More carrot, less stick? A transatlantic consideration of recent developments in corporate self-reporting

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Lloyd Firth from WilmerHale’s London Investigations and Criminal Litigation team considers recent developments in corporate self-reporting.

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On 5 April 2016, the Fraud Section of the US Department of Justice’s (DOJ) Criminal Division issued an enforcement plan and guidance (DOJ Guidance), setting out the steps that it is taking to intensify Foreign Corrupt Practices Act (FCPA) enforcement (see DOJ: The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance). Of these steps, one in particular has prompted discussion within the criminal defence community: the establishment of a one-year pilot programme that rewards companies for voluntary disclosure and co-operation, including the provision of up to a 50% reduction in the amount of any fine imposed and, in certain circumstances, the declination of a prosecution (the Pilot Programme).

This article compares certain aspects of the Pilot Programme to the corporate self-reporting regime currently in place at the UK’s Serious Fraud Office (SFO). It asks whether either regime meets the twin demands of a company faced with the decision whether to voluntarily self-report instances of wrongdoing: transparency (in what the prosecuting agency requires from a company looking for mitigation credit for voluntarily self-reporting) and certainty (over what credit a company can receive if it chooses to do so).

**Rationale?**

The stated purpose of the Pilot Programme is to encourage companies to disclose misconduct to “permit the prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered by or disclosed to law enforcement.” This dovetails neatly with Deputy Attorney General Yates’s memorandum dated 9 September 2015 (the Yates Memo) which made clear, amongst other things, that to be eligible for any co-operation credit, companies must provide the DOJ with all relevant facts about any individuals involved in corporate misconduct.

Both the Pilot Programme and the Yates Memo form part of the DOJ’s response to the criticism that it prosecutes companies in preference to senior individuals within those companies. In contrast, the SFO is often subject to the obverse criticism: that it all too rarely chooses to prosecute companies. Whilst the contrast in approach is in large part down to the differing laws on corporate criminal liability in each jurisdiction (the UK’s identification principle versus the US’s model of vicarious liability), the DOJ’s restated approach is already articulated in the UK’s Joint Prosecution Guidance on Corporate Prosecutions (see SFO: Guidance on corporate prosecutions) and Deferred Prosecution Agreements Code of Practice (see SFO: Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013). Both make clear that the “Prosecution of a company should not be seen as a substitute for the prosecution of criminally culpable individuals” and that a company must ensure that, as part of any self-report, it “does not withhold material that would jeopardise an effective investigation and, where appropriate, prosecution of implicated individuals.”

**Requirements?**

The DOJ Guidance sets out three requirements that a company must meet to qualify for credit for self-reporting under the Pilot Programme: voluntary self-disclosure; full co-operation; and timely and appropriate remediation. Aspects of each requirement are considered further below.

Before turning to these, however, it is worth reminding ourselves of the SFO’s approach to corporate self-reporting (see SFO: Corporate self-reporting). This was revised and restated in October 2012, shortly after the current SFO director David Green QC took up his post, replacing the previous guidance which had afforded companies an implicit guarantee that self-referral cases would be settled civilly wherever possible.

Under the SFO’s restated approach, once a company has self-reported, whether or not the SFO will (i) prosecute the company, (ii) seek to enter into a DPA or (iii) take no further criminal action (perhaps making use of a Civil Recovery Order (CRO) under the Proceeds of Crime Act 2002) will be governed by the Full Code Test in the Code for Crown Prosecutors, the Joint Prosecution Guidance on Corporate Prosecutions and the DPA Code.

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. For a self-report to be taken into account as a public interest factor tending against prosecution, the self-report must form part of a:

“genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice …
This will include making witnesses available and the disclosure of the details of any internal investigation.

A company’s failure to report wrongdoing within a reasonable time of the offending coming to light will be regarded as a public interest factor in favour of prosecution.

**Voluntary self-disclosure**

Voluntary self-disclosure is encouraged as part of the Pilot Programme. The DOJ Guidance provides that, for a company to receive credit for a voluntary disclosure of wrongdoing under the Pilot Programme, it must, amongst other things, disclose the conduct reasonably promptly after becoming aware of it and disclose all relevant facts known to it, including relevant facts about any implicated individuals. Both these requirements also serve as public interest factors tending against prosecution in the UK.

**Full co-operation**

The status of documents that benefit from legal professional privilege (LPP) under the Pilot Programme is dealt with categorically:

"Eligibility 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."

The position in respect of such documents in the context of a self-report in the UK is equivocal. The SFO's published approach to self-reporting makes no reference to LPP and nor does the Joint Prosecution Guidance. The DPA Code addresses the position only obliquely, unhelpfully stating that: "The Act [the Crime and Courts Act 2013] does not, and this DPA Code cannot, alter the law on legal professional privilege."

The SFO's public pronouncements on whether a company is required to waive LPP to be regarded as co-operating fully offer similarly little clarity or certainty. Speaking recently at the European Compliance and Ethics Institute (see SFO: Speech to compliance professionals), the SFO's General Counsel stated:

"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."

Such ambiguous statements suggest that, despite the legal position as set out in the DPA Code, there may be circumstances in which companies will be expected to waive LPP to qualify for alternatives to prosecution, such as DPAs. It is questionable whether such a position is ultimately tenable. The SFO will be keenly aware of the legal challenges which engulfed the DOJ following the issuance of the *Thompson Memorandum* (in 2003) and the *McNulty Memorandum* (in 2006); and which ultimately forced the DOJ to restate its position in the *Filip Memorandum* (in 2008), making clear that eligibility for co-operation credit is not predicated upon a waiver of LPP (as adopted by the DOJ Guidance).

**Timely and appropriate remediation**

In contrast to the UK’s Joint Prosecution Guidance, which simply states that, “the existence of a genuinely proactive and effective corporate compliance programme” is a public interest factor tending against prosecution, the DOJ Guidance adds some helpful flesh to the bones of what an effective compliance programme looks like in practice. It emphasises the financial aspects of a compliance programme, including whether the company dedicates "sufficient resources" to its compliance function, how a company’s compliance personnel are compensated compared to other employees and how compensation at the company more generally is affected by both "disciplinary infractions and failure to supervise adequately."

**Reward?**

What then are the benefits on offer to a company that has voluntarily self-disclosed misconduct, fully co-operated and remediated in a timely and appropriate manner? In such cases, the DOJ:

- "May accord up to a 50% reduction" off the fine range.
- "Generally should not require" the appointment of a monitor.
- "Where those conditions are met ... will consider a declination of prosecution."

The position in the UK is markedly different. It is the SFO's stated policy not to "give any advice on the likely outcome of a self-report until the completion of that process." Those companies who self-report and for whom the public interest weighs against prosecution and in favour of resolution by way of a DPA, can only expect a one-third discount in financial penalty, that is, a discount equivalent to that which would be afforded by an early guilty plea.

The Pilot Programme 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 co-operates and remediates. This is in stark contrast to the DPA Code, under which a company's failure to notify the wrongdoing within a reasonable time of the offending conduct coming to light is a public interest factor in favour of prosecution, notwithstanding any subsequent co-operation.

The distance between the SFO's approach to self-reporting and that of the DOJ is significant and, with the issuance of the Pilot Programme, appears to be widening. Whilst the DOJ Guidance remains far from definitive as to what credit a company will receive for self-reporting, it at least offers the prospect of a clearly defined incentive. The SFO on the other hand offers very little incentive for a company to self-report. In a world in which multinational companies increasingly operate across multiple jurisdictions (including the US), this approach may well prove counterproductive. The SFO may ultimately find itself compelled to soften its position and guarantee that, in the light of a voluntary self-report, at least some consideration will be given to resolving corporate misconduct by means of a DPA or a CRO.

**Conclusion**

Neither the Pilot Programme nor the SFO's guidance offer companies absolute certainty as to the credit that they can expect to receive. The wording of the Pilot Programme (emphasis added) "may accord up to a 50 percent reduction"; "cases generally should not require the appointment of a monitor"; and "will consider a declination of prosecution" appears carefully chosen so as not to bind the DOJ's hands when it comes to making a decision as to what credit a company should receive, whilst the SFO's guidance offers even less certitude: "Self-reporting is no guarantee that a prosecution will not follow. Each case will turn on its own facts."

For those companies in the UK's regulated sector, and their equivalents in the US, who are under a positive obligation to disclose to the regulator anything which the regulator would reasonably expect notice, there is clearly a much reduced scope for discretion as to whether to self-report wrongdoing. Companies outside the regulated sector, however, are faced with a choice; one that is laid bare by the Pilot Programme Guidance:

"Nothing in the Guidance is intended to suggest that the government can require business organizations to voluntarily self-disclose, cooperate, or remediate. Companies remain free to reject these options."

Given that a company will potentially be inviting the commencement of a formal criminal investigation by voluntarily self-reporting, it continues to remain uncertain whether the benefits of doing so outweigh the risks.