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FCPA

Companies that discover instances of corruption within their organization face the complex and uncertain task of weighing up the potential benefits of making a voluntary self-disclosure to prosecutors against the risk of otherwise being prosecuted. The complexity of this task is only magnified when voluntary self-disclosure to prosecutors is available in multiple jurisdictions implicated by the conduct. In this article we compare and contrast the U.S. and U.K. approaches to voluntary self-disclosure and the purported benefits of self-disclosing in each jurisdiction. We focus particularly on the recently announced U.S. Department of Justice's Foreign Corrupt Practices Act (FCPA) Pilot Program and the U.K.'s new regime for Deferred Prosecution Agreements.

Self-disclosure of Corruption Offenses To the U.S. and U.K. Authorities: Where Are We Now?




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1. Overview of the FCPA Pilot Program in the U.S.

The FCPA Pilot Program announced by the US Department of Justice (DOJ) on April 5 (the ''Pilot Program'') has been received with much fanfare in the U.S. (66 CARE, 4/6/16). The Pilot Program is intended to give more concrete guidance and policy information on the benefits for companies in making voluntary self-disclosures to the DOJ of their own potentially corrupt conduct in FCPA cases.

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The Pilot Program is applicable to organizations that voluntarily self-disclose or cooperate in FCPA matters during the next year. The Pilot Program will be re-evaluated and may be made permanent after this initial trial period.

The Pilot Program provides credit in FCPA matters ''*above and beyond any fine reduction provided for under the [U.S.] Sentencing Guidelines*.'' That credit may affect the type of disposition, the reduction in fine, or the determination of the need for a monitor. More specifically, the Pilot Program provides for the possibility of a declination or a 50 percent reduction off the bottom end of the U.S. Sentencing Guidelines (the ''Guidelines'') fine range for companies that voluntarily self-disclose, fully cooperate, and engage in timely and appropriate remediation.

By way of background, the U.S. Sentencing Guidelines apply to all federal criminal cases. The DOJ designed the Guidelines to maximize uniformity and proportionality in federal sentencing. The Guidelines also aim to make federal sentencing more predictable, curtailing the sometimes arbitrary discretion that prosecutors, judges, and the parole commission have traditionally held in setting federal sentences. Importantly, however, after the 2005 *United States v. Booker* decision by the U.S. Supreme Court, the Guidelines no longer have binding authority on federal judges. Nevertheless, they remain the fundamental starting point for a sentencing judge. In corporate plea agreements and deferred prosecution agreements, an agreed-upon Guidelines range and recommended sentence is typically adopted by the sentencing judge, based upon the multi-step calculation process provided for in the Guidelines. Although the seemingly mechanical nature of these calculations suggests a static approach to the determination of fines and penalties, there is significant flexibility in certain portions of the Guidelines, which allow for variations in the ultimate fine a company may face.

In many respects, the Pilot Program clarifies the DOJ's expectations regarding voluntary self-disclosure without signaling a significant shift in policy.

In order ''*to receive this additional credit under the pilot program, organizations must meet the standards described [in the Pilot Program], which are more exacting than those required under the Sentencing Guidelines.*'' For example, the Pilot Program requires: self-disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including all facts related to involvement in the criminal activity by the corporation's officers, employees and agents; proactive rather than reactive cooperation; and disclosure of the locations in which overseas documents were found and to identify the individuals who found them. To the extent consistent with the attorney-client privilege, the Pilot Program also requires that all relevant facts gathered during an internal investigation be attributed to specific sources. A company claiming that any requirement for cooperation credit is impossible to meet bears the burden of proving impossibility. For companies that earn cooperation and remediation credit but do not voluntarily self-disclose, the Pilot Program provides for a maximum 25 percent reduction off the bottom of the Sentencing Guidelines fine range.

In many respects, the Pilot Program clarifies the DOJ's expectations regarding voluntary self-disclosure without signaling a significant shift in policy. The DOJ has been encouraging corporate cooperation as a way to obtain evidence to prosecute the individuals responsible for a number of years.

Proper remediation is another key aspect of obtaining cooperation credit under the Pilot Program. The Pilot Program provides that the following will be required for a company to receive credit for timely and appropriate remediation under the Pilot Program:

- Implementation of an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization, but will include:
  - * whether the company has established a culture of compliance, including an awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
  - * whether the company dedicates sufficient resources to the compliance function;
  - * the quality and experience of the compliance personnel such that they can understand and identify the transactions identified as posing a potential risk;
  - * the independence of the compliance function;
  - * whether the company's compliance program has performed an effective risk assessment and tailored the compliance program based on that assessment;
  - * how a company's compliance personnel are compensated and promoted compared to other employees;
  - * the auditing of the compliance program to assure its effectiveness; and
  - * the reporting structure of compliance personnel within the company.
- Appropriate discipline of employees, including those identified by the company as responsible for the misconduct, and a system that provides for the possibility of disciplining others with oversight of the responsible individuals, and considers how compensation is affected by both disciplinary infractions and failure to supervise adequately.
- Any additional steps that demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

The Pilot Program underscores the importance for companies of decisions about self-disclosure and improving compliance programs. It increases the pressure on companies to self-disclose quickly and to cooperate fully so as to ensure they are eligible for full credit, even though this means the company will be unlikely to know the full extent or implications of the potential misconduct at the time they self-disclose. Because the Pilot Program links the DOJ's decisions about imposing a corporate monitor to the effectiveness of a company's compliance program, it also makes it important for compliance officers and in-house counsel to evaluate

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their companies' compliance programs in light of each of the criteria identified in the Pilot Program well in advance of any compliance issues arising.

2. Introduction to Voluntary Disclosure in the U.K.

Most FCPA matters that require voluntary self-disclosure to the U.S. authorities involve legal issues in other jurisdictions. In many jurisdictions there is no recognized mechanism for companies to self-disclose their own corrupt behavior or any tradition of them doing so. However, in other jurisdictions, voluntary self-disclosure regimes exist and are becoming more sophisticated. One of those jurisdictions is the U.K., a jurisdiction in which white collar crime enforcement has traditionally been sporadic, but where prosecution agencies now have new significant legal tools available to them to tackle corporate defendants in corruption cases.

The current guidance on the approach the U.K. authorities and courts will take to voluntary self-disclosure (generally known as self-reporting in the U.K.) can primarily be found in three sources: the Serious Fraud Office's (SFO) guidance on Corporate Self-Reporting (the ''SFO Guidance''); the Deferred Prosecution Agreements (DPA) Code of Practice (the ''DPA Code''); and the new guidelines issued by the Sentencing Council of England and Wales for the sentencing of corporate offenders (the ''Sentencing Guidelines'').

The SFO Guidance

The principal U.K. authority tasked with investigating and prosecuting corporate bribery and corruption is the SFO. As with the DOJ, the SFO encourages companies to self-report instances of bribery and corruption.

The SFO Guidance provides that if, on the evidence, there is a realistic prospect of conviction, the SFO will prosecute a company, providing it is in the public interest to do so. The SFO Guidance indicates that ''*for a self-report to be taken into consideration as a public interest factor tending against prosecution, it must form part of a 'genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice.' Self-reporting is no guarantee that a prosecution will not follow. Each case will turn on its own facts.*'' Accordingly, a company's failure to self-disclose wrongdoing within a reasonable time of the offending coming to light will be regarded as a public interest factor in favor of prosecution. Where a prosecution is not considered in the public interest (e.g. because of a proactive self-disclosure) then the SFO has the power (but not the obligation) to resolve investigations into the company without a prosecution by using a DPA or the SFO's civil recovery powers.

The DPA Code

DPAs have been available in the U.K. since February 2014 to certain designated prosecutors for resolving a limited range of corporate criminal matters without a criminal prosecution. A DPA is an agreement between a prosecutor and an organization facing prosecution for certain prescribed offences. The effect of the DPA is that proceedings are instituted by the prosecutor, but are then deferred on terms agreed between the prosecutor and the company and must be approved by the court. These terms can include the payment of a financial penalty, compensation and disgorgement of profit along with implementation of a compliance program, cooperation with the prosecutor's investigation and payment of costs. If, within the specified time, the terms of the DPA are met, the criminal proceedings are discontinued. A breach of the terms of the DPA can lead to the suspension being lifted and the prosecution being pursued.

DPAs along with Non-Prosecution Agreements (NPAs) and other forms of negotiated resolutions have been the cornerstone of U.S. corporate criminal resolution for over a decade, and are the basis of the Pilot Program.

In the U.K., the DPA Code was prepared by the SFO and the Crown Prosecution Service, the U.K.'s general criminal prosecutor, to provide guidance on how the DPA procedure would work. The DPA Code states that ''*considerable weight*'' may be given to a genuinely proactive approach adopted by the company's management, including voluntary self-disclosure when the prosecutor is determining whether to offer a DPA or not. More generally, the DPA Code places emphasis on the benefits of self-disclosure for companies, but comes up significantly short of the types of purported assurances that are to be found in the Pilot Program.

On Nov. 30, 2015, Lord Justice Leveson approved the U.K.'s first DPA between the SFO and Standard Bank Plc (now known as ICBC Standard Bank Plc). The allegations underlying the Standard Bank DPA relate to a $6 million payment in March 2013 by a former sister company of the Bank, Stanbic Bank Tanzania, to a local partner in Tanzania, and Standard Bank's failure to prevent its subsidiary, as an associated person under Section 7 of the U.K. Bribery Act 2010 (UKBA), from paying a bribe on the company's behalf. As both the first DPA and the SFO's first enforcement action under Section 7 of the UKBA, the agreement represents a watershed moment for bribery and corruption enforcement in the U.K.

For present purposes, the Standard Bank DPA is relevant due to the fact that the case was first brought to the SFO's attention by a voluntary self-disclosure by Standard Bank. In approving the DPA and its terms, Lord Justice Leveson cited the voluntary self-disclosure as being a key reason for the SFO proposing and his approving the DPA:

> *''The second feature to which considerable weight must be attached is the fact that [the Bank] immediately reported itself to the authorities and adopted a genuinely proactive approach to the matter[. . .] In this case the disclosure was within days of the suspicions coming to the Bank's attention, and before its solicitors had commenced (let alone completed) their own investigation.''*

This gives companies considering voluntary disclosure in the U.K. the first real glimpse of the potential benefits of making a voluntary disclosure in the context of the DPA regime.

Three recent Scottish cases have also recently been resolved without prosecutions following voluntary self-disclosures. The first concerned Abbot Group Ltd. (Abbot), a Scottish oil service company that made a disclosure to the public prosecutor in Scotland in July 2012, outlining the benefit it had received from bribes paid in 2006 and 2007 by an overseas subsidiary to win contracts overseas (before the UKBA came into force). Abbot agreed to pay £5.6 million to the Civil Recovery

Unit, representing the profit Abbot made on the corrupt contract. The second concerned International Tubular Services Ltd. (ITSL), an oil and gas service company that made a similar self-disclosure in November 2013, outlining benefits it had received stemming from corrupt payments made by a former employee, based in Kazakhstan, to secure additional contracts from customers in that country. ITSL agreed to pay £172,200, again representing the total profit made from the corrupt contract in Kazakhstan. The third concerned Brand-Rex, a Scottish network cabling company that made a similar disclosure outlining benefits it believed it had received in connection with an incentive scheme it operated for its U.K. distributors and installers. After an internal investigation, Brand-Rex's solicitors considered that it had failed to prevent bribery in violation of UKBA Section 7. Brand-Rex agreed to pay £212,800, again representing the profit accruing from the contravention.

On July 8, the SFO agreed to its second DPA. The counterparty to the latest DPA is a UK small and medium-sized enterprise (SME) that cannot currently be named due to ongoing, related legal proceedings. The DPA relates to the offer and/or payment of bribes by a number of the company's agents and employees to secure contracts in overseas jurisdictions. The conduct was found by Lord Justice Leveson to be ''part of [the company's] established business conduct.'' Twenty-eight contracts were found to have been procured as a result of the bribes and £17.24 million was paid to the company from those 28 contracts. The total gross profit from the contracts amounted to £6,553,085. The wrongdoing took place between 2004 and 2012. As such, the suspended indictment included offences under the old UK bribery law, as well as Section 7 of the UK Bribery Act 2010. The key terms of the DPA are as follows:

- The company will pay financial orders of £6,553,085 (comprised of a £6,201,085 disgorgement of gross profits and a £352,000 financial penalty).

- £1,953,085 of the disgorgement will be paid by the company's U.S. registered parent company as repayment of a significant proportion of the dividends that it received from the company over the indictment period. The disgorgement sum will be paid by way of installments over five years. Payment in that way reflects the company's means and ability to pay.

- The company has agreed to continue to cooperate fully with the SFO and to provide a report addressing all third-party intermediary transactions, and the completion and effectiveness of its existing anti-bribery and corruption controls, policies and procedures within 12 months of the DPA and every 12 months for its duration.

- The indictment against the company has been suspended for a minimum of two and a half years and a maximum of five years, dependent upon when the financial penalty is paid in full.

Like the first DPA, this second DPA highlights the impact of genuine cooperation by the company on the SFO's decision to enter into a DPA, the decision by the judiciary that a DPA is in the public interest and the financial penalty ultimately imposed. A key factor taken into account by Lord Justice Leveson when weighing up the public interest in approving this second DPA was the fact that the company self-reported to the SFO within four weeks of retaining a law firm to conduct an internal investigation and before that law firm had completed its investigation.

The Sentencing Guidelines

Whether a voluntary self-disclosure has been made to the U.K. authorities will also be relevant to the level of fine payable under both a DPA and when a company is sentenced for a criminal offence.

In parallel to the introduction in February 2014 of DPAs, the Sentencing Council of England and Wales introduced new guidelines for the sentencing of corporate offenders (the ''Sentencing Guidelines''). The Sentencing Guidelines came into force on Oct. 1, 2014, for the sentencing of fraud, bribery and money laundering offenses in the U.K. The Sentencing Guidelines set out a new process for the calculation of fines for corporate offenders. This process is intended to provide greater certainty regarding the level of fines that companies will face and a more mathematical process for calculating them.

Under the Sentencing Guidelines, cooperation with an investigation and/or a voluntary self-disclosure will be seen as a mitigating factor when the court comes to consider the fine to be imposed on the company.

The Sentencing Guidelines will be used as a point of reference when financial penalties under DPAs are being considered and negotiated. The financial penalty imposed by a DPA should be broadly comparable to the fine that a court would have imposed on conviction following a guilty plea. Therefore, a voluntary self-disclosure can have benefits for a company seeking a DPA at least in two respects: first, it is likely to affect the decision by the prosecutor to offer a DPA; and second, it may act to reduce the ultimate fine payable under the DPA.

This is the first time that there have been guidelines in the U.K. for the level of sentence and fine that corporations can expect. The intention is that this greater clarity and certainty of outcome will encourage companies to self-disclose and enter into DPAs or to cooperate or plead guilty if a DPA is not offered by the prosecutor. However, the Sentencing Guidelines already are resulting in the English courts imposing higher fines on companies for criminal wrongdoing and we expect this trend to continue.

3. Similarities in Voluntary Disclosure in the U.S. and U.K.

Perhaps unsurprisingly, there are a number of similarities between the current self-disclosure regimes in the U.S. and the U.K.

The first and major similarity between the self-disclosure regimes in the U.S. and U.K. is that neither regime offers companies any guaranteed outcomes. The Pilot Program provides that cooperation ''*may accord up to a 50% reduction*'' and that the DOJ will ''*consider a declination of prosecution*.'' Likewise, the SFO Guidance provides that ''*Self-reporting is no guarantee that a prosecution will not follow. Each case will turn on its own facts*.'' Likewise, the DPA Code and the Sentencing Guidelines give the prosecutors and the courts significant discretion to consider the facts of each case. While this approach is frustrating for companies that desire certainty, it is unsurprising that prosecutors do

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not wish to tie their hands and/or restrict their ability to flexibly respond to issues before them in the future.

Another similarity is that in both jurisdictions, prosecutors will not seek access to privileged material as a condition of obtaining credit for self-disclosure. The Pilot Program is clear that ''*[e]ligibility for full cooperation credit is not predicated upon waiver of the attorney-client privilege or work product protection and none of the requirements above require such waiver*.'' This statement and approach is consistent with a practice that has become well established in the U.S. in recent years through government guidance, including that contained in the McNulty and Filip memoranda.

Likewise in the U.K., the DPA Code provides that ''*[the Crime and Courts Act 2013] does not, and this DPA Code cannot, alter the law on legal professional privilege*.'' However, the SFO's General Counsel Alun Milford recently stated in a speech at the European Compliance and Ethics Institute, Prague, March 29: ''*If a company's assertion of privilege is well-made out, then we will not hold that against the company [. . .] By the same token if, notwithstanding the existence of a well-made-out claim to privilege, a company gives up the witness accounts we seek, then we will view that as a significant mark of co-operation*.'' Like their U.S. counterparts, refusal to waive privilege will not be held against a company by the SFO, but in the U.K. it appears that a decision to waive privilege will go a long way to showing a desire to cooperate.

4. Differences between Voluntary Disclosure in the U.S. and U.K.

Despite the similarities, there remains a number of distinct differences between the current self-disclosure regimes in the U.S. and the U.K. In-house counsel need to be aware of these differences when considering such a self-report in both the U.S. and U.K. and specialist advice should be sought in both jurisdictions.

First, there is significantly more experience and precedent in the U.S. regarding corporate self-disclosure than in the U.K. While some companies resolved cases with the SFO following self-reports under former SFO director Richard Alderman's self-disclosure policy (that a genuine voluntary disclosure of potential bribery would most likely result in a civil rather than a criminal resolution of the matter for companies), there remains very few cases that have been successfully resolved following a voluntary self-disclosure. In contrast, the DOJ has been resolving self-disclosed cases for a number of years and has extracted significant fines and other penalties from such companies. As a result, a significant amount of experience and precedent has accumulated. A corresponding lack of experience and precedent in the U.K. on the part of prosecutors results in a less predictable outcome for companies self-disclosing in the U.K. However, as more companies follow the path of Standard Bank and the unnamed SME and self-disclose instances of corruption, U.K. prosecutors will become more experienced and outcomes more predictable.

A second key difference between the two self-reporting regimes is the role of the judiciary in the DPA process. Contrary to the procedure in the U.S., a critical feature of DPAs in the U.K. is the requirement that the proposed DPA be examined in detail by the court at two stages of the process, prior to its finalization. This allows the U.K. court to establish whether the statutory conditions for a DPA are satisfied (including whether it is in the public interest) and, if appropriate, approve the DPA.

Judges in the U.S. are generally quite deferential to prosecutors in approving DPAs. This limited judicial oversight by U.S. judges with respect to DPAs has led some critics to claim that the U.S. system gives prosecutors and regulators too much power to dictate the terms of a settlement and places companies at the mercy of the DOJ. In recent years, two influential federal trial judges have joined the debate by refusing to ''rubber stamp'' corporate settlements they thought were unduly lenient. In both cases, appellate courts ultimately reversed these rulings.

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Most recently in *United States v. Fokker Servs. B.V.*, a case alleging trade sanctions violations, the DOJ and Fokker agreed that Fokker would pay $21 million in fines and forfeiture and enter into an 18-month DPA. However, Judge Richard Leon in Washington, D.C., refused the parties' joint request to suspend the Speedy Trial Act, thereby effectively blocking the execution of the DPA. In explaining his ruling, Judge Leon criticized the government for failing to prosecute any individuals for their conduct and suggested that the DPA was unduly lenient given the company's alleged conduct: *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 166-67 (D.D.C. 2015). The U.S. Court of Appeals for the D.C. Circuit overruled Judge Leon on April 5, opining that prosecutors—rather than judges—must make decisions pertaining to DPAs with corporate defendants (66 CARE, 4/6/16). The appellate court noted that ''*the Constitution allocates primacy in criminal charging decisions to the Executive Branch*'' and that ''*the Judiciary generally lacks authority to second-guess those Executive determinations, much less to impose its own charging preferences*'': *United States v. Fokker Servs.* B.V., No. 15-3016 (D.C. Cir. April 5, 2016). In short, U.S. federal appellate courts appear to have slammed the brakes on the effort to create a more meaningful role for trial judges in the supervision of corporate settlement agreements in the U.S. However, this development does allow prosecutors in the US to give more concrete assurances with respect to the benefits of voluntary self-disclosure and cooperation knowing that their position is more likely to be upheld by the courts. Many companies will find this encouraging.

Greater judicial oversight of the appropriateness of DPAs and their terms in the U.K., although lauded by those seeking greater transparency and oversight in the process, means that prosecutors in the U.K. are less able to offer guarantees, or any certainty of approval, prior to, or during the negotiation of a DPA. Whilst guidelines do exist in the DPA Code, the looming question of whether the agreement will be approved by the judiciary will necessarily create some greater uncertainty in the process for prosecutors and defendant companies alike. Those negotiating DPAs with the U.K.

authorities need to be aware of this important difference in approach.

A third difference between the two self-disclosure regimes is that, in our view, DPAs in the U.K. are likely to remain a rare occurrence and will not be used with the same frequency as they have been in the U.S. In commentary before and following the Standard Bank DPA, the message from the SFO has been clear: the bar for obtaining a DPA is and will remain high and DPAs will not be appropriate in every case. Prosecution will remain the primary method of resolving corporate criminality and DPAs will be used only in exceptional circumstances. In contrast, in the U.S., in recent years, the vast majority of all corporate DOJ enforcement actions under the FCPA have been resolved either through an NPA or a DPA.

This point was emphasized in a speech given by Ben Morgan (the SFO's joint head of bribery and corruption) following the Standard Bank DPA: *''Please don't mistake our willingness to go down this route on this case for a desire to force a DPA onto every corporate case that we take on. In some, quite specific situations they will be appropriate, and we will always have in mind their possible use, but they are not the answer to everything. It is a high bar for a DPA to be suitable and where it is not met we have the appetite, stamina and resources to prosecute in the ordinary way.[. . .] We are not prepared to risk compromise to the DPA process or our credibility as a user of it by putting forward cases to the court that are anything less than 100% appropriate.''*

Unlike the position in the U.S., only a small percentage of corporate wrongdoing is likely to be dealt with using DPAs in the U.K.

Given the SFO's role in instigating DPAs, such a message indicates that, unlike the position in the U.S., only a small percentage of corporate wrongdoing is likely to be dealt with using DPAs in the U.K. Rather it seems that, where appropriate, criminal convictions will remain an important means of dealing with corporate wrongdoing, including breaches of the UKBA. By way of example, on Dec. 18, 2015, the SFO announced that Sweett Group Plc had pleaded guilty at Southwark Crown Court to an offence under Section 7 of the UKBA regarding conduct in the Middle East. It appears that, in the case of Sweett Group, the ''high bar'' for a DPA was not met. Sweett Group was fined £1.4 million and ordered to pay £851,152.23 in confiscation. Additionally, £95,031.97 in costs were awarded to the SFO.

This tough message from the SFO does dovetail with the approach it took to the Standard Bank DPA in which, despite the significant co-operation given by the Bank, the SFO extracted one of the largest fines ever obtained for corruption in the U.K. and imposed a number of arguably onerous non-financial terms. The first DPA suggests that DPAs will be far from a ''soft option'' for companies dealing with the U.K. authorities.

The fourth difference between the two regimes is the approach taken by prosecutors to internal investigations conducted by companies prior to a self-report. Under the tenure of the previous director, the SFO was more willing to accept the findings of a properly conducted internal investigation. However, more recently David Green (the director of the SFO) and his staff have expressed concern about the management of investigations by external legal counsel and the resulting claims of legal privilege over the product of the investigation, particularly internal interview notes. The SFO has made its view clear that many such documents do not attract legal privilege and has recently sought to bring court cases against cooperating companies for a failure to hand over such materials, and to compel them to do so. For example, in December 2015, at a private hearing in connection with an ongoing investigation into whether a U.K. bank and its senior executives made false and misleading statements about a £7 billion deal with Middle Eastern investors during the global financial crisis, the SFO argued that it should be provided with documents linked to the enquiry, which the bank argued contained legal advice protected by privilege. Under pressure from the SFO and with a court hearing scheduled for March 2016, during which the SFO intended to assert that the documents were not privileged, the bank chose to disclose the documents voluntarily to the SFO, in February 2016.

The SFO has made its view clear that many such documents do not attract legal privilege and has recently sought to bring court cases against cooperating companies for a failure to hand over such materials, and to compel them to do so.

David Green recently shared his thoughts with *The Times* newspaper in London, revealing his concerns about the potential motivations for companies (and their advisers) in making disclosures. Green cautioned that the SFO would be skeptical in receiving reports that sought to ''*minimise the problem*'' or exonerate the subject company from wrongdoing. In such instances Green explained that the SFO ''*will never take a report at face value and will drill down into its evidence and conclusions*.''

Indeed, in contrast to their U.S. counterparts who are sometimes criticized due to a perception that they ''outsource'' the conduct of corporate criminal investigations to law firms representing corporate defendants and as such are overly reliant upon the findings presented, the SFO has demonstrated its desire to conduct its own thorough independent enquiries whenever they choose to take on cases regardless of the disclosing company's posture of cooperation.

As such, critics would argue that one of the major motivations for companies that might consider making a voluntary disclosure—that of control over the investigation and process—may be vitiated, to an extent, by this approach taken by the SFO. The SFO's resource constraints in conducting investigations and their track record of prolonged corporate criminal investigations may also cause companies legitimate concern about the potential timeframe for resolution of matters following

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voluntary disclosure. The Standard Bank case may offer some reassurance in this regard. The disclosure in that case was made by Standard Bank in April 2013 and the final resolution by way of DPA came two and a half years later in November 2015, representing a relatively truncated timeframe, particularly so given the necessary judicial review and novelty of the case and method of resolution. It also appears from the Standard Bank DPA that the SFO and Standard Bank's external counsel conducting the investigation worked closely and collaboratively to finalize the investigation during this time.

However, in contrast, in the case of the second DPA the company first self-reported the matter to the SFO on Oct. 2, 2012, and, some four months later, submitted a written report of its internal investigation. Between April 2013 and January 2016 the SFO conducted its own investigation. Negotiations regarding a possible DPA began in August 2015 and the matter was finally resolved by way of a DPA in July 2016. For companies hoping for a speedy resolution of corruption issues with the SFO, a delay of almost four years between discovery and resolution will be of some concern.

Although, as noted above, both the U.S. and U.K. self-disclosure regimes are uncertain for companies, the final difference between the two is that, under the Pilot Program, the benefits on offer to companies appear to be greater and marginally more predictable than those on offer under the U.K. DPA regime or under the U.K. Sentencing Guidelines. As noted above, if a company has voluntarily self-disclosed misconduct, fully cooperated and remediated the wrongdoing, under the Pilot Program the DOJ: ''*[m]ay accord up to a 50% reduction off the fine range*''; ''*Generally should not require*'' the appointment of a monitor and ''*Where those conditions are met [. . .] will consider a declination of prosecution*.'' The Pilot Program also provides that a company that has not voluntarily disclosed misconduct may still go on to receive ''*a 25% reduction*'' off the fine range, if it later fully cooperates and remediates. Companies self-reporting to the U.K. authorities have no such assurances, other than that, if a DPA is agreed it can expect a potential fine to benefit from a ''*one third discount for a plea at the earliest opportunity*.''

5. Conclusion

Whether in the U.S. or in the U.K., companies that discover corruption issues within their organization face a complex and uncertain task of weighing up the potential benefits of making a voluntary self-disclosure against the risk of otherwise being prosecuted.

Increasingly these decisions cannot be made in isolation under any single regime or jurisdiction. Prosecutors in the U.S., the U.K. and elsewhere are increasingly cooperating in the investigation, prosecution and resolution of international corporate criminal matters. A recent example of this cooperation is the recent Standard Bank DPA in which the U.K. authorities took the lead on resolving the case, but the U.S. authorities aided the investigation and applied their own coordinated resolution. In this context, information shared with one country's prosecutors under the posture of a voluntary self-disclosure is likely to be shared with other prosecutors who may have jurisdiction over the case—either to prosecute the conduct in their own right or to provide access to witnesses or evidence. These are trends that are certain to continue as the issue of corruption moves from being a specialist legal subject area to the front pages of the world's media (and therefore straight into the political spotlight).

The decision to voluntarily self-disclose to any authority is not one that should be taken lightly. It is a decision that requires very detailed and careful consideration. There are a number of similarities between the self-disclosure regimes in the U.S. and U.K., but there are a number of significant differences. It is these differences that need to be considered especially carefully by in-house counsel and those advising companies. Specialist advice should be taken from experts on such issues in both jurisdictions so that the differing regimes do not expose the company to increased liability or a delayed resolution.