

Banks need to expose senior manager culpability after SFO's second deferred prosecution agreement

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The Serious Fraud Office has secured its second [deferred prosecution agreement](#), sending out a powerful message that banks must cooperate with the SFO to stand a chance of success, lawyers said.

In this case, unlike the [Standard Bank](#) DPA last year, cooperation meant exposing the culpability of two very senior managers.

"This is the first DPA involving a substantive offence where the SFO has concluded that there is sufficient evidence of guilt of very senior individuals, and, as a result of this, the company would be culpable as well. In this respect it was unlike Standard Life," said Neil Swift, partner at Peters & Peters. Swift said the same judge had dealt with both DPAs, and might well deal with more.

The names of those involved in this latest agreement have been anonymised. Swift said their actions had had a negative influence on the conduct of the firm's business; the bribes were made over eight years and affected the profitability. In contrast, the Standard Bank case had involved a one-off bribe paid by a sister company.

Prompt action

"All this can be overcome if the firm acts promptly and correctly and it cooperates fully with the SFO. This case demonstrates to banks and other financial services firms that DPAs will apply in a variety of circumstances, some of which did not apply in Standard Bank's DPA," he said.

Swift said a particular factor in this case was that the overall financial penalty had very much been subjected to a public interest test. "The case was framed as exceptional because of this," he said.

One element in the firm's favour was that it had decided to sharpen up its compliance even before the wrongdoing was discovered, and had put in place a comprehensive compliance and anti-bribery programme in 2011.

"The company, on finding out the bribery in 2013, got lawyers involved very quickly. Within a month of uncovering the crime, lawyers spoke to the SFO, and within another month met with it," Swift said.

He said that banks thinking of applying for a DPA should consider what cooperation with the SFO would really entail. "The bank needs to decide whether the potentially culpable parties involved should be interviewed. The SFO may not always want those interviews to take place because it can hamper their investigation before it begins. Care has to be taken from the beginning of any investigation not to alert the individuals who might remove emails and destroy records."

Judgement call

He said banks faced a difficult decision in such circumstances, as they must take care not to forewarn suspects. On the other hand, the suspects might be the very individuals who would point them in the right direction and quickly reveal what had taken place.

"The decisions get more difficult in looking at those who might be suspects and who might be witnesses. This is about looking at those who approved certain payments and whether they knew the purpose of those payments. They could be lower-level employees who may say they were asked to do this, and did not ask questions."

He said such people were on the borderline and that decisions about whether to interview them were a matter for discussion with the SFO. Banks must also take care not to tamper with the scene of the crime.

"Provided a bank in this situation acts quickly and, in cooperation with the SFO, cleanses itself of guilty individuals, it is a positive for [a] DPA. In large banks, non-executive directors will take this seriously and culpable individuals can be suspended, but conflicts can arise. Company owners in small firms are a bigger problem," he said.

Swift said banks which discovered bribery needed to consider potential vulnerability properly at an early stage since it might not be easily prosecutable, and should weigh up the pros and cons of approaching the SFO against the risk of discovery and prosecution, perhaps due to a whistleblower.

"In time, as more DPAs take place, the judgement call will get easier. The more jurisprudence there is on DPAs, the more certainty there is for banks whether one is achievable," he said.

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