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UK Will Follow US Lead On DPA Pilot Program

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The United States Department of Justice has announced a one-year pilot program intended to incentivize companies to self-disclose offenses under the U.S. Foreign Corrupt Practices Act of overseas bribery of a foreign official. If companies self-disclose they will be eligible for a wide range of incentives — the DOJ says it will even consider declining to prosecute.


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In the U.K., the Serious Fraud Office (SFO) can offer a Deferred Prosecution Agreement (DPA) to companies which self-disclose offenses — but the incentives for self-disclosing in the U.K. are nowhere near as generous as those being offered by the DOJ in its pilot program. As a result the success of this pilot will be keenly watched on this side of the Atlantic to determine if similar steps should be taken in the U.K.

The DOJ Pilot Program

The DOJ has issued guidelines on plea agreements with companies since 1999. The memo detailing the new pilot was issued on April 5, 2016 by DOJ Fraud Section Chief Andrew Weissman, and sets out the potential credit available to companies in respect of FCPA offenses when they self-disclose.

Under the new pilot program those companies that self-disclose an FCPA offense to the DOJ will be eligible to enter into a plea agreement with a reduction of any fine of up to 50 percent below the low end of applicable range of fines; plus the DOJ will generally not require appointment of a monitor (subject to the observations we make below). The DOJ may even decline to prosecute. However the company must fully cooperate with the DOJ (by promptly disclosing all relevant facts, including providing information on employees) and, where appropriate, remediate flaws in its controls and compliance program. These are high hurdles for a company to clear before it is eligible to benefit from the pilot program.

While the appointment of a monitor remains an option for the DOJ, it appears that this will not be required if the company has implemented an effective compliance program by the time of the resolution. What constitutes an "effective compliance program" will vary depending upon the size and resources of the company, but Section Chief Weissman's memo emphasizes that the company must have a culture of compliance, implemented by an independent and sufficiently resourced compliance function. Companies will also be required to ensure "[a]ppropriate discipline of employees" for any offense.

The new pilot program therefore complements the DOJ's recent Yates memo, with its focus on the pursuit of culpable individuals by the DOJ, pursuant to which companies have to disclose information on employees who were involved in any offense in order to get any credit. The fact that the pilot program is required indicates a lack of companies self-reporting to the DOJ. Given that the U.K. likes to try to follow the U.S.' lead on prosecution of white collar criminal offenses, what effect (if any) could the DOJ pilot have on the approach adopted in the U.K.?

The U.K. DPA Regime

In the U.K., DPAs have only been part of U.K. law since 2014, being legislated for in the Crime and Courts Act 2013. The minister who piloted the legislation through Parliament is on the record stating that the U.K.'s DPA regime is modeled on the system long-established in the US.[1]

Only companies can enter into a DPA, and the company cannot ask for one — the SFO must decide it will offer one. Once it has been negotiated, the DPA must be approved by the court as being "*fair, reasonable and proportionate.*" It is clear that this approval is not a simple rubber-stamping exercise — the court will interrogate the decision reached between the company and the SFO, and may amend the agreement or even veto it altogether. At the time of writing only one DPA has been concluded and it took over 18 months from the company self-disclosing to obtaining the court's approval.

Under a DPA the company will still be liable for the punishment it would have been had the SFO pursued a successful prosecution against it, including disgorgement of profit, payment of the SFO's costs, remediation of any flaws in control and compliance policies and potentially the appointment of a monitor. There are therefore some questions as to why a company would want to agree to a DPA which is then approved by the court. However the advantages include that it enables the company to draw a line under the offense, and to avoid the cost of a contested trial. Further, the negotiation of a DPA is conducted in private, only becoming public once the court has approved the DPA. These factors will all be attractive to any company, especially a listed company.

Crucially, the act setting out the DPA regime states that the company must also pay a penalty which is "broadly comparable to the fine a court would have imposed" following a guilty plea. The SFO is therefore prevented by statute from offering, and the court from approving, any discount for self-disclosing — the very thing the U.K. DPA regime is designed to encourage.

Therefore it is not currently open to the SFO to offer (and the court to approve) the reduction of a fine, and certainly not on the same scale as the DOJ proposes in its pilot program.

The Impact of the DOJ Pilot Program on the U.K. DPA Regime

The DOJ's pilot program suggests a lack of companies self-disclosing offenses in the U.S., which is reflected in the U.K. (albeit the U.K. regime has been in place for a much shorter period of time). Given that the U.K. DPA regime is based on U.S. practice, the success or otherwise of the DOJ pilot program will be keenly watched in the U.K..

If the pilot program is a success, with more companies self-disclosing and cooperating on the DOJ's terms in return for a lower fine, serious consideration will have to be given to whether (and if so, how) this should be emulated on this side of the Atlantic. However if the DPA regime is to be altered to permit reductions in any fine for self-disclosing, this will require amending the underlying legislation. As such a

step would give opponents in Parliament the opportunity to present the government as being "soft" on white collar crime, it must be able to point to significant, concrete results flowing from the DOJ program for such amendments to the legislation to be considered, let alone approved.

There is therefore every chance that the approaches to combating white collar crime in both the U.S. and the U.K. will hinge on the results of the DOJ's pilot program.

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[1] "Deferred Prosecution Agreements," Sir Edward Garnier QC MP, New Zealand Law Journal December 2012, p. 389.