SFO Announces New Corporate Cooperation Guidance

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On August 6, the United Kingdom's Serious Fraud Office ("SFO") published new guidance on the steps companies should take in order to receive cooperation credit in the SFO's charging decisions. The document, titled "Corporate Co-operation Guidance" (the "SFO Guidance"),[1] outlines similar steps to those set forth in the United States Department of Justice's Corporate Enforcement Policy ("CEP"), indicating that SFO Director Lisa Osofsky, formerly of the FBI, is ushering in familiar U.S.-based standards in her new role leading the SFO.

Despite many similarities, the SFO Guidance differs from the CEP in a few significant respects. The most noteworthy of these differences is that the SFO Guidance indicates that a company may not obtain cooperation credit unless it waives privilege over witness accounts, notes, and transcripts obtained during the course of the company's investigation. Second, by requiring companies to provide such material, the SFO Guidance could come into tension with the recent *United States v. Connolly* decision from the Southern District of New York, in which Chief Judge Colleen McMahon admonished the Department of Justice for "outsourcing" its investigation to company counsel, rather than relying on its own investigation and resources.[2]

As set forth below, it remains to be seen how these differences will play out in matters being jointly investigated by the DOJ and SFO, such that the subject company can cooperate effectively in both countries without foregoing cooperation credit from either agency.[3]

The SFO Guidance

The SFO Guidance defines cooperation as "providing assistance to the SFO that goes above and beyond what the law requires."[4] Under preexisting SFO guidance, if a company takes a "genuinely proactive approach" including "self-reporting and remedial actions," this conduct would weigh in favor of not prosecuting the company.[5] Similarly, cooperation can carry "considerable weight" in a decision to grant a

[1] Serious Fraud Office, Operational Handbook, *Corporate Co-operation Guidance* (2019), *available at* https://www.sfo.gov.uk/download/corporate-co-operation-guidance/# ("*SFO Guidance*").

[2] *United States v. Connolly*, Case No. 16-cr-370, 2019 WL 2120523 (S.D.N.Y. May 2, 2019).

[3] Recent examples of companies jointly investigated by the DOJ and SFO include Guralp Systems Limited (2018) and Rolls-Royce plc (2017).

[4] *SFO Guidance* at 1.

[5] Serious Fraud Office, Guidance on Corporate Prosecutions 8 (2010).

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company a Deferred Prosecution Agreement ("DPA") under the SFO's 2013 DPA Code of Practice, if that cooperation is "genuinely proactive."[6]

The new SFO Guidance does not so much alter the landscape as elaborate upon the type of conduct expected in order to obtain cooperation credit. Much of the SFO Guidance is devoted to detailing the best practices that organizations should take to preserve and provide physical evidence. Some of these best practices include:

- Preserving digital and hard-copy versions of relevant material using methods that prevent damage or destruction
- Ensuring digital integrity of electronic materials
- Providing materials in an organized, useful way that makes it easy for the SFO to digest
- Assisting in identifying material that might help any accused individual or entity or that might undermine the case for prosecution
- Providing relevant background information on the company
- Notifying the SFO of other government agencies the company has been contacted by or reported to
- Making relevant personnel available to explain the company's financial records[7]

Other notable examples include reporting the misconduct of relevant actors—regardless of seniority or position—directly to the SFO within a reasonable time as well as preserving evidence and providing it to the SFO.

The SFO Guidance also provides some examples of behavior considered inconsistent with cooperation, including tactical delay, information overload, and unjustifiably blaming others.[8] Though the SFO Guidance endeavors to give examples of how corporations ought to behave, it also emphasizes that cooperative conduct is not a matter of specific checklists so much as "the nature and tone of the interaction" between the organization and the SFO.[9]

Privilege Waiver

The most significant difference between the SFO Guidance and the CEP is the SFO Guidance's approach to privileged information. Under the SFO Guidance, companies seeking cooperation credit "by providing witness accounts should additionally provide any recording, notes and/or transcripts of the interview and identify a witness competent to speak to the contents of each interview."[10] Indeed, under the SFO Guidance, while a company will not be penalized if it chooses not to waive privilege, an "organization that does not waive privilege and provide witness accounts does not attain the corresponding factor against prosecution that is found in the DPA Code."[11]

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[6] Serious Fraud Office, Deferred Prosecution Agreements Code of Practice 2.8.2.i. (2013).

[7] *SFO Guidance* at 2-4.

[8] *Id.* at 1.

[9] *Id.* at 2.

[10] *Id.* at 5.

[11] *Id.*

This is a stark departure from the approach taken in the CEP, which explicitly states that "eligibility for cooperation or voluntary self-disclosure credit is not in any way predicated upon waiver of the attorney-client privilege."[12] Indeed, the "in any way" language found in the CEP was recently added in March 2019, erasing any doubt that cooperation credit under the CEP was in any way related to a company's willingness to waive privilege.

In this regard, one important point to note is that, while the attorney-client privilege is similar in many respects in the U.S. and U.K, the U.K. takes a more narrow approach when it comes to employee interviews. As a general matter, in the U.K., employee interviews are not protected by the legal advice privilege, but a recent U.K. Court of Appeal decision ruled against the SFO in finding that, in certain circumstances, interview notes are protected if the interview was conducted in anticipation, and for the dominant purpose, of litigation.[13] Thus, companies seeking to comply with the SFO Guidance should be prepared to waive privilege over employee interview notes that may otherwise be protected under U.K. law.

Moreover, the SFO Guidance notes that a company asserting privilege "will be expected to provide certification by independent counsel that the material in question is privileged."[14] This presents an added burden for companies conducting internal investigations, and it remains to be seen how much pushback independent counsel will receive from the SFO regarding privilege determinations.

Other Key Differences from the DOJ's Corporate Enforcement Policy

The SFO Guidance differs from the CEP in a few other notable respects.

- **No Presumption in Favor of Non-Prosecution.** The SFO Guidance states that a company's cooperation will be a relevant consideration in the SFO's charging decision, but that "even full, robust co-operation" will "not guarantee any particular outcome."[15] Thus, unlike the CEP, the SFO Guidance does not establish any presumption in favor of a particular enforcement outcome based on a company's level of cooperation. Instead, the SFO retains full discretion to determine the correct outcome based "upon the particular facts and circumstances" of each case.[16]
- **Reporting Requirements.** Another difference between the two policies is in regard to the depth of their reporting requirements. In order to achieve cooperation credit under the SFO Guidance, a company must "identify[] suspected wrong-doing and criminal conduct together with the people responsible, regardless of their seniority or position in the organization."[17] The CEP, on the other hand, only requires that companies disclose "relevant facts about all individuals *substantially*

[12] Justice Manual Title 9-47.120, *FCPA Corporate Enforcement Policy*, *available at* **www.justice.gov/jm/jm-9-47-120** ("*Corporate Enforcement Policy*").

[13] *See Dir. Serious Fraud Office v. Eurasian Nat. Res. Corp. Ltd.* [2018] EWCA (Civ) 2006, (Eng.).

[14] *SFO Guidance* at 5.

[15] *Id.* at 1.

[16] *Id.*

[17] *Id.*

involved in or responsible for the violation of law."[18] Thus, companies may face a heavier burden in identifying relevant individuals to the SFO as compared with their reporting obligations to the DOJ.

- **Personal Communications Records.** The SFO Guidance also differs slightly from the CEP in its approach to personal communications records. Both the SFO Guidance and CEP make clear that strong recordkeeping practices will be rewarded, but in the context of communication records, the CEP places a slightly more stringent burden on companies. The CEP requires companies seeking cooperation credit to "implement[] appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms."[19] Thus, companies must formally outline the permissible uses of these platforms to optimize compliance and record retention. While the SFO Guidance emphasizes strong recordkeeping practices such as maintaining an audit trail of the acquisition and handling of digital material, it asks only that companies "alert the SFO to relevant digital material that the organisation cannot access – for example . . . messaging apps."[20]

Implications on Joint Investigations

The differences between the SFO Guidance and the CEP pose a number of questions for how companies being jointly investigated by the SFO and DOJ can cooperate fully and effectively under each agency's guidance. On the one hand, for example, waiving privilege over witness interviews and related accounts to comply with the SFO Guidance risks waiving that same privilege with respect to the DOJ—an action flatly not required under the CEP to obtain cooperation credit. Indeed, such waiver could also have broader implications in other proceedings (such as civil litigation) beyond any joint investigation conducted by the DOJ.

As set forth above, other differences such as reporting requirements and approach to personal communication records could force companies to elect courses of action that go beyond what is required under the agencies' individual guidance. Indeed, when faced with the option of which guidance to follow, one factor that companies might consider is the presumption in favor of non-prosecution found in the CEP—a presumption that the SFO Guidance has clearly carved out.

Some of the cooperation requirements set forth in the SFO Guidance could also come into tension with language in Chief Judge Colleen McMahon's recent opinion in *U.S. v. Connolly*. For example, the SFO Guidance requires that companies "consult in a timely way with the SFO before interviewing potential witnesses or suspects" and "mak[ing] employees and (where possible) agents available for SFO interviews."[21] This approach diverges from that counseled by the *Connolly* decision, which criticized the government's directing of employee interviews as well as the company's having sought government permission to interview its own personnel.[22] The requirement that companies waive privilege over the

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[18] Indeed, when then-Deputy Attorney General Rod Rosenstein announced this revision in November 2018, he cited "the inefficiency of requiring companies to identify every employee involved [in wrongdoing] regardless of their culpability." He further emphasized that "investigations should not be delayed merely to collect information about individuals whose involvement was not substantial." *See* Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), *available at* **https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0**.

[19] *Corporate Enforcement Policy*.

[20] *SFO Guidance* at 3.

[21] *Id*. at 4.

[22] *United States v. Connolly*, Case No. 16-cr-370, 2019 WL 2120523 at *6, *12 (S.D.N.Y. May 2, 2019).

notes, accounts, and transcripts of witness interviews also risks allowing the government to do precisely what Chief Judge McMahon warned against in *Connolly*: "outsourc[ing] the important development stage of [the government's] investigation" to the company and then relying on that information to "buil[d] its own investigation."[23]

It remains to be seen how these potential tensions may play out in practice or whether the SFO will issue additional guidance or statements addressing these concerns.

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[23] *Id*. at *12.