

U.K. Serious Fraud Office Lays Out Framework for Corporate Cooperation



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Michael A. Schwartz | schwartzma@pepperlaw.com

Abigail A. Hazlett | hazletta@pepperlaw.com

Saverio S. Romeo | romeos@pepperlaw.com

On August 6, the U.K. Serious Fraud Office (SFO) issued new guidance formalizing its policy on corporate cooperation. Although the SFO makes no promises, the new policy serves as a useful road map for any company attempting to negotiate its way through an SFO investigation.

The Policy

The SFO's "Corporate Co-operation Guidance" (available at: <https://www.sfo.gov.uk/download/corporate-co-operation-guidance/?wpdmdl=24184>) makes one thing clear: The SFO desires corporate cooperation and is prepared to reward that cooperation in an appropriate case. But a company seeking cooperation credit must do more than simply

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abide by its legal obligations in responding to an investigation. Rather, the SFO expects that a company will adopt a “genuinely proactive approach” that “goes above and beyond what the law requires.” Such an approach includes preserving and providing relevant material to the SFO in an organized, useful and prompt fashion. Beyond preserving all potentially relevant information, companies should, for example, provide the SFO with a list of relevant document custodians and the location of documents, identify relevant material that may be held by third parties, and turn over financial records that show relevant money flows. The SFO also expects that productions will be made on a rolling basis and in a format that is easy to import into its document review platforms.

A company seeking cooperation credit should also be sure to conduct an internal investigation in a way that does not prejudice the SFO's investigation. The SFO requests, for instance, that a company consult with the SFO **before** interviewing potential witnesses and that the company conduct those interviews in a way that avoids “tainting a potential witness’s recollection.”

While the SFO’s new policy bears some resemblance to the U.S. Department of Justice’s (DOJ’s) policy on corporate cooperation (available at: <https://www.pepperlaw.com/publications/revised-doj-corporate-cooperation-policy-supports-more-efficient-resolutions-2018-12-03/>), it differs in at least two material respects. *First*, under the SFO policy, a company may not be able to obtain a deferred prosecution agreement if it does not waive privilege. Indeed, the SFO expects that companies will share notes, recordings and/or transcripts of witness interviews. This is in contrast to DOJ policy (available at: <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.710>), which does not condition cooperation credit on the waiver of privilege. In another departure from DOJ policy, if a company intends on asserting privilege, the SFO expects that the company will not only turn over a privilege log, but will also obtain a certification from independent counsel attesting that the material is, in fact, privileged.

Second, unlike DOJ policy, the SFO requests that companies generally coordinate with the SFO before interviewing witnesses in connection with an internal investigation. The DOJ typically does not require such advance coordination (available at: <https://www.justice.gov/criminal-fraud/file/838416/download>).

Implications

Companies facing an SFO investigation finally have some clarity as to concrete steps they can take in seeking to obtain credit for cooperation. The new policy, however, leaves several questions unanswered.

First, although the SFO is likely to reward cooperation, the extent of that reward will depend on the case. The SFO has cautioned that there is no one-size-fits-all checklist a company can follow to guarantee a particular outcome.

Second, the SFO's request for privilege waivers and coordination with the SFO before interviewing witnesses is likely to lead to battles over legal privilege and whether and to what extent the SFO may interject itself into a company's internal investigation efforts.

Finally, the SFO's new corporate cooperation policy could exert pressure on companies to self-report issues early on in an attempt to receive more credit for cooperation. The race to the Crown's office, however, could prove risky if a company does so before it has a good handle on the facts.