
UK Serious Fraud Office Publishes Corporate Co-Operation Guidance

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On 6 August 2019, the UK Serious Fraud Office ('SFO') published Corporate Co-operation Guidance ('Guidance')¹. This Guidance is designed to assist companies considering whether to self-report corporate wrongdoing to the SFO and, if so, how to achieve maximum co-operation credit to help avoid prosecution, or be offered the opportunity to enter into a Deferred Prosecution Agreement ('DPA'). In doing so, it clarifies the SFO's position on various key investigative themes, including: data gathering and production; the company's dealings with individual witnesses and suspects; and the implications of asserting legal professional privilege ('Privilege') over witness accounts obtained during an internal investigation.

Background

The tenures of Ms Osofsky's two most recent predecessors as Director—Richard Alderman and David Green QC—came to be defined by the SFO's approach to companies wishing to co-operate with it in the hope of obtaining a favourable outcome.

Guidance published by Alderman in July 2009 provided that the SFO would seek to settle self-reported cases civilly wherever possible, provided certain criteria were met. This approach led to accusations of a lack of transparency, and to Green QC retracting Alderman's policy on self-reporting six months after taking office in April 2012. In his restated policy announcement, Green QC made clear that under his stewardship, self-reporting offered no guarantee that a prosecution would not follow.

This most recent Guidance reiterates Green's central policy tenet that: "even full, robust co-operation—does not guarantee any particular outcome ... [e]ach case will turn on its own facts" but goes beyond that by also providing guidance on what co-operation should look like.

Preserving and providing material—good practice indicators

The Guidance is clear that co-operation "means providing assistance to the SFO that goes above and beyond what the law requires", and provides examples of behaviour inconsistent with genuine co-operation, including "protecting specific individuals ... silence about selected issues ... and tactical delay or informational overloads."

Though not exhaustive, the Guidance provides an extensive list of “indicators of good practice” as examples of steps which the SFO may ask an organisation to undertake, some of which are potentially burdensome. These include:

- **Avoiding a ‘data dump’** by providing material to the SFO in a “useful, structured way”, including, for example, providing compilations of documents selected by the SFO and sorting material by custodian or specific issue.
- **Identifying material** that “might reasonably be considered capable of assisting any accused or potential accused or **undermining the case for the prosecution**” (i.e. assisting the SFO in fulfilling its statutory duty of disclosure).
- Identifying to the SFO relevant **material** that is **in the hands of third parties** and helping the SFO to obtain it.
- **Providing relevant material that is held abroad** where it is in the “possession or under the control” of the organisation (notwithstanding the outcome of the awaited appeal to the UK Supreme Court in the case of KBR).
- **Creating and maintaining an accurate audit trail** of steps taken in the acquisition and handling of all digital and hard-copy material and identifying a person to provide a witness statement in respect of continuity.
- Producing **financial records** in a way that directly assists the SFO’s work, for example by providing “records that show relevant money flows”, and grouping together documents such as bank records, invoices and contracts.
- Providing helpful information on **industry practices and key players**, and on “defences particular to the market or industry at issue”.
- **Consulting with the SFO before taking either investigative or employment-related action** in relation to **key individuals**—both witnesses and suspects. The company should also expect to **facilitate SFO interviews with these individuals**, including arranging for them to return to the UK if needed.

Witness accounts and waiving Privilege

Companies “will not be penalised by the SFO” for asserting Privilege over witness interview memoranda, but nor will they “attain the corresponding factor against prosecution that is found in the DPA Code...”.

Only time and the outcome of cases will tell how heavily the non-waiver of Privilege by a company weighs in the balance when the SFO and the Court determine whether there are sufficient other factors tending against prosecution. The Guidance requires that any company that chooses to maintain Privilege must properly establish its claim by having it certified by independent counsel. The Guidance also requires that any such company must prepare and provide to the SFO a schedule or ‘privilege log’ detailing all documents withheld on the basis of Privilege, and the basis for asserting the same.

Companies that choose to waive Privilege and seek co-operation credit by providing witness accounts must also provide “any recording, notes and/or transcripts of the interview”, and identify a

witness competent to speak to each interview.

Conclusion

Critically, the Guidance is able only to *inform* rather than *resolve* the key questions facing a company on notice of potentially fraudulent activity. Should the company self-report? If so, when? Before any witness interviews have been undertaken? Should Privilege attaching to the notes of any such interviews be waived? If not, will that fatally wound any hopes of a non-criminal resolution or obtaining a DPA? How can the company retain control over the scope and direction of the investigation whilst also co-operating fully? And how should a company balance its obligations to respond promptly to SFO requests, while also providing information in a more organised and focussed manner?

For those companies and their legal advisors who do decide to adopt a posture of full co-operation with the SFO, however, the Guidance will likely prove helpful. It draws together multiple disparate sources of the SFO and the Court's prior expectations on co-operation (including guidance issued under the former Director, recent case law, public statements made by senior SFO representatives and the five DPAs concluded to date) into one place, to serve as a practical road map to securing full co-operation credit.

¹ *SFO Operational Handbook: Corporate Co-operation Guidance*, August 2019.