Boeing Plea Deal Is A Mixed Bag, Providing Lessons For Cos.

By **Edmund Vickers** (July 22, 2024)

Edmund Vickers

The Boeing Co., the multinational aerospace, defense and commercial airplane company, has agreed in principle to a deal with the U.S. Department of Justice to plead guilty to a single criminal charge of conspiracy to defraud the government.

The plea deal submitted to the U.S. District Court for the Northern District of Texas, if accepted by the judge, will see Boeing pay a further $243.6 million in penalties, invest $455 million to strengthen safety and compliance, and submit itself to independent monitoring for the next three years.

The parties were due to go to court last week, but federal prosecutors asked for more time to hammer out the details of the proposed deal.

This comes after Boeing failed to abide by the terms of the deferred prosecution agreement the corporation reached with prosecutors in 2021. As a result of that agreement, Boeing paid more than $2.5 billion in fines and compensation to victims' families, accepting responsibility for two crashes of its 737 Max aircraft in Indonesia in 2018 and Ethiopia in 2019, in which a total of 346 people died.

Boeing was also subject to a three-year period of supervision in which, inter alia, it was to "design, implement, and enforce a compliance and ethics program to prevent and detect violations of the U.S. fraud laws throughout its operations."

That period is now up, and federal prosecutors have concluded that Boeing failed to comply with the stipulations. Prosecutors have therefore resurrected the criminal charge, to which Boeing indicated it will now plead guilty.

While the parties have asked for more time to work on the detail of the plea deal — in particular the independent monitoring of the company's compliance — Paul Cassell, a lawyer representing the families of the victims, has already indicated that they object to the agreement in principle. In a statement, Cassell said that "through crafty lawyering ... the deadly consequences of Boeing's crime are being hidden."

For some, there may be an uneasy feeling that the victims and their families have been denied justice if a corporation can avoid more stringent criminal liability for failing to fully comply with the terms of the DPA.

U.S. District Judge Reed O'Connor has indicated that he will give the families seven days to file any objections to the proposed agreement, and the parties will then have a further 14 days to respond. We will see how this plays out in front of the judge.

The decision of the DOJ to enter into this plea deal is evidence that a DPA has real teeth. But it is a lesson to all corporations that agree to terms in a deferred prosecution that the criminal liability will not go away unless the terms of the agreement are actually abided by.

The plea deal would, however, do much to help manage the very real damage done to Boeing's reputation, which has been continuously under fire since the disasters. This

damage was further compounded in January of this year, when, due to an unrelated technical issue, the door of an Alaska Airlines Boeing 737 Max 9 jet blew out midair. The incident forced an emergency landing, though fortunately no one was injured.

The deal may also be seen as federal prosecutors being keen to flex the muscles of their office after the failure to secure the conviction of aviation technical expert and pilot, Mark Forkner — the only Boeing employee prosecuted in relation to the safety issues — who was alleged to have concealed important safety information about the aircraft from the Federal Aviation Administration.

On balance, the deal is a significant win for Boeing's lawyers. Although the detail of any settlement is yet to be resolved, including the nature and extent of its period of enhanced federal monitoring during the three-year probation period and who will be responsible for the supervision, any deal is likely to help Boeing avoid further reputational damage.

More significantly, the board at Boeing will likely be hoping that this deal will allow the company to renew defense contracts with the U.S. government if it is able to obtain a waiver from the U.S. Department of Defense.

The case is a timely reminder to all corporations of the benefits of cooperating early and fully with investigating authorities; complying with the conditions of DPAs; and working on plea agreements to avoid greater criminal sanctions, which ultimately could otherwise have far-reaching and possibly terminal consequences for the company. If these measures are handled effectively, the corporation's health may start to improve.

Boeing, however, is not out of the woods yet. If the judge refuses to accept the plea deal, having seen the detail of the agreement and heard the objections from the families of the victims, the DOJ and the company's directors will have to go back to the negotiating table.

In recent years, the use of nonprosecution agreements and DPAs has grown significantly, particularly in the U.S. and U.K., as well as in parts of Europe and South America, although numbers have ticked down in the U.S. in the last 18 months.

While some observers and victims are critical of such deals — some say they let the corporation off the hook or protect corporations that are said to be "too big to fail" — prosecutors tend to argue that such deals stop reckless or unlawful conduct, recoup ill-gotten funds, ensure large compensatory awards to victims, put in place performance compliance and monitoring, and send out a loud message to other companies to clean up their acts and comply with financial regulations.

Such deals, as Boeing has found out to its considerable cost, also hang over the corporation, like a sword of Damocles, for the period of deferment. The threat of full prosecution and the glare of even more adverse publicity at trial does not go away until all requirements set out in the terms of the agreement are met and the company complies with its supervision.

Companies that have, in recent years, entered into DPAs in the U.S., paying large fines and compensation in addition to various compliance monitoring and reporting obligations, include Teva Pharmaceuticals USA Inc. and Glenmark Pharmaceuticals Inc. USA (with fines of $225 million and $30 million, respectively); chemicals manufacturing company Albemarle Corp. ($218 million); JPMorgan Chase & Co. ($920 million); Credit Suisse Group AG ($275 million); Deutsche Bank AG ($130 million); United Airlines Inc. ($50 million); Epsilon Data Management LLC ($150 million); and financial services

company State Street Corp. ($115 million).

Lawyers regard the government's increasing incentives to whistleblowers — over $1 billion has been paid out since the U.S. Securities and Exchange Commission's whistleblower program began in 2011, and in May 2023, the SEC paid out a record $279 million in one case alone — will inevitably pile on the pressure on corporations to reach plea deals going forward.

Although whistleblowers were not used in this prosecution of Boeing, the company and a principal supplier, Kansas-based Spirit AeroSystems Holdings Inc., have faced separate allegations of safety and quality control from a number of former employees, and Spirit Aerosystems is currently defending a lawsuit from shareholders.

Earlier this month, David Calhoun, the outgoing CEO of Boeing, announced that the company was acquiring Spirit Aerospace for more than $8 billion to "fully align our commercial production systems, including our Safety and Quality Management Systems, and our workforce to the same priorities, incentives and outcomes — centered on safety and quality."

In the U.K., where the use of DPAs is more recent — introduced by legislation in 2014, with the first DPA being entered into 2015 with Standard Bank PLC — the courts have approved agreements in over a dozen cases between the Serious Fraud Office and the likes of Rolls-Royce Motor Cars, Serco, Tesco, G4S, Airbus SE and Amec Foster Wheeler Energy.

And, at the end of 2023, the Crown Prosecution Service used a DPA for the first time with Entain PLC, a global online betting business, which included the imposition of financial penalties of £615 million ($777 million).

The message coming from both the SFO and CPS is that these deals are available, and that corporations should get on board as early as possible. Indications are that the SFO would like to develop a U.K. whistleblower scheme akin to that of the U.S., although some legal experts in the U.K. believe that the use of whistleblowers will play into defense hands, cause disclosure problems for the prosecution and may even embolden defendants to fight the case.

It is clear, however, that prosecutors in the U.S., U.K. and elsewhere are increasingly keen to use DPAs to secure deals with large corporations, in which substantial penalties are levied, victims receive significant compensation and greater criminal liability is avoided. And by entering into such agreements, both parties avoid the greater risks and costs that come with a criminal trial.

This trend is likely to increase in the future, particularly in the U.S. where the whistleblower incentives are on the rise.

And, as Boeing has discovered, corporations will only avoid further criminal liability, greater fines and costs, and more supervision if they comply fully with the terms of the agreement.

For any corporation concerned about its reputation and share price, its directors and lawyers should therefore not only ensure proper compliance with financial and safety regulation, but also be prepared to cooperate swiftly to avoid further reputational damage.

This will be onerous in the short- to medium-term, but may well be a price worth paying. While this will give little comfort to the victims of corporate misconduct, the Boeing

experience ought to send a sobering message to other corporations about the need for better compliance and risk management.

Edmund Vickers KC is a barrister at Red Lion Chambers.