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The U.K.'s Serious Fraud Office recently released its much-anticipated Corporate Cooperation Guidance, offering key insight into the steps a company should take to earn credit for cooperating with authorities in foreign bribery investigations. This article explains how the new guidance fits in with obtaining the best outcome in parallel investigations by British and American authorities.

Like the guidance the U.S. Department of Justice has issued, the SFO's memo directs companies on the steps they should take to get credit for cooperating in an investigation. While there are important similarities and differences between the two, together they establish a set of measures that are relevant to cooperating companies when dealing with the world's two preeminent criminal corporate enforcement agencies.

Part of the U.K criminal justice authority, the SFO investigates and prosecutes matters involving major or complex fraud, bribery, and corruption in England, Wales, and Northern Ireland (but not Scotland). It often collaborates with the DOJ Fraud Section in handling many of the highest-profile international corruption cases. Together, the agencies are sometimes known by field practitioners and corporate compliance officials as "Mom and Dad." The close working relationship between the agencies is built upon the aggressive, extraterritorial enforcement of the two leading anti-corruption statutory regimes—the U.S.'s Foreign Corrupt Practices Act and the U.K.'s Bribery Act. The transatlantic partnership has strengthened even further since an American former federal prosecutor and dual citizen, Lisa Osofsky, took the helm as the SFO's director in 2018.

The SFO's five-page memo begins by affirming that cooperation is to be taken into account in making charging decisions while also making clear there is no guarantee of leniency. Encouraging a "genuinely proactive approach," the guidance makes clear that "[c]o-operation means providing assistance to the SFO that goes above and beyond what the law requires," an expectation shared by American prosecutors. This involves identifying suspected misconduct along with those responsible, without regard to their seniority or position in the company, timely reporting of wrongdoing to the SFO, and preserving and promptly providing evidence to authorities in a way it can be used. Think of this last requirement as the delivery of trial-ready evidence.

Like its American counterpart, the SFO has crafted its guidance to leverage a company's instinct for self-preservation and desire to limit damage in order to maximize opportunities to prosecute individual wrongdoers. To that end, the guidance's self-stated goal is to quickly establish relevant facts, develop admissible evidence, and build the case to the point where prosecutors can successfully apply the law to the facts—and to do so in a way that will withstand challenges by individual defendants who wish to fight the charges.

The cooperation framework is divided into two principal components: preserving and providing documents, and witness accounts and privilege waivers.

As for the first component, the SFO Guidance lays out a non-exhaustive list of best practices, including preserving documents to prevent destruction or damage, maintaining digital integrity, obtaining and producing material promptly when requested, furnishing a list of document custodians along with the location of the materials, providing the material in a structured way, such as by individual or issue, bringing to the SFO's attention any suspected data loss, deletion, or destruction, identifying relevant material in the possession of third parties or located abroad, providing a log of documents withheld on the basis of the attorney-client privilege, and identifying material that may exculpate individuals.

The guidance also directs companies to produce relevant financial records, make accountants and other financial personnel available for interviews, provide industry and background information along with information about others in the relevant market, identify potential witnesses, consult with the SFO before interviewing individuals (a practice known as de-confliction) or taking personnel actions, and making employees available for interviews.

With regard to the second component, the SFO Guidance recognizes that during the course of an internal investigation, some companies will have interviewed employees and other individuals. It encourages companies to disclose witness accounts along with the documents shown to them. In addition, it specifically requests production of any recording, notes, or transcripts of an interview and identifying a witness who can "speak to" the contents of an interview. The guidance notes that should an organization choose to not waive the attorney-client privilege and to withhold the production of witness accounts on that basis, it will not be penalized by the SFO but will also not earn cooperation credit (which is a form of penalization). It includes the added burden of requiring a company asserting privilege "to provide certification by independent counsel that the material in question is privileged."

Although the SFO guidance does not make any major changes to pre-existing policy, it does a good job of explaining the best practices in an internal investigation. It serves as a useful set of protocols for lawyers or compliance officials engaged in—and board members overseeing—a fact-finding effort. It does not, however, provide a framework to prevent corporate bribery or quantify, even generally, how an organization's cooperative posture will lead to benefits. To understand what sort of outcome may result from cooperating, you have to turn to other authority.

The Code for Crown Prosecutors states that criminal charges should be filed against an entity or an individual only if, in the government's view, there is "a realistic prospect of conviction" and prosecution is in the public interest. The Crown Prosecution Service's Corporate Prosecutions guidance sets forth several factors weighing against prosecution, the first of which is "[a] genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involving self-reporting and remedial actions … " The government will consider whether the company has furnished sufficient information about its operation in order to determine whether it has been "proactively compliant." A company that has met this standard, among others, is likelier to avoid an enforcement action and become a candidate for a deferred prosecution agreement.

So, what does the release of this new guidance mean for companies that operate internationally and want to minimize the consequences of a joint investigation and potential enforcement action brought by Mom and Dad?

As an initial matter, it is important to consider some of the differences between the expectations of British prosecutors and those of their American counterparts. The DOJ's corporate cooperation policy, part of the Principles of Federal Prosecution of Business Organizations, places a premium on "the diligence, thoroughness, and speed of the internal investigation." Accomplishing that, however, may conflict with the SFO's directive to consult with prosecutors before interviewing individuals or taking personnel actions. That SFO instruction is also in tension with the DOJ's more hands-off approach with respect to internal investigations (and the practice federal courts favor).

In addition, the DOJ has made clear that receiving cooperation credit does not depend on a company's waiver of the attorney-client privilege or work product protection, and federal prosecutors are specifically directed to not request such waivers. Under the SFO's Corporate Cooperation Guidance, an organization that elects to not waive privilege, including not making available someone who can speak to the contents of a witness interview (typically a lawyer), will not be penalized but will not get cooperation credit either. Further, the SFO Guidance requires a company to reveal to prosecutors suspected misconduct "together with the people responsible . . . " The DOJ's FCPA Corporate Enforcement Policy expects less, requiring disclosure of "all relevant facts known to it at the time of disclosure, including as to any individuals substantially involved in or responsible for the misconduct at issue."

Nonetheless, companies facing the possibility of dual investigations and exposure in foreign bribery cases are advised to look to both authorities' guidance for a roadmap to the best outcome. As noted above, the SFO guidance offers a best practices framework for internal investigations, particularly when there is concurrent government inquiry. At the same time, the CEP lays out the steps an entity should take in order to get quantifiable benefits, including no-prosecution. It includes the presumption of a declination (absent aggravating circumstances) in instances where a company has voluntarily self-disclosed the misconduct, fully cooperated in the government's investigation, and undertaken timely and appropriate remediation.

Where a company has cooperated and remediated without voluntarily self-disclosing, the CEP allows a fine reduction of as much as 25% below the minimum penalty recommended under the federal sentencing guidelines. The SFO guidance includes no such specifics. This clarity is useful to a company trying to weigh the risks and rewards of cooperation.

Nearly all companies that find themselves in law enforcement's crosshairs choose to cooperate with the government's investigation. In cases involving suspected bribes to foreign officials, many will have to answer to both British and American authorities. Accordingly, companies that see fit to cooperate should take into account the pragmatic advice found in the SFO guidance with the understanding there may be some tension between that guidance and the DOJ's expectations. Finding the path to the best outcome in a parallel investigation involving prosecutors on both sides of the pond requires an effort to follow both the SFO guidance and DOJ policy, an exercise that is more art than science. The one thing that is certain: there is no one-size-fits-all transatlantic checklist for companies that wish to put their foreign bribery problems behind them.