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SFO May Breathe Life Into Fraud Reporting After Setbacks

By **Richard Crump**

Law360, London (April 10, 2019, 5:23 PM BST) -- The Serious Fraud Office's plan to clarify its rules on reporting fraud will encourage companies to exchange information from internal investigations if the watchdog makes it clear that those which cooperate can enter into deferred prosecutions agreements in lieu of a court battle.

Lisa Osofsky, the head of the SFO, said last week the agency would publish guidance on what companies and their legal advisers can expect if they report suspicions of crime within their organizations. The move follows recent setbacks for the agency that may encourage companies to decide to fight rather than cooperate with its probes.

The crime-fighting agency has yet to outline what will be included in the guidance. But corporate crime attorneys say any new rules should give companies certainty on what benefit they will be given if they decide to come forward when they discover wrongdoing and waive privilege over confidential documents.

"If the SFO makes it explicit that waiving privilege will stand you in good stead for a deferred prosecution agreement, that is a good thing," said Alistair Graham, head of white collar crime at Mayer Brown LLP. "Lisa Osofsky needs to put flesh on the bones and recognize the SFO's previous approach to DPAs was unhelpful."

The move comes amid scrutiny over the SFO's use of deferred prosecution agreements after some high-profile failures and recent legal judgments in England that reinforced the rights of companies over confidential internal documents and advice received from their lawyers.

The SFO's case against former Tesco directors — brought after the agency reached a DPA with the supermarket chain — collapsed. That embarrassment for the agency, along with decisions not to bring charges in other high-profile corruption cases, has called into question its approach to prosecuting corporate crime, including its use of DPAs.

The SFO reached a record £497 million ($650 million) DPA with Rolls-Royce PLC, but later dropped a probe into individuals connected to the engineering company.

It can be extremely difficult, because of the nature of corporate criminal liability in English law, to establish liability for a company without the conviction of a sufficiently senior executive. Consequently,

companies with potential corporate crime problems could see greater value in sitting tight and forcing the SFO to prove it has a case in light of recent cases suggesting that DPAs are unlikely to help the SFO secure convictions of individuals.

And companies are still suspicious about the benefits they will receive by opening up themselves to the SFO's scrutiny when weighed against the risk that the information they provide will be used against them in a future prosecution.

"Osofsky has made clear that waiving privilege will provide a big tick for the SFO when balancing whether to issue an invitation to enter DPA negotiations," said Caroline Black, a white-collar crime attorney at Dechert LLP. "She seems to be focused on first accounts made by individuals during corporate investigation interviews"

Although a DPA offers major benefits, there's no guarantee that a company entering into negotiations will come out with an agreement. Prosecutors will invite a company into DPA talks only if there is public benefit, a calculation that also requires prosecutors to consider the gravity of the offense.

But Osofsky, a former FBI director and protégé of U.S. special counsel Robert Mueller, appears to be taking a more sensitive approach to the use of DPAs compared to her predecessor. David Green repeatedly said the agreements were not some form of cozy agreement between prosecutor and defense counsel.

Previously, the SFO would have treated companies unwilling to waive privilege on confidential documents as not cooperating with the agency.

Osofsky talks of a "true public-private partnership" that from her agency's perspective involves cooperation with companies, but which concedes that those companies will want to investigate their own suspicions of criminality or regulatory breaches first and bring in their own outside legal advisers.

If a company that detects fraud or corruption wants its investigations to count as cooperation, it must be willing to report that to the authorities as soon as possible, she said.

"In the old days under David Green the SFO did not want companies trampling on the crime scene and getting in and doing own their own investigation and first-account witness interviews," said Graham. "That has been diluted recently, and Osofsky has shown a more nuanced approach."

But lawyers are still skeptical that Osofsky's overtures are just another route to allow the SFO to get its hands on first accounts and witness statements taken by companies carrying out internal probes into suspected economic crime and fraud.

Indeed, Osofsky said the SFO wanted to see companies meet the ultimate objective of cooperating with law enforcement by preserving vital evidence such as first-hand accounts and witness testimony and not trying to use legal professional privilege to keep such evidence out of the SFO's sight.

"There is still a concern from the SFO that privilege is being used to cloak first accounts given by witnesses in internal investigations," said Judith Seddon, co-head of Ropes & Gray LLP's London international risk practice. "Most corporates will discuss with the SFO how they will approach internal investigations."

Osofsky said this is not the same as what happens when a company calls in a team of lawyers and "throws the blanket" of legal professional privilege over the material they have gathered.

"That is not cooperation: courts do not like it, it does not help law enforcement, it does not make the job of dispensing justice fairly any easier," she said.

The SFO has recently been burned in its aggressive approach to privilege. Last year the Court of Appeal ruled that the anti-fraud agency could not have access to documents and advice relating to an internal probe into allegations of wrongdoing by the mining group ENRC because the materials were covered by legal privilege.

The landmark ruling enshrined the principle of legal privilege and represented a serious setback for the SFO.

Nevertheless, Osofsky pointed to the comments of Sir Brian Leveson — the senior judge who ruled on the ENRC case — that, when they decide whether to allow a DPA to proceed, courts should examine the extent to which the company co-operated with the SFO, including whether it was willing to waive privilege and be frank in disclosing what it had uncovered.

Kuldip Singh QC of Serle Court chambers said it is important to remember that DPAs did not come into practical use in English law until 2014. As a result of statements made soon after by Green about how the SFO would approach companies that self-reported, the clear implication was that they would need a waiver of legal professional privilege in order to get agreement for a DPA from the agency.

"Because of its desire to get at legal privilege, the SFO slightly wound itself up in knots," Singh said. "What David Green said worked as a disincentive to legal advisers. You were basically telling your client to hand over the keys of the business to the SFO without any guarantees."

Singh said that, because the SFO desires access to privileged material, that approach has in some cases proved unproductive and had deterred self-reporting.

"Clients were naturally cautious about, in effect, handing over to the SFO the keys to their offices, and legal advisers — who are cautious by nature — were extremely wary of advising them to do so," Singh said.

Still, Osofsky noted that waiving privilege over that initial investigative material will be a strong indicator of cooperation and an important factor that the agency will take into account as it considers whether to invite a company to enter into negotiations. It also indicates whether a DPA would be in the public interest, especially in a jurisdiction where the judge plays such a critical role in determining whether to accept an agreement.

“It is ironic that the argument for privilege waiver which Osofsky cites arises out of the same [ENRC] case where the SFO was defeated in its challenge to the company’s privilege," Seddon of Ropes & Gray LLP said. “Under the DPA code of practice it is for the courts to determine whether a DPA is in the interests of justice.

"The ENRC judgment and Lisa Osofsky’s recent comments emphasize that one factor in making this determination will be whether the company has waived privilege.”

But is reporting suspected fraud the best way forward for a company? There are still cases where a corporate settlement is the best option.

"Unless a legal adviser had analyzed the relevant material in advance of giving such advice, it would be like a doctor diagnosing a patient without having examined them," Singh said. "All concerned will appreciate that self-reporting comes at a price, even if you are not prosecuted."

--Additional reporting by Christopher Crosby. Editing by Ed Harris.