

## SFO Publishes Long-Awaited Corporate Co-operation Guidance

13 August 2019

On 6 August 2019, the UK Serious Fraud Office (“SFO”) published its much-awaited guidance on corporate co-operation (the “Guidance”). The Guidance is relevant to corporates considering whether or not to self-report potential wrongdoing to the SFO, and whether to co-operate with the SFO’s investigation.

Co-operation is a relevant consideration in the SFO’s charging decisions, including whether or not it determines that a corporate should be invited to enter into Deferred Prosecution Agreement (“DPA”) negotiations. Genuine proactive co-operation is a public interest factor tending against criminal prosecution, and it is often on this basis that, upon learning of wrongdoing, a corporate will choose to co-operate with the SFO. However, the Guidance makes clear that co-operation is not just a case of complying with the law; rather, it means “providing assistance to the SFO that goes above and beyond what the law requires”. Furthermore, the Guidance states that what constitutes co-operation will depend on the facts of each case and that co-operation, even where it is “full, robust co-operation”, does not guarantee a particular outcome.

### Preserving and Providing Material

The Guidance sets out a broadly helpful non-exhaustive list of indicators of good practice in relation to the preserving and providing of material to the SFO. Although many of these are uncontroversial, some practices are likely to pose a more onerous burden on a corporate, including:

- Identifying relevant material that is in the possession of third parties and potentially helping the SFO to obtain it;

- Providing relevant material that is held abroad that could pose additional international data protection issues where such material is in the possession or under the control of the corporate; and
- Assisting in identifying material that might reasonably be considered capable of assisting any accused or potential accused, or of undermining the case for the prosecution. This wide provision could lead to a corporate telling the SFO what material it would be required to disclose to any individual defendants, thereby assisting the SFO's prosecution of any such individuals.

The Guidance does not deal with notable thorny topics, such as data protection or co-operation, in the context of investigations involving multiple law enforcement agencies.

## Witness Accounts and Waiving Privilege

Following previous statements by Lisa Osofsky, Director of the SFO, it comes as no surprise that the Guidance reaffirms the SFO's preference for corporates to waive privilege over witness accounts. Nevertheless, while the Guidance does state that failure to waive privilege would not satisfy the corresponding factor against prosecution in the DPA Code of Practice (i.e., there would be no 'positive' cooperation credit), such a failure "will not be penalised by the SFO".

However, the Guidance states that, "if the organisation claims privilege, it will be expected to provide certification by independent counsel that the material in question is privileged". The requirement has been included to reinforce the strength of a claim to privilege, thereby helping the SFO to avoid potential disclosure issues in respect of individual defendants. However, it will no doubt prove a costly exercise for companies, and it further underpins the need to appropriately consider privilege in internal investigations from the outset.

## Self-Reporting

The Guidance makes clear that one element of co-operation includes "reporting [suspected wrong-doing] to the SFO within a reasonable time of the suspicions coming to light". Mirroring recent comments made by the Court of Appeal in *ENRC v SFO*,<sup>1</sup> this recognises the fact that companies will need to carry out a level of initial investigation before making a decision to self-report. However, how long and in-depth that initial

investigation can be before the SFO determines that there has not been a self-report “within a reasonable time” will necessarily be a fact-specific question.

## Parallel Proceedings

Co-operation can also have broader implications on parallel or subsequent proceedings, such as related civil litigation or regulatory action, especially when it comes to waiving privilege. For example, in parallel civil proceedings relating to the same facts at issue as in an SFO investigation, a claimant may request disclosure of documents provided to the SFO, over which the defendant chose to waive privilege in order to cooperate and where such documents were subsequently utilised in criminal proceedings. In regulatory proceedings, a regulator may also expect a corporate to grant the same privilege waiver to them as was given to the SFO.

## Conclusion

The Guidance makes the SFO’s expectations clear in relation to co-operation and provides useful information on what corporates can expect when self-reporting and seeking to co-operate. However, complying with the Guidance will be a costly and time-consuming exercise. Ultimately, whether or not to co-operate remains a fact-specific decision with regard to a number of factors.

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1. [2018]EWCA Civ 2006↔

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