PAUL HASTINGS

Stay Current

December 2020

Follow @Paul_Hastings

Approaching Self-Reporting & Co-operation Standards in U.S., U.K. & French Enforcement

By Simon Airey, Nicola Bonucci, Morgan Miller, Neil Schumacher, Chris Hardjasa, Alison Morris & Bridget Vuona

I. INTRODUCTION

The U.K. Serious Fraud Office (the "**SFO**") recently published a new chapter of its Operational Handbook (the "**Handbook**")[1] to provide internal guidance to Crown Prosecutors regarding the offer, entry and enforcement of Deferred Prosecution Agreements ("**DPAs**") to resolve investigations into potential criminal conduct by companies. The new guidance is intended to supplement the SFO's DPA Code of Practice (the "**DPA Code**"),[2] and does not appear to embody dramatic changes to the SFO's policies and practices regarding consideration and credit available for self-reporting and co-operation as part of negotiated resolutions. However, it does provide additional clarity in a number of important respects.[3]

The Parquet National Financier ("**PNF**")—the French equivalent to the SFO—together with the Agence Française Anticorruption ("**AFA**") published similar guidance last year concerning the use of the Convention Judiciaire d'Intérêt Public ("**CJIPs**"), which are analogous to DPAs.[4] Although negotiated resolutions are still fairly limited in number in both the U.K. and France, and are available for a wide range of offences, most of the DPAs and CJIPs to date relate to violations of the U.K. *Bribery Act* ("**UKBA**") and *Sapin II*, the revised French anti-corruption legislation introduced in 2016.

The new SFO guidance and French standards follow several iterative changes to the corresponding corporate criminal and civil enforcement standards and policies in the U.S. administered by the Department of Justice ("**DOJ**") and Securities & Exchange Commission ("**SEC**"). This guidance continues a measured evolution toward what appears to be a harmonisation with the U.S. approach, including through the encouragement of voluntary self-reporting and co-operation, recognition of the likelihood of parallel investigations, and greater assurances of leniency in certain circumstances.

Although this additional transparency in the SFO guidance and trend towards harmonisation are welcome, significant differences remain among the three systems such that companies will continue to face challenging voluntary disclosure decisions where potential misconduct may have a nexus to multiple jurisdictions. Key aspects of the U.S., U.K. and French approaches are summarised in **Table 1** below. There remains a fundamental distinction between the determinable and assured benefits of voluntary disclosure and co-operation in the U.S. and the more discretionary, less prescriptive approach of U.K. and French prosecutors. Fortunately, all three jurisdictions are now offering tangible, if not always ascertainable and quantifiable, reassurance that voluntary self-disclosure and full co-operation will be rewarded.

Table 1

Comparison of Co-operation Standards

	U.S.	U.K.	FRANCE
Voluntary Disclosure Timing	Prompt but not necessarily immediate; companies afforded time to develop preliminary facts and identify potential issues prior to disclosure	*"Within reasonable time of offending conduct coming to light";* companies afforded time for at least some internal investigation prior to disclosure	After top executives become *"aware"* of the offense; companies are *expected* to conduct some internal investigation prior to disclosure
Voluntary Disclosure Necessary?	A prerequisite in order to benefit from a presumption that the case will be resolved through a declination (but not a DPA or NPA)	Strongly encouraged but not necessary in order to obtain a DPA / co-operation credit	One of three key factors in determining whether a company will be offered a CJIP
Timing of Compliance Program Evaluation	Evaluation at the time of charging decision	Evaluation at the time of reporting and at the time of resolution (for some purposes)	Evaluation at the time of reporting
Co-operation Obligations & Penalty Impact	Ascertainable penalty reductions	No guaranteed penalty reductions, but trend of significant discounts	No guaranteed penalty reductions, but trend of significant discounts
Treatment of Legal Privilege	Waiver of privilege never expected or highlighted as positive co-operation consideration	Waiver of privilege not required, but emphasised as positive indication of co-operation	Withholding privileged material can be viewed as uncooperative
Co-operation in Parallel Investigations	Self-reporting and co-operation in other jurisdictions highly relevant to determination of co-operation and acceptance of responsibility	Co-operation with other authorities in context of parallel investigations is encouraged, but unclear whether co-operation treated as a mitigating factor; some caution regarding de-confliction obligations	Co-operation among authorities in context of parallel investigations is encouraged, but French laws and guidance may hinder company efforts to co-operate with other authorities
Court Approval of DPA/NPA Required?	Varies	Yes	Yes (for CJIP)
Acquiring Company Liability	Acquiring companies can be held liable for acquired company's pre-acquisition conduct, but presumption of declination for pre-acquisition conduct (and limited post-close continuation of conduct), if timely and voluntarily reported and fully remediated	No general concept of successor liability; acquiring companies benefit from ability of acquired companies to avoid prosecution for pre-acquisition conduct, if fully remediated and evidence of significant organisational and cultural changes; treatment of limited post-close continuation of conduct unclear	Acquiring companies can be held liable for acquired company's pre-acquisition conduct under certain circumstances,[5] but punishment may be limited to financial penalties (e.g. fine or disgorgement); no clear assurance of leniency for acquiring companies for limited post-close continuation of conduct

II. ANALYSIS

Voluntary Self-Disclosure Credit

In the U.S., a company's voluntary, timely and complete self-disclosure has long been critical to receiving a favourable resolution with the DOJ and SEC. Generally, civil or criminal investigations against a company are resolved through (i) a Deferred Prosecution Agreement (i.e. where charges are filed but proceedings are suspended; and charges are dismissed if the DPA terms are fulfilled); (ii) a Non-Prosecution Agreement (where misconduct is alleged but no formal charges filed if the NPA terms are fulfilled); or (iii) a Declination (a formal, private confirmation that the authorities have concluded the investigation and elected not to take enforcement action). According to the DOJ Justice Manual—binding policy for DOJ enforcement attorneys—voluntary disclosure is one of eleven key factors (the "*Filip factors*") considered in determining whether to bring charges and whether to offer a negotiated resolution.[6] Similarly, under the SEC Enforcement Manual, self-reporting is one of four key factors used to determine whether and to what extent the SEC will grant leniency.[7]

Both the DOJ and SEC consider a disclosure to be timely when it is *prompt* but not necessarily *immediate*—thus giving companies an opportunity to develop preliminary facts before scheduling an initial discussion with U.S. regulators. In matters involving allegations of corruption, voluntary self-disclosure assumes even greater significance. Under the DOJ's Corporate Enforcement Policy, applicable to potential violations of the Foreign Corrupt Practices Act ("**FCPA**"), voluntary self-disclosure is a prerequisite for the company to benefit from a *presumption* that the case will be resolved through a declination. Even if the presumption is overcome, the Corporate Enforcement Policy still guarantees a substantial fine reduction.

In the U.K., companies historically have been encouraged to disclose as soon as practicable, leading to significant pressure to self-report potential violations before identifying evidence that criminal conduct may have taken place. However, whilst full co-operation credit has been afforded to companies that have self-reported in various DPAs to date, self-reporting has *not* been seen as essential to receive full co-operation credit or a DPA.[8]

The previous director of the SFO repeatedly emphasised a company's obligation to *"preserve the crime scene,"* in order to allow the SFO an opportunity to investigate first. However, the revised DPA guidance now allows companies to report suspected wrongdoing "*within reasonable time of offending conduct coming to light.*" The new Handbook also emphasises: (1) consideration of the totality of the information a company has provided when making a self-report; (2) the extent to which the offending was previously known to the SFO, if at all; and (3) the extent to which the company is providing it voluntarily (e.g. without the threat of imminent disclosure by a third party or other compulsion).

This new standard appears to bring the SFO into closer alignment with the U.S. approach—though it declines to offer concrete insight into how quickly the SFO will expect a report and the circumstances that will trigger the expectation to report. Nevertheless, the SFO appears to be encouraging at least some internal investigation prior to self-disclosure. Recent comments from the SFO director, Lisa Osofsky, are also a strong signal that the SFO will continue evolving toward a more co-operative investigative model comparable to the general approach in the U.S.

In France, under the 2019 PNF & AFA Guidelines on the Implementation of the CJIP ("**CJIP Guidelines**"), voluntary self-reporting is a key factor in determining whether a company will be offered a CJIP and the degree of fine mitigation. However, the CJIP Guidelines provide no specifics about how long a company may wait to contact the authorities after the "*top executives . . . become aware of the offenses.*"[9]

The disclosure must be "*made in detail to allow prosecutors to take a sufficiently accurate view of the offenses,*" suggesting that companies are both permitted and expected to investigate the conduct to some degree before reporting. Prosecutors will also assess the impact of any delay in reporting. Similar to the U.S. standard, when a company discloses potential misconduct in a timely manner, the disclosure reduces the company's culpability score (which is a factor in calculating the amount of any fine); however, unlike the U.S. regime, this does not guarantee that any specific fine reduction will be offered. Because of these uncertainties, the ministerial guidance on combatting international corruption issued in June 2020 provides that the PNF should confer "*with organisations that represent undertakings which are active internationally*[10] *. . . in order to define and implement a framework and practical incentive measures for voluntary disclosure."*[11]

Evaluation of Corporate Compliance Program Relevant to Timing of Self-Disclosure

In the U.S., U.K. and France, prosecutors expect companies to provide evidence of robust compliance programs consistent with their respective enforcement standards—but one notable difference persists. Although all three approaches consider the existence of an effective compliance program at the time of the misconduct in determining the appropriate manner in which to resolve a matter, the U.K. DPA Code and French CJIP Guidelines focus on the compliance program *at the time of reporting,* whereas the U.S. approach also considers the company's compliance program *at the time of the charging decision*.

In the U.S., companies are afforded time to identify issues and remediate the most significant gaps, but must continue to remediate and address those issues even after any self-report. In larger investigations, there can be years to further enhance a program between the initial voluntary disclosure and the final charging decision. Because a company's disclosure date in the U.K. or France will become the date at which it is bound to prove the effectiveness of its compliance program, it may be advantageous for a company to consider delaying disclosure in those jurisdictions if it is not yet prepared to defend the adequacy of its compliance program, but at the risk of jeopardising the company's credit for voluntary and timely self-disclosure.

While not an explicit factor in the U.K. and France, remedial work undertaken prior to the resolution of a matter and a commitment to future compliance are clearly relevant factors in determining whether or not a DPA or a CJIP should be granted, as well as the key terms of any such arrangement (e.g., the duration of the DPA/CJIP and whether or not a monitor should be appointed). Similarly, in the U.K., a company is less likely to receive a DPA if the company had an ineffective compliance program at the time of the alleged misconduct (or none at all) and was unable to demonstrate a significant improvement in such a program since that time.

In all three jurisdictions, the importance of a tailored, properly implemented and effective compliance program cannot be over-emphasised as a means of reducing the likelihood of prosecution and substantial penalties in the event of future misconduct.

Co-operation Standards

The U.S., U.K. and France all evaluate and offer formal credit for a company's co-operation through the course of an investigation, regardless of the circumstances of disclosure. In the U.S., co-operation is evaluated with reference to its timeliness, diligence, thoroughness and speed. In a criminal matter, the DOJ Justice Manual generally requires identification of all responsible individuals and relevant facts relating to their misconduct.[12] The DOJ Corporate Enforcement Policy applicable to corruption investigations includes more specific co-operation standards to obtain full co-operation credit. Companies must—

- disclose all relevant facts gathered during a company's independent investigation, and attribute those facts to specific sources rather than provide a general narrative, including facts related to (a) involvement of company's officers, employees and agents, and (b) potential criminal conduct by third-party companies (including their officers, employees and agents);
- identify opportunities for the DOJ to obtain relevant evidence not in the company's possession and not otherwise known to the DOJ;
- preserve, collect and disclose in a timely manner all relevant documents, and information relating to their provenance, including through (a) disclosing overseas documents, including locations where documents were found and who found the documents, (b) facilitating third-party production of documents and (c) providing translations of documents in foreign languages;
- de-conflict witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that the DOJ intends to take; and
- make available for interview company officers and employees who possess relevant information, including those located overseas as well as former employees, and where possible, facilitate third-party production of witnesses.

Companies deemed to have fully co-operated and remediated the misconduct are entitled to a minimum 25% discount off the low end of the appropriate U.S. Sentencing Guidelines range.[13] Provided they also accept full responsibility for misconduct, companies also receive a two-point reduction off their culpability score—which may reduce the potential monetary exposure by millions of dollars or more.[14]

In evaluating co-operation in civil enforcement matters, the SEC Enforcement Manual refers to the Seaboard Report, which includes many of the same co-operation standards described in the DOJ Corporate Enforcement Policy (e.g., disclosing findings of the company's internal investigation, identifying culpable individuals, co-operating with law enforcement inquiries, and facilitating employee co-operation with the SEC's investigation).[15]

Company co-operation in the U.K. is evaluated under the SFO's Corporate Co-operation Guidance in its Operational Handbook and under the DPA Code. Co-operation indicators include:

- reporting misconduct within a reasonable amount of time;
- taking remedial actions including, where appropriate, compensating victims;
- preserving available evidence and providing it promptly;
- identifying relevant witnesses, disclosing accounts and documents, making witnesses available for interviews when requested;
- providing internal investigation reports; and
- waiving privilege over legally privileged materials.

The new DPA guidance also notes that considerable weight may be given to a genuinely proactive approach in bringing matters to the SFO's attention.

Although both U.S. and U.K. authorities place a high premium on co-operation, the nature of the co-operation required to earn a DPA in the U.K. continues to differ from the position in the U.S. Further, the emphasis in the U.K. on waiver of legal privilege remains a notable point of departure. DOJ and SEC guidance makes clear that companies are not required to waive privilege to receive co-operation credit. The U.K. approach embodied in the DPA Code and SFO Handbook instructs companies that they are not *required* to waive privilege in order receive co-operation credit, as the Code and Guidance both state that a company cannot be compelled to waive privilege or be penalised for not waiving privilege. However, waiver of legal professional privilege is emphasised as a positive indicator of co-operation. Further, potential differences in what is considered privileged in internal investigations in the U.S. and the U.K. (e.g., interview memoranda or recordings[16]) will require companies subject to potential exposure in both jurisdictions to weigh the benefits of full co-operation in the U.K. against the impact that a potential waiver may have on U.S. or other third-party proceedings.

The U.K. approach to sentencing, which is governed by the England & Wales Sentencing Council Guidelines ("**Sentencing Council Guidelines**"), is indeterminate with respect to guaranteed fine reductions for mitigating conduct.[17] The SFO Handbook notes that current sentencing guidelines provide for a one-third discount for a guilty plea entered at the earliest opportunity, but the nature and extent of the company's co-operation will largely determine the level of discount. Thus, the factors capable of reducing a company's financial penalty are broadly similar, but the Sentencing Council Guidelines endorse substantial prosecutorial discretion. This approach stands in contrast to the formulaic assessment under the U.S. Sentencing Guidelines, which allow a company to calculate the precise impact of each factor on the resulting fine. On the other hand, the U.K. SFO Handbook notes that "*[i]n the majority of DPAs to date, the court has approved terms permitting discount of 50% in recognition of the levels of co-operation demonstrated.*" In six of the nine U.K. DPAs to date, the court has approved penalty discounts of 50% in recognition of the exemplary levels of co-operation those companies demonstrated. An important point to note is that court approval is required in the U.K. both for the issue of a DPA and the terms of the DPA.

Similar to the U.K., the French CJIP Guidelines treat co-operation as a pre-requisite for obtaining a CJIP as well as a mitigating factor in determining the ultimate financial sanctions, but the treatment is subject to prosecutorial discretion and appears to push companies toward waiving legal privilege and sharing materials that may be considered privileged in the U.S.[18] A company is expected to provide French prosecuting agencies with: (1) an accurate and comprehensive internal investigation report describing the relevant conduct "*with the greatest possible accuracy*"; (2) the identity of responsible individuals and witnesses, along with all relevant documents (subject to confidentiality and privilege rules); and (3) reports or transcripts of witness interviews, together with documents on which those reports or interviews rely.[19] Also, similar to the U.K., a CJIP is subject to court approval of the appropriateness, procedure and certain terms including the proposed fine.

For investigations conducted by external lawyers, it is for the company and its counsel to determine which documents they wish to make available to prosecutors. However, if a company refuses to provide certain documents, it is for the prosecutors to determine whether this refusal appears justified in light of the applicable confidentiality rules and, in case of abuse, this may be viewed as non-cooperation.[20] The CJIP Guidelines require mitigation of the fine upon determination of "*excellent co-operation and complete and effective internal investigation,*" but there is no specified degree to which each mitigating factor directly results in a reduced penalty.[21]

Co-operation in the Context of Parallel Investigations

In the U.S., self-reporting and co-operation with regulators in other jurisdictions is not a specific requirement under the DOJ or SEC's corporate enforcement policies but will be relevant in the context of voluntarily disclosing conduct in a timely manner and demonstrating acceptance of responsibility and appropriate remedial actions.

In a criminal matter, the U.S. Sentencing Guidelines and Corporate Enforcement Policy confirm that "*steps that demonstrate recognition of the seriousness of the company's misconduct [and] acceptance of responsibility for it*" are required in order to receive all applicable benefits. In civil matters, the SEC's Seaboard Report calls for consideration of whether the company has "*promptly, completely and effectively disclose[d] the existence of the misconduct to the public, to regulators and to self-regulators.*"[22] The DOJ and SEC routinely ask companies about the status of interactions with other regulators, though the assessment by the DOJ and SEC regarding a company's decision to self-report in another country varies based on the jurisdiction and particular facts. U.S. authorities also consider parallel matters both in deciding whether to resolve charges through a DPA/NPA or declination and in crediting foreign fines relating to the same underlying conduct under the DOJ's "*Piling-on Policy*" and SEC's practice of offsetting against any disgorgement obligation amounts paid to another regulator if they are intended to deprive the company of any profits resulting from the misconduct.[23]

The SFO Handbook provides a new list of considerations for companies facing parallel investigations in multiple jurisdictions. The Handbook does not treat a company's co-operation with other authorities as an explicit factor and suggests that conflicts of interest may arise when a company attempts to co-operate with multiple authorities, which may hinder the SFO from providing full recognition of a company's co-operation. For example, the Handbook calls for consideration of "*early communication and de-confliction in respect of investigating activity . . . and in respect of interaction with the Company and the Company's position with respect to the SFO and other agencies on matters such as [legal professional privilege].*"

The U.K. guidance does little to explain the SFO's expectations in situations where a company's co-operation with the SFO implicates parallel matters, such as the challenges associated with a company's effort to safeguard legal privilege in other jurisdictions, which is frequently a challenge given the different legal standards and approaches to waiver. But by acknowledging the potential for a coordinated multilateral settlement and requiring consideration of debarment or de-licensing as collateral consequences, the Handbook does encourage SFO prosecutors to co-operate with their foreign counterparts.

By contrast, CJIP Guidelines regulate and may even complicate a company's efforts to co-operate with multiple regulators in parallel investigations. Companies are required to inform the AFA of suspected or identified violations implicating both France and other countries and to ensure any proposed communications with other regulators do not run afoul of the French Blocking Statute (Law No. 68-678 of 26 July 1968).[24] In practice, companies may be forced to suggest that foreign authorities use mutual legal assistance treaty (MLAT) requests to obtain protected information. On the other hand, French prosecutors have been willing to coordinate with their foreign counterparts regarding criminal fines to ensure that a co-operating company will not be subject to overlapping financial penalties for the same underlying conduct.[25]

Successor Liability for Acquiring Companies

U.S. law generally recognises the concept of *"successor liability,"* i.e., a successor by merger or acquisition assumes the predecessor company's liabilities. However, the DOJ and SEC have repeatedly declined to take enforcement action against companies that voluntarily disclosed and remediated pre-acquisition misconduct and fully co-operated with the DOJ and SEC throughout. For potential violations of anti-corruption law, the DOJ Corporate Enforcement Policy now assures any company that identifies potential misconduct and has no prior history of FCPA violations the presumption of a declination if the conduct is voluntarily reported in a timely manner and fully remediated. Thus, a co-operating company will be well positioned to receive the presumption of a declination even if such conduct continued for a limited time post-close. Further, a company with a prior FCPA violation or other aggravating factor(s) is not precluded from receiving a declination.

Under English criminal law, there is no general concept of successor liability and parent companies will not automatically become criminally liable for the previous misconduct of their newly acquired subsidiaries. However, in deciding whether to prosecute an offending company that has since been acquired by another, prosecutors will take into account whether the "*offending is not recent and the company is effectively a different entity from that which committed the offences*"—for example, where the company has been "*taken over by another organisation*" or the company's management team has changed completely. There is now at least a reasonable prospect that a company may avoid prosecution for pre-acquisition misconduct provided that it (or its acquirer) can show that any misconduct was or has been fully remediated and that its compliance culture is very different from before.

Conversely, if a DPA is duly agreed, the SFO will expect that provision be made for a future sale, merger or other change in corporate structure of the offending company during the DPA period. Ordinarily, this will require that: (i) the prosecutor's consent be obtained before any such sale/merger; and (ii) the obligations under the DPA be transferred to the new entity. Although no DPA to date has included such a term, this is nevertheless likely to impact the viability of any sale or merger process such that if a company has a future sale or merger in its sights, and is weighing up a voluntary disclosure in advance of it, this will be a significant factor in any decision to self-report.

In a recent decision, the highest court in France reversed a longstanding rule that allowed acquiring companies to avoid automatic successor liability (in light of the fact that the previous legal person had effectively disappeared).[26] From now on, acquiring companies may face liability for an acquired company's pre-acquisition conduct under certain circumstances.[27] Although the recent ruling specifically notes that acquiring companies may be *"condemned criminally to a fine or confiscation,"* it is not yet clear whether an acquiring company's punishment is limited to monetary penalties and a finding of guilt, or whether the company may also be deemed criminally responsible for the conduct and subject to additional non-monetary sanctions, such as debarment. Thus, there is no assurance that prosecutors will offer leniency for inherited practices that may have continued for a limited time post-close.[28]

III. CONCLUSION

Companies that are considering self-reporting misconduct with a potential nexus to multiple jurisdictions face difficult strategic choices given that the U.S., U.K. and French approaches to negotiated resolution remain decidedly varied, if not opposing, in several key respects. Recent SFO guidance harmonises the U.K. approach in certain areas, including the ability to conduct an initial internal investigation and the timing for making a voluntary disclosure, but there remain significant distinctions that companies must consider to effectively navigate the different regulatory expectations.

However, the clear expectation of waiver and the different levels of protection afforded to privileged materials in internal investigations in the U.K. and France will continue to pose a challenge for companies forced to navigate parallel proceedings in both the U.S. and U.K. or France. Companies should consider whether the promised but amorphous co-operation credit for sharing privileged materials outweighs the risk of disclosure in the U.S. or, alternatively, whether they can maintain a principled middle ground by keeping prosecutors on both sides of the Atlantic on sufficient and equal factual footing without jeopardising applicable privileges. Under either alternative, the risk of sacrificing privilege in a matter with a clear U.K. or French interest is likely to complicate a company's disclosure decision—and how to proceed in a co-operative posture if the disclosure leads to a more searching investigation.

On the other hand, companies should welcome the formal acknowledgment of parallel proceedings in both the U.K. and French guidelines. While they do not go so far as to provide actionable standards comparable to the DOJ's stated credit for overlapping foreign fines and willingness to defer to foreign authorities, they offer some assurance that these agencies will investigate and take action in proportion to their relative interests.

Recent resolutions attest that both U.K. and French prosecutors are willing to co-operate with their U.S. counterparts toward a coordinated multilateral resolution where U.K. and French interests are paramount (in some cases resulting in substantially reduced penalties payable to U.S. authorities); the guidance also gives reason to assume that the converse will apply when U.S. interests are paramount.

The distinctions between the U.S., U.K. and French standards for evaluating co-operation and self-reporting may affect the company's incentives to proceed with self-disclosure and will almost certainly affect its strategic and tactical approach for doing so. With increased transparency provided by these standards, companies should be better positioned to consider whether a voluntary self-disclosure may be in their interest and, if so, to determine the scope and sequencing of disclosures that are likely to minimise the duration and complexity of any ensuing investigations. Moreover, companies are now less likely to be penalised for delaying disclosure until they are able to adequately assess whether a basis to disclose in each country may exist.

Companies that have identified potential violations of anti-corruption laws should give particular consideration to the ascertainable benefits provided under the DOJ Corporate Enforcement Policy. For example, companies considering matters with a clear U.K. or French interest but with no immediate U.S. nexus may place little at risk if they elect to make a simultaneous voluntary disclosure to U.S. authorities, provided they have no prior record of FCPA violations. By contrast, where a U.S. nexus is likely, but the nexus to the U.K. or France is lesser or uncertain, companies may prefer to investigate further and refrain from disclosure unless and until they find a clear basis for U.K. or French interest.

Ultimately, the scope and timing of a disclosure will depend upon any number of other factors such as the scope and significance of the issue, the company's reporting history on similar issues, the likely interest in pursuing both corporate and individual wrongdoers and the likelihood of the matter coming to the attention of authorities by alternative means such as a whistle-blower or media report. Unfavourable audits, third-party litigation and regulatory filing obligations or other public statements can also augur in favour of a disclosure under certain circumstances.

Such factors have long been relevant considerations, but the new U.K. and French standards offer increasing assurance that voluntary self-disclosure and co-operation will result in demonstrable benefits that may tip the balance in favour of self-disclosure in cases where other factors may not be determinative.

✧ ✧ ✧

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

London

Simon Airey
Partner
+44 (0)20 3023 5156
simonairey@paulhastings.com

Paris

Nicola Bonucci
Managing Director
+33.1.42.99.04.20
nicolabonucci@paulhastings.com

Washington, D.C.

Morgan Miller
Partner
+1.202.551.1861
morganmiller@paulhastings.com

---

1 *See* SFO Operational Handbook: Deferred Prosecution Agreements (2020), available here.
2 *See* SFO & CPS Deferred Prosecution Agreements Code of Practice (2014), available here.
3 *See* our client alert dated 10 October 2020 which considers a number of key points contained in the Handbook, available here.
4 *See* PNF & AFA Guidelines on the Implementation of the CJIP (2019), at 9, available here.
5 *See* Ruling delivered by France's Court of Cassation on 25 November 2020, available here. Following a recent decision by highest court in France, the transfer of criminal liability may apply to mergers and acquisitions concluded after 25 November 2020 and within the scope of the European Union directive on the establishment and functioning of limited liability companies, available here. In addition, the highest court recalled that if the purpose of the merger was to escape criminal liability, courts may always impose all available criminal sanctions on the acquiring company, irrespective of the date of the merger and the corporate form of the companies involved.
6 *See* DOJ Justice Manual § 9-28.300 ("*Filip Factors*") (2020), available here.
7 *See* SEC Enforcement Manual § 6.1.2 ("*Framework for Evaluating Co-operation by Companies*"), available here.
8 For example, in the Rolls Royce DPA, the company had not self-reported the issue but in light of the extraordinary degree of co-operation demonstrated by the company (including provision of documents which the SFO would not have obtained as part of its own investigation) full credit was nevertheless awarded.
9 *See* CJIP Guidelines, *supra* Footnote 4, at 9.
10 Such as the MEDEF (French Employer's Federation) and the AFEP (French Association of Private Enterprises).
11 *See* our client alert dated 7 July 2020, available here.
12 *See* DOJ Justice Manual § 9-28.700 (2018), available here.
13 *See* DOJ Justice Manual § 9-47.120 (2019), available here.
14 *See* United States Sentencing Guidelines (USSG) § 8C2.5(g), available here.
15 *See* SEC Seaboard Report (2001), available here.
16 In the U.K., transcripts of interviews are not automatically privileged unless litigation or a regulatory investigation is contemplated or underway.
17 *See*, *e.g.* Sentencing Council Guidelines for Use in Crown Court, Bribery of Foreign Public Officials, available here.
18 *See* CJIP Guidelines, *supra* Footnote 4, at 8-10.
19 *Id.* at 9-10.
20 *Id.* at 10.
21 *Id.* at 12-13.
22 *See* Seaboard Report, *supra*, Footnote 15.
23 *See* Remarks Delivered by Deputy Attorney General Rod Rosenstein on May 9, 2018, available here.
24 *See* CJIP Guidelines, *supra* Footnote 4, at 15-16.
25 In the French and U.S. agreements reached with Société Générale, both authorities credited the fine paid by the company to the other authority such that each authority was paid one-half of the total fine (both fine amounts were the same). *See* Société Générale's 2018 CJIP with French authorities, available here, and Société Générale's 2018 DPA with DOJ, available here. In addition, in the Airbus resolution, the aggregate penalties assessed against Airbus across all jurisdictions (U.S., U.K., and France) were taken into account in the French CJIP in determining whether the fine imposed was *"proportionate to the benefits derived from the wrongdoing,"* as well as in the SFO DPA when considering the level of penalty said to be *"just and proportionate."*
26 *See* Ruling delivered by France's Court of Cassation on 25 November 2020, *supra* Footnote 5.
27 *Id*; *See also* Footnote 5.
28 *See* AFA Practical Guide on Anti-Corruption Audits in the Context of Mergers & Acquisitions, at 6, available here.