

UK Serious Fraud Office Issues Corporate Cooperation Guidance

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On 6 August 2019, the UK Serious Fraud Office (the “SFO”) published long-anticipated internal guidance (the “Guidance”) on how it assesses cooperation by corporates for the purpose of making charging decisions and determining whether to enter into deferred prosecution agreements (“DPAs”).¹

The Guidance explains that cooperation means “providing assistance to the SFO above and beyond what the law requires”, and it provides a set of expectations of good practice. The Guidance emphasises that no amount of cooperation—even “full” cooperation—guarantees a particular outcome from the SFO, that there can be no checklist for what constitutes cooperation, and that each case will turn on its individual facts. This of course leaves it unclear what the minimum degree of cooperation required is and whether some of the more burdensome aspects of the Guidance are indispensable to, in particular, qualify for a DPA.

In issuing the Guidance, the SFO has broken with the previous Director’s refusal to provide formal guidelines to the industry on cooperation with the SFO.² However, much of the Guidance’s contents have already been articulated in earlier public statements by the SFO. The novelties in the guidance relate to the management and supervision of privilege claims made by a cooperating corporate.

Preservation and Provision of Materials. The Guidance provides a list of steps—already widely applied in practice—indicating that a corporate has been cooperative in preserving evidence and providing it to the SFO. It emphasises good record keeping of both digital and physical materials and maintaining an effective audit trail of data collections and productions.

¹ SFO Operational Handbook, Corporate Co-operation Guidance (August 2019) <https://www.sfo.gov.uk/download/corporate-co-operation-guidance/>.

² In October 2012, previous Director David Green QC withdrew the then three-year-old policy on corporate self-reporting of overseas corruption. See <https://www.debevoise.com/insights/publications/2012/10/serious-fraud-office-issues-new-policies-on-self->.

The Guidance also formalises SFO’s long-standing position that corporates should not “trample on the crime scene”: cooperative defence counsel are expected to consult with the SFO before interviewing witnesses or suspects and to make employees and agents available for interview by the SFO.

A new indicator of cooperation under the Guidelines is the expectation that cooperative corporates will provide a privilege log—a record of all documents withheld on the basis of privilege, including the basis for asserting privilege. A practice common in the U.S., privilege logs have hitherto not been standard in SFO practice. Indeed, historically the SFO has tended to request unfiltered data precluding the need for privilege logs to be produced ahead of production. Combined with the indication that material should be produced in a “structured” format, this may suggest that the SFO will in the future make more targeted document requests and expect corporates to review the documents for relevance and privilege before production.

Handling of Witnesses and Waiver of Privilege. In this respect, the Guidance makes three key points.

First, the Guidance reaffirms the approach outlined in the 2014 DPA Code of Practice, which requires the identification of relevant witnesses and disclosure of their accounts and documents shown to them. The Guidance goes on to state that a cooperative corporate “seeking credit for cooperation by providing witness accounts should additionally provide any recording, notes and/or transcripts of the interview”, as well as “identify a witness competent to speak to the contents of each interview”.

This may mark a shift to a stricter approach. Hitherto, a number of corporates, notably Sarclad, have secured DPAs after disclosing only incomplete summaries of interviews without waiving privilege. If the new Guidance is to be taken at face value, that would no longer be sufficient to warrant cooperation credit.

Second, the Guidance renders operational a framework for the management of privilege claims by a cooperating corporate that “elects not to waive privilege” over witness accounts (as well as other material) suggested in the case of AL.³ In that case, the SFO was criticised for not complying with its disclosure obligations by having failed to challenge contestable privilege claims made by a cooperating corporate over records of interviews conducted in an internal investigation.⁴

In the Guidance, on the one hand the SFO expressly recalls the law on the absolute nature of privilege. On the other, it also recalls its disclosure obligations to defendants in

³ R (AL) v SFO [2018] EWHC 856 (Admin).

⁴ See <https://www.debevoise.com/insights/publications/2018/04/english-high-court-considers-status>.

ulterior proceedings and states that even a cooperating corporate can expect to receive witness summons which will force it to justify its privilege claims to a trial judge. Presumably with a view to avoiding this scenario as far as possible, the Guidance states that a cooperating corporate that claims privilege over records of internal investigation interviews (and other materials) needs to provide “certification by independent counsel that the material in question is privileged”. Independent counsel is a long-standing feature of privilege reviews in SFO investigations, but this use of independent counsel set out in the Guidance is novel.

Third, while waiving privilege will be considered for the purpose of assessing a corporate’s degree of cooperation, the Guidance states that the decision by a corporate *not* to waive privilege or provide witness accounts will not be penalised. It remains to be seen how this will work in practice: if, *e.g.*, a corporate that elects not to waive privilege thereby fails to obtain the maximum financial penalty discount under a DPA, such corporate will effectively be penalised.

Conclusion. The Guidance is a clear manifestation of SFO Director Osofsky seeking to balance a rigorous approach to the collection and preservation of evidence and the management of privilege claims necessary to carry out its primary purpose of prosecuting serious and complex fraud, with the provision of some clarity and comfort to induce corporates to come forward and cooperate. Comparing the Guidance to the recent joint guidelines issued by the French PNF and AFA on the approach to the CJIP or “French DPA”⁵, while there are many similarities, the French guidelines insist more on a positive obligation to conduct an internal investigation and an expectation that records of witness interviews will be shared with the authorities in an evidential format.

For corporates, the Guidance does provide some additional clarity on the SFO’s intended approach, mainly indicating more formalism and less flexibility, particularly in the areas of internal investigation interviews and privilege. Even so, key strategic issues, particularly whether and when to self-report, the degree of cooperation with the authorities, and how to manage privilege, will need to be considered on a case-by-case basis.

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Please do not hesitate to contact us with any questions.

⁵ See <https://www.debevoise.com/insights/publications/2019/07/french-cjip-guidelines>.

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