Bloomberg BNA

Prevention of Corporate Liability

Current Report™

 ISSN 1067-6104

Focus
Corporate Compliance

U.K. Guidelines Emphasize Importance of Robust Programs

By Bret Campbell, Adam Lurie, Joseph Moreno and Karen Woody

In January, the Sentencing Council of England and Wales issued its first set of guidelines applicable to corporate white collar offenders.[1] The guidelines, which cover fraud, bribery and money laundering offenses committed by companies, will apply to sentences imposed on or after Oct. 1, regardless of the date of the offense. Given the high-profile fraud and bribery investigations currently being conducted by the U.K. Serious Fraud Office, a U.K. court may soon be called on to apply the guidelines in high-profile matters.

The guidelines provide an unambiguous message to companies regarding the importance of corporate compliance programs, particularly anti-corruption and anti-money laundering systems. The guidelines are clear that companies without these programs are more likely to be prosecuted criminally and receive stiffer sentences. Accordingly, corporations subject to the criminal jurisdiction of the U.K. should review the scope and status of their compliance programs under the guidelines.

Structure Similar to U.S. Version

The guidelines are not mandatory. Instead, they serve as definitive guidance to judges and must be followed "unless the court is satisfied that it would be contrary to the interests of justice to do so."[2] Thus, the guidelines are similar to the U.S. Sentencing Guidelines which, under recent U.S. Supreme Court precedent, are only advisory for U.S. federal courts.[3]

Corporations subject to the criminal jurisdiction of the U.K. should review the scope and status of their compliance programs under the guidelines.

The Sentencing Council recognized that monetary penalties are the primary criminal punishment available for use against corporate offenders and indicated that its central goal was to provide a consistent approach in calculating fines.[4] The three main principles underpinning the guidelines are the removal of any ill-gotten profits (disgorgement), the imposition of a fine with a "real economic impact" on the offender and its shareholders (punishment) and deterrence.[5] To implement these three principles, the guidelines establish a multi-step approach to sentencing:

Compensation Order: The court first should consider making a compensation order requiring the offender to pay for any personal injury, loss or damage resulting from the offense. If the offender has limited assets available, payment of compensation to an injured party should take precedence over the assessment of penalties.

Confiscation Order: The court next should consider issuing a confiscation order requiring the offender to surrender any benefit obtained as a result of the offense. Confiscation may be sought at the request of the prosecutor or ordered sua sponte.

Determination of Offense Category: The court then determines the offense category based on an evaluation of "culpability" and "harm."[6] Culpability of a company is ranked using three categories—High, Medium or Lesser—based on the court's assessment of the corporate defendant's role and motivation in the offense. Willful obstruction, coercion and intentional targeting of vulnerable victims are all factors likely to result in a higher culpability ranking. Harm is calculated on the basis of the monetary values involved in the crime, with reference to the underlying offense. In fraud cases, harm will normally be calculated as the actual or intended gross gain to the offender. In bribery cases, harm is calculated as the gross profit from the contract obtained, retained or sought as the result of the corruption. For money laundering offenses, harm will normally be calculated as the amount laundered. Where actual or intended gain cannot be established, the court may use the amount that was likely to be achieved under the circumstances.

Determination of Fine Range: The court establishes a starting point for

(continued on page 30)

The authors are members of Cadwalader, Wickersham & Taft LLP's White Collar and Government Enforcement Group. Lurie is a member of the U.S. Sentencing Commission's Practitioners Advisory Group, and Moreno is admitted as a solicitor in England and Wales.

[1] "Fraud, Bribery and Money Laundering: Corporate Offenders Definitive Guideline," available at http://sentencingcouncil.judiciary.gov.uk/docs/Fraud_Definitive_Guideline_(web).pdf. Separate guidelines applicable to individual offenders are expected to be released by the Sentencing Council later this year.

[2] Section 125(1), Coroners and Justice Act (2009).

[3] See *United States v. Booker*, 543 U.S. 220 (2005) (rendering the sentencing guidelines "effectively advisory" rather than mandatory).

[4] "Fraud, Bribery and Money Laundering: Response to Consultation," January 2014, available at http://sentencingcouncil.judiciary.gov.uk/docs/Fraud_Response_to_Consultation_(web).pdf.

[5] Guidelines, supra note 1 at 8.

[6] Id. at 5.

  BACM ISSN 1067-6104

(continued from page 32)

the fine range by using the culpability ranking and harm value, and then adjusts the range upward or downward through the application of certain enumerated aggravating and mitigating factors. Aggravating factors can include, among others, substantial harm having been caused to markets or governments, crimes that occur across borders, previous convictions and the establishment of a corporate subsidiary for the sole purpose of committing fraudulent activity.[7] Mitigating factors can include, among others, the lack of previous convictions or crimes, corporate cooperation with investigators, new management and little or no actual gain from the offense.[8] Using the guidelines' matrix, fines can range from 20 percent to 150 percent of the harm amount for lesser-culpability offenders, 100 percent to 300 percent for medium-culpability offenders and 250 percent to 400 percent for high-culpability offenders.

Fulfillment of Guidelines' Principles: The court has discretion to adjust the fine upward or downward to fulfill the guidelines' principles of disgorgement, punishment and deterrence. Factors for consideration include the company's ability to make restitution to victims, the impact of the fine on the company's ability to implement an effective compliance program, and the impact of the fine on the employment of staff, service users, customers and the local economy.[9] The guidelines accept the possibility that in egregious cases a fine may result in the insolvency of the defendant—the equivalent of a corporate death sentence. Conversely, companies that cooperate by assisting the prosecutor or investigator may be considered for a reduced fine.

Marshaling arguments that are tied to the guidelines' principles, while downplaying aggravating factors and emphasizing mitigating factors, are likely to be the most productive strategies companies can pursue in negotiating for favorable DPA terms.

A Deferred Prosecution Agreement is a court-approved agreement made between a prosecutor and defendant, under which a criminal prosecution is deferred pending compliance with certain terms and conditions. The use of DPAs in resolving criminal cases against corporations accused of financial fraud, bribery or similar financial crimes was introduced in the U.K. in April 2013.[10] Under the new law, negotiated DPA conditions may include the payment of financial penalties that should be comparable to the fine that likely would be imposed following a conviction after a guilty plea. U.K. prosecutors were authorized to begin using DPAs as of Feb. 24.[11]

Guidelines Help Predict Penalties

Because a DPA is not a criminal conviction for purposes of the guidelines, reference to the guidelines is not mandatory for judges reviewing DPA terms and conditions that have been agreed to by prosecutors and defendants. Notwithstanding this limitation, the Sentencing Council indicated that it anticipated the use of DPAs in the U.K. in the future and that it intended the guidelines to assist judges, prosecutors and defendants in the calculation of negotiated DPA penalties.[12] Accordingly, companies should look to the guidelines both as a predictor of the range of potential DPA penalties and as the roadmap that U.K. prosecutors and courts will follow in determining how severely or leniently to treat them during negotiations. Marshaling arguments that are tied to the guidelines' principles, while downplaying aggravating factors and emphasizing mitigating factors, are likely to be the most productive strategies companies can pursue in negotiating for favorable DPA terms.

Corporate compliance programs are likely to play a central role in both negotiated DPA resolutions and judicial sentencing under the guidelines. First, from a U.K. prosecutor's view, the existence of a robust compliance program should be given weight in deciding whether to resolve a criminal investigation through a DPA. The SFO's Code of Practice for Deferred Prosecution Agreements states that one factor to be considered in favor of pursuing a DPA is ''the existence of a proactive corporate compliance program both at the time of offending and at the time of reporting but which failed to be effective.''[13] In contrast, pursuing a criminal prosecution is appropriate where the crime was ''committed at a time when [the offender] had no or an ineffective compliance program'' and ''has not been able to demonstrate a significant improvement in its compliance program since then.''[14]

Prevention Can Pay Off

Second, the guidelines highlight the importance of anti-corruption and anti-money laundering compliance systems by directing courts to evaluate these programs during their culpability and harm assessments in the sentencing phase. In assessing culpability in bribery cases, a company can receive a ''lesser culpability'' determination if the court finds ''some effort made to put bribery prevention measures in place but insufficient to amount to a defense.''[15] Alterna-

[7] Id. at 6.

[8] Id.

[9] The guidelines do not distinguish between the culpability of management and that of shareholders. Although the guidelines require the court to consider the impact of the fine on the employment of staff, service users, customers and the local economy, the guidelines explicitly state that any impact on shareholders is not a factor for the court to consider. Id. at 8. Accordingly, under certain circumstances, the guidelines' policies could diverge from the mandate of the U.S. Securities and Exchange Commission, the hallmark of which is the protection of investors (i.e., shareholders). It remains to be seen how (or whether) this divergence will be resolved in cases where a defendant corporation is subject to the jurisdiction of both the SFO and the SEC.

[10] Schedule 17, Crime & Courts Act (2013) available at http://www.legislation.gov.uk/ukpga/2013/22/schedule/17.

[11] ''Deferred Prosecution Agreements Code of Practice,'' Serious Fraud Office, available at http://www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf (hereinafter ''DPA Code of Practice'').

[12] ''Fraud, Bribery and Money Laundering: Response to Consultation,'' January 2014, at 2, available at http://sentencingcouncil.judiciary.gov.uk/docs/Fraud_Response_to_Consultation_(web).pdf.

[13] DPA Code of Practice, supra note 11, at Section 2.8.2.iii.

[14] Id. at Section 2.8.1.iii.

[15] Guidelines, supra note 1 at 5.

tively, a ''high culpability'' assessment should be made against defendants that demonstrate a ''culture of willful disregard of commission of offenses by employees or agents with no effort to put effective systems in place.''[16] In quantitative harm assessments in bribery cases, an alternative measurement for harm caused by bribery under the U.K. Bribery Act 2010 is the cost that a company avoided in failing to put in place appropriate measures to prevent bribery. Similarly, in money laundering cases, an alternative harm measurement can be determined by the amount the defendant avoided in failing to implement an effective anti-money laundering program.[17]

[16] Id.

[17] Id. This alternative harm calculation applies to money laundering schemes only if the amount avoided by failing to establish an anti-money laundering program is higher than the amount of money laundered.

Although the guidelines do not explicitly reference the existence or nonexistence of a corporate compliance program as a mitigating or aggravating factor in sentencing, the guidelines are clear that its enumerated list of factors is not exhaustive.[18] In addition, in determining whether the proposed fine fulfills the guidelines' principles, the court will examine the impact of the fine on the company's ability to implement an effective compliance program.[19] Thus, corporate defendants should have several opportunities, beyond the court's culpability and harm assessments, in which to present their compliance program as a potentially mitigating factor. Of course, this mitigation argument will be only as strong as the program being described.

Expect More U.K. Prosecutions

The issuance of the guidelines, the introduction of DPAs, the passage of the U.K. Bribery Act 2010 and the recent high-profile investigations launched by the SFO all point to the U.K. government's increased emphasis on white collar corporate prosecutions. Like their counterparts in the U.S., courts and prosecutors in the U.K. are being armed with a variety of tools to investigate, prosecute and resolve white collar criminal cases against companies. If the U.S. enforcement environment is an example, as U.K. prosecutors become increasingly adept at the use of these tools and their legality and scope are established by the U.K. courts, we should expect to see more corporate prosecutions, faster resolutions through negotiated outcomes and the assessment of higher penalties. Companies should respond to this changing U.K. environment by continuing to implement robust compliance programs that can be presented to U.K. courts and prosecutors in support of a DPA resolution or a request for sentencing leniency.

[18] Id. at 6.

[19] Id. at 8.

BACM ISSN 1067-6104