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The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the United Kingdom and the United States

Fifth Edition

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

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Witness Interviews in Internal Investigations: The UK Perspective

Caroline Day and Louise Hodges[1]

7.1 Introduction

Witness interviews are a key part of most corporate investigations. While documentary evidence can provide the underlying facts of a case, it is often the accounts given by witnesses that deliver the context and detail of what has happened. They can provide vital background information, shed light on the motivations of those involved and allow for an individual's credibility to be assessed. However, the timing, preparation, record-taking, content and use of the interviews need careful consideration.

Witness interviews can serve a number of purposes in the context of a corporate investigation, including:

- to scope the investigation;
- to understand the facts and issues;
- to understand accountability and defences; and
- to assess the credibility of individuals and their accounts.

Interviews in this context can present particular difficulties because of the myriad employment, criminal, civil and regulatory issues that can arise, and the fact that the interests of the company and the witness are often not aligned. These interviews are typically conducted confidentially and can be premised on a need to maintain legal privilege and the duty of confidence owed between an employer and employee. This can often be at odds with the expectations of some authorities for the company to provide details of the witnesses' accounts. There is often a tension between a company's right to conduct its own enquiries into allegations

1 Caroline Day and Louise Hodges are partners at Kingsley Napley LLP. The authors would like to thank Will Hayes, an associate at Kingsley Napley LLP, for assistance with this chapter.

of wrongdoing, including interviewing its employees, and the suggestion by the authorities that its enquiries could (depending on how they are conducted) be detrimental to a criminal or regulatory investigation. In addition, the position surrounding legal privilege in the context of witness interviews has become more complex over the past few years following a number of court judgments.

This chapter explores these issues, considers the practices that can be adopted when conducting interviews and highlights some of the benefits and risks of these different approaches. It considers the preparation and formalities that may be required for witness interviews in the United Kingdom, and identifies particular complexities that can arise in global investigations when multiple jurisdictions are involved.

Types of interviews 7.2

Broadly, witness interviews in corporate investigations can be split into two categories: preliminary or scoping interviews, and substantive interviews. Generally, they should be distinguished from any employment or disciplinary interviews.

Preliminary or scoping interviews may be appropriate at the outset of an investigation to seek background information, identify further sources of evidence, obtain a quick understanding and provide context to an allegation. These interviews will generally take place at the start of the investigation and, depending on the specific circumstances, may take place before any firm view has been reached on the terms of reference or extent of material that will be reviewed. They are more likely to be conducted with employees who may have knowledge of matters under investigation but are not at direct risk of any criticism. It may also be necessary to undertake interviews with whistleblowers at this stage.

See Chapter 19 on whistleblowers

Substantive interviews will generally take place after most, if not all, the relevant material has been reviewed. The purpose is to obtain a detailed understanding of what went on, to provide explanations of key documents in the case and, if necessary, to test the account given. These interviews will often be used to inform an understanding of any individual and corporate liability and any defences. The timing is important and can depend on a number of factors, including the available evidence, whether the authorities are already involved and whether civil and criminal proceedings are contemplated.

More recently, there has been a rise in internal investigation interviews being conducted remotely, given advances in technology and the need for remote working.

Where interviews are conducted remotely, it is important to ensure that the integrity and effectiveness of the investigation is maintained. Measures should be put in place to ensure that interviews are conducted confidentially and to limit the risk of any breach of this, whether intentional or inadvertent.

Deciding whether authorities should be consulted 7.3

The decision about whether to consult the authorities in advance of a witness interview is not dictated by statute; no statutory framework explicitly requires it and in general terms a company may manage its internal affairs and make

enquiries as it sees fit. Therefore, this decision often rests on whether there is an implicit obligation on the company to notify the authorities under its regulatory reporting regime, or whether it is in the interests of the company to co-operate with the authorities by notifying them of any forthcoming interviews.

Regulated firms may be obliged to report a violation or allegation of wrongdoing. For example, the Solicitors Regulatory Authority's code of conduct requires a law firm to report any allegation of serious misconduct promptly, fully co-operate with its investigation and report any material change about the firm.[2] Accountants may hold similar obligations under the requirements of their regulators. There are reporting requirements under the Listing Rules for those companies admitted to trading on a regulated market,[3] and those in the regulated sector are required to submit a suspicious activity report if they know or suspect (or have reasonable grounds for knowing or suspecting) that another person is engaging in money laundering or terrorist financing.[4] Financial institutions regulated by the UK Financial Conduct Authority (FCA) must under Principle 11 of the FCA's Principles for Businesses act in an open and co-operative manner and disclose anything relating to the firm of which the regulator would reasonably expect notice. Firms that are dual-regulated by the FCA and Prudential Regulation Authority (PRA) have equivalent obligations under Fundamental Rule 7 of the PRA's Fundamental Rules.[5]

The FCA's expectations under Principle 11 extend to requiring a firm to consider notifying it of a decision to investigate conduct concerns at the earliest opportunity. In November 2015, the Director in Enforcement at the FCA, suggested during a speech[6] that self-reporting is the bare minimum that is required and that a firm should discuss the scope of its investigation with the FCA as early as possible. He identified witness interviews as a key area of risk, suggesting that firms be alive to the possibility that their own investigation could prejudice or hinder a subsequent FCA investigation, and that firms should discuss this with the FCA before taking action. A firm should therefore consider its regulatory obligations when assessing if, and when, to consult its regulator regarding any proposed witness interviews.

During a speech at the 2nd Annual GIR Live London conference,[7] the then-Director in Enforcement at the FCA recognised that there are sometimes good reasons for firms to carry out their own investigations and that the FCA

2 Solicitors Regulatory Authority (SRA) Code of Conduct, Chapter 10. See also the SRA's Guidance in Reporting and Notification Obligations, issued on 25 November 2019: https://www.sra.org.uk/solicitors/guidance/ethics-guidance/reporting-notification-obligations/.

3 Also see Prospectus Rules and Disclosure and Transparency Rules.

4 Part 7 Proceeds of Crime Act 2002 and Part 3 Terrorism Act 2000.

5 https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/new-bank/Fundamentalruleprinciples.

6 Speech by Jamie Symington, then Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA, at the Pinsent Masons Regulatory Conference 2015, 5 November 2015.

7 Speech by Jamie Symington, then Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA, at the 2nd Annual GIR Live, London, 28 April 2016.

encourages this proactive approach and does not wish to interfere with a firm's legitimate procedures and controls. However, he reiterated that when conducting their own investigations, firms should ensure that they do not take steps that might prejudice or obstruct a subsequent FCA investigation and highlighted the importance of early communication in this regard.

The Serious Fraud Office (SFO) has similarly acknowledged that there are good and proper reasons for a company to carry out its own investigation[8] but has also referred to the potential dangers of an internal investigation 'churning up the crime scene', which could include the taking of first statements from witnesses in a way that influences their testimony.[9] In August 2019, the SFO published its Corporate Co-operation Guidance, which sets out how the SFO assesses co-operation from business entities and its potential benefits.[10] Within that there is an expectation by the SFO that companies would consult in a timely way before interviewing witnesses.

A former Joint Head of Bribery and Corruption at the SFO commented in a speech in 2018 that, in the context of the company handling the evidence: 'We need to understand the methodology, what's been captured and from where, the use of search terms and be provided with the metadata. [We a]ppreciate it's likely to be dynamic and not a complete set when you speak to us, so update us as you go along.' On consulting with the SFO, she said: 'We expect to discuss the scope of the investigation, to be notified of conduct which you uncover and what you ought to bring to our attention even if we don't ask, the sequencing of interviews and media contact.'[11]

Where the authorities are not yet aware of the allegations under review, it is likely that preliminary enquiries will be necessary before the company is in a position to reach a view as to whether to self-report. Where this includes witness interviews, it may be inappropriate for the authorities to be consulted in advance. This can create a tension between the authorities' expectations to be notified as well as the need for the company to bear in mind the risks of prejudicing a future investigation.

See Chapter 3 on self-reporting to authorities

Where an investigating authority is already involved, it is prudent for the company to consult or inform it prior to undertaking interviews. Increasingly the SFO and the FCA have sought to impose restrictions on the conduct of interviews in corporate investigations or to prevent them from taking place. While a company cannot be prevented from undertaking its own interviews, there is risk of criticism if it proceeds without the consent of the authority, particularly where

8 Speech by Alun Milford, then General Counsel, SFO, at the 14th Annual Corporate Accountability Conference, Congress Centre, London, 9 June 2016 (as reported by GIR on 10 June 2016).

9 Speech by David Green QC, then Director, SFO, at the GIR Roundtable: corporate internal investigations, 27 July 2015.

10 SFO Operational Handbook, Corporate Co-operation Guidance, https://www.sfo.gov.uk/download/corporate-co-operation-guidance/.

11 Speech by Camilla de Silva, then Joint Head of Bribery and Corruption, SFO, at the ABC Minds Financial Services conference, 15 March 2018.

it could be suggested that it has prejudiced an investigation. In particular, there may be circumstances where an investigating authority requests that the company refrain from conducting witness interviews during its investigation. The recent judgment handed down by Mr Justice Williams[12] in the DPA reached between SFO and Serco Geografix Ltd confirmed: 'The SFO requested that Serco Group PLC and its constituent parts should not engage in any internal inquiry by way of interviewing witnesses during the criminal investigation. There was and continues to be full compliance with that request. Rather, Serco Group PLC instructed an independent law firm to conduct a full document review and to provide the SFO with a detailed report of its findings.'[13] The DPA reached with Güralp Systems Limited in 2019 similarly referred to Güralp's cooperation; the statement of facts cited its decision to defer interviews until the SFO was content for it to proceed and to provide details of those witness interviews to the SFO as evidence of extensive co-operation.[14]

7.4 Providing details of the interviews to the authorities

The introduction to the SFO's Corporate Co-operation Guidance sets out its expectations when assessing a company's level of co-operation:

> *Co-operation means providing assistance to the SFO that goes above and beyond what the law requires. It includes: identifying suspected wrongdoing and criminal conduct together with the people responsible, regardless of their seniority or position in the organisation; reporting this to the SFO within a reasonable time of the suspicions coming to light; and preserving available evidence and providing it promptly in an evidentially sound format.*[15]

In a section on 'Preserving and Providing Materials', in relation to a corporate dealing with individuals, the SFO's Corporate Co-operation Guidance lists the following indicators of good practice:

> *i. To avoid prejudice to the investigation, consult in a timely way with the SFO before interviewing potential witnesses or suspects, taking personnel/HR actions or taking other overt steps.*
> *ii. Identify potential witnesses including third parties.*
> *iii. Refrain from tainting a potential witness's recollection, for example, by sharing or inviting comment on another person's account or showing the witness documents that they have not previously seen.*

12 *SFO v. Serco Geografix Limited*, Deferred Prosecution Agreement, (Case No. U20190413) [2019] 7 WLUK 45.

13 *SFO v. Serco Geografix Limited*, Deferred Prosecution Agreement,(Case No. U20190413) [2019] 7 WLUK 45 at para. 24.

14 *SFO v. Güralp Systems Limited*, Deferred Prosecution Agreement, Statement of Facts.

15 SFO Operational Handbook, Corporate Co-operation Guidance at p. 1, https://www.sfo.gov.uk/download/corporate-co-operation-guidance/.

iv. Make employees and (where possible) agents available for SFO interviews, including arranging for them to return to the UK if necessary.

v. Provide the last-known contact details of ex-employees, agents and consultants if requested.[16]

When it comes to witness interviews, authorities often expect details of the interviews to be provided. It is therefore crucial to consider the purpose of the interview, its intended audience, record-keeping and, if appropriate, how this information is to be shared.

The SFO's Corporate Co-operation Guidance provides that: 'Organisations seeking credit for co-operation by providing witness accounts should additionally provide any recording, notes and/or transcripts of the interview and identify a witness competent to speak to the contents of each interview.'[17]

There is no statutory duty on a company to co-operate with the authorities with respect to its witness interviews. Instead there is published guidance in the form of codes of practice, speeches and guidelines. This varies between authorities, but for the most part there is an expectation that details of witness accounts should be provided. As the SFO Director, Lisa Osofsky, commented in a 2018 speech: 'Co-operation is about making the path to admissible evidence easier. This is not rocket science. It is documents. It is financial records. It is witnesses.'[18]

This issue is considered in the Code of Practice on Deferred Prosecution Agreements (the Code)[19] jointly issued by the SFO and the Crown Prosecution Service. The Code states at paragraph 2.8.2(i) that co-operation with the authorities will include identifying relevant witnesses, disclosing their accounts and the documents shown to them and, 'where practicable', making witnesses available for interview when requested.

On 23 October 2020, the SFO published a chapter of its Operational Handbook entitled 'Deferred Prosecution Agreements'.[20] In this it underlines that co-operation is a key factor to consider when deciding whether to enter into a DPA, restates that the company's co-operation should be evaluated using the SFO's Corporate Co-operation Guidance and reiterates the provisions referred to above. This was published with the caveat that this is internal guidance only, and we are reminded that it should not, therefore, be relied on as the basis for any legal advice or decision and some of the content of this document may have been redacted.

The SFO has made clear its expectation that for a deferred prosecution agreement (DPA) to be considered, co-operation must be forthcoming. In the early

16 SFO Operational Handbook, Corporate Co-operation Guidance at p. 4, https://www.sfo.gov.uk/download/corporate-co-operation-guidance/.

17 SFO Operational Handbook, Corporate Co-operation Guidance, at p. 5, https://www.sfo.gov.uk/download/corporate-co-operation-guidance/.

18 Speech by Lisa Osofsky, Director, SFO, at the Royal United Services Institute, 3 April 2019.

19 SFO/CPS Deferred Prosecution Agreements Code of Practice, Crime and Courts Act 2013.

20 SFO Operational Handbook, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/deferred-prosecution-agreements/.

months of her tenure Lisa Osofsky recalled that: 'I am often asked what prosecutors mean by full cooperation. At its simplest, it's not so hard: tell me something I don't know. Help the prosecutor find the truth. Don't obstruct, or mislead, or delay. Don't hold things back.'[21]

During a speech in 2018, the SFO's then Joint Head of Bribery and Corruption commented: 'To be clear, the co-operation we want is with our investigation into the suspected offence, not the company. This means that, at the end of the process, the company will have helped us move that investigation forward and, in so doing, made it easier for us to investigate and, if appropriate, prosecute other suspects.'[22] More recently, Lisa Osofsky confirmed the SFO's approach in a speech where she stated that companies needed to take certain steps for their efforts to count as co-operation: 'First, in carrying out their own investigation, we need to see the ultimate objective of cooperating with law enforcement by preserving vital evidence such as first-hand accounts and witness testimony.'[23]

While the SFO has clearly set out its expectations to be told what witnesses have to say in interviews with particular emphasis on 'first accounts',[24] what is less clear is how the detail of the accounts should be imparted and the level of detail that is required. The SFO has been inconsistent in its approach. In the case of *SFO v. ICBC SB*,[25] it was sufficient for oral reports of first-account witness evidence to be provided by the bank to the SFO to enable full co-operation to be established.[26] The former general counsel at the SFO, noted the bank's commitment to supply all relevant non-privileged material and provision of summaries of witness first accounts as an example of its co-operation.[27]

Summaries of witness interviews were similarly supplied by Rolls-Royce in the context of its DPA reached in January 2017.[28] In his judgment, Sir Brian Leveson, then President of the Queen's Bench Division, noted that the company had demonstrated 'extraordinary cooperation', referring to the disclosure of interview memoranda (on a limited waiver basis) as an example of this.[29] The judgment also made reference to the company 'co-operating with the SFO's requests

21 Speech by Lisa Osofsky, Director, SFO, at the 35th International Conference on the Foreign Corrupt Practices Act in Washington, DC, 28 November 2018.

22 Speech by Camilla de Silva, then Joint Head of Bribery and Corruption, SFO, at the ABC Minds Financial Services conference, 15 March 2018.

23 Speech by Lisa Osofsky, Director, SFO, at the Royal United Services Institute, 3 April 2019.

24 Speech by Alun Milford, then General Counsel, SFO, to an audience of compliance professionals at the European Compliance and Ethics Institute, Prague, 29 March 2016.

25 *Serious Fraud Office v. Standard Bank Plc* (Now known as ICBC Standard Bank plc): Deferred Prosecution Agreement (Case No. U20150854).

26 Speech by Ben Morgan, then Joint Head of Bribery and Corruption, SFO, at the Managing Risk and Mitigating Litigation Conference 2015, 1 December 2015.

27 Speech by Alun Milford, then General Counsel, SFO, at the Handelsbatt Conference 2016, 14 September 2016.

28 *SFO v. Rolls-Royce Plc*, Deferred Prosecution Agreement (Case No. U20170036) [2017] Lloyd's Rep FC 249.

29 *SFO v. Rolls-Royce Plc*, Deferred Prosecution Agreement (Case No. U20170036) [2017] Lloyd's Rep FC 249 at para. 121.

in respect of the conduct of the internal investigation, to include the timing of and recording of interviews and reporting findings on a rolling basis'.[30] While the SFO acknowledged its acceptance of summary witness accounts instead of transcripts in the DPAs for Standard Bank and Rolls-Royce, at a conference in April 2017, the former SFO General Counsel refuted suggestions that it would be standard practice in all cases[31] and similarly commented in November 2017 that it is not the case that summaries will always be sufficient.[32]

In the case of *SFO v. Sarclad Ltd*,[33] oral summaries were provided without the company's badge of 'genuine co-operation' being compromised. However, the SFO's decision to accept oral proffers in this case was subject to judicial scrutiny. In *R (on the application of AL) v. SFO*,[34] a judicial review was brought against the SFO for failing to pursue Sarclad (then anonymised as XYZ Ltd) for non-compliance with its DPA. The terms of the DPA required the company to disclose to the SFO all information and material in its possession that is 'not protected by a valid claim of legal professional privilege or any other applicable legal protection'. Having accepted oral summaries, and following a number of attempts to pursue the full set of notes, the SFO decided to stop pursuing the full set of notes. The SFO's position in defending the judicial review was that there was no need to obtain the interview notes because the company's claims of privilege were 'not obviously wrong', and that it had exercised legitimate prosecutorial discretion in accepting the summaries. Although the application was quashed on the grounds that alternative remedies in the Crown Court were available, and therefore judicial review was not the appropriate remedy, the SFO was criticised in the judgment for not pursuing the disclosure. Mr Justice Green described the provision of summaries as an alternative as 'highly artificial' and questioned the SFO's decision not to take a more robust stance. The SFO was similarly criticised for its failure to challenge the assertion of privilege and require the notes in circumstances where it believed the material not to be privileged.

The SFO's Corporate Co-operation Guidance refers to the provision of witness accounts as a sign of co-operation, and that firms seeking credit for this should provide recordings, notes and transcripts of the interviews.[35] It states: 'An organisation that does not waive privilege and provide witness accounts does not attain the corresponding factor against prosecution that is found in the DPA

30 *SFO v. Rolls-Royce Plc*, Deferred Prosecution Agreement (Case No. U20170036) [2017] Lloyd's Rep FC 249 at para. 121.

31 Speech by Alun Milford, then General Counsel, SFO, at GIR London Live, 27 April 2017 (reported by GIR on 27 April 2017).

32 Speech by Alun Milford, then SFO General Counsel, SFO, at the Cambridge Symposium on Economic Crime 2017, Jesus College, Cambridge, 4 September 2017.

33 *SFO v. XYZ Limited*, Deferred Prosecution Agreement (Case No. U20150856). The defendant was subsequently identified in July 2019 as Sarclad Ltd following the acquittals of three Sarclad employees.

34 *R (on the application of AL) v. Serious Fraud Office* [2018] EWHC 85.

35 SFO Operational Handbook, Corporate Co-operation Guidance, at p. 4, https://www.sfo.gov.uk/download/corporate-co-operation-guidance/.

code.'[36] Further, the Guidance states: 'The Court of Appeal has not ruled out a court's consideration of the effect of an organisation's non-waiver over witness accounts as it determines whether a proposed DPA is in the interests of justice.'[37]

While the SFO's approach has not always been consistent, it is unlikely that the SFO would accept oral summaries for key witnesses in future to secure a DPA.

Despite the inconsistency in how details of accounts have been disclosed to the SFO, the SFO has said that to be considered for a DPA, co-operation is required. Its former General Counsel said in a speech in 2017, '[w]e have been clear and consistent that only co-operative companies will ever be offered the opportunity of entering into a DPA with us'.[38] In *(SFO) R v. Sweett Group PLC* (unreported), Sweett Group's refusal to hand over details of the witness interviews undertaken during its internal investigation was deemed unco-operative by the SFO.

The DPA with Güralp Systems Limited in 2019 referred to the extensive co-operation through provision of information from witness interviews. Co-operation was similarly referred to in the DPA between the SFO and Airbus SE in January 2020.[39] In the judgment, Dame Victoria Sharp confirmed that Airbus co-operated to the fullest extent possible despite being initially slow to engage with the SFO, and that the co-operation it subsequently provided was exemplary. This co-operation (as set out in the judgment) included that the 'SFO examined the internal investigation documents (including interviews with Airbus employees and BPs, Airbus having waived legal professional privilege on a limited basis).

This contrasts with the DPA between G4S Care and Justice Systems (UK) Limited and SFO (July 2020)[40] where the reduction in financial penalty for assistance to the prosecution and guilty plea was 40 per cent, which the SFO's announcement noted represented 'only the second time in an SFO DPA that a discount lower than 50 per cent has been applied' and that these terms 'appropriately reflected the gravity of the conduct, and were fair, reasonable, and proportionate. The 40 per cent discount reflects the delayed nature of G4S C&J's substantial cooperation with the SFO's investigation.' The judgment noted the 'less than full co-operation with the SFO investigation until a relatively late stage', and that it was only after October 2019 that the company agreed to provide details of the witness interviews on the basis of a limited waiver of privilege.

The FCA has clear expectations that regulated firms provide notification of any significant matters that occur in the context of an internal investigation, in accordance with its Principle 11 obligation.[41] While this does not explicitly apply

36 SFO Operational Handbook, Corporate Co-operation Guidance, at p. 5, https://www.sfo.gov.uk/download/corporate-co-operation-guidance/.

37 SFO Operational Handbook, Corporate Co-operation Guidance, at footnote 5, https://www.sfo.gov.uk/download/corporate-co-operation-guidance/.

38 Speech by Alun Milford, then General Counsel, SFO, at the Cambridge Symposium on Economic Crime 2017, Jesus College, Cambridge, 4 September 2017.

39 *SFO v. Airbus SE* (Case No: U20200108).

40 *SFO v. G4S Care and Justice Services (UK) Limited* (Case No: U20201392).

41 For dual-regulated firms, the PRA's Fundamental Rule 7 obligation will also apply. https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/new-bank/Fundamentalruleprinciples.

to witness interviews, the FCA Enforcement Guide makes clear that if the FCA is ultimately asked to rely on submissions or an investigation report in the context of its own decision-making powers, it would ordinarily expect the firm to provide the underlying material, which could include notes of witness interviews, in addition to the report itself.[42] While the level of information will undoubtedly differ from case to case, the FCA has indicated that an oral report may not be sufficient and that information should be shared in a transparent manner, with a proper record.[43] Furthermore, if an individual performing a controlled function or a member of senior management is suspended, a firm must submit a Form C explaining the reasons for suspension.[44]

The guidance surrounding co-operation with the authorities and what is expected is evolving. In cases where the company or its employees are at risk of further investigation, prosecution or civil action, the company will want to consider the benefits that early co-operation may bring. However, whether it is in the interests of the company to co-operate will depend on the facts of each case.

Identifying witnesses and the order of interviews 7.5

Where interviews are to be conducted, the company or its representatives, or both, should seek to interview all company personnel who were involved in the facts under investigation, including those who should have been involved by virtue of their position. Reporting lines of those involved should also be considered. The witness list may expand as more information becomes known, and therefore should be reviewed regularly.

Employees generally have a duty to co-operate and are likely to owe a duty of candour towards their employer, and a failure to comply could result in disciplinary action.

Where there is a whistleblower, it may be preferable to interview him or her at the start of the process. The structure of an investigation is very fact-specific, but, broadly, the order of other interviews should be based on the level of risk that the witness poses to the business, beginning with those who present the least risk to the company. For the most part this is likely to follow levels of seniority, starting with lower-level employees and leaving senior management until later. Timing considerations sometimes mean witness interviews need to be taken out of the normal order. For instance, it is generally advisable to ensure that any employees who may be about to leave the company (either permanently or for temporary absence such as maternity leave) are interviewed beforehand and while they still owe a duty to the company to co-operate. In circumstances where there are a number of individuals to be interviewed, consideration should be given to the creation of a 'leavers list' to ensure that potential witnesses who resign from the company are flagged to those undertaking the witness interviews.

See Chapter 19 on whistleblowers

See Section 7.6

42 FCA Enforcement Guide, para. 3.26.

43 Speech by Jamie Symington, then Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA, at the Pinsent Masons Regulatory Conference 2015, 5 November 2015.

44 SUP 10.13 Changes to an approved person's details.

The benefit of this approach is that the company may be better positioned to obtain an overall sense of the extent of the issues before focusing on particular areas of risk. Lower-level employees are generally more likely to communicate openly, although it is important that sensitive or confidential information is not referred to unless strictly necessary as there is risk that information may be shared.

While it may be appropriate to conduct early interviews with senior employees to obtain initial accounts (particularly where there is likely to be more than one opportunity to interview), generally members of senior management should be interviewed when the investigation is further advanced. Typically, senior employees are more likely to pose a greater risk from the perspective of corporate liability and therefore it is important that any potential risks are identified beforehand. Under the principle of identification, in the United Kingdom a company can be criminally responsible for the actions of those employees that represent the 'directing mind and will' of that company,[45] generally restricted to board directors, the managing director and other senior officers who carry out management functions on the company's behalf.[46] The principle of identification is explored in more detail in Chapter 1.

This can cause difficulties when interviewing board members and senior management who may be the 'client' for the purposes of the investigation but who may need to be interviewed in the context of their own involvement. For the most part this can be avoided by identifying the 'client' at the outset of the case as made up of a group of senior employees or board members with no involvement in matters under investigation. However, depending on the size of the company and the nature of the case, this is sometimes unavoidable and therefore the basis on which the interview is being conducted must be made clear to the witness.

See Chapter 5 on beginning an internal investigation

There are a number of statutory exceptions to the principle of identification, and the government has been examining the case for reform of the law on corporate liability for economic crime.[47] A recent, long-awaited development is that the Law Commission has been tasked by the Ministry of Justice to undertake a review of the law relating to the criminal liability of non-natural persons, including companies, and has been asked to provide options for reform. It is expected to report towards the end of 2021.[48]

Under section 7 of the Bribery Act 2010, a corporate can be criminally liable for failing to prevent the acts of its employees or agents unless it can show that it had adequate procedures in place to prevent bribery from taking place. Two corporate offences of facilitating tax evasion under the Criminal Finances Act 2017[49] also adopt a failure-to-prevent model, with criminal liability attaching for the acts of persons acting on the company's behalf unless the corporate can show it had reasonable prevention procedures in place. Similarly a corporate can be guilty of

45 *Lennards Carrying Co and Asiatic Petroleum* [1915] AC 705, *Bolton Engineering Co v. Graham* [1957] 1 QB 159 (*per* Denning LJ) and *R v. Andrews Weatherfoil* 56 Cr App R 31 CA.

46 *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153.

47 Call for evidence: Corporate and Economic Crime – 13 January 2017 to 31 March 2017.

48 https://www.lawcom.gov.uk/project/corporate-criminal-liability/.

49 Sections 45 and 46, Criminal Finances Act 2017.

corporate manslaughter if the management or organisation of its activities causes a person's death, and amounts to a gross breach of a duty of care owed by the organisation to the deceased.[50] When the issues under investigation fall within the statutory exceptions, it can be difficult to identify the appropriate individual to interview on behalf of the company. Again, the purpose of the interview and the basis on which it is being conducted needs to be made clear from the outset.

Senior employees are also more likely to owe fiduciary duties to the company and potentially be liable for breaches of those duties and become defendants in civil proceedings by the company. As a result, these interviews should generally take place when the company is in a better position to identify the extent of any breaches.

See Chapter 5 on beginning an internal investigation

Relevant information could also be sourced through interviews with third parties including former employees, customers and contractors. The obvious benefit is that these witnesses may be more forthcoming where there is no risk of disciplinary proceedings. However, third parties cannot generally be required to attend an interview, and unless there is a contractual obligation requiring their attendance, they could refuse to attend. Even in circumstances where a contractual obligation exists this could be difficult to enforce, as could a confidentiality clause. The interview process itself is likely to notify the third party of the investigation and the subject matter under review and depending on the nature of the relationship, it may not be appropriate to interview him or her at that time, particularly when the decision on self-reporting is outstanding. The timing of these interviews would depend on the facts of each case.

When to interview 7.6

The timing of interviews can be influenced by a number of factors, including the stage of the investigation and whether or not any record of interview would be covered by legal privilege. Scoping interviews usually take place at the outset of an investigation, most likely with a few individuals who have a general knowledge of the subject matter under investigation.

See Section 7.11 and Chapter 36 on privilege

Substantive interviews are likely to be most effective once the bulk of any document review has taken place. This will allow for any key documents to be identified and put to the witness, and for questions to focus on the areas of risk. Furthermore, it is best to plan for only one interview; while there may be circumstances where a second or third interview is appropriate, it is by no means guaranteed that the witness would agree.

Timing of the interviews can pose particular difficulties when there are competing considerations. For example, it may be necessary to delay when the company has a claim for injunctive relief against individuals, to avoid assets being dissipated in advance of a freezing order being granted. However, it could be that there is only a limited amount of time to interview an employee who is leaving the company or the company may need to speak to an individual at short notice to assist in an assessment of whether to self-report. Clearly such factors need to be prioritised.

50 Section 1, Corporate Manslaughter and Corporate Homicide Act 2007.

See Section 7.11 and Chapter 36 on privilege

It is important to allow for a degree of flexibility as certain factors outside the company's control can dictate when an interview should take place. Where the corporate investigation is likely to remain an internal review, there is little risk to the company conducting interviews to a timetable that suits it, although the company will wish to consider whether legal privilege would apply. Where there is suspicion of a criminal or regulatory violation and a formal investigation has commenced, there are a number of risks associated with conducting interviews in parallel with these investigations.

As a general point, any interviews with individuals at risk of criminal exposure should be postponed until all evidence has been secured, to minimise the risk of evidence being destroyed. This is particularly important where a criminal or regulatory investigation is likely. Similar concerns apply where the individuals are potential defendants to civil proceedings by the company.

Both the SFO and the FCA place significant emphasis on the first accounts of witnesses, and take the view that they can help inform an understanding of what went on and allow for the accuracy or integrity of a witness to be tested. However, depending on the facts of the case, this view can often be misplaced; the first account given by a witness is not necessarily always the best one, particularly in complex investigations that span a number of years and where there is extensive underlying material. The quality of a witness's evidence can often be improved having been given the opportunity to review the evidence and recall the context. Nonetheless, the SFO and FCA have increasingly sought to place restrictions on interviews of key suspects in corporate investigations and may seek to prevent them altogether.

In such circumstances it may be prudent for a company to seek to agree an approach with the authorities prior to conducting any interviews.

The authorities are also increasingly sensitive to the risks of witness contamination, and a company whose conduct of witness interviews has caused prejudice to a criminal or regulatory investigation could be subject to serious criticism. At best this could involve comment or views that are unhelpful for the company; at worst this could include allegations of perverting the course of justice. In 2016, the then-Director in Enforcement at the FCA, observed that firms must take care not to take steps that might prejudice an FCA investigation and suggested that in certain circumstances it may prefer that a firm does not commission its own investigation, for example, in criminal investigations where alerting the suspects could have adverse consequences.[51] Mark Steward, Director of Enforcement and Oversight at the FCA has commented on the importance of an 'independent public body investigation' being able to conduct itself without 'the crime scene being trampled over'.[52] The SFO has similarly made clear that corporate investigations that 'trample over the crime scene' are unhelpful and that integrity of evidence,

51 Speech by Jamie Symington, then Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA at the 2nd Annual GIR Live London, 28 April 2016.

52 Speech by Mark Steward, Director of Enforcement and Oversight, FCA, at the 14th Annual Corporate Accountability Conference, Congress Centre, London, 9 June 2016 (as reported by GIR on 10 June 2016).

especially regarding witness accounts, should be respected,[53] and has noted that internal investigations may result in first accounts of witnesses being taken, delivered or recorded in a form which may be less than full and accurate, as opposed to recording the account by way of a transcript.[54] The SFO's former Joint Head of Bribery and Corruption, during a speech in 2018, commented: 'The data needs to be identified, collected, preserved and analysed in a way that does not tip off potential suspects into deleting data and protects its integrity and continuity.'[55]

Witness interviews should always be conducted in a manner that minimises the risk of contamination or prejudice.

When a criminal or regulatory investigation is anticipated or already under way, a company may wish to consider engaging with the authorities at an early stage to avoid any criticism that might follow. However, engaging with the authorities may not necessarily be appropriate in every case and runs the risk of loss of control. Each case will need to be assessed on its specific facts and surrounding circumstances.

Planning for an interview 7.7

Interviews in the context of a corporate investigation can be conducted by various people: internal or external lawyers, accountants, forensic experts, specialist investigators, HR or compliance officers, and others. Careful thought should be given to who is best placed to undertake them.

As a general rule, where a company is engaged in a corporate investigation into allegations of criminal or regulatory misconduct, it is preferable to have lawyers (internal, external or both) present at interviews to take notes and identify the key risk areas, to enable confidentiality, and for any claim to privilege to be strengthened. Generally, it is preferable for the same person or persons to conduct the interviews of those witnesses who provide similar types of information. This will allow for consistency of approach and for the credibility of witnesses to be more readily assessed. It is also preferable to have two interviewers present to allow for one to take notes while the other asks questions.

Where external lawyers have been instructed, they should generally conduct the interviews. External lawyers often bring (and importantly are seen to bring) expertise, objectivity and independence, which can be very important when assessing the credibility of the investigation. Although it can bring a degree of formality that can make the experience more daunting for the witness, the use of external lawyers will strengthen a claim to legal privilege.

Where external lawyers have not been instructed, the company may consider resourcing the process internally either by using compliance personnel, internal auditors or HR officers or by using in-house lawyers. Either way, those

53 Speech by Ben Morgan, then Joint Head of Bribery and Corruption, SFO, at the Global Anti-Corruption and Compliance in Mining Conference 2015 on 20 May 2015.

54 Speech by David Green QC, then Director, SFO, at the GIR Roundtable, 27 July 2015.

55 Speech by Camilla de Silva, then Joint Head of Bribery and Corruption, SFO, at the ABC Minds Financial Services conference, 15 March 2018.

conducting the interview should not have had any involvement in the allegations under review. While the use of non-lawyers may decrease the levels of concern among employees, in general they may be less skilled in conducting these types of interviews and less familiar with the issues that may arise. In-house lawyers will have a good understanding of the business and legal advice given to the company will generally be privileged in the United Kingdom. However, the protection of legal privilege will not apply to advice given by in-house lawyers in the context of European Commission related investigations,[56] and it may be necessary in those circumstances to engage external lawyers.

See Section 7.11 and Chapter 36 on privilege

Where forensic experts (internal or external) are also engaged it may be prudent to involve them in interviews with key individuals. If so, it is generally advisable for these interviews to be conducted alongside internal or external lawyers to ensure that the contents can be covered by the company's confidentiality and privilege, as appropriate, and to strengthen a claim to this privilege.

Prior to the interview, a core bundle of documents relevant to the particular witness should be prepared. Consideration should be given to whether the witness is given access to documents, either before or during an interview, or as part of staged disclosure, and what documents, if any, should be put to the witness. Referring to documents can be a very useful tool to assist in refreshing a witness's memory and to allow for specific comment. Key documents can be put to provide a better understanding of their content and to give an opportunity for the witness to provide an explanation.

In general, copies of confidential or sensitive documents should not be given to witnesses where there is a risk these could be shared or used contrary to the company's interests. In complex matters, providing pre-interview disclosure will enable the witness to prepare; however, where documents are provided to the witness, this should be done on a restricted and confidential basis with the requirement that they are either returned or destroyed at the conclusion of the interview. It is preferable that a witness is not given documents that he or she has not previously seen. Where the interview is to be conducted remotely, access could be given to material on a secure data sharing platform or alternatively screens could be shared. However, the need for confidentiality and security of data remains.

See Chapters 5 and 6 on beginning an internal investigation; and 11 on production of information to authorities

The provision of documents may give rise to data protection issues, particularly in light of the company's obligations under the data protection principles[57] and where multiple jurisdictions are involved.

A detailed interview plan can be useful to ensure that all relevant questions are put to the witness, although the interviewer should not feel restricted by this. In general, topics should be addressed in a chronological order that develops facts in a logical way.

Regarding the provision of topics in advance of an interview, it is generally helpful to indicate the main areas that may be covered to assist the witness to prepare, particularly where the subject matter is complex. However, giving a list

56 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission*, Case C-550/07 P.

57 Article 5, General Data Protection Regulation.

of detailed questions is generally not appropriate, and a witness who has had the opportunity to script his or her answers is less likely to be considered credible. Furthermore, questions are likely to evolve as the interview progresses. There is also a risk that the questions might be shared.

Interviewers should ask questions in a measured and courteous manner with a clear and professional tone. There is little point in adopting an aggressive approach or engaging in lengthy cross-examination; this is unlikely to be effective and could give rise to criticism, or employment or personal injury claims. A skilled interviewer will seek to put the witness at ease before addressing the key topics. Where there are two interviewers, different interviewing styles can often be effective.

Conducting the interview: formalities and separate counsel 7.8

Professional obligations can affect how witness interviews are conducted. Solicitors have a general duty to act in their client's best interests,[58] they must not take unfair advantage of a third party,[59] and they must not take unfair advantage of an opposing party's lack of legal knowledge where they have not instructed a lawyer.[60] These duties do not always align and it is therefore important to balance the competing requirements.

The interviewer should be satisfied that the witness understands the basis on which he or she is being interviewed, the purpose of the interview and the use that could be made of the information provided, because this may impact its admissibility.

In the United States, an *Upjohn* warning is given at the start of the interview, where lawyers are present. This practice is often adopted in many investigations in the United Kingdom, even where there is no involvement of US authorities at that time. The warning sets out that:

- The lawyers represent the company and not the employee/witness.
- Privilege in the interview belongs to the company and not the employee.
- The company might choose to waive its privilege and disclose matters discussed in interview to the authorities.

Upjohn warnings derive from the case of *Upjohn Co v. United States*,[61] where it was held that the privilege that attaches to communications between a company's lawyers and its employees is the company's privilege, and not that of its employees. While there is no formal requirement for these warnings to be given in the United Kingdom, it is considered best practice to do so.

The witness should be reminded of the confidential nature of the interview and, where appropriate, be told that it is a fact-finding exercise. However, if a company has decided to waive privilege prior to the interview and provide details to the authorities, the *Upjohn* warning may need to be strengthened. The company could

58 Principle 4, SRA mandatory principles.

59 Chapter 11, SRA Code of Conduct.

60 Chapter 11, SRA Code of Conduct.

61 *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

consider whether to give a more formal caution, similar to that given by the police when investigating suspects, although this would rarely be required. If necessary, the witness should be told that while not part of a disciplinary process, the information provided could inform a decision on whether to instigate disciplinary action.

The company should consider whether its own legal advisers can advise the witness or whether to allow the witness to have his or her own lawyer in attendance. The company may wish to offer to pay for the independent legal adviser. Clearly a company cannot prevent its employees obtaining legal advice of their own volition and expense; however, it can control who can be present in an internal interview. If an authority investigation is under way, the witness may have contractual rights or rights under an insurance policy (D&O insurance) to fund an independent legal adviser. Former employees may have an indemnification or contractual right as part of their exit package.

Those witnesses who appear to be at little risk of criminal or regulatory exposure are unlikely to need independent counsel to protect them against any risk of self-incrimination, and the provision of an *Upjohn* warning or a similarly worded preamble should suffice. However, a company may nonetheless offer separate legal advice to these witnesses if this would allay their concerns or ensure that appropriate advice is given (including from an employment or civil perspective). Perhaps most importantly, an independent adviser's role will assist preparation and increase the likelihood that the individual will give their best account. Moreover, it is often not easy to predict where risks may be at an early stage. Where the interview is conducted remotely and the witness is advised by an independent legal adviser, thought should be given to allowing a separate remote consultation room and access to that legal advice that preserves confidentiality and privilege.

The provision of separate counsel is particularly important where there may be a conflict of interest between the company and a witness. This can arise where a witness is a whistleblower or at risk of criminal or regulatory investigation or where the company could be implicated in corporate wrongdoing. In these circumstances the interests of the company and the witness may not align and it would be prudent to consider suggesting independent counsel. While this might delay the interview to allow advice to be given, it ensures that the witness has had the opportunity to obtain his or her own legal advice and, depending on the facts, could make the interview more effective. However, the involvement of an independent legal adviser could also result in the witness being less inclined to attend the interview or answer questions, although an employee would then be at risk of disciplinary action for not co-operating.

The decision when to offer independent legal advice can also depend on the account given by the witness, and it may be appropriate to stop interviews if witnesses give an account that indicates that the company has a potential civil claim against them or that they are making potentially criminal admissions.

Ultimately it would be difficult for witnesses to assert that they had not been fully informed where they had been separately represented, or that the interviewer or company had taken an unfair advantage.

Conducting the interview: whether to caution the witness 7.9

Where a witness may be suspected of involvement in a criminal offence, a caution may be considered. A caution is used by police officers and other investigators when conducting interviews of suspects to ensure that any resulting account (or refusal to answer questions) is admissible in criminal proceedings.[62]

Section 67(9) of the Police and Criminal Evidence Act 1984 (PACE) provides that 'persons other than police officers who are charged with the duty of investigating offences' shall have regard to the relevant provisions of the PACE Codes of Practice, and Code C 10.1 of the Codes sets out the requirement to caution.

This duty applies to SFO investigators,[63] but is not restricted to state authorities and can also apply to private store detectives[64] and commercial investigators who are appointed by a company to investigate its employees for the commission of criminal offences.[65] Importantly, however, it does not apply in the context of an internal investigation where the sole purpose is to determine what recommendations should be made to an internal disciplinary panel.[66] It is therefore unlikely to apply in circumstances where an employer investigates allegations that could give rise to disciplinary action and where the sole purpose of the investigation was to inform the company how to respond.

Where criminal offences are being considered, section 67(9) would only apply if the investigator was charged with investigating or charging criminal offences at the time.[67] This would arise in circumstances if the interviews had been delegated to those conducting the investigation and where they were effectively acting on behalf of a criminal authority. It would require the authorities to sanction the taking of a suspect's account with a view to it being used in a criminal trial. In light of the authorities' general reluctance for a company to conduct interviews with suspects, particularly when it involves obtaining first accounts, it is unlikely that this situation would arise, and therefore a caution is unlikely to be required.

Conducting the interview: record-keeping 7.10

A record can be kept of a witness interview in a number of ways. It could be audio-recorded and transcribed. A verbatim record would exist, removing the risk of any challenge to the accuracy of what was said, and the recording would capture the tone and any pause or emphasis, which can often give context and allow for an overall assessment. However, it could affect the witness's account by adding an element of formality, potentially having an unsettling effect on the interviewee and making him or her less forthcoming. More importantly, there is significant uncertainty over whether legal privilege would apply to a recording, particularly where the interview has been conducted as a fact-finding exercise. Even where

See Section 7.11 and Chapter 36 on privilege

62 Code C, 10.1 PACE Codes of Practice.

63 *R v. Director of the Serious Fraud Office, ex p Saunders* [1988] Crim LR 837.

64 *Bayliss* (1993) 98 Cr App R 235.

65 *Twaites and Brown* (1990) 92 Cr App R 106.

66 *R v. Welcher* [2007] EWCA Crim 480.

67 *R v. Seelig* [1992] 1 WLR 148 and *Joy v. Federation against Copyright Theft* [1993] Crim LR 588.

privilege can be properly asserted, it is likely to be challenged by the authorities, and where a transcript exists, the authorities are likely to request a copy.

An alternative approach is for the legal adviser to prepare a note of what the witness has said. Legal privilege is more likely to apply in circumstances where notes contain some form of legal comment, advice and analysis. This may include the lawyer's own impressions and assessment of the interview. Alternatively, two sets of notes could be prepared, one containing the factual account and one containing the lawyer's own views. If so, at a minimum, the authorities are likely to seek a copy of the factual account.

The company will need to decide whether to provide the witness with a copy of the note. Where it is likely to rely on the witness's testimony in civil proceedings, it may be helpful to agree a note at an early stage to limit any future challenge to its accuracy. This carries the risk that it may be passed on and any applicable privilege would be lost, and may cause issues if the account is materially disputed.

Where proceedings are anticipated, there are some advantages in preparing a witness statement at an early stage. If the witness decides at a later date not to co-operate or for whatever reason he or she is no longer able to assist, the company may be able to rely on the evidence given, or compel the witness to attend and give evidence having already taken a record of the witness's evidence. However, even if privilege can be maintained, it is likely the authorities would nevertheless seek a copy.

Where interviews are conducted remotely, steps should be taken to ensure that the interview remains confidential and to limit the risks of it being recorded either deliberately or inadvertently.

7.11 Legal privilege in witness interviews

Legal privilege in witness interviews raises a number of complex issues and a claim to privilege will be closely scrutinised by the authorities. Over the past few years, the SFO has claimed that it does not want to undermine legal privilege, which is respected as a legal principle and fundamental right. In a speech made in November 2018, the then-Joint Head of Fraud at the SFO stated: 'We do not, and never have required the waiver of privilege, but if you want to waive privilege that will be viewed as a positive feature. We are very disinterested in privileged material that is the proper legal advice you are receiving from your solicitors.'[68] In June 2018, the former Joint Head of Bribery and Corruption noted: 'Recent cases have highlighted that the SFO will challenge overly ambitious claims to privilege and, in specific circumstances, are obliged to do so.'[69] Furthermore, a company's decision to structure its investigation so as not to attract privilege will be viewed as significant co-operation. 'We are not interested in material that is genuinely

68 Speech by Hannah von Dadelszen, then Joint Head of Fraud, SFO, at the Pinsent Masons Business Crime and Compliance conference, London, 9 November 2018.

69 Speech by Camilla de Silva, then Joint Head of Bribery and Corruption, SFO, at the 12th International Pharmaceutical and Medical Device Compliance Congress, Vienna, 14 May 2018.

privileged. We do however reserve the right to question, probe and where necessary challenge assertions of privilege which are[,] in our view, excessive.'[70]

More recently, in an April 2019 speech, SFO Director Lisa Osofsky said:

> *First, in carrying out their own investigation, we need to see the ultimate objective of cooperating with law enforcement by preserving vital evidence such as first-hand accounts and witness testimony. This is different from when a company calls in a team of lawyers and then throws the blanket of Legal Professional Privilege over all the material they have gathered – especially material that we in law enforcement need to assess individual culpability, which is the very same material that individuals may need to defend themselves. That is not cooperation: courts do not like it, it does not help law enforcement, it does not make the job of dispensing justice fairly any easier.* [71]

She commented that legal professional privilege is recognised as a 'fundamental right in our legal system', but that companies can 'waive that privilege if they wish to cooperate with the Serious Fraud Office. This was a precursor to the Co-operation Guidance that followed.

In a section on 'Witness Accounts and Waiving Privilege', the SFO's Corporate Co-operation Guidance states:

> *In conducting internal investigations, some organisations will have obtained accounts from individuals. . . . Organisations seeking credit for co-operation by providing witness accounts should additionally provide any recording, notes and/or transcripts of the interview and identify a witness competent to speak to the contents of each interview.*[72]

When an organisation elects not to waive privilege, the SFO nonetheless has obligations to prospective individual defendants regarding disclosable materials.

The existence of a valid privilege claim must be properly established. During the investigation, if the organisation claims privilege, it will be expected to provide certification by independent counsel that the material in question is privileged. If privilege is not waived, and a trial proceeds, where appropriate, the SFO will apply for a witness summons under section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965.

An organisation that does not waive privilege and provides witness accounts does not attain the corresponding factor against prosecution that is found in the DPA Code but will not be penalised by the SFO.

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70 Speech by Camilla de Silva, then Joint Head of Bribery and Corruption, SFO at the Herbert Smith Freehills Corporate Crime Conference 2018, 21 June 2018.

71 https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/.

72 SFO Operational Handbook, Corporate Co-operation Guidance, at pp. 4-5, https://www.sfo.gov.uk/download/corporate-co-operation-guidance/.

If a company chooses not to co-operate with the SFO, it is likely that it will not be offered a DPA. The SFO's Corporate Co-operation Guidance states: 'The Court of Appeal has not ruled out a court's consideration of the effect of an organisation's non-waiver over witness accounts as it determines whether a proposed DPA is in the interests of justice.'[73]

The SFO referred to its expectations in earlier speeches, with the former Joint Head of Bribery and Corruption stating in 2018 that the SFO will only invite a company to enter into a DPA where that company has 'genuinely cooperated with the SFO' and that 'the DPA Code provides that co-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them.' The former Joint Head of Fraud confirmed: 'We are going to ask a lot of companies who self-report to us.'[74]

However, the timing of co-operation was referenced in the judgment concerning the recent DPA reached between the SFO and G4S Care and Justice Services (UK) Limited in July 2020:

> *[T]here were aspects of the company's co-operation in this case which were less than full at the outset. Until October 2019 it could not be said that the level of co-operation was exemplary. This affects the level of discount to be applied to the financial penalty…. It should not be 50% because full co-operation with the SFO investigation came relatively late in the day.*[75]

There is a risk that disclosing information relating to witness interviews could result in a waiver of privilege more generally. Ultimately the information could be shared with authorities in other jurisdictions or be disclosable in criminal proceedings against third parties (e.g. former employees) which might follow from the company self-reporting, or in other proceedings that may not be in the company's best interests. While this risk may in part be mitigated by a limited waiver agreement, this would not necessarily extend to other jurisdictions and is unlikely to prevent the SFO from disclosing documents in criminal proceedings if statutory obligations require it to do so. Once disclosed or shared with authorities in other jurisdictions, confidentiality may in due course be lost, for example if a defendant relies on a privileged document at trial. The Law Society of England and Wales provides guidance to lawyers about their duty to act in the best interests of clients, including maintaining their claim to privilege.

The law surrounding legal privilege and records of interviews is complex and evolving. It has recently been made more complicated by the narrow interpretation of privilege that has been taken in several recent court decisions. These cases are summarised below.

See Chapter 36 on privilege

73 SFO Operational Handbook, Corporate Co-operation Guidance, at p. 5, footnote 5, https://www.sfo.gov.uk/download/corporate-co-operation-guidance/.

74 Speech by Hannah von Dadelzsen, then Joint Head of Fraud, SFO, at the Pinsent Masons Business Crime and Compliance conference, London, 9 November 2018.

75 *SFO v. G4S Care and Justice Services (UK) Limited* Case No: U20201392,

It was held in *The RBS Rights Issue Litigation*[76] that the interview notes prepared by the bank's legal representatives were not subject to legal advice privilege (it was accepted that litigation privilege did not apply). The court found that, for the purposes of legal advice privilege, the 'client' consists only of those employees authorised to seek and receive legal advice from the lawyer. In relation to interviews with witnesses, it found that privilege does not extend to information provided by employees and ex-employees outside the client group. Furthermore, it was held that in order for the lawyers' working notes of the interviews to attract legal advice privilege, the notes must contain 'some attribute or addition such as to betray or at least give a clue as to the trend of advice being given to the client by its lawyer'.[77] The court held that the bank had failed to demonstrate this.

This judgment was followed by the High Court in *Director of the SFO v. ENRC*.[78] At first instance, Mrs Justice Andrews rejected ENRC's argument that legal advice privilege applied to lawyers' notes of interviews, and found that the question of whether legal advice privilege applied was an evidential one as to whether the notes demonstrated the legal analysis and 'tenor' of the advice.[79] In her judgment, Andrews J referred to examples of the type of evidence required to attract legal advice privilege, to include a qualitative assessment of the evidence or any thoughts about its importance or relevance to the inquiry, or indications of further areas of investigation that the author of the notes considered might be fruitful. It was noted in the judgment that the betrayal of further lines of investigation would not in itself have been sufficient to render the notes privileged.[80]

Applying the case of *Three Rivers (No. 5)*,[81] Andrews J held that legal advice privilege would only apply to communications between the lawyer and those authorised by the company to obtain legal advice on its behalf, and therefore not to employees or former employees more widely.[82]

Andrews J's decision was appealed, and although the Court of Appeal did not need to reach a decision on issues relating to legal advice privilege (because of its decision on litigation privilege, see further below in this section), it nevertheless gave its view (*obiter*) on how it would have decided those issues. The Court would have found that *Three Rivers (No. 5)* had been correctly interpreted by Andrews J (and by courts on other occasions) as having created a general rule that, in a corporate context, only the communications of those employees authorised by the company to seek and receive legal advice on its behalf are capable of attracting legal advice privilege.[83] On this basis, Andrews J was right to conclude that the interview notes were not covered by legal advice privilege. Significantly

76 *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

77 *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) at para. 107.

78 *Director of the SFO v. ENRC* [2017] EWHC 1017 (QB); [2017] 1 WLR 4205.

79 *Director of the SFO v. ENRC* [2017] EWHC 1017 (QB); [2017] 1 WLR 4205 at para. 97.

80 *Director of the SFO v. ENRC* [2017] EWHC 1017 (QB); [2017] 1 WLR 4205 at para. 180.

81 *Three Rivers District Council v. Governor and Company of the Bank of England (No. 5)* [2003] EWCA Civ 474.

82 *Director of the SFO v. ENRC* [2017] EWHC 1017 (QB); [2017] 1 WLR 4205 at para. 180.

83 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006; [2019] 1 WLR 791 at paras. 123 and 133.

however, the Court gave a strong indication that it felt *Three Rivers (No. 5)* had been wrongly decided and would have been in favour of departing from that case had it been open to it to do so, although ultimately it felt this is a question that only the Supreme Court can determine.[84]

In addition, it had been argued by ENRC that the interview notes constituted lawyers' working papers and as such were covered by legal advice privilege. While Andrews J had rejected this argument at first instance, the Court of Appeal declined to give a view.[85]

ENRC's claim for litigation privilege was also rejected by Andrews J at first instance, who was not satisfied that, on the facts, litigation was in reasonable contemplation at the pertinent times or that, in any event, the dominant purpose of the documents coming into existence was for use in the conduct of litigation. The High Court held that an SFO investigation was seen as a preliminary step and that a prosecution only becomes a real prospect once evidence is discovered to substantiate the allegation, or where the accusations appear to be true.[86]

The Court of Appeal took a different approach to the availability of litigation privilege to ENRC's interview notes and disagreed with Andrews J's conclusion of the facts, holding that at the time the documents came into existence, ENRC did reasonably contemplate a prosecution by the SFO.[87] While the Court did not necessarily disagree with Andrews J's view that an SFO investigation in itself could not constitute adversarial litigation for the purposes of litigation privilege, it was of the view that:

> *When the SFO specifically makes clear to the company the prospect of its criminal prosecution (over and above the general principles set out in the [Self-Reporting] Guidelines), and legal advisers are engaged to deal with that situation, as in the present case, there is a clear ground for contending that criminal prosecution is in reasonable contemplation.*[88]

In addition, although the Court did not accept ENRC's alternative argument that once an SFO investigation is in reasonable contemplation so too is a prosecution, it held that in this case the evidence 'pointed clearly towards the contemplation of a prosecution if the self-reporting process did not succeed in averting it'.[89] Furthermore, the Court did not feel that the uncertainty a company inevitably experiences when faced with whistleblower allegations is a bar to litigation privilege.[90] Finally, the Court deemed as erroneous Andrews J's suggestion that

84 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006; [2019] 1 WLR 791 at para. 130.
85 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006; [2019] 1 WLR 791 at para. 142.
86 *Director of the SFO v. ENRC* [2017] EWHC 1017 (QB); [2017] 1 WLR 4205 at paras. 150 to 163.
87 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006; [2019] 1 WLR 791 at para. 93.
88 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006; [2019] 1 WLR 791 at para. 96.
89 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006; [2019] 1 WLR 791 at para. 97.
90 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006; [2019] 1 WLR 791 at para. 98.

litigation privilege cannot apply until a defendant either knows the full details of what is likely to be unearthed or a decision to prosecute has been taken.[91]

As to whether the dominant purpose of the documents coming into existence was for conduct of the litigation, the Court of Appeal was satisfied that this requirement was met in this case and disagreed with Andrews J that ENRC had always intended to show the documents to the SFO, even though it had indicated that it would give full and frank disclosure. It held that just because solicitors prepare a document with the ultimate intention of showing it to the opposing party, that does not automatically deprive the preparatory legal work they have undertaken of litigation privilege.[92] Of particular importance was the Court's view that documents prepared for the dominant purpose of avoiding or settling litigation are just as much covered by litigation privilege as those prepared for defending it.[93] The Court of Appeal concluded that the interview notes were covered by litigation privilege, as a prosecution by the SFO was in reasonable contemplation at the time they came into existence and they were created for the dominant purpose of resisting or avoiding it.

ENRC provides very helpful guidance and several principles of wider application to assist corporates who find themselves in similar situations. However, it also highlights the extent to which questions of litigation privilege in the context of internal investigations turn on the facts (as indeed is the case with all questions of privilege).

Three other recent cases also illustrate the importance of the facts of the case when it comes to establishing the status of privilege, and a company should consider this throughout the internal investigation so it can better judge whether the notes of a witness interview are likely to be privileged at any stage.

In *Bilta & Ors v. RBS & Anor*,[94] the High Court's Chancery Division was concerned with the status of documents created during an internal investigation carried out by RBS's solicitors, relating to a tax dispute with Her Majesty's Revenue and Customs (HMRC). The documents included transcripts of interviews with employees and ex-employees that had come into existence following HMRC sending RBS a letter claiming there were sufficient grounds to deny it a certain amount of input tax. Bilta and various other claimants subsequently sought disclosure of these documents, which was resisted by RBS on the basis that they were subject to litigation privilege. The Court held that the documents were indeed protected by litigation privilege. As to whether litigation could be said to be reasonably in contemplation at the time the documents came into existence, the sending of HMRC's letter was considered significant and found to have marked a 'watershed moment', and was likened to a letter before claim. While RBS may also have hoped to dissuade HMRC from proceeding, it was found that this was only a subsidiary purpose subsumed into the dominant purpose.

91 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006; [2019] 1 WLR 791 at para. 100.

92 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006; [2019] 1 WLR 791 at paras. 102 and 112.

93 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006; [2019] 1 WLR 791 at paras. 102, 113, 118.

94 *Bilta & Ors v. RBS & Anor* [2017] EWHC 3535 (Ch).

In *R (for and on behalf of the Health and Safety Executive) v. Paul Jukes*,[95] following a fatality at work, solicitors instructed by the employer concerned carried out an investigation. A statement was obtained from the appellant Mr Jukes, a former manager, as part of the internal investigation, after the Health and Safety Executive (HSE) had begun its investigation but before it commenced proceedings. This statement was relied on heavily during the subsequent prosecution of the appellant, and following his conviction he appealed, partly on the basis that the trial judge had been wrong to allow the prosecution to rely on the statement, as it was protected by privilege. The Court of Appeal did not accept this argument and found that at the time the statement was made there was no evidence that anybody within the company knew what the company's and the HSE's investigations would unearth, such that it could be said that prosecution by the HSE was reasonably in contemplation. It was held that the statement was not therefore protected by litigation privilege.

In *Jukes*, the Court of Appeal approved part of the first instance *ENRC* decision. The Court of Appeal in *ENRC* addressed this potential issue but felt that its conclusions were not invalidated by *Jukes*, on the basis that the endorsement of Andrews J's judgment in that case had been *obiter*.

Notes of interviews and the status of privilege were further considered by the High Court in *R (on the application of AL) v. SFO*.[96] A judicial review was brought against the SFO for failing to pursue Sarclad Ltd (initially anonymised as XYZ Ltd), for non-compliance with its DPA through not disclosing the full interview notes, having instead accepted oral proffers.[97] The SFO's position was that there was no need to obtain the interview notes because the company's claims of privilege were 'not obviously wrong',[98] and that it had exercised legitimate prosecutorial discretion in accepting the oral proffers. In the judgment, the SFO was criticised for (among other things) its failure to challenge the assertion of privilege and require the notes in circumstances where it believed the material not to be privileged. It was found that, even if the assertion of privilege could be made out (which, in light of recent case law, the court said was not supported), by providing oral summaries the privilege had been waived. The judgment noted the SFO's failure to fully consider whether to require Sarclad to waive privilege over the notes, given its contractual duty to co-operate under the DPA,[99] and whether privilege had been waived, even on a limited basis.

At the time of writing and in the absence of any further judicial interpretation, those conducting internal investigations should therefore be conscious that a claim to privilege of records of interviews with those outside the client group could be subject to challenge, notwithstanding the helpful decision of the

95 *R (for and on behalf of the Health and Safety Executive) v. Paul Jukes*, [2018] EWCA Crim 176.

96 *R (on the application of AL) v. SFO* [2018] EWHC 856 (Admin).

97 *SFO v. XYZ Ltd* (Case No. U20150856). The defendant was subsequently identified in July 2019 as Sarclad Ltd following the acquittals of three Sarclad employees.

98 *R (on the application of AL) v. SFO* [2018] EWHC 856 (Admin) at para. 7.

99 *R (on the application of AL) v. SFO* [2018] EWHC 856 (Admin) at para. 26.

Court of Appeal in *ENRC*, and whether a claim to privilege will be successful will depend on the facts of each case. Where the records could be said to form part of the lawyer's working papers in the context of advice, a claim to legal advice privilege would be strengthened if the notes contained sufficient legal analysis, assessment as to relevance and the 'tenor' of the legal advice. Legal advice privilege will also attach to material that forms part of the continuum of the lawyer–client communications even where those documents do not expressly seek or convey legal advice.[100] For litigation privilege to apply, however, litigation must be in reasonable contemplation, and the dominant purpose of the interviews must be the conduct of that litigation. This will depend on the facts of the case, but where litigation is in contemplation, this should be documented to assist in defending any challenge to a claim for privilege.

See Chapter 36 on privilege

Factors that may strengthen a claim to privilege over interview notes include where, for example, notes arise from interviews with likely potential defence witnesses in contemplated litigation or where interviews are conducted with a view to assessing the potential risk the witness may pose in likely proceedings.

Those conducting investigations may wish to consider the timing of witness interviews in the context of when the likelihood of litigation (civil or criminal) is clearer, in the absence of which there is a risk that claims to privilege of records of witness interviews will be challenged.

Where privilege can be established, the best position may be to ensure that any notes taken during interviews are done so as to strengthen a claim to privilege and to leave any decision on whether to waive privilege until the course of the investigation and interests of the authorities are clearer.

Conducting the interview: employee amnesty and self-incrimination 7.12

As a general point, an employer cannot provide amnesty from criminal or regulatory action. Similarly, an agreement cannot prevent disclosures to regulators or inhibit criminal investigations.

While in theory amnesty against internal disciplinary action could be offered, this is very rare. More commonly, discussions take place with a view to the employee leaving under the terms of a settlement agreement, which can include a financial settlement and avoids the employee being dismissed. Such discussions can take place 'without prejudice', or they may take place as 'protected conversations' and therefore should not take place during a witness interview. These discussions, providing they meet the required criteria, cannot be used as evidence in unfair dismissal proceedings,[101] although, unless the without prejudice rule can genuinely apply, they could be used in whistleblowing or discrimination claims.

See Chapter 13 on employee rights

Though in theory it is possible for an employer to agree a certain course of action (for example, to retain an employee and waive the right to bring

100 *Balabel v. Air India* [1988] 1 Ch 317.

101 Section 111A Employment Rights Act 1996.

disciplinary action), this would not be advisable in circumstances where facts are not yet known or understood. If an amnesty is given, the employer would want to ensure that any waiver against disciplinary action related to closely defined and identifiable incidents only.

Employers also need to be wary of consistency. Where two employees have committed misconduct, allowing one employee to remain and dismissing another would support an unfair dismissal claim that the dismissed employee may bring. The employer would need to justify the difference in treatment, which may be easier to do when an employee has left under the terms of a settlement agreement.

An employee may also seek to claim privilege against self-incrimination and refuse to answer questions on that basis, particularly where he or she is advised by independent counsel. While there may be clear advantages to this approach from a criminal or regulatory perspective, this in itself would not provide a defence against dismissal. An employer could reach a decision to dismiss on the basis of the information that it had at that time. Though it cannot compel employees to answer questions, their failure to do so could be deemed to be unco-operative and in breach of the terms and conditions of employment, resulting in further grounds for disciplinary action. A dismissal for gross misconduct can still be fair in circumstances where a decision has been made not to prosecute, or where the employee has been acquitted of criminal charges for the same offence.[102] Acts that could constitute gross misconduct are broader than criminal offences and the requirement that gross misconduct be 'fair' is lower than the criminal standard of proof.[103]

In addition to employment considerations, it is always possible for an employer to agree not to pursue civil claims against an employee in return for information being provided. However, as set out above, this should generally not be offered until the full facts have been established.

7.13 Considerations when interviewing former employees

In general, unless there is a contractual commitment to do so, former employees can simply refuse to attend a witness interview. It is important to bear this in mind when negotiating an employee's exit, although in reality (depending on the specific contract terms), once the employee has left there may be little a former employer can do to require attendance, even if it enjoys the benefit of a contractual commitment from the employee to co-operate in any future investigation or proceedings. Former employees regulated by the FCA have a duty under Statements of Principle and Code of Practice for Approved Persons (APER) Principle 4 to

102 *Okhiria v. Royal Mail* UKEAT/0054/14/LA.

103 A dismissal for gross misconduct is 'fair' if the employer believed that the employee was guilty of gross misconduct, if it had reasonable grounds on which to base that belief, and if it had carried out as much investigation as was reasonable in the circumstances of the particular case: *British Home Stores Ltd v. Burchell* [1978] UKEAT 108_78_2007. In a criminal trial the standard of proof required is to prove guilt 'beyond a reasonable doubt'.

co-operate with the regulators.[104] It is unlikely that this provision would require them to assist with an internal investigation, and if asked, they could fairly argue that their duty was to the regulator.

Where a former employee is interviewed there are some protections available in respect of whistleblowing, discrimination or victimisation, should they arise in the conduct of the interview or how he or she is treated afterwards. An employer should be wary of giving assurances of anonymity to a former employee in respect of information given, although this could be given on a need-to-know basis. Anonymity should not be guaranteed where regulatory obligations exist or where it could inhibit any criminal investigation, and assurances that any statement provided would not be disclosed to criminal or regulatory authorities should not be given.

See Chapters 5 on beginning an internal investigation and 11 on production of information to authorities

Data protection issues may also arise if the account or statement given by a former employee contains personal data. Care also should be taken in global investigations that data protection rules from other relevant jurisdictions are considered.

See Chapter 40 on data protection

Considerations when interviewing employees abroad 7.14

Interviewing witnesses abroad can present particular difficulties in global investigations. Statutory employment law is generally of geographical rather than universal jurisdiction and, as a result, statutory employment laws of the jurisdiction where an employee is based will always apply, even if the employment contract is governed by English law. Nonetheless the governing law of the contract should also be considered, as should any rights or protections under that contract.

When planning interviews abroad it is crucial that the law and procedure relevant to those jurisdictions are considered. The employment documents (the staff handbook, for example) should be reviewed to ensure that procedures are followed. It is important to consider whether the employee or employer is covered by any regulatory rules within that jurisdiction (as well as the United Kingdom) to ensure compliance with any parallel reporting obligations.

It would be wise to engage local legal advice on local laws and local culture, which should be factored into the interview strategy. Clearly the interviews should comply with local laws, and in particular those relating to employment, data protection, privacy, privilege and blocking statutes. While the English rules of privilege determine whether privilege applies in this jurisdiction, authorities from other jurisdictions may also have an interest, and advice should be sought on how privilege is determined in those jurisdictions.

A witness's procedural rights in the jurisdiction where he or she is based, as well as in the United Kingdom, should also be considered. Compliance with local laws as well as collective consultation and representation rules should be factored in. In addition, the employer should take advice on whether the employee abroad is covered by UK statutory employment rights.

104 The Statement of Principle 4 (see APER 2.1A.3 R) is in the following terms: 'An approved person must deal with the FCA, the PRA and other regulators in an open and cooperative way and must disclose appropriately any information of which the FCA or the PRA would reasonably expect notice.'

See Chapters 5 on beginning an internal investigation and 40 on data protection

Issues often arise regarding access to documents, particularly where there are restrictions on the movement of information from one jurisdiction to another.[105] Employees may also have a right to access and correct notes and files identifying them.[106] The applicable directives, regulations or rules should be considered in advance to ensure compliance with data protection laws.

Finally, maintaining confidentiality can be particularly difficult when interviewing witnesses abroad. Where witness interviews span a number of countries, the risk of information being shared or leaked is greater and measures should be put in place to ensure that confidentiality remains.

7.15 Key points

Witness interviews are a key part of most internal investigations and can provide vital information for the investigation. Internal investigation interviews can take the form of either preparatory interviews at the outset of an investigation or substantive interviews likely to take place once a review of relevant material has taken place.

There can be a tension between the right of a company to investigate allegations of wrongdoing and undertake witness interviews as part of its review, and the expectations of the authorities to be consulted prior to it doing so. Enforcement agencies may seek to restrict how the interviews are conducted or suggest that they be postponed until the authorities have conducted their own investigation. Witness interviews should be conducted in a manner that minimises the risk of contamination or prejudice.

UK enforcement agencies have stated that a refusal to provide details of the accounts given by witnesses in internal investigations could be construed as unco-operative or a breach of regulatory requirements. The provision of this information and the form in which it would be provided needs to be balanced with the need to ensure confidentiality in an investigation and to maintain legal privilege.

Where a company is investigating allegations of criminal or regulatory misconduct, it is preferable to have lawyers (internal, external, or both) present at interviews to take notes and identify the key risk areas that may arise, and to enable confidentiality and for privilege to be asserted, as appropriate. Where external lawyers have been engaged it is preferable for them to conduct the interviews; they often bring (and, importantly, are seen to bring) expertise, objectivity and independence. Preferably there should be two interviewers to ensure all relevant information is captured.

Interviews can be recorded in a number of ways: by recording and transcribing the interview; by counsel preparing notes of the interview; and with the preparation of a witness statement. UK and overseas enforcement agencies are likely to seek details of the accounts provided, and consideration should be given to ensuring legal privilege is capable of being asserted. How an interview is recorded, the

105 The General Data Protection Regulation sets limits on the collection and use of personal data within the EU. The provisions were supplemented by the Data Protection Act 2018 (passed 23 May 2018).

106 Right of access by the data subject, Article 15 of the General Data Protection Regulation.

privilege that may attach to that record, and whether or not to provide details of the witness's account will depend on the circumstances of each case.

Legal privilege in the context of witness interviews raises a number of complex issues and a claim to privilege will be closely scrutinised by the authorities. Notes of interviews with witnesses who fall outside the 'client' group may attract litigation privilege if circumstances allow, but the facts of each case must be carefully considered. There is a risk that disclosing information relating to witness interviews could result in a waiver of privilege more generally.

When conducting the interview, lawyers should be satisfied that the witness understands the basis on which he or she is being interviewed, the purpose of the interview, and the use that could be made of the information provided. While there is no formal requirement to do so, it is best practice for the witness to be given an *Upjohn* warning at the outset and to remind the witness of confidentiality. Where a company has decided to waive privilege prior to the interview, the *Upjohn* (or similar) warning may need to be strengthened. It is unlikely that a formal caution, similar to that given by the police when investigating suspects, would be required.

The company should consider whether its own legal advisers can give advice to the witness or whether to offer (and to pay for) separate independent legal advice, particularly where there may be a conflict of interest between the company and the witness and where the witness is at risk of criminal or regulatory investigation, or where the company could be implicated in corporate wrongdoing.

In general, a company cannot provide a witness with amnesty from criminal or regulatory action. Similarly an agreement cannot prevent disclosures to regulators or inhibit criminal investigations. Amnesty against internal disciplinary action is rare and while it is always possible to agree not to pursue civil claims in return for information being provided, this should generally not be offered until the full facts have been established.

Interviewing witnesses abroad can present particular difficulties in global investigations. It is crucial that the law and procedure relevant to those jurisdictions are considered and that any relevant regulatory rules are complied with. It would be wise to engage local counsel to advise on local laws, regulatory rules and culture to ensure compliance. Any applicable directives or regulations surrounding access to documents should also be considered in advance to ensure compliance with data protection laws. Measures should be put in place to seek to ensure confidentiality.

Appendix 1

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Caroline Day specialises in serious fraud and financial crime. She represents corporates and individuals in complex global investigations. She has led numerous internal investigations on behalf of companies in relation to allegations of financial crime and misconduct, including fraud, theft, corruption, money laundering and environmental crime – including multi-jurisdictional. She advises companies and individuals who are subject to investigations and prosecutions by various agencies including the Serious Fraud Office, the Financial Conduct Authority, HM Revenue and Customs, the Crown Prosecution Service, and the Competition and Markets Authority. Caroline has a particular interest in cross-border cases and her experience extends to MLA requests and extradition. Caroline sits on the executive committee of the Fraud Lawyers Association. Caroline has been recognised in GIR's 100 'Women in Investigations 2018', and listed in *Who's Who Legal Investigations Future Leaders – Partners 2020*.

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Louise Hodges is the head of the criminal department at Kingsley Napley LLP. She specialises in all fraud and business crime litigation, including investigations and prosecutions by the Financial Conduct Authority, the Serious Fraud Office, the National Crime Agency, HM Revenue and Customs, the City of London Police, and the Crown Prosecution Service.

She is a lead partner in the Kingsley Napley financial services group and internal investigations team. Louise has a particular interest in cross-border cases representing companies and individuals. Her cases frequently have an international dimension, including involving the US Department of Justice (DOJ), Federal Bureau of Investigation (FBI), Securities and Exchange Commission (SEC) and US Commodities Futures Trading Commission (CFTC) as well as European prosecutors and regulators, including Consob, BaFin and FINMA.

She was part of the team representing Tesco in the deferred prosecution agreement with the SFO. Louise is past chair of the Fraud Lawyers Association and former vice chair of the European Criminal Bar Association. She is listed as a Global Elite Thought Leader in *Who's Who Legal: Investigations 2020*, *Business Crime Defence 2020* and *GIR Thought Leaders 2019*. She is listed as a Global Leader in *Business Crime Defence – Corporates 2020* and *Investigations 2020*.

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