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Legal focus: deferred prosecution agreements – proceed with caution

11 April 2014 |By Ross Dixon, Hickman and Rose criminal defence partner

The rights of employees may not be best served by this latest tool against corporate crimes

The publication of the Deferred Prosecution Agreements: Code of Practice was the last piece of legislative framework to be finalised before deferred prosecution agreements (DPAs) came into force at the end of February. It remains to be seen whether DPAs will increase the number of corporates beating a path to the Serious Fraud Office's Cockspur Street headquarters to self-report offences of fraud, bribery and the like. However, the introduction of the code was a missed opportunity to implement vital safeguards for the treatment of companies' directors, officers and employees during an internal investigation. Consequently, individual employees may be well advised to approach DPAs with considerable caution.

There are certainly a number of incentives for a corporation to opt for an internal investigation, instead of one conducted by the SFO. These include the ability to decide on the nature and extent of any engagement with authorities along with the opportunity to minimise disruption to its business continuity. However, for individual employees, internal investigations are less attractive. The rub for employees who have been interviewed in an internal investigation is that the protection from prosecution afforded by a DPA covers only a company and does not apply to individuals. This places employees in a position of uncertainty and vulnerability. A self-reporting company intent on securing a DPA may have different interests to those of its individual officers.

As a precondition for securing a DPA, a company will be expected to provide records of interviews with employees to the SFO. Where an internal investigation has been launched, suspicion of misconduct is likely to fall on some of those employees. Although suspects interviewed in a state-run investigation will always be told about their rights to independent legal advice and silence, it is a matter of discretion for the lawyer running an internal investigation whether the same protections are extended when an employee is questioned in the context of an internal investigation. Of course, employees have duties to their employers that include disclosure of information and they may feel compelled to participate in the interview process. However, without establishing a code of good practice expressly requiring investigators to forewarn employees of their rights, employees may be interviewed without appreciating

that their answers could be used against them not only in the employment context, but as the cornerstone of a subsequent criminal investigation. Furthermore, it may be in an employer's best interests to find a scapegoat who can be sacrificed for the greater good of the company to help secure a DPA. Regardless of whether an interview is ultimately admissible as evidence in a later criminal trial, information offered by an employee could inform any subsequent criminal investigation into their conduct.

The introduction of DPAs in the UK will see an increase in lawyers partaking in the growing business of internal investigations. In this climate, individuals need carefully to consider the consequences of agreeing to an interview as part of an internal investigation. The publication of the code afforded an opportunity to set minimum standards to preserve the rights of those being questioned. Unfortunately, this opportunity was missed. In the absence of clear procedural safeguards, the rights of employees are at risk of being diluted when a company is pursuing a DPA. Consequently, individuals may best be served by approaching the latest feature of the UK's developing corporate crime landscape with considerable caution.