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Client Alert

New Corporate Co-operation Guidance from the UK Serious Fraud Office: Convergence and Divergence between the US and UK Regimes

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Contact

James G. Cavoli, Partner
+1 212.530.5172
jcavoli@milbank.com

Charles Evans, Partner
+44.20.7615.3090
cevans@milbank.com

William Charles, Associate
+44.20.7615.3076
wcharles@milbank.com

Will Denker, Associate
+1 212.530.5061
wdenker@milbank.com

The UK Serious Fraud Office ("**SFO**") published new "*Corporate Co-operation Guidance*" (the "**Guidance**") on 6 August 2019. In doing so, the SFO provided a greater degree of clarity as to its expectations of organisations seeking co-operation credit. In particular, the Guidance lists a number of specific factors that the SFO will take into account when considering the level of co-operation by an organisation under investigation, which will directly impact the decision whether to charge a company or initiate negotiations for a Deferred Prosecution Agreement ("**DPA**") in lieu of prosecution.

Based on the Guidance, the SFO—which has been led by Lisa Osofsky, the former Deputy General Counsel at the US Federal Bureau of Investigation, since late August 2018—has moved closer to the policies and practices of the US Department of Justice ("**DOJ**"). However, there remain a number of significant differences between the respective approaches of the SFO and DOJ when it comes to corporate co-operation. It is critically important for companies facing parallel, cross-border investigations to successfully navigate—to the extent possible—the divergent approaches applied by the different authorities. We focus below on the key developments under the Guidance, and then examine the differences between the US and UK regimes.

The Guidance: Co-operation "*above and beyond*"

The SFO's fundamental perception of meaningful co-operation is expressed in general terms as "*providing assistance to the SFO that goes above and beyond what the law requires,*" including "*identifying suspected wrongdoing and criminal conduct together with the people responsible, regardless of their seniority or position in the organisation; reporting this to the SFO within a reasonable time of the suspicions coming to light; and preserving available evidence and providing it promptly in an evidentially sound format*."[1] The corollary of this, as explained in the Guidance, is that genuine co-operation "*is inconsistent with: protecting specific individuals or unjustifiably blaming others; putting subjects on notice and creating a danger of*

[1] Guidance at 1.

tampering with evidence or testimony; silence about selected issues; and tactical delay or information overloads."[2]

The Guidance specifies a number of "*indicators of good practice*" (see below), though it is expressly non-exhaustive in this respect ("*This is not a complete list . . . .*").[3] It is explicit, however, that even full compliance with these indicators will not guarantee a particular outcome in terms of the SFO's decision-making ("*it is not intended to, nor does it, create legally enforceable rights, expectations or liabilities*"). Below is a summary of the key aspects of the "*indicators of good practice*."

Documentary evidence: preservation and production

In the Guidance, the SFO has emphasised the importance of robust document preservation measures, including the digital integrity of electronic material; and that a co-operating organisation should alert the SFO without delay to any "*suspicions of, and reasons for, data loss, deletion or destruction.*" Relatedly, organisations should be alive to risks arising from "*ageing technology or bespoke systems*" and preserve the means of reviewing all digital files over the life of the investigation (and any subsequent prosecution).[4]

As to the production of evidence to the SFO, the Guidance lists a number of examples of co-operative steps, many of which are non-controversial and familiar as 'best practice'. These include, for example, the provision of information promptly and in a useful, structured manner (such as compilations of selected documents relating to specific issues). The Guidance also emphasises the provision of evidence in such a way as to facilitate technology-assisted review by the SFO. For example, the SFO *"may ask an organisation to provide… details of search terms, 'seed sets' or other search methodologies applied to extract the documents."*[5]

The Guidance also includes specific provisions on three further types of information:

(i) First, the organisation seeking maximum co-operation credit should identify relevant material that is in the possession of third parties (including, for example, information regarding bank accounts into which monies flowed from the organisation), and the SFO "*may ask the organisation to facilitate the production of*" such material.[6] Relatedly, the Guidance indicates that the SFO should be alerted to digital material that the organisation is unable to access (*e.g.*, relevant private email, or social media, accounts).

(ii) Second, the company should provide relevant material in its possession or control even if it is held outside of the UK. Accordingly, where documents are held by overseas affiliates, for example, a company under investigation will need to assess the degree to which such documents are within its control.

(iii) Third, the organisation should "*assist in identifying material that might reasonably be considered capable of assisting any accused or potential accused or undermining the case for the prosecution.*"[7] In this way, the SFO seemingly incentivizes organisations under investigation to facilitate compliance with the SFO's own statutory duty to disclose such material to the accused in the context of criminal prosecutions.[8]

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[2] *Id.*
[3] Guidance at 1, 2.
[4] Guidance at 2, 3.
[5] *Id.*
[6] Guidance at 2.
[7] Guidance at 3.
[8] S.3 Criminal Procedure and Investigations Act 1996.

Witnesses: co-ordination of interviews and production of accounts

The Guidance also propounds a general rule that an organisation seeking to co-operate should "*consult in a timely way with the SFO before interviewing potential witnesses or suspects, taking personnel/HR actions or taking other overt steps.*"[9] Moreover, the organisation must avoid any risk of tainting the witness's recollection (*e.g.*, by showing the witness previously unseen documents, or by sharing the account of another witness). As explained below, this diverges from the DOJ's general approach.

In relation to the fruits of witness interviews, the Guidance repeats a provision from the DPA Code of Practice which stipulates that "*[c]o-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them…*".[10] The Guidance goes further, however, stating that organisations seeking credit for co-operation by providing witness accounts "*should additionally provide any recording, notes and/or transcripts of the interview and identify a witness competent to speak to the contents of each interview*", which it concedes may be privileged.[11] This added direction may reflect an increasing reluctance by the SFO to accept 'oral downloads' or 'proffers' of witness interviews. It is notable, in this regard, that this practice was recently criticised in a case where the SFO was given oral proffers of interviews conducted by company counsel with four executives suspected of wrongdoing.[12] This new, more specific guidance also has potentially significant implications with respect to legal privilege, as discussed below.

Privilege

There is a strong focus in the Guidance on claims to legal privilege and the waiver of privilege by organisations seeking co-operation credit (and, as explored below, this is an area of meaningful divergence from the guidance issued by the DOJ).

First, the Guidance is consistent with an increasing preparedness by the SFO to contest assertions of privilege over relevant investigation materials. In particular, the Guidance includes a new requirement that "*[d]uring the investigation, if the organisation claims privilege, it will be expected to provide certification by independent counsel that the material in question is privileged.*"[13] In addition, the Guidance stipulates that an organisation should "*[p]romptly provide a schedule of documents withheld on the basis of privilege, including the basis for asserting privilege*"—in other words, the SFO must receive a 'privilege log', which has been the practice in US investigations and civil litigation for decades—and that the SFO may challenge any such assertion where it considers it necessary or appropriate.[14]

Second, it is apparent from the Guidance that a company will <u>not</u> be afforded co-operation credit for providing witness accounts unless and until it waives privilege and provides "*any recording, notes and/or transcripts*" of the pertinent interviews.[15] While it is difficult to reconcile this aspect of the Guidance with its additional statement that an organisation which does not waive privilege in this way "*will not be penalised by the SFO*" (as considered below), the Guidance clearly reflects the increasing pressure on organisations to provide information obtained during an internal investigation, which provision will likely attract arguments that any legal privilege has been waived.[16]

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[9] Guidance at 4.

[10] SFO, *Deferred Prosecution Agreements Code of Practice*, para 2.8.2(i), *available at* https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf, p. 5.

[11] Guidance at 5.

[12] *R (on the application of AL) v Serious Fraud Office* [2018] EWHC 856 (Admin).

[13] Guidance at 5.

[14] Guidance at 2, 3.

[15] Guidance at 5 ("*An organization that does not waive privilege and provide witness accounts does not attain the corresponding factor against prosecution that is found in the DPA Code . . . .*").

[16] *Id. E.g.*, *Serious Fraud Office v Rolls-Royce plc, Rolls-Royce Energy Systems Inc* [2017] Lloyd's Rep. F.C. 249, in which the English High Court praised the defendant's "*extraordinary co-operation*" with the SFO (para 121), including a limited waiver of privilege in respect of interview memoranda from the investigation.

Key Differences Between the US and UK Regimes and Practice Considerations

Legal privilege and witness interview evidence

Perhaps the starkest contrast between the US and UK regimes is in their respective approaches to legal privilege. While the Guidance provides that a company that refuses to waive privilege over witness statements will not be penalized, it also makes clear that the failure to do so means that the company will be unable to rely on this aspect of co-operation as a factor weighing in favour of a DPA (which effectively amounts to a penalty). Although co-operation credit would remain available based on other co-operative steps, it remains to be seen whether the SFO's assessment of such steps will be coloured by an organisation's failure to waive privilege in respect of witness accounts. By contrast, the DOJ's Justice Manual expressly states that the failure to waive privilege (whether related to witness statements or otherwise) cannot and will not amount to a negative in assessing co-operation credit. Specifically, the DOJ's policy is that "*eligibility for cooperation or voluntary self-disclosure credit is not in any way predicated upon waiver of the attorney-client privilege or work product protection . . . .*"[17]

Further, a company considering waiving privilege over witness statements to garner greater co-operation credit under the UK regime must consider the different protections afforded under English law as compared to US law. Although "legal advice privilege" and "litigation privilege" under English law and their US analogues (respectively, the attorney-client privilege and the attorney work product doctrine) share a common underlying policy rationale, they have developed differently, leading to important differences in scope, as we have explored in previous client alerts.[18] For example, the English courts have recognized that a party may waive privilege over a document on a selective or limited basis (and without thereby effecting any wider waiver) by disclosing it to a third party in confidence and for a limited purpose, and recent authority makes clear that this doctrine may extend to privileged documents disclosed to regulatory authorities.[19] The majority view under US law, however, is that the provision of privileged material to the government—even if done in confidence and with the express intent not to waive more broadly—results in a broader waiver as to third-parties.[20] As such, corporations hoping to maximize co-operation credit with the SFO should be wary of the potential cross-border implications of waiving privilege in the UK, and alive to the risk that a limited waiver to the SFO could amount to a waiver in US criminal and civil proceedings as well.

In addition, the SFO's requirement that a company asserting privilege provide certification by independent counsel that the information is, in fact, privileged adds a burden not imposed by the DOJ, the full implications of which are not yet clear. At the very least, identifying the documents over which privilege is asserted in the US, and deciding on the types of privilege asserted, may require additional analysis and resources due to the presence of a second law firm and the desire for consistency in the two forums (though we recognize that the precise contours of legal privilege are not the same in the US and UK).

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[17] Justice Manual, 9-47.120, *FCPA Corporate Enforcement Policy*, *available at* https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977 (emphasis added).

[18] *See* Milbank LLP Litigation & Arbitration Group Client Alerts: (i) *Privilege in cross-border investigations and litigation: Implications of The RBS Rights Issue Litigation in the English High Court* (Mar. 15, 2017), *available at* https://www.milbank.com/images/content/2/5/v6/25896/RBS-Rights-Issue-Litigation-Client-Alert-March-2017.pdf; and (ii) *A Victory for Legal Privilege in Cross-border Investigations – US and UK perspectives on the English Court of Appeal's decision in The Serious Fraud Office v ENRC Limited* (Sept. 11, 2018), *available at* https://www.milbank.com/images/content/1/0/105317.pdf.

[19] *E.g.*, *Property Alliance Group v Royal Bank of Scotland plc* [2016] 1 WLR 361 (per Birss J at 113), where it was held that privilege had not been waived in documents disclosed to authorities (including the DOJ, SEC and CFTC) expressly on terms that confidentiality and privilege would be maintained and despite the fact that such terms included carve-outs permitting the authorities to deploy (including by publishing) the relevant documents.

[20] *See, e.g., In re Pacific Pictures Corp.*, 679 F.3d 1121, 1127 (9th Cir. 2012) (noting that, except for the Eighth Circuit, every other circuit has rejected the notion of "selective waiver") (collecting cases).

Advance consultation on investigative steps

While the Guidance incentivizes companies seeking to maximize co-operation credit to consult with the SFO before conducting any witness interviews or taking personnel actions (as part of remediation, for example), there is no such general rule in the US. The DOJ can (and does) make so-called "de-confliction" requests (i.e., requests that a particular employee not be interviewed before the government interviews him or her), but such requests are ostensibly rare, and there is no blanket expectation in the US that a company will affirmatively reach out to the DOJ before conducting interviews as part of an internal investigation.[21]

In addition, compliance with certain aspects of the Guidance—i.e., consulting with the SFO in advance of any witness interview, personnel decision, or other overt investigative steps, and conducting interviews as the SFO advises ("*[r]efrain from . . . showing the witness documents that they have not previously seen*"), could suggest that a company is acting as an arm of the SFO, a circumstance frowned upon under US law. In *United States v. Connolly*, a district judge in Manhattan sharply rebuked the DOJ for effectively outsourcing its investigation to company counsel, as evidenced by its micromanagement of the company's internal investigation.[22] In this sense, the Guidance seems to encourage (at least to a certain extent) what the *Connolly* court admonished, adding another wrinkle to cross-border investigations. While this tension is unlikely to have direct negative implications for a company under investigation (since the concerns raised in *Connolly* are essentially concerns for the DOJ), it is nonetheless important for companies conducting an internal investigation to be cognizant of these competing dynamics.

Further, the advance-consultation recommendation set forth in the Guidance may, in certain circumstances, be at odds with the DOJ's policy of considering the "*timeliness of the cooperation*" and the "*thoroughness and speed of the internal investigation*" (among other things).[23] The added time necessary to consult the SFO, and the potential for the SFO to delay important witness interviews as a result of such consultation, may compromise both the thoroughness and speed of an internal investigation, and delay the conveyance of material facts to the DOJ. To avoid losing co-operation credit in the US, a corporation under investigation in both jurisdictions should, at a minimum, regularly apprise the DOJ of any delays attributable to the SFO and/or compliance with the Guidance.

Presumption in favour of non-prosecution

While the SFO Guidance promises to consider a company's co-operation when making charging and enforcement decisions, "*even full, robust co-operation*" will "*not guarantee any particular outcome*."[24] This differs from the US regime in relation to investigations under the US Foreign Corrupt Practices Act. In that setting, the Justice Manual provides for a "*presumption*" that the company "*will receive a declination absent aggravating circumstances . . . .*", assuming full co-operation and the satisfaction of other prerequisites.[25]

Self-reporting requirements and the burden on co-operating companies

The two regimes also appear to differ in terms of the scope of a company's self-reporting obligations. The Guidance requires early self-reporting of "*suspected wrong-doing and criminal conduct together with the*

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[21] *See* Roger Hamilton-Martin, Global Investigations Review, *Leslie Caldwell: 'deconfliction' requests should be rare*" (Apr. 28, 2016).

[22] *United States v. Connolly*, No. 16 Cr. 0370 (CM), 2019 WL 2120523 (S.D.N.Y. May 2, 2019). For a full discussion of the *Connolly* case and its ramifications, refer to the following Milbank Client Alert: James Cavoli, Antonia Apps, Tawfiq Rangwala, *'USv. Connolly': The Consequences of Outsourcing Government Investigations to the Private Sector*, N.Y. L.J. (May 8, 2019), *available at* https://www.milbank.com/images/content/1/1/v3/114323/USvConnollyNYLawJournalMilbank.pdf

[23] Justice Manual, 9-28.700, *Principles of Federal Prosecution of Business Organizations, The Value of Cooperation* (subsection A, "General Principle"), *available at* https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700.

[24] Guidance at 1.

[25] Justice Manual, 9-47.120, *Foreign Corrupt Practices Act of 1977, FCPA Corporate Enforcement Policy*, *available at* https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.

people responsible, regardless of their seniority or position in the organization."[26] This broad wording may place a more onerous burden on organisations seeking to co-operate than does the DOJ's policy, which requires companies to disclose only "*relevant facts*" regarding *"all individuals substantially involved in or responsible for the misconduct.*"[27] Indeed, in response to "*concerns raised about the inefficiency of requiring companies to identify every employee involved regardless of relative culpability,"* the DOJ revised its policy at the end of 2018 to make clear that that is not the requirement—the focus is only on those with substantial involvement."[28] The Guidance is not so limited and, as such, the US and UK appear to be moving in opposite directions in this regard, although the actual extent of the divergence remains to be seen in practice.

Conclusions and Practical Advice

Despite providing greater clarity on the factors that the SFO will take into account in assessing corporate co-operation, the Guidance also highlights a number of tensions with the prevailing approach in the US. Organisations facing parallel investigations in both the UK and US must appreciate those tensions and, in some cases, make difficult decisions that result therefrom. For example, a company may have to decide whether the benefits associated with a limited privilege waiver vis-à-vis the SFO (important to securing co-operation credit under the Guidance) outweigh the risks that such waiver might be more broadly construed under US law. Ultimately, it remains to be seen how the differences explored above will be addressed in practice. In this respect, it is important to bear in mind that the general climate is one of greater co-operation between authorities in different jurisdictions, which may, as a practical matter, ameliorate some of these concerns. Organisations would, however, be well-advised to keep abreast of the evolving positions of the SFO and the DOJ in relation to corporate co-operation, and to retain counsel with a clear understanding of cross-border investigations and attendant issues.

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[26] Guidance at 1.

[27] Justice Manual, 9-28.700, *Principles of Federal Prosecution of Business Organizations, The Value of Cooperation* (subsection A, "General Principle"), *available at* https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700.

[28] *See* Former Deputy Attorney General Rod J. Rosenstein, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0 (emphasis added); Justice Manual, 9-28.700, *Principles of Federal Prosecution of Business Organizations, The Value of Cooperation* (subsection A, "General Principle"), *available at* https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700.

London	10 Gresham Street, London EC2V 7JD	
Tom Canning	tcanning@milbank.com	+44-20-7615-3047
Charles Evans	cevans@milbank.com	+44-20-7615-3090
Julian Stait	jstait@milbank.com	+44-20-7615-3005
New York	**55 Hudson Yards, New York, NY 10001-2163**	
Wayne M. Aaron	waaron@milbank.com	+1-212-530-5284
Antonia M. Apps	aapps@milbank.com	+1-212-530-5357
Thomas A. Arena	tarena@milbank.com	+1-212-530-5828
George S. Canellos *Global Head of Litigation*	gcanellos@milbank.com	+1-212-530-5792
James G. Cavoli	jcavoli@milbank.com	+1-212-530-5172
Scott A. Edelman *Firm Chairman*	sedelman@milbank.com	+1-212-530-5149
Adam Fee	afee@milbank.com	+1-212-530-5101
Christopher J. Gaspar	cgaspar@milbank.com	+1-212-530-5019
David R. Gelfand	dgelfand@milbank.com	+1-212-530-5520
Katherine R. Goldstein	kgoldstein@milbank.com	+1-212-530-5138
Robert C. Hora	rhora@milbank.com	+1-212-530-5170
Alexander Lees	alees@milbank.com	+1-212-530-5161
Grant R. Mainland	gmainland@milbank.com	+1-212-530-5251
Atara Miller	amiller@milbank.com	+1-212-530-5421
Sean M. Murphy	smurphy@milbank.com	+1-212-530-5688
Daniel Perry *Practice Group Leader*	dperry@milbank.com	+1-212-530-5083
Tawfiq S. Rangwala	trangwala@milbank.com	+1-212-530-5587
Stacey J. Rappaport	srappaport@milbank.com	+1-212-530-5347
Fiona A. Schaeffer	fschaeffer@milbank.com	+1-212-530-5651
Jed M. Schwartz	jschwartz@milbank.com	+1-212-530-5283
Alan J. Stone	astone@milbank.com	+1-212-530-5285

Errol B. Taylor	etaylor@milbank.com	+1-212-530-5545

Washington, DC | International Square Building, 1850 K Street, NW, Suite 1100, Washington, DC 20006

Andrew M. Leblanc	aleblanc@milbank.com	+1-202-835-7574
Michael D. Nolan	mnolan@milbank.com	+1-202-835-7524
Aaron L. Renenger	arenenger@milbank.com	+1-202-835-7505

Los Angeles | 2029 Century Park East, 33rd Floor Los Angeles, CA 90067-3019

Lauren Drake	ldrake@milbank.com	+1-424-386-4320
Gary Frischling	gfrischling@milbank.com	+1-424-386-4316
David I. Gindler	dgindler@milbank.com	+1-424-386-4313
Robert J. Liubicic	rliubicic@milbank.com	+1-424-386-4525
Yite John Lu	jlu@milbank.com	+1-424-386-4318
Jerry L. Marks	jmarks@milbank.com	+1-424-386-4550
Mark C. Scarsi	mscarsi@milbank.com	+1-424-386-4580

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