

KING & SPALDING: TRANSATLANTIC BUSINESS CRIME AND INVESTIGATIONS SEPTEMBER COLUMN

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King & Spalding's Special Matters and Government Investigations team shares its views on developments in transatlantic business crime and investigations.

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WHAT DOES THE SFO'S CORPORATE CO-OPERATION GUIDANCE MEAN FOR COMPANIES UNDER INVESTIGATION BY BOTH THE SFO AND DOJ?

Companies facing cross-border investigations by both the UK Serious Fraud Office (SFO) and US Department of Justice (DOJ) have long complained of the different approaches taken by the authorities when it comes to cooperation. For example, the SFO often prefers companies not to conduct interviews during internal investigations (claiming that this "tramples the crime scene"), whereas DOJ often expects it. This can lead to difficult decisions for those who want to cooperate with both authorities.

Until now, the US has been more prescriptive in its requirements through guidance such as the Justice Manual and the FCPA Corporate Enforcement Policy, whereas the SFO has steered away from issuing similar written guidance. Instead, to understand what might be expected of the SFO in this context, UK corporates referred to a short paragraph on cooperation in the Deferred Prosecution Agreements (DPA) Code of Practice, or relevant commentary in Sir Brian Leveson's various DPA judgments. However, on 16 August 2019 the SFO published its own Corporate Co-operation Guidance (see *SFO: Corporate Co-operation Guidance* (the Guidance)).

Key aspects of the Guidance

The Guidance covers a range of topics around providing evidence and information and dealing with individuals. As you might expect, there are plenty of synergies with DOJ guidance around preserving and providing relevant material. However, the Guidance does not attempt to bridge the gaps in other key areas and will therefore only serve to reinforce existing concerns about the differing approaches. The silver lining is that the Guidance will allow US colleagues and clients to get up to speed more quickly on the SFO's expectations. The following provisions are particularly important for those under investigation by both authorities:

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- The Guidance confirms the SFO's preference for companies to consult with it "in a timely way" before interviewing either potential witnesses or suspects or "taking personnel/HR actions or taking other overt steps". Depending on the circumstances, this approach could lead to a company self-reporting a potential issue to the SFO before the company understands what the issue is, or even whether it has a real issue in the first place. We suspect that UK corporates will find this aspect of the Guidance difficult to navigate. Notably, the DOJ FCPA Corporate Enforcement Policy does not require companies to consult with DOJ prior to witness interviews. But it does permit DOJ to require companies to defer certain investigative steps (including potential witness interviews) for "de-confliction purposes". And DOJ may consider "de-confliction" as a factor in evaluating cooperation credit.
- The Guidance suggests that material held abroad which is under the "possession or control" of the company should be provided. This element of the Guidance reinforces the trend of authorities bypassing slow, cross-border mutual legal assistance requests. Indeed, the Guidance mirrors DOJ's FCPA Corporate Enforcement Policy (see [DOJ: FCPA Corporate Enforcement Policy](#)), which requests that companies provide "overseas material". Given that material provided voluntarily to one authority will often be provided to the other, these cross-border document requests can create a risk of investigation scope creep on both sides of the Atlantic.
- The Guidance suggests that companies should identify suspected wrongdoing and criminal conduct "together with the people responsible, regardless of their seniority or position in the organisation". This reinforces the SFO's focus on companies taking an active approach to identifying individual culpability. Such an approach is similar to DOJ requirements of the Justice Manual (see [DOJ: Justice Manual](#)), which incorporates the Yates Memo's guidance on individual accountability. Under DOJ guidance, however, companies are asked only to provide "all relevant facts" regarding all individuals substantially involved in or responsible for the misconduct at issue, which could be seen as stopping short of actually attributing responsibility for wrongdoing.
- It is no secret that the SFO wants companies to waive privilege over their internal investigations and, in particular, witness accounts and key documents shown to witnesses. Although the Guidance confirms that it will not penalise those companies who do not waive privilege, it makes clear that without it, a company cannot obtain credit for "cooperation" as a factor against prosecution under the DPA Code. This may be an area of real UK/US tension, given that DOJ does not expect a waiver of privilege. In fact, DOJ explicitly states in the Justice Manual 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. But under US law, a waiver of privilege for one purpose (even if specific and limited) generally constitutes a waiver for all purposes (whereas English law recognises a limited waiver of privilege). Companies may therefore have to make a tough choice when facing investigations involving both the SFO and DOJ and/or other US authorities.
- A surprising and contentious addition to the Guidance is that if a company does want to assert privilege over investigation materials, it will be expected to provide "certification by independent counsel that the material in question is privileged". It will be interesting to see how this plays out in practice, given the potential time and cost of obtaining such certification and a potential element of uncertainty around the ultimate determination.

UK UNEXPLAINED WEALTH ORDERS VS US CIVIL FORFEITURE

At the end of July 2019, the UK's National Crime Agency (NCA) obtained an unexplained wealth order (UWO) targeting six properties belonging to a person suspected of ties to paramilitary activity and cigarette smuggling. This is just the fourth UWO since the regime was established in 2018, but it is the third since May of this year, potentially indicating that officials intend to deploy UWOs more frequently in the future. As explained in [Practice note, Unexplained wealth orders](#), UWOs were introduced as a mechanism to identify and ultimately confiscate the proceeds of crime by using civil, rather than criminal, powers. While authorities in the UK already had the power to obtain civil recovery orders, they do not often use that power and the introduction of UWOs undoubtedly makes it easier to target property on a civil basis. In contrast, every year, US authorities seize hundreds of millions of dollars of real estate and personal property associated with criminal activity through a civil route.

UK's UWO regime

The UK government introduced UWOs in 2018 (as part of the Criminal Finances Act 2017) in order to provide law enforcement with a further tool to tackle the perceived common practice of criminals (and/or their professional "enablers") laundering illicit funds in the UK via transactions in real estate or other valuable property. The NCA, the SFO, HM Revenue and Customs and the FCA can obtain UWOs against individuals as well as property-holding structures like companies and trusts. UWOs target property valued at over £50,000 where there are reasonable grounds for suspecting that the owner's lawful income would have been insufficient to obtain the property, and where either (a) the owner is a non-EEA Politically Exposed Person (PEP), which may include family members or other close associates; or (b) the owner or a person connected with the owner is suspected of involvement in serious crime in the UK or elsewhere. The authorities can obtain interim freezing orders alongside UWOs in order to prevent any transfers of the target property while the UWO is litigated. Where an individual cannot show a legitimate source of funds, the property targeted by the UWO is presumed to be recoverable in civil proceedings under the UK's Proceeds of Crime Act 2002.

US civil forfeiture

Civil forfeiture actions are a daily occurrence in the US. Law enforcement authorities must allege that the property is an instrumentality of criminal conduct or the proceeds of a crime, but authorities can prevail without meeting the strict, criminal standard of proof beyond a reasonable doubt; generally a preponderance of the evidence or clear and convincing evidence will be sufficient.

In recent years, political actions groups like the American Civil Liberties Union (ACLU) have targeted civil forfeiture laws, alleging serious abuses by law enforcement, focusing on the substantial amounts forfeited every year and claiming disparate treatment of minority communities. It remains to be seen whether UWOs in the UK will be subject to similar challenges.

Additional tools to fight money laundering in real estate

Aside from UWOs, the UK government is taking additional action to counter perceived money laundering in real estate by pursuing the creation of a register of beneficial owners for any foreign registered businesses owning property in the UK. Implementation of these new reporting requirements is on track for 2021: any entity that fails to report will be unable to transfer title and criminal sanctions may also apply. These proposed requirements are comparable to the US Financial Crimes Enforcement Network's (FinCEN) geographic targeting orders, a new programme requiring beneficial ownership reports for significant, non-bank financed real estate transactions in specific metropolitan areas across the US. Commentators have speculated that these new reporting requirements have materially blunted prices for high-end properties in cities like New York, Los Angeles and Miami. Despite some public controversy, all signs suggest further government pressure in the US and UK to reduce the incidence of money laundering involving real estate and other high value assets.