

New Sheriff In Town As Rolls-Royce Pays Record Penalty For Foreign Bribery And Corruption

Monday, January 23, 2017

On 17 January 2017, the UK Serious Fraud Office (“SFO”),^[1] the US Department of Justice (“DOJ”),^[2] and the Brazilian Ministério Público Federal (“MPF”) announced an \$800 million global settlement with Rolls-Royce plc and Rolls-Royce Energy Systems Inc., (together, “Rolls-Royce”) resolving allegations of a long-running scheme to bribe foreign officials in South America, the Middle East, Eastern Europe, and Asia in exchange for assistance in obtaining government contracts. In addition to the payment of disgorgements and fines – the largest ever imposed under the UK’s Bribery Act 2010 (“UK Bribery Act”) – Rolls-Royce has agreed to implement a number of compliance measures and reporting requirements pursuant to deferred prosecution agreements (“DPAs”) with UK, US, and Brazilian authorities. The joint settlement, which was spearheaded by the SFO, heralds a new era in global cooperation and coordination in the enforcement of bribery and corruption laws.

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Unprecedented simultaneous tripartite global penalty

Under its DPA with the SFO, Rolls-Royce will pay a penalty of over £497 million (US \$612 million), comprising disgorgement of profits of £258 million and a financial penalty of £239 million (US \$294 million), plus interest. In addition, Rolls-Royce will pay approximately £13 million (US \$16 million) to reimburse the SFO’s full investigation and litigation costs.

In the US, Rolls-Royce has agreed to pay a criminal penalty of nearly \$170 million (UK £138 million) for conspiring to violate the Foreign Corrupt Practices Act (“FCPA”) by having paid bribes in excess of \$35 million between 2000 and 2013. The penalty reflects a 25-percent reduction from the bottom of the US Sentencing Guidelines fine range and a credit of more than \$25 million (UK £20 million) in recognition of the fine paid in Brazil. The settlement with the DOJ falls within the top fifteen largest FCPA settlements of all time.

In Brazil, Rolls-Royce has agreed to a fine of approximately \$25 million, reflecting \$12 million in profits received from contracts with Brazil’s state-run oil company, Petrobras, \$6 million paid in kickbacks paid to intermediaries, and a fine equal to the amount of kickbacks.

DPAs - more than just a fine

In the UK, DPAs are voluntary agreements which result in the suspension of a prosecution in return for the offending company meeting certain obligations including that the company must account for its conduct before a criminal court. The terms of the DPA must be approved by a judge as fair, reasonable, proportionate, and in the interests of justice. A DPA is not available to individuals. Upon review, on 17 January 2017, Sir Brian Leveson, sitting as a judge in the Crown Court, approved the Rolls-Royce DPA noting that the financial penalty was “broadly comparable to a fine that a court would have imposed on conviction following a guilty plea.”^[3]

In addition to payment of the fine, under the UK DPA, Rolls-Royce is required to continue the independent compliance review of its approach to anti-bribery and anti-corruption which commenced in January 2013 when

Rolls Royce appointed independent lawyer, Lord Gold, to conduct the review. Lord Gold has already produced two interim reports and is due to produce a third report by the end of March 2017. Rolls-Royce has agreed to provide the SFO with Lord Gold's third report and produce a written Implementation Plan setting out how it will give effect to the third report's recommendations and any other outstanding recommendations not yet implemented in the first and second reports. Rolls-Royce must implement or have sustainment plans to execute the Implementation Plan to the satisfaction of Lord Gold within 2 years of its commencement. Once the Implementation Plan is complete, Rolls-Royce must obtain a final report from Lord Gold and provide it to the SFO.

In addition to these compliance measures, Rolls Royce has agreed to continue its cooperation with the SFO including the disclosure of all relevant information and material in its possession, custody or control, which is not protected by legal professional privilege, in respect of its activities and those of its present and former directors, employees, agents, consultants, contractors and sub-contractors. It must also use its best efforts to make available for interview, as requested by the SFO, present or former officers, directors, employees, agents and consultants of Rolls-Royce.

Much like in the UK, DPAs in the US set the terms by which prosecutors will decline to pursue a case against the offending company. The DOJ agreed that it will not pursue a criminal or civil case against Rolls-Royce, provided that, within three years, the company pays the \$170 million penalty, cooperates fully with US and foreign authorities in all matters related to corrupt payments, implements a compliance program that meets the elements identified in the DPA, and annually reports to the DOJ regarding remediation and implementation of its compliance program. Among other requirements, Rolls-Royce must develop and maintain policies and procedures addressing particular risk areas (e.g., gifts, entertainment, travel, political contributions and charitable donations) through periodic risk-based review, assign one or more senior corporate executives for implementation and oversight of the policies and procedures, implement periodic training and compliance certifications, establish an effective system for internal reporting and investigation, and institute risk-based due diligence and compliance requirements for all agents and business partners. The DPA does not provide any protection against the prosecution of individuals.

Brazilian law empowers the relevant authorities to enter into agreements ("leniency agreements") with entities that have cooperated with the authorities' investigations. By satisfying the conditions of the agreements, companies may face lower fines or lesser sanctions. Rolls-Royce reportedly provided the MPF with the results of an internal investigation in early 2015 and agreed to cooperate with Brazilian authorities. The terms of its agreement with the MPF also impose measures designed to ensure that the company enhances its existing compliance programs.

Cooperation can be a mitigating factor

Rolls-Royce's cooperation with and accountability to regulators appears to have factored into the global settlement. In the UK, the court acknowledged that, despite not initially self-reporting its conduct, Rolls-Royce cooperated extensively with the SFO since 2012, and "[c]ould not have done more to expose its own misconduct."^[4] This extensive cooperation was one of the primary reasons the court concluded that the DPA was in the interests of justice and a relevant factor in mitigation when assessing the value of the agreed penalty. However, the UK settlement does not conclude the matter in its entirety. As noted by the court, the SFO will continue to investigate the conduct of current and former Rolls-Royce employees. These individuals are afforded no protection from prosecution under the DPA and, given the wide-ranging allegations documented in the DPA's statement of facts, more charges seem likely.

The US also acknowledged Rolls-Royce's cooperation throughout the government investigation, including its thorough internal investigation, numerous factual presentations, and producing witnesses for interviews. Going forward, Rolls-Royce must continue to cooperate for three years under the terms of its settlement with the DOJ, and must promptly report any evidence or allegations of past or new FCPA violations, truthfully disclose all factual information, provide documents or evidence requested by the DOJ, and use its best efforts to make current and former officer, directors, employees and agents available for interviews or testimony.

SFO led investigation - A new trend?

To date, the US has irrefutably been the global leader in investigating and enforcing anti-bribery and anti-corruption offences. In 2016, twenty-seven companies paid approximately \$2.48 billion to resolve criminal and civil FCPA enforcement matters with the DOJ and the Securities and Exchange Commission. In contrast, the SFO has been criticised for failing to undertake comprehensive investigations capable of securing high-profile convictions under the UK Bribery Act. This has led many commentators to conclude that the UK Bribery Act is less effective than the FCPA, despite the fact it is more extensive than the FCPA in terms of its jurisdictional reach and the conduct it prohibits.

Rolls-Royce's DPA with the SFO is only the third of its kind endorsed by English courts. In each instance, courts have emphasized the importance of self-reporting. Indeed, Sir Brian Leveson noted in his judgment endorsing the Rolls-Royce settlement that a "DPA will likely incentivise the exposure and self-reporting of wrong doing by organisations in similar situations to Rolls-Royce. This is of vital importance in the context of the investigation and prosecution of complex corruption cases in bringing more information to the attention of law enforcement agencies so that crimes can be properly investigated, and prosecuted effectively. Furthermore, the effect of the DPA is to require the company concerned to become a flagship of good practice and an example to others demonstrating what can be done to ensure ethical good practice in the business world."^[5]

The Rolls-Royce settlement may also signal a new trend in global anti-bribery and anti-corruption enforcement. It is the single largest individual investigation the SFO has conducted to date, spanning a four year period, with over 30 million documents reviewed, and numerous arrests and interviews of current and former Rolls-Royce employees (taken both voluntarily and under compulsion). Additionally, the settlement follows in the footsteps of VimpleCom's \$795 million resolution with US and Dutch authorities in 2016, having been reached with the assistance of law enforcement officials in several jurisdictions, including Austria, Germany, the Netherlands, Singapore and Turkey. The scope of the SFO's investigation and its cooperation with other global law enforcement agencies, together with the resulting penalty, should be a warning to businesses operating internationally that they may face scrutiny from several global regulators simultaneously and expect intense scrutiny of world-wide conduct.

Gone are the days of US authorities being the lone sheriff in town, policing foreign companies that have contacts in the US but consoling themselves to non-intervention by the home countries. Rather, companies must be aware that there are now consequences for non-compliance on their home turf as well. As the SFO and other foreign authorities demonstrate the will to pursue bribery and corruption cases, the US may allow the countries in which corrupt companies are domiciled to police those practices at home.

[1] See SFO Case Information, Rolls-Royce PLC (17 January 2017), available at <https://www.sfo.gov.uk/cases/rolls-royce-plc/>.

[2] See Press Release, Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (17 January 2017), available at <https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act>.

[3] See Serious Fraud Office v Rolls Royce PLC Rolls-Royce Energy Systems Inc [2017] at paragraph 63, available at <https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf>

[4] See Serious Fraud Office v Rolls Royce PLC Rolls-Royce Energy Systems Inc [2017] at paragraph 38, available at <https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf>.

[5] See Serious Fraud Office v Rolls Royce PLC Rolls-Royce Energy Systems Inc [2017] at paragraph 60, available at <https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf>.

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