The SFO Publishes Its Internal Guidance on Deferred Prosecution Agreements

29 October 2020

Summary. On 23 October 2020, the Serious Fraud Office (the "SFO") published the chapter on deferred prosecution agreements ("DPAs") from its Operational Handbook, including how it "*engages with companies where a DPA is a prospective outcome*".[1] The SFO has made clear that this guidance is for internal use only and was published "*in the interests of transparency*"; it is not authoritative. Although the guidance does not contain new information or changes from existing DPA practice, it is useful in setting out the SFO's consolidated approach in respect of DPAs. It does not supersede or replace previous guidance and should be considered alongside the legislation covering entry into a DPA (Schedule 17 of the Crime and Courts Act 2013) and the DPA Code, which is authoritative, as well as previous guidance, including the Corporate Co-operation Guidance.

So far, the SFO has concluded eight DPAs, with a ninth DPA awaiting approval by the court on 30 October 2020.

Co-operation and Self-Reporting. Reiterated throughout the newly published guidance is the fact that co-operation is "*a key factor to consider when deciding whether to enter into a DPA*". This is an established factor already focused upon during DPA negotiations: the DPA Code itself states that considerable weight may be given to a "*genuinely proactive approach adopted by a company when wrongdoing is bought to their attention*".[2] In short, the various steps a company can take to cooperate listed in the guidance echo information found in the SFO's Corporate Co-operation Guidance, which is already used to evaluate a company's level of co-operation.

Self-reporting suspected wrongdoing within a reasonable time is highlighted as an important aspect of co-operation. The guidance states that companies must report suspected wrongdoing "within reasonable time of the offending conduct coming to light" in order to proceed to DPA negotiation. The inclusion of the temporal qualifier "reasonable" clarifies that companies do not necessarily need to self-report immediately

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1 https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/deferred-prosecution-agreements/.

2 DPA Code, paragraph 2.8.2(i).

on becoming aware of potential misconduct and thus leaves open the possibility for them to conduct a necessary level of investigation before making the self-reporting decision. Although self-reporting is clearly described as an important consideration towards achieving a DPA, the guidance does not elevate it to the key element of co-operation.

There Is (Still) No Guarantee That Compliance with Guidance Will Lead to a DPA. The internal guidance notes that a company is not entitled to be invited to enter into DPA negotiations and that there is no guarantee that a DPA will be offered. It stresses that the decision of whether to enter into negotiations is for the Director of the SFO alone and that if negotiations fail, a decision to prosecute may still be made. This is the standard approach to DPA negotiations and does not add anything new or previously unknown to the SFO's approach. The emphasis in the guidance accords with the SFO's recent efforts to appear as a tough prosecutor and reflects the SFO's position that DPAs should not be viewed as an automatic entitlement of companies that have reported wrongdoing.

No Requirement to Admit Misconduct? The guidance states that there is "*no requirement for the Company to formally admit guilt in respect of the offences charged in the indictment*", although "*consideration should be given to including admission where appropriate*". This is in line with the practice seen in the DPAs entered into to date, and the legislation does not require an admission of guilt. Those critical of DPAs suggest that this approach allows companies to both avoid admitting to wrongdoing and avoid being prosecuted for it. However, in the statement released alongside the published guidance,[3] Lisa Osofsky, the Director of the SFO, stated that "DPAs require the company to admit to the misconduct". This could be read as being at odds with the newly published guidance if admitting to misconduct suggests that a company must accept guilt (rather than the already required obligation to agree the misconduct set out in the statement of facts). The admission of misconduct by individuals, however, does not automatically mean criminality attaches to the company.

Multijurisdictional Investigations and Resolutions. The guidance expressly refers to relevant considerations for a DPA in the event there are parallel investigations by other authorities (whether domestic or overseas). These include, among other things, early communication and de-confliction in regards to the company's approach to the SFO and other agencies, including on matters such as privilege, consistency by the company on admissions (of fact or liability) made in the respective jurisdictions, co-ordination of market announcements for public companies in the different jurisdictions and co-ordination of court listing dates to ensure simultaneous resolutions where possible.

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[3] https://www.sfo.gov.uk/2020/10/23/serious-fraud-office-releases-guidance-on-deferred-prosecution-agreements/.

These aspects are, of course, already part of the SFO's DPA practice in cases of concurrent jurisdiction, but their express listing in the guidance is a helpful reminder of the intricacies and complexities (both for the companies concerned but also the SFO and the other agencies) of navigating such matters to successful resolution.

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