

Who will foot the bill for pre-investigation interviews with the SFO?

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A review of the personal liability implications for directors of the Serious Fraud Office's new investigatory powers.



COOKIE CONSEN

Nick Ephgrave, the newly appointed director of the Serious Fraud Office, recently described The Economic Crime and Transparency Act 2023 (the Act) as: 'the most significant boost to the [SFO]'s ability to investigate and prosecute serious economic crime in over 10 years.' He did not specify which of the many provisions in the Act he had in mind.

Certainly, the new corporate offence of failure to prevent fraud has attracted much attention, as has the new statutory ability to aggregate 'guilty knowledge' among senior managers of companies for the purposes of corporate criminal prosecutions for a range of offences. But while both sets of provisions place increased focus on the role and knowledge of senior managers in the investigatory phase, they are unlikely to have an immediate impact on directors' exposure to personal liability under UK criminal law. That is because they are both concerned with corporate offences.

Perhaps, Mr. Ephgrave also had in mind the amendment made to section 2 of the Criminal Justice Act 1987 by section 211 of the Act. Less has been said and written about this, but the implications – both for companies and directors – of what amounts to a considerable expansion of the SFO's investigatory powers, deserve some scrutiny. It is also an opportunity to re-visit the question of who pays the costs associated with ensuring directors have access to appropriate legal representation in the vitally important early stages of a criminal investigation.

Expansion of the SFO's power to compel witness evidence



Anyone who has had the misfortune to be on the receiving end of a section 2 notice from the SFO knows quite how wide-ranging the statutory power to compel production of 'information relevant to any investigation' is. The SFO does not publish information about the number of such requests it has issued, but the costs of complying with them can be considerable. That is because section 2 notices are often framed to capture a lot of evidence both in the form of documents and witness evidence from directors as well as other managers and employees working within the companies under investigation. Failure to comply with a section 2 notice is a criminal offence.

Prior to section 211 of the Act the coming into force in January 2024, the SFO's ability to issue section 2 notices other than in cases of international bribery and corruption was limited to those where it had already launched an investigation. That power has now been extended to the pre-investigation phase. In other words, the SFO can now issue section 2 notices in order to help it to decide whether or not to launch an investigation in the first place. This provides a significant boost to its investigatory powers.

Implications of SFO's expanded powers

Reinvigorated by the recent appointment of a new director and keen to burnish its reputation as an effective and independent prosecutor of serious fraud, the SFO is likely to wish to avail itself of its new powers with the result that the number of requests to produce documents or attend for interview is likely to rise. The implications of this for individuals who are required to attend for interview by the SFO at this preliminary stage are considerable.

- First, it should be remembered that the SFO can share information it obtains using its section 2 powers through statutory information sharing gateways with other prosecutors and regulators. Furthermore, it may indeed be compelled to share such information with others whom the SFO may decide to charge with an offence, either as part of the prosecutor's general duty of disclosure or as part of negotiations for a deferred prosecution agreement. So, even if the SFO decides not to launch an investigation, the interview notes may emerge – perhaps years later – in quite a different context.
- Second, under existing [guidance](#) issued by the SFO, the role played by lawyers representing witnesses at interview is restricted in order to encourage 'candour' in answering the questions put to them. For this very reason, the witnesses themselves, especially when they appreciate the importance of their evidence and the uses to which it may later be put, very much seek and welcome legal advice and assistance in preparing for interview. Indeed, the liability risks both in a civil litigation and regulatory context, let alone a criminal context, for a prospective interviewee who has not had access to appropriate legal advice and assistance can be considerable.
- Third, the question of who will pay the relevant legal advice and representation costs of witnesses and the related question regarding for whom any lawyer is acting may not always get the attention they deserve.

Who will pay for legal advice for individual managers and employees?

The first point to emphasise is that this article is concerned with the SFO's expanded powers to interview witnesses as opposed to their separate powers to interview suspects in a formal criminal investigation. In the latter case, few would argue that a suspect requires and indeed is legally entitled to independent legal advice. It is also the case that for any company which has purchased Directors and Officers liability insurance (D&O), the relevant policy would almost certainly be triggered by such an event. What is less clear, is who will pay in circumstances where the individual is not a target of an investigation but simply a witness and what happens where there is no ongoing 'investigation' as such because the SFO is exercising its new pre-investigation powers to compel witness testimony under section 2.

Although every case will be different, a few general points can be made.

- The first issue is whether and, if so, at what stage the company gives consideration to providing the potential witness access to independent legal advice; the assumption being that at least some legal advice is highly desirable. In many cases, the appointment of separate counsel may be viewed as unnecessary, with legal advice instead at least initially being provided by internal or external counsel retained by the company. If the lawyer is employed by the company, however, it should be remembered that his or her primary duty will be to the company. Moreover, any legal professional privilege in advice given is likely to be that of the company rather than that of the individual concerned. Then there is the question whether the SFO would even permit a lawyer retained by and acting for the company rather than the individual to attend any interview. The guidance referenced above suggests that that may be unlikely.
- A second but related issue is who will pay the relevant legal representation costs. If the company's lawyers provide the legal advice, the answer is clear. What is the position though where independent counsel are appointed? In many cases, the answer will be the same, that is, the company will be willing pick up the tab. It is possible though – perhaps particularly in cases where the witnesses sought by the SFO are no longer employed by the relevant company – that this is not the case. Equally, it is possible that there may be a difference of opinion between the witness and the company as to the need for independent legal advice. Whether and to what extent the witness may be entitled to be reimbursed by the company for such legal expenses will depend on the nature and breadth of any indemnity in respect of such costs to which the individual may be entitled under his or contract of employment or otherwise.
- Finally, there is a separate question as to whether any D&O policy purchased by the company will cover the legal representation costs associated with providing advice to potential witnesses – especially in the pre-investigation phase of the SFO's newly expanded powers under section 2. There is no uniformity in the precise triggers for cover in respect of investigation costs under these policies, and that is particularly so with respect to the early stages of an inquiry where insurers are often unwilling to cover such costs on a blanket basis.

There is also a potential coverage complication where the legal advice is given by the same external counsel to both the company and the individuals. Here the challenge may be to separate out and 'allocate' the costs for the individual which would ordinarily be covered and those of the company which would not. There may also be separate coverage questions to be addressed relating to which D&O policy will respond in the event the individual only finds him or herself involved in formal proceedings many years after the initial interview.

Conclusion

The gap between an initial contact from the SFO seeking information and the final outcome of a prosecution following a criminal investigation can be – and usually is – already measured in years and occasionally in decades. The expansion of the SFO's powers to seek information at a pre-investigation phase is likely to extend this gap still further. In the interim, it may be entirely unclear to the witnesses concerned in which direction and at what speed the process is travelling or even if it exists. What is clear, however, is that any 'first account' evidence provided to the SFO may prove to be vitally important for the defence of that individual and his or her reputation in any future proceedings, should they materialise.

Company directors are a clear target for the SFO in trying to establish what a company knew or should have known about the subject matter under investigation. Therefore, there is much to be said for companies giving some thought to and planning for the real possibility that they and other senior executives may one day be recipients of a section 2 notice. What factors would influence the stance taken by the company with regard to the appointment of independent counsel? What limitations are there on the extent to which the company's D&O policy covers all legal representation costs for directors involved in responding to a section 2 notice? These are questions companies can address now.

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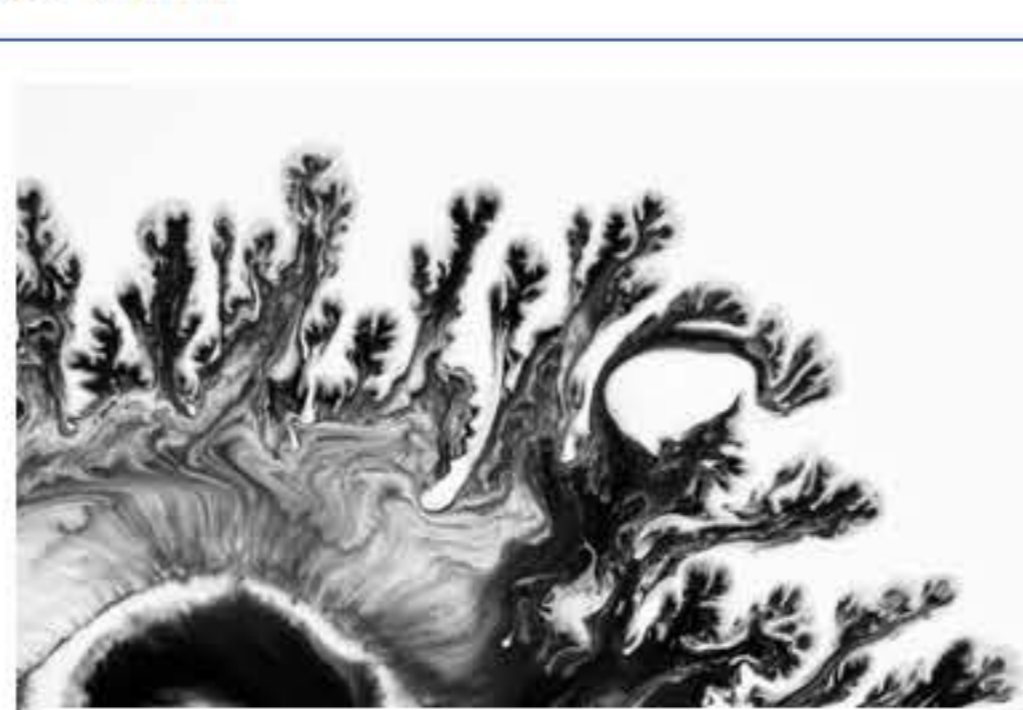


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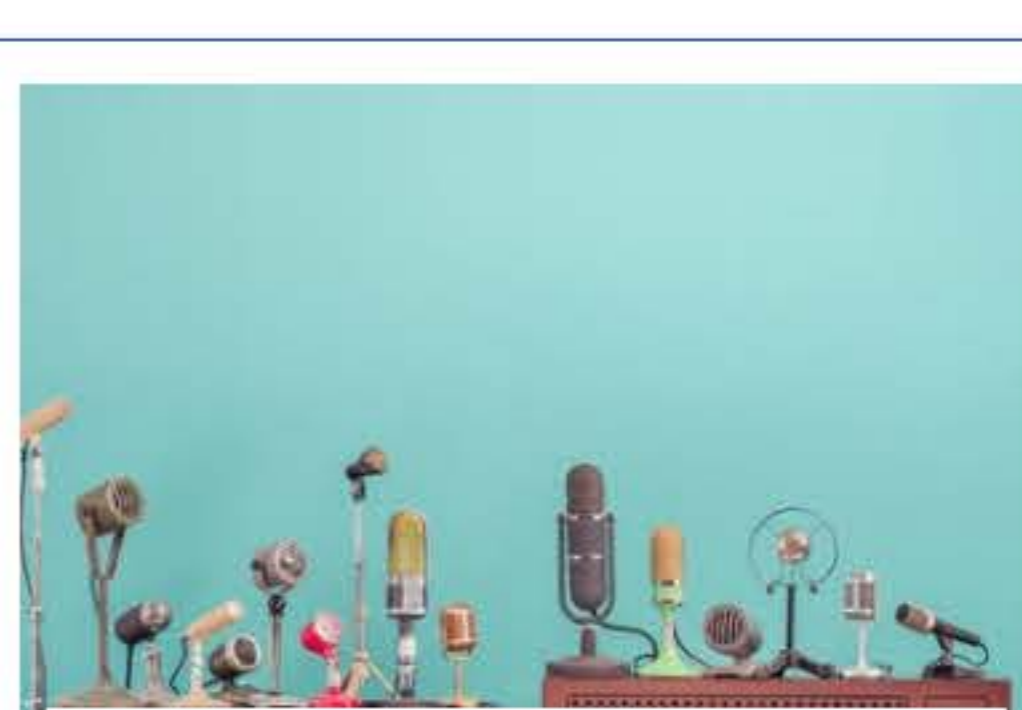
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