



## UK Guidance on Corporate Cooperation Credit

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On 6 August 2019, the UK Serious Fraud Office (SFO) issued its much-anticipated **Corporate Cooperation Guidance** (the Guidance) outlining, in substantial detail, the steps that the SFO expects corporations to undertake in order to be eligible for cooperation credit when the SFO makes charging decisions, including in relation to whether a deferred prosecution agreement would be appropriate in lieu of full criminal prosecution.

In many respects, the Guidance is unsurprising and provides the types of investigative best practices that sophisticated companies and their advisers are already familiar with—particularly companies familiar with US regulators' expectations regarding cooperation credit.

However, the Guidance raises strategic questions for companies navigating cross-border investigations. In particular, companies will still need to assess:

- The extent to which they should conduct an investigation before making the complex decision to self-report a potential issue; and
- Whether to waive privilege to obtain cooperation credit while risking broader disclosure, particularly in cross-border investigations.

Companies will need to undertake these assessments, absent a clear indication of the precise benefits of cooperating with the SFO in resolving a case, as the Guidance does not provide clear elaboration on what weight the SFO gives cooperation in making charging decisions.

### SFO's Views on Cooperation

The Guidance explains that the SFO will consider the extent of a company's cooperation when making corporate charging decisions, but that cooperation does not guarantee any specific outcome. To be regarded a cooperator, a company must go beyond what is required by law; compliance with compulsory process is not enough. To that end, the Guidance sets out a detailed list of actions that the SFO will consider cooperative, including:

- Reporting misconduct to the SFO within a reasonable time of the suspicions coming to light (without specifying what is considered "reasonable")

- Identifying responsible employees regardless of seniority or position in the company
- Following general investigatory best practices, including proper data preservation, providing material promptly and meeting agreed deadlines, providing material in an organised, useful, and structured way (*g.*, compilations of key documents categorised by individual or issue), and providing relevant material that is held abroad but is still in the possession or under control of the company (again, possession/control is not defined in the Guidance)
- Making company accountants or other personnel available to speak to the government about financial records and money flow, if appropriate
- Providing notes (and/or recordings/transcripts) of witness interviews and providing witnesses to the government who are competent to give the evidence contained in those witness interviews
- Consulting with the SFO before interviewing witnesses or taking any disciplinary action, and refraining from showing a witness any document that he or she may not have already seen

Another “new” feature stemming from the Guidance is that the SFO appears to be accepting a greater level of internal investigation by companies, prior to self-reporting, while still granting cooperation credit to them. Under the SFO’s previous director, there had been a number of well-publicised speeches by senior staff counselling companies against investigations that “trampled the crime scene”; preferring to leave fact-finding tasks to SFO investigators. The direction provided by this Guidance, however, presupposes that the company will have undertaken some investigative efforts itself in order to be prepared to self-report and cooperate, reflecting an acknowledgement that companies will engage in some level of internal investigation.

## Tension with US Cooperation Standards

Much of the Guidance is common-sense investigative practice. However, certain aspects of the Guidance could raise practical issues for companies conducting complex, cross-border investigations, particularly those involving the US authorities that have cooperation standards that stand in tension with the new UK Guidance.

First, the Guidance expressly instructs companies to consult with the SFO “*before* interviewing potential witnesses, or suspects, taking personnel/HR actions or taking other overt steps”. (emphasis added). In general, US authorities do not require such pre-approval (though consultation at times may be appropriate) and, in practice, often appreciate factual briefings that contain information derived from this type of witness interview.

Second, the Guidance is proscriptive in how the SFO expects a company to conduct certain elements of its own investigation. For example, the Guidance instructs parties to “refrain from tainting a potential witness’s recollection, for example, by hearing or inviting comment on another person’s account or showing the witness documents that they have not previously seen”. The cooperation guidance from US regulators does not include this type of direction on tactical decisions, leaving these to be made by the company and its counsel. Indeed, a US court recently raised concerns about governmental involvement and/or directives in a nominally internal investigation, which could raise the risk that the company’s investigative activities could be

imputed to the government, thereby implicating the protections afforded by the US Constitution (*i.e.*, against self-incrimination, compelled testimony, etc.).<sup>1</sup>

Third, regarding the much-discussed topic of interview memos, the Guidance states that “[o]rganisations 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”. Given that, in the US, this type of material will likely be protected by the attorney-client privilege and/or attorney work product doctrines, the Guidance creates an expectation that a company will be required to waive that US-based privilege in order to obtain cooperation credit in the UK.

## Key Considerations for Companies

Although the Guidance provides welcome direction to companies facing an SFO investigation, it leaves open several strategic questions:

### **Consider Timing of a Self-Report**

The Guidance requires early self-reporting, while also instructing companies to consult with the SFO before interviewing key witnesses. Companies will need to balance the risk of the SFO considering an investigation to be tainted (due to the extent of internal investigation prior to a self-report), with the need to ensure that the preliminary facts justify self-reporting (thereby ceding control of the investigation to the SFO and inviting the possibility of an enforcement proceeding).

Companies must carefully consider how to plan the preliminary stages of an investigation. On the one hand, they will need to take sufficient precatory steps to enable an informed decision on self-reporting; on the other hand, the SFO remains wary of a company taking steps that could taint the SFO’s own investigation. To the extent that this incentivises companies to make an early disclosure, that raises risks that a company will disclose and trigger a government investigation in situations where there has been no criminal misconduct.

Striking this balance raises two practical concerns. First, whether and under what circumstances a company’s preliminary investigation can include witness or suspect interviews and still obtain cooperation credit. Second, to what extent a company is willing to cede control of its own investigative activities and at what stage (and the consequent impact of any HR or ancillary civil actions), in order to facilitate a self-report to the SFO.

### **Consider Privilege Implications From Cooperation**

Companies should closely consider the privilege ramifications of any disclosure of material to the SFO, including interview notes or summaries. Under US law, a voluntary waiver for one purpose is generally a waiver for all purposes. Accordingly, any such voluntary disclosure of privileged materials to the SFO could effectuate a broad waiver of the privilege in respect of any documents pertaining to the same subject matter in any ongoing or subsequent US proceeding (whether criminal, administrative, or civil). In other words, witness summaries produced to the SFO would also likely need to be produced in a civil securities or other plaintiffs case in the US. Companies

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<sup>1</sup> United States v. Connolly, No. 16 Cr. 0370 (CM), slip op. at 6–7 (S.D.N.Y. May 2, 2019).

should, in consultation with counsel, carefully consider cross-border exposure before deciding to waive privilege in the context of SFO investigations.

### **Consider Benefits of Cooperation**

Although the Guidance states that cooperation is a factor in charging decisions (including in respect of whether a company is eligible for a deferred prosecution agreement), it does not provide, with any particularity, the benefits a company can expect to obtain by cooperating. In contrast, the US DOJ FCPA Corporate Enforcement Policy (“DOJ Policy”), which was first issued in November 2017 and since adopted into official DOJ policy, expressly provides a presumption in favour of a declination where there has been: (i) a voluntary self-disclosure; (ii) full cooperation and; (iii) timely and appropriate remediation.<sup>2</sup> In addition, the DOJ Policy provides for specific reductions in fines (up to 25%) if there has been cooperation and remediation but no voluntary self-disclosure. While the Guidance does helpfully provide companies with the SFO’s view on cooperation, it leaves companies with potentially difficult decisions in the face of uncertain benefits to such cooperation.

### **Conclusion**

The Guidance is a welcome and insightful look at how the SFO evaluates a company’s cooperation. However, companies will continue to wrestle with difficult questions about how best to respond to an SFO investigation, particularly in an increasingly cross-border environment where multiple investigative bodies may be involved.

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<sup>2</sup> *Id.*