



The Consultative Committee of Accountancy Bodies-Ireland

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SECTION 59, CRIMINAL JUSTICE (THEFT AND FRAUD OFFENCES) ACT, 2001

This Memorandum has been prepared by the Consultative Committee of Accountancy Bodies – Ireland (“CCAB-I”) to alert members of the profession to the duty to report to the Garda Síochána, introduced by Section 59 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

This Memorandum, is not a comprehensive guide to the Act’s detailed requirements. It should be read in conjunction with, and not as a substitute for, the Act. Members are advised that it may be appropriate, in considering the application of the provision in particular circumstances, to seek legal advice.

No responsibility for loss occasioned to any person acting, or refraining from action, as a result of material in this publication can be accepted by the CCAB-I.

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APPENDICES

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BACKGROUND

1. Section 59 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, (“the 2001 Act”), requires a relevant person, which would include an auditor and would generally include an accountant providing professional services, to report to a member of the Garda Síochána in circumstances where information or documents indicate that certain offences under the Act may have been committed by a client entity, or by its management or employees. The text of section 59 is included in Appendix 4.
2. The 2001 Act updates and consolidates the law relating to dishonesty and fraud. Its provisions are based in part on:
 - (i) 1992 Report of the Law Reform Commission “The Law relating to Dishonesty”: and
 - (ii) 1993 Report of the Government Advisory Committee on Fraud.

These Reports recommended that auditors should be required to report fraud or suspected fraud to the Garda Síochána. That proposal was also included in the First Report of the Company Law Review Group and, subsequently, in the Report of the Working Group on Company Law Compliance & Enforcement.

DUTY TO REPORT

3. Section 59(2) provides

“Where the accounts of a firm, or as the case may be any information or document mentioned in subsection (1)(b), indicate that –

 - (a) an offence under this Act (other than Sections 8, 12 to 15, 49(1) and 52(8)) may have been committed by the firm concerned, or
 - (b) such an offence may have been committed in relation to its affairs by a partner in the firm or, in the case of a corporate or unincorporated body, by a director, manager, secretary or other employee thereof, or by the self-employed individual concerned,

the relevant person shall, notwithstanding any professional obligations of privilege or confidentiality, report that fact to a member of the Garda Síochána.”
4. A list of reportable offences under the 2001 Act is contained in Appendix 2. Reference should be made to the specific wording of the 2001 Act when considering whether an offence may have occurred.

Effective date

5. The statutory duty to report to the Garda Síochána came into force on 1st August 2002.
6. The reporting obligation arises on the discovery of any documentation or information on or after 1 August 2002. This is regardless of whether the documentation or information relate to matters in existence before that date. However, section 59 does not have retrospective effect in relation to indicative documentation or information arising prior to commencement of the section on 1st August 2002.

INTERPRETATIONS

7. Section 59 is drafted in an ambiguous manner and precise definitive interpretation of its provisions can, ultimately, only be given by the Courts. The commentary hereunder on certain terms used in section 59 is based on legal advice received by the CCAB-I.

Accounts

8. In the absence within the 2001 Act of a statutory definition, the term “accounts”, having regard to the construction to be applied in the context of statutory provisions creating a criminal offence, is likely to include:
- audited financial statements, the preparation, presentation and, where applicable, publication of which is in compliance with the requirements of the Companies Acts or other legislation;
 - financial statements, comprising a balance sheet, profit and loss account and other statements and related notes prepared and presented in compliance with generally accepted accounting principles (“GAAP”); and
 - other forms of accounts such as ‘receipts and payments’ accounts.

Relevant person

9. “Relevant person” is defined in section 59 as a person
- “(a) who audits the accounts of a firm, or
(b) who otherwise with a view to reward assists or advises a firm in the preparation or delivery of any information, or of any declaration, return, account or other document, which the person knows will be, or is likely to be, used for the purpose of keeping or auditing the accounts of the firm.”
10. Where a “relevant person” performs any work on the “accounts” that person will be a “relevant person” in relation to information and documents examined during the work.
11. Legal advice has been received to the effect that, within an accountancy practice, the term “relevant person” applies to the engagement partner or sole practitioner, as the individual responsible for the audit or for the assistance or advice, as the case may be. Generally, work procedures within an accounting practice will need to provide that relevant issues are passed to the responsible person for consideration and decision.
12. Other than an auditor, the definition of “relevant person” would include, for example:
- a person providing accounting services to the firm;
 - a tax advisor;
 - solicitors advising on the merits and likely financial implications of a claim against a firm;
 - an insurance assessor advising on a loss of profits claim;
 - a bank confirming the firm’s existing banking arrangements; and
 - an actuary advising on the funding of the firm’s pension scheme;

where that person knows that the particular information or document “...will be, or is likely to be, used for the purpose of keeping or auditing the accounts of the firm...”.

13. Section 59 specifies that an employee of the firm whose accounts are being prepared or audited is not a “relevant person” provided his or her remuneration is subject to PAYE.

Firm

14. The term “firm” is defined in section 59 as a “partnership, a corporate or unincorporated body, or a self-employed individual”. Consequently, the term can apply to a wide range of organisations, for example, a charity, a credit union, or a pension scheme.
15. Definitions of key terms used in the 2001 Act are given in Appendix 1 of this document.

OBLIGATION ON RELEVANT PERSON

16. The primary responsibility for ensuring compliance by a firm with its statutory obligations lies with the directors, or managers, or proprietors of that firm.
17. It is not the relevant person’s function to ensure compliance with the provisions of the 2001 Act or to undertake work to determine whether a firm has done so. However, the fact that the firm is subject to an audit, or that a professional accountant “...assists or advises a firm...” may act as a deterrent to non-compliance.
18. The obligation to report arises in circumstances where information or documents “indicate” that specified offences under the Act “...may have been committed.”
19. The “...information or document mentioned in subsection (1)(b)...” is that which the relevant person “...knows will be, or is likely to be, used for the purpose of keeping or auditing the accounts of the firm.” Unless the individual knows that the particular information or document “...will be, or is likely to be, used for the purpose of keeping or auditing the accounts of the firm”, he or she will not be a relevant person and, therefore, will not be subject to the statutory reporting obligation.
20. Legal advice received by CCAB-I is that section 59 does not contain any requirement placing an obligation on a “relevant person” to review documents which he or she would not normally review in carrying out the assignment. However, where the relevant person’s suspicions are aroused, he or she will have regard to the guidance below.
21. In the case of auditors, the scope of their work is designed to enable them to form an opinion as to whether the financial statements give a true and fair view of the state of the company’s affairs at a particular date and of its results for the reporting period ending on that date. In considering this, auditors have regard to the requirements and guidance in Statements of Auditing Standards issued by the Auditing Practices Board. SASs of particular relevance are SAS 110 “Fraud and error” and SAS 120 “Consideration of law and regulations”.
22. In the case of a professional accountant who “...assists or advises a firm...”, that work will be carried out in the particular context of the task concerned.
23. As a consequence of the restricted/focused scope of the work referred to above it is not possible for an individual auditor or professional accountant, regardless of how detailed and diligently the work is carried out, to identify every possible circumstance in which “any information or document” may indicate an offence may have been committed under the 2001 Act.
24. Many of the specified offences set out in the 2001 Act are complex. Specialised legal knowledge and expertise would frequently be required to ascertain whether particular information or documents indicate a specified offence may have been committed.
25. Where the professional accountant is carrying out a non-audit assignment for the client firm and information or documents indicate that an offence under the 2001 Act may have been committed, he or she will take steps such as those instanced in paragraph 26 below, to clarify, to the extent possible, the situation identified and assess whether the circumstances are such as are to be reported to the Garda Síochána.

26. In determining whether circumstances indicate an offence may have been committed, the auditors or other relevant person will undertake appropriate procedures, for example;
- enquiry of appropriate level of staff;
 - review of correspondence and documents relating to the event concerned;
 - discussions with senior management (see paragraph 27) ; and
 - obtaining independent legal advice.
27. Where management of the firm concerned has taken legal advice as to whether an offence under the 2001 Act has been committed, the relevant person may review and consider that advice in deciding whether they believe circumstances have arisen which require them to make a report in compliance with Section 59 of the 2001 Act.
28. The relevant person may discuss the matter further with colleagues within the firm of accountants and may wish to seek legal advice or raise particular aspects of the matter with his or her professional body.

REPORTING

29. Having determined that the circumstances encountered do indicate a specified offence may have been committed, the relevant person should report the facts giving rise to the indication of an offence to the Garda Síochána without undue delay.
30. The duty to report applies to a relevant person regardless of whether:
- (i) the matter has already been referred to the Garda Síochána, by the firm itself or by a third party; or
 - (ii) where the Garda Síochána have themselves determined an offence may have been committed; or
 - (iii) the firm has already been successfully prosecuted for the particular offence.
31. Section 59 does not include any wording to indicate that a relevant person may take into account their own assessment of the materiality of an offence when determining whether to report to the Garda Síochána.
32. When making their report under section 59(2), relevant persons consider including the following:
- (i) the name of the firm concerned;
 - (ii) a statement that the report is made in compliance with the duty imposed by section 59(2), Criminal Justice (Theft and Fraud Offences) Act, 2001;
 - (iii) the offence/s the information or document indicates may have been committed;
 - (iv) the information or document concerned;
 - (v) the name and address of the relevant person making the report;
 - (vi) the date the report is given; and
 - (vii) a request for confirmation that the report has been received.

PROTECTION OF RELEVANT PERSON

33. Section 59(3) states
- “A disclosure in a report made in good faith by a relevant person to a member of the Garda Síochána under subsection (2) shall not be treated as a breach of any restriction imposed by statute or otherwise or involve the person in liability of any kind”.
34. Section 59(3) offers general protection to persons making a report to the Garda Síochána in compliance with section 59(2). However, such protection would not be given if it were held that the person acted in bad faith or maliciously in making the report.

REQUEST FOR FURTHER INFORMATION

35. Should follow up enquiries be received from the Garda Síochána, the relevant person considers obtaining legal advice to determine;
- (i) whether he or she is statutorily obliged to respond to such enquiries; and, if so,
 - (ii) whether he or she retains the protection afforded by Section 59(3), or has other statutory protection, in responding to such enquiries.

CRIMINAL JUSTICE (THEFT AND FRAUD OFFENCES) ACT, 2001

DEFINITIONS IN THE ACT

<i>Appropriates</i>	In relation to property, usurps or adversely interferes with the proprietary rights of the owner of the property.
<i>Dishonestly</i>	Without a claim of right made in good faith.
<i>Document</i>	Includes a map, plan, graph, drawing, photograph or record or a reproduction in permanent legible form, by a computer or other means (including enlarging), of information in non-legible form
<i>Gain/Loss</i>	Extending only to gain or loss in money or other property, whether any such gain or loss is temporary or permanent. “Gain” includes a gain by keeping what one has, as well as a gain by getting what one has not. “Loss” includes a loss by not getting what one might get, as well as a loss by parting with what one has.
<i>Firm</i>	A partnership, a corporate or unincorporated body or a self-employed individual
<i>Property</i>	Money and all other property, real or personal, including things in action and other intangible property
<i>Record</i>	Any information in non-legible form which is capable of being reproduced in permanent legible form
<i>Relevant person</i>	A person – (a) who audits the accounts of a firm, or (b) who otherwise with a view to reward assists or advises a firm in the preparation or delivery of any information, or of any declaration, return, account or other document, which the person knows will be, or is likely to be, used for the purpose of keeping or auditing the accounts of the firm, but does not include an employee of a firm who – (i) in that capacity so assists or advises the firm, and (ii) whose income from so doing consists solely of emoluments chargeable to income tax under Schedule E, as defined in section 19 of the Taxes Consolidation Act, 1997.
<i>Stolen Property</i>	Includes property which has been unlawfully obtained otherwise than by stealing.
<i>Theft</i>	A person is guilty of theft if he or she dishonestly appropriates a property without the consent of its owner and with the intention of depriving its owner of it.

CRIMINAL JUSTICE (THEFT AND FRAUD OFFENCES) ACT, 2001

REPORTABLE OFFENCES UNDER SECTION 59(2)

These titles are extracted from the Act, which should be referred to for the relevant detailed provisions.

Part 2

<i>Section</i>		<i>Commencement Date</i>
4	Theft	01/08/2002
6	Making gain or loss by deception	01/08/2002
7	Obtaining services by deception	01/08/2002
9	Unlawful use of computer	01/08/2002
10	False accounting	01/08/2002
11	Suppression of documents	01/08/2002

Part 3

17	Handling stolen property	01/08/2002
18	Possession of stolen property	01/08/2002
19	Withholding information regarding stolen property	01/08/2002

Part 4

25	Forgery	01/08/2002
26	Using false instrument	01/08/2002
27	Copying false instrument	01/08/2002
28	Using copy of false instrument	01/08/2002
29	Custody or control of certain false instruments	01/08/2002

Part 5 *

33	Counterfeiting currency notes & coins	19/12/2001
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34	Passing counterfeit currency notes or coins	19/12/2001
35	Custody or control of counterfeit currency notes and coins	19/12/2001
36	Materials and implements for counterfeiting	19/12/2001
37	Import and export of counterfeits	19/12/2001
39	Failure to apply measures to detect counterfeiting	19/12/2001

Part 6

42	Fraud affecting European Communities' financial interests	01/08/2002
43	Active corruption	01/08/2002
44	Passive corruption	01/08/2002
45	Certain offences committed outside the State	01/08/2002

Part 7

51	Concealing facts disclosed by documents	19/12/2001
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Part 9

58	Liability for offences by bodies corporate and unincorporated	19/12/2001
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* *Offences under Part 5 apply even if committed outside the State*

CRIMINAL JUSTICE (THEFT AND FRAUD OFFENCES) ACT, 2001

INTERPRETATION OF CERTAIN OFFENCES

Unlawful use of computer

It is an offence to dishonestly, within the State or outside the State, operate or cause to be operated a computer within the State with the intention of making a gain for oneself or for another or causing a loss to another.

False Accounting

False accounting will be an offence and will be committed where a person, intending to make a gain for oneself or another, or to cause loss to another, does any one of the following :

- (i) destroys or otherwise falsifies accounts or documents for accounts ;
- (ii) fails to complete accounts or documents
- (iii) furnishes false or misleading accounts or documents. Falsifying accounts or documents arises where misleading or false entries are made or where relevant particulars are omitted.

Suppression of documents

Section 11 is concerned with the dishonest use of valuable securities and other documents for the purpose of realising a benefit or causing loss. It is an offence dishonestly to destroy, deface or conceal certain documents, including valuable securities, wills, etc. with the intention of making a gain for oneself or another or causing a loss to another. Similarly it will be an offence to dishonestly by any deception procure the execution of a valuable security with the like intention. Subsection (3) defines what is meant by valuable security, including a document transferring a right in or over land or authorizing the payment of money.

SECTION 59, CRIMINAL JUSTICE (THEFT AND FRAUD) OFFENCES ACT, 2001

59. – (1) In this section –

“firm” means a partnership, a corporate or unincorporated body or a self-employed individual;

“relevant person” means a person –

- (a) who audits the accounts of a firm, or
- (b) who otherwise with a view to reward assists or advises a firm in the preparation or delivery of any information, or of any declaration, return, account or other document, which the person knows will be, or is likely to be, used for the purpose of keeping or auditing the accounts of the firm,

but does not include an employee of a firm who –

- (i) in that capacity so assists or advises the firm, and
- (ii) whose income from so doing consists solely of emoluments chargeable to income tax under Schedule E, as defined in section 19 of the Taxes Consolidation Act, 1997.

(2) Where the accounts of a firm, or as the case may be any information or document mentioned in *subsection (1)(b)*, indicate that –

- (a) an offence under this Act (other than *sections 8, 12 to 15, 49(1) and 52(8)*) may have been committed by the firm concerned, or
- (b) such an offence may have been committed in relation to its affairs by a partner in the firm, or in the case of a corporate or unincorporated body, by a director, manager, secretary or other employee thereof, or by the self employed individual concerned,

the relevant person shall, notwithstanding any professional obligation of privilege or confidentiality, report that fact to a member of the Garda Síochána.

(3) A disclosure in a report made in good faith by a relevant person to a member of the Garda Síochána under *subsection (2)* shall not be treated as a breach of any restriction imposed by statute or otherwise or involve the person in liability of any kind.

(4) A person who fails, without reasonable excuse, to comply with the duty imposed by *subsection (2)* is guilty of an offence and is liable on summary conviction to a fine not exceeding €1,900