KIRKLAND ALERT

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Singapore Introduces Deferred Prosecution Agreements

On 19 March 2018, Singapore passed legislation introducing the concept of the deferred prosecution agreement ("DPA") to the jurisdiction for the first time. Under the new laws, corporations (but not individuals) facing prosecution for offences of corruption, money laundering or receipt of stolen property may attempt to negotiate the terms of a DPA with prosecuting authorities, under which they would avoid prosecution, in return for adherence to various conditions imposed upon them, for a set period of time.

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How does Singapore's regime compare to other jurisdictions?

When considering its approach to DPAs, the Singaporean Parliament reviewed various international models and settled on adopting a framework very similar to that introduced by the U.K. As with the British scheme, the terms of any Singaporean DPA must be court-approved (in this case, by the Singaporean High Court), with a judge satisfied that the DPA is "in the interests of justice," and that the terms are "fair, reasonable and proportionate." Similar to the features of other international corporate criminal resolutions, these terms may include financial penalties, disgorgement of profits, compensation to victims, the imposition of a compliance monitor, requirements to implement enhanced internal controls and other compliance measures, and a prohibition against further offences during the DPA's term. Also, as with the U.K. scheme, the court's approval of a DPA is a matter of public record, as are the terms of the agreement and the facts of the underlying conduct.

In contrast, the terms of deferred prosecution agreements in the U.S. are decided by the U.S. Department of Justice ("DOJ") alone, and U.S. courts have very limited supervisory powers over a DPA's implementation. This has sparked criticism that the U.S. process may be too opaque, fails to generate jurisprudence from which guidance can be drawn, and may shift too much power to prosecutors in negotiating terms.

Singapore follows global trend for corporate self-reporting

As is common elsewhere around the world, corporations are expected to self-report wrongdoing that they have discovered and to demonstrate a commitment to genuine remediation of misconduct in order to be considered for a Singaporean DPA. This is one of the key rationales globally behind the introduction of DPAs, which

are designed to act as an inducement for corporations to voluntarily disclose any issues that they discover and to cooperate fully with investigative authorities in return for the opportunity to avoid a criminal conviction.

Corporate self-reporting is not necessarily required in all cases, however, with the 2017 Rolls Royce DPA in the U.K.[5] providing a notable exception to the general principle. In that case, the Serious Fraud Office ("SFO") was first alerted to misconduct within Rolls Royce from an anonymous blog in China, rather than via a self-report. The subsequent resolution by DPA has since been justified by the SFO due to the extraordinary levels of cooperation by Rolls Royce during the ensuing SFO investigation.

In the U.S., the availability of DPAs has also been used to encourage corporations to provide information that may assist prosecutors in bringing charges against implicated employees, in line with the DOJ's increased emphasis on individual prosecutions in corporate investigations, as outlined in the Yates Memo of 9 September 2015. The SFO also has stated that it considers the provision of information related to corporate employees as an important factor when deciding whether to offer a DPA in the U.K.[6] It remains to be seen whether and how Singaporean authorities will consider these factors. Singapore has not yet published any guidance on precisely how the DPA regime will function. The Singaporean law does not require guidance to be issued, in contrast to the U.K. legislation, which did, and the U.S., which provides guidance through the DOJ's Criminal Resource Manual and (for analogous civil DPAs) through policy statements by the U.S. Securities & Exchange Commission.

An upcoming shift in Singapore's approach to compliance and corporate criminal liability?

At present in Singapore, attributing criminal liability to a corporation is a difficult task. As was the position until recently in the U.K. (prior to the enactment of the UK Bribery Act 2010 and the Criminal Finances Act 2017[7]), Singaporean prosecutors need to prove that any illegal activities were ordered by an employee sufficiently senior to be considered as the "directing mind" of the corporation.

This has traditionally proved difficult, as was recently highlighted in the US$422 million global corruption settlement between Singapore, the U.S. and Brazil with Singapore's Keppel Offshore, in which Keppel admitted to paying bribes for more than a decade to Brazil's state-owned oil company, Petrobras. Singapore's current anti-corruption legislation, the Prevention of Corruption Act ("PCA"), has a maximum fine of S$100,000 (US$76,000), and so Singapore was only able to receive its US$105.5 million portion of the settlement under an *ad hoc* "conditional warning" agreement with the Corrupt Practices Investigation Bureau, as opposed to formal charges under the PCA. This has led to renewed scrutiny as to the adequacy of Singapore's anti-corruption legislation.

The PCA has in fact been the subject of a governmental review since 2014, and the indications are that the introduction of DPAs likely heralds the implementation of further U.K.-style laws designed to make the prosecution of corporations easier. Without such changes, the availability of DPAs in Singapore may have little practical effect, given the current challenges in prosecuting corporate crime.

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Overall, however, the introduction of DPAs, and the anticipated increased scrutiny on corporate conduct in Singapore, likely will yield greater alignment in compliance standards of domestic corporations operating out of Singapore and their multinational counterparts. Relatedly, an increased focus on corporate self-disclosure will require Singaporean corporations to place greater attention on the internal investigation of whistleblower complaints and potential misconduct if they hope to reap the benefits of DPAs.

Now that it has joined the "club" of jurisdictions offering DPAs, Singapore promises to be a more active player in the increasingly coordinated efforts of global government regulators investigating cross-border corporate crime.

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1 First introduced in the late 1990s.

2 DPA-style "leniency agreements," introduced in 2013.

3 Introduced in 2014.

4 Introduced in 2016.

5 On 17 January 2017, Rolls Royce PLC ("Rolls Royce") entered into a DPA with the SFO.

6 Speech by Ben Morgan, SFO Joint Head of Bribery and Corruption, on 7 March 2017.

7 These pieces of legislation impose strict, vicarious liability on corporations for the criminal acts of certain people, including its employees, for bribery and facilitating tax evasion respectively.

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