

Fraud, theft and corruption - Who has a duty to report what?

The question often arises whether a CFE (or any other forensic auditor or investigator) has a duty to report irregularities discovered to the Police or prosecuting authority. This article serves to address the situations in which the CFE or investigator will have a duty to report fraud, theft or corruption:

The Corruption Act

Section 34 of the Prevention and Combatting of Corrupt Activities Act, Act No 12 of 2004 (PRECCA), provides that any person **in a position of authority** who knows, or ought reasonably to have known, or suspect that another person has committed:

- Corruption; or
- offences of theft, fraud extortion, forgery or uttering of a forged document, involving R100 000 or more must report such knowledge, or suspicion, or cause same to a police official.

In terms of Section 34 (2) failure to comply with this obligation will constitute an offence with effect from 31 July 2004. Provision is made for a sentence of not exceeding 10 years in the case of a High Court, whereas a Magistrate's Court can impose a fine or a period of imprisonment not exceeding 3 years.

Note that the reporting of a suspicion of corruption is not dependent on the amount involved, as with fraud or theft, where the reporting duty kicks in only when the amount exceeds R100 000.

In terms of Section 34 the following persons hold a position of authority:

- The Director-General or head or equivalent officer of a national or provincial department
- A municipal manager
- Any public officer in the senior management service of a public body
- A head, rector or principal of a tertiary institution
- A manager, secretary or director of a company (also a member of a close corporation)
- The executive manager of any bank or financial institution
- Any partner in a partnership
- Any person appointed as a chief executive officer or equivalent officer of an agency, authority, board, commission, committee, corporation, council, department, entity, financial institution, foundation, fund, institute, service or any other institution or organisation whether established by legislation, contract or any other legal means
- Any person responsible for overall management of the business of an employer

- Any person appointed in an acting or temporary capacity in any of the above-mentioned positions

When looking at these “persons” above, it is evident that it does not specifically include an auditor, investigator, CFE, consultant or the like. It can be inferred that the legislature did not intend to place this reporting duty on the “watchdog”, but rather on the senior management of companies, departments, entities, institutions and organisations.

However, in instances where a CFE is employed within these institutions or businesses, they may very well be required to file section 34 reports on behalf of the “accountable person”. This obligation would be imposed by their employment contract and not by the law (PRECCA) itself.

If the CFE is a professional consultant, it is imperative that the CFE informs his client about the reporting duty in terms of Sec 34 of PRECCA. The report in terms of Sec 34 and even more so, the recommendation by the CFE that the client should adhere to this prescript, is not a pronouncement on the guilt or innocence of the alleged perpetrator, but merely the report of a suspicious transaction as envisaged in the Act.

Failure to report as required in terms of PRECCA is a criminal offence and carries a penalty of the imposition of a fine or imprisonment of up to 10 years.

From a public-sector perspective, National Treasury has issued a Circular on 6 November 2011 instructing Accounting Officers in national departments to adhere to the provisions of Section 34.

Money laundering

In terms of the Financial Intelligence Centre Act, No 38 of 2001 (FICA), certain reportable and accountable institutions are obliged to report suspicious or unusual transactions to the Financial Intelligence Centre. The obligation of the report is triggered when an institution or individual either has actual knowledge or reasonably suspects that it has received, is about to receive, or about to facilitate receiving or moving proceeds of unlawful activity, including money laundering. What constitutes reasonable suspicion is determined by the facts of each matter.

There are additional reporting duties that apply within the public sector, including:

- The Code of Conduct for the Public Service requires all employees of the public service to report corruption to an appropriate authority.
- The Public Finance Management Act (PFMA) and the Municipal Finance Management Act (MFMA) requires Accounting Officers (not accountants), to report any losses that can be attributed to criminal conduct, to the SAPS.

In terms of section 28 and 29 of the Financial Intelligence Centre Act 38 of 2001, certain ‘accountable’ and ‘reporting’ institutions must report “cash transactions” over a certain

prescribed limit and then reporting duties are also imposed on any person who 'carries on a business' or who 'is employed by a business' to report suspicious or unusual transactions regarding the proceeds of unlawful activities.

In instances where a CFE is employed within these institutions or businesses, they may very well have a reporting duty.

Registered auditors

Where a CFE is a registered auditor and conducted an audit, it should be noted that they may have a duty to report "reportable irregularities" per Regulation 29(1)(b) of the Companies Act. Regulation 29(1)(b) of the Companies Act defines a reportable irregularity (RI) as follows:

"any act or omission committed by any person responsible for the management of a company, which-
(i) unlawfully has caused or is likely to cause material financial loss to the company or to any member, shareholder, creditor or investor of the company in respect of his, her or its dealings with that entity; or
(ii) is fraudulent or amounts to theft; or
(iii) causes or has caused the company to trade under insolvent circumstances."

In terms of the regulations a registered auditor has a duty to report such "reportable irregularities" to either the Companies and Intellectual Property Commission (CIPC), the Board of directors of the company involved and/or the professional body to which the auditor belongs, for e.g. SAICA, etc.

In fact, the auditor also has a duty in terms of Section 45(1)(a) of the Audit Professions Act, Act No 26 of 2005 to report the irregularities to the Regulatory Board and the Regulatory Board in turn has a duty in terms of sect 45(4) to report that irregularity to the appropriate Regulator. It follows that the reporting duty is, therefore, on the Regulator and not the individual CFE.

However, one should distinguish between the auditor who performs an audit in terms of section 44(1)(a) and a CFE (who happens to be a qualified auditor). The reporting duty, in terms of the Audit Professions Act, is on the auditor who performs an audit and not the CFE who investigates alleged corrupt activities or fraud.

The ACFE's rules and bylaws

The Professional Standards of the ACFE do not prescribe that suspected (or proven) irregularities be reported by CFEs.

Protection for the reporter

Section 17(7) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act provides protection to the reporter by stating that no “*action, whether criminal or civil, lies against a person complying in good faith’ with the reporting duty under section 12(1) of the Act.*”

Conclusion

It is, therefore, clear that CFE’s do not automatically, or *ex officio*, have a duty to report irregularities for criminal investigation, but they may have these duties in some situations:

- If the irregularity happened in their employer organisation and they hold a management position, e.g. as a director or branch manager;
- Where the CFE is employed by an entity to do internal investigations and the employment policies or job description prescribes that the CFE has a duty to report certain findings on behalf of his/her employer;
- If the CFE is in the public sector and his/her employer is subject to the PFMA or MFMA, they may have a duty to report as described above;
- Where the CFE or investigator incurred a duty in terms of the reporting of money laundering;
- Where the engagement contract of the CFE as a consultant requires this to be done; and
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- Where the CFE or investigator is a registered auditor and uncovers a “reportable irregularity” while conducting an audit.

However, if you have any uncertainty regarding whether you have a reporting duty or not, it is always advisable to seek advice and consult with a legal representative or practitioner.