

DEALING WITH AGENCIES THAT INVESTIGATE BUSINESS CRIME

14 May 2018 Azizur Rahman.

Business crime can often involve a number of companies, individuals and countries. As a result, it can be investigated by a large number of agencies, here and abroad.

This article focuses on the Serious Fraud Office (SFO), Financial Conduct Authority (FCA) and National Crime Agency (NCA). It is by no means exhaustive but it does touch on the key issues surrounding the activities of the three agencies.

The SFO, FCA and NCA all have large amounts of expertise, experience, legal power and resources at their disposal. But a defence team with its own high levels of experience and expertise can challenge the conduct of such an agency - or the assumptions it makes - in order to dismantle the case against their client.

SFO

The SFO is "one of a kind". It has an annual budget but can go to the Treasury for extra finances – what has been named blockbuster funding – for large cases as they arise. It works under what is called the Roskill model; which involves a team of investigators, accountants, prosecutors, experts and counsel being assigned to an investigation from the earliest stages.

When deciding whether to investigate a case, the SFO considers whether it involves:

- A threat to the UK's commercial or financial interests.
- High actual or potential financial loss.
- Significant actual or potential economic harm.

London Office
36 Whitefriars Street
London
EC4Y 8BQ
+44 (0)203 947 1539
enquiries@rahmanravelli.co.uk

Midlands Office
3 Brindley Place
Birmingham, West Midlands
B1 2JB
+44 (0)121 231 7025

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

Rapid Response Team
24 Hour Emergency Contact
0800 559 3500
Fax +44 (0)1422 430 526
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- Significant public interest.

Its cases can be complex, lengthy and involve many resources. Cases that it decides not to investigate may be passed to the City of London Police or other police forces. The rule that the SFO only investigated cases that involved more than £1M no longer applies, as so many cases now top the million-pound mark.

When the SFO accepts a case for investigation, it has a wide range of unique powers under Section 2 of the Criminal Justice Act 1987 – the Act which created the SFO.

The SFO can use Section 2 to compel any individual or organisation to provide it with information or documents or attend an interview if it believes they have relevant information. Section 2 interviews are not carried out under caution and are not subject to the Police and Criminal Evidence Act 1984, which governs the conduct of most interviews. An individual cannot refuse to answer a question in a Section 2 interview. Failure to cooperate with one can lead to up to two years' imprisonment.

The SFO has told lawyers that they have no automatic right to accompany a client that is compelled to attend a Section 2 interview. If a lawyer wants to attend a Section 2 interview, they must argue why they should be allowed to and agree to restrictions on their role in it.

DPA's

As the SFO, however, is an investigation and prosecution agency, it cannot carry out arrests. These are carried out for it by the police. Yet the SFO's powers are far from limited. It can prosecute individuals and corporates – and has other options at its disposal.

The SFO can decide to offer a deferred prosecution agreement (DPA) as an alternative to a prosecution. Introduced into UK law by Schedule 17 of the Crime and Courts Act 2013, a DPA allows the SFO (or Crown Prosecution Service) to offer a corporate the chance to avoid being prosecuted by meeting certain conditions.

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These conditions can include paying a financial penalty or compensation, cooperating with the prosecution of individuals or making changes to working practices. If the conditions stipulated in the DPA are met, the corporate is not prosecuted. But it can be if it fails to meet them.

Representation

The fact that the SFO has lawyers involved in its cases from the very start does not mean it is beyond legal challenge. If anything, it emphasises the need for anyone investigated by the SFO – or any agency, for that matter - to seek legal representation at the earliest opportunity if they are being treated as a suspect.

This must be representation that can:

- Match the investigating agency's lawyers when it comes to experience and expertise in business crime law.
- Gather the relevant information and evidence.
- Mount a robust, intelligent defence against SFO allegations.
- Argue, where possible, a client's right not to incriminate themselves when interviewed.

It can be worth a company seeking legal advice about carrying out an internal investigation if it suspects wrongdoing. This can ensure that it identifies the problem before it comes to the attention of an investigating agency. The company then has the opportunity to self-report the problem which can, in many cases, lead to more lenient treatment than if an investigating agency had discovered the illegal activity for itself.

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B1 2JB
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Speaking from experience, it must be remembered that an investigating agency can be challenged at all stages of an investigation over the reliability of information and material that it plans to use as evidence. Section 21 of the Police and Criminal Evidence Act (PACE) gives people the right of access to any material of theirs that has been seized, while the Attorney General's Guidance on Disclosure (December 2013) laid down guidelines on the seizure of digital material.

The right legal approach can prevent those investigated being disadvantaged: which is why it is important that anyone investigated seeks legal representation from solicitors experienced in this field, who can act with foresight, negotiate where necessary and make informed, strategic decisions.

UWO's

Since January 31 this year, the SFO, the NCA, FCA, HM Revenue and Customs and Crown Prosecution Service also have unexplained wealth orders (UWO's) at their disposal.

Introduced into UK law by the Criminal Finances Act 2017, a UWO gives an authority the right to make an individual explain how they managed to acquire an asset, such as a house. If the individual does not cooperate with the UWO or does not give what is considered to be a satisfactory explanation, the authority can begin civil recovery proceedings under the Proceeds of Crime Act 2002 (POCA) to seize that asset.

Civil recovery is a tool that the authorities will use as an alternative to criminal prosecution. As an example, in recent weeks the SFO has recovered £4.4M from Chad diplomats who had been bribed by a Canadian energy company that was seeking development contracts in the African country.

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B1 2JB
+44 (0)121 231 7025

Northern Office
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The introduction of UWO's shifts the burden of proof onto the subject of the Order. The person now has to prove that they acquired an asset legitimately instead of the authority having to show that it was gained through criminal activity. To prove this will require obtaining all relevant information, producing compelling evidence to back a person's claim that the asset was acquired legitimately and, where necessary, negotiating with the authority.

We will have to see how popular UWO's become with the authorities. But a skilled lawyer may be able to have an Order discharged if the authority has not followed the application procedure properly. Such outcomes are common regarding search warrants and production orders. It could well be the same when it comes to challenging UWO's; regardless of which authority is seeking one.

Such challenges to procedure are defence options when any authority begins an investigation. Checking procedures have been followed when warrants and orders are obtained, when a raid is carried out and when material is seized can uncover mistakes by the investigating authority. Challenges can also be made at any time to the admissibility of evidence or the reliability of witness testimony.

FCA

The Financial Conduct Authority (FCA) was created by the Financial Services Act 2012. It regulates 56,000 financial firms that provide services to customers and maintains the integrity of the UK's financial markets. It investigates individuals and organisations and has the power to ban financial products for up to a year. Last year, it issued £229M in fines. Since April 2014, it has also been responsible for regulating the consumer credit industry.

London Office
36 Whitefriars Street
London
EC4Y 8BQ
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3 Brindley Place
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B1 2JB
+44 (0)121 231 7025

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While it does not have the SFO's extensive range of powers, it is similar to the SFO in that its investigators do not have powers of arrest, it has lawyers working on investigations from the earliest stages and it has the power to bring criminal prosecutions. Since last year, it also has civil recovery powers, as a result of the Criminal Finances Act; which amended POCA to make it an enforcement authority.

This article is only the briefest of overviews of the FCA. The FCA is well resourced, it carries out what are often lengthy investigations and has penalised some of the biggest financial institutions with heavy fines. In 2015, Barclays was fined £284M for Forex manipulation while Deutsche Bank was ordered to pay £227M the same year for manipulating Libor and Euribor. The FCA can fine, prosecute or impose restrictions on those it investigates.

While it does not have the Section 2 powers that the SFO can use, the FCA can:

- withdraw a firm's authorisation
- prohibit individuals from carrying on regulated activities and suspend firms and individuals from undertaking regulated activities
- fine firms and individuals who breach its rules, commit market abuse or breach competition laws
- apply to the courts for injunctions, restitution orders, winding-up and other insolvency orders
- bring criminal prosecutions to tackle financial crime, such as insider dealing, unauthorised business and false claims to be FCA-authorised

With such a range of powers, it is essential that anyone investigated by it seeks appropriate legal representation.

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NCA

Just two months ago, it was the National Crime Agency (NCA) that issued the first two UWO's. This, I would argue, can be seen as an indicator of its willingness to use all options available to it. The NCA is the UK's most prominent organisation when it comes to tackling international corruption and bringing civil recovery action to recover the proceeds of crime.

Created in 2013 to replace the Serious Organised Crime Agency (SOCA), the NCA has powers of arrest, prosecution and civil recovery.

It has many responsibilities, including drug and human trafficking, missing persons and organised crime, to name just a few. But when it comes to business crime, it is the major investigating agency for money laundering and the leading UK authority on economic crime that crosses borders. Its role means that it works closely with the SFO and is the main point of contact for foreign and international law enforcement agencies. The NCA also receives and acts upon suspicious activity reports (SAR's) filed by banks and financial institutions.

As an authority, it has a global reach. Its International Corruption Unit (ICU), formed three years ago, investigates money laundering in the UK involving corrupt overseas officials, bribery around the world that has links to UK companies and cross-border bribery that has a UK link. The ICU also helps foreign law enforcement agencies with international corruption investigations.

While the ICU is supported by the Department for International Development and is seen as part of the battle against corruption-related poverty, its remit is not limited to developing countries.

But it uses many of the same procedures as the other agencies mentioned here. It is, therefore, an organisation that has many powers – but is not an organisation that cannot be challenged.

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+44 (0)121 231 7025

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

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0800 559 3500
Fax +44 (0)1422 430 526
DX16001 HX1



Azizur Rahman
Senior Partner
aziz.rahman@rahmanravelli.co.uk
+44 (0)203 911 9339

Aziz Rahman is Senior Partner at Rahman Ravelli and its founder. His ability to coordinate national, international and multi-agency defences has led to success in some of the most significant corporate crime cases of this century and top rankings in international legal guides. He is recognised worldwide as one of the most capable legal experts regarding top-level, high-value commercial and financial disputes.

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