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SFO's Deferred Prosecution Hunt May Hit Dead End With City

By **Mark Taylor**

Law360, London (February 20, 2017, 6:21 PM GMT) -- Britain's increasingly active Serious Fraud Office has served notice it will push deeper into enforcement in financial services with offers of deferred prosecution agreements — but City lawyers say it will meet resistance from banks, which are already more tightly regulated than other industries.

The SFO's head of bribery and corruption, Ben Morgan, told Law360 this month that the agency's recent £497 million DPA with Rolls Royce PLC in a bribery case could act as a model for similar deals with financial firms facing fraud charges. Morgan noted that white-collar crime was still rife in the City.

But financial lawyers say DPAs, in which which criminal charges can be put on ice on condition the defendant agrees to fully cooperate and pay fines, do not have the same application in financial services.

“The Rolls Royce DPA was a significant success for the SFO, and there may well be more DPAs in the pipeline, but I don’t agree with Mr. Morgan that the tide is about to turn,” Elly Proudlock, counsel at WilmerHale, said. “We shouldn’t forget that, as things currently stand, it is very difficult in the U.K. to prosecute companies for anything other than failing to prevent bribery under section 7 of the Bribery Act.”

The Ministry of Justice has announced a review of corporate criminal laws intended to prevent economic crimes such as fraud, false accounting and money laundering and to punish perpetrators. It is too early in the process to predict what will happen, Proudlock said, but a change in the law is the only development likely to change attitudes in London.

“If the law is reformed so that it becomes easier to prosecute corporates for other economic offenses, then DPAs may become more commonplace, but right now the government is only in the early stages of that consultation process,” she said.

The financial sector is already bound by onerous reporting requirements regarding behavior by the Financial Conduct Authority and the banking watchdog the Prudential Regulation Authority. Lawyers say that between them the two bodies leave little room for criminal misconduct to materialize.

“In our experience, when financial services firms discover a problem, the issue is not whether to self-report but rather when and how,” said Guy Wilkes, financial enforcement partner at Mayer Brown International LLP.

So far only one bank has settled a case with the SFO via a DPA: Standard Bank PLC, a South African lender. Lawyers familiar with the case say they would be surprised if this became a regular event, despite a desire from the agency to see it happen.

“To the extent that there has been a change in culture within financial firms over recent years, this is less to do with DPAs and far more to do with regulatory developments such as the senior managers regime,” Proudlock said.

Financial firms have lived in the era of self-disclosure to the FCA for so long they fully understand the consequences — and leave little to chance, added Ian Hargreaves, financial services partner at Covington & Burling LLP. “They are well-versed and tend to always report,” he said.

In the Law360 interview, Morgan said he believed the lack of DPAs arose partly because British law firms were more defensive and less sophisticated under instruction than their U.S. counterparts when representing companies under investigation.

Morgan's boss, SFO director David Green, has said he wants to see the U.K. move toward vicarious liability to prosecute corporations, as used by U.S. authorities. Britain’s government is also mulling a “failure to prevent” offense, similar to the Bribery Act, alongside new tax evasion laws entering force.

However City attorneys questioned how useful DPAs had proved to be, and defended the British approach.

"Whether in-house or external lawyers, they take stock and consider the issues without necessarily immediately rolling over,” said Hargreaves. “I don’t think it’s an unsophisticated approach: companies have to be fairly balanced in the way they examine the issues as it’s not always clear on what the strategy should be.”

Some companies have not taken the DPA route and their punishment hasn’t been much worse, lawyers said.

“With DPAs you can manage the process better, and you can try and get more favourable press coverage through agreed press releases. However, in some cases the news of today simply becomes the fish and chip paper of tomorrow, ” Hargreaves said. “The benefits of DPAs may not be as obvious as the SFO would like at this point.”

Likewise, as the SFO forges ever closer ties with the U.S. Department of Justice as white collar probes become increasingly international, the SFO must acknowledge that firms face significant barriers to cooperate in the way the SFO wants, according to Wilkes.

“For example, volunteering information or documents to the SFO in the U.K., might attract the ire of overseas regulators who have concerns about data protection in their jurisdiction,” Wilkes said. “Similarly waiving privilege over internal investigation reports might put firms at risk of unrelated litigation from third parties elsewhere.”

There is also a big question mark over whether a DPA is a big-enough incentive for a company to self-report, London-based White & Case LLP partner Jonathan Pickworth said.

“If companies can be better encouraged to self-report wrongdoing it would shift the manpower and cost burdens of large scale and expensive investigations away from the taxpayer and onto the companies that are potentially at fault,” Pickworth said.

Lawyers agree that Green has revitalized the SFO as a tougher and more resourceful entity since taking over in 2012. But the recent swing towards DPAs hints at a return to the previous era, when companies were invited in for informal talks dubbed "fireside chats" before self-reporting, a practice Green explicitly wanted to move away from.

“However, it must be stressed that DPAs relate to deferred criminal prosecutions- not civil recovery orders," Hargreaves said. "DPAs are a sensible development if we are looking for realistic, commercial compromises rather than unduly aggressive cost-inducing proceedings which do not necessarily work in the best interests of the SFO or the businesses that are subject to criminal prosecutions."

-- Additional reporting by Melissa Lipman and Alex Davis. Editing by Ed Harris.
