MAYER | BROWN

September 10, 2019

Legal Update

Corporations, Mind Your Step: UK's SFO Joins US and French Enforcers in Providing Guidance on Co-operation Leniency, but Paths Still Diverge and Areas of Uncertainty Remain

On 6 August 2019, the UK's Serious Fraud Office (SFO) released its Corporate Co-operation Guidance (SFO Guidance)[1], joining the US Department of Justice (DOJ) [2] and French *Parquet National Financier* (PNF) and *Agence Française Anticorruption (*AFA)[3] in issuing new 2019 corporate enforcement guidance. All three regions provide welcome direction to assist companies towards the same destination—leniency for co-operation and avoidance of a criminal conviction via local deferred or negotiated prosecution agreements (DPAs). Despite these parallels, they are not a perfect match: companies must navigate several differences in cross-border investigations on the route to a global resolution.

This Legal Update (i) examines the key aspects of the SFO Guidance; (ii) considers the differences between the UK, US and French approaches; and (iii) reflects on some of the challenges that remain for multinational companies, particularly in the context of cross-border investigations.

(I) The SFO Guidance: An Overview

For the first time, the SFO Guidance compiles in one document the assessment criteria and expectations of the SFO in respect of corporate co-operation in connection with DPAs, and builds on emerging jurisprudence, which can be discerned from the SFO's five DPAs to date. The release of the SFO Guidance represents a step change in tone under its new director, Lisa Osofsky, yet remains consistent with comments made publicly by SFO officials in recent years around corporate co-operation. The guidance provides "indicators of good practice"[4] that will assist the SFO in "more quickly and reliably" understanding a matter under investigation in a way that "benefits the public and advances the interests of justice".

The SFO Guidance provides helpful clarity, especially relating to expectations around:

- the preservation, identification and production of **documentary evidence**;

- the importance of **audit trails** and chains of custody;
- not only providing what is available to a company in **timely, transparent and useful forms**, but also proactively identifying what is potentially relevant **information that is not available to the company** (based on location, third-party custody or aging systems/technology);
- **value-add analysis** in the form of money flows and profit/penalty calculations, as well as market and industry context; and
- **identifying any other government agencies** with whom the company may be in contact.

However, the guidance still leaves a potential grey area of interpretation around the quagmire of **professional privilege** and the SFO's expectations regarding prior or parallel internal investigations and "**trampling over the crime scene**."[5]

The SFO Guidance cites the importance of a "genuinely proactive approach" by company management, and states that co-operation is evidence of that approach. The SFO also acknowledges the nuances of application, and importance of the role of companies' legal advisers, noting: "Many legal advisers well understand the type of conduct that constitutes true co-operation. This will be reflected in the nature and tone of the interaction between a genuinely co-operative organisation, its legal advisers and the SFO. Nonetheless, some indicators of good practice are listed . . ."

Two additional themes are repeated across the guidance (emphasis added):

- "Co-operation means providing assistance to the SFO that goes **above and beyond** what the law requires."
- "Co-operation – even full, robust co-operation – **does not guarantee** any particular outcome."

Above & Beyond – The SFO Guidance states that co-operation means "providing assistance to the SFO that goes above and beyond what the law requires." This includes identifying suspected wrongdoing to the SFO within a reasonable time and taking steps to preserve and provide evidence to the SFO in a sound format. In the *Rolls Royce* DPA, Sir Brian Leveson brought attention to the "extraordinary co-operation" of the company, which—in that case—included inter alia the voluntary disclosure of internal investigations, limited waiver of privilege over internal investigation memoranda and co-operating with independent counsel in the resolution of privilege claims.[6] The SFO Guidance also makes clear that certain actions are inconsistent with genuine co-operation—e.g., protecting specific individuals, creating a danger of the tampering of evidence or testimony and tactical delay or information overloads.

No Guarantees – While the SFO provides formal guidance that companies can follow to demonstrate co-operation in the conduct of an SFO investigation, it is clear that even "full, robust co-operation" does "not guarantee any particular outcome." This may lead some companies to question the benefits and incentives of co-operating with the SFO. However, the SFO Guidance addresses potential skeptics by explicitly confirming that co-operation is a relevant consideration in the SFO's charging decisions—and the corporate community will be watching closely to see what measure of co-operation is necessary in practice to be eligible for a DPA.

(II) Comparison of the SFO Guidance with DOJ and PNF/AFA Guidance on Key Issues

The SFO Guidance echoes many of the elements of the US Department of Justice (DOJ) FCPA Corporate Enforcement Policy (DOJ Policy). Those familiar with the DOJ Policy will recognise the fundamentals around preservation of documents and providing timely access to pertinent information and witnesses, as well as the clear focus on genuinely proactive co-operation. There are, however, subtle differences in approach that may impact how a company engages with regulators in the United Kingdom and the United States respectively. This is particularly so following a March 2019 update to the DOJ policy (2019 DOJ Policy Update) that clarified several considerations for corporate co-operation in the US context. Likewise, on 27 June 2019, the PNF and AFA jointly published Guidelines on the implementation of the French Deferred Prosecution Agreement ("*Convention judiciaire d'intérêt public*", CJIP) (French Guidelines).[7]

Below, we explore two key areas that remain uncertain in the SFO's co-operation regime, how the US and French guidance in these areas may diverge, and where, accordingly, corporations will be wise to mind their step: **legal privilege** and **internal investigations**.

LEGAL PRIVILEGE

The SFO guidance notes, "Co-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them."[8] This highlights how the question of legal privilege in internal investigations remains an ongoing source of tension between authorities and companies.

On its face, the guidance leaves the SFO position fundamentally unchanged: the waiving of legal privilege has always been a factor that weighs in favour of co-operation in the context of DPAs. Indeed, in April 2019, Osofky stated that "waiving privilege over … initial investigative material will be a strong indicator of co-operation and an important factor that [the SFO] will take into account when considering whether to invite a company to enter into DPA negotiations."[9] The SFO Guidance states that it will not penalise a company for not waiving privilege, and indeed the *Sarclad* DPA shows that a company can enter into a DPA without waiving privilege over interview materials (in that case, Sarclad disclosed incomplete interview summaries to the SFO).

However, the guidance does dedicate an entire section to "Witness Accounts and Waiving Privilege" and could be read to encourage companies seeking co-operation credit to provide witness accounts, even if it means being prepared to waive privilege over materials including inter alia recordings, notes and/or transcripts of the relevant interview. Further, if a company were to assert legal privilege over witness accounts and other materials, the SFO Guidance envisages that such claims be certified by independent counsel, a uniquely UK requirement. In the past, the SFO has been known to engage independent legal counsel to verify claims of legal privilege (see, for example, the *Rolls Royce* DPA). However, this express reference in the SFO Guidance could present an additional cost consideration to companies that weighs on the decision of whether to assert or waive legal privilege.

In practice, companies seeking co-operation credit should be prepared to think proactively about how relevant information is collected and should anticipate that the company may need to find a way to provide such information, either in non-privileged forms or via waiver. In that

analysis, companies will need to work with their legal advisers across jurisdictions and civil/criminal lines to achieve the right balance and make informed decisions—recognising that, in a cross-border context, the potential benefits must be weighed against the possibility that witness summaries produced to the SFO may be disclosable in other jurisdictions' investigations or collateral proceedings.

In contrast, the US position on treatment of attorney-client privilege in the context of corporate investigations has evolved significantly since the early 2000s, alongside the iterations of memoranda setting out the factors DOJ prosecutors consider when making charging decisions against corporations.[10] The requirements in this area have since been updated and superseded by the McNulty Memorandum in 2006,[11] the Filip Memorandum in 2008,[12] and most recently the Yates Memorandum in 2015.[13] Following earlier criticism that privilege waiver in exchange for co-operation credit had become a widespread expectation,[14] the McNulty Memorandum clarified that waiver was **not** a prerequisite for co-operation credit and required that prosecutors obtain written authorisation from the US Attorney General's Office prior to requesting categories of privileged information including legal advice. However, since the changes outlined by then-Deputy Attorney General Mark Filip in 2008 in the Filip Memorandum, it has been clear that the DOJ shall not ask a corporation to waive privilege in order to demonstrate co-operation or credit/penalise corporations for waiving or not waiving privilege.

This is reflected in current DOJ Policy, which broadly states that eligibility for co-operation credit is not predicated on waiver of attorney-client or work product privilege protections and that none of the Policy's directives require such waiver. In practice, this means that the focus has shifted to compliance with the DOJ Policy's requirement of timely disclosure of "all facts relevant to the wrongdoing at issue … including all relevant facts gathered during a company's independent investigation". This separation between purely factual and legally privileged information emphasises the importance of working with external counsel and being both deliberate and proactive in planning evidence gathering from the beginning of internal investigations.

Finally on this topic, according to the French Guidelines, the co-operation of corporations in an investigation by French authorities and the conduct of corporate internal investigations before or during an investigation by French authorities, are included in the conditions required to benefit from a CJIP. The French Guidelines require, among other things, the identification of the main witnesses and the communication of relevant documents in possession of the corporations to the PNF. However, it is specified that this communication is subject to applicable attorney-client privilege.[15] If the corporation and the PNF do not agree regarding the application of attorney-client privilege to documents that the corporation has refused to communicate, the PNF will assess whether this non-communication could negatively impact the degree of co-operation of the corporation.

INTERNAL INVESTIGATIONS

As discussed above, the SFO Guidance devotes an entire section to "Witness Accounts and Waiving Privilege," emphasising the importance of providing witness accounts. The SFO Guidance also encourages companies to "identify potential witnesses including third parties" and "make employees and (where possible) agents available for SFO interviews, including arranging for them

to return to the UK if necessary… [and] provid[ing] the last-known contact details of ex-employees, agents and consultants if requested." However, at the same time, the SFO notes, "[Companies should] refrain from tainting a potential witness's recollection, for example, by sharing or inviting comment on another person's account or showing the witness documents that they have not previously seen …".

To avoid prejudice to an investigation, the SFO Guidance states that companies should consult with the SFO before inter alia interviewing potential witnesses or suspects and taking personnel/HR actions or other overt steps in the conduct of an investigation. Although not quite as stringent as previous SFO positions on "trampling over the crime scene,"[16] the SFO Guidance does express concerns around the "tainting" of a potential witness's recollection of events. But rather than making deterrent statements about potential sanctions, the SFO emphasises that early engagement with the SFO around the interviewing of individuals would help to demonstrate co-operation. In a recent example of this type of co-operation in practice, it was reported in the *Serco DPA*[17] that the SFO had requested that Serco refrain from interviewing witnesses during the SFO's criminal investigation. This enabled the SFO to take the first witness accounts in that case.

Significantly, there is still a lack of clarity around how the SFO Guidance impacts the conduct of a company's own internal investigation. In practice, a company may need to interview individuals to establish key facts around potential misconduct before assessing whether or not a disclosure to the SFO would be necessary or appropriate. *Serco* may illustrate that a company may need to make the assessment without interviewing key individuals. However, the SFO Guidance's good practices anticipate the potential production of "first accounts, internal investigation interviews or other documents." This may suggest a degree of recognition at the SFO of the practical advantages of companies' conducting internal investigations—including for the SFO's ability to "quickly and reliably understand facts," as it continues to signal that timely investigations and resolutions are a priority.

When compared to the approach taken in the United States and France on this issue, there are important differences in language and approach relating to the interplay between privilege waiver and co-operation credit in the conduct of internal investigations and the de-confliction of witness interviews (where a company is requested to defer investigative steps internally so as not to prejudice an aspect of a regulatory investigation).

In contrast to the SFO Guidance, the US approach clearly addresses potential compulsion concerns that can arise where a company lawyer is required to take or not take particular actions in an internal investigation by the government. Following the 2019 DOJ Policy Update, it is clear that any requests around de-confliction in the United States will be narrowly tailored to a specified aspect of a DOJ investigation and are *not* intended to otherwise interfere with a company's own internal review. A footnote now expressly provides that the DOJ "will not take any steps to affirmatively direct a company's internal investigation efforts". This is consistent with the DOJ's general approach of encouraging early voluntary disclosure, while not viewing well-run internal investigations as problematic, especially where the company and external counsel are prepared to share relevant facts and documents in a timely manner. As noted above, the SFO Guidance—at least on paper—suggests a stricter approach on this issue.

As with the earlier discussion on legal privilege, the US DOJ approach has evolved over time to reflect updates to government guidance and court decisions, impacting the way that US companies approach internal investigations. For example, it is standard practice in the United States for company counsel to provide employees being interviewed with so-called "Upjohn warnings" reiterating that the lawyer represents only the company as client and **not** the individual employee.[18] Providing effective Upjohn warnings is vital to avoiding conflicts disputes and also ensures that the company is able to maintain control over attorney-client privilege if it later decides to disclose information obtained to the government when seeking co-operation credit.[19]

Also of note in the US context are cases that implicate constitutional protections under the Fifth Amendment. For example, in *US v. Stein*,[20] the court found that accounting firm KPMG had breached its employee's constitutional rights when it stopped paying attorneys' fees for those who failed to co-operate in a DOJ investigation involving the creation and marketing of illegal tax shelters. The court attributed KPMG's conduct to the government, engaging the Fifth Amendment protection. This decision was later reflected in an update to the 2008 Filip Memorandum, which made clear that federal prosecutors may not consider whether a company has advanced attorneys' fees to its employees in determining whether to afford co-operation credit. Recent cases have also raised complex constitutional protection issues in circumstances where statements from employees are obtained in an internal investigation where the government has effectively outsourced its own investigation to company counsel, such that their actions may be "*fairly attributable*" to the government.[21]

In comparison to the UK and US approaches, in France, according to the French Guidelines on the implementation of the CJIP, the conduct of internal investigations is required as a condition to benefit from a CJIP. The internal investigations that take place before the disclosure to the PNF and the opening of an investigation by French authorities should ensure the "truthfulness of witnesses' testimonies" and the "preservation of evidence". In general, main witnesses must be identified and relevant documents must be provided to the PNF, including records of witnesses' or suspects' interviews conducted during internal investigations. Contrary to the SFO's Guidance specifically requiring consultation with the regulator before interviewing witnesses or suspects during internal investigations, the French Guidelines require good coordination and regular exchange of information with the PNF during internal investigations taking place in parallel with an investigation by a French authority. Corporations must also ensure that the internal investigation does not disrupt the investigation by French authorities.

Further, while the approach of both the SFO and DOJ on matters of document preservation is broadly consistent, the DOJ Policy emphasises a company's oversight of its employees use of "ephemeral messaging platforms" (such as WeChat and WhatsApp) as part of the appropriate retention of business records. The DOJ notably clarified its initial position on this point in the 2019 DOJ Policy Update, with companies now directed to implement "appropriate guidance and controls" on the use of such platforms as part of demonstrating full corporate co-operation.[22] In contrast, the SFO Guidance simply requires that a company alert the agency to such digital material that the company cannot access directly.

The SFO Guidance is silent on certain areas of concern for companies in the conduct of investigations, including data protection considerations. However, the SFO Guidance does provide helpful clarity in a number of other areas. For example, as part of the provision of financial statements, the SFO Guidance suggests that accountants and/or other relevant personnel should be made available to facilitate the SFO's understanding of relevant financial records, enabling valuable co-operation with the SFO as well as better investigation results.

(III) Challenges for Companies in Cross-Border Investigations

Under Osofsky's leadership, the SFO continues to take steps to increase alignment and cross-border co-operation, in particular with the United States. Cross-border investigations can result in a company interacting with multiple regulators across the world in respect of the same investigation, including the SFO, DOJ, PNF/AFA and others. Consistent with US experience under the DOJ Policy and in light of the SFO Guidance, the analysis of key strategic issues for companies—such as whether (and when) to self-report and the degree of co-operation with regard to privilege waiver and dealing with current employee witnesses—will still need to be made carefully on a case-by-case basis. Counsel with experience across key jurisdictions can help a company navigate this complex landscape.

The release of guidance in the United Kingdom, United States and France has provided welcome clarity for companies on what will be required to achieve leniency for co-operation in each jurisdiction—but as this update has explored, they are not a perfect match and, like all such guidance, can be expected to change further. In the United States in particular, regulatory guidance on expectations of corporate compliance has notably evolved and expanded to address feedback and the practical experiences of implementation. As the SFO Guidance is applied in practice, further guidance may be issued—particularly to address those areas lacking clarity that are noted above. Companies will need to be increasingly conscious of the evolving guidance—and nuances—around corporate co-operation with regulators.

One thing is certain: Navigating the differences between the approaches of enforcement across the globe, particularly in the context of cross-border investigations, will continue to pose challenges for multinational corporations.

For more information about the topics raised in this Legal Update please contact:

UNITED KINGDOM:

Sam Eastwood
Partner
+44 20 3130 3087
seastwood@mayerbrown.com

Alistair Graham
Partner
+44 20 3130 3800
alistair.graham@mayerbrown.com

Jason Hungerford
Partner
+44 20 3130 3084
jhungerford@mayerbrown.com

James Ford
Associate
+44 20 3130 3351
jford@mayerbrown.com

UNITED STATES:

Audrey L. Harris
Partner
+1 202 263 3118
aharris@mayerbrown.com

Matthew J. Alexander
Partner
+1 202 263 3160
malexander@mayerbrown.com

Juliet Gunev
Associate
+1 212 506 2847
jgunev@mayerbrown.com

FRANCE:

Nicolette Kost De Sèvres
Partner
+33 1 53 53 43 43
nkostdesevres@mayerbrown.com

Joydeep Sengupta
Counsel
+33 1 53 53 39 49
jsengupta@mayerbrown.com

Edna Hurtado
Associate
+33 1 53 53 43 43
ehurtado@mayerbrown.com

Endnotes

[1] SFO Corporate Co-operation Guidance, published 6 August 2019, available at: https://www.sfo.gov.uk/download/corporate-co-operation-guidance/#

[2] US Attorneys' Manual, § 9-47.120: https://www.justice.gov/criminal-fraud/file/838416/download.

[3] Financial Prosecutor's Office ("*Parquet national financier,*" PNF) and the French Anti-corruption Agency ("*Agence Française Anticorruption*", AFA) jointly published, on 27 June 2019, Guidelines on the implementation of the French equivalent deferred or negotiated prosecution agreements ("*Convention judiciaire d'intérêt public*", CJIP); available at: https://www.agence-francaise-anticorruption.gouv.fr/fr/lafa-et-parquet-national-financier-precisent-mise-en-oeuvre-convention-judiciaire-dinteret-public

[4] Setting out the six categories of guidance under "Preserving and providing materials" and examples of 11 "good general practices" around the preservation and provision of information to the SFO alongside specific guidance around *inter alia* the treatment of digital and physical evidence, as well as the types of financial records and analysis that should be provided by companies, and the treatment of individuals (particularly around the timing and conduct of interviews of potential witnesses or suspects).

[5] The risk of "trampling over the crime scene" is a concern expressed by David Green QC, former director of the SFO.

[6] Serious Fraud Office v Rolls-Royce PLC and Rolls-Royce Energy Systems Inc., paragraph 121, available at: https://www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.

[7] *Parquet national financier (PNF) et Agence française anticorruption (AFA), Lignes directrices sur la mise en œuvre de la convention judiciaire d'intérêt public*, published 27 June 2019, available at: https://www.agence-francaise-anticorruption.gouv.fr/fr/lafa-et-parquet-national-financier-precisent-mise-en-oeuvre-convention-judiciaire-dinteret-public.

[8] The Deferred Prosecution Agreements Code of Practice, Crown Prosecution Service, published February 2014, available at: https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf.

[9] Fighting fraud and corruption in a shrinking world, Lisa Osofsky, SFO Director, 3 April, available at: https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/

[10] The Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Jan. 20, 2003) (known as the "Thompson Memorandum"). An earlier version of the memorandum issued by then-Deputy Attorney General Eric Holder in 1999, had advised prosecutors that they could choose whether to take privilege waiver (among other factors) into account.

[11] Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Dec. 12, 2006) (known as the "McNulty Memorandum", available at

https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf);

[12] Memorandum from Mark R. Filip, Deputy Attorney General, to Heads of Department Components and United States Attorneys regarding Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008) (known as the "Filip Memorandum"), available at https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

[13] Memorandum from Sally Quillian Yates, deputy attorney general, to All United States Attorneys (Sept. 9, 2015) (known as the "Yates Memorandum"), available at https://www.justice.gov/archives/dag/file/769036/download.

[14] On this topic see Laurence Urgenson and Audrey Harris, "The Incredible Shrinking Privilege," Business Crimes Bulletin: Vol. 10, No. 8, September 2003.

[15] It is important to note that, in France, in-house counsel are not members of the French bar and therefore cannot provide attorney-client privilege.

[16] *Id*., footnote 5.

[17] Serious Fraud Office v Serco Geografix [2019] 7 WLUK 45, approved on 4 July 2019 and available at: https://www.judiciary.uk/wp-content/uploads/2019/07/serco-dpa-4.07.19.pdf

[18] Taking their name from Upjohn Co. v. United States, 449 US 383 (1981).

[19] The importance of Upjohn warnings has only increased following the release of the Yates Memo by the DOJ in September 2015 with its focus on gathering evidence to support prosecutions of individuals for corporate wrongdoing.

[20] United States v. Stein, 440 F. Supp. 2d 315 (S.D.N.Y.) (2006).

[21] See, e.g., United States v. Connolly, 16 CR 370 (S.D.N.Y.) (2019).

[22] Following the 2019 DOJ Policy Update, the FCPA Corporate Enforcement Policy relevantly requires the "[a]ppropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including *implementing appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations*" (emphasis added). The previous version of the FCPA Corporate Enforcement Policy, published in 2017 had required the "[a]ppropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including *prohibiting employees from using software that generates but does not appropriately retain business records or communications*" (emphasis added).