

GUIDANCE ON THE APPROACH OF THE CROWN OFFICE AND PROCURATOR FISCAL SERVICE TO REPORTING BY BUSINESSES OF BRIBERY OFFENCES

Introduction

1. The Bribery Act 2010 ("the Act") came into force on 1 July 2011. The Act replaced the former common law provisions and a century-old legislative regime. It is a means of reshaping the law so that bribery and corruption as they exist in the modern world can be combated effectively. To mark the commencement of the Act, and to highlight the Crown's commitment to encouraging good corporate governance and to creating a corporate culture in which bribery is not hidden, the Lord Advocate approved an initiative for businesses to "self-report" bribery offences. Under the initiative the Crown will accept reports from businesses (meaning bodies corporate or partnerships as referred to in Section 14(1) of the Act) who wish to report the discovery by them of conduct within their organisation which may amount to an offence under the Act, with a view to consideration being given by the Crown to refraining from prosecuting the business and referring the case to the Civil Recovery Unit ("CRU") for civil settlement.
2. The Lord Advocate has approved an extension to the self reporting initiative which has been in operation since 1 July 2011, when the Bribery Act 2010 came into force. The initiative has been extended until 30 June 2016
3. In order to participate, businesses will require to submit a report via a solicitor to the Serious and Organised Crime Division ("SOCD") within the Crown Office and Procurator Fiscal Service before 30 June 2016. This guidance note sets out in detail how such reports should be made and how they will be dealt with both by SOCD and, if appropriate, by CRU.
4. The Crown Office and Procurator Fiscal Service is the sole public prosecutor in Scotland and considers all reports of alleged criminality in Scotland. The initiative described here is distinct from the self-reporting scheme operated by the Serious Fraud Office ("SFO") in England and Wales. The Crown has however had discussions with the SFO about this initiative and there will be liaison between SOCD and the SFO about self-reported cases. If the SFO is presented with a report from a business which clearly relates to conduct in, or predominantly in, Scotland they will refer the company to SOCD. The same will apply in reverse where SOCD receives a report which appears to disclose circumstances more appropriately dealt with by the SFO. In some cases which raise cross-border issues there may require to be discussion between SFO and SOCD as to which department will deal with the case.
5. Where there are cross-border issues each case will have to be considered individually. As a guide, examples of factors that suggest a business should report to Crown Office in the first instance are where the business has its headquarters or registered office in Scotland; or where

the business predominantly carries on its business in Scotland; or, most importantly, where the wrongdoing that the business has identified has taken place in, or mostly in, Scotland.

Parameters

6. During the period of the initiative the Crown will consider a report relating to conduct which would be an offence under the Act or, if it relates to conduct occurring before 1 July 2011, which would constitute an analogous offence under the law as it is before the Act comes into force.

Initial reporting

7. A report under this initiative should be made to SOCD by a solicitor acting on behalf of the business. Minimum requirements for acceptance of a report will be that the business:

- has conducted a thorough investigation of the circumstances, which may include an assessment by forensic accountants. The business must be willing to share any resulting report with SOCD and must acknowledge that the report is being provided to SOCD on its behalf.
- agrees to disclose to SOCD the full extent of criminal conduct which has been discovered,
- describes what has been done to prevent a repetition of this conduct in the organisation, and
- is committed to meaningful dialogue with the Crown in their assessment of the case and in any investigation

8. SOCD staff will be willing to have early discussions with the solicitors of any business considering making a report, to discuss the content of any report and to provide an early indication of whether or not such a report would be accepted. In some cases it will be appropriate for CRU staff to be involved in discussions, at this early stage and when a report has been received by SOCD, so that there can be discussion of issues such as how long CRU estimate it would take to complete their work on the case, the requirement to engage a further independent forensic accountant, and whether CRU are content with the level of benefit to the business identified by the business. There may be some cases where SOCD will advise that it would be more appropriate for the business to refer the matter to a regulator rather than to the Crown. While SOCD staff will be prepared to provide information about how cases will be dealt with, they will not enter into discussions with solicitors who wish to discuss a possible report in a particular case without disclosing the identity of their client. Information, including the initial report, provided to SOCD will be recorded. It will be treated in confidence but may be used by the Crown (or by law

enforcement on behalf of the Crown) in any subsequent criminal investigation and prosecution, or in any civil recovery investigation. In cross-border cases where a decision is made that the SFO have jurisdiction; or where prosecution or law enforcement agencies in other jurisdictions request assistance for their investigations; the Crown reserves the right to share this information with them.

9. The business must be clear that the report is made on behalf of the Board, where the business is a company, or on behalf of the Partners, where the business is a partnership; and that the business has received legal advice before making the report or disclosing any information to the Crown. The business will be asked to acknowledge that the information it provides to the Crown, including any report on its investigation of the matter and any other documentation, may be used by the Crown as indicated above. Reports will only be accepted from businesses and not from individuals. If an individual wishes to make a report without the knowledge of the business for which he works he will be directed to the appropriate law enforcement agency who will investigate outwith the terms of this initiative.

SOCD evaluation

10. SOCD will have regard to the following criteria when determining whether a self-reported case should be passed to CRU, with a view to reaching a civil settlement:

- the nature and seriousness of the offence and the extent of the harm caused;
- the extent of the wrongdoing within the business, including whether conduct was authorised by, or connived in, by senior management, or restricted to a small number of lower-ranking individuals;
- whether it is clear that the business is taking action as soon as the matter comes to the attention of senior management (as opposed to taking no action until it becomes aware that there is a risk that the conduct is going to come to light);
- whether the business (or the individuals involved in the matter reported) has any previous record for this type of conduct. This would go beyond a previous criminal conviction, and would include any regulatory enforcement action or warning;
- whether the individuals involved in the wrongdoing have left the business and, where decisions were taken at Board level, whether there is a new Board in place, and in both cases the timing and reasons for the departure of these individuals;
- whether the business has honoured its commitment to engage with the Crown meaningfully and in particular to disclose the full extent of the wrongdoing;
- whether the business had in place adequate anti-bribery systems at the time of the criminal conduct and whether it has further addressed this following the conduct;

- whether there are particular considerations which may weigh against prosecution, such as the consequences of prosecution for the company's employees and stakeholders.

11. Every case will be considered on its own merits. There may be self-reported cases where it is in the public interest to refer the case to CRU with a view to a civil settlement being agreed. However, it is anticipated that there may be cases where, taking into account all the criteria and all representations made on behalf of the business, the public interest considerations in reaching a civil settlement with a business which self-reports and demonstrates that it has taken remedial action, will be outweighed by other factors (principally where the offending is sufficiently serious for there to be an overriding public interest in a prosecution).

Such a case would be deemed inappropriate for referral to CRU and would be passed to law enforcement for criminal investigation, with direction and guidance from SOCD. In these cases, it is envisaged that the business will continue to cooperate with law enforcement. Law enforcement will report such cases to SOCD to consider prosecution and any ancillary confiscation proceedings. The business will be able to rely on their self-reporting and co-operation with the Crown and law enforcement as significant mitigating factors to be taken into account by the Court.

12. It is likely that in some cases a self-reporting business will want to reach an arrangement both in relation to how it will be dealt with and how former or current officers or employees of the business will be dealt with. The preliminary evaluation by SOCD will take this into consideration. It may be that it will not be in the public interest to allow a business to self-report and reach a civil settlement but prosecute individuals connected to the business, though there may be exceptions to this. Where it is decided that a case is unsuitable for referral to CRU no guarantees can be given about how individuals are to be dealt with.

SOCD appraisal

13. Specialist staff within SOCD will make an initial evaluation of the report within 8 weeks of receipt. SOCD may ask law enforcement agencies to provide advice and information about what has been disclosed and may seek more information from the business about the circumstances. Informal contact may be made with CRU at this stage to discuss whether a referral would be possible. If SOCD consider that the case can be most appropriately dealt with by referral to CRU, a report will be prepared for Crown Counsel who will be asked to approve such a referral.

14. If a decision is made to refer a case to CRU intimation of this will be given to the solicitor for the business. It will be agreed that neither SOCD, CRU nor the business will make any public comment about the case at this stage, beyond an acknowledgment that the case is being considered as part of the self-reporting initiative.

CRU involvement

15. Any case referred to CRU will be investigated under the civil recovery provisions of the Proceeds of Crime Act 2002 ("POCA"). An investigation will be instigated, with the involvement of a third party forensic accountancy firm ("the forensic accountants"), who will be paid for by the self-reporting business. The letter of engagement with the forensic accountants will reflect this arrangement. It is anticipated that professional conflicts may exist which will prevent some firms being appointed as the forensic accountants in certain cases. A forensic accountancy firm which has carried out an initial investigation for a business might have a conflict of interest such as would prevent its appointment depending on the terms under which it was instructed and other services being provided by the firm to the business. Otherwise, it is anticipated that forensic accountants will be appointed in accordance with Scottish Government procurement policy.

16. The forensic accountants will examine the business's initial investigation to understand the scope and accuracy of the conclusions which have been reached by the business. In this phase there will be consideration of the quality of the business's investigation and the level of additional investigation that may be required.

17. The forensic accountants will report their findings to CRU and provide recommendations as to further work that should be carried out. This will verify the initial report and provide comfort that the business has reported all offences and the extent of the wrongdoing within their organisation. The extent of the work thereafter carried out by the forensic accountants will be instructed by CRU and will be explained to the business.

18. The forensic accountants will make regular reports to CRU outlining the level of compliance of the company. Any serious breaches of compliance by the business, for example failure to allow the forensic accountants access to accounting records, will result in the case being returned to SOCD. The forensic accountants will also advise CRU should they uncover further criminality that was not part of the initial self-reporting by the business. On receipt of this information the CRU will return the case to SOCD. Such cases will only be re-referred to CRU for completion of the civil recovery investigation if SOCD are satisfied there is good reason not to begin a criminal investigation in the circumstances.

19. The forensic accountants will ultimately provide a report outlining their findings in relation to the reported conduct and any other conduct uncovered during their investigation. CRU will use this information to quantify the appropriate level of a settlement by reference to the property which has been obtained by the business through unlawful conduct. Following a decision by CRU to conclude a settlement, SOCD will be invited to intimate formally that there will be no prosecution of the business for the incident reported, subject to full implementation of the settlement. SOCD will seek Crown Counsel's confirmation of this.

20. Publicity will follow any settlement unless a compelling reason for confidentiality exists.

21. As previously stated, the forensic accountant's fees will be paid directly by the self-reporting business during the investigation. The business will pay the forensic accountants' invoices within an agreed timescale. Failure to do so may result in their case being returned to SOCD for further consideration of criminal investigation. The costs incurred by the business in respect of the forensic accountants may be taken into account when determining the appropriate level of any extra-judicial settlement but there should be no expectation by the business that these costs will be taken into account in every case.

22. There may be circumstances, in cases where the business has submitted a forensic accountancy report as part of their self-report, in which CRU take the view that the requirement to instruct a third party forensic accountancy firm can be dispensed with. This will be determined on a case to case basis and will be the subject of discussions with the business,

Practical arrangements for making a report

23. A solicitor wishing to find out more about the initiative or to hold a preliminary discussion about a case should contact the Serious and Organised Crime Division on 0131 243 8203..A solicitor wishing to make a report should write to Lindsey Miller, Head of SOCD. Argyle House, 3 Lady

Lawson Street, Edinburgh, EH3 9DR. or email

SOCDselfreporting:@copfs.gsi.gov.uk