice Thomas was highly critical of the SFO's plea deal with Innospec. Although the Crown Court imposed a \$12.7 million fine on Innospec that was consistent with the plea agreement between the SFO and Innospec, the Court found that "the Director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again."⁴⁴ Such a stinging

⁴⁰ FSA, *Final Notice to Goldman Sachs International* (Sept. 9, 2010), available at http://www.fsa.gov.uk/pubs/final/goldman_sachs_int.pdf.

⁴¹ *Id.* at 4.52(2).

⁴² SFO, *Guidance on Self-Reporting*, available at <http://www.sfo.gov.uk/media/171439/Approach-of-the-Serious-Fraud-Office-to-dealing-with-overseas-corruption.doc> (last visited June 28, 2012).

⁴³ *U.S. v. Innospec, Inc.*, Judgment of Conviction, Case No. 10-cr-00061(D.D.C. March 18, 2010); *SEC v. Innospec, Inc.*, Final Judgment, Case No. 10-cv-0448 (D.D.C. March 24, 2010).

⁴⁴ *Regina v. Innospec Ltd.*, Sentencing Remarks of Lord Justice Thomas (Crown Court Mar. 26, 2010), available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf>. On June 10, 2012, the SFO obtained the guilty plea of the former CEO of Innospec to two charges of

rebuke by the Crown Court will undoubtedly present difficulties in resolving future cases against corporations particularly in cross border prosecutions.

As regards cooperation by individual defendants, it too faces some serious hurdles in the U.K. in light of recent precedent. In theory, the SFO has the power to enter into plea negotiations in complex fraud cases, provided however, that the SFO and the defendant do not agree upon a specific sentence to be imposed by the Court. A recent Crown Court decision has raised questions with how that power can be exercised in practice. In *Regina v. Dougall*, the defendant conspired to make bribes to doctors and surgeons employed by the Greek government in order to receive lucrative government contracts. The defendant cooperated fully with the SFO and the U.S. authorities (DOJ and SEC) in a joint corruption investigation and pleaded guilty in the U.K. pursuant to a plea agreement with the SFO. Even though the defendant's cooperation had been of great importance to the authorities, the sentencing court imposed a term of imprisonment of 12 months. While the Court of Appeal did impose a suspended (non-custodial) sentence, the Court was highly critical of the SFO's agreement with the defendant and its advocacy on his behalf.⁴⁵ The Court made clear that in the U.K., "a plea agreement or bargain between the prosecution and the defence in which they agree what the sentence should be, or present what is in effect an agreed package for the court's acquiescence is contrary to principle."⁴⁶ The Court also emphasized that such agreements "are not countenanced" in the U.K.⁴⁷ The Court also criticized the SFO for its advocacy in urging a noncustodial sentence for the defendant and noted that while the SFO was free to bring matters of mitigation to the Court, "they do not require advocacy."⁴⁸

Thus, the *Innospec* and *Dougall* cases reveal a reluctance on the part of the U.K. judiciary to give up its discretion concerning sentencing matters to prosecutors and defense counsel as part of a plea deal. As a practical matter, these decisions may make cooperation in the U.K. more difficult for corporations and individuals.

4. The Civil Enforcement Side: Comparing the Wells Process to the RDC Process

In addition to the differences in the approach to criminal enforcement discussed above, there are also important differences in civil enforcement procedure between the FSA and SEC that are worthy of comment. At the conclusion of a civil investigation, the FSA conducts an internal review of the case by another FSA lawyer who was not part of the investigation team to recommend what action, if any, the FSA should take. The FSA staff prepares a preliminary investigation report which is sent to the individuals or corporations under investigation. The recipients have 28 days to respond.

conspiracy to make corrupt payments to public officials in Indonesia and Iraq to secure government contracts. See Press Release, SFO, *Innospec Ltd: Former CEO Admits Making Corrupt Payments* (June 11, 2012), <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/innospec-ltd--former-ceo-admits-making-corrupt-payments.aspx>.

⁴⁵ *Regina v. Dougall*, Judgment, Case No. 2010/2063/A3 (Court of Appeal (Criminal Division), May 13, 2010), available at <http://openmedicineu.blogactiv.eu/files/2011/10/JJ-DOUGALL-Appeal-Judgement1.pdf>.

⁴⁶ *Id.* ¶ 19.

⁴⁷ *Id.* ¶ 23.

⁴⁸ *Id.* ¶ 30.

Unlike the Wells process that the SEC has adopted in the U.S. for the initiation of enforcement actions, the FSA has a unique system whereby an independent gatekeeper, the FSA Regulatory Decisions Committee (the “RDC”), must approve any civil enforcement action. Thus, if the FSA staff recommends a civil enforcement action, the matter is reviewed by the RDC. Contrary to what an outsider might expect, the RDC is not made up not of career FSA employees, but rather of outside lawyers and market professionals in the U.K. which potentially gives it a greater degree of independence in reviewing charging decisions. The RDC then issues a Warning Notice to the individual or corporation in question that the FSA intends to take further action. The individual or corporation has the right to review the material relied upon by the RDC in sending the Warning Notice. It is important to note that the RDC process is only triggered by the FSA’s exercise of its civil enforcement powers. Accordingly, there is no RDC process in the criminal enforcement context.

The RDC process also differs from the Wells process in other important respects. The Wells process is one-sided in that defense counsel makes a written submission to the Commission explaining the reasons why an enforcement action should not be brought. Defense counsel do not receive any formal written opposition to their submission from the SEC. Nor do defense counsel appear before the Commission to present argument. From the perspective of a U.S. defense lawyer, the RDC process potentially has additional safeguards and protections that are commendable and worthy of consideration in the U.S. For example, counsel for the individual or corporation that receive a Warning Notice are given an opportunity to present argument to the RDC in the form of written and oral submissions. The FSA, in turn, also has an opportunity to make written and oral submissions to the RDC. Thus, issue is more formally joined in the RDC process than in the Wells process. Further, a meeting is then held before the RDC at the FSA’s offices. To be sure, the meeting before the RDC is not a full-blown trial on the merits by any means. Again from the perspective of a U.S. lawyer, the practice before the RDC is analogous to an extensive oral argument. After the meeting, the RDC renders its decision in writing which is also different from the Wells process. Either side can appeal the decision to the Upper Tribunal (Tax and Chancery Chamber) which is independent of the FSA. To what extent the FCA and PRA will continue to adhere to the RDC process is an open question as of the date this article was submitted for publication. There have been proposals to streamline the RDC process and move the U.K. more toward U.S.-style enforcement. Defense counsel have criticized these proposals as eroding the substantial protections afforded by the current RDC system.⁴⁹

The SFO does not have an RDC process similar to the FSA. In most cases, the charging decision by the SFO is made by the case manager in charge of a specific case team where the case manager is a lawyer.⁵⁰ If the case manager is not a lawyer, the decision will be taken by the

⁴⁹ For a thoughtful discussion and critique of the various proposals to streamline the RDC process, see Julia Black & Martyn Hopper, *Breaking Up Is Hard to Do: The Next Stage?*, Herbert Smith LLP & London School of Economics, at 16-19 (May 2012), available at http://www.herbertsmith.com/NR/rdonlyres/C80AF559-A812-480C-AECE-922E7829A276/0/9705_HSandLSEdiscussionpaperthirdedition_d6web.pdf.

⁵⁰ SFO, *Charging Policies*, in OPERATIONAL HANDBOOK (2012), *supra* note 24, available at http://www.sfo.gov.uk/media/106812/charging_policies_sfo_operational_handbook_topic.pdf.

case lawyer.⁵¹ As discussed above, in criminal enforcement matters before the FSA, the RDC process is not used.

III. A Review of Recent FSA Matters involving U.S.-U.K. Cooperation

The FSA has made the prosecution of insider dealing a top priority and has achieved a string of successful prosecutions in that area. According to the FSA's Enforcement Annual Performance Account for 2011 and 2012 which provides an overview of enforcement investigations and outcomes, "Each of our insider dealing prosecutions in the last year has represented an escalation in magnitude from those brought in previous years. In addition, one case was the result of parallel investigations in the U.K. and the U.S. by the FSA, the SEC, and the DOJ resulting in convictions and fines in both the U.K. and the U.S. Each such investigation or prosecution we bring increases our ability to bring further cases and strengthens the ties we have with our international regulatory colleagues tackling similar matters around the world."⁵² The joint U.K.-U.S. insider dealing prosecution referred to in the FSA's Annual Performance Account arose out of a complex web of facts and ended somewhat differently on each side of the Atlantic. In the U.S., civil insider trading enforcement actions were brought by the SEC against a former tax partner at a prestigious accounting firm and his wife for leaking material non-public information concerning acquisitions planned by her husband's clients to the wife's sister and brother-in-law in the U.K.⁵³ The scheme allegedly reaped approximately \$3 million in illegal profits.⁵⁴ The wife eventually cooperated and pleaded guilty to obstruction of justice for lying to the SEC. She was sentenced to 11 months' imprisonment and a \$1 million fine. Her plea deal and sentence reflected her cooperation with the government investigation including agreeing to a limited waiver of marital privilege and her family circumstances as the mother of two young children.⁵⁵ According to court papers filed by the wife's counsel, she misappropriated confidential information from her husband – without his knowledge – by eavesdropping on his business conversations and reviewing work papers in his home office and, in turn, provided it to her sister and brother-in-law in order to help her father in U.K. who was facing criminal charges there; she then repeatedly lied about it under oath to the SEC.⁵⁶ Ultimately, the U.S. authorities accepted the wife's cooperation and confession of her role in the offense and exonerated the husband. No criminal charges were filed against the husband, and the SEC civil complaint against him was dismissed.⁵⁷

⁵¹ *Id.*

⁵² FSA, ENFORCEMENT ANNUAL PERFORMANCE ACCOUNT 2011/12, at 9 (2012), available at <http://www.fsa.gov.uk/static/pubs/annual/ar11-12/enforcement-report.pdf>.

⁵³ Press Release, SEC, SEC Charges Former Deloitte Partner and Wife in International Insider Trading Scheme (Nov. 30, 2010), <http://www.sec.gov/news/press/2010/2010-234.htm>.

⁵⁴ *Id.*

⁵⁵ Transcript of Proceedings, *U.S. v. McClellan*, No. Cr. 10-0860 (WHA), at 4-11 (Nov. 8, 2011, ECF No. 34); see also U.S. Sentencing Memorandum *U.S. v. McClellan*, No. Cr. 10-0860 (WHA), at 5-6 (Oct. 28, 2011).

⁵⁶ Defendant Annabel McClellan's Redacted Sentencing Memorandum, *U.S. v. McClellan*, Case No. 10-cr-00860-WHA, at 1-2 (N.D. Cal. Nov. 3, 2011).

⁵⁷ See Ben Moshinsky, *Blue Index Founder's Insider Gains Used on Wine, Clothes*, BLOOMBERG, June 20, 2012, available at <http://www.bloomberg.com/news/2012-06-20/blue-index-founder-sanders-gets-4-years-for-insider-trading.html>. See also Stipulation of Dismissal of Action Against Defendant Arnold McClellan, Case No. 10-CV-5412 WHA (Oct. 25, 2011).

In the UK, the sister and brother-in-law pleaded guilty and were sentenced on June 20, 2012.⁵⁸ The brother, an owner and director of Blue Index, a defunct brokerage firm, received four years imprisonment – the longest sentence imposed by a U.K. court for insider dealing. For her part, the sister received a sentence of 10 months imprisonment. The investigation was particularly grueling and required the FSA to review 26 million emails and thousands of telephone conversations that were recorded by Blue Index.⁵⁹ The hard work paid off. The FSA found a smoking-gun call which broke the case wide open. During a recorded call between the brother-in-law and father, the father asked whether they were engaged in insider dealing, laughed, and then answered his own question by remarking “try proving it,” to which the brother-in-law replied “yes, exactly.” Unfortunately for them, that is just what the U.K. and U.S. authorities did.⁶⁰

In addition to investigating insider trading, the U.K. and U.S. authorities have been cooperating in a multi-year investigation into whether certain banks attempted to manipulate various key interest rates including LIBOR. On June 27, 2012, the CFTC, DOJ, and FSA announced a \$453 million settlement with a major U.K. bank.⁶¹ The bank entered into a non-prosecution agreement with the DOJ for \$160 million,⁶² settled an administrative proceeding with the CFTC for \$200 million,⁶³ and settled with the FSA for £59.5 million.⁶⁴ The investigation into other banks is ongoing and future charges are expected.

IV. Conclusion

Cooperation between the U.S. and U.K. in white collar investigations is at an all-time high. As exemplified by the LIBOR investigation, cooperation between the U.S. and U.K. will likely continue. The coming months will be interesting times for enforcement in the U.K. As the FSA is disbanded and the FCA and PRA take over, it will be interesting to see what the new agencies’ enforcement priorities will be and how they will exercise their powers. In the coming months, the debate in the U.K. over deferred prosecution agreements will come to an end. If the U.K. allows such agreements, it will give the SFO and the CPS a new and powerful tool to combat corporate crime. Further, the SFO will likely need to recalibrate its approach to pleas and cooperation in light of recent Court decisions critical of its practices. The new Director of SFO, David Green QC, is an experienced criminal practitioner. How he responds to these challenges will be of interest to those on both sides of the Atlantic.

⁵⁸ Press Release, FSA, Three Sentenced for Insider Dealing (June 20, 2012), <http://www.fsa.gov.uk/library/communication/pr/2012/067.shtml>

⁵⁹ Kirstin Ridley, *London Trader and Wife Jailed for Insider Dealing*, REUTERS, June 20, 2012, available at <http://uk.reuters.com/article/2012/06/20/uk-insiderdealing-blueindex-jail-idUKBRE85J0GL20120620>.

⁶⁰ In a press release following the sentencing, the FSA noted that it has “secured 11 further convictions in relation to insider dealing” Press Release, FSA, *supra* note 58.

⁶¹ See Protesst & Mark Scott; Nixon, *supra* note 3.

⁶² Press Release, DOJ, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty (June 27, 2012), <http://www.justice.gov/opa/pr/2012/June/12-crm-815.html>.

⁶³ Order, *In the Matter of Barclays PLC et al.*, No. 12-25 (CFTC June 27, 2012).

⁶⁴ Press Release, FSA, Barclays fined £59.5 million for Significant Failings in Relation to LIBOR and EURIBOR (June 27, 2012), <http://www.fsa.gov.uk/library/communication/pr/2012/070.shtml>.