

Serious Fraud Office Issues Cooperation Guidance

August 23, 2019

White Collar Crime

The Serious Fraud Office (SFO) released its much-anticipated cooperation guidance on August 6, 2019. The five-page document sets out the steps an organization can take to assist the SFO in an investigation and thereby maximise the organization's chances of avoiding prosecution. The publication represents a welcome change in direction on the part of the SFO, which has previously refused requests to provide guidance on how a company should respond to an SFO investigation. However, there are elements of the new guidance which might cause companies unease. The SFO is very careful to emphasize that following its recommendations will not guarantee companies credit for cooperation. Therefore, organizations still face the risk of shouldering all of the burdens of cooperation, only to be prosecuted for the underlying misconduct anyway. The guidance also reaffirms the SFO's intention to pursue privileged documents, which has proved to be a major point of contention for certain companies who have faced investigations by the agency.

What is "Cooperation"?

Cooperation means providing assistance to the SFO that goes "above and beyond what the law requires". This includes identifying suspected wrongdoing and criminal conduct together with those responsible; reporting this to the SFO within a reasonable time of the suspicions coming to light; and preserving evidence and providing it promptly to the agency in an evidentially sound format.

The SFO also sets out certain behaviours which it considers are indicative of a failure to cooperate with an investigation. These include protecting certain individuals or unjustifiably blaming others; putting a subject on notice that there is an investigation underway (which complicates the issuing of a litigation-hold letter); creating a danger of evidence or testimony being tampered with; remaining silent on selected issues; and deploying tactical delays and document overloads.

Although the guidance goes into detail on the exact steps companies can take which are indicative of cooperation, the SFO has emphasized that not all of its recommendations will be relevant in every case. Therefore, when responding to an SFO investigation, it is important for companies to keep in mind the general principles of cooperation.

Preserving and Providing Information to the SFO

The guidance sets out the following best practices, among others, that companies should adopt when preserving and submitting material to the SFO:

- Providing basic background information about the organization; relevant financial records; material gathered during any internal investigation; and industry information
- Providing material to the SFO in a structured and digestible format, which might involve arranging documents by topic or individual
- Making use of lists and schedules. For example, a company might produce a list of relevant document custodians and the locations of those documents. The SFO might also ask an organization to provide schedules of relevant documents along with details of the search terms and methodologies applied to identify those documents
- Maintaining an audit trail of the acquisition and handling of both hard copy and digital materials
- Retaining passwords, recovery keys, and decryption keys in respect of all digital devices to allow for access to potentially relevant documents
- Ensuring that digital files are delivered to the SFO in a format so that they are ready for ingestion and review on the SFO's document review platforms
- Ensuring that technology systems are up-to-date to preserve the means of reading digital files
- Providing material as promptly as possible and, in any event, in accordance with agreed deadlines
- Being proactive in alerting the agency to the existence of relevant materials in the hands of third parties, such as private email accounts, messaging applications, and bank accounts which received payments from the organization
- Taking steps to preserve potentially relevant material using a method that prevents the risk of document destruction or damage. If, for any reason, potentially relevant material is lost or destroyed, the organization should inform the SFO as soon as possible

Witness Interviews in Internal Investigations

The guidance potentially puts organizations in a difficult position in respect of conducting witness interviews as part of internal investigations. The SFO states that organizations should consult with the agency before interviewing potential witnesses or suspects to avoid prejudicing the investigation. This may be practicable in certain situations, however, companies often need to commence internal investigations to ascertain whether any misconduct has taken place – before there is anything to report to the SFO.

Further, it is important for organizations to investigate any alleged wrongdoing promptly to maximize their chances of collecting relevant and reliable evidence; the requirement to liaise with the SFO in advance of commencing witness interviews could slow down this process and diminish the prospects of obtaining valuable evidence and testimony. The best course of action on when and how to conduct witness interviews as part of an internal investigation will depend

on the circumstances in each case, and companies should always obtain legal advice on this issue.

However, organizations should always follow certain basic rules on witness interviews which are set out in the SFO guidance to maximize their chances of obtaining cooperation credit. At the outset of any internal investigation, organizations should identify potential witnesses including third parties. Companies should also refrain from tainting a witness's recollection of events, for example by showing the witness documents he or she has not already seen.

Privilege

The SFO uses the guidance to reiterate its controversial position that companies seeking credit for cooperation should be prepared to waive legal privilege over materials documenting witness interviews, including transcripts, notes, and other documents. According to the guidance, the organization must also be willing to identify a witness who can speak to the contents of each interview.

The SFO stresses that companies who refuse to waive privilege over these materials risk losing the cooperation credit and, as a result, being ineligible for a settlement. Notwithstanding the SFO's robust stance on providing privileged interview materials, it should be noted that previous respondents have met the cooperation requirement and successfully negotiated deferred prosecution agreements with the SFO even though they have asserted privilege over relevant materials.

The guidance also states that, if an organization asserts privilege over documents during the course of an investigation, it will be expected to provide certification by independent legal counsel that the material in question is in fact privileged. Given the SFO's resistance to assertions of privilege, the agency and its legal representatives may well scrutinize company-appointed independent counsel who opine that materials are protected by privilege.

A Helpful Guide – But No Guarantee of a Favourable Outcome

The guidance represents a positive step by the SFO under the agency's new director, Lisa Osofsky. Her predecessor, David Green, had resisted calls to provide guidance to companies and even circumscribed the scope of pre-existing guidance on self-reporting misconduct.

There is no doubt that the new guidance on cooperation will be a useful tool for companies subject to SFO investigations. Cooperation with the SFO which is part of a "genuinely proactive approach" to resolving an issue is one of the factors the agency considers when deciding whether to offer a deferred prosecution agreement. (There are still some doubts as to how beneficial a DPA may be in any event – but this analysis is not addressed in this note). If an organization under investigation can demonstrate that it has satisfied the SFO's guidelines on cooperation, the company will be in a stronger position to secure a settlement. However, the SFO has emphasized that cooperation alone will not guarantee a favourable outcome. The agency added that cooperation is only one of many factors that it will take into consideration when determining an appropriate resolution to an investigation.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

<u>Ian Hargreaves</u>	+44 20 7067 2128	ihargreaves@cov.com
<u>Mark Finucane</u>	+44 20 7067 2185	mfinucane@cov.com
<u>David Lorello</u>	+44 20 7067 2012	dlorello@cov.com
<u>Ian Redfearn</u>	+44 20 7067 2116	iredfearn@cov.com
<u>Sarah Crowder</u>	+44 20 7067 2393	scrowder@cov.com
<u>Deirdre Lyons Le Croy</u>	+44 20 7067 2058	dlyonslecroy@cov.com
<u>Matthew Beech</u>	+44 20 7067 2310	mbeech@cov.com

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