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September 10, 2019

UK Regulator Sets High Bar for Corporate Cooperators



Last month, the UK Serious Fraud Office ("SFO") published non-binding, internal guidance expanding on its view of corporate cooperation in prosecutions.



The guidance marks a notable departure from the SFO's past reluctance to clarify its expectations for corporations seeking cooperation credit, while still making it clear that no outcome will be "guaranteed," even for companies that have provided "full, robust" cooperation. Rather, cooperation is just "one of many factors" that the SFO will consider when making a charging decision. The guidance outlines two broad categories governing the SFO's expectations for corporate cooperators: (1) the preservation and production of evidence, and (2) the provision of witness accounts. **Preservation and Production of Evidence** Several of the "indicators of good practice" identified by the SFO with respect to data preservation and production will not be particularly surprising to practitioners accustomed to interfacing with US prosecutors. For example, the SFO expects that companies will preserve digital and hard copy data and organize compilations of relevant materials in a "useful, structured way." The guidance also appears to signal a particular interest in exculpatory evidence, noting that companies are expected to "[a]ssist in identifying material that might reasonably be considered capable of assisting any accused...or undermining the case for the prosecution." Further, companies are expected to make accountants or other personnel (internal or external) available to "speak to financial records and explain what they are and what they show about money flows." **Witness Accounts** The guidance outlines some expectations that have already been met with controversy given the perceived encroachment into the attorney-client

relationship. For example, the SFO expects that companies consult with prosecutors "before interviewing potential witnesses or subjects"--an expectation that, in practice, would prevent a company from conducting an internal investigation, and assessing its own legal risk, without first consulting with the SFO. Relatedly, companies that are willing to share with prosecutors witness accounts that were gathered in the course of an internal investigation are also expected to "provide any recording, notes and/or transcripts" of any such witness interviews. Somewhat paradoxically, the guidance suggests that companies declining to waive attorney-client privilege will **not** be penalized by the SFO, yet at the same time, the guidance states that any such company will not "attain the corresponding factor against prosecution" under the SFO's [Deferred Prosecution Agreements Code of Practice](#) (seemingly, an outcome that many companies would consider to be penalizing). Further, companies asserting privilege are expected to take the extraordinary step of providing a "certification by independent counsel" that the material in question is privileged. Despite the unusual nature of this expectation, the guidance provides little additional detail as to how it would operate in practice. **Conclusion** Given the bold and demanding expectations set forth in the SFO guidance, coupled with the non-binding and intangible benefits available to companies in recognition of their cooperation, it may well be that the most controversial features of the guidance will remain largely theoretical.

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