

FCPA Alert

November 22, 2013

New Risks Associated with Simultaneous U.S. FCPA and U.K. Bribery Act investigations

On November 20, 2013, during a panel presentation at the 30th International Conference on the Foreign Corrupt Practices Act (“FCPA”), current and former prosecutors from the United States and the United Kingdom discussed the recent authorization for the use of Deferred Prosecution Agreements (“DPAs”) in U.K. Bribery Act cases, which are expected to be available for use by prosecutors in February 2014. Daniel Braun, Deputy Chief of the U.S. Department of Justice, Criminal Division, Fraud Section (“DOJ”), Patrick Rappo, formerly of the U.K. Serious Fraud Office (“SFO”), the U.K. agency primarily responsible for investigating and prosecuting Bribery Act cases, and Peter Burrell, a U.K. defense attorney, described the requirements for the new program, which authorizes the resolution of allegations of liability under Section 7 of the Bribery Act for the failure of a company (called a “corporate” under the Bribery Act) to prevent bribery by DPA rather than a corporate guilty plea. A Draft Code of Practice has been prepared and released for comment, but the final Code of Practice is expected to be issued in connection with the availability of DPAs in early 2014.

The DPA program will require the company to agree to certain conditions in order to resolve Bribery Act violations by that method. The conditions include: paying a financial penalty; paying compensation; and cooperating with law enforcement in other prosecutions, including prosecutions of individuals. If the company violates the terms of the DPA, the SFO could choose to resume its prosecution of the company.

In discussing the program, the panelists drew attention to the stark contrasts between the use of DPAs in the U.S. to resolve FCPA cases and the contours of the new DPA program in the U.K. Unique requirements for program eligibility in the U.K. include that, it is only available for companies; it is only for serious economic crimes, including fraud, money laundering and bribery; and the prosecutor must invite the company to meet with them to discuss entry into the program.

Panelists also discussed that program guidance suggests that a DPA should not be offered to companies that do not already have adequate compliance programs in place. Such a requirement may limit the availability of the program to exclude many companies that are investigated by the SFO. Another important distinction highlighted by the panel is that in the U.K., companies are required to write to the SFO when notifying the office of a potential violation, which would result in companies memorializing admissions in writing. In the U.S., companies may notify the DOJ of potential FCPA problems by calling the DOJ as an alternative to notification in writing. In addition, under the U.K. program, because a DPA can only be used to resolve serious economic crimes, there may be other company conduct that cannot be resolved by DPA. Practically speaking, this means that the SFO may seek to separately prosecute an activity that falls outside the DPA concurrently or at a later date.

Most notably, the panelists explained that under the program, if a company enters into a DPA with the SFO, the SFO will expect the company to waive the attorney-client privilege and any other protections by producing documents such as witness statements and internal legal reports. By contrast, in the United States, DOJ prosecutors cannot request or reward the waiver of such privileges. Moreover, companies that operate in the U.S. are wary of producing attorney-client privileged materials or information to government investigators because, in general, waiver of the privilege with respect to one recipient waives it as to all third parties. Panelists discussed the possibility that the SFO would be more understanding, and potentially more forgiving, on the waiver requirement when a company is being investigated in parallel by U.S. authorities as well.

In principal, this key difference in handling privileged material creates a significant risk for companies being investigated in both the U.K. and the U.S. for allegedly corrupt activity, and has implications for future civil litigation based on the conduct as well. Practically speaking, what could happen with respect to companies being investigated in both jurisdictions is that the DOJ could wait for the SFO to collect the sensitive privileged documents or information from the company and then demand that the company produce the same information to the DOJ on the grounds that the information is no longer privileged. Alternatively, U.S. authorities could seek to obtain the documents or information with a formal request for Mutual Legal Assistance under the treaty between the U.S. and the U.K. This could be problematic for a company cooperating with law enforcement officials in the U.K. and subject to investigation in the U.S. as well, or where the company negotiates a DPA in the U.K. before resolving the case in the U.S.

The panelists also discussed the fact that in the U.K., judges will be very involved in the decision as to whether to accept a DPA. A further implication of the attorney-client privilege waiver requirement is that if a judge determines not to accept the DPA, law enforcement authorities may already have the company's privileged documents and information and may determine that prosecution is necessary. In this way, the SFO may be able to potentially use the documents and information against the company in its prosecution. By contrast, in the U.S., judges are not involved at all in determining whether to allow the company to enter into a DPA where the case is resolved before it is indicted.

Akin Gump will be closely monitoring and will report on the U.K.'s new DPA program and cases resolved through that program. Watch for future updates to be sent out, or posted at www.akingump.com.

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