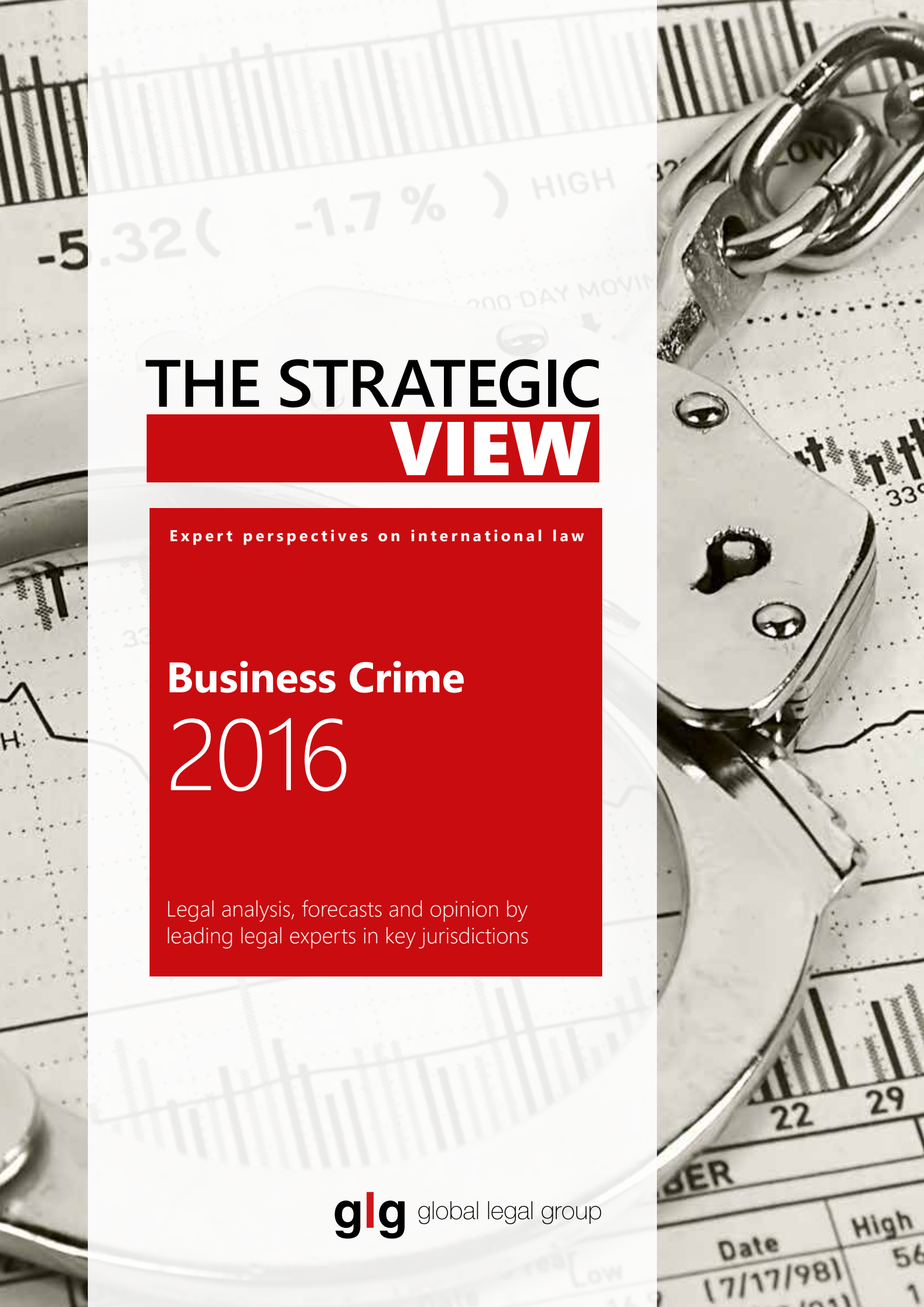

# THE STRATEGIC VIEW

Expert perspectives on international law

## Business Crime 2016

Legal analysis, forecasts and opinion by leading legal experts in key jurisdictions

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## Business Crime 2016

Contributing Editors
**Ryan Junck and Keith Krakaur, Skadden, Arps, Slate, Meagher & Flom LLP**

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TABLE OF CONTENTS

3 **PREFACE**
**Ryan Junck & Keith Krakaur** Skadden, Arps, Slate, Meagher & Flom LLP

5 **NEW CORPORATE CRIMINAL OFFENCES**
**Jonathan Cotton & Amy Russell** Slaughter and May

10 **AN INSPECTOR CALLS: DO YOU NEED A LAWYER?**
**Tim Thompson & Gareth Minty** Mishcon de Reya LLP

15 **ARGENTINA**
**Manuel M. Beccar Varela & Francisco Zavalía** Estudio Beccar Varela

21 **AUSTRALIA**
**Stephanie Wee & Ghassan Kassisieh** Gilbert + Tobin

27 **BELGIUM**
**Stefaan Loosveld & Gert-Jan Hendrix** Linklaters LLP

32 **BRAZIL**
**Carina Quito & Alice Christina Matsuo** Sica & Quito Advogados

37 **BRITISH VIRGIN ISLANDS**
**Martin S. Kenney** Martin Kenney & Co., Solicitors

43 **CHINA**
**Bradley Klein & Steve Kwok** Skadden, Arps, Slate, Meagher & Flom LLP

48 **CYPRUS**
**Andreas Michaelides** Michaelides & Michaelides

53 **GERMANY**
**Dr. Christian Pelz & Dr. Martin Schorn** Noerr LLP

58 **ITALY**
**Roberto Pisano** Studio Legale Pisano

64 **PORTUGAL**
**Paulo Saragoça da Matta & Nuno Arêde de Carvalho**
Saragoça da Matta & Silveiro de Barros – Sociedade de Advogados RL

69 **ROMANIA**
**Madalin Enache & Octavian Popescu** Mușat & Asociații

74 **RUSSIA**
**Alexander Khazov** Khazov, Kashkin & Partners Legal Services

80 **SPAIN**
**Mar de Pedraza Fernández & Paula Martínez-Barros Rodríguez**
De Pedraza Abogados, S.L.P.

86 **SWITZERLAND**
**Flavio Romerio & Roman Richers** Homburger

92 **TAIWAN**
**Hung Ou Yang** Brain Trust International Law Firm

96 **UKRAINE**
**Volodymyr Bogatyr** BOGATYR & PARTNERS

102 **UNITED KINGDOM**
**Peter B. Pope & Nancy C. Jacobson** Jenner & Block

108 **USA**
**Keith Krakaur & Ryan Junck** Skadden, Arps, Slate, Meagher & Flom LLP

**Peter B. Pope**
Jenner & Block

**Nancy C. Jacobson**
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# UNITED KINGDOM

Peter B. Pope and Nancy C. Jacobson review business crime in the United Kingdom; focusing on the Bribery Act 2010, cyber crime and deferred prosecution agreements

**1.** What trends, in terms of activity or focus, have you seen in the prosecution of business crimes in your jurisdiction in the last 12 months?

The last 12 months saw the first conviction under Section 7 of the Bribery Act 2010, which makes an organisation liable for failing to prevent bribery intended to benefit the organisation. Section 7 offences were also the subject of the U.K.'s first two Deferred Prosecution Agreements (DPAs). (See question 9 for a discussion of DPAs.) The Serious Fraud Office (SFO) reports it is pursuing bribery allegations against Alstom, Rolls Royce, and Unaoil among other companies. For offences committed on or after 1 July 2011, Section 7 of the Bribery Act is one of the tools available to prosecutors. Section 7 is in effect a strict liability offence, making it easier to prosecute corporations. Earlier conduct is covered by laws that predated the Bribery Act. Under those prior laws, it is harder to establish corporate criminal liability because, for offences that require intent, prosecutors must show that the company's "controlling mind" had a role in the misconduct.

The Section 7 conviction and DPAs helped raise the standing of the SFO in a year when its future was a topic of speculation. There was extensive public discussion in early 2016 about placing the SFO under the direction of the National Crime Agency (NCA). Indeed, in May 2015, the NCA established

> Last year's DPAs and conviction under Section 7 of the Bribery Act [...] reflect the government's interest in pursuing corporations when the legal framework is conducive to it

an International Corruption Unit focused on the SFO's traditional targets of bribery and money laundering. However, the proposal to merge the SFO and NCA has not been publicly advanced, and SFO director David Green was reappointed in February 2016 for another two-year term.

**2.** Are enforcement agencies particularly focused on any specific industries or crimes?

As noted above, corporate bribery liability was a focus of the past year's enforcement. Along with Bribery Act enforcements, 2016 saw the sentencing of a small company convicted of bribery under the Prevention of Corruption Act 1906, for offences that predated the Bribery Act. Companies were also penalised for bribery where no corporate criminal liability was established, as the Financial Conduct Authority (FCA) reached settlements with two firms for controls failings related to bribery risks.

Another growing focus for law enforcement is cyber crime. The number of cyber crime prosecutions is small but growing – up from 45 in 2014 to 61 in 2015. A National Cyber Security Plan, announced in November 2015, commits to increase cyber security funding to £1.9 billion by 2020, and includes the launch of a National Cyber Security Centre and the enactment of an Investigatory Powers Bill to improve detection and investigation. The City of London Police has teamed with the Manhattan District Attorney's office to form a cooperative initiative to prevent cyber crime.

Enforcement agencies have continued to focus on the financial sector in 2016, with additional trials related to LIBOR rigging and new criminal charges for EURIBOR manipulation. The LIBOR trials had mixed results, with six defendants acquitted in January 2016 and three convicted in July 2016, along with one co-defendant who pled guilty and two who will be retried because jurors could not reach a verdict.

The engineering and aerospace industry has been a target of anti-bribery enforcement, with trials starting soon on charges related to Alstom's projects in India, Poland, and Tunisia and an investigation into Airbus's use of third parties.

**3.** Are enforcement agencies more or less focused on pursuing cases against corporations or individuals?

Because the "controlling mind" doctrine is a high hurdle to convicting corporations, many business crimes result in individual prosecutions only. Last year's DPAs and conviction under Section 7 of the Bribery Act, however, reflect the government's interest in pursuing corporations when the legal framework is conducive to it. Two new proposed offences would make it easier to convict companies for financial crimes other than bribery and would likely lead to many more corporate indictments or other dispositions. (See question 5.)

Increased prosecution of companies, however, is unlikely to translate into fewer enforcement actions against individuals. SFO Director David Green has said that "the prosecution of a company should never be seen as a substitution for the prosecution of culpable individuals". A new Senior Manager Regime implemented in the banking industry is intended to increase regulators' power to hold senior managers accountable for misconduct in their areas of responsibility.

**4.** Does the legal framework concerning the prosecution of business crimes allow for extraterritorial enforcement? Are such matters being pursued?

Extraterritorial jurisdiction is expressly provided by the Bribery Act 2010, the Fraud Act 2006, and the Terrorism Act 2006. Absent a statute providing extraterritorial jurisdiction, an offence must have a "substantial connection" with England or Wales to create jurisdiction. The Proceeds of Crime Act 2002 has been interpreted to allow offences committed abroad to be treated as predicate crimes for money laundering that occurs in the U.K.

The SFO has aggressively pursued foreign bribery, investigating and prosecuting conduct in Africa, Europe, the Middle East, and Asia. If proposed criminal tax legislation comes into effect, its territorial reach would extend to any financial institution, corporation, or person with a U.K. nexus. (See question 5.)

**5.** What judicial or legislative developments have impacted the prosecution of business crimes in your jurisdiction in the last 12 months? Are there any significant proposals for reform of the legal framework that governs business crimes in your jurisdiction?

Business crime enforcement in the last year was less about new legislative developments than about fulfilling the potential of prior legislation. Enough time has passed for the SFO to uncover, investigate, and prosecute bribery offences committed since the Bribery Act came into effect in July 2011, and the SFO showed the teeth of Section 7 in one successful prosecution and two DPAs. The government has been empowered to offer DPAs since 2014.

One significant move in 2016, aimed at money laundering and tax evasion, was the publication in June of a beneficial ownership registry for U.K. businesses. At the Anti-Global Corruption Summit in May, then Prime Minister Cameron announced that foreign companies owning property in the U.K. would also have to publicly register their beneficial owners and that no foreign company would be able to buy U.K. property or bid on U.K. central government contracts without joining the registry.

Looking ahead, there are significant proposals to expand the scope of business crime liability in the coming year:

- Draft legislation has been published for a new offence of failure to prevent facilitation of tax evasion. Modelled on Section 7 of the Bribery Act, the proposed law would make a corporation liable when someone providing services for or on behalf of the corporation facilitates tax evasion. The proposed offence will apply against any corporation, wherever located, for failure to prevent facilitation of U.K. tax evasion. A corporation could be liable for failure to prevent facilitation of foreign tax evasion if any step in the facilitation occurred in the U.K.
  As with the Bribery Act, preventive measures may shield a company from liability under the proposed law. The Bribery Act allows a company to avoid liability by having "adequate" procedures to prevent bribery. The draft law provides a similar defence to companies with "reasonable" procedures to prevent facilitation of tax evasion. The law is expected to come into force in 2017, but tax practitioners have urged the government to delay its implementation while companies develop appropriate compliance procedures.
- At the Global Anti-Corruption Summit, then Prime Minister Cameron revived consideration of a wider "failure-to-prevent" offence, applicable to economic crime such as fraud and money laundering. Such legislation was considered previously and then shelved in autumn 2015, with the explanation that there had been no prosecutions under Section 7 of the Bribery Act, on which the proposed law was based. The government is consulting on the renewed proposal. If enacted, it will broadly expand the reach of corporate criminal liability.
- Taking aim at lawyers, accountants, and financial advisors, a recent proposal from HM Revenue & Customs (HMRC) would penalise those who "design, market or facilitate" tax avoidance schemes that HMRC rejects. Under the proposal, when a tax avoidance arrangement is defeated, every "enabler" in the chain would be subject to penalties: the promoter who designed the scheme; the financial adviser who marketed it; and the lawyers and bankers who facilitated its implementation. The proposal was published for consultation on 17 August 2016.

> "[T]here are significant proposals to expand the scope of business crime liability in the coming year"

**6.** How common is it for enforcement agencies in your jurisdiction to exchange information and cooperate internationally with other agencies? What are the consequences of cross-border cooperation on prosecutions of entities and individuals in your jurisdiction?

U.K. enforcement agencies cooperate extensively with authorities in other jurisdictions. The SFO has a strong relationship with U.S. agencies, with which it has partnered in its LIBOR investigations and in the Standard Bank case that resulted in the first DPA, among others. The United States

Federal Bureau of Investigation currently has a special agent seconded to the National Crime Agency. It remains to be seen whether closer working relationships lead to the adoption in the U.K. of techniques now common in the U.S. in white-collar cases, including, for example, having cooperating witnesses record ongoing criminal conversations. In the U.K. such a cooperator is known as a Covert Human Intelligence Source (CHIS). The use of a CHIS is highly regulated by the Regulation of Investigatory Powers Act 2000 (RIPA).

Information sharing for investigations and prosecutions is formally provided for by U.K. statutes including the Serious Crime Act 2007, the Serious Organised Crime and Police Act 2005, and the Financial Services and Markets Act 2000. U.K. agencies also use Memoranda of Understanding to share evidence, for example between the FCA and U.S. Securities and Exchange Commission.

NCA director-general Lynne Owens publicly raised concerns that Brexit could jeopardise the U.K.'s intelligence-sharing and cooperation with the E.U. However, Owens said, if cooperation with other authorities can no longer be met through EU mechanisms, "we will find others". Thus, while Brexit will affect some existing formal cooperation mechanisms, it seems likely that the U.K. will negotiate bilateral or multilateral agreements to replace such EU arrangements as the Convention on Mutual Assistance in Criminal Matters and the European Arrest Warrant scheme.

Cooperative investigations can lead to prosecutions in multiple jurisdictions, thus reaching corporate defendants that would be hard to convict in the U.K. under the "controlling mind" doctrine. In the LIBOR cases, for example, banks have paid significant fines to settle U.S. claims while U.K. prosecutors focus on individuals.

Cooperative investigations can produce more information for U.K. prosecutors. For example, with limited exceptions, RIPA prohibits the introduction of wiretapped conversations, and other telecommunications intercepted under a U.K. warrant, into evidence in the U.K. In contrast, U.S. prosecutors have used wiretaps as admissible evidence in white-collar cases for years. As investigations become more international, will U.K. prosecutors seek to introduce into evidence conversations that were lawfully intercepted

by their law enforcement partners abroad, and how would U.K. courts react to such coordinated efforts?

**7.** What unique challenges do entities or individuals face when enforcement agencies in your jurisdiction initiate an investigation?

Limitations on corporate liability often put investigative emphasis in the U.K. on individuals. Unless the government can connect corporate misconduct to a "controlling mind" of the company, its only prosecutorial recourse for most business crimes is to pursue those directly involved in misconduct. Individuals targeted in government investigations have the right to silence when interviewed. However, a court may later draw negative inferences from the interviewee's silence or from failure to mention facts later used in defence.

For corporations, the Bribery Act enforcements and the proposed new failure-to-prevent offences raise the stakes of investigations and introduce new uncertainties. The SFO has stressed the importance of cooperating with government investigations, but companies fear uncertain results from cooperation. With only two DPAs and a prosecution, it is difficult for practitioners to accurately predict the benefits of self-reporting, and there has been considerable discussion on this topic at conferences and in publications. The SFO has set a high bar for cooperation with no guarantee that a cooperating company will be offered a DPA.

To receive credit for cooperation, companies are advised by the SFO to disclose misconduct soon after it is identified and to share internal witness accounts with government investigators. In a speech to compliance professionals, SFO General Counsel Alun Milford said the SFO will view "false or exaggerated claims of privilege" as uncooperative, and will view it as a mark of cooperation when a company provides witness accounts despite a well-made-out claim of privilege.

**8.** Do enforcement agencies in your jurisdiction provide incentives for individuals or entities to self-report a business crime or otherwise provide assistance to the government? If so, what factors should individuals or entities consider when assessing whether to self-report a business crime or cooperate with a government investigation?

A company is unlikely to receive a DPA unless it voluntarily discloses misconduct, although self-reporting does not guarantee a DPA. The DPA Code of Practice makes company's cooperation a central factor, but not the only factor, in the decision of whether to prosecute. In a speech the day after the first DPA was approved, the SFO's Joint Head of Bribery and Corruption, Ben Morgan, described "genuine cooperation" as "prompt reporting, scoping and conducting your own investigation in conjunction with [the SFO]".

"With only two DPAs and a prosecution, it is difficult for practitioners to accurately predict the benefits of self-reporting, and there has been considerable discussion on this topic at conferences and in publications"

The government offers no financial incentives to whistleblowers. The Home Office and the Department of Business, Innovation, and Skills (BIS) recently assessed the use of whistleblower rewards in cases of bribery and corruption, and decided not to offer incentives. One question is the extent to which U.K. prosecutors will reap collateral benefits from incentives given to U.S. whistleblowers whilst working in parallel investigations with U.S. authorities.

**9.** Do enforcement agencies in your jurisdiction use non-prosecution agreements ("NPA") or deferred prosecution agreements ("DPA")? If so, how do such agreements work in practice and what can entities or individuals do to reach an NPA or a DPA with enforcement agencies? If not, do you believe it is likely that such agreements will become part of the legal framework in the next five years?

DPAs have been available to U.K. prosecutors since February 2014, when the DPA Code of Practice was finalised. DPAs in the U.K. are available to companies only, not to individuals. The government, not the company, must initiate DPA negotiations. A DPA must be approved by a court that finds that it to be in the "interests of justice", with "fair, reasonable, and proportionate" terms. Under the DPA Code, financial penalties provided by a DPA must receive a discount equivalent to that afforded by an early guilty plea.

The first DPAs, both for offences under Section 7 of the Bribery Act, were made with Standard Bank in December 2015 and with an unnamed company in July 2016. Both companies self-reported their misconduct and then cooperated with the government's investigation. In accordance with the DPA Code, Standard Bank's penalty was discounted by one third, the percentage that the sentencing laws provide for an early guilty plea to bribery. The recipient of the second DPA, however, received a greater discount than would have been available to a company being prosecuted. The judge noted that a company's "openness must be rewarded and be seen to be worthwhile". The adequacy of DPA discount incentives has been a recent topic of discussion at conferences and in publications.

NPAs are not available in the U.K.

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