# SFO Cooperation Guidance Merits Cautious Welcome: Part 1

By **Matt Getz and Scott Wilson** (October 15, 2019)

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On Aug. 6, the U.K.'s Serious Fraud Office published its long-awaited Corporate Cooperation Guidance.[1] This is not the first time the SFO has published such guidance, but previous guidance relating in particular to self-reporting, was withdrawn in late 2012, under the previous director.

Publication of the guidance will therefore be seen as another sign that the relatively new SFO director, Lisa Osofsky, intends to take a more open and collaborative approach to corporates than her predecessor, though not necessarily a more lenient one.

This article is in two parts.

The first part considers what the SFO means by cooperation, and how companies can use that to improve both their processes and their chances of a negotiated outcome.

The second part analyzes the SFO's evolving views on privilege.

**Summary**

The guidance is positive, though something of a mixed bag.

Most positively, it provides an excellent framework for how an investigation should be conducted, not just in order to win favor in the eyes of the SFO, but also as a matter of best practice. Legal and compliance professionals — as well as boards of directors — would be advised to study this framework.

However, the guidance does not clearly say what cooperation will get corporates. In the words of one of the authors, "There is a lot of quid and not much quo." This is at best neutral.

The guidance is also disappointing for what it does not include: the SFO's views as to what constitute adequate procedures to prevent bribery. Such guidance, if it ever comes, will be far more helpful, since the reward for adequate procedures is clear: Under the U.K. Bribery Act, it constitutes a full defense to a charge of failure to prevent bribery.

**Contents**

This part consists of three sections.

1. We analyze the significance of cooperation, under the guidance and other instruments.

2. We review the SFO's views on what constitutes cooperation.

3. We briefly compare the guidance to U.S. practice.

**Cooperation: What Is It Good for?**

Where alternatives to prosecution are available, such as in the U.S. and the U.K., prosecutors need a basis to determine when a company should be prosecuted, not prosecuted or given an alternative. The extent to which a company cooperates has always been an important factor in this determination, even before the arrival in the U.K. of deferred prosecution agreements in 2014.

Under the Code for Crown Prosecutors in England, a company (or individual) must be prosecuted only if prosecutors consider that the evidence provides a realistic prospect of conviction, and it would be in the public interest to prosecute the company. The Joint Prosecution Guidance on Corporate Prosecutions,[2] which has been in place since late 2009, sets out eight corporate-specific public interest factors against prosecution. The very first factor 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, 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 introduction in 2016 of DPAs — a kind of halfway house between prosecuting and not prosecuting — led to further description of the importance of cooperation, described like this in the prosecutors' Deferred Prosecution Agreements Code of Practice:[3]

> Co-operation: 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.

If this factor (one of seven) is met, that would tend towards not prosecuting the company but inviting it to enter into negotiations for a DPA. At the same time, as the code of practice and the relevant legislation made clear, an invitation to enter into a DPA is no guarantee that a DPA will be offered or agreed. But the code of practice says clearly to companies: If you cooperate in these terms, you will enhance your chances of being offered a DPA.

The new guidance in essence repeats the same message, stating: "It is important that organisations seeking to co-operate understand that co-operation – even *full, robust co-operation* – does not guarantee any particular outcome … [C]o-operation is one of many factors that the SFO will take into consideration when determining an appropriate resolution to its investigation." (emphasis added)

We do not consider that this is a real change from previous policies and guidance, as there

never have been binding promises. It is noteworthy, however, that the SFO wants corporates to understand that they should cooperate, and do so robustly, but the SFO is not obliged to provide anything in return. The aim, as ever, is to improve corporate behavior but without binding the government.

**Cooperation: What Is It?**

The next and largest section of the guidance sets out what the SFO calls "some indicators of good practice." These are clearly based on the SFO's experience of numerous investigations by companies more and less cooperative (and law firms more or less competent). This section is detailed and is a very useful roadmap to corporates and their advisers as to steps that should be taken in conducting investigations — even if some of the SFO's asks are a little unrealistic.

The indicators are in six categories:

1. General practices for preserving and providing material (i.e., documentation);

2. Digital evidence and devices;

3. Hard copy and physical evidence;

4. Financial records and analysis;

5. Industry and background information; and

6. Individuals.

All of these are worth full consideration by external and internal counsel, boards of directors, compliance and investigation departments. Indeed, we would recommend that companies also share these indicators with their audit, finance and IT functions, well before the need for an investigation arises. A few points, both positive and negative, are worth making:

- The SFO suggests that there should be audit trails of all documents collected, and a person appointed and identified to provide a witness statement as to what has been done. This is excellent advice and should be followed at all times;

- The SFO asks companies to help it identify material that may be in the possession of third parties, and where possible, try and get such information. Third parties could include foreign subsidiaries, law firms, banks, trust companies, joint venture partners and the like. In our view, this is a reasonable request from the SFO, since cooperation surely means providing whatever documents one has the right to access. However, companies need to be sure they act appropriately vis-à-vis third parties;

- Companies should be alert to ageing technology or bespoke systems and ensure that means of reading digital files remain preserved. This is a good pointer, though sometimes easier said than done. It is not unheard of for an investigation to reveal

potentially relevant material that cannot easily be read, be it 3.5" floppy disks or code written in Fortran;

- Companies are asked to provide information about industry practices and others in their market. This is clearly a request to turn in one's rivals (or partners). This is not so unusual, especially given antitrust regulators' long-standing policy of leniency for cooperating companies. Companies may consider seeking extra credit from the SFO for really useful information;

- Companies should help the SFO identify any material that will exculpate potential individual suspects. This is a new requirement, and is designed to help the SFO ensure that it does not err in going after particular individuals. Employees of companies should welcome and encourage this factor; and

- Companies are asked to consult with the SFO before interviewing witnesses, taking HR actions (i.e., disciplining employees) or taking other overt steps. This has been a growing trend, starting in the U.S., where it is known as deconfliction. It can be a difficult issue for companies, since they will often need to conduct a number of interviews before even reporting to the SFO. Companies may sometimes know better than the SFO who should be interviewed when, not to mention the risk that the U.S. Department of Justice and other authorities may have different ideas from the SFO as to priority and timing. As for HR actions, companies may find themselves in a tricky situation if local laws, or local prosecutors, require action before the SFO is ready. These are thus paradigm examples of issues that will need to be negotiated on a case-by-case basis.

Some of the SFO's indicators seem a little less reasonable or achievable. In particular:

- The SFO asks companies to "[p]romptly provide a schedule of documents withheld on the basis of privilege, including the basis for asserting privilege." This request for a privilege log is more akin to the U.S. method of conducting litigation (though the DOJ does not require a privilege log as a matter of course). We think many companies will resist providing a detailed schedule, and will at most note if there are interview memos that the company considers privileged — as to which, see below.

- The SFO asks that potential witnesses' recollections are not tainted by asking them to comment on other accounts, or showing them documents they have not seen. While lawyers and investigators always need to think carefully before doing such things, there may be times where that is the best way to find facts or to probe somebody's veracity. If a company is to investigate properly — and both the joint guidance and the code of practice expect that companies will — it needs to preserve some autonomy as to how it conducts interviews.

Overall, though, this part of the guidance should prove very useful to companies.

**U.S. vs. U.K.**

The SFO's guidance, which is welcome, follows in the footsteps of much previous guidance put out by its counterparts at the DOJ. Since many investigations these days are global, it is worth considering the salient differences between what the U.S. and U.K. authorities expect, and whether this will pose difficulties for corporates wishing to be seen to cooperate by both sets of prosecutors.

There is a tension between the SFO's request that companies preclear certain investigative steps with the SFO and the DOJ's expectation that companies will develop the factual record for reporting to the government as fully as possible on a self-directed basis. The DOJ Justice Manual lists among the traditional factors applied in assessing cooperation credit "the diligence, thoroughness and speed of the internal investigation." The DOJ is not likely to be sympathetic in a situation where the company cannot access significant facts because the SFO has asked that company counsel not speak to certain employees.

This issue can cut both ways, as requests to forbear from certain investigative activity, such as reinterviewing a key witness, are not uncommon in the DOJ's own investigations. Companies cannot rely on the U.K. and U.S. authorities to work out these issues between themselves. Balancing proactive cooperation with the need to not interfere with parallel government investigations is as much an art as a science.

**Conclusion**

Overall, the guidance is to be welcomed. As a general matter, the open desire to collaborate and cooperate will help both the SFO and corporates, and should serve the interests of justice. The detailed indicia of cooperation are a valuable reflection of the SFO's experience, and worth study by corporates (though as we will explain tomorrow, issues of privilege remain unclear). The guidance also does not address the thorny problems of multiple investigations, and what constitutes adequate procedures. Hopefully, the SFO will consider these suitable subjects for additional guidance.

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[1] https://www.sfo.gov.uk/download/corporate-co-operation-guidance/.

[2] https://www.cps.gov.uk/legal-guidance/corporate-prosecutions.

[3] https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf.