

UK SFO Publishes DPA Guidance: comparing and contrasting the approach of the U.S. DOJ to DPAs

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The United Kingdom Serious Fraud Office (SFO) recently published comprehensive guidance on Deferred Prosecution Agreements (DPAs). Lisa Osofsky, Director of the SFO, stated, “Over the past six years, we at SFO have been developing our approach to negotiating and entering into DPAs, and in turn, establishing best practice.” The publication is an effort to provide transparency on what SFO expects from companies cooperating with the Office. Osofsky added, “DPAs are a valuable tool in the fight against serious fraud, bribery and corruption, capable of not only punishing corporates for criminality but also making sure the company rehabilitates and becomes a better corporate citizen. This helps us foster a business environment where everyone plays by the rules, which can only benefit UK Plc.”

A DPA is a court-approved agreement between a company under investigation and a government prosecutor which allows for the suspension of prosecution provided the company meets certain conditions. In order to enter into a DPA, a company must: (1) admit to the misconduct; (2) pay a financial penalty, and (3) agree to specific conditions set out by the prosecutor in order to ensure future cooperation and compliance. DPAs became an alternative to prosecution in the UK on 24 February 2014 when Schedule 16 to the Crime and Courts Act 2013 came into effect. The SFO is the only UK law enforcement agency to have negotiated DPAs, and has entered into nine DPAs since 2014.

The SFO has faced criticism for its use of DPAs. In particular, many have argued that the SFO has pursued high profile settlements with large corporations whilst failing to secure convictions of the individuals who were involved in the offending conduct. Others say that the SFO is too willing to enter into DPA negotiations with big companies in circumstances where a prosecution might be the more appropriate option in light of the nature of the allegations. In that context, it is striking that the SFO’s new guidance on DPAs does not represent a change of approach, but rather brings together the various codes of practice and precedents on DPAs which were already available to the general public. The document serves as a reminder of the factors which are considered by the SFO when determining whether a DPA is the appropriate course of action, including principally whether a DPA would be in the public interest.

The guidance spells out a non-exhaustive list of factors that weigh against prosecution, including: (1) cooperation; (2) a lack of history of similar conduct; (3) the existence of a proactive compliance program both at the time of offending conduct and at the time of reporting; (4)

disciplinary action taken against all the culpable individuals; and (5) whether a conviction is likely to have collateral effects on the public, the company's employees and shareholders, or the company and/or institutional pension holders.

Unpacking these factors in the context of recent DPA cases, it is clear that cooperation remains the key consideration for the SFO. The SFO's understanding of cooperation is expansive, and includes (1) self-reporting within a reasonable time of becoming aware of alleged wrongdoing; (2) taking remedial steps; (3) preserving evidence and making witnesses available for interview; (4) providing regular reporting in relation to any internal investigation; and (5) waiving applicable privilege.

The guidance sets out the various terms which may be proposed in an SFO DPA: large-scale data collection (ideally accompanied by a wholesale waiver of privilege) for the purposes of self-reporting; implementing a robust corporate compliance program; facilitating a monitorship; and paying a significant fine including disgorgement of profits. Finally, the guidance confirms a trend seen in recent years: a corporate reorganization can help a company when arguing that it has turned over a new leaf. Such a reorganization may also assist companies in avoiding debarment as a result of the alleged wrongdoing, because they are able to argue that offending is limited to one rogue entity. Recent DPAs have recorded the government's agreement that restructured companies may continue to bid for public contracts.

While DPAs are a relatively new alternative to prosecution in the UK, prosecutors in the United States have long employed DPAs in the resolution of enforcement actions. Federal prosecutors have wide latitude in determining when, whom, how, and whether to prosecute violations of federal criminal law, and DPAs offer a middle ground between declining prosecution and convicting a company. The U.S. Department of Justice (DOJ) sets out principles of federal prosecution and provides guidance on when DPAs may be an appropriate alternative to prosecution in the corporate context.

The Justice Manual offers a non-exhaustive list of factors prosecutors should consider in the appropriate treatment of a company:

- the nature and seriousness of the offense, including the risk of harm to the public;
- the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- the corporation's history of similar misconduct;
- the corporation's willingness to cooperate, including as to potential wrongdoing by its agents;
- the adequacy and effectiveness of the corporation's compliance program;
- the corporation's timely and voluntary disclosure of wrongdoing;
- the corporation's remedial actions, including, but not limited to, any efforts to implement an adequate and effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, or to pay restitution;
- collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
- the adequacy of remedies such as civil or regulatory enforcement actions;
- the adequacy of the prosecution of individuals responsible for the malfeasance; and
- the interests of any victims.

When considering whether DPAs are an appropriate alternative to prosecution, prosecutors are advised to consider the interest of victims, and the collateral consequences of a corporate conviction on third parties. With respect to victims' interests, while criminal fines collected following conviction are deposited into the Crime Victims Fund (CVF), which helps compensate crime victims, fines collected pursuant to a DPA are sent to the General Fund of the U.S. Treasury. Further, DOJ guidance notes, "[W]here the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. . . . Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement."

While both the UK SFO and U.S. DOJ recognize the rehabilitative value of DPAs for companies charged with wrongdoing, DOJ guidance focuses much more on individual responsibility. The Justice Manual explains that the "[p]rosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation" and that "[b]ecause a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing." In deciding the appropriate course of action for a company, prosecutors consider whether charges against the individuals responsible for the company's malfeasance would adequately satisfy the goals of federal prosecution. The SFO guidance lacks that same emphasis.

The two agencies also take a different approach to the cooperation of corporations. As discussed above, SFO guidance sets out cooperation as the key factor weighing in favor of a DPA rather than prosecution, and provides numerous indicators of cooperation. DOJ on the other hand describes cooperation as a mitigating factor for which a corporation can receive "credit" and again focuses on individual accountability. In order for a corporation to receive consideration for cooperation in the US, it must identify all individuals substantially involved in or responsible for the corporate misconduct at issue, and disclose all relevant facts relating to the misconduct. A corporation that is unable to provide such information may still receive credit for cooperation under certain circumstances.

Osofsky, a former U.S. federal prosecutor, knows first-hand how DPAs can be an effective tool in law enforcement. As an alternative to prosecution, DPAs offer law enforcement agencies and corporations the opportunity to work together to hold wrongdoers accountable, remediate the company, promote compliance and in some cases, ensure the viability of a company. Although companies will not be able to prevent every instance of misconduct, companies can control the implementation and maintenance of a robust corporate compliance program—a critical factor in the decision to prosecute a corporation under both regimes.

Sources:

Justice Manual, 9-28.000 – Principles of Federal Prosecution of Business Organizations, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations> (last visited Oct. 29, 2020).

Serious Fraud Office Releases Guidance on Deferred Prosecution Agreements (Oct. 30, 2020), <https://www.sfo.gov.uk/2020/10/23/serious-fraud-office-releases-guidance-on-deferred-prosecution-agreements/>.

SFO Operational Handbook, Deferred Prosecution Agreements (Oct. 2020), <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/deferred-prosecution-agreements/>.

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