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## The UK Serious Fraud Office Internal Guidance on Deferred Prosecution Agreements

The UK Serious Fraud Office (SFO) recently published a new chapter in its internal Operational Handbook, which provides guidance on the SFO’s approach to Deferred Prosecution Agreements (DPAs) (the Guidance). The SFO’s Director, Lisa Osofsky, remarked, “Over the past six years, we at the SFO have been developing our approach to negotiating and entering into DPAs, and in turn, establishing best practice. Publishing this guidance will provide further transparency on what we expect from companies looking to co-operate with us.”

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The Guidance, which follows on from several high profile DPAs, largely restates the principles already set out in the DPA Code of Practice and DPA precedents and does not signal a change in policy. Nevertheless, the Guidance serves to reinforce the SFO’s focus on proactive co-operation by companies and implementation of effective corporate compliance. As Ms. Osofsky said during an address in September 2020, the SFO’s objective with DPAs is to “drive better corporate citizenship” and ensure that companies “admit their fraud and corruption and turn their attention to cleaning house.”

DPAs were first introduced in the UK in 2014 under Schedule 17 of the Crime and Courts Act 2013. A DPA is a court-approved agreement between a prosecuting authority such as the SFO and a company, and is an alternative to prosecution for certain criminal offences (*e.g.*, conspiracy to defraud, money laundering, fraud, bribery, failure to prevent facilitation of tax evasion). The court will approve a DPA if it is likely to be in the interests of justice and the proposed terms are fair, reasonable, and proportionate.

The Guidance sets out a number of non-exhaustive factors that the SFO will consider in determining whether a DPA is appropriate in a particular circumstance:

In favour of prosecution	Against prosecution
<ul style="list-style-type: none"> <li>• History of similar conduct and established business practices</li> <li>• Lack of or an ineffective corporate compliance programme</li> <li>• Company was previously subject to a warning, sanctions, or criminal charges</li> <li>• Failure to notify the offending conduct within a reasonable time</li> <li>• Company reported inaccurate, misleading, or incomplete information</li> <li>• Significant level of harm to victims or adverse impact on markets or governments</li> </ul>	<ul style="list-style-type: none"> <li>• Lack of history of similar conduct/offence represents isolated actions by individuals</li> <li>• Existing compliance programme both at time of offence and reporting</li> <li>• Offence was not recent and company is effectively a different entity from that which committed the offence</li> <li>• Co-operation and voluntary self-reporting</li> <li>• Conviction would have disproportionate consequences and/or collateral effects to the public</li> </ul>

## Key Takeaways

**Co-operation and Self-Reporting.** The Guidance repeatedly emphasises that the SFO will give considerable weight to the company's proactive co-operation in determining whether to enter into DPA negotiations. Co-operation includes self-reporting "[w]ithin a reasonable time of wrongdoing coming to light." Although self-reporting is not a pre-requisite to a DPA, neither will self-reporting automatically entitle a company to a DPA. The guidance underscores that "[n]o Company is entitled to be invited to enter DPA negotiations." To qualify for a DPA, the company must be prepared to provide assistance to the SFO above and beyond that otherwise required by law, including, among other things, providing evidence, identifying witnesses and making them available for interview, providing reports of any internal investigation, and waiving privilege (though waiver cannot be compelled and the company may not be penalised for not waiving privilege). The company's co-operation will further inform the term of the agreement and financial penalty. DPAs will also typically impose an ongoing obligation on the company to self-report new misconduct that is identified during the term of the DPA.

**Compliance Programme.** The SFO will also consider improvements to the company's compliance programme in setting the term of the agreement. Conversely, if the company does not have an adequate compliance programme in place, the DPA may require the company to implement a compliance programme and/or make improvements to its existing programme. Consistent with global trends, the Guidance notes that such obligations may include the use of data analytics to test the company's compliance programme.

**Parallel Investigations.** Where there is a parallel investigation by an overseas and/or other UK authority, the SFO will consider the company's early communication and de-confliction in respect of each authority's investigation, whether the company has taken a consistent position with each authority in respect of the facts and liability, co-ordination of court listing dates to ensure simultaneous resolutions, and co-ordination of market announcements for public companies.

**Admission of Misconduct.** Under the Crime and Courts Act 2013, a company entering into a DPA is not required to admit guilt. The Guidance affirms that there is "no requirement for formal admissions of guilt in respect of offences charged." However, the company will need to admit to the contents and meaning of key documents referred to in the DPA's statement of facts, meaning that, to all intents and purposes, the company will be required to admit to the misconduct. Indeed, in her statement published alongside the Guidance, Ms. Osofsky made clear that "DPAs require the company to admit to the misconduct."

## Conclusion

The principles set out in the Guidance are consistent with the SFO's recent DPAs. To date, the SFO has entered into nine DPAs since 2014, including three so far in 2020. The most recent DPA, with Airline Services Limited ("ASL"), was approved by the High Court on 30 October 2020 in relation to offences under the Bribery Act 2010. Notably, ASL identified the conduct at issue and self-reported to the SFO. The company received a 50% discount on its financial penalty for its co-operation. As the Guidance and recent DPAs demonstrate, self-reporting, co-operation, and good corporate governance will be key considerations for companies seeking DPAs from the SFO.