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The U.K. Deferred Prosecution Agreement Arrives

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For years many prosecutors in the United Kingdom wished they could use U.S.-style deferred prosecution agreements (DPAs) to prosecute corporate crime. That wish is about to become a reality, as the U.K. Code of Practice governing use of DPAs, promulgated pursuant to the Crime and Courts Act of 2013, takes effect later this month.

The timing is fortuitous. The U.K. DPA arrives at a moment of rising global corporate criminal enforcement, of greater coordination between U.K. and U.S. prosecutors, and in the midst of complex multinational investigations ranging from alleged manipulation of the London Interbank Offered Rate (LIBOR) and various currency exchange rates to alleged schemes to pay bribes for business. With U.K. prosecutors now gaining the power to use DPAs, the enforcement landscape will shift and the liability picture for companies facing criminal exposure in both the United Kingdom and the United States will be further complicated.

There are certain similarities between the new U.K. DPA and its U.S. analog. Under both systems, a charging document is filed in court and, subject to court approval, prosecution of the charge is "deferred" indefinitely as long as the company complies with its DPA obligations. Pursuant to a typical DPA, a company will pay a monetary penalty, admit to the factual basis for wrongdoing in a detailed statement of facts, implement new internal controls to seek to prevent future wrongdoing, and be required to cooperate in the government's investigation.

There are, however, several noteworthy differences. Companies should not be surprised if U.K. prosecutors seek to enter into DPAs much earlier in an investigation than is typical in the United States. Under the new U.K. Code of Practice, a prosecutor can seek a DPA based on "reasonable suspicion" that a company committed a criminal offense plus "reasonable grounds" to believe continued investigation would develop enough evidence to make a trial conviction more likely than not. This may in some cases portend a significant departure from practice in the United States, where DPA discussions ordinarily commence at the tail end of a multiyear investigation, after the prosecution and company are in a position to draft a final statement of facts.

U.K. DPAs may also in some instances raise difficult questions about finality. Under the U.K. policy,

corporations cannot obtain protection against prosecution for any misconduct other than what is "particularised in the draft indictment," a departure from the U.S. Department of Justice practice of granting coverage for known conduct beyond what is set out in the charging document, especially in Foreign Corrupt Practices Act (FCPA) matters involving varying levels of misconduct in multiple countries. In the new U.K. system, companies may face the tough choice of either agreeing to include all potentially offending conduct in the charging document—thus expanding the scope of wrongdoing the company is admitting and potentially increasing its exposure in, for example, shareholder lawsuits—or negotiating a DPA that is narrower in scope with the hope that U.K. authorities will not in the future decide to pursue known, but uncharged, activity.

Companies will also want to exercise special caution regarding the information they provide to U.K. prosecutors in connection with a DPA. Whereas U.S. DPAs typically require companies to avoid providing deliberately false, incomplete or misleading information, the U.K. law contains no *mens rea* limit and a company must explicitly warrant that it has provided no such information. Such a warranty naturally raises concerns, given that views on what is inaccurate, incomplete or misleading can change over time as more information is gathered and can vary depending on the eye of the beholder.

Other potentially significant distinctions between the U.K. and U.S. DPA systems are apparent. The new U.K. policy contains requirements regarding disclosure of details of internal investigations, consideration of collateral consequences and court review of DPAs that may, in practice, develop along very different lines than the U.S. approach.

How often U.K. DPAs will be used remains to be seen. During the past decade, U.S. prosecutors have used DPAs as a primary corporate law enforcement tool, with more than 150 DPAs entered and more than half of those occurring within the past four years. Foreign and domestic banks, pharmaceutical companies and other multinational majors have entered into U.S. DPAs based on alleged violations of an array of statutes in the U.S. criminal code: the Bank Secrecy Act, the FCPA, the wire fraud statute, the False Claims Act and the Sherman Act. The DOJ imposed more than $2.4 billion in DPA penalties during 2013 alone, and 2014 is off to another strong start following the $1.7 billion DPA entered into with J.P. Morgan Chase & Co. regarding Bernie Madoff's Ponzi scheme. The SEC has also begun using DPAs on occasion.

The widespread use of DPAs in the United States likely stems in part from the relatively low *respondeat superior* liability standard, which in essence allows criminal misconduct by any employees or agents, regardless of rank, to be imputed to the company as long as they acted within the broad scope of their employment. The United Kingdom, however, continues to have a higher threshold, known as the "controlling mind and will" test, which requires prosecutors to prove that board-level senior management was complicit in the criminality.

How the stringent U.K. liability test will influence the use of DPAs in the United Kingdom is difficult to predict. U.K. prosecutors may pursue DPAs more often than not to avoid the risks inherent in trying to satisfy the "controlling mind and will" test in a litigated setting. Conversely, it may be that the high threshold for liability will prove a fundamental barrier to broad use of DPAs in that country.

Whatever the volume of U.K. DPAs, companies would be well advised to proceed with care.

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