

Serious Fraud Office Issues Cooperation Guidance 英国严重欺诈局发布合作指南

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White Collar Crime 白领犯罪

The Serious Fraud Office (SFO) released its much-anticipated cooperation guidance on August 6, 2019. The five-page document sets out the steps an organization can take to assist the SFO in an investigation and thereby maximise the organization's chances of avoiding prosecution. The publication represents a welcome change in direction on the part of the SFO, which has previously refused requests to provide guidance on how a company should respond to an SFO investigation. However, there are elements of the new guidance which might cause companies unease. The SFO is very careful to emphasize that following its recommendations will not guarantee companies credit for cooperation. Therefore, organizations still face the risk of shouldering all of the burdens of cooperation, only to be prosecuted for the underlying misconduct anyway. The guidance also reaffirms the SFO's intention to pursue privileged documents, which has proved to be a major point of contention for certain companies who have faced investigations by the agency.

英国严重欺诈局（下称“SFO”）于2019年8月6日发布了备受期待的合作指南。这份五页的文件阐述了机构在调查中可采取以协助SFO从而在最大程度上增加机构避免诉讼几率的措施。该文件表明SFO的态度有了可喜的转变。SFO之前曾拒绝就公司应当如何应对SFO调查提供指导。但是，新指南中有些内容可能会令公司不安。SFO非常谨慎地强调，遵从其建议并非能确保公司获得合作奖励。因此，机构仍然面临承担所有合作负担的风险，结果无论如何都会因相关不当行为被起诉。指南还再次确认了SFO追查受特权保护文件的意图，表明这对于曾面临该局调查的某些公司而言是一个很大的争议点。

What is “Cooperation”?

何为“合作”

Cooperation means providing assistance to the SFO that goes “above and beyond what the law requires”. This includes identifying suspected wrongdoing and criminal conduct together with those responsible; reporting this to the SFO within a reasonable time of the suspicions coming to light; and preserving evidence and providing it promptly to the agency in an evidentially sound format.

合作指向 SFO 提供“高于及超越法律要求的”协助。这包括识别疑似错误行为和犯罪行为以及负责人；在疑似行为出现后的合理时间内向 SFO 报告；及保留证据并及时以证据充分的形式向 SFO 提供上述证据。

The SFO also sets out certain behaviours which it considers are indicative of a failure to cooperate with an investigation. These include protecting certain individuals or unjustifiably blaming others; putting a subject on notice that there is an investigation underway (which complicates the issuing of a litigation-hold letter); creating a danger of evidence or testimony being tampered with; remaining silent on selected issues; and deploying tactical delays and document overloads.

SFO 还阐述了其认为表明未配合调查的某些行为。这些行为包括保护某些个人或不公正地指责他人；告知当事人当下所进行的调查（这使出具诉讼保留函的情况变得复杂）；造成证据或证言被篡改的危险；在所选择的问题上保持沉默；以及部署策略上的延迟和文件过载。

Although the guidance goes into detail on the exact steps companies can take which are indicative of cooperation, the SFO has emphasized that not all of its recommendations will be relevant in every case. Therefore, when responding to an SFO investigation, it is important for companies to keep in mind the general principles of cooperation.

尽管指南对于公司可采取哪些表明合作的具体措施未作详细说明，但 SFO 强调，并非其所有建议与每个案件相关。因此，在应对一项 SFO 调查时，公司务必要记住合作的一般原则。

Preserving and Providing Information to the SFO

保留并向 SFO 提供信息

The guidance sets out the following best practices, among others, that companies should adopt when preserving and submitting material to the SFO:

指南阐述了公司在保留并向 SFO 提交材料时应当采纳的主要最佳做法：

- Providing basic background information about the organization; relevant financial records; material gathered during any internal investigation; and industry information
提供关于机构的基本背景信息；相关财务记录；在任何内部调查中搜集的材料；以及行业信息
- Providing material to the SFO in a structured and digestible format, which might involve arranging documents by topic or individual
以结构清晰和易于理解的形式向 SFO 提供材料，可包括按主题或个人类别整理文件
- Making use of lists and schedules. For example, a company might produce a list of relevant document custodians and the locations of those documents. The SFO might also ask an organization to provide schedules of relevant documents along with details of the search terms and methodologies applied to identify those documents
利用清单和明细表。例如，一家公司可提供一份相关文件保管人及这些文件所在位置的清单。SFO 还可请机构提供相关文件的明细表，以及识别这些文件所需的搜索词和方法的细节

- **Maintaining an audit trail of the acquisition and handling of both hard copy and digital materials**
对纸质和电子材料的获取和处理保持审计跟踪
- **Retaining passwords, recovery keys, and decryption keys in respect of all digital devices to allow for access to potentially relevant documents**
保留与允许访问可能相关文件的所有数码设备有关的密码、恢复密钥和解密密钥
- **Ensuring that digital files are delivered to the SFO in a format so that they are ready for ingestion and review on the SFO's document review platforms**
确保数码文件以可供随时在 SFO 的文件审阅平台上提取和审阅的格式交付 SFO
- **Ensuring that technology systems are up-to-date to preserve the means of reading digital files**
确保技术系统保持最新，以保留读取数码文件的手段
- **Providing material as promptly as possible and, in any event, in accordance with agreed deadlines**
尽量及时地提供材料，且在任何情形下遵守约定的最后期限
- **Being proactive in alerting the agency to the existence of relevant materials in the hands of third parties, such as private email accounts, messaging applications, and bank accounts which received payments from the organization**
积极地提醒 SFO 相关文件掌握在第三方手中，如私人电邮账号、消息应用以及从机构接受付款的空白账户
- **Taking steps to preserve potentially relevant material using a method that prevents the risk of document destruction or damage. If, for any reason, potentially relevant material is lost or destroyed, the organization should inform the SFO as soon as possible**
采用防止文件被销毁或损坏风险的方法，采取措施保留可能相关的材料。如果，可能相关的材料因任何原因遗失或被损毁，机构应当尽快通知 SFO

Witness Interviews in Internal Investigations

内部调查中的证人面谈

The guidance potentially puts organizations in a difficult position in respect of conducting witness interviews as part of internal investigations. The SFO states that organizations should consult with the agency before interviewing potential witnesses or suspects to avoid prejudicing the investigation. This may be practicable in certain situations, however, companies often need to commence internal investigations to ascertain whether any misconduct has taken place – before there is anything to report to the SFO.

关于将进行证人访谈作为内部调查的一部分，指南可能会令机构陷入两难境地。SFO 称，机构在与证人或嫌疑人面谈之前应当咨询该局，以免影响调查。这在某些情况下或许是可行的，但是，公司往往需要先开始内部调查，以查明是否有任何不当行为已发生——然后才需要向 SFO 报告。

Further, it is important for organizations to investigate any alleged wrongdoing promptly to maximize their chances of collecting relevant and reliable evidence; the requirement to liaise with the SFO in advance of commencing witness interviews could slow down this process and diminish the prospects of obtaining valuable evidence and testimony. The best course of action

on when and how to conduct witness interviews as part of an internal investigation will depend on the circumstances in each case, and companies should always obtain legal advice on this issue.

此外，机构有必要及时调查任何指称的错误行为，从而最大可能地搜集相关和可靠的证据；在开始证人面谈之前与 SFO 联络的要求可能减缓这一过程，降低获得有价值证据和证言的可能性。关于何时及如何进行作为内部调查一部分的证人面谈，最好的行动方案将取决于具体情形，公司应当始终就此问题征询法律意见。

However, organizations should always follow certain basic rules on witness interviews which are set out in the SFO guidance to maximize their chances of obtaining cooperation credit. At the outset of any internal investigation, organizations should identify potential witnesses including third parties. Companies should also refrain from tainting a witness's recollection of events, for example by showing the witness documents he or she has not already seen.

但是，机构应当始终遵循 SFO 指南中阐明的关于证人面谈的某些基本规则，以最大可能地获得合作奖励。在任何内部调查开始时，机构应当确定包括第三方在内的潜在证人。公司还应当避免影响证人回忆事件，例如向证人出示其未曾见过的文件。

Privilege 特权保护

The SFO uses the guidance to reiterate its controversial position that companies seeking credit for cooperation should be prepared to waive legal privilege over materials documenting witness interviews, including transcripts, notes, and other documents. According to the guidance, the organization must also be willing to identify a witness who can speak to the contents of each interview.

SFO 通过指南重申了其有争议的立场，即寻求合作奖励的公司应当有放弃对记录证人面谈的材料（包括笔录、笔记及其他文件）的法律特权保护的心理准备。根据指南，机构还必须愿意确定一名能够谈论每次面谈内容的证人。

The SFO stresses that companies who refuse to waive privilege over these materials risk losing the cooperation credit and, as a result, being ineligible for a settlement. Notwithstanding the SFO's robust stance on providing privileged interview materials, it should be noted that previous respondents have met the cooperation requirement and successfully negotiated deferred prosecution agreements with the SFO even though they have asserted privilege over relevant materials.

SFO 强调，拒绝放弃受特权保护材料的公司有可能无法获得合作奖励，因而无资格达成和解。尽管 SFO 在提供受特权保护面谈材料一事上持强硬态度，应当指出的是，以前有被告人虽然对相关材料主张了特权保护，但仍然满足了合作要求，并成功与 SFO 谈判获得暂缓起诉协议。

The guidance also states that, if an organization asserts privilege over documents during the course of an investigation, it will be expected to provide certification by independent legal counsel that the material in question is in fact privileged. Given the SFO's resistance to

assertions of privilege, the agency and its legal representatives may well scrutinize company-appointed independent counsel who opine that materials are protected by privilege.

指南还指出，如果一个机构在调查过程中对文件主张特权保护，其应当通过独立法律顾问提供关于相关材料的确受特权保护的证明。鉴于 SFO 对特权保护的主张持反对态度，该局及其法定代表很可能对认为材料受特权保护的公司指定的独立法律顾问进行严格审查。

A Helpful Guide – But No Guarantee of a Favourable Outcome 有帮助的指南——但不确保达到有利的结果

The guidance represents a positive step by the SFO under the agency's new director, Lisa Osofsky. Her predecessor, David Green, had resisted calls to provide guidance to companies and even circumscribed the scope of pre-existing guidance on self-reporting misconduct.

指南表明 SFO 在新任局长 Lisa Osofsky 的领导下迈出了积极的一步。其前任 David Green 拒绝了向公司提供指南的呼吁，甚至还限制了关于自我报告不当行为的已有指南的范围。

There is no doubt that the new guidance on cooperation will be a useful tool for companies subject to SFO investigations. Cooperation with the SFO which is part of a “genuinely proactive approach” to resolving an issue is one of the factors the agency considers when deciding whether to offer a deferred prosecution agreement. (There are still some doubts as to how beneficial a DPA may be in any event – but this analysis is not addressed in this note). If an organization under investigation can demonstrate that it has satisfied the SFO's guidelines on cooperation, the company will be in a stronger position to secure a settlement. However, the SFO has emphasized that cooperation alone will not guarantee a favourable outcome. The agency added that cooperation is only one of many factors that it will take into consideration when determining an appropriate resolution to an investigation.

关于合作的新指南对于受 SFO 调查的公司而言无疑是一个有用的工具。与 SFO 合作是解决问题的“真正积极策略”的一部分，也是 SFO 在决定是否给予暂缓起诉协议时考虑的因素之一（关于 DPA 在任何情形中如何有利仍然存疑，但本文中不作此分析）。如果一家受调查的机构能证明，其遵循了 SFO 关于合作的指南，则该公司将更有可能获得和解。但是，SFO 已强调，仅仅合作无法确保达到有利的结果。该局还说明，合作只是其决定恰当解决调查时将会考虑的诸多因素之一。

If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

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