THE INVESTIGATIONS REVIEW OF THE AMERICAS 2017

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Cross-border overview: managing differences in DOJ and SFO approaches to corporate cooperation in cross-border investigations

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Introduction

The US Department of Justice (DOJ) and the UK Serious Fraud Office (SFO) have formal policies to encourage companies to self-report allegations of corporate crime and 'cooperate' in the ensuing investigation by, among other things, providing evidence about executives, employees and third parties who engaged in wrongdoing. The incentive offered by both agencies is the possibility of resolution of a potential criminal matter against the company on more lenient terms, including without a conviction, through a deferred prosecution agreement (DPA), a non-prosecution agreement (NPA), or even a declination of prosecution. In many instances, the potential benefits for a company, especially one that is publicly listed or heavily regulated, may be substantial and meaningful, including reducing the company's exposure to monetary penalties or overly burdensome oversight, limiting the disruption to its business activities, and mitigating reputational damage. Thus, understanding and managing the differences in the approaches of the DOJ and SFO to corporate cooperation is essential to maximising the potential benefits.

The DOJ and the SFO agree that the single most important factor for a company seeking leniency is how much genuine cooperation the company has provided. Both also emphasise that early and voluntary self-disclosure must be demonstrated in order to receive full cooperation credit. Unfortunately, this is as far as the common approach goes. There are fundamental and substantial differences between what US and UK prosecutors expect in terms of cooperation and how they assess it, including with regard to: the timing of voluntary disclosure; the scope of claims of privilege over material produced during the company's internal investigation; the prosecutor's role with respect to the company's internal investigation; and the prosecutor's expectations as to what materials the company should produce from its internal investigation. And, while the DOJ is increasingly pushing a narrower view of the application of both the attorney-client and work product privileges to the role of counsel in an internal investigation, the SFO has challenged the very existence of such privileges in this context.

In this article, we provide an overview of the differing approaches to cooperation between the DOJ and SFO and provide some suggestions for companies that must manage these differences when facing an investigation involving both agencies.

DOJ guidance on corporate cooperation

The factors considered by the DOJ in determining whether to bring criminal charges against a company were originally set forth in a 1999 policy memorandum by then Deputy Attorney General Eric Holder, and have been rearticulated in subsequent iterations of the memorandum in what has come to be known as the Principles of Federal Prosecution of Business Organizations (the Principles). According to the Principles, prosecutors must assess whether a company deserves leniency based on, among other factors: the seriousness of the offence and the degree to which senior management was involved; the timeliness of any voluntary disclosure of wrongdoing; the company's cooperation in the government's investigation; the adequacy of the company's compliance programmes; any remedial actions taken by the company; and the collateral consequences of prosecution of the company to its shareholders, employees, creditors and others.[1]

Recent guidance by the DOJ addresses the scope of information the DOJ expects to receive in complex corporate fraud and corruption cases. In September 2015, Deputy Attorney General Sally Yates issued guidance (the Yates Memorandum) stating that a company that failed to provide 'all relevant facts about individual misconduct' would not qualify for any cooperation credit.[2] The lack of detail surrounding this mandate has created uncertainty about the DOJ's expectations regarding a company's cooperation. For example, because the identification of facts turns on the scope of the internal investigation, this mandate may lead some companies to construct extremely broad internal investigations even where the initial allegations of wrongdoing would suggest that a more tailored investigation would be reasonable. Similarly, companies, in an abundance of caution, may provide facts about individuals that are ultimately of inconsequential value.

Shortly after issuing the Yates Memorandum, the DOJ announced a one-year 'pilot' programme applicable to cases investigated under the US Foreign Corrupt Practices Act (FCPA).[3] While the FCPA pilot programme provides some specific examples of the kind of assistance and categories of information the DOJ expects to receive from a cooperating company, it also raises – and leaves unresolved – other issues about cooperation. Although the FCPA pilot programme formally applies only to FCPA cases, companies facing investigation for fraud and other crimes would be advised to consider following the guidance as well, as it sets forth the expectations that prosecutors have concerning voluntary disclosure and cooperation.

Early self-reporting

Under the new FCPA pilot programme, a company can only qualify for full cooperation credit, capped at 50 per cent off the low-end of the sentencing range under the US Sentencing Guidelines, if it voluntarily and timely self-discloses, fully cooperates, and timely and effectively remediates deficiencies in its policies, procedures and controls. A company that does not self-disclose would only be eligible for up to a 25 per cent reduction off the low-end of the sentencing range.[4] There continues to be uncertainty about the DOJ's expectations regarding the scope and timing of an initial self-disclosure by a company, and the FCPA pilot programme provides no new guidance. Instead, it references existing imprecise standards, noting that the disclosure must occur 'within a reasonably prompt time after becoming aware of the offense,' and 'prior to an imminent threat of disclosure or government investigation,'[5] and it places the

burden of demonstrating timeliness on a company.[6] The FCPA pilot programme also requires that a company disclose 'all relevant facts known to it, including all relevant facts about the individuals involved in any FCPA violation,'[7] suggesting that a company may be obliged to disclose everything it has learned about potential wrongdoing even before it has a sufficient opportunity to evaluate the nature and implications of information it has just discovered. Further, a company that fails to disclose information before the authorities learn of it independently may fail to receive any credit for voluntary disclosure.[8]

Cooperative conduct of internal investigations

The FCPA pilot programme incorporates Yates Memorandum standards and requires a company to report to the DOJ 'all facts relating to involvement in the criminal activity by the corporation's officers, employees or agents.'[9] Companies that fail to satisfy this requirement, even if they have identified in earnest what they believe are all of the relevant facts regarding individuals, will not qualify for cooperation credit.[10] It also is unclear if the DOJ will now expect a full written report of the findings of a company's internal investigation. In the past, many companies have provided a written summary, while others have provided oral reports, especially when there are legitimate concerns that disclosure of a written report to the DOJ may be used as a basis for compelling production of the report in collateral civil litigation. Whether such an approach will be satisfactory under the Yates Memorandum and FCPA pilot programme remains to be seen.

Under the FCPA pilot programme, the DOJ also expects that a company will proactively assist the DOJ in identifying evidence in the possession of third-parties 'unless legally prohibited,' including facilitating 'the third-party production of documents and witnesses from foreign jurisdictions,'[11] making mandatory what had once been considered exceptional cooperation. Similarly, under the programme, if a company claims that 'conflicting foreign law' prohibits it from producing evidence or making employees available for interviews from other jurisdictions, it bears the burden of demonstrating those impediments.[12] As in the past, the DOJ will assess a company's willingness to attempt to facilitate cooperation in the face of foreign legal obstacles, such as blocking statutes, but the programme now makes clear that the DOJ can deny cooperation credit if it concludes that those claims are not well-founded.[13]

Disclosing sources of information

Following a number of high-profile accounting scandals in the early 2000s, the DOJ, in 2003, authorised prosecutors to request potentially privileged witness statements made to company counsel.[14] In 2006, however, in response to a backlash in the business community and Congress against perceived prosecutorial overreach, the DOJ issued new guidance to prosecutors limiting their authority to request privileged communications, information and materials to those circumstances where there was a 'legitimate need for the privileged information to fulfil their law enforcement obligations.'[15] Two years later, in 2008, the DOJ went further, stating that prosecutors should never request material that could be privileged, absent the existence of traditional grounds for piercing a claim of privilege, such as the crime fraud exception. Instead, prosecutors were only permitted to request that a company disclose the facts of its investigation.[16] Even after issuance of this guidance, however, information learned from witness statements often is provided to the DOJ by counsel in narrative summary fashion, with care taken not to identify the witness source of a particular fact.

Notably, the FCPA pilot programme appears to push further on this front. It mandates that a cooperating company identify 'specific sources [of facts] where such attribution does not violate the attorney-client privilege, rather than a general narrative of facts.'[17] Since historically the source of facts gathered by counsel during an internal investigation has been viewed as privileged and/or attorney work product, and was not subject to disclosure under the 2008 guidance, the DOJ's present insistence on disclosure of those sources seems to signal that the DOJ is taking a narrower view of the attorney-client and work product privileges in internal investigations and potentially returning to the more aggressive position on corporate privilege that the DOJ had previously disavowed.[18] This approach is likely to create greater uncertainty and discomfort for companies attempting to strike the balance between providing the cooperation the DOJ expects, while preserving privilege in collateral civil litigation.

SFO guidance on corporate cooperation

In February 2014, legislation came into effect making DPAs available to prosecutors in the UK in cases of corporate crime, two decades after DPAs had first been used in the US. The arrival of DPAs and the authority to resolve criminal matters against companies in that way has led to questions over how the SFO and UK courts will exercise this discretion. In common with the US, one of the most significant factors that prosecutors and courts will consider is the cooperation the company has provided.[19]

There are three main sources of 'guidance' regarding cooperation and how it will impact the exercise of DPA discretion: SFO Published Guidance,[20] SFO speeches to industry and, now, case law.[21] The language common to all three sources is that the company needs to show that its management team has taken 'a genuinely proactive approach […] when the offending was brought to their notice.'[22] If a company fails in this or engages in what the SFO have termed 'pseudo cooperation', it is unlikely that a DPA will follow. From the available sources, it appears that a 'genuinely cooperative approach' involves several key elements, which we discuss below:

Early self-reporting

In the UK, the approach to the timing of a self-report is underpinned by the principle that a company must not disturb the crime scene in a way that prejudices the SFO's investigation into the company or its executives. The SFO has commented that, '[i]n the past we used to see internal investigations that were kept from us right until the end, and culminated in a 'whitewash' document, intended to put the matter to bed before we had even looked at it.'[23] Any self-report must therefore be made at a very early stage. The Published Guidance states that it must be made 'within [a] reasonable time of the offending coming to light.'[24] In essence, the SFO will expect a company to come forward '[o]nce [it] has come to the view that the concerns are not fanciful but real and substantive.'[25] For example, in the recent case involving Standard Bank that resulted in a DPA with the SFO, the bank made a report to the SFO within days of the suspicions of bribery coming to light and before any investigation of any kind had been conducted by its own lawyers.

This early timing is so that the prosecutor can 'discuss work plans, timetabling or to provide […] directions'[26] to the company on its internal investigation, including the order of interviews or even whether the company should refrain from interviewing certain individuals. The SFO will also wish to direct the process of data collection from custodians and the preservation of other data. Unlike the DOJ, the SFO does not want these activities to commence before the

self-report. Furthermore, no interviews should be conducted with any person suspected of wrongdoing in advance of a self-report.[27]

A further requirement, found in the Published Guidance and reiterated by the SFO, is that the wrongdoing must at the time of the self-report be 'otherwise unknown to the prosecutor,'[28] but the interpretation of this language remains unclear.[29] While requiring a company to approach the prosecutor before it is itself approached by the prosecutor is understandable, it is unreasonable to preclude a company from receiving credit for otherwise timely self-disclosure because the SFO may have already been tipped off about the matter from another source without the company's knowledge.

Cooperative conduct of internal investigations

Neither the Published Guidance nor the SFO require a company to conduct its own investigation in order to be seen as cooperative. The only requirement is to cooperate with the SFO's investigation. On this issue, the SFO has said, 'we do not require you to carry out internal investigations; investigation is our job. And while we do understand that up to a point you will need to do some work to look into allegations of bribery, we find internal investigations that 'trample over the crime scene' to be unhelpful. Our stance is to ask for genuine cooperation with our investigation, not duplication of it.'[30]

Therefore, if a company chooses to conduct an investigation, it must do so in a way that does not prejudice the prosecutor's investigation. According to the SFO, this will include, 'not tipping off data custodians who may also be potential suspects and not carrying out its own enquiries in a manner that is likely to cause prejudice to our own investigations.'[31] Additionally, any investigation that the company conducts will be critically assessed 'to determine whether its conduct could have led to material being destroyed or the gathering of first accounts from suspects being delayed to the extent that the opportunity for fabrication has been afforded.'[32]

As to the specifics of how cooperation within the context of an internal investigation may be demonstrated, the SFO has explained that data collection must be conducted with 'forensic integrity,'[33] so that if necessary the company or its executives can be prosecuted based on the material collected. Furthermore, data collections must be 'prompt, covert, co-ordinated and simultaneous,'[34] with whole images being taken and preserved. The expectation is that back-up tapes will be kept and any rolling destruction processes stopped.[35] Companies will have to expect the data collection process to be 'disclosed fully to the SFO, and be supported by witness statements.'[36]

Other key relevant considerations in the SFO's assessment of whether an internal investigation is being conducted cooperatively include: identifying key witnesses, agreeing to the sequencing of interviews, and alerting the SFO to repositories of data that were unknown to them.[37] In the *Standard Bank* case, for example, the internal investigation that followed the self-report was in essence sanctioned by the SFO. In particular, witnesses were made available to the SFO for interview, requests for documents were responded to quickly and completely, and the SFO was even given access to the bank's own document review platform.[38]

Disclosing the product of internal investigations

If an internal investigation has been conducted by the company, the Published Guidance requires that the details of the investigation be disclosed, which must include 'sufficient information about the company's operation and conduct […] in order to assess whether [it] has been cooperative.'[39] In particular, this will include: providing a report of the investigation, producing the source documents, identifying relevant witnesses, and disclosing their accounts and the documents shown to them.[40] The company must be careful not to hold back information 'that would jeopardise an effective investigation and, where appropriate, prosecution of individuals.'[41]

The main area of controversy has been over the SFO's expectation that it will be given 'access to any first witness accounts that may have been taken.'[42] In the *Standard Bank* and *XYZ* cases, the SFO were given investigation reports and oral summaries of the first accounts of interviews.[43] Many UK practitioners take the view that the accounts given by witnesses during an internal investigation are subject to legal advice privilege or litigation privilege. The SFO disagrees, but this has yet to be challenged in court. The SFO's Joint Head of Bribery and Corruption has explained that witness accounts are not privileged at all, stating that 'requiring a corporate to provide us with the factual narrative that underpins any self-report, does not, of itself, give rise to a demand that privilege be waived.'[44]

On the other hand, the SFO's General Counsel has put the issue of privilege over first-hand accounts slightly differently, apparently conceding that there may be genuine claims of privilege, stating: 'We do not regard ourselves as constrained from asking for them even if they are privileged and, as with our colleagues in [the] US DOJ who do operate under that constraint, our experience is that at least some corporates are not themselves constrained from letting us know what their investigators were told.'[45] In the same speech, the General Counsel went on to explain that 'false' or 'exaggerated' claims of privilege will be treated as uncooperative, while companies who choose to waive privilege or 'structure' the internal investigation to avoid claims of privilege, will gain significant advantages. In the latest SFO DPA with XYZ Ltd, it is clear that some claims of privilege were made by the company and regarded as appropriate.[46]

Key points of difference in DOJ and SFO views on corporate cooperation

Companies that face criminal exposure in the US and UK and wish to cooperate in both jurisdictions must navigate the different approaches to cooperation taken by the DOJ and SFO. The key difference, which influences the approach to many issues, is that the SFO is committed to preserving what it views as a 'clean' crime scene from which to conduct its own independent investigation. The DOJ employs a different approach which, far from requiring the company to avoid collecting documents and interviewing witnesses, essentially 'deputises' a company to autonomously conduct an internal investigation once a self-report has been made, provided company counsel does so in a manner which does not prejudice any subsequent DOJ investigation (eg, by avoiding tainting witnesses). This difference manifests itself in a number of key areas that will affect the way in which an investigation with potential US and UK exposure can be conducted in order to achieve a successful outcome.

Timing of self-reports

First, it is important to note that making a disclosure to one authority will not count as a report to others. Separate reports must be made meeting the requirements on timing of each jurisdiction. The US and UK are united in encouraging companies to come forward early. A period of time is allowed for the company to triage potential wrongdoing, but to proceed beyond this is to risk being uncooperative in the eyes of a prosecutor on both sides of the Atlantic. The UK has an additional requirement that the company should report issues before the SFO learns of them from other sources. On the other hand, before the advent of the FCPA pilot programme, it seemed that the DOJ was satisfied with the promptness of a

self-report so long as the disclosure was made in a 'timely' manner after discovering the wrongdoing and before the company was approached by any authorities with the same information. This may suggest that there is more urgency in reporting to the UK in order to beat a whistleblower or reports from other jurisdictions. Support for this may be found in the *Standard Bank* case, where the reports to the SFO were made within days of the allegations coming to the bank's attention.

Privilege

Although a more aggressive approach to privilege claims regarding counsel's interviews of witnesses can be detected in recent DOJ guidance, there is still a broad consensus in the US that the DOJ should not request documents, including memoranda of witness interviews, that are privileged or constitute attorney work product. The SFO, on the other hand, seems to be requiring that companies investigate wrongdoing (even where litigation is contemplated) in a way that avoids claims of privilege. Investigations that are structured in a way that supports a claim of privilege, particularly over facts provided by witnesses, or making overblown or tenuous claims of privilege, will be treated as uncooperative. Proceeding in a way that would be acceptable to the DOJ, therefore, may nonetheless offend the SFO. It is therefore essential to structure and document the approach to privilege claims with great care from the very moment when the company's management team first learns of suspected wrongdoing.

Employee interviews

The SFO will expect to be consulted and may even direct who is to be interviewed, by whom and when. In order to assess the integrity of the investigation, the SFO will also want to see interview plans or outlines to ensure that they include 'tough' questions. The same level of supervision will not be expected in the US, although the Fraud Section of the DOJ's Criminal Division has suggested that companies should preview their investigation plan with its prosecutors. In a US–UK investigation, satisfying the SFO's requests on, for example, interview sequencing, could slow the investigation down and frustrate the DOJ, which, barring some particular sensitivity about a witness or group of witnesses, generally expects a company's investigation to proceed as quickly as reasonably possible, in part to ensure that the matter is reported to the DOJ before evidence becomes stale and the statute of limitations on possible individual charges has expired. The frustration could be compounded where the SFO asks the company not to interview key executives, but to leave that to them, particularly if the DOJ does not have jurisdiction over those executives.

Data or evidence collection

The SFO is likely to have specific requirements as to whose data should be collected and how that should be done. The DOJ, by contrast, is content for a company's lawyers to conduct this part of the investigation so long as it is done in accordance with basic forensic requirements. The practical difficulty that we expect is one of timing. Unless the SFO's requests are focused and manageable, delays may be inevitable and the expectations of the DOJ as to progress may not be met.

Recommended practices

With these challenges in mind, when faced with potential parallel DOJ and SFO investigations, the question necessarily arises as to which agency to self-disclose to first. Corporate counsel should assess which agency is likely to have the primary claim to jurisdiction and to consider making a self-disclosure to that agency first. Factors to consider in making this assessment would include assessing which jurisdiction has a more significant regulatory interest in addressing the conduct, where the greatest injury from the alleged misconduct lies, where most witnesses or documents are available, where the company's shares are listed, the location of the company's headquarters or offices involved in the misconduct, the existence of previous settlement agreements and/or recent oversight by either agency, and whether either agency is taking the lead in a broader investigation in which the company appears to be implicated.

Counsel would also be well-advised to seek guidance from the agencies as to which will take the lead in investigating and prosecuting the matter. In some of the LIBOR manipulation cases, the DOJ and SFO appeared to have divided between themselves the investigation of some of the implicated financial firms and the investigation of their employees.[47] If the agencies are willing to provide such guidance, then company counsel can tailor its investigation and cooperation to the standards expected by the lead agency. In addition, the company can request the lead agency to coordinate any evidentiary requests from the other agency.

Potential areas of concern will still remain, however. For example, witness statements taken by one agency may be shared with the other, which may not agree to abide by the terms under which the statement was procured. In such cases, an agreement should be sought from the procuring agency that it will not share such statements with the other agency absent its undertaking to use the statements subject to the same restrictions. Similarly, when providing sensitive commercial information to either agency, the company should request that the agency not disclose those materials to another investigating agency that does not agree to abide by reasonable restrictions on confidentiality. Finally, if a company feels compelled by the SFO to produce witness statements made during counsel's investigation, it should be mindful that such disclosure could constitute a waiver of the privilege surrounding those statements in collateral US criminal or civil proceedings. By the same token, narrative factual disclosures made by counsel to the DOJ and subsequently shared with the SFO may be used by the SFO to strengthen its claim for the underlying statements themselves.

In sum, careful consideration must be given to tailoring an internal investigation to meet the demands of the agency with a primary claim of jurisdiction while being cognisant that steps taken in furtherance of cooperation with that agency may have unintended implications before the other agency.

Notes

1 Memorandum of Deputy Attorney General Eric Holder, 'Bringing Criminal Charges Against Corporations' (16 June 1999), available at www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF; Memorandum of Deputy Attorney General Larry D Thompson, 'Principles of Federal Prosecution of Business Organizations' (20 January 2003) (the Thompson Memorandum); Memorandum of Deputy Attorney General Paul McNulty, 'Principles of Federal Prosecution of Business Organizations' (12 December 2006) (the McNulty Memorandum), available at www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf; Memorandum of Deputy Attorney General Mark Filip, 'Principles of Federal Prosecution of Business Organizations' (28 August 2008) (the Filip Memorandum), available at www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

2 Memorandum of Deputy Attorney General Sally Yates on Individual Accountability for Corporate Wrongdoing (9 September 2015), at 3 ('In order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct.') (the Yates Memorandum), available at www.justice.gov/dag/file/769036/download.
3 US Department of Justice, 'The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance' (5 April 2016) (the FCPA pilot programme), available at www.justice.gov/opa/file/838386/download. The DOJ's FCPA enforcement programme had seen a proliferation of DPAs and escalating penalties since 2008, and the new pilot programme sought to further promote self-disclosure and cooperation through purportedly increased transparency concerning the DOJ's calculation of monetary credit for cooperation.
4 The FCPA pilot programme also allows for the possibility that the DOJ might decline to prosecute a company for potential violations of the FCPA, but provides a high bar for obtaining such a result. A company must not only demonstrate that it timely self-disclosed and fully cooperated, but must also demonstrate that it has remediated deficiencies in its policies, procedures, and/or internal controls and disgorged all profits derived from the alleged misconduct. Even then, it may be denied a declination if its senior management was involved in the violations, it derived a significant profit from the violations, or it otherwise had a history of non-compliance. FCPA pilot programme at 9.
5 Id. at 4 (quoting U.S.S.G. section 8C2.5(g)(1)).
6 Id.
7 Id. at 4.
8 For example, in the DOJ's recent settlement with PTC Inc and two of its subsidiaries, the DOJ declined to give the companies voluntary disclosure credit because, although the companies, through their parent corporation PTC Inc, disclosed certain misconduct identified through a then-ongoing internal investigation in 2011, they did not voluntarily disclose evidence of other potential violations known to PTC Inc at the time of the initial disclosure until the DOJ had uncovered those facts on its own. See DOJ Non-Prosecution Agreement with Parametric Technology (Shanghai) Software Co Ltd and Parametric Technology (Hong Kong) Ltd, entered 16 February 2016, at 1, available at www.justice.gov/opa/file/824911/download.
9 FCPA pilot programme at 5.
10 Id. at 6.
11 Id.
12 Id. at 5, note 3.
13 Id.
14 Thompson Memorandum at 6.
15 McNulty Memorandum at 8.
16 Filip Memorandum at 8-9.
17 FCPA pilot programme at 5-6.
18 Indeed, the Principles of Federal Business Prosecution, since 2008, have only required that a company disclose relevant facts, not the source of those facts. See Filip Memorandum at 8-9.
19 The Joint SFO/CPS Code of Practice on Deferred Prosecution Agreements confirms that 'considerable weight' can be attached to this factor. See Serious Fraud Office and Crown Protection Service, Code of Practice on Deferred Prosecution Agreements, paragraph 2.8.2(i), available at www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf (the DPA Code of Practice).
20 See Serious Fraud Office and Crown Protection Service, Corporate Prosecutions, available at www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/; DPA Code of Practice; Serious Fraud Office, Corporate Self-Reporting (October 2012), available at www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/.
21 See (1) *SFO v Standard Bank PLC* (30 November 2015), available at www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Preliminary_1.pdf, and www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf; (2) SFO v XYZ Ltd (Preliminary, 8 July 2016) and SFO v XYZ (Final, 11 July 2016) both available at www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/.
22 See DPA Code of Practice, paragraph 2.8.2.
23 Ben Morgan, Address at the Managing Risk and Mitigating Litigation Conference: First use of DPA legislation and of section 7 of the Bribery Act 2010 (1 December 2015), available at www.sfo.gov.uk/2015/12/01/first-use-of-dpa-legislation-and-of-s-7-bribery-act-2010/.
24 See DPA Code of Practice, paragraph 2.8.2(i).
25 See Matthew Wagstaff, Address at the Annual Information Management Conference: The Role and Remit of the SFO (18 May 2016) (Wagstaff Remarks), available at www.sfo.gov.uk/2016/05/18/role-remit-sfo/.
26 See DPA Code of Practice, paragraph 2.9.2.
27 The new FCPA pilot programme does not contain such a requirement but encourages counsel to preview their proposed investigation with the DOJ and, in certain instances, to ensure that aspects of the company's investigation (eg, an interview of a key witness) will not conflict with the DOJ's investigation. FCPA pilot programme at 5-6.
28 See DPA Code of Practice, paragraph 2.8.2(i).
29 For example, in Matthew Wagstaff's speech to the Annual Information Management Conference on 18 May 2016, he stated that companies need to tell 'us about something that we do not already know.' Wagstaff Remarks.
30 Ben Morgan, Address at the Global Anti-corruption and Compliance in Mining Conference: Compliance and Cooperation (20 May 2015), available at www.sfo.gov.uk/2015/05/20/compliance-and-cooperation/.
31 Wagstaff Remarks.
32 See DPA Code of Practice, paragraph 2.9.3.
33 Alun Milford, Address at the European Compliance and Ethics Institute, Prague (29 March 2016) (Milford Remarks), available at www.sfo.gov.uk/2016/03/29/speech-compliance-professionals/.
34 Id.
35 The FCPA pilot programme also requires companies to preserve data and materials, FCPA pilot programme at 5, consistent with longstanding DOJ expectations and legal requirements that companies preserve evidence that may be relevant to a federal investigation. See, eg, 18 U.S.C. section 1519 (prohibiting destruction, alteration or falsification of documents in certain instances).
36 Milford Remarks.
37 Ben Morgan, Address at the Annual Anti-bribery and Corruption Forum (29 October 2015), available at www.sfo.gov.

uk/2015/10/29/ben-morgan-at-the-annual-anti-bribery-corruption-forum.

38 See Final Judgment, *SFO v Standard Bank PLC* (30 November 2015), paragraph 30, available at www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf.

39 See Guidance on Corporate Prosecutions, paragraph 32.

40 See DPA Code of Practice, paragraph 2.8.2.

41 See DPA Code of Practice, paragraph 2.9.1.

42 Wagstaff Remarks.

43 In *Standard Bank*, these were verbal summaries only. See GIR Live, 29 June 2016, available at http://globalinvestigationsreview.com/article/1036260/gir-live-london-dpas-and-privilege; In the *XYZ* case, the court, in agreeing to the DPA with the SFO, stated that 'XYZ provided oral summaries of first accounts of interviewees, facilitated the interview with current employees, and provided timely and complete responses to requests for information and material, save for those subject to a proper claim of legal professional privilege.' 'SFO Secures Second DPA After 'Extensive Cooperation,' GIR Live, 8 July 2016.

44 Wagstaff Remarks.

45 Milford Remarks.

46 See *SFO v XYZ* (Preliminary 8 July 2016), paragraph 27.

47 In the *Barclays* and *UBS LIBOR* cases, the DOJ prosecuted the companies, and the SFO prosecuted or is still prosecuting the individual employees. See *United States v Barclay Bank PLC*, available at www.justice.gov/criminal-fraud/sff/cases-libor-fx/barclays-bank/barclays-bank-plc. UBS AG originally entered into an NPA in 2012 with the DOJ to resolve its LIBOR liability, but after breaching that agreement, was required to enter a guilty plea in 2015 on related charges. See *United States v UBS, AG*, available at www.justice.gov/criminal-fraud/sff/cases-libor-fx/ubs-ag/ubs-ag. UBS's subsidiary in Japan was also required to plead guilty to LIBOR-related charges in 2012. See *United States v UBS Securities Japan Co, Ltd*, Plea Agreement (19 December 2012) available at www.justice.gov/sites/default/files/ag/legacy/2012/12/20/executed-plea-agreement-appendix-b.pdf. See also Serious Fraud Office, LIBOR US Dollar (Barclays), available at www.sfo.gov.uk/cases/libor-barclays/.

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Steven Tyrrell is the head of Weil's global white-collar defence and investigations practice, and also serves as managing partner of the firm's Washington, DC office. His practice focuses on white-collar criminal defence, regulatory enforcement matters, and internal investigations, with an emphasis on FCPA and other anti-corruption laws, the False Claims Act, securities fraud, accounting fraud and healthcare fraud, among other things. Mr Tyrrell also regularly advises clients on regulatory issues arising in the context of M&A transactions, and assists clients in developing and executing internal compliance programs. Mr Tyrrell previously served as Chief of the Fraud Section of the US Department of Justice, Criminal Division. In that capacity, he led the investigation, prosecution and coordination of a broad range of sophisticated economic crime matters and enforcement initiatives.

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With approximately 1,100 lawyers in offices on three continents around the world, Weil, Gotshal & Manges LLP operates according to the 'one firm' principle, allowing us to bring the right mix of firm-wide skill and local-market presence to deliver the coordinated legal advice necessary to help our clients achieve their sophisticated goals and objectives.

Weil's white-collar defence and investigations practice represents major corporations, financial institutions, partnerships, boards of directors, and senior executives in complex criminal and regulatory matters, internal investigations, and related litigation proceedings across a wide range of substantive issues and specialisations – including the FCPA and other anti-corruption statutes, accounting fraud, securities fraud, antitrust violations, government procurement and programme fraud, healthcare fraud, economic sanctions, and the False Claims Act (FCA). Importantly, given the firm's commercial litigation experience, Weil is perfectly positioned to manage and resolve follow-on litigation resulting from government and internal investigations so as to reduce overall risk.

Perhaps best known for navigating the likes of AIG, Lehman Brothers, and WaMu through complex, multi-agency criminal and civil investigations at the heart of the financial crisis – with no criminal charges brought to date – Weil's white-collar practice continues to address its clients' most sensitive regulatory, criminal, and compliance matters. These matters reflect current global regulatory enforcement initiatives, and demonstrate Weil's involvement in some of the leading issues of the day: investigations into LIBOR; FCPA-related investigations across several industries and continents; FCA investigations; and price-fixing investigations in the global energy and financial markets, among many others.

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2012

ISSN 2056-6980