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A Briefing Guide to

Serious Fraud Office (SFO) Investigations

RAHMAN RAVELLI

Serious Fraud Office (SFO) Investigations

The right response to an investigation by the Serious Fraud Office (SFO) is the only way to ensure the best possible outcome.

A swift and robust challenge to aspects of an SFO's case and its conduct or assumptions can help obtain that outcome. Such challenges can be the difference between the SFO proceeding with a case and dropping it. But it is equally important to be able to recognise opportunities to negotiate with the SFO.

As a firm with vast experience, in-depth expertise and a record of success for companies, senior business figures and high net worth individuals in this field, managing major and high-profile SFO cases is a constant part of our workload. Here, we offer a brief overview of how the SFO works and the powers it has. This is not meant to be an exhaustive guide but it will give you an understanding of SFO investigations and how they should be managed.

The SFO is a unique organisation in both the powers it possesses and the way it works. Any investigation conducted by it can have serious implications for the reputation and business prospects of companies and individuals. For that reason, the teams we assemble for clients are tailored to each individual SFO investigation. By doing this, we make sure the investigation is both conducted and concluded in the best way possible for those we represent. We are here to manage all aspects of an SFO investigation, from the earliest allegations onwards, so that the subject of it can continue to function in as normal a manner as possible. We make minimising disruption our priority, while working to achieve the best possible conclusion to the investigation.

For many individuals or companies, they know nothing of an investigation until their premises or home is raided by the SFO. The SFO has had plenty of time to plan its activity and apply to the courts for search warrants and restraint or asset freezing orders. That does not mean it is in an invincible position.

Thanks to a range of powers (which we outline below) and an ability to request extra funding from the UK government as and when major cases arise, the SFO is a formidable agency. But our experience and our track record mean we know that the right outcome can be achieved when dealing with an SFO investigation.

Co-ordinating a Response to the SFO

Our success is based on our ability to challenge allegations, evidence and assumptions in all manner of ways all over the world. It may be that the SFO is just one of a number of agencies involved in what could be an investigation that spans a number of countries. We are able to use our expertise to ensure complete co-ordination of a client's responses to both the SFO and any other agencies here and abroad that become involved in an investigation.

We put our efforts into constructing a well thought-out, perfectly-executed approach. Such an approach uses speed of thought, careful analysis of the main issues, expert witnesses and intelligent challenges on matters such as the conduct and legality of a raid or the admissibility and credibility of evidence.

A defence team can use the law of disclosure to gain access to material obtained by the SFO that it does not intend to use as evidence – yet may assist the defence. Disclosure can be used to stop SFO investigators being over-zealous in making allegations and can - along with strong factual and informed legal argument - prevent an SFO investigation reaching the charge or trial stage.

Pinpointing weaknesses in the SFO case, developing methods of exploiting them and recognising and seizing any opportunity to negotiate are all ways in which we obtain the best outcome.

The Work Of The SFO

The SFO was established under the Criminal Justice Act 1987. It takes on the largest, most complex cases and is the specialist authority for investigating bribery and corruption. The SFO may work with other organisations in the UK, such as the National Crime Agency (NCA), or with other agencies abroad, such as the United States' Department of Justice (DOJ) or Securities and Exchange Commission (SEC). Its cases may involve a number of countries and jurisdictions and require the skills of specialists, such as forensic accountants, IT specialists, data analysts or individuals with in-depth experience of the area of business where the allegations have been made.

The SFO receives information from many sources, which it then assesses to determine if it is worthy of investigation. If the SFO believes the situation undermines UK financial and corporate interests, it will accept it for investigation; involving the unique range of powers it has under Section 2 of the Criminal Justice Act.

The SFO's Section 2 Powers

Under Section 2, the SFO can compel any individual or organisation to provide it with information or documents that it believes are relevant to its investigation. The SFO has told lawyers that they are not guaranteed a right to accompany a client that is compelled to go in for interview under Section 2. Any lawyer intending to attend a Section 2 interview with their client must argue why they should be allowed to do so and may even have to agree to certain restrictions during the interview. This is an approach that the Law Society, the

solicitors' professional body, has called "inappropriate".

In 2018, a court case confirmed that the SFO could use its Section 2 powers beyond UK borders. In a case involving a UK firm and its US parent company, the High Court held that the SFO can, under Section 2, compel companies and individuals to produce material held abroad, subject to there being a sufficient connection to the UK. The ruling stated that the SFO could conduct international investigations and the purpose of Section 2 might be frustrated if there was a restriction on its use.

Self-reporting to the SFO

If a company or individual finds out officially, unofficially or even from their staff or third parties that it is suspected of business crime, the best course of action is to conduct an internal investigation. This is the best way to both assess the extent of any wrongdoing and decide how best to respond to any allegations made by the SFO. If an internal investigation produces evidence of wrongdoing before the authorities are aware of it, the company can self-report the problem. This can make it more likely that it will receive more lenient treatment from the SFO.

The SFO has made it clear, however, that self-reporting is no guarantee that a prosecution will not follow. It will not accept a company's report of wrongdoing at face value, although it encourages companies to self-report as early as possible. Self-reporting must be viewed as more than an attempt to avoid prosecution by saying nothing illegal happened. But it does provide an opportunity to start a dialogue with the SFO: a dialogue that could achieve that goal of avoiding prosecution. It must be remembered, however, that self-reporting is a major decision. Companies considering it will need advice from those with both legal expertise and extensive experience of dealing with the SFO.

Corporate Investigations

Whether self-reporting, negotiating or challenging any allegations, such actions can only be done effectively if you know every aspect of what prompted SFO interest. Often the best way to guarantee this is to conduct an internal investigation at the earliest possible opportunity.

We have written on the subject of internal investigations elsewhere on this website. But it is worth emphasising here that a properly-conducted, credible internal investigation can be the best way to establish what truth there is - if any – in allegations that have been made and the best way to proceed.

At Rahman Ravelli, our experience in multinational, cross-border cases involving issues such as bribery and corruption has seen us carry out major, complex internal investigations for some of the corporate world's biggest names. We also carry out such investigations when one company has taken over or merged with another and historical wrongdoing has come to light or allegations have prompted SFO attention. Internal investigations can be pivotal to determining the most appropriate response to the SFO's

building of a case. They can determine whether to self-report wrongdoing, challenge SFO allegations, negotiate with it or seek a deferred prosecution agreement (which we explain further down this page).

Rahman Ravelli carries out internal investigations worldwide in all manner of professions and industries. National and international companies, financial institutions, major organisations and wealth funds request our internal investigation teams to examine and assess situations, offer advice on the possible civil, criminal and regulatory implications and liaise with the relevant law enforcement agencies; including the SFO.

A well-planned investigation conducted in a prompt, professional manner can:

- Establish the circumstances surrounding a specific event or allegation.
- Ensure the board or other senior figures are kept fully informed of what has happened.
- Enable the organisation to announce that it has thoroughly investigated an issue and taken any action necessary.
- Give the organisation the ability to respond to concerns or criticism from shareholders, potential investors, trading partners or other third parties.
- Determine whether legal action and / or disciplinary needs to be taken against anyone.
- Make sure all regulatory obligations are being complied with.
- Discourage regulators or law enforcement agencies, such as the SFO, from beginning their own formal investigation.
- Discover what, if any, remedial action needs to be taken, including self-reporting.

Deferred Prosecution Agreements

The SFO now has deferred prosecution agreements (DPAs) at its disposal. These involve companies admitting and then paying a penalty for wrongdoing as well as subjecting themselves to stringent conditions to prevent any further illegal activity. With DPAs being a relatively new legal development for both the SFO and the companies it investigates, it is important that companies considering entering into a DPA seek expert advice to protect their interests.

Introduced under the provisions of Schedule 17 of the Crime and Courts Act 2013, a DPA is an agreement reached (under the supervision of a judge) between a prosecutor and an organisation which could be prosecuted. It allows a prosecution to be suspended for a defined period, provided that the organisation meets certain specified conditions. A company must admit the criminal behaviour and agree to work under certain conditions that the SFO or Crown Prosecution Service (CPS) decides to impose. Such conditions include alterations to working practices, staff changes, paying fines or introducing anti-corruption measures. If the company continues to meet these conditions for a set length of time, it avoids prosecution. If it does not meet them, it is prosecuted.

DPAs are another example of the scope the SFO has when it comes to dealing with bribery.

Exactly what course of action the SFO takes regarding each bribery investigation may come down largely to the way a company negotiates with it. The SFO's senior figures have repeatedly emphasised that a DPA will only be granted if a company has thoroughly reviewed its working practices and compliance measures in the wake of the wrongdoing and has introduced appropriate changes. The SFO will only invite a company to enter into an agreement to defer prosecution where the company has genuinely cooperated with the SFO.

DPAs are an evolving area of law. Corporates looking to obtain a DPA must know how to carry out an internal investigation but also how to approach the authorities once this is complete. Negotiation skills and experience of dealing with the SFO are essential if a DPA is to be secured on the most favourable terms. Dealing with the SFO on this (or any issue) requires steering a careful course.

Negotiating With The SFO

Every case is, obviously, unique. But negotiating with the SFO involves recognising the most favourable outcome, devising a strategy to obtain it and identifying what needs to be done to execute that strategy.

Regardless of the investigation, SFO investigators will be looking for cooperation if they are to offer the scope for negotiation. This can, as we have outlined, involve self-reporting and sharing the findings of an internal investigation.

But cooperation does not necessarily have to follow this route. As an example, Rolls-Royce obtained what was probably the UK's most high-profile DPA. It had not self-reported its use of bribery to secure contracts in many countries. But when the SFO became aware of it, Rolls-Royce offered full cooperation; including alerting the SFO to wrongdoing that had previously not been identified. This cooperation was highlighted by the judge as a factor in approving the DPA and the lenient penalties within it. It must be said that the cooperation has to be there from the very start of an SFO investigation. It must also be genuine and ongoing. Appointing legal representatives with experience and expertise in dealing with the SFO is arguably the only way to guarantee your actions are viewed by it as full cooperation.

The SFO will only consider treating a company under investigation leniently if it sees that company making appropriate and genuine reforms to its working practices to prevent any repeat occurrences of wrongdoing. If, as an example, we consider the DPA's that the SFO has so far granted, it is no coincidence that they have all been made after the corporates under investigation removed senior managers who were either implicated in the wrongdoing or should have been aware of it. While the SFO welcomes (and sometimes rewards) cooperation, it also wants to see clear evidence of a company's commitment to changing its working arrangements to reduce the possibility of future problems. This change must display an awareness of the previous failings and a determination to correct them.

Any company hoping to negotiate with the SFO must, therefore, show an appetite for cooperation and reform. But it is also important that this is conveyed to the SFO in a way that emphasises that those under

investigation are genuine in their desire to put right the wrongs and are not just "ticking the boxes" to obtain the least damaging outcome. This is a sensitive area – and one where the right expertise can be all-important.

Search Warrants And Raids

The SFO is likely to seek a search warrant if it has reasonable grounds to suspect that an offence has been committed and that there may be material on the premises that would be of value to an investigation.

Most warrants are issued under the Police and Criminal Evidence Act 1984 (PACE) or the Proceeds of Crime Act 2002. When the SFO or other authority applies to the court for a warrant, it must state the object of the search and provide sufficient information to show that it is necessary. It has to explain the reason for the search and outline its reasonable grounds for believing that an offence has been committed and that there is material on the premises likely to assist the investigation. The application will be made to a judge ex parte. In other words, and for obvious reasons, the defence are unaware of the application. That in itself creates heightened obligations upon the SFO when presenting its case without the benefit of the defendant being present: there have been some spectacular mishaps in the history of SFO ex parte applications.

Search warrants can be challenged by way of an application for Judicial Review in the High Court, against the SFO and the court that made the order. A High Court judge may be more inclined to take a robust approach to the principle that a search is a serious infringement of people's private lives – as defined under Article 8 of the Human Rights Act - and demand the highest standards of those making ex parte applications. Such a challenge, however, is subject to strict time limits and can be costly. The alternative is an appeal against the grant of the warrant under Section 59 of the Criminal Justice and Police Act 2001.

If procedural rules are not followed, the warrant may be quashed and the seized property returned. This could prevent the prosecution using what they seized in any subsequent prosecution. As an example, where an investigating agency has carried out the search and has seized items but failed to leave schedules to the warrant at the searched premises, the search can be ruled unlawful. In arguably the most high-profile example of an authority having a search ruled unlawful, Tchenguiz v Serious Fraud Office & Others [2012], the SFO was shown to have failed to check the credibility of information it presented to the court when applying for the search warrants. The case ended with the SFO apologising to the two brothers who were raided, paying them £4.5 million and being heavily criticised by the court for both a lack of understanding and at least one serious factual omission in its application for the search warrant.

If the High Court quashes a search warrant, it usually means the return of the seized material. But Section 59 of the Criminal Justice and Police Act 2001 allows agencies, such as the SFO, to apply to the High Court for

permission to retain the material for a short time while it re-applies to the Crown Court for, in effect, a new order justifying the old seizure. In these situations, the Crown Court has a discretion to authorise the retention of the material seized, despite the unlawfulness of the original search. The court is allowed to do this in circumstances were, if the seized material was returned, it would be immediately appropriate to issue a warrant, under which it would be lawful to seize the property. This basically means the authorities get a second chance to get the application right.

But challenges can be made at any stage of the raid process. Courts can and will often come down heavily on the SFO (or any other enforcement agency) if it presents a misleading picture to a judge when seeking a warrant. If a warrant has been obtained unlawfully it can be quashed. This can make it harder for the authorities to gain a second search warrant as the court knows they got it wrong last time and the defence is there to argue against it.

Section 21 of PACE gives people the right of access to any material of theirs that has been seized by the SFO, which means a defence team can make sure that the investigators cannot withhold or refuse to return potentially relevant material. Similarly, the Attorney General's Guidance on Disclosure (December 2013) laid down guidelines on how to deal with the seizure and search of digital material, which may contain terabytes of information.

The prosecution will always find its search and seizure activity more difficult if the defence is aware of its ability to issue challenges. Such an approach can be at the heart of a successful defence against SFO allegations.

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