

UPDATE

The Rolls-Royce of reminders for Cayman's regulated entities

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The English Court's recent approval of the entry by Rolls-Royce and the Serious Fraud Office into a deferred prosecution agreement demonstrates why co-operation with the regulator is so important. It is a salient reminder to Cayman's regulated entities that those sections of the Monetary Authority's enforcement manual, which addresses co-operation with the regulator, should not be taken lightly.

On 17 January 2017, Sir Brian Leveson QC approved the entry by Rolls-Royce and the Serious Fraud Office (SFO) into the largest Deferred Prosecution Agreement (DPA) of its kind. In what is a timely reminder for all regulated entities – including those in the Cayman Islands – Rolls-Royce's co-operation with the regulator was considered to be an important factor in determining that the DPA was appropriate. From a local perspective, the judgment is influential, because it highlights the importance of the provisions in the enforcement manual issued by the Cayman Islands Monetary Authority (CIMA) which address the level of co-operation by a licensee and the fact this is a key consideration when CIMA is determining what action it should take.

Background

In 2012, postings on Rolls-Royce's website about its business dealings in China and Indonesia came to the attention of the SFO. It caused the SFO to seek information from Rolls-Royce about its dealings with seven countries and ultimately, the biggest single investigation conducted by the SFO. Once it had been contacted by the SFO, Rolls-Royce immediately commenced its own investigation, which led to an internal report on the findings into these and other issues, which the English court described as 'the most serious breaches of the criminal law in the areas of bribery and corruption (some of which implicated senior management, and on the face of it, controlling minds of the company).'

However, the court considered that entry into a DPA – rather than a criminal prosecution – was appropriate for a number of reasons, including (but not limited to): the change in membership of Rolls-Royce's Board since the investigation had commenced; the impact a prosecution might have on the company and its stakeholders, including its 50,000 employees, shareholders and suppliers; and the saving of significant time and money which would otherwise form part of any prosecution. Another important factor was that a DPA 'will likely incentivise the exposure and self-reporting of wrong doing by organisations in similar situations'. The point about 'self-reporting' then led to an analysis of the 'extraordinary co-operation' by Rolls-Royce with the SFO's own investigation.

The consequence of entry into the DPA is that criminal proceedings, which might otherwise be instituted, are suspended on condition that Rolls-Royce complies with strict measures imposed under the DPA, including the payment of a very significant financial penalty, the disgorgement of profits arising from the company's misconduct, and the implementation of a compliance program which would avoid similar breaches occurring in the future.

The benefits of co-operation

In approving the DPA, the court noted that the 'full and extensive nature of [Rolls-Royce's] co-operation has led to the acquisition, and application of digital review methods to over 30 million documents'. It separately noted the provision by the company of documents relating to its internal investigations, co-operation with independent counsel in the resolution of privilege claims, the provision of recorded interviews and findings on a rolling basis and liaising with the SFO and agreeing on how to approach any media enquiries. Whilst Rolls-Royce's conduct did not amount to self-reporting, the court was prepared to accede to the SFO's submission that it should be treated as such, because of the level of co-operation exercised by Rolls-Royce as soon as the SFO's investigation commenced.

In practical terms, the company's level of co-operation resulted in the court applying a 50 per cent discount to the financial penalty which was to be imposed on Rolls-Royce (which, applying the discount, reduced the penalty to £239,082,645). Together with a condition that it disgorge all profits received as a consequence of its criminal conduct, this amounted to a total financial penalty of £497,252,645. Rolls-Royce was also ordered to pay the SFO's costs of approximately £13m on an indemnity basis. However, the economic benefit of its co-operation with the SFO cannot be overstated.

CIMA's enforcement manual

The manual refers to the effectiveness of CIMA's regulatory regime depending 'to a significant extent on the maintenance of an open and co-operative relationship between the Authority and those whom it regulates'. In considering what action to take, CIMA will take into account:

'The willingness and ability of the licensee to co-operate with and assist the Authority in terms of its investigations and recommendations. This includes how quickly, effectively and completely the licensee brought the contravention to the Authority; the degree and timeliness of co-operation in meeting the requests of the Authority for information, documents etc; any remedial actions the licensee has already taken or intends to take in rectifying the situation; and any action that has been taken to ensure that such a contravention does not arise in the future.'

Part 16 of CIMA's enforcement manual addresses the prosecution of offences and assessment of fines and penalties. The criteria for assessment includes considerable importance being attached to, amongst other things, 'licensees making timely submission of reports and relevant documents'.

Although we are not aware of any recent decisions by CIMA which highlight the importance of co-operating with it in any regulatory investigation, CIMA's enforcement manual makes plain the importance such conduct plays in assessing what action it should take.

Conclusion

The judgment and CIMA's enforcement manual demonstrates that co-operation with the regulator will be a mitigating factor when assessing what financial penalty (if any) should be imposed. The judgment is also a stark reminder of the importance of being full and frank with the regulator once a regulatory breach has been identified, and the benefits of self-reporting once breaches are discovered. As Sir Brian Leveson said:

'A cynic (or irresponsible company) might look at the costs which Rolls-Royce have incurred ... and wonder whether it would be more sensible to keep quiet and hope that its conduct does not fall under the eye of the authorities ... that is to fail to understand that such an approach carries with it cataclysmic risks' which for Rolls-Royce would 'almost inevitably spell a far greater disaster'. Co-operation with the regulator is clearly the more prudent approach once any shortcomings are identified.

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