Government Investigations

Contributing editors
David M Zornow and Jocelyn E Strauber

2019

GETTING THE DEAL THROUGH

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Skadden, Arps, Slate, Meagher & Flom LLP

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CONTENTS

Preface

Government Investigations 2019

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Government Investigations*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Greece and India.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, David M Zornow and Jocelyn E Strauber of Skadden, Arps, Slate, Meagher & Flom LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
August 2018

England & Wales

Michael Drury and Natasha Sammy
BCL Solicitors LLP

Enforcement agencies and corporate liability

1 What government agencies are principally responsible for the enforcement of civil and criminal laws and regulations applicable to businesses?

The six agencies primarily responsible for the enforcement of laws and regulations applicable to businesses are the following:

- the Crown Prosecution Service (CPS);
- the Serious Fraud Office (SFO);
- the Financial Conduct Authority (FCA);
- the Competition and Markets Authority (CMA);
- Her Majesty's Revenue and Customs (HMRC); and
- the Insolvency Service, an executive agency of the Department for Business, Energy and Industrial Strategy.

2 What is the scope of each agency's enforcement authority? Can the agencies pursue actions against corporate employees as well as the company itself? Do they typically do this?

The scope of the above agencies' enforcement authority is determined by statutory provisions and memoranda of understanding between them. Generally, the CPS, supported by police investigators, will prosecute criminal offences committed by individuals and companies that are not prosecuted by the specialist agencies considered below. The CPS also prosecutes offences of tax fraud investigated by HMRC, if HMRC officers consider it necessary and appropriate to use criminal enforcement rather than using their civil enforcement powers.

The SFO is a specialist agency that investigates and, if appropriate, prosecutes both individuals and companies that commit serious or complex fraud, bribery and corruption, even where there is no corresponding regulatory offence. It also uses civil enforcement in relation to asset freezing and the recovery of the proceeds of crime.

The FCA is primarily a regulator of the financial services industry. It uses a wide range of enforcement powers – criminal, civil and regulatory – to take action against businesses and individuals that breach their principles and rules protecting consumers, keeping the industry stable and promoting healthy and effective competition between financial institutions. It has become the de facto prosecutor for insider dealing.

The CMA has both a regulatory and enforcement function. It investigates mergers that could restrict competition; conducts investigations into markets where there may be competition problems; investigates suspected breaches of UK and EU anticompetitive agreements; and brings criminal proceedings against individuals who commit cartel offences. In respect of the latter, as of 1 April 2014 the law in relation to criminal cartel offences was amended by removing the dishonesty element. The removal of the mental element of the offence should, in theory, make it easier for the CMA to prosecute these offences; although no prosecutions under the 'new' law are believed to have been brought as at the time of writing.

HMRC is responsible for the collection and regulation of taxes, and the investigation of serious and organised fiscal crime in particular offences committed pursuant to the Customs and Excise Acts. It has both criminal and civil investigatory and enforcement powers. As with those above, it is also vested with powers of compulsion.

The Insolvency Service deals with corporate misconduct through its investigation of companies, and has civil enforcement powers, including the power to conduct investigations into serious corporate abuse.

Each of the above-mentioned agencies can pursue enforcement against both corporates and corporate employees. The majority of financial crime offences require a mental element (mens rea) and generally apply to individuals. Ordinarily, a company can only be convicted of an offence requiring a mental element by implementation of the 'identification doctrine'. The prosecution must first establish that an individual who was a 'directing mind and will' of the company (ie, a senior individual who could be said to embody the company in his or her actions and decisions – usually a director) committed acts amounting to a criminal offence and had the criminal intent to commit those acts. His or her guilt is then attributed to the company without the need to prove anything further against the company. An exception to offences requiring a mental element, and a prosecution that can only be brought against a company, is an offence under section 7 of the Bribery Act 2010. This prescribes that a corporate can be prosecuted for failure to prevent bribery and the recently enacted offence of failure to prevent the facilitation of tax evasion pursuant to the Criminal Finances Act 2017. These are strict liability offences.

Guidance on corporate prosecutions has been issued by the prosecuting agencies (www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/) and applies effectively to all prosecutors, including the SFO. Generally, the guidance provides that a company should not be treated differently from an individual simply because of its artificial personality. At the same time, prosecution of a company should not be seen as a substitute for the prosecution of criminally culpable individuals. In every case, sufficient evidence is required and then public interest factors must be considered for the prosecution of both individuals and companies. Some examples of factors tending against prosecution of companies include the availability of civil or regulatory remedies that are likely to be effective and proportionate, and a genuinely proactive approach adopted by the company when offending is brought to its attention, such as self-reporting and remedial actions, including the compensation of victims. In the case of corporates (and not individuals), a deferred prosecution agreement (DPA) is available as an outcome (see question 21).

3 Can multiple government entities simultaneously investigate the same target business? Must they coordinate their investigations? May they share information obtained from the target and on what terms?

Agencies can and do work together. For example, the same target business may be under investigation by the SFO in relation to fraud offences while simultaneously being under investigation by the FCA for regulatory breaches. Generally, if an agency is conducting a criminal investigation, this will tend to take precedence over any civil or regulatory investigation (but there is no statutory impediment to criminal and regulatory action continuing in parallel). The extent to which agencies will investigate together and share information is dependent on their particular memoranda of agreement, but there are frequently used statutory gateways permitting such exchanges.

4 In what fora can civil charges be brought? In what fora can criminal charges be brought?

Agencies whose remit includes both regulatory and enforcement functions have powers to impose administrative penalties through regulatory tribunals. The FCA, for instance, can take civil or regulatory action, such as imposing fines against companies and individuals, and withdrawing

or limiting their authorisations through their regulatory tribunal process – the Regulatory Decisions Committee and then the Upper Tribunal.

Certain agencies, including the SFO, can institute civil recovery proceedings in the High Court for the purpose of recovering money and other property obtained through unlawful conduct.

Criminal prosecutions always commence in the magistrates' courts, but the most serious offences (indictable-only offences) are transferred to the Crown Court. Appeals of decisions of the Crown Court may be made to the Court of Appeal. Further appeals, exceptionally, may be made to the Supreme Court.

5 Is there a legal concept of corporate criminal liability? How does the government prove that a corporation is criminally liable for the acts of its officers, directors or employees?

In the eyes of the law, a company is a legal 'person' and thus capable of being prosecuted for the acts or omissions of the natural persons it employs, unless a statute indicates otherwise. A company may be guilty of strict liability offences, such as an offence under section 7 of the Bribery Act 2010 referred to in question 2, where no mental element (mens rea) of the crime needs to be proved.

For offences requiring a mental element, a company is liable for the acts and state of mind of a company officer who is its 'directing mind and will' – commonly a director or senior manager. These acts and state of mind will then be attributed to the company. All elements of the offence must be proved against the 'directing mind and will' (ie, the individual who can be shown to direct the company) and the company's liability will follow if that is achieved. This is a matter of some concern to prosecutors (see 'Update and trends').

6 Must the government evaluate any particular factors in deciding whether to bring criminal charges against a corporation?

The Code for Crown Prosecutors (which is also applicable to the SFO) (www.cps.gov.uk/publications/code_for_crown_prosecutors/) sets out the general principles that agencies should follow when deciding whether to prosecute a person (entity or individual) with an offence. Prosecutors must first be satisfied that there is sufficient evidence to provide a realistic prospect of conviction. If so satisfied, prosecutors must then go on to consider whether a prosecution is required in the public interest. In relation to corporate prosecutions, additional public interest factors must be considered. The CPS guidance states:

> *The more serious the offence, the more likely it is that prosecution will be needed in the public interest. Indicators of seriousness include not just the value of any gain or loss, but also the risk of harm to the public, to unidentified victims, shareholders, employees and creditors and to the stability and integrity of financial markets and international trade. The impact of the offending in other countries, and not just the consequences in the UK, should be taken into account.*

Agencies whose remit includes both regulatory and enforcement functions apply further criteria to the decision as to whether to bring criminal, civil or regulatory proceedings. The FCA, for example, takes into account factors including the seriousness of the misconduct, the financial consequences, the person's compliance history and his or her level of cooperation.

Initiation of an investigation

7 What requirements must be met before a government entity can commence a civil or criminal investigation?

Generally, investigations are commenced when a complaint is made, there are circumstances suggesting that a crime may have been committed or there is evidence of a regulatory breach. However, the agencies also apply their own specific criteria. The SFO, for example, considers factors such as whether the apparent criminality undermines UK PLC commercial or financial interests in general and, in the City of London in particular, whether the actual or potential financial loss involved is high, whether the economic harm is significant, whether there is a significant public interest element and whether there is a new type of fraud before deciding whether it will commence an investigation.

8 What events commonly trigger a government investigation? Do different enforcement entities have different triggering events?

This depends on the agency conducting the investigation. Usually a complaint, anonymous or otherwise, will have been made to the particular agency or referred to it by another agency. However, agencies often commence investigations following reports in the media or as a result of a company self-reporting a particular issue.

The FCA and CMA, which both have regulatory functions, will often commence an investigation after identifying a problem during a standard audit or compliance check.

9 What protections are whistle-blowers entitled to?

The policy on protections for whistle-blowers is dependent on the agency concerned and the company from which the whistle-blower originates. Generally, it is not possible for an agency to guarantee confidentiality and anonymity, as there is a possibility that a court will order the disclosure of this information. However, where possible, agencies try to accommodate the understandable desire to be kept anonymous, using a claim to 'public interest immunity' to resist disclosure to the parties to the proceedings or the public.

The FCA, for instance, undertakes to treat the individual's case as sensitively as possible. However, it does not guarantee that the identity of whistle-blowers will be kept anonymous, as its policy provides either that the identity may become obvious upon questioning of the target business, or that disclosure may be necessary for the particular circumstances of the case.

The SFO is seemingly more confident in its ability to protect whistle-blowers, and says it will maintain confidentiality unless the target business has a genuine need to know, or the court orders disclosure.

Consideration is being given (by the FCA in particular) to introducing an incentive programme similar to that of the United States Security and Exchange Commission's Office of the Whistleblower.

In relation to protection from employers, the Public Interest Disclosure Act 1998 protects whistle-blower employees from detrimental treatment by their employers. In cases where an employee is subjected to detrimental treatment following the disclosure of certain information (including, inter alia, the commission of a criminal offence), the employee can bring a case before an employment tribunal.

10 At what stage will a government entity typically publicly acknowledge an investigation? How may a business under investigation seek anonymity or otherwise protect its reputation?

This depends on which entity is conducting the investigation. The fact that the police (and CPS) have commenced an investigation into a corporate or individual should not generally be publicly acknowledged. This information should only be publicly acknowledged when a decision has been made to prosecute a corporate or individual in the criminal courts. In reality, however, press reporting means that an investigation by the police does become public knowledge.

The SFO and CMA often publicise the fact that an investigation has been opened and this information is available on their respective websites.

As of October 2013, the FCA can issue warning notices that are publicly available. These notices detail the reasons that enforcement action is being taken and will only be published when an investigation has been completed.

In short, if a business is being investigated by the SFO, CMA or FCA, it will not be possible to seek anonymity, save in the most exceptional cases – for example, where the privacy rights of minors are in issue. It is standard practice to engage a suitably experienced PR consultant in cases where publicity is likely to be a factor influencing the rights and obligations of a company or an individual.

Evidence gathering and investigative techniques

11 Is there a covert phase of the investigation, before the target business is approached by the government? Approximately how long does that phase last?

Prior to the target business being advised of an investigation, agencies may obtain information from other parties either voluntarily or by using their compulsory powers.

The next stage of the investigation will usually involve the investigating agency making contact with the target business to advise it that an investigation has commenced. The agency will then request the disclosure of documents and seek to interview relevant witnesses, either voluntarily or using powers designated to the particular agency by statute (in the case of the SFO by using the powers under section 2 of the Criminal Justice Act 1987). There is no law requiring businesses to be informed; however, if an investigating agency considers that its investigations would be best advanced by the use of covert techniques or not informing the business, then they it adopt these methods, including the execution of a search warrant (a 'dawn raid') without notice.

Any covert investigations, such as covert surveillance and the interception and collection of communications data, must be undertaken in accordance with the Investigatory Powers Act 2016 (IP Act).The IP Act can be used by specified government agencies on the grounds of national security, and for the purposes of detecting crime, preventing disorder, protecting public safety and public health or in the interests of the economic well-being of the United Kingdom.

There is no time limit on how long a phase of covert investigations will last.

12 What investigative techniques are used during the covert phase?

As set out in question 11, before advising a target business of an investigation, agencies may obtain information by interviewing witnesses or requesting the disclosure of documents from other parties.

In relation to specific covert techniques, these include:

- intercepting communications (intercepted communications are not admissible in criminal or regulatory proceedings in the United Kingdom);
- conducting covert human intelligence;
- conducting intrusive surveillance; and
- obtaining communications data.

13 After a target business becomes aware of the government's investigation, what steps should it take to develop its own understanding of the facts?

Conducting employee interviews as part of an internal investigation does carry a risk. The SFO has suggested that corporates carefully consider whether it is best to do so or to limit the ambit of internal investigation to document review only. Any final decision will need to take into account the facts and circumstances of the case and the corporate concerned, bearing in mind any obligation or duty owed to its employees and shareholders. If an investigation is decided upon it should include gathering the relevant documents and interviewing witnesses to ascertain the facts. Although the position is open to dispute (see question 16), particularly in light of the decision in the case of *The Director of the Serious Fraud Office v Eurasian Natural Resources Company (ENRC)* [2017] EWHC 1017(QB) (which is subject to appeal), the employment of external lawyers may enable the business to assert that legal professional privilege can be claimed. Otherwise, the business investigation may be disclosable to the authorities and, in practice, often is.

14 Must the target business preserve documents, recorded communications and any other materials in connection with a government investigation? At what stage of the investigation does that duty arise?

When a target business has been informed that an investigation has commenced, there is no legal duty to preserve material; however, the destruction of evidence is in itself a criminal offence. Section 2(16) of the Criminal Justice Act 1987 provides that a person who knows that the police or the SFO is conducting or may conduct an investigation into allegations of serious or complex fraud and destroys, conceals, falsifies or otherwise disposes of relevant documents (or causes the same) is guilty of an offence. There is also a general offence of conspiracy (agreement) or attempting to pervert the course of justice that might apply if material is destroyed.

Companies that are regulated by the FCA or CMA have a duty to cooperate with investigations; this includes the preservation of documents.

15 During the course of an investigation, what materials – for example, documents, records, recorded communications – can the government entity require the target business to provide? What limitations do data protection and privacy laws impose and how are those limitations addressed?

Some agencies have the power to issue notices compelling a person to answer questions about matters relevant to an investigation, to furnish information or to produce documents (including information recorded in any form). Generally, the criteria for issuing a notice are that there are reasonable grounds for suspecting that an offence has been committed, and that the recipient of the notice has relevant information regarding the offence. The agencies may also apply to a court for a search and seizure warrant. To issue the warrant, the court must be satisfied that the company has failed to comply with an obligation to produce documents, and to give a notice may seriously prejudice the investigation.

In general, data protection and privacy laws are overridden by statutory powers of the government agencies to investigate unlawful conduct and regulatory breaches. The protections that do exist remain important in ensuring that public authorities' actions are proportionate and consistent with the Human Rights Act 1998.

16 On what legal grounds can the target business oppose the government's demand for materials? Can corporate documents be privileged? Can advice from an in-house attorney be privileged?

As a general rule, notices or court orders may not compel the production of a document that is legally privileged, nor may legally privileged material be seized pursuant to a warrant. This includes material subject to legal advice privilege and litigation privilege (commonly known together as legal professional privilege). However, it is often impractical to identify privileged material at the time of seizure, such that potentially privileged material may need to be seized for the data separation to occur later. In these circumstances, the material is subject to independent review and must be returned if it is later determined to be privileged. The rules governing legal professional privilege apply to both external and in-house counsel, except in cases relating to European Commission law (typically cartels or competition cases), where in-house lawyers cannot claim legal professional privilege over internal communications with employees. A recent development (June 2017) in relation to the scope of legal professional privilege arose in the case of *SFO v ENRC* referred to in question 13. This case is subject to appeal, but the decision of the High Court at first instance is that the product of an internal investigation (with a view to self-reporting) is not covered by legal professional privilege. The judgment states:

> *Documents that are generated at a time when there is no more than a general apprehension of future litigation cannot be protected by litigation privilege just because an investigation [by an investigating agency] is, or is believed to be imminent.*

The judgment states that adversarial litigation must be a real possibility and the fact that work product is generated as a result of the announcement of an agency's investigation will not be sufficient to invoke legal professional privilege.

Production orders granted by a court can be challenged at court if, for example, the information in the application made to the court contains incorrect or inadequate information.

Certain confidential material such as journalistic material or personal records acquired or created in the course of business may also be protected from seizure, but not generally from a production requirement. However, certain documents held in confidence may be protected. For example, in FCA or HMRC investigations, there are reasonable arguments to suggest that the recipient of a notice who is not a person under investigation may refuse to provide documents held under an obligation of banking confidence.

17 May the government compel testimony of employees of the target business? What rights against incrimination, if any, do employees have? If testimony cannot be compelled, what other means does the government typically use to obtain information from corporate employees?

Where a company is suspected of committing a criminal offence, an agency cannot arrest or compel it to attend an interview. The company

can, however, be invited to nominate a duly authorised representative to attend an interview and answer questions on its behalf.

Additionally, certain agencies (including the SFO and HMRC) may, in the circumstances described above, issue a notice compelling any person to answer questions or otherwise furnish information. Persons who receive a notice compelling them to answer questions may not, without reasonable excuse, refuse to answer questions. The privilege against self-incrimination is not a reasonable excuse as statements obtained from a person under compulsion may not, save in limited circumstances, be used in evidence against him or her.

In circumstances where investigators have concluded that there are reasonable grounds to suspect an individual of having committed a crime, where necessary and appropriate, he or she can be arrested by the police for the purpose of interview. In such circumstances, the interview will normally take place at a police station. Whether arrested or not – and in many cases interviews are arranged by appointment – the individual will have the right not to incriminate himself or herself.

18 Under what circumstances should employees obtain their own legal counsel? Under what circumstances can they be represented by counsel for the target business?

All persons interviewed under caution (ie, after being arrested or attending to be interviewed by appointment) have a right to be represented by a solicitor during questioning. If an employee is interviewed in these circumstances, he or she should obtain independent legal representation.

Persons who receive a notice compelling them to answer questions as a witness are not entitled to legal representation, although such persons are generally given a reasonable opportunity to arrange this. If the target business, as well as one or more of its employees, is under investigation, the employee should seek independent representation. In June 2016 the SFO produced operational guidance on the approach to be taken on the role of lawyers in interviews of compelled witnesses. This guidance seeks to ensure that lawyers acting for a corporate suspect do not also attend with compelled witnesses, in order to prevent the potential for confidential information to be shared between witnesses and suspects during the investigative stage.

It is also advisable for an employee who has been compelled as a witness to obtain independent counsel even if the business is not under investigation and the investigation relates to a single employee's conduct.

19 Where the government is investigating multiple target businesses, may the targets share information to assist in their defence? Can shared materials remain privileged? What are the potential negative consequences of sharing information?

There is nothing to prevent businesses from sharing information but, in practice, they will prefer to keep matters confidential. Every case will be different and will require careful consideration of the facts. Shared material will only be privileged if it falls into the category of legal advice or litigation privilege.

The possible negative consequences are that a business may inadvertently share information that may assist the investigating agency should it be obtained at a later stage. A business could also potentially undermine its position in relation to the other businesses under investigation by sharing information. There is also a risk that the sharing of information could interfere with the investigation and the business could be in danger of perverting the course of justice, which in itself is a criminal offence.

20 At what stage must the target notify investors about the investigation? What should be considered in developing the content of those disclosures?

In many instances, the fact of an investigation will have been made public by the investigating agency – for example, as stated above, the SFO announces on its website when a business is under investigation.

If an investigation has not been made public by the investigating agency, then a public limited company (ie, a company listed on the stock market) has a duty to inform investors that an investigation has commenced. If the company is a private limited company, in principle, the same duty does not apply and the decision about whether or not to notify investors will be a commercial one.

Any disclosure should be kept factual and should, in most cases, be very brief, simply setting out the fact that an investigation has commenced and that the business is cooperating fully.

Cooperation

21 Is there a mechanism by which a target business can cooperate with the investigation? Can a target notify the government of potential wrongdoing before a government investigation has started?

The mechanisms by which a target business can cooperate depend on the agency conducting the investigation.

In relation to SFO and CPS investigations and prosecutions, companies that wish to avoid prosecution and wish to enter into a DPA will generally have to self-report their misconduct (ideally before the prosecutor discovers the misconduct); commit to resolving the issue; cooperate fully and agree to conduct any further investigation (and share the result of the investigation with the prosecutor); and agree to provide appropriate restitution and implement a programme of training and culture change (this may include the appointment of an independent monitor). Despite their implementation in February 2014, DPAs remain relatively scarce albeit increasingly important weapons for prosecuting agencies. However, following the DPAs in respect of Standard Bank Plc, XYZ Ltd, Rolls Royce and Tesco, a precedent for the terms of a DPA has now been established, with Lord Justice Leveson having approved each of them. Companies therefore have a 'rule book' to determine whether a DPA should be considered. Self-reporting has been used by businesses, often in order to negotiate a civil settlement rather than a criminal prosecution. There are no guarantees that a company that cooperates will avoid prosecution or be invited to enter into a DPA but, if prosecuted, it is likely to benefit from a reduced financial penalty and may be able to work with the prosecution in agreeing the basis of plea. A key developing issue is the extent to which cooperation requires the waiver of legal professional privilege (see also questions 13 and 16). Investigating agencies suggest that it does, or that the company's investigations do not give rise to legal professional privilege claims. In any event, careful consideration is required as to how a business positions itself, taking into account potential civil claims, reputational management and pure business drivers.

In general terms, a business that cooperates with an FCA investigation will receive a significant reduction in any financial penalty and the opportunity to have substantial input in the wording of any published final notice.

Any formal cooperation by an individual with the CPS or SFO resulting in either leniency in sentencing (sections 73 and 74) or immunity from prosecution (section 71) is governed by the Serious Organised Crime and Police Act 2005. It is also possible for a business to cooperate informally, without seeking immunity from prosecution, and this will usually result in a reduced sentence.

Under the Enterprise Act 2002, the CMA may grant criminal immunity to individuals, and civil immunity to businesses in relation to cartel investigations in certain circumstances. Where immunity is not available but a business cooperates with an investigation, the CMA can apply leniency to any civil sanction.

22 Do the principal government enforcement entities have formal voluntary disclosure programmes that can qualify a business for amnesty or reduced sanctions?

Each agency has a form of voluntary disclosure programme that may result in immunity from prosecution or a reduced sanction. It is important to bear in mind that these programmes are within the discretion of the agency and are not guaranteed. In the case of corporates, a DPA is possible if a corporate admits to criminal conduct but avoids a prosecution by entering into an agreement with the prosecuting authority (the process being subject to court approval). Along with paying a significant financial penalty, other steps are normally necessary as conditions of a DPA, and these typically include restitution, ostensible changes in business practices and the appointment of a monitor. Voluntary disclosure is generally regarded as a precondition of such agreements.

See question 21.

23 Can a target business commence cooperation at any stage of the investigation?

Yes. If a business decides to cooperate in an investigation, the earlier it does this, the better the outcome is likely to be.

24 What is a target business generally required to do to fulfil its obligation to cooperate?

As stated in question 21, this is dependent on the agency it is dealing with and the particular circumstances of the case. However, in general terms, a business should commit to resolving the issue; cooperate fully or agree to conduct any further investigation (and share the result of the investigation with the prosecutor); agree to provide appropriate restitution; and implement a programme of training and culture change within the business. This may practically require consideration, and the likelihood, of a waiver of legal professional privilege.

25 When a target business is cooperating, what can it require of its employees? Can it pay attorneys' fees for its employees? Can the government entity consider whether a business is paying employees' (or former employees') attorneys' fees in evaluating a target's cooperation?

This is largely dependent on the business and its own policies. Most businesses have employment contracts that require employees to cooperate with an internal investigation.

In relation to fees, in most cases a business will pay the legal fees of its employees who have been interviewed voluntarily, have been compelled to answer questions or have been interviewed under caution. In the case of directors and company officers, businesses often have insurance to cover this type of situation. The fact that a business pays its employees' legal fees is not a relevant consideration for the government entity to consider in evaluating its cooperation.

26 What considerations are relevant to an individual employee's decision whether to cooperate with a government investigation in this context? What legal protections, if any, does an employee have?

As outlined in question 17, if an employee refuses to cooperate in an SFO or HMRC investigation, he or she can be compelled to provide information, subject to the fact that compelled testimony generally cannot be used as evidence against that individual. He or she will be able to seek independent legal advice to make an informed decision about cooperating, but in practice, given the powers of compulsion, there is usually no alternative to cooperating.

In relation to internal investigations by company counsel, for example, most employees will have employment contracts that require them to cooperate with an internal investigation. Any refusal to do so may result in disciplinary proceedings. The individuals will often be told that there is no privilege attached to the information they are providing to the company and that the company may indeed consider disclosing this material to investigating agencies.

27 How does cooperation affect the target business's ability to assert that certain documents and communications are privileged in other contexts, such as related civil litigation?

See question 16.

If a business cooperates with an investigation, this does not mean that privileged documents will be provided. Privileged information can only be obtained by the investigating agency if the business has waived privilege. Once privilege has been waived in relation to one investigation, a business cannot assert privilege over the same material in related litigation.

Resolution

28 What mechanisms are available to resolve a government investigation?

There are numerous possible outcomes of a government investigation and the outcome will depend on which agency has conducted the investigation.

If the investigation is criminal in nature, then the business or employee could be charged and prosecuted through the criminal courts. This will result in a guilty plea, or in the event of a not guilty plea, a trial at the Crown Court. Of course, it may be that once the investigation is completed, there is insufficient evidence or it is not in the public interest to prosecute. There are also circumstances in which the SFO may decide to pursue a civil settlement rather than a criminal prosecution.

Prosecution agencies can also enter into DPAs with businesses, thus allowing the business an opportunity to resolve the issue without being prosecuted (but effectively admitting wrongdoing at a corporate level).

As a regulator, the FCA has mechanisms for resolving investigations in addition to criminal prosecution. In the majority of cases involving businesses, a financial penalty is imposed; but it has a range of sanctions at its disposal, including suspending or prohibiting businesses and employees from undertaking regulated activities.

29 Is an admission of wrongdoing by the target business required? Can that admission be used against the target in other contexts, such as related civil litigation?

An admission of wrongdoing is required if the business wants to plead guilty to an offence or regulatory breach. The position is the same if the business wants to enter into a DPA or pursue immunity or leniency with the CMA.

Any admission of culpability in proceedings brought by a government agency can be used in related civil litigation and will often result in a settlement being agreed.

30 What civil penalties can be imposed on businesses?

The main civil penalty that can be imposed against businesses or individuals is a financial penalty. The quantum of any financial penalty will depend on a number of variables, including the nature of the regulatory breach; the culpability of the business; any cooperation provided during the investigation; and other mitigation such as an early acceptance of wrongdoing.

In addition to this sanction, the FCA has powers including:

- withdrawing a business's authorisation;
- censuring firms and individuals through public statements;
- applying to a court to freeze assets; and
- seeking restitution orders.

31 What criminal penalties can be imposed on businesses?

Businesses and individuals can incur unlimited fines, individuals can face imprisonment and company directors can be disqualified from acting as directors. Although not strictly a penalty, one consequence of admission of (bribery) offences by a corporate is disbarment from public procurement competitions.

32 What is the applicable sentencing regime for businesses?

Businesses guilty of criminal offences are sentenced according to statute or the common law. While these set out the penalties available, with regard to businesses the level of financial penalty is determined by consideration of case law and the Sentencing Council's Fraud, Bribery and Money Laundering Offences: Definitive Guideline (a mandatory document; see www.tinyurl.com/sentencing-council).

Ultimately the final decision on sentence is a matter for the judge. For offences such as fraud, bribery and money laundering, the guidelines have been in force since 1 October 2014 and provide the framework for the sentencing of corporate offenders in the United Kingdom. They cover the following offences:

- fraud;
- money laundering;
- bribery;
- fraudulent evasion of value added tax;
- fraudulent evasion of duty;
- false accounting; and
- the common law offences of conspiracy to defraud, and cheating the public revenue.

The guidelines set out the sentencing process to be followed by the court, including a compulsory obligation to first consider making a compensation order in such amount as the court sees fit. Priority is to be given to compensation payments over any other financial penalty levied against businesses in sentencing, and the reasons for a court declining to make a compensation order should be given if one is not made. If the prosecution has requested confiscation, or the court thinks it appropriate, after

Update and trends

The SFO and FCA

On 4 June 2018, the Attorney General's Office announced the appointment of Lisa Osofsky as the new Director of the SFO from September 2018.

With a five-year term ahead for Lisa Osofsky – and with the SFO's future secured and the potential for it to become part of the National Crime Agency seemingly now ended following David Green's tenure – the question remains as to whether there will be any change in its focus and approach in the future. With a strong US law background and past statements stressing the seriousness of money laundering issues, commentators have speculated that the appointment of Lisa Osofsky will lead to a significant US influence, including a greater willingness to strike deals, greater emphasis on DPAs (a long-standing and common feature of the US criminal justice system) and improved SFO–DOJ cooperation.

There remains a long list of extant inquiries, many of which have yet to reach the point of a charging decision. The new director will have to deal with both the inquiries and the likely referral of many more cases, given the seeming attraction of the DPA and early resolution of corporate wrongdoing (and the likely advice of law firms in this field).

It would be wrong to view the SFO as the only active player. Notably, a reinvigorated FCA has made clear its intention to adopt a more aggressive approach to enforcement, with enhanced alignment between that and its role as a financial supervisor. Those advising corporates need to watch and consider the likely actions of the FCA, as much as they do the SFO.

SFO v ENRC

On 3 July 2018, the Court of Appeal began hearing the case of *SFO v ENRC*. The legal community awaits the latest twist in this high-profile case concerning the SFO's challenge to claims of legal professional privilege (LLP) when dealing with purported cooperating corporates, as well as the scope of LLP more generally in respect of records of work created as part of an internal investigation.

The case arose out of a dispute between the SFO and Eurasian Natural Resources Company after ENRC refused the SFO's request for the surrender of internal investigation records from fact-finding interviews in circumstances where legal proceedings were not (it is said by the SFO) in reasonable contemplation.

Permission has been given to appeal to the Court of Appeal, on the basis that there is a real prospect of success, despite the rejection by the High Court of ENRC's claim that documents created as part of an internal company investigation were covered by litigation privilege. Such is the importance of the matters at issue that the Law Society – the professional body representing solicitors in England and Wales – is intervening in the appeal.

It is anticipated that the appeal will address and provide greater clarity on:

- the extent to which lawyers can claim legal advice privilege in respect of 'working papers';
- the point at which adversarial proceedings are reasonably in contemplation so as to trigger litigation privilege in the context of internal investigations;
- the definition of 'client' in the context of legal advice privilege; and
- the application of the approach adopted by the Court of Appeal in *Three Rivers District Council v The Governor and Company of the Bank of England* (No. 5).

The outcome will define the approach that corporates take when dealing with regulators and prosecutors, with an overly restrictive Court of Appeal judgment potentially discouraging the self-reporting of corporate crime.

Corporate liability – lowering the threshold?

In order to convict a corporate, prosecutors are required to prove that those who are the 'directing mind and will' of the company knew, actively condoned or participated in the alleged offence. This is commonly referred to as the 'identification principle' and imposes a high threshold of attribution for any prosecution to succeed.

The Bribery Act 2010 introduced the offence of 'failure to prevent bribery' pursuant to section 7, an exception to the identification principle under which corporates can be prosecuted for failing to have adequate procedures in place to prevent bribery without the need to identify the directing mind and will.

Building on that, the UK government is considering whether to lower the threshold required to prove criminal corporate wrongdoing more generally in relation to economic crime, removing the identification principle as the key test of corporate culpability and extending the scope of the state's ability to pursue corporates for acts committed by their directors, employees and agents more widely.

The SFO is a long-standing proponent of this reform. Its rationale is that the identification principle, as currently applied, inappropriately incentivises companies to devise complicated corporate structures so as to distance the directing mind and will from operational duties, creating an unfair imbalance between companies based on the size of the entity, with it being easier to attribute liability to smaller companies as compared to a large multinational corporate. The underlying philosophy is that a greater ability to hold companies to account in respect of their commercial policies and governance strategies can only be a good thing.

Those opposed to the proposition consider that such changes would impose an undue burden on corporates, exposing them to criminal liability in circumstances where the acts of their employees are often unforeseen and uncontrollable, especially when the directing mind and will are, in fact, at a significant remove from the acts of the employees.

In January 2017, the Ministry of Justice called for evidence on this issue. That consultation having finished some time ago, at the time of writing, the Ministry continues to analyse the feedback received and has not yet brought forward any proposal for reform. This is an issue, however, that is not going away.

Unexplained wealth orders

As of 31 January 2018, unexplained wealth orders (UWOs) came into force. The Criminal Finances Act 2017, amending the Proceeds of Crime Act 2002 (POCA), enables the state to deprive an individual or corporate body of property and demand information in order to avoid such deprivation happening in what is, in effect, a new civil investigative tool designed to assist law enforcement to crack down on corruption and recover assets.

The High Court may grant a UWO in circumstances where a person who holds property worth over £50,000 is reasonably suspected of involvement in, or of being connected to a person involved in, serious crime, to require that person to explain the nature and extent of his or her interest in that property, and to explain how the property was obtained where there are reasonable grounds to suspect that the respondent's known sources of lawfully obtained income would be insufficient to allow the respondent to obtain the property.

A UWO can also be applied to politicians or officials from outside the European Economic Area (EEA), or those associated with them, known as politically exposed persons (PEPs). A UWO made in relation to a non-EEA PEP does not require suspicion of serious criminality.

The ability to apply for a UWO is limited to those agencies that fall within the definition of an 'enforcement authority' in England and Wales – namely HMRC, the FCA, the SFO and the CPS (although there are means by which other public authorities can refer cases to those bodies).

In effect, the burden of proof is placed on the respondent – the UWO is a civil and not criminal investigative tool – to justify the wealth, including, but not limited to, details of lawful ownership of the property and how it was obtained. A failure to provide a response, or adequate response, to a UWO in time or at all may give rise to a presumption that the property is recoverable under any subsequent civil recovery action taken under the POCA.

Proponents of the regime are hopeful that it will assist in overcoming the United Kingdom's reputation of being a haven for illegitimately acquired assets. By reason of its low threshold (the requirement for only £50,000 monetary value and reasonable grounds to suspect for non-PEPs), it is anticipated that in time UWOs will be strictly applied by the courts. Given that UWOs are applicable to property irrespective of when the property was acquired (even property acquired before the existence of the regime, property held by more than one person or property located outside the jurisdiction) it could have a far-reaching effect and will surely affect corporate fund managers, property holding companies and professional advisers.

Opponents have referred to a potential breach of human rights by reason of the reverse burden of proof and the lack of government best practice guidance for individuals and corporates outlining the extent of information that should be provided in response to a UWO (assuming that there is information in existence to provide at all, considering that property can be lawfully obtained as a gift without a formal will, trust, deed or contract). The possibility that agencies could use information provided to investigate or create new lines of enquiry for their investigations will require individuals and corporates to strike a careful and tactical balance regarding any response they give to a UWO.

However the scheme will operate – and there is a real debate about whether this is 'tokenism' or a measure with real effect – all will likely agree that the introduction of the UWO regime represents something of a shift for the United Kingdom in its focus on the recovery of assets instead of prosecution, although evidence of criminal conduct should sensibly lead to the latter if it emerges in the course of a UWO. Although directed at individuals, there is a plain impact on corporates too.

prioritising and dealing with compensation the court must deal with or take into account confiscation when assessing any other financial order or fine to be levied against corporate offenders.

In sentencing corporate offenders, the court will determine the offender's culpability level (low, medium or high) and calculate harm in accordance with the provided guidance. This information is used to determine the appropriate starting point and range for a financial penalty for that offence, making adjustments in increasing seriousness or mitigating factors to determine the level of fine to be imposed. The court should determine the level of fine in accordance with section 164 of the Criminal Justice Act 2003 to reflect the seriousness of the offence, and take the financial circumstances of the offender into account. To this end, companies are expected to provide annual accounts for the three years prior to sentence in order to assist the court in making an accurate assessment.

33 What does an admission of wrongdoing mean for the business's future participation in particular ventures or industries?

This will depend on the particular wrongdoing proved or admitted and the nature of the business's activities. There will inevitably be reputational implications for the business that will require careful management. In certain sectors (eg, the public sector), businesses that have a negative finding recorded against them are prohibited from tendering for contracts.

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