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THE UK SERIOUS FRAUD OFFICE’S LATEST GUIDANCE ON CORPORATE CO-OPERATION – GREAT EXPECTATIONS FULFILLED OR LEFT ASKING FOR MORE?

To Our Clients and Friends:

On August 6, 2019 the Serious Fraud Office (“SFO”) in London published a new section of its Operational Guidance entitled *Corporate Co-operation Guidance* (the “Co-operation Guidance”). The Director of SFO, Lisa Ososky, foreshadowed the publication of such guidance in previous speeches, noting in one that the purpose of the guidance was “*to provide... added transparency about what [companies] might expect if they decide to self-report fraud or corruption.*” [1] This raised great expectations amongst practitioners and companies alike. The question is whether these expectations have been met or do they leave readers asking for more?

The primary audience for the Co-operation Guidance is SFO prosecutors and investigators. This is also the case for the *Deferred Prosecution Agreement Code of Practice* (the “DPA Code”) where, the *Crime and Courts Act 2013* directs that a Code be published to give prosecutors “*guidance on - the general principles to be applied in determining whether a DPA is likely to be appropriate in a given case.*” [2] However, despite the intended primary audience of these documents, knowing the considerations that prosecutors will take into account when assessing whether it is in the public interest to offer a Deferred Prosecution Agreement (“DPA”) is invaluable insight for companies. In many respects the Co-operation Guidance codifies the content of speeches given by the Director and other members of the SFO’s senior leadership. Reliance on speeches to understand the requirements had always been unsatisfactory where they may have been unpublished, selectively reported and on occasions were inconsistent.[3]

Introduction to the Co-operation Guidance

The Co-operation Guidance begins by providing high level opening descriptions of cooperation, which includes timely self-reporting to the SFO, the identification of the alleged perpetrators and the prompt provision of evidence. On the other hand it identifies delay, stalling tactics or prejudicing a criminal investigation by warning potential suspects, as uncooperative.

The Co-operation Guidance also makes clear early on that it is not a “*checklist*”, that “*each case will turn on its own facts*” and that “*co-operation is one of many factors that the SFO will take into consideration when determining an appropriate resolution...*” In saying this the SFO preserves a significant breadth of prosecutorial discretion. This is welcome to the extent that it provides the possibility for a case being resolved by a DPA that does not fit a conventional view of what constitutes the interests of justice. For example, such discretion has permitted a previous DPA to be concluded

where the Court's first reaction was that if the company in that matter "*were not to be prosecuted ... then it was difficult to see when any company would be prosecuted.*" [4]

Whilst discretion may therefore be welcome, the unqualified words that "*even full, robust co-operation – does not guarantee any particular outcome*" suggests that the SFO has missed the opportunity to maximise the incentivisation for self-reporting and other co-operation. In contrast, the DOJ's FCPA Corporate Enforcement Policy contains a presumption in favour of a declination with disgorgement for self-reporting, co-operation and remediation absent aggravating circumstances. Those considering reporting conduct captured by both UK and US enforcers are therefore presented on the face of it with different and potentially inconsistent standards and consequences for self-reporting and other co-operation.

In its introductory paragraphs the Co-operation Guidance refers to and quotes from the separate but similarly named Guidance on Corporate Prosecutions (the "Corporate Guidance"). The Corporate Guidance is undated but heralds back to the Directorship of the SFO under Richard Alderman which ended in 2012. It was the first attempt to provide direction in respect of the SFO's expectations of companies regarding co-operation. It contains the public interest factors both in favour of charging and not charging companies. Those public interest criteria were adopted in the public consultation draft of the DPA Code in 2013. As a result of that public consultation the public interest criteria were amended in the DPA Code as finally published. The Corporate Guidance is now therefore redundant. Anyone referring to both the Corporate Guidance and the DPA Code will find inconsistent criteria, and may therefore arrive at a conclusion which is flawed. [5]

Examples of Co-operative Conduct

Provision of Information

In a speech delivered by Ms Osofsky on December 4, 2018 she stated:

"Cooperation is making the path to a case easier. For the prosecutor that means making the path to admissible evidence easier. This is not rocket science. It is documents. It is financial records. It is witnesses.

- *Make them available – promptly.*
- *Point us to the evidence that is most important – both inculpatory and exculpatory. In other words, give us the "hot" documents. Don't just bury us in a document dump.*
- *Make the evidence available in a way that comports with our laws.*
- *Make it available in a way useful to us so that we can do our job – which we will do. We will not, of course, simply take your word for it. We will use what you give us as a starting point, not an end point. We will test, we will probe.*
- *Do not do things that create proof issues for us or create procedural barriers."*

Despite the Co-operation Guidance making it plain that it is not exhaustive nor a checklist for identifying cooperative conduct, instead of providing overarching guidance which describe positive behaviours consistent with the Director's words, it instead begins by particularising in detail over twenty mechanistic criteria in respect of material identification, collection, processing and production which reads like the very checklist it previously disavows. Those experienced in conducting internal investigations will already approach document identification, collection, processing and production in a methodical manner. The detail given in the Co-operation Guidance however signals that the SFO will seek the provision of material of a specified scope, that is compliant with a particular collection and production methodology, is accompanied by an audit trail and individuals are identified who will be able to give evidence in a future trial in these respects. Given the particularised approach, companies and their advisors should familiarise themselves with the requirements.

Individual Interview Accounts

The importance of the company's approach to interviewing individuals is dealt with in detail. Obtaining, preserving and disclosing early accounts from persons central to the events under investigation has long been a key focus of the SFO, and has led to extensive litigation, either where the SFO has sought such accounts (*SFO v ENRC*)[6] or failed to do so properly (*R (on the application of AL) v SFO*).[7]

The Co-operation Guidance states that companies should seek the SFO's view "*before interviewing potential witnesses or suspects*" or "*taking other overt steps*". In this respect, the Co-operation Guidance does not acknowledge that there may be interviews or other overt steps that need to be conducted by the company in order to establish whether there is any conduct to self-report to the SFO. The Director of the SFO however has recognised that this may be the case in a number of speeches including on April 3, 2019 where Ms Osofsky stated that, "*I know that companies will want to examine any suspicions of criminality or regulatory breaches – indeed they have a duty to their shareholders to ensure allegations or suspicions are investigated, assessed and verified, so they understand what they may be reporting before they report it.*" The absence of this recognition in the Co-operation Guidance is a significant omission which creates uncertainty. Our view is that those conducting investigations may conduct interviews and take other unavoidable overt steps in order to establish whether there is anything to report. However if those interviews, whether alone or combined with other steps, demonstrate misconduct that would be of interest to the SFO, then any further interviewing or taking of overt steps prior to self-reporting, will likely fall short of what is suggested by the Co-operation Guidance. Companies will therefore have to give careful consideration as to whether interviews should be suspended, pending consultation with the SFO.

It would seem that it is not the SFO's desire to direct internal investigations, but instead to secure the opportunity to determine whether it should conduct interviews first, in order for example to secure an individual's first account or prevent a suspect being tipped off. A request not to interview is comparable to the de-confliction of witness interviews in the DOJ's FCPA Corporate Enforcement Policy. If the SFO makes such a request in practice, it is then reasonable to assume that it will conduct an interview promptly to ensure that the company may proceed to interview for its own fact gathering purposes, including disciplinary or remedial action. A company's disciplinary and remedial action are also documented as important considerations for assessing whether a DPA is in the interests of justice.[8]

There have been instances where companies in the UK have been directed not to conduct interviews at all. This occurred in the investigations of *Tesco Stores Limited* and *Serco Geografix Limited*. The acquiescence by the companies to such a request weighed positively in favour of DPAs being approved. However, there are more recently commenced investigations in which companies have not been so directed so it cannot be determined yet whether this reflects a settled trend. It may be expected that such direction will be given in the future, particularly in cases concerning uniquely UK misconduct and involving a small number of persons of interest.

Privilege Claims over Internal Investigation Interview Records

A whole section of the Co-operation Guidance is devoted to privilege. Waiver is characterised as co-operative but an assertion of privilege will in the eyes of the SFO be neutral. While this is a welcome clarification, the Co-operation Guidance notes that a Court may view the assertion differently and footnotes the case of *SFO v ENRC* in support of that caution. In our view the judgement in that case says no more than waiving privilege will be viewed positively. However, it is in our view unlikely that a Court deciding whether a DPA is in the interests of justice would weigh a properly established assertion of privilege against a company when establishing whether to approve a DPA. Of the five DPAs approved to date in the UK, two involved assertions of privilege yet were approved by the same judge who gave the judgment in *SFO v ENRC*. Those DPAs are in our view clear authority that waiver of privilege is not a prerequisite.

Where there is a balancing exercise of potentially competing considerations as to whether a DPA is in the interest of justice, the positive weight of a waiver of privilege in some cases may make a determinative difference favouring a DPA. However, this will be difficult to determine at the early stages of a self-reporting process and may be incapable of remedy later. Whether to assert privilege thereby forfeiting credit, or waiving privilege to receive it, will require careful judgements to be made.

Where privilege claims are made, the Co-operation Guidance reminds prosecutors that the claims will need to be properly established. Not only is the SFO interested in knowing what individuals have said in interviews that it was not party to, it is cognisant that future defendants will be equally interested. The SFO has a duty to those defendants to pursue all reasonable lines of enquiry to secure such information.

In our client alert of September 5, 2018, commenting on the case of *SFO v ENRC*, we set out what a company must demonstrate in order to best establish a claim of privilege. The Co-operation Guidance states that such claims should be certified by independent counsel. The SFO appears therefore not to be prepared to accept representations made by a company, regardless of how well they might be articulated or evidenced. While not prescriptive on the level of detail that will be required in independent counsel's certification, given the statement that claims of privilege will need to be properly established, it suggests that significant detail will be expected. The reasons for this are twofold. Firstly, in requiring independent counsel certification, the SFO is implicitly agreeing to be bound by such certifications. As such they must be able to make a qualitative examination of the certification. Secondly, the detail will be important since future individual defendants may dispute the certification even if the SFO is satisfied, and therefore the reasoning will need to be capable of withstanding such challenge. The use of independent counsel is a proactive step to address potential criticism by individual defendants that the testing of a company's

assertion of privilege was inadequate. Whether the use of independent counsel will halt the satellite litigation contesting privilege claims rather than merely providing a different springboard for the challenge remains to be seen. We suspect it will be the latter given the often complex and finely balanced factual considerations that need to be assessed. In 2014 individual defendants made precisely such a challenge to independent counsel's determination, albeit in that case they were unsuccessful. [9]

Conclusion

The Co-operation Guidance is the product of repeated requests from companies and legal practitioners for clarity as to what constitutes co-operation in corporate investigations in order that they know how to secure a DPA. Under the SFO's previous Director, the issuing of such guidance was resisted. [10] For the SFO to depart from this position was worth doing only if the outcome is to provide clarity and certainty.

The clarification on conducting interviews and claims of privilege is certainly helpful and sets some recent ambiguity to rest. How document collection, processing and production should occur is made clear. However the manner of a company's document collection and production is unlikely to ever be weighed heavily in an SFO decision to offer to resolve a case by way of a DPA. Therefore whilst understanding SFO requirements in this respect is helpful, the lengthy addressing of this issue in the Co-operation Guidance elevates disproportionately its relative importance in any such decision.

It is however the unwillingness to describe definitively the consequences of self-reporting and other co-operative behaviour which, absent aggravating features, would presumptively result in a DPA being offered is the key point on which the Co-operation Guidance does not meet expectations. Whilst the SFO is likely to dismiss this uncertainty as a difficulty for companies and their advisors to navigate, the enforcement of multi-jurisdictional financial crime and the incentivisation of its self-reporting is an enforcer's responsibility and requires an appreciation of the global enforcement landscape. Providing such clarity and certainty could have significantly encouraged self-reporting thereby advancing the prompt and effective enforcement of corporate crime, which was the main driver behind the introduction of DPAs. As the then Solicitor General, Oliver Heald QC said in 2012 when announcing the decision to introduce DPAs, "*Whatever perspective we bring to the issue of enforcement, it is clear that all involved could benefit from a tool to reduce the complexity and uncertainty of current enforcement powers, and to deal with cases more quickly and in a way which better meets the interests of justice and commands public confidence.*"[11]

This unresolved lack of clarity and certainty is likely to leave companies asking for more.

[1] Lisa Osofsky, "*Fighting fraud and corruption in a shrinking world*" 3 April, 2019, Royal United Services Institute, London.

[2] Schedule 17, paragraph 6(1) (a).

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- [3] See reporting of a speech given at GIR Live, London, December 6, 2018 which made the novel suggestion that asserting privilege may be inconsistent with co-operation - <https://globalinvestigationsreview.com/article/1177673/waiving-privilege-shows-willingness-to-cooperate-sfo-official-says>
- [4] *SFO v Rolls-Royce Plc*, Southwark Crown Court, 17 January 2017, <https://www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf> at paragraph 61.
- [5] By way of illustration the Corporate Guidance states that: “A *genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involving self-reporting and remedial actions, including the compensation of victims: In applying this factor the prosecutor needs to establish whether sufficient information about the operation of the company in its entirety has been supplied in order to assess whether the company has been proactively compliant. This will include making witnesses available and disclosure of the details of any internal investigation.*” The DPA Code however states (with emphasis added for illustration) that “*Considerable weight may be given to a genuinely proactive approach adopted by P’s management team when the offending is brought to their notice, involving within a reasonable time of the offending coming to light reporting P’s offending otherwise unknown to the prosecutor and taking remedial actions including, where appropriate, compensating victims. In applying this factor the prosecutor needs to establish whether sufficient information about the operation and conduct of P has been supplied in order to assess whether P has been co-operative. Co-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them. Where practicable it will involve making the witnesses available for interview when requested. It will further include providing a report in respect of any internal investigation including source documents.*”
- [6] [2018] EWCA Civ 2006.
- [7] [2018] EWHC 856 (Admin).
- [8] DPA Code, paragraph 2.8.2 iv.
- [9] *R v Dennis Kerrison and Miltos Papachristos*, Southwark Crown Court.
- [10] <https://globalinvestigationsreview.com/article/1149586/sfo-director-we-dont-do-guidance>
- [11] Oliver Heald QC, “*Keynote Speech to the World Bribery and Corruption Compliance Forum*, 23 October 2012: <https://www.gov.uk/government/speeches/keynote-speech-to-the-world-bribery-and-corruption-compliance-forum>.



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Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding these developments. If you would like to discuss this alert in greater detail, please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following members of the firm's UK disputes practice.

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