

# UK Serious Fraud Office Publishes Corporate Co-Operation Guidance

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The SFO recently released its much anticipated Corporate Co-Operation Guidance<sup>1</sup> (the “Guidance”). It provides details of the types of behaviour expected by the SFO in order for an organisation to receive credit for its cooperation, including through the offer of a Deferred Prosecution Agreement (“DPA”) or by the SFO determining that it is not in the public interest to prosecute. The Guidance raises the bar for obtaining cooperation credit in key areas, and also produces certain points of tension with guidance issued by US enforcement authorities which will have to be navigated during any transatlantic investigation.

The Guidance was heralded in a speech by SFO Director Lisa Osofsky in April 2019<sup>2</sup> and builds on the approaches to cooperation set out in the Guidance on Corporate Prosecutions<sup>3</sup> and the DPA Code of Practice<sup>4</sup> for prosecutors. The Guidance defines cooperation as the provision of “assistance to the SFO that goes above and beyond what the law requires,” but stresses it is not proscriptive and what is required for a company to be deemed cooperative will turn on the facts of each case. It also makes clear that even “full, robust” cooperation by a company does not guarantee a particular outcome (such as the offer of a DPA). There can, therefore, be no certainty as to the benefits of cooperation.

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<sup>1</sup> Corporate Co-operation Guidance, Serious Fraud Office, <https://www.sfo.gov.uk/download/corporate-co-operation-guidance/>.

<sup>2</sup> “Fighting fraud and corruption in a shrinking world,” Lisa Osofsky, Director of the SFO, April 3 2019, <https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/>.

<sup>3</sup> Guidance on Corporate Prosecutions, Serious Fraud Office, <https://www.sfo.gov.uk/publications/guidance-policy-andprotocols/corporate-self-reporting/>.

<sup>4</sup> Deferred Prosecution Agreements Code of Practice, Serious Fraud Office, <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>.



Much of the Guidance lists indicators of good practice which may constitute “*true*” or “*genuine*” cooperation (although the list is not exhaustive or necessarily applicable in every case). Many of these indicators (which are focused on “*preservation and provision of material*” and “*witness accounts and privilege*”) are likely to be familiar to practitioners and an established part of companies’ interactions with law enforcement agencies. They include, for example, providing material to the SFO in a useful and structured way that meets the SFO’s specifications for protection of electronic data, creating an audit trail with respect to the handling of material, identifying potential witnesses and informing the SFO without delay of data loss or destruction of material (the indicators are further summarised at the end of this alert memorandum). There are notable provisions in relation to:

- material in the possession of third parties – the Guidance flags that the SFO may ask an organisation to facilitate the production of relevant third-party material. This raises questions as to the steps which the SFO may ask companies to take when attempting to secure third-party material.
- material held abroad – companies may be requested to provide material held abroad where it is in their possession or control. In multi-national companies with complex corporate structures and overlapping systems for storing of electronic information there is significant scope for disagreement about whether documents are located abroad and/or are within a company’s control, and issues with foreign data protection laws will also have to be carefully traversed.
- companies should assist the SFO in its disclosure obligations during a prosecution by identifying material that might be capable of assisting an accused or undermining his/her prosecution – this is likely in response to criticism the SFO received from the English courts last year for failing to challenge assertions of privilege made by a

company (which agreed a DPA) over its interview notes with employees; the notes were not available for a subsequent criminal prosecution of the employee.<sup>5</sup>

- the timing and conduct of witness interviews – the Guidance states that:
  - the SFO should be consulted before the interview of witnesses or taking other overt steps as part of an internal investigation. In practice, companies may often have to balance this requirement with the need to gather sufficient information to assess whether contact with the SFO is warranted.
  - steps should be taken to avoid witness’ recollection becoming tainted by sharing another person’s account of events or showing them previously unseen documents.

On the issue of privilege, the Guidance makes it clear that (consistent with the SFO’s existing practice of litigating privilege issues in certain instances) the SFO may challenge claims of privilege and also spells out additional burdens for companies seeking to withhold privileged material from the SFO. Companies should be prepared to produce a certification by independent counsel that the relevant material is in fact privileged, as well as a schedule which asserts the basis for withholding the material from disclosure. Both requirements may prove to be costly and time-consuming for companies involved in SFO investigations.

The Guidance states that companies which choose not to waive privilege over witness accounts will not be specifically penalised by the SFO (so a company can in theory claim privilege over witness accounts and also be deemed cooperative). On a more cautionary note, however, the Guidance notes a claim of privilege over witness accounts will mean that a company does not attain the corresponding public interest factor mitigating against prosecution found in the DPA Code of Practice,<sup>6</sup> and it may be an issue considered by a

<sup>5</sup> *AL, R (On the Application Of) v Serious Fraud Office & Ors* [2018] EWHC 856 (Admin).

<sup>6</sup> DPA Code of Practice, para 2.8.2.i.

court determining whether a proposed DPA is in the interest of justice. Additionally, Lisa Osofsky recently cited the waiver of privilege over initial investigative material as a “*strong indicator of cooperation*.”<sup>7</sup> The Guidance is silent as to the level of cooperation a company claiming privilege over witness accounts must exhibit in other areas to receive credit, but given three of the five DPAs agreed by the SFO to date have involved some form of waiver of privilege over witness accounts, it may have to be a very high level. Additionally, cooperation credit will only be awarded for providing witness accounts where substantially all of the relevant material is provided (for example, a recording, notes and/or transcript of the interview), and a witness identified who can speak to the contents of each interview.

Companies should remain conscious of the wider ramifications of disclosing privileged material to the SFO by way of a limited waiver of privilege (where privilege claims can be maintained against third parties, such as adversarial civil litigants), which may expose them to risk relating to prosecution or civil claims elsewhere in the world. Enforcement authorities, regulators and courts in other jurisdictions (including the US) may not recognise the concept of limited waiver in the same way as the UK, and may seek material disclosed to the SFO in related proceedings in other jurisdictions on the basis it is no longer confidential.

### Comparison with the US

Cooperation is also a mitigating factor for the US Department of Justice (“DOJ”).<sup>8</sup> Although cooperation also does not *guarantee* a certain outcome in the US, DOJ has, in recent years, provided greater transparency about the tangible benefits of cooperation. For example, under DOJ’s Foreign

Corrupt Practices Act Corporate Enforcement Policy (the “Enforcement Policy”), which serves as nonbinding guidance in all DOJ Criminal Division matters, cooperation can, in conjunction with other factors, result in a declination of prosecution, or in a reduction of up to 50% off the bottom end of the applicable fine range.

Three additional points of comparison with the US approach, concerning “de-confliction,” privilege waivers and document productions, are worth highlighting.

*First*, the SFO provides much more specific guidance than DOJ on “*indicators of good practice*,” as well as “*examples of steps which the SFO may ask an organisation to take*.”<sup>9</sup> The specificity of the SFO’s Guidance contrasts with the tenor of DOJ’s, which remains more general when describing what cooperation should look like, and envisages little to no involvement in the company’s internal investigation. In particular, as discussed, the SFO requires that companies consult with them before interviewing potential witnesses – a practice known as “*de-confliction*.” As a rule, DOJ does not require this practice in every investigation. That said, DOJ’s Enforcement Policy notes that “*full cooperation*” may include de-confliction where “*requested and appropriate*.” The Policy also provides that a de-confliction request “*will be made for a limited period of time and be narrowly tailored to a legitimate investigative purpose*,” and “[o]nce the justification dissipates, the Department will notify the company that the Department is lifting its request.” Thus, although DOJ may ask a company to refrain from taking certain steps for de-confliction purposes for “*a limited period of time*,” DOJ recently stated that it “*will not take any steps to affirmatively direct a company’s internal investigation efforts*.”<sup>10</sup>

<sup>7</sup> “*Fighting fraud and corruption in a shrinking world*,” Lisa Osofsky, Director of the SFO, April 3 2019, <https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/>

<sup>8</sup> US DEP’T OF JUSTICE, JUSTICE MANUAL (“JM”) § 9-28.700 (The Value of Cooperation), <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700>.

<sup>9</sup> JM § 9-47.120 (FCPA Corporate Enforcement Policy), <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977>.

<sup>10</sup> JM § 9-47.120 (FCPA Corporate Enforcement Policy, Comments), <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977>.

*Second*, the SFO's Guidance creates an expectation that a company under investigation will waive privilege over material, including interview memos, in order to obtain cooperation credit. DOJ strikes a different tone on the issue of privilege, expressly stating that cooperation credit is not in any way predicated upon the waiver of privilege.<sup>11</sup> Nevertheless, though DOJ does not *require* a waiver of privilege, it has, in the past, declined to grant full cooperation credit to parties that over-broadly assert privilege.<sup>12</sup> DOJ also takes the view that "*facts are not privileged*," and that it may request otherwise privileged communications where a company is asserting an advice-of-counsel defence or upon a showing that communications with counsel were made in furtherance of a crime or fraud.

*Finally*, unlike the SFO, DOJ does not explicitly predicate cooperation credit on producing documents held abroad. However, a corporation must provide to DOJ "*all relevant facts*" concerning "*all individuals substantially involved in or responsible for*" the misconduct under investigation in order to receive cooperation credit.<sup>13</sup> In practice, full cooperation may require corporate counsel to expend considerable effort to make document productions that both provide "*all relevant facts*" and comply with foreign data privacy laws, including, for example, seeking permission from

the relevant data privacy authority to produce the documents. Nonetheless, if a company is "*legally prohibited*" from disclosing certain documents to the government, it may still receive cooperation credit if it successfully explains those legal restrictions to DOJ.<sup>14</sup>

## Conclusion

The Guidance gives some welcome definition to the steps a company may take to pursue a cooperative stance with the SFO. However, there is still uncertainty about the benefits of cooperation in any particular case, and the Guidance reinforces that cooperation does not guarantee any particular outcome or attract any automatic reduction in sanction. In contrast, while cooperation in a DOJ investigation also does not guarantee a more favourable outcome, DOJ has attempted to provide greater transparency about cooperation's tangible benefits. When a company is faced with a decision whether and how to cooperate in an investigation, it should carefully weigh (in tandem with its advisers) the *potential* significant benefits against the relevant costs and risks.

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Recently, DOJ was criticised by a US court for "*outsource[ing]*" its investigation to a company and its counsel, thereby compromising the constitutional rights of an individual under investigation. *See United States v. Connolly*, No. 16 CR. 370 (CM), 2019 WL 2120022, at 11-12 (S.D.N.Y. May 2, 2019); *see also SDNY Judge Finds Government "Outsourcing" of Investigation to External Counsel Runs Afoul of Fifth Amendment*, May 7, 2019, Breon Peace, Victor Hou, Jennifer Kennedy Park and Rahul Mukhi, <https://www.clearlygottlieb.com/-/media/files/alert-memos-2019/sdny-judge-finds-government-outsourcing--pdf.pdf>. DOJ's de-confliction guidance and its express assertion that it will not take steps to direct a company's internal investigation responds to this criticism.

<sup>11</sup> JM § 9-28.700 (The Value of Cooperation) ("*To be clear, a company is not required to waive its attorney-client privilege or attorney work product protection to be eligible to receive cooperation credit.*"), <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.720>. DOJ's current guidance on waiver stems from widespread criticism

of its prior stance, where a corporation could be seen as having failed to cooperate if it did not waive attorney-client privilege or indemnified directors and officers in connection with criminal investigations. *See, e.g.*, Thomas Vartanian, Michael Bromwich & Karen Bloom, *Assault on the Shrine: The Demise and Possible Revival of the Attorney-Client Privilege*, 15 BANKING L. COMMITTEE J. (July 14, 2008).

<sup>12</sup> *See, e.g.*, "*Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than \$283 Million to Resolve Foreign Corrupt Practices Act Charges*," DOJ Press Release (Dec. 22, 2016) ("*The company, however, did not receive full cooperation credit because of issues that resulted in delays to the early stages of the Fraud Section's investigation, including vastly overbroad assertions of attorney-client privilege*"), <https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt>.

<sup>13</sup> JM § 9-28.700 (The Value of Cooperation).

<sup>14</sup> *Id.*

### **The SFO's Indicators of Cooperative Conduct**

#### General

- Report suspected wrongdoing within a reasonable time.
- Do not protect specific individuals.
- Do not tactically delay or overload the SFO with information.

#### Preserving and Providing Material

- Preserve relevant material and its integrity.
- Provide lists of document locations and custodians.
- Provide material in a structured and 'useful' way, e.g.:
  - sorting materials by issue or individual, and
  - providing material in an accessible format.
- Immediately inform the SFO of data loss / destruction.
- Facilitate production of third party material if requested.
- Provide relevant material held abroad.
- Identify materials relevant to any accused party.
- Maintain an audit trail recording the handling of evidence.
- Be prepared to give a witness statement covering handling of evidence.
- Alert the SFO to relevant inaccessible digital material.
- Provide information about the organisation and industry.
- Disclose the involvement of other government agencies.
- Provide evidence of money flows and commentary on financial records.
- Provide calculations relevant to financial penalties (e.g. profit, disgorgement etc.)

#### Witness Accounts and Privilege

- Identify witnesses (including from third parties).
- Consult the SFO before interviewing witnesses.
- Disclose recordings, notes and/or transcripts of witness interviews.
- Be prepared to speak to the contents of witness interviews.
- Take care not to taint a witness' recollection.
- Make employees and (if possible) agents available for SFO interviews.
- Provide contact details of ex-employees if requested.
- Obtain certification of privileged material from independent counsel.
- Provide a schedule of privileged material.