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The Practitioner's Guide to Global Investigations

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

SIXTH EDITION

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

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

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Sixth Edition

Editors

Judith Seddon

Eleanor Davison

Christopher J Morvillo

Michael Bowes QC

Luke Tolaini

Ama A Adams

Celeste Koeleveld

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Publisher's Note

The Practitioner's Guide to Global Investigations is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime investigations.

The Guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct (or conduct oneself) in such an investigation, and what should one have in mind at various times?

It is published annually as a two-volume work and is also available online and in PDF format.

The volumes

This Guide is in two volumes. Volume I takes the reader through the issues and risks faced at every stage in the life cycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the practices and thought processes of cutting-edge practitioners, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Volume II takes a granular look at law, regulation, enforcement and best practice in the jurisdictions around the world with the most active corporate investigations spaces, highlighting, among other things, where they vary from the norm.

Online

The Guide is available at www.globalinvestigationsreview.com. Containing the most up-to-date versions of the chapters in Volume I, the website also allows visitors to quickly compare answers to questions in Volume II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy, vision and intellectual rigour in devising and maintaining this work. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at: insight@globalinvestigationsreview.com.

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Foreword

Mary Jo White

Partner and Senior Chair, Debevoise & Plimpton LLP; Former Chair, US Securities and Exchange Commission; Former US Attorney for the Southern District of New York

The sixth edition of GIR's *The Practitioner's Guide to Global Investigations* is emblematic of the important work GIR has now done for many years, making sure that the lawyers and others who practise in the field have the resources and information they need to stay current in a transforming world. Compared with white-collar practice when I began my career, the landscape today can seem dizzying in its ever-expanding complexity. The amount of data now available, and the variety of means of communication, are boundless. Pitfalls are everywhere, from new and sometimes conflicting rules on data privacy to varied and changing standards for the attorney–client privilege across the world, among many others. The talented editors and very knowledgeable authors of this treatise, many of whom I have had the pleasure of working with first-hand throughout the course of my careers in government and now again in private practice, have done us all a great service in producing this valuable and practical resource.

The Guide tracks the life cycle of a serious issue, from its discovery through investigation and resolution, and the many steps, considerations and decisions along the way – and, at each critical point, includes chapters from the perspective of experienced practitioners from both the United States and the United Kingdom, and at times other jurisdictions. The chapters provide invaluable advice for the most experienced practitioners and a useful orientation for lawyers who may be new to the subject matter and are full of practical considerations based on a wealth of experience among the authors, who represent many of the leading law firms around the world, including my own. Unlike many other treatises, the Guide also offers separate – and essential – perspectives from leading in-house lawyers and from outside consultants who are critical parts of the investigative team, including forensic accountants and public relations experts.

The comparative approach of this book is unique, and it is uniquely helpful. Having the US and UK chapters side by side in Volume I can deepen understanding for even veteran practitioners by highlighting the different (and sometimes significantly divergent) approaches to key issues, just as learning a foreign language deepens our understanding of a native tongue. These comparisons, as well as the primers for other regions around the world in Volume II, are an essential guidebook for fostering clear communications across international legal and cultural boundaries. Many a misunderstanding could be avoided

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by starting with this book when a new cross-border issue arises, and appreciating that we bring to each legal problem internalised frameworks that have become so familiar as to be invisible to us. The comparative approach of this treatise shines a light on those differences, and can prevent many missteps.

There are also very helpful situational comparisons, including chapters on interviewing witnesses when representing a corporation but also from the perspective of representing the individual. A lawyer on either side will benefit from reading the chapter on the other perspective.

The specific chapter topics in the Guide are a checklist for the many complexities of modern cross-border investigations, including considerations of self-reporting and co-operation, extraterritorial jurisdiction, remediation and dealing with monitorships. Significant attention is given to electronic data collection and strategies for using it to best advantage, and appropriately so. In almost any modern investigation, the amount of electronic data available to investigators will far exceed the resources that reasonably can be applied to reviewing it. Developing a well targeted but adaptive strategy for turning these mountains of data into actionable investigative information is absolutely critical, both to understanding the issue in a timely fashion and in delivering value to clients. The proliferation of stringent but diverse data privacy laws only adds to the complexity in this process, and the Guide is right to emphasise that understanding these issues early on is essential to the success of any cross-border investigation.

The Guide's chapters on negotiating global settlements are spot on. Despite professed global and domestic agreement against 'piling on', it remains a rarity to have only a single enforcement authority or regulator involved in a significant case. And although it is now accepted wisdom – and in my experience, the reality – that authorities across the globe are coordinating more than ever, this coordination does not mean the end of competition among them. As we frequently see in the United States, competition – even among authorities and regulators in the same jurisdiction – is still the frustrating norm. All of this amplifies both the risks that significant issues can bring, and the challenge for counsel to understand the competing perspectives that are at play.

The jurisdictional surveys in the second volume are also a tremendous resource when we confront a problem in an unfamiliar locale. These are necessarily high-level, but they can help identify the important questions that need to be asked at an early stage. As any good investigator can attest, knowing the right questions to ask is often more than half the battle.

This sixth edition arrives just as many of us are looking forward to returning to the office and to travel, meeting more people and investigations face to face. As predicted in the previous volume, the strain and disruption of the pandemic has only increased the number of serious issues requiring inquiry across the globe. The Guide will be a tremendous benefit to the practitioners who take them on – particularly for those who consult it early and often.

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mjwhite@debevoise.com

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Preface

The history of the global investigation

For over a decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes companies – and their employees – to greater risk of hostile encounters with foreign law enforcers and regulators than ever. This is partly owing to the continued globalisation of commerce, the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to exact exorbitant penalties as a deterrent and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement, of course, has also spawned greater coordination between law enforcement agencies, domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, direct and collateral, for individuals and businesses, are unprecedented.

The Guide

To aid practitioners faced with the challenges of steering a course through a cross-border investigation, this Guide brings together the perspectives of leading experts from across the globe.

The chapters in Volume I cover, in depth, the broad spectrum of law, practice and procedure applicable to investigations in the United Kingdom and United States. The Volume tracks the development of a serious allegation (originating from an internal or external source) through all its stages, flagging the key risks and challenges at each step; it provides expert insight into the fact-gathering phase, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; it discusses strategies to successfully resolve international probes and manage corporate reputation throughout; and it covers the major regulatory and compliance issues that investigations invariably raise.

In Volume II, local experts from major jurisdictions across the globe respond to a common and comprehensive set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation.

In the first edition, we signalled our intention to update and expand both parts of the book as the rules evolve and prosecutors' appetites change. The Guide continues to grow in substance and geographical scope. By its third edition, it had outgrown the original

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single-book format. The two parts of the Guide now have separate covers, but the hard copy should still be viewed – and used – as a single reference work. All chapters are, of course, made available online and in other digital formats.

Volume I, which is bracketed by comprehensive tables of law and a thematic index, has been wholly revised to reflect developments over the past year. These range from US prosecutors reprising their previously uncompromising approach to pursuing *all* individuals involved in corporate misconduct and promising a surge in enforcement activity to UK authorities securing a raft of deferred prosecution agreements, some of which remain under reporting restrictions at the time of going to press. For this edition, we have commissioned a new chapter on emerging standards for companies' ESG – environmental, social and governance – practices. This issue has rocketed to the top of corporate agendas, and raised the eyebrows of legislators and regulators, far and wide. The Editors feel that this is an area to watch closely and that corporate ESG investigations will proliferate in the coming years.

The revised, expanded questionnaire for Volume II includes a new section on ESG issues so readers can gauge the developments in each jurisdiction profiled. Volume II carries regional overviews giving insight into cultural issues and regional coordination by authorities. The second volume now covers 21 jurisdictions in the Americas, the Asia-Pacific region and Europe. As corporate investigations and enforcer co-operation cross more borders, we anticipate Volume II will become increasingly valuable to our readers: external and in-house counsel; compliance and accounting professionals; and prosecutors and regulators operating in this complex environment.

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Celeste Koeleveld
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Fines, Disgorgement, Injunctions, Debarment: The UK Perspective

Tom Epps, Marie Kavanagh, Andrew Love, Julia Maskell and Benjamin Sharrock[1]

25.1 Criminal financial penalties

Financial penalties for corporate and individual fraud, bribery and money laundering offences are determined in accordance with relevant legislation and the sentencing guidelines issued by the Sentencing Council.[2] For corporates, the relevant guideline is 'Corporate Offenders: fraud, bribery and money laundering' (the Guideline).[3] The Guideline applies to corporates sentenced on or after 1 October 2014, regardless of the date of the offence, and must be followed by the court unless it would be contrary to the interests of justice to do so.[4]

In applying sentencing guidelines to offences prosecuted under legislation that pre-dates them, the court may reflect 'modern attitudes' to historic offences and make allowance for any change in maximum sentence for that particular

1 Tom Epps is a partner, and Marie Kavanagh, Andrew Love, Julia Maskell and Benjamin Sharrock are associates, at Cooley LLP. The authors wish to acknowledge the contributions of Kelly Hagedorn, Robert Dalling and Matthew Worby, the authors of the corresponding chapter in the previous edition of this Guide, on which this chapter is partly based.

2 The Sentencing Council publishes separate guidelines for the magistrates' and Crown courts. Many guidelines are offence-specific, but there are also overarching guidelines on various topics, including a General Guideline with Overarching Principles, effective from 1 October 2019, to be used in conjunction with the specific guideline or where no offence-specific guideline is available. Available at https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/.

3 Sentencing Council Definitive Guideline, Corporate offenders: fraud, bribery and money laundering, effective from 1 October 2014, available at https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-offenders-fraud-bribery-and-money-laundering/.

4 Coroners and Justice Act 2009, s.125(1).

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offence[5] (although the court cannot exceed the maximum sentence available at the time of the commission of the offence) to ensure that the sentence passed is in the interests of justice.

The sentencing guidelines set out a step-by-step process for sentencing offenders. The Guideline contains 10 steps:

- compensation;
- confiscation;
- determining the offence category;
- starting point and category range;
- adjustment of fine;
- factors that would indicate an adjustment;
- reduction for guilty pleas;
- ancillary orders;
- totality principle;
- reasons.

The steps are explained in further detail below.

Compensation 25.2

The court must first consider ordering a company to pay compensation to a victim of offending for any personal injury, loss or damage resulting from the offence,[6] in an amount it considers appropriate. The court will have regard to any evidence and any representations made by the prosecutor or the company[7] and must consider the company's ability to pay.[8] If a company does not have the means to pay both a fine and a compensation order, a compensation order will take priority.[9] Compensation orders are not mandatory, but if the court does not make one it must give reasons for the decision.[10]

Confiscation 25.3

The second step under the Guideline is for the court to consider confiscation. The confiscation regime is governed by the Proceeds of Crime Act 2002. The court must consider confiscation where the prosecutor asks it to proceed or where the court considers it appropriate to do so,[11] and confiscation must be dealt with before any other fine or financial order (except compensation).[12] The purpose of a confiscation order is to recover a sum of money equal to the benefit obtained from the offence, whether or not it has been retained.

5 *R v. H & Ors* [2011] EWCA Crim 2753; *R v. Clifford* [2014] EWCA Crim 2245.

6 Powers of Criminal Courts (Sentencing) Act 2000, s.130(1).

7 ibid., s.130(4).

8 ibid., s.130 (11).

9 ibid., s.130(12).

10 ibid., s.130(3).

11 Proceeds of Crime Act 2002, s.6.

12 ibid., s.13.

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The court will consider (1) whether the defendant has benefited from criminal conduct, (2) the value of the benefit obtained and (3) what sum is recoverable from the defendant.

The defendant's criminal benefit is the value of the property obtained as a result of, or in connection with, the criminal conduct, including any pecuniary advantage.[13]

In calculating the benefit, the court must first consider whether the defendant has a 'criminal lifestyle'.[14] Circumstances where a criminal lifestyle will be found include where a defendant is convicted of money laundering offences;[15] where the defendant has obtained benefit of at least £5,000, where the offence forms part of a course of criminal activity;[16] or where it is committed over six months or more.[17] Given that serious economic offences are often committed over lengthy periods, (especially where charged as a conspiracy), the criminal-lifestyle provisions are often engaged. Where a criminal lifestyle is found, the court will decide whether the defendant has benefited from 'general criminal conduct'[18] namely, any of his or her criminal conduct, whenever it occurred and regardless of whether there it has ever been prosecuted.[19] When calculating the benefit to a defendant with a 'criminal lifestyle', the court may draw certain assumptions about the defendant's property,[20] which can be very detrimental to a defendant. For example, it may assume that any property transferred to the defendant in the six years preceding a charge was obtained by criminal conduct. However, the defendant may prove that an assumption is incorrect, and the court may not draw an assumption where it would give rise to a serious risk of injustice.[21]

If the defendant is not considered to have a criminal lifestyle, the court must consider whether the defendant has benefited from the criminal conduct[22] for which he or she is being sentenced and determine the value of that benefit. The court must then decide the recoverable amount and make a confiscation order requiring the defendant to pay,[23] unless the defendant can show the available amount is less than the benefit, in which case the recoverable amount will be the available amount, or a nominal amount, if nothing is available.[24] The

13 ibid., s.76(4) and (5).

14 ibid., s.6(4)(a). 'Criminal lifestyle' is defined in s.75 Proceeds of Crime Act 2002.

15 ibid., s.75(2)(a). The section provides for specified lifestyle offences that are set out in Schedule 2 of the Act.

16 ibid., s.75(2)(b).

17 ibid., s.75(2)(c).

18 ibid., s.6(4)(b).

19 ibid., s.76(2).

20 ibid., s.10.

21 ibid., s.10 (6)(a) and (b).

22 ibid., s.6(4)(c).

23 ibid., s.6(5).

24 ibid., s.7(2).

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available amount is the aggregate of the value of the defendant's free property and any tainted gifts made by the defendant, less the value of any obligations that take priority.[25]

A confiscation order is an order to pay a sum of money, but it can be enforced against the defendant's property and any tainted gifts, if the defendant fails to pay.

Before making an order, the court must consider whether a confiscation order is proportionate.[26] Case law suggests that it is not proportionate to take the entire value of a corrupt contract as the benefit (where full value is given under the contract), but rather that proportionality dictates that the benefit should be confined to the gross profit, together with any other pecuniary advantage flowing from the corruption.[27] The amount of any bribes paid will be added back if they have been deducted as an expense when reaching the gross profit. In a separate case, it has been held that where the defendant can establish that VAT output tax on revenue obtained from criminal conduct has been paid to HM Revenue and Customs, it would be disproportionate to make a confiscation order calculated on the basis that a sum equivalent to that VAT paid has been 'obtained' by the defendant.[28]

Fine 25.4

In determining the level of fine, the Guideline requires the court to first assess the offence category, by reference to the company's culpability and the harm caused. The Guideline sets out three categories of culpability – high, medium and lesser; and provides a non-exhaustive list of characteristics that may demonstrate each level. The court should weigh up all the factors of the case to determine the company's culpability.

The harm figure is a financial sum that represents the amount obtained or loss avoided (or intended to be obtained or avoided). For fraud offences and cheating the revenue, the harm is generally the actual or intended gross gain to the company. For offences under the Bribery Act[29] the harm figure will generally be the gross profit from the contract obtained, retained or sought as a result of the offending. Where the offence is failing to prevent bribery,[30] the likely cost avoided by the company in failing to put adequate procedures in place may be used as an alternative measure. For money laundering offences, the harm figure will generally be the amount laundered or the likely cost avoided by failing to put in place an effective anti-money laundering programme (if this is higher). If the actual or intended gain cannot be established, the harm figure will be the amount that the court considers was likely to be achieved in

25 ibid., s.9.

26 *R v. Waya* [2012] 3WLR 1138; Proceeds of Crime Act 2002, s.6(5).

27 *R v. Sale* [2013] EWCA Crim 1306.

28 *R v. Harvey* [2016] 4 All ER 521.

29 UK Bribery Act 2010.

30 ibid., s.7.

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all the circumstances. The Guideline also suggests that in large cases in which the true harm is to commerce or markets generally, a harm figure in excess of those guidelines may be justified.

A multiplier is then applied to the harm figure according to the category of culpability. The Guideline sets out a table with the starting point and range for each culpability level. For high culpability, the starting point is a multiplier of 300 per cent; for medium culpability, 200 per cent; and for lesser culpability, 100 per cent. Once the court has determined the appropriate starting point, it must consider adjustment within the range provided for aggravating and mitigating factors (although the Guideline also suggests that in some cases it may be appropriate to use a figure outside the category range). A non-exhaustive list of such factors is set out in the Guideline.

The fine must reflect the seriousness of the offence and take into account the financial circumstances of the offender.[31]

Once the court has arrived at the fine, it is required to 'step back' and consider the overall effect. The combination of compensation, confiscation and fine is supposed to (1) remove all gain, (2) punish appropriately and (3) deter. The court should consider whether there are any further factors that may require an adjustment and ensure those aims are met fairly. Examples set out in the Guideline include the impact of any fine on the company's ability to implement an effective compliance programme, or on the employment of staff or on the local economy.

If a company is being sentenced for more than one offence, the court should also apply the 'totality principle': it should consider whether the total sentence is just and proportionate to the offending.[32]

A defendant may seek an indication in advance of the maximum sentence that would be imposed were he or she to plead guilty at that stage of proceedings, although a judge may also refuse to give one. This is known as a '*Goodyear* indication'[33] and is binding on the court once given; although if the defendant chooses not to plead guilty at that stage, it ceases to be binding.

25.5 Guilty plea

Where a defendant pleads guilty, the court must consider a reduction in sentence,[34] having regard to the 'Reduction in Sentence for a Guilty Plea Guideline' (the Plea Guideline).[35] The level of reduction is determined by the stage at which the defendant pleads guilty and the circumstances in which it

31 Criminal Justice Act 2003, s.164.

32 Step 9 of the Guideline. There is also an overarching 'Totality Guideline', available at https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/totality/.

33 *R v. Goodyear* [2005] EWCA Crim 888; Criminal Practice Direction, VII Sentencing, C, Indications of sentence: *R v. Goodyear*.

34 Criminal Justice Act 2003, s.144; Step 7 of the Guideline.

35 Sentencing Council, 'Reduction in sentence for a guilty plea – first hearing on or after 1 June 2017', effective from 1 June 2017, available at https://www.sentencingcouncil.org.uk/

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was given, but it cannot exceed one third of the sentence. A defendant will generally receive a discount of one third if a guilty plea is entered at the first stage of proceedings, which is generally the first hearing at which a plea or indication of plea is sought and recorded by the court.[36]

For a guilty plea entered after the first stage, the maximum discount available is one quarter up until the first day of trial, when a maximum of one-tenth is available. For pleas entered subsequently during the trial, the discount will reduce again, potentially to zero. The Plea Guideline sets out exceptions where the discounts may not be applied as described, for example, for certain offences that have minimum or appropriate sentences prescribed by statute.

The court should also consider any other factors that would justify a reduction, such as co-operation by the defendant with the investigation or prosecution.[37]

Costs 25.6

The court may make a costs order in favour of either the prosecution or the defendant.[38] Ordinarily, in the event of a conviction, the defendant will be ordered to pay costs to the prosecutor that the court considers just and reasonable.[39] If a defendant is acquitted or the prosecution does not proceed to trial, the court may make an order in favour of the defendant of an amount the court considers reasonably sufficient to compensate for any expenses properly incurred in the proceedings.[40]

overarching-guides/crown-court/item/reduction-in-sentence-for-a-guilty-plea-first-hearing-on-or-after-1-june-2017/.

36 A one-third discount may still be given after that stage if the court is satisfied that circumstances significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner. However, a distinction is made between cases where a defendant needs to receive advice or see evidence to understand whether he or she is in fact guilty of the offence (in which case the defendant may still receive a one-third discount), and cases where the defendant merely delays entering a plea to assess the strength of the prosecution evidence and the prospects of being convicted or acquitted (where the defendant will not receive a discount).

37 Serious Organised Crime and Police Act 2005, ss.73 and 74; Step 6 of the Guideline.

38 Criminal Practice Directions 2015 [2015] EWCA 1567; Practice Direction (Costs in Criminal Proceedings) 2015 [2015] EWCA Crim 1568; Prosecution of Offences Act 1985, Part II (ss.16 to 19B); Access to Justice Act 1999; Legal Aid, Sentencing and Punishment of Offenders Act 2012 (in relation to funded clients); Costs in Criminal Cases (General) Regulations 1986.

39 Prosecution of Offences Act 1985, s.17.

40 ibid., s.16.

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25.7 Director disqualifications

Under the Company Directors Disqualification Act 1986 (CDDA), any director convicted of misconduct[41] in connection with a company (either in the United Kingdom or overseas) or considered unfit to be concerned with the management of a company, may be disqualified from the right to manage a company for up to 15 years by a disqualification order.[42] The person will also be entered on the register of disqualified directors. The definition of 'director' is very wide, and has been interpreted to include former directors, shadow directors and senior managers who may be considered to be acting as directors of the company.[43]

Where there is a conviction in respect of an indictable offence,[44] usually the sentencing court will consider whether a disqualification order ought to be made and impose it. However, the Insolvency Service[45] may also look to bring separate disqualification proceedings, before or even alongside, a criminal prosecution irrespective of whether the company in question is solvent.

The Secretary of State also may apply to court for a disqualification order if it appears expedient in the public interest, and the court may grant it where it is satisfied that a person's conduct in relation to the company (alone or taken together with his or her conduct as a director of other companies or overseas companies) makes that person unfit to be concerned in the management of a company.[46] For offences committed outside the United Kingdom, the Secretary of State may apply to the court for a disqualification order.[47]

25.8 Civil recovery orders

Some enforcement agencies[48] may obtain a civil recovery order (CRO) to recover proceeds of crime where it is proved, on the balance of probabilities,

41 Sections 2 to 5A of the Company Directors Disqualification Act 1986 set out the misconduct for which a director can be disqualified.

42 Company Directors Disqualification Act 1986, ss.2(1), 5A(2) and 8(2).

43 Companies Act 2006, s.250; see *Revenue and Customs Commissioners v. Holland* [2010] UKSC 51 for consideration of the definition in practice. In this case, the Supreme Court confirmed there is no definitive test for when a person may be considered a *de facto* director, and the question should be whether they have assumed responsibility to act as a director in relation to the company in question.

44 In addition, any conviction in connection with the liquidation or striking off of a company, with the receivership of a company's property or with being an administrative receiver of a company's property may also result in a disqualification order: section 21, Company Directors Disqualification Act 1986.

45 See https://www.gov.uk/government/organisations/insolvency-service.

46 Company Directors Disqualification Act 1986, s.8.

47 ibid., s.5A.

48 The Serious Fraud Office (SFO), the National Crime Agency (NCA), the Crown Prosecution Service (CPS), HM Revenue and Customs and the Financial Conduct Authority (FCA) may obtain such orders.

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that the property has been obtained unlawfully.[49] Such property is 'recoverable property' and it is vested in a trustee appointed to realise the property to maximise the amount payable to the enforcement agency.[50]

A CRO is made in respect of specific property, and no conviction is required. Recent guidance issued in 2021 by the Home Office in relation to the use of asset recovery powers by relevant enforcement agencies[51] states that non-conviction based asset recovery powers may be sought whether or not there is a criminal investigation or prosecution and regardless of what stage any criminal investigation or prosecution may have reached.

In 2018, the Serious Fraud Office (SFO) obtained a significant CRO in respect of Griffiths Energy, a company that had pleaded guilty to bribery charges in Canada relating to bribing Chadian diplomats in the United States and Canada to secure contracts. The SFO recovered £4.4 million of the proceeds of the crime that had been traced to a bank account in London.[52] The recovered funds were to be transferred to the Department for International Development who were to identify key projects to invest in to benefit the people of Chad.[53]

The High Court also may make unexplained wealth orders.[54] These require politically exposed persons or persons suspected of involvement in serious crime to explain how they obtained assets that appear to be disproportionate to their known income. A failure to provide a response will give rise to a presumption that the property is recoverable in civil recovery proceedings.

Certain enforcement agencies may seize and detain cash or listed assets[55] of £1,000 or more where they have reasonable grounds to suspect that it is recoverable property or intended for use in unlawful conduct.[56] A magistrate may extend the period of detention.[57] An application can be made to the court for an account freezing order in relation to money in bank accounts on the same grounds.[58] Cash, and money in frozen bank accounts, will be automatically forfeited if no objection is raised to a forfeiture notice.[59] The magistrates' court

49 Pursuant to Part 5, Proceeds of Crime Act 2002.

50 Proceeds of Crime Act 2002, ss. 266(2) and 267.

51 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001245/June_2021_amended_s.2A_guidance_.pdf.

52 *SFO v. Saleh* [2018] EWHC 1012 (QB). For another example of significant civil recovery order against a corporate, see the 2012 CRO against Oxford Publishing Limited, at https://www.sfo.gov.uk/2012/07/03/oxford-publishing-ltd-pay-almost-1-9-million-settlement-admitting-unlawful-conduct-east-african-operations/.

53 https://www.sfo.gov.uk/2018/03/22/sfo-recovers-4-4m-from-corrupt-diplomats-in-chad-oil-share-deal/.

54 Criminal Finances Act 2017, ss.1 to 9. Applications can be made by the SFO, NCA and FCA, among others.

55 Proceeds of Crime Act 2002, s.303B.

56 ibid., ss.294, 295, 303J and 303K.

57 ibid., ss.295(2) and 303L.

58 ibid., ss.303Z1 to 303Z3.

59 ibid., ss.297A-297E and 303Z9-303Z13.

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may order forfeiture of cash, listed assets or money in frozen bank accounts where it is satisfied the assets are recoverable property or intended for use in unlawful conduct.[60]

The NCA may also tax the proceeds of crime where they represent income in respect of which tax has not been paid.[61]

25.9 Criminal restraint orders

Restraint orders can be made to freeze assets at any time following the commencement of a criminal investigation up until the conclusion of proceedings.[62] An order will be granted at the investigation stage if there are reasonable grounds to suspect that an alleged offender has benefited from his or her criminal conduct;[63] or, if proceedings have begun, if there is reasonable cause to believe the defendant has benefited from his or her criminal conduct.[64] An order should only be made where there is a real (rather than fanciful) risk that assets will be dissipated if an order is not made.[65] If necessary, an allowance will be made from the restrained property for the defendant's reasonable living expenses[66] and to enable a person to carry on any trade, business, profession or occupation.[67] Provision may also be made for reasonable legal expenses, but not if they are incurred in connection with the offences in respect of which the restraint order has been made.[68]

25.10 Serious crime prevention orders

Serious crime prevention orders (SCPOs)[69] are injunctions[70] that can be imposed on a person been convicted of a serious offence[71] or who has 'been

60 ibid., ss.298, 303O and 303Z14.

61 ibid., Part 6.

62 ibid., s.40.

63 ibid., s.40(2)(b).

64 ibid., s.40(3)(b).

65 *Re AJ & DJ* (Unreported), 9 December 1992, CA.

66 Proceeds of Crime Act 2002, s.41(3)(a).

67 ibid., s.41(3)(b).

68 ibid., ss.41(3)(a) and 41(4).

69 SCPOs were introduced in the Serious Crime Act 2007 and significantly broadened by the Serious Crime Act 2015.

70 Serious Crime Act 2015, s.35(1).

71 The Crown Court has jurisdiction to make an SCPO where a person has been convicted of a 'serious offence' in the Crown Court or in the magistrates' court where they committed to the High Court for sentence; s.19(1), paras. (a) and (b) Serious Crime Act 2007. A 'serious offence' is defined in s.2(2), paras. (a) and (b) Serious Crime Act 2007 as an offence that is specified In Part 1 of Schedule 1 to the Act, or an offence the court considers to be sufficiently serious to be treated as if it were so specified.

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involved in serious crime'[72] where there are reasonable grounds to believe that making an SCPO would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales. The court may include such terms in an SCPO as it considers appropriate for the purpose of so protecting the public;[73] but they must be proportionate to the identified risk. Restrictions that might be imposed include limitations on financial, property or business dealings;[74] a person's associations or communications;[75] use of any item;[76] and travel both within and outside the jurisdiction.[77] An SCPO may also include a requirement to provide specified information or disclose documents to law enforcement.[78]

Breach of an SCPO is a criminal offence. The maximum sentence for an individual five years' imprisonment.[79] Where a corporation is convicted of a breach of an SCPO, the court may order its dissolution where to do so would be 'just and equitable'.[80]

Regulatory financial penalties and other remedies 25.11

Companies and individuals may also face regulatory sanctions for their misconduct separately or in addition to criminal penalties.

The Financial Conduct Authority (FCA) regulates firms and individuals performing regulated financial services activities and may bring enforcement action against regulated firms and individuals in connection with economic

72 The High Court has jurisdiction to make an SCPO where a person has 'been involved in serious crime'; Serious Crime Act 2007, s.1, paras. (a) and (b). Such a finding can be made in the absence of a conviction. Persons have been involved in serious crime if they have (1) committed a serious offence, (2) facilitated the commission by another person of a serious offence, or (3) conducted themselves in a way that was likely to facilitate the commission by themselves or another person of a serious offence, whether or not such an offence was committed; ibid., s.2(1), paras. (a) to (c).

73 Serious Crime Act 2015 (High Court), s.1(3); s.19(5) (Crown Court). Other legislation dealing with civil orders in furtherance of the criminal law, such as anti-social behaviour orders, sexual offences prevention orders, and terrorism prevention and investigation measures impose a requirement of 'necessity' rather than 'appropriateness'. As most applications for an SCPO will engage one or more rights under the European Convention on Human Rights, however, the court will need to consider the Human Rights Act 1998, in particular the precept of proportionality, which includes necessity. See also CPS guidance on serious crime prevention orders (Terms of orders), available at https://www.cps.gov.uk/legal-guidance/serious-crime-prevention-orders.

74 Serious Crime Act 2015, s.5(3)(a).

75 ibid., s.5(3)(c).

76 ibid., s.5(3)(e).

77 ibid., s.5(3)(f).

78 ibid., s.5(5)(a). But a requirement to provide information orally is not permissible: ibid., s.11.

79 Serious Crime Act 2003, s.25.

80 ibid., s.27.

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crimes if it considers there has been a regulatory breach.[81] It may also take action against persons who carry out regulated activities without FCA authorisation. The FCA's Enforcement Guide (EG) describes the FCA's approach to exercising its enforcement powers, and Chapter 7 summarises its powers to impose financial penalties and other sanctions.

The FCA's Decision Procedure and Penalties Manual (DEPP) sets out its policy for the imposition and amount of financial penalties (among other things).

The regime for setting financial penalties is based on three principles: (1) disgorgement, (2) discipline and (3) deterrence.[82]

The total amount payable will comprise disgorgement of any benefit received and a financial penalty reflecting the seriousness of the breach.[83] These elements are incorporated in a five-step process to determine the level of a financial penalty to be imposed on a firm for a regulatory breach, as follows:[84]

1 Removal of any financial benefit derived from the breach (which may include the profit made or loss avoided), plus interest. Where a firm's entire business model depends on breaching FCA rules or other regulatory requirements and the breach is at the core of the firm's regulated activities, the FCA will seek to deprive the firm of all the financial benefit derived from such activities.[85]
2 Determining a figure reflecting the seriousness of the breach.[86] In many cases the FCA considers the amount of revenue generated by a firm from a particular product line or business area is indicative of the harm or potential harm that its breach may cause. In those cases, the FCA will determine the firm's revenue from the relevant products or business areas during the breach, called the 'relevant revenue'. The figure will be a percentage of this from 0 per cent to 20 per cent, applied on a sliding scale to reflect the seriousness of the breach, taking into account factors set out in DEPP 6.5.2A.
3 Mitigating and aggravating factors[87] are applied to increase or decrease the figure reached at step 2.
4 If the FCA considers the figure arrived at after step 3 is an insufficient deterrent, it may increase the penalty.[88]
5 A settlement discount is applied, if appropriate, to reflect the stage at which the FCA and the firm reached agreement.[89]

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81 The FCA may also institute proceedings for certain criminal offences, for example insider trading, under Financial Services and Markets Act (FSMA) 2000, ss.401 and 402.

82 DEPP 6.5.2.

83 ibid., 6.5.3(1).

84 ibid., 6.5A.

85 ibid., 6.5A(1).

86 ibid., 6.5A(2).

87 ibid., 6.5.A(3).

88 ibid., 6.5A(4) provides examples of circumstances when this may occur.

89 ibid., 6.5A (5).

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The FCA introduced a new enforcement procedure for disciplinary cases in 2017, under which four settlement options are available for resolving matters at an early stage in proceedings. These are:

- 30 per cent discount if the party settles the factual issues, the fact of a regulatory breach and the amount of penalty with the FCA;
- 30 per cent discount if the party agrees with the FCA all the relevant facts and accepts that they amount to regulatory breaches, whether or not it disputes the penalty to be imposed;
- 15 to 30 per cent discount if the party agrees with the FCA all the relevant facts but disputes that they amount to regulatory breaches and disputes the penalty; or
- 0 to 30 per cent discount if the party reaches partial agreement with the FCA as to facts, liability and penalty but disputes a narrow set of issues.[90]

This gives regulated firms the ability to receive discounts where they accept some aspects of the case but to keep their right to challenge certain aspects of the FCA's findings before the Regulatory Decision Committee.[91]

In 2020, the FCA levied fines that totalled just over £192.5 million.[92]

Withdrawing a firm's authorisation 25.12

In addition to imposing financial penalties on authorised firms and individuals, the FCA has a number of other powers including powers to issue public censures and to withdraw authorisation to engage in regulated activities. A common form of authorisation is permission given by the FCA to a firm under Part 4A of the Financial Services and Markets Act (FSMA) 2000 to carry on regulated activities. The FCA's powers include a right to cancel this permission if it appears to the FCA that the authorised person is failing or is likely to fail to fulfil the threshold conditions.[93] Withdrawal of permission means that the person ceases to be authorised and cannot engage in regulated activities.[94] As an alternative to withdrawing permission, the FCA has broad powers to vary a Part 4A permission or to impose specific conditions on its exercise instead.[95] The EG states that the cancellation power will be exercised mainly where the FCA has 'very serious concerns'[96] about a firm, or the way its business is or has been conducted, and sets out a list of non-exhaustive examples of circumstances

90 FCA Enforcement Information Guide, April 2017, p. 4, available at https://www.fca.org.uk/publication/corporate/enforcement-information-guide.pdf.

91 https://www.fca.org.uk/publication/corporate/enforcement-information-guide.pdf.

92 https://www.fca.org.uk/news/news-stories/2020-fines.

93 FSMA 2000, s.55J(1)(a). The FCA may also cancel permission if the authorised person has not engaged in regulated activity in the previous 12 months: ibid., s.55J(1)(b).

94 ibid., ss.19 and 31(1)(a).

95 ibid., ss.55J and 55L.

96 FCA's Enforcement Guide (EG) 8.5.1.

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in which the FCA may cancel a firm's permission.[97] These include, for example, where there are repeated failures to comply with rules or requirements,[98] or where there has been a failure to co-operate with the FCA of sufficient seriousness that the FCA ceases to be satisfied that the firm is fit and proper.[99]

25.13 Approved persons

The Approved Persons Regime regulates individuals exercising certain functions on behalf of regulated entities. Approved persons are approved by the FCA to exercise 'controlled functions' at an authorised firm. They must know and meet the relevant regulatory requirements, meet the fitness and propriety test, and comply with the FCA Conduct Rules.[100] They have a duty to report to the FCA anything that could affect their ongoing suitability to be an approved person. Senior management functions are a subset of controlled functions. A person holding a designated senior management function has an additional 'duty of responsibility' so that if a firm breaches a regulatory requirement, the senior manager responsible for managing the relevant area will also be held accountable for the breach if they did not take 'such steps as a person in their position could reasonably be expected to take' to avoid the breach occurring or continuing.[101]

Where approved persons (including senior managers) have committed a regulatory breach, they may receive a financial penalty or a public censure.[102] They may also have their approval withdrawn or be prohibited from performing functions in relation to regulated activities,[103] or both. The FCA may also issue private warnings.

25.14 Restitution orders

The FCA may seek restitution where it seeks to compensate those adversely affected by a regulatory breach.

The FCA will take the following considerations into account in determining whether to seek restitution, in the light of 'all the circumstances of the case':

- whether the profits are quantifiable or the losses identifiable;
- the number of persons affected;
- costs to the FCA of securing restitution;
- availability of alternative redress, such as compensation schemes or through another regulator;
- whether victims can be expected to bring proceedings in their own right;
- the firm's solvency;

97 EG 8.5.2

98 ibid., 8.5.2(7).

99 ibid., 8.5.2(8)

100 FCA Handbook Code of Conduct (COCON).

101 FSMA 2000, s.66A(5).

102 ibid., s.66.

103 ibid., s.56.

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- alternative powers available to the FCA; and
- the conduct of persons having suffered loss, for example whether they have contributed to their loss.[104]

This list is not exhaustive. The FCA can apply for restitution to a court, which may order payment of a sum it considers 'just' having regard to the profits made or loss caused.[105]

Where appropriate, the FCA will consider imposing a restitution order using its administrative powers[106] where the FCA is 'satisfied that a person has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement'.[107] The person against whom the order is sought must either have profited from the contravention, or caused loss or other adverse effect to another.[108]

Debarment 25.15

Companies need to be mindful of the impact that any conviction, or even misconduct not resulting in a conviction, may have on their ability to tender for public contracts. The rules governing debarment are contained in the Public Contracts Regulations 2015 (the Regulations).[109]

Debarment can be mandatory or discretionary. Debarment is mandatory if the tendering company has been convicted of certain offences, including:

- bribery;[110]
- corruption; and
- money laundering.[111]

A company may also face mandatory debarment if certain individual representatives of the company are convicted of one or more of these offences.[112] Mandatory debarment applies for a maximum of five years.

104 EG 11.2.1.

105 FSMA 2000, s.382(2).

106 ibid., s.384.

107 ibid., s.382(1) and (6). The meaning of 'relevant requirement' is somewhat narrower than under the injunction provisions, but is substantially the same: see ibid., s.382(9).

108 ibid., s.382(2).

109 These came into force on 26 February 2015 and implemented the EU Procurement Directive (Directive 2014/24/EU) in the United Kingdom.

110 Specifically, the common law offence of bribery; corruption within the meaning of s.1(2) Public Bodies Corrupt Practices Act 1889; corruption within the meaning of s.1 Prevention of Corruption Act 1906; bribery within the meaning of s.1, s.2 or s.6 Bribery Act 2010; or bribery within the meaning of s.113 Representation of the People Act 1983. The failure of a commercial organisation to prevent bribery, contrary to s.7 Bribery Act 2010, will not trigger mandatory debarment but may result in discretionary debarment.

111 Public Contracts Regulations 2015, Regulation 57.

112 ibid., Regulation 57(1).

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The Regulations set out a list of circumstances in which discretionary debarment may apply.[113] One of these is where a contracting authority is able to demonstrate, by appropriate means, that a company is guilty of grave professional misconduct rendering its integrity questionable. Discretionary debarment applies for a maximum of three years.[114]

In 2015, the United Kingdom adopted the European Union's concept of 'self-cleaning' in relation to mandatory and discretionary debarment. The Regulations set out a number of conditions that, if met, can demonstrate a company's suitability for access to public procurement tenders despite the existence of grounds for mandatory or discretionary debarment. The conditions include the payment of compensation, co-operation with investigative authorities and the taking of concrete measures to prevent further criminal offences or misconduct being committed.[115]

25.16 Outcomes under a DPA

The legislation, the SFO's Operational Handbook[116] and DPA Code of Practice[117] state that the level of financial penalty imposed in a DPA should be comparable to a fine that a court would have imposed following a guilty plea.[118] The DPA Code states that this approach is intended to enable the parties and courts to have regard to relevant sentencing principles and guidelines to determine the appropriate level for a financial penalty. The Director of the SFO has stated that, since DPAs were introduced, they have delivered penalties, costs and returned illicit gains worth more than £1.5 billion.[119]

In all but two DPAs[120] approved by the court, a discount of around 50 per cent of the financial penalty has been applied. This figure has been reached by taking an initial one-third discount, equivalent to a guilty plea at the earliest stage, and adding a further discount on the basis of co-operation

113 ibid., Regulation 57(8).

114 ibid., Regulation 57(12).

115 ibid., Regulation 57(15).

116 The SFO's Operational Handbook was updated to include a chapter on DPAs in October 2020, available at https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/deferred-prosecution-agreements/.

117 Crime and Courts Act 2013; SFO and CPS, Deferred Prosecution Agreements Code of Practice, available at https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/.

118 Crime and Courts Act 2013, Schedule 17, para. 5(4); DPA Code, para. 8.3.

119 Lisa Osofsky, 'We're defending the UK as a safe place for business', *The Times* (London, 30 June 2021).

120 *SFO v. Standard Bank Plc (Now known as ICBC Standard Bank Plc)* [2016] Lloyd's Rep FC Plus 122; *SFO v. G4S Care and Justice Services (UK) Limited*, [2020] 7 WLUK 303, para. 40. Standard Bank only received a one-third reduction in penalty for promptly reporting its own conduct and co-operating with the SFO's subsequent investigation. This was considered a 'full reduction' in this matter. G4S received a 40 per cent reduction in penalty.

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and remediation activities. This discount is likely to be consistent with what would be imposed under the Guideline, which directs reductions for guilty pleas and co-operation.

For example, in the *Sarclad Limited* DPA, Sir Brian Leveson, then President of the Queen's Bench Division, considered that a 50 per cent reduction was appropriate as the company had self-reported in a timely way and had fully co-operated with the SFO.[121] A similar justification also prompted 50 per cent discounts for the *Tesco*, *Serco Geografix, Airline Services* and *Amec Foster Wheeler* DPAs.[122]

Even where companies have not self-reported, some have still received 50 per cent reductions in financial penalty when they have provided extensive co-operation after the investigation began. Rolls-Royce did not self-report to the SFO. Although Airbus technically did self-report, it had known of concerns for some time and reported only once it was notified that UKEF considered it was obliged to disclose the matter to the SFO.[123] The court, in approving the DPA, stated: 'Airbus could have moved more quickly.'[124] However, both received a 50 per cent reduction in penalty owing to 'extraordinary co-operation' on the part of Rolls-Royce and 'exemplary co-operation and remediation' by Airbus.[125] By contrast, G4S self-reported but only received a 40 per cent reduction in penalty. Its co-operation fell short of being exemplary or extraordinary, and full co-operation was said to have come 'relatively late in the day'. However, a discount of more than one-third was considered appropriate because of the overall level of co-operation and the unusually wide scope of the self-cleaning steps taken by G4S.[126]

In the *Güralp* DPA (where Güralp self-reported), the SFO sought to impose no financial penalty. This was on the basis that to do so would cause the organisation to become insolvent, disproportionately impacting the business, and would also cause harm to the organisation's innocent employees.[127]

The mandatory debarment provisions of the Public Contracts Regulations 2015 will not apply because the entry into a DPA does not constitute a conviction. However, a company may still be at risk of discretionary debarment if the conduct underlying the DPA is considered 'grave professional misconduct', in accordance with the Regulations.

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121 *SFO v. Sarclad Limited* [2016] Lloyd's Rep FC 509, para. 69.

122 *SFO v. Tesco Ltd* [2017] 4 WLUK 558; *SFO v. Serco Geografix Ltd* [2019] 7 WLUK 45; *SFO v. Airline Services Limited* Case No. U20201913.

123 *SFO v. Airbus SE* [2020]: Statement of Facts prepared pursuant to Schedule 17, para. 5(1) Crime and Courts Act 2013, paras. 33 and 34, available at https://www.sfo.gov.uk/download/airbus-se-deferred-prosecution-agreement-statement-of-facts/

124 *SFO v. Airbus SE* [2020] 1 WLUK 435, para. 73.

125 *SFO v. Airbus SE* [2020] 1 WLUK 435, para. 112; *SFO v. Rolls-Royce plc and Rolls-Royce Energy Systems Inc*, [2017] Lloyd's Rep FC 249, para. 123.

126 *SFO v. G4S Care and Justice Services (UK) Limited,* [2020] 7 WLUK 303, para. 40.

127 *SFO v. Güralp Limited* [2019] Case No. U20190840, para. 35.

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Appendix 1

About the Authors of Volume I

Tom Epps
Cooley LLP

Tom Epps is the head of Cooley's London white-collar defence and investigations team. Tom is recognised in the United Kingdom and internationally as a leading white-collar crime lawyer. He has been involved in many of the United Kingdom's largest and most complex investigations in the past 20 years.

Tom has substantial experience representing those facing investigations brought by all the major UK enforcement agencies, particularly investigations with an international aspect. He is advising clients in the majority of the Serious Fraud Office's most high-profile investigations, nearly all of which involve substantial international dimensions. He frequently advises companies and senior individuals facing sensitive investigations and regulatory issues and is often called on to assist suspects, whistleblowers and witnesses. Tom is regularly recognised as a thought leader and highly ranked in the leading legal directories for white-collar crime. He is recognised by *Who's Who Legal* 2021 as a Global Elite Thought Leader for Business Crime and as a Global Leader for Investigations and Asset Recovery. *Chambers and Partners UK* ranks Tom in the top bands for his representation of individuals and corporates, as well as for high net worth individuals in financial crime investigations. He is recognised as a leading individual for Fraud: White Collar Crime by *The Legal 500*.

Marie Kavanagh
Cooley LLP

Marie Kavanagh advises companies and senior individuals facing criminal and regulatory investigations carried out by all the leading UK authorities including the Serious Fraud Office (SFO), the Financial Conduct Authority and others. She advises suspects and witnesses in cases involving allegations of complex fraud, bribery and corruption, money

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laundering and other types of misconduct, often with a cross-border element. Marie acts for clients in both internal investigations and those led by enforcement agencies.

Marie has advised clients in relation to high-profile SFO investigations, including its investigations into Glencore, Quindell plc, Euribor, Barclays/Qatar, Rolls-Royce plc, Tesco plc, ENRC Ltd, Serco, Sweett Group plc, Libor and FX.

Marie is recommended by *Who's Who Legal* as a Future Leader (Non-Partners) in its Investigations 2020 and 2021 editions. Its 2020 edition states: 'Marie Kavanagh is "head and shoulders above the rest". Clients are "always reassured by her advice and rigour" and dub her "an undoubted star of the future" who is "extremely hardworking and wonderfully diligent in all manner of tasks".' Marie is also listed in *Expert Guides* as a Rising Star for White Collar Crime 2021 and in *The Legal 500* as a Rising Star for Fraud: White Collar Crime (Advice to Individuals) 2022.

Andrew Love

Cooley LLP

Andrew Love is an associate in the litigation team in Cooley's London office. Andrew has worked on a wide range of white-collar matters, with particular focus on international internal investigations. Andrew has also assisted corporate and individual clients in relation to investigations carried out by the SFO and FCA. Before joining Cooley, Andrew's experience included undertaking a review of the mis-selling of financial products by a global bank before the 2008 financial crisis.

Julia Maskell

Cooley LLP

Julia Maskell is an associate in the litigation department in Cooley's London office. She works with companies on a range of matters, including international internal investigations, compliance, regulatory investigations and commercial disputes. She has experience in working with companies across Cooley's global platform in a range of industries, with a particular focus on manufacturers of consumer products.

Benjamin Sharrock

Cooley LLP

Benjamin Sharrock is an associate in the commercial litigation department of Cooley's London office. Benjamin advises on white-collar crime matters concerning companies and senior individuals in allegations of fraud, bribery and corruption and anticompetitive behaviour. He also advises on a broad range of complex contractual disputes and regulatory investigations across a variety of industry sectors and jurisdictions, often with a cross-border element. Benjamin has particular experience dealing with leading UK authorities, including the Serious Fraud Office.

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Cooley (UK) LLP

22 Bishopsgate
London, EC2N 4BQ
United Kingdom
Tel: +44 20 7583 4055
tepps@cooley.com
mkavanagh@cooley.com
alove@cooley.com
jmaskell@cooley.com
bsharrock@cooley.com
www.cooley.com

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