

Is New SFO Head A 'Different Kind Of Director'?

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By **Ross Dixon**

Law360 (March 12, 2019, 2:23 PM EDT) -- It's been six months since Lisa Osofsky succeeded David Green as director of the [Serious Fraud Office](#).

Since then, the dual U.S./U.K.-trained lawyer has made regular public pronouncements setting out how she expects to make her mark as director.

Half a year on from her appointment, can we come to any conclusions about the changes she is making — and what they mean for lawyers and their clients?



Ross Dixon

A Different Kind of Director

In September last year, Osofsky used her first public speech in post to pledge to be a "different kind of director."

She highlighted her background working alongside law enforcement as a federal prosecutor in Chicago, telling her audience: "I did everything the agents did — followed leads, flipped defendants who later became witnesses, determined the best next investigative steps, subpoenaed records and shaped the indictment."

She would, she later promised, use her time at the SFO "to make the world even more inhospitable for those who would lie, cheat steal and bribe to line their pockets." To that end, she said, she would bring bigger and better cases — and to do so more quickly.

Her first step has been to take stock. In December last year she told the [House of Commons](#)' Justice Committee that she was personally reviewing more than 70 outstanding SFO cases to establish why they are taking so long to come to charge.

If Osofsky is able to speed up the decision-making process, this will be welcomed by all those under suspicion in these investigations who usually wait years for the SFO to decide whether or not to prosecute. After six months in post we now have her first substantive decisions.

On Feb. 18 this year, Osofsky announced her decisions in two of the SFO's largest cases.

She revealed she had closed the SFO's six-year-long investigation into allegations of bribery and corruption at Rolls-Royce, despite the agency having three years ago secured over £500 million from the company in a deferred prosecution agreement. She also closed a five-year investigation into allegations of bribery by GlaxoSmithKline with no action being taken against any party.

In her statement justifying these decisions, Osofsky said she had "concluded that there is either insufficient evidence to provide a realistic prospect of conviction or it is not in the public interest to bring a prosecution in these cases."

Many were surprised by these decisions — especially so in the Rolls-Royce case where the company itself admitted widespread wrongdoing. However, it is worth bearing in mind that just because a company agrees to a DPA does not always mean that individuals should be prosecuted. There are many reasons why a corporate may quite properly decide that a DPA is the best outcome for the company, but yet the evidence does not support the prosecution of individuals.

Indeed, the decision not to prosecute individuals in Rolls-Royce may be a true reflection of the realpolitik at play in these situations. It can be in the interests of the company and the SFO to agree to a DPA without there being any need to fully test the evidence on which it is based. However, if it were to be scrutinized in a criminal trial there may not be enough to demonstrate the guilt of an individual.

Whatever the merits of the SFO's decisions in Rolls-Royce and GlaxoSmithKline, they clearly show that Osofsky is willing to make up her own mind, even if her decision is unexpected.

It is worth noting that the Rolls-Royce and GlaxoSmithKline decisions will free up significant resource at the SFO. It will be interesting to see whether this is redeployed on the bigger and better cases the director has talked about.

DPAs

Although heralded as an effective means of holding corporates to account for criminal wrongdoing without the expense and risk of a trial, deferred prosecution agreements have had some bad press over recent months.

Back in 2017 — long before Osofsky joined the SFO — the agency secured a DPA with Tesco PLC on the basis that three senior directors were guilty of fraud. But in December last year the SFO's prosecution of the three men was thrown out by a judge who concluded that the evidence against them was too weak to be left to a jury. This outcome raised serious concerns about the SFO's judgement. It also led some to wonder whether the SFO had been so keen to secure a DPA that the deal was done in the face of the evidence rather than in accordance with it. The decision not to prosecute individuals from Rolls Royce despite the DPA agreed upon by the company has also attracted adverse comment.

Notwithstanding such criticism, Osofsky has been steadfast in her support for DPAs. They are, she has reportedly said, at the "core" of her strategy. She has also made it clear that she "expects, as a starting point, full cooperation" from any firm which has violated the Bribery Act.

Osofsky has done nothing over the past six months to suggest there will be any dimming of the SFO's enthusiasm for DPAs; and while the acquittals in the Tesco case and the failure to prosecute individuals in Rolls-Royce may give corporates pause for thought before entering into a DPA, many boards of directors will still view them as the best outcome to an investigation.

Overseas Cooperation

Osofsky has repeatedly said that a major focus will be on developing the agency's international relationships.

"Law enforcement [cannot] afford to work in geographic law enforcement silos," she said last October.

"We must work closely together, we must share information and — together — we must follow the criminals across borders."

Her first steps in this direction have been to strengthen the SFO's ties to American law enforcement. Last December she revealed how a [U.S. Department of Justice](#) prosecutor had been seconded to the SFO for a year. This and other actions have led most U.K. white collar lawyers to expect Osofsky to import something of the culture and techniques of the U.S. It remains to be seen if this translates into any change in practice.

Corporate Liability

When appearing before the Justice Committee, Lisa Osofsky voiced her support for the rules of corporate criminal liability to be changed, to make it easier for the SFO to hold companies to account for the actions of individuals.

Addressing members of parliament last December, she expressed the view that under the current regime it is "difficult" for the SFO to get corporates in the dock. "An extension of the rules of corporate criminal liability might find us not as hamstrung," she said.

Her sentiments echo those of her predecessor, David Green. On this subject at least, Osofsky is entirely consistent with his approach.

Osofsky has said that she would ideally see the U.S. concept of "vicarious liability" introduced to English law.

"If I couldn't get vicarious liability," she said, "I would be happy having a failure to prevent offence that I could use across the whole arena of economic crime."

Time will tell whether the government shares the director's enthusiasm for such a change,

Conclusion

Osofsky has made a number of public pronouncements since her appointment. Her decision in the Rolls-Royce and GlaxoSmithKline matters indicate a degree of decisiveness and independence.

Everyone with an interest in white collar crime will be watching with great interest to see how her regime develops from here.

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Disclosure: Ross Dixon acted for former Tesco U.K. managing director Chris Bush in his defense against fraud charges and for one individual in connection with the SFO's abandoned investigation into Rolls-Royce.

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