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FROM FOG TO FOCUS: SFO SHARPENS ITS STANCE ON CORPORATE CO-OPERATION

The Serious Fraud Office (SFO) has published new self-reporting Guidance, outlining the key factors it will consider when deciding whether to invite a corporate to negotiate a deferred prosecution agreement (DPA[1]) as an alternative to prosecution. Since the DPA regime was introduced in 2014, uncertainty has persisted around the requirements the SFO expects a company to meet in order to be eligible for a DPA.

The new Guidance is a welcome step towards greater clarity for corporates on the DPA process, the SFO's expectations around self-reporting, what constitutes co-operation, and what benefits corporates can expect for compliance with the Guidance. The document also signals a desire by the SFO to adopt a more constructive and transparent approach to corporate engagement. As SFO Director Nick Ephgrave suggested, in remarks coinciding with the publication of the Guidance, "I am a man you can do business with… work with us and we will work with you."

The Guidance forms part of Ephgrave's broader efforts to reinvigorate the SFO in the wake of recent criticism over its performance, particularly following high profile prosecution failures, disclosure problems and a notable lack of new investigations into large corporates in 2024. His reform agenda also includes accelerating the pace of investigations, implementing much-needed improvements to disclosure practices, adopting new technologies and promoting the introduction of financial incentives for whistleblowers. The SFO has also announced a new anti-corruption taskforce alongside prosecutors in France and Switzerland, and three international bribery investigations in the last six months.

A central aim of the new Guidance is to reverse the recent decline in both self-reports of corporate wrongdoing, and DPAs. Since the introduction of the DPA regime, the SFO has entered into 12 DPAs, but none since 2021. In an apparent effort to help address this trend, the Guidance introduces a new default position: companies that self-report promptly and co-operate fully will be invited to negotiate a DPA, barring exceptional circumstances. This marks a departure from the previous approach, under which self-reporting companies remained at risk of prosecution.

The SFO hopes this shift - alongside recent reforms to the corporate criminal liability regime, including the expanded identification doctrine and the new failure to prevent fraud offence[2] - will drive a new wave of corporate self-reports and settlements. Whether this goal is achieved remains to be seen, but the Guidance nevertheless provides corporates with a clearer framework for interacting with the agency should criminality come to light within their operations.

[1] A DPA is a Court approved agreement between a company and a prosecutor that settles a criminal case against the company. The SFO or the Crown Prosecution Service can enter into a DPA as an alternative to prosecution of a company, where it is in the public interest. DPAs typically require the company to admit to certain facts, pay a financial penalty and agree to adhere to conditions set out in the DPA to ensure future co-operation and compliance.

[2] See our previous briefings on the introduction of these changes to the corporate criminal liability regime: Two steps forward, no steps back - Corporate criminal liability reform and Countdown to Compliance - Failure to Prevent Fraud Guidance Released.

Self-reporting

The new starting point is clear: a self-report is a key factor in favour of a DPA. However, it is not the case that a self-report alone is sufficient to justify a DPA. Under the Guidance, self-reporting and co-operation are distinct and cumulative factors. A company that self-reports must still demonstrate "genuine co-operation" throughout the SFO's investigation to be eligible for a DPA. Conversely, a company that does not self-report may still qualify if it provides "exemplary" co-operation. The Guidance makes clear that only in exceptional circumstances will a combination of a prompt self-report and full cooperation lead to prosecution rather than an invitation to negotiate a DPA. However, the Guidance does not elaborate on what might constitute such exceptional circumstances. This omission likely reflects the SFO's intention to retain a small degree of discretion in assessing the overall merits of a case, in its broader context and the extent of the cooperation provided.

The overarching aim is clearly to incentivise early self-reporting of corporate misconduct. Yet, despite the Guidance's improved clarity on several fronts, it provides little practical detail on what constitutes "prompt" reporting. It notes that organisations should report "soon after learning" of direct evidence of misconduct, and before an internal investigation is "fully complete." Reassuringly, it also acknowledges to a greater extent than in previous guidance that some preliminary internal investigation will often be necessary to understand the nature and extent of the offending before making a report. It is also clear from the types of information that the SFO expects a corporate to include in a self-report, which should enable the SFO to "to understand the nature and extent of the suspected offending", that some investigation must have been carried out before making a self-report.

The real challenge lies in determining how far an internal investigation can progress before the balance tips in favour of reporting. That challenge is further complicated by remarks made by Ephgrave at the launch of the Guidance, suggesting that companies should stop their internal investigation and report as soon as they have a "reasonable suspicion" of wrongdoing. This is a very low threshold and goes beyond what the Guidance itself suggests, risking encouragement of premature disclosures before the facts are properly understood.

The question of when exactly a company's knowledge of misconduct triggers a self-report continues to be a difficult, case-specific judgement that organisations and their advisers will need to navigate with care.

Hall marks of co-operation

The Guidance reaffirms the position in previous guidance that co-operation means conduct that goes "above and beyond what the law requires." It then adopts a checklist-style format, outlining a range of behaviours the SFO considers either co-operative or unco-operative - many of which reflect or expand upon established practices. Although the list is non-exhaustive and, at times, exacting, it is refreshingly clear and practical, offering a tangible framework for organisations seeking to co-operate.

Notably, the Guidance addresses the extent to which the SFO expects to be involved in a corporate's internal investigation, if it wishes to be regarded as co-operative. How the internal investigation is conducted and how the company engages with the SFO throughout will be key. The Guidance calls for early dialogue on the scope of the internal investigation and emphasises the importance of avoiding any steps that could prejudice the SFO's own inquiry. More explicitly than before, it expects corporates to provide advance notice of significant actions, particularly proposed interviews, and to be prepared to refrain from such interviews at the SFO's request. It also identifies the sharing of interview notes as an indicator of co-operation.

Helpfully, the Guidance does not impose a blanket prohibition on corporates conducting their own interviews or give the SFO an automatic right to interview witnesses first – marking a shift from recent SFO practice, where they have often insisted on obtaining the initial account. Instead, it recognises that whether a company may conduct its own internal interviews and who goes first, will depend on the circumstances. This more measured approach provides a useful reference point for organisations navigating engagement with the SFO on internal investigations.

The Guidance also adopts a broader approach to the scope of information organisations are expected to disclose in a self-report and as part of ongoing co-operation, compared to previous guidance. Companies are now expected to identify in the self-report "all known facts and evidence" relating to the suspected offence and the individuals involved, as well as the location of key materials, to help the SFO assess the nature and scope of the misconduct.

The updated examples of co-operative conduct also include disclosing prior corporate criminal conduct, details of any disciplinary actions taken against individuals, and financial information concerning any gain or harm arising from the offence. At the same time, the SFO cautions against submitting excessive or irrelevant material, warning that doing so may be viewed as unco-operative. This caveat likely reflects the agency's ongoing challenges with its disclosure practices and document management systems. Striking the right balance between providing comprehensive information and not overloading the SFO will be important for organisations seeking to demonstrate genuine co-operation.

The privilege paradox

The Guidance largely reaffirms the SFO's well-established stance on legal professional privilege - companies asserting a valid claim to privilege will not be penalised, however the SFO will treat a waiver of privilege as a marker of "significant co-operation." This creates an inherent tension: while maintaining privilege should not be held against a company, it may limit its ability to demonstrate significant co-operation and secure full co-operation credit, particularly if the matter was not self-reported to the SFO. This remains a challenging issue for organisations to navigate. Although the SFO's position on this is not new, the clear restatement of the position in the Guidance provides a helpful reference point for companies when engaging with the agency on privilege issues.

Time is of the essence

In a helpful development, the Guidance introduces some clearly defined targets on timelines for both the DPA negotiation process and the progression of investigations, aiming to keep the SFO on a more efficient and focused path. It specifies that the SFO 'will seek to' respond to a self-report within 48 hours, decide whether to open a formal investigation within six months, and conclude DPA negotiations within an additional six months. Most of these targets will be welcome news for corporates, given past experiences where self-reports have gone unacknowledged for months, or even remained unanswered, and where DPA negotiations have stretched on for years.

However, when it comes to the timeframe within which the SFO aims to complete its investigation - from the point it is formally opened to the decision to invite an organisation to enter into DPA negotiations - the Guidance offers little certainty. It merely states that the SFO will seek to conclude its investigation "within a reasonably prompt timeframe." It remains to be seen whether the actual conduct of investigations the SFO opens can be kept focussed and carried out at a faster pace, so that a DPA can be reached with co-operating companies in a reasonable timeframe, rather than the many-years-long and ever expanding investigations the SFO has become used to conducting.

A further, potentially less welcome aspect is the six-month timeframe for deciding whether to open a formal investigation. While this may be an improvement compared to some of the protracted pre-investigation phases we've seen (in one case exceeding 18 months) it still raises questions about why a more expedited decision-making process isn't possible.

The economics of compliance

The new Guidance brings greater clarity to what the SFO expects from companies in terms of co-operative conduct. However, the financial benefits that may follow such co-operation remain difficult to quantify. The Guidance does not specify the level or range of discount available for cooperation nor does it set out any enhanced discount specifically for self-reporting.

Financial penalties in corporate crime cases are typically calculated using the culpability and harm framework set out in the Sentencing Council's guidelines for corporate offenders in fraud, bribery, and money laundering cases. In previous DPAs, companies have secured discounts of up to 50% in recognition of substantial co-operation – a figure reflected most recently in the Entain plc DPA with the Crown Prosecution Service. Despite this precedent, the new Guidance offers no further insight into how such discounts will be calculated in future cases. Like earlier SFO guidance documents, it does not adopt the 2019 recommendation of the House of Lords Select Committee's post legislative report on the Bribery Act, which called for a clear distinction between discounts for companies that self-report and those that co-operate after an investigation has commenced.

In contrast, the U.S. Department of Justice (DOJ) provides a more structured and transparent approach. Under its Corporate Enforcement Policy, companies that self-report and fully co-operate can receive a reduction of between 50 – 75%, while those that co-operate without self-reporting can still receive up to a 50% reduction. While questions remain about the application of the DOJ's policy, in light of the Trump-era slowdown in bribery and corruption enforcement, it is nonetheless more transparent about the financial incentives available and draws a sharper distinction between self-reporting and co-operation, than the current SFO regime.

The SFO Guidance also draws little distinction in terms of non-financial benefits. Both self-reporting corporates and those that provide exemplary co-operation only after the SFO initiates contact remain eligible for a DPA. This raises a legitimate question for boards: is early self-reporting always the best option? Past cases suggest not necessarily. For example, in the Rolls-Royce DPA, a 50% discount on the fine and a DPA were achieved by exemplary co-operation, without a self-report.

Concluding remarks

The Guidance does not revolutionise the SFO's position, but it does clearly communicate established practice, extending it in some respects, and significantly improves clarity in important areas. For companies facing potential exposure to economic crime investigations, it offers a clearer, though still imperfect, framework for engaging with the agency. It should also help ensure that the agency's approach is more consistent and predictable than we have seen in the past.

The real test, however, will be whether the SFO can translate this Guidance into faster, more focused investigations that lead to timely resolutions, particularly through DPAs, which the agency now professes to be keener than ever to pursue. Achieving that will require more than policy reform; it demands a cultural shift within the SFO itself, particularly among those managing cases day-to-day, not just at the leadership level.

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