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CLIENT ALERT

UK Serious Fraud Office issues new guidance on corporate co-operation and enforcement

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On 24 April 2025, the UK's Serious Fraud Office ("SFO") issued new "External Guidance on Corporate Co-operation and Enforcement in relation to Corporate Criminal Offending" (the "Guidance"). The Guidance replaces and combines previous (internal) SFO guidance on corporate co-operation (from 2019) and self-reporting (last updated in 2012).

Given the consequential impact of being deemed "*co-operative*" for a company that becomes subject to SFO investigation, the Guidance has, rightly, received significant attention. As an official statement of the SFO's current expectations of corporates, it is helpful. The new Guidance places particular weight on self-reporting suspected wrongdoing and aims to increase the incentives for companies to do so. It also includes updated examples of conduct the SFO views as co-operative and unco-operative.

Nonetheless, there is little in the Guidance that is truly new. Much of it either restates the existing guidance and/or established practice or, at most, indicates a change of emphasis in the SFO's approach. On its own, we do not expect the Guidance to drive a major shift in corporate behaviour. However, as part of wider developments – including reforms to criminal corporate liability and the incoming Failure to Prevent Fraud offence, a renewed push to introduce reward schemes for whistleblowers, and operational improvements planned or underway at the SFO – the Guidance may well be a useful step towards a more effective enforcement strategy for the SFO.

Companies will need to have regard to the new Guidance whenever suspected wrongdoing is identified within the organisation, including before commencing an internal investigation and certainly before making any decisions about whether to report concerns to the SFO or in any other forum (e.g. to another authority or the public).

We discuss the key points from the Guidance below.

The importance of co-operation

As is noted at the outset of the Guidance, the extent to which a company is (or is not) "co-operative" is one of the key considerations for the SFO when deciding whether or not to charge a corporate or invite it to negotiate a Deferred Prosecution Agreement ("DPA")[1]. Co-operation can also be an important aspect of mitigation during sentencing (e.g. it may directly reduce the amount of any fine). In a less formal sense, co-operation is also integral to the dynamic between a company under investigation and the SFO and may have a far-reaching influence on the relationship between them.

It is therefore often critical for companies that are, or may become, subject to SFO investigation to understand what they can do to be considered co-operative. The new Guidance sets out the SFO's expectations for companies, although it must also be read alongside other relevant documents, such as the Code for Crown Prosecutors, the Corporate Prosecutions Guidance and the DPA Code.

Improving incentives to self-report

The principal objective of the Guidance is to encourage companies to self-report suspected misconduct, following a drop-off in corporate reporting to the SFO in recent years. Indeed DPAs, which have been held out as the ultimate prize for companies that come forward early, have themselves been in decline, with no new DPAs entered into by the SFO since 2021.

The Guidance provides two key changes in this regard:

[1] A DPA is an alternative to prosecution, which brings with it a standard 50% penalty discount and other potential benefits.

1. Front and centre is a new commitment to companies that self-report promptly and co-operate fully that they will be invited to negotiate a DPA, rather than be prosecuted, "*unless exceptional circumstances apply*". This is a meaningful (though relatively subtle, and still conditional) change of emphasis from previous guidance, which indicated that such conduct would be a relevant consideration to be taken into account by the SFO in decisions about whether or not to offer a DPA.

2. There is also a new, positive expression of intent by the SFO to progress cases efficiently once self-reports are received, including target timescales. This includes statements that the SFO "*will seek to*": (a) decide whether or not to open an investigation within six months of a self-report; (b) conclude an investigation "*within a reasonably prompt time frame*"; and (c) conclude DPA negotiations within six months of sending an invitation to enter into discussions.

   These are ambitious timeframes based on previous SFO practice, and no commitments are made regarding the crucial period of time to conclude an investigation (currently 4.4 years on average). If cases can be progressed more quickly, however, this should be a significant impetus for corporate co-operation and help address concerns that self-reporting risks entering into a long, drawn-out process. Whether or not the SFO will be able to meet these targets is yet to be seen and achieving a timely outcome in live and upcoming cases will be an important test of the SFO's ability to deliver on the new commitments in the Guidance.

On other points, the Guidance helpfully clarifies and articulates the SFO's expectations in relation to self-reporting, but does not fundamentally change the existing position.

In particular, on the critical question of when to self-report, the Guidance helpfully recognises that corporates will usually want to have conducted at least some investigation themselves before approaching the SFO, so that they "*understand the nature and extent of any offending.*" However, the SFO does not expect corporates to "*fully investigate*" before self-reporting: "*If there is direct evidence of corporate offending, we would expect a corporate to self-report soon after learning of that evidence.*"

This does not represent a material shift from the current state of affairs and the often difficult decisions around how far to progress an investigation before self-reporting will need to continue to be made on a case-by-case basis. The relatively loosely defined position in the Guidance may also allow individual case teams within the SFO to take divergent approaches when assessing the timeliness of self-reports. Indeed, SFO Director Nick Ephgrave suggested at an event to launch the Guidance that companies should self-report as soon as they have a "*reasonable suspicion*" of wrongdoing. That would suggest a low threshold that goes beyond what the Guidance itself suggests (indeed, it is closer to the test that applies to the requirement for *regulated* firms to report suspected money laundering).

Companies should also note that, as is now spelled out expressly in the Guidance, reporting offending through a Suspicious Activity Report (i.e. a money laundering disclosure to the National Crime Agency), or to another agency in the UK or overseas, is not considered a self-report to the SFO, unless the

offending is also reported to the SFO at the same time or immediately afterwards. It has always been advisable for companies that report suspected wrongdoing in any forum (e.g. to a regulator or publicly) to consider all of the other authorities and other stakeholders who could be informed and whether the company may be better off if it approaches them proactively. The Guidance now makes clear that the SFO expects to receive reports directly from the company.

"Genuine co-operation"

The Guidance makes clear that a prompt self-report is a strong factor indicating co-operation, but that it is not sufficient on its own: "*A self-reporting corporate must go on to provide genuine co-operation to be eligible [to] be invited to negotiate a DPA.*" Conversely, a company that does not self-report can still be eligible for a DPA if it nevertheless provides "*exemplary co-operation.*" That has anyway been the position in practice (e.g. Airbus agreed a DPA with the SFO, even though it did not make an early self-report, although it did later provide significant co-operation to the SFO's investigation), but it is now helpfully set out in the Guidance.

Again, as had previously been the position, co-operation "*means providing assistance to us that goes above and beyond what the law requires*". The Guidance set outs various examples of ways in which companies can demonstrate co-operation. A number of these also featured in the previous co-operation guidance, such as various points around the way documents and other evidence are identified and provided to the SFO.

There are also some useful new examples in the Guidance. These include points around how corporates should conduct internal investigations where there is also SFO interest, such as expectations for "*[e]arly engagement with us as to the parameters of the investigation*" and for companies to *"[refrain] from interviewing employees at our request*".

As regards legal professional privilege, the Guidance states that, while a corporate which maintains a valid claim of privilege will not be penalised for doing so, the SFO would consider a voluntary waiver of privilege "*to be a significant co-operative act and it can help expedite matters*". This goes beyond the previous co-operation guidance and is a more explicit call for companies to waive privilege. However, it has become relatively common practice in recent years for the SFO to ask companies to consider waiving privilege, so such practice is now consistent with the Guidance. In appropriate cases, it may be advisable for companies to offer limited waivers of privilege over certain documents in favour of the SFO, although this is always something that needs to be considered carefully.

The Guidance also provides examples of unco-operative conduct, which had not been included in the previous guidance. These include, for example, "*"forum shopping" by unreasonably reporting offending to another jurisdiction for strategic reasons*", "*[s]eeking to exploit differences between international law enforcement agencies or legal systems*" and "*[a]ttempts to obfuscate the involvement of individuals,*

minimise and/or withhold the extent of the suspected offending." While such factors will always have been considered indicators of unco-operative behaviour, it is notable that the SFO has chosen to highlight these issues in the Guidance.

The Guidance in context

Overall, the Guidance does not represent a radical shift in the SFO's approach, though it does provide additional clarity for companies on how they should interact with the SFO once suspected criminality has been identified. Helpfully, it more clearly articulates established practice in certain areas and also extends it in others.

On its own, the Guidance does not, in our view, fundamentally shift the calculus for companies on key questions such as whether or when to self-report, or whether to pursue a DPA or another outcome (such as a negotiated plea). It also leaves various issues vague or loosely defined and is, for example, far less detailed or prescriptive than the US Department of Justice Corporate Enforcement and Voluntary Self-Disclosure Policy.

As one piece in the broader enforcement puzzle, however, the Guidance may well have a material impact. For example, new rules on corporate criminal liability, introduced under the Economic Crime and Corporate Transparency Act 2023 and to be extended under a new Crime and Policing Bill, have made it easier for companies to be liable for criminal offences by increasing the pool of individuals whose liability can be attributed to the corporate. The new Failure to Prevent Fraud offence, which comes into force in September 2025, will make it easier for companies to be criminally liable for fraud within the organisation. If the SFO and others get their way and the UK introduces US-style financial rewards for whistleblowers, companies may be more inclined to self-report suspected wrongdoing due to concerns that a whistleblower could inform the SFO first. Director Ephgrave has also discussed plans to build out the SFO's covert intelligence-gathering functions to "*better understand what's going on in corporates that they're not telling us about so that we can either go after them or encourage them to come forward*". All such changes may, collectively (and incrementally), build out and improve the SFO's intelligence and enforcement capabilities and give companies real incentives to come forward and co-operate at an early stage when they identify wrongdoing.

Ultimately, however, the greatest impact on corporate behaviour is likely to come only if the SFO shows that it is able to conclude more timely, better focused investigations. If the SFO can do so (and it has said it is implementing the operational improvements necessary to achieve that), this will be the clearest signal to corporates that, in return for assuming the risks of coming forward and working constructively with the SFO, they are likely to be rewarded with a sensible and efficient outcome. In addition, and critically, where the outcome of an investigation is a DPA, the SFO needs to be able to demonstrate that

the DPAs it reaches are appropriate and adequately reflect the alleged offending, both in terms of the facts which the company will be required to accept, but also the penalty and other terms.

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