

Overseas Banks Legal & Compliance Forum

Welcome

28 January 2016

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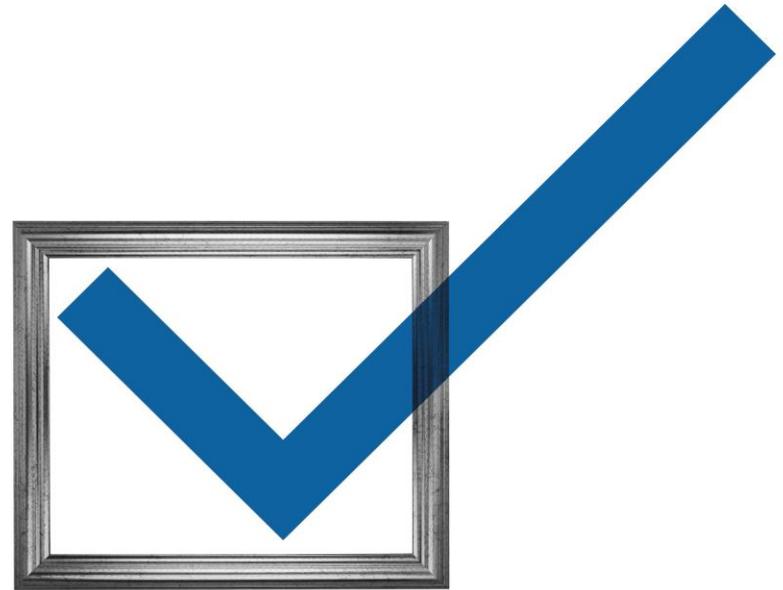
Deferred Prosecution Agreements

An introduction

28 January 2016

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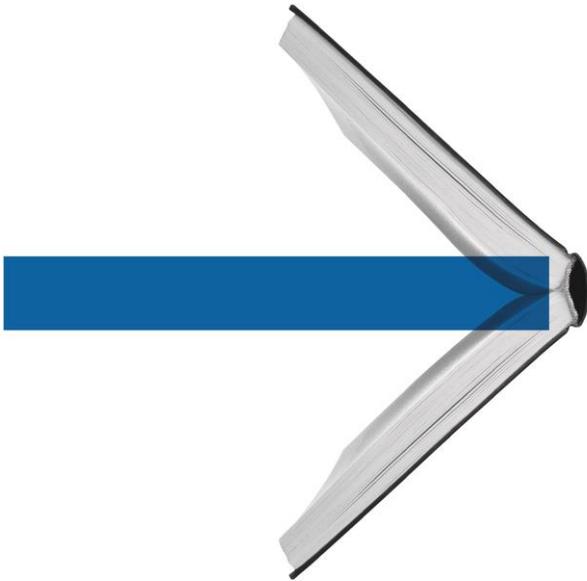
Deferred Prosecution Agreements: the US regime

Overview (1)

- Corporate criminal liability models:
 - US: respondeat superior;
 - UK: controlling mind (“identity principle”);
 - proposed “failure to prevent” offences.
- DPAs are a well-developed mechanism in the US and have been regularly used as a prosecution tool;
- DPAs are an agreement between the Government and defendant that if certain conditions are met, a filed criminal case will not be prosecuted;
- between 2000 and 2013 \$37.2bn recovered from companies seeking resolution of cases via a DPA in the US; and
- administered by Department of Justice on criminal matters and Securities and Exchange Commission in securities enforcement actions.

Deferred Prosecution Agreements: the US regime

Overview (2)



Three key differences between the US and UK DPA regime:

1. in the US DPAs are available to corporates and individuals, whereas in the UK DPAs are only available to corporates;
2. in the UK the terms of a DPA need to be approved via a two stage judicial process; and
3. the DPA process is firmly codified in the UK.

Deferred Prosecution Agreements: the US regime

Which offences can DPAs apply to?

- initially used with individuals, but now used in matters involving business organisations across a wide spectrum of alleged federal crimes;
- conviction often disqualifies the organisation or individual from participating in Government contracts – Federal Acquisition Regulations and Foreign Corrupt Practices Act; and
- conviction or judgment can also lead to an order prohibiting general business operations.

First UK DPA: ICBC Standard Bank PLC

First Deferred Prosecution Agreement in the UK

Background

- DPA approved on 30 November 2015 between the SFO and ICBC Standard Bank Plc (the “Bank”);
- first time a DPA has been used in England and Wales to settle criminal charges, and the first time a prosecution has been brought against a commercial organisation for failing to prevent bribery under the Bribery Act;
- the rapid, decisive and appropriate response of the Bank’s global leadership to the conduct was critical in enabling it to agree a DPA.

First Deferred Prosecution Agreement in the UK

The terms of the DPA

The SFO will suspend its prosecution of the Bank under the Bribery Act for three years.

The prosecution will be recommenced within three years if the Bank does not:

- pay compensation of just over \$7m (including interest) to the Government of Tanzania;
- pay \$25.2m in disgorged profits and penalties to HM Treasury;
- pay the SFO's reasonable costs of £330,000;
- co-operate with the ongoing and future investigations; and
- review and upgrade its anti-bribery and corruption policies according to independent recommendations.

First Deferred Prosecution Agreement in the UK

Lessons for corporates

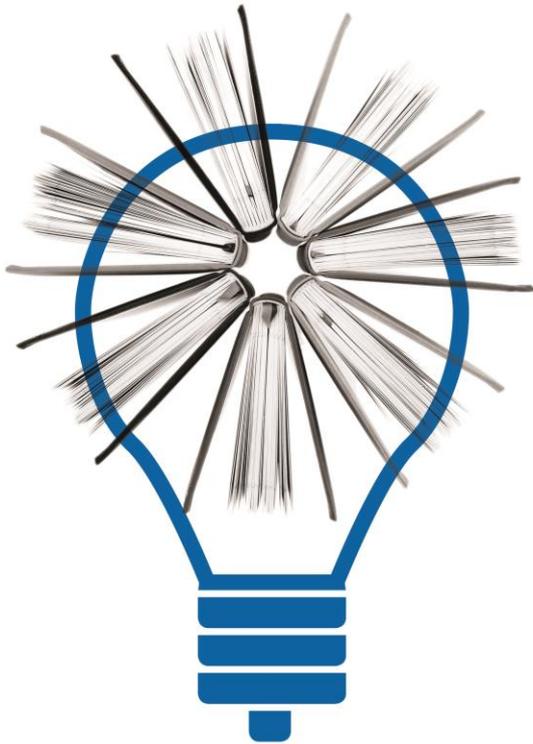
When criminal conduct is discovered, it is imperative for a corporate to:

- launch an investigation; and
- consider self reporting as soon as possible.

The SFO described the Bank's co-operation as "significant" and this was a factor that enabled them to reach a DPA.

First Deferred Prosecution Agreement in the UK

The future?



- defining moment in corporate criminal law;
- company that discovers criminality can potentially reach an early resolution and avoid prosecution;
- first of many DPAs and the second DPA is expected imminently.

Questions?

EVERSHEDS

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Senior Managers and Certification Regime

28 January 2016

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FCA and PRA Senior Managers and Certification Regime - update

Senior Managers and Certification Regime

Overview – UK relevant firms

- ❑ New regime for Senior Managers
 - 17 new SMF roles
 - Prescribed responsibilities and business activities assigned to individuals
- ❑ New Certification Regime
 - Applies to functions that can cause 'significant harm to a firm or its customers'
 - Firms must assess and certify that an individual is fit and proper
- ❑ New Conduct Rules
 - 4 Senior manager conduct rules
 - 5 Individual conduct rules
- ❑ New Processes
 - Statements of Responsibility
 - Responsibilities Map
 - Handover requirements for joiners and leavers
 - Regulatory References
 - Fit and Proper Reviews
 - Duty of Responsibility

UK Branches of Overseas Banks

Update: UK branches of foreign banks

What's new?

- In December 2015, the FCA published PS 15/30 *Strengthening accountability in banking: UK branches of foreign banks (final rules)*
 - Builds on previous publications with some minor, technical amendments to improve clarity
 - HM Treasury legislation that formally extends the regime to incoming branches has come into force
 - FCA's aim has been to cover individuals who could affect the FCA's objectives, wherever they are geographically based

UK Branches of EEA banks

Overview

- ❑ Only two FCA SMFs
 - ❑ EEA Branch Senior Manager Function (SMF 21)
 - ❑ MLRO (SMF 17)
- ❑ No prescribed responsibilities
- ❑ Fitness and propriety – applies in some circumstances
- ❑ Responsibilities Map – SYSC set out what the EEA branch responsibilities map should include
- ❑ Statements of Responsibilities
- ❑ Certification Regime
- ❑ Conduct Rules

UK Branches of non-EEA banks

Overview

- ❑ The following SMFs - **where applicable**
 - Chief Finance Function (SMF 2)
 - Chief Risk Officer (SMF 4)
 - Head of Internal Audit (SMF 5)
 - Group Entity Senior Manager Function (SMF 7)
 - Head of Overseas Branch Function (SMF 19)
 - FCA Executive Director (SMF 3)
 - FCA Compliance Oversight (SMF 16)
 - FCA MLRO (SMF 17)
 - FCA Other Local Responsibility Function (SMF 22)
- ❑ Tailored list of 12 prescribed responsibilities
- ❑ Certification Regime
- ❑ Conduct Rules
- ❑ Responsibilities Maps and Statements of Responsibilities

What next?

In October 2015, HM Treasury published a paper setting out changes to the regime. We are waiting to see how these will be reflected in the final rules:

- Reporting of breaches of Conduct Rules – consultation
- Regulatory References – consultation closed in December. Policy Statement due in Q1 2016
- Presumption of Responsibility now Duty of Responsibility

□ Upcoming Dates

- 8 February 2016 – grandfathering forms
- 7 March 2016 – SM&CR compliance with Conduct Rules
- 7 March 2017 – wider application of Conduct Rules (to all staff)