



The Prevention and Combatting of Corrupt Activities Act, Act 12 of 2004 (“PRECCA”) has made it a requirement to report certain actual or suspected crimes. This memorandum sets out high level guidance for public officials, executives, non-executive directors and audit committees to understand the reporting obligations. We have included information provided by the Directorate for Priority Crime Investigation (DPCI also known as the HAWKS) and practical observations by KPMG Forensic gained from assisting organisations to make reports under PRECCA.

This document is intended for general guidance and may not address the specific circumstances faced by you or your organisation. It should not be construed as legal advice and should you have any queries please consult your advisor.

### Duty to report:

Section 34 of PRECCA places a duty on certain persons to report certain offences. Failure to report is a criminal offence.

### What to report:

- Corruption;
- Theft;
- Fraud;
- Extortion;
- Forgery; and
- Uttering of a forged document.

These offences must involve an amount of R100, 000.00 or more.

### Who must report:

Any person who holds a position of authority (as defined in section 34(4) of PRECCA), who knows or **ought reasonably to have known or suspected** that any other person has committed an offence (of corruption) in terms of sections 3 to 16 or 20 to 21 of PRECCA or theft, fraud, extortion, forgery or uttering of a forged document involving an amount of R100 000 (hundred thousand rand) or more, **must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to DPCI.**

Section 34(2) of PRECCA provides that any person who fails to report such corrupt activities is guilty of a criminal offence (with a potential custodial sentence).

### Where to report:

As amended by the South African Police Service Amendment Act, 2012 (Act 10 of 2012), reporting should be made to a police official in the DPCI in terms of Section 34(1) of the PRECCA.

### When to report:

Our understanding of the legislation is that there is no stipulated timeframe within which to report an incident. We suggest that the report is made

as soon as investigation is completed. Legal advice should be obtained to confirm, based on available facts, whether prima facie evidence (or reasonable grounds to suspect) exists that one or more of the crimes listed in section 34 of PRECCA were committed.

### Observations:

Based on our practical experience with reporting under section 34, the following observations have been noted:

- How to discharge the obligation? Reporting under section 34 discharges the obligation to report in terms of the section (remember to obtain and retain a receipt from the DPCI). However, it does not mean that an investigation will automatically follow - the decision to investigate allegations made in a report is at the discretion of the DPCI.
- The format of reporting varies. There is a prescribed form available to make the report (see the SAPS website). However, for commercial crime matters, the official form is usually too short and is often supported by an affidavit and further supporting documents.
- Is the section 34 report a case number? The section 34 report reference number is a DPCI number and not a South African Police Service case number. As it stands, one may need to consider making a simultaneous report to the Commercial Crimes Unit of SAPS to obtain a case number and pursue criminal investigation and/or obtain the case number for insurance purposes.
- Do I report a suspicion? The reporting obligation causes much debate in terms of reporting an actual incident or merely a suspicion of wrongdoing. The reporting of a reasonable suspicion without any prima facie evidence is not common and not recommended as there may be adverse legal consequences. Typically, it is advisable for entities to establish a process for making such reports to the DPCI and, in the event that there is insufficient evidence, we caution clients against reporting a suspicion without due consultation and consideration.
- What if the wrongdoing is not R100,000 or more? Not reporting wrongdoing below the R100 000 threshold is often debated. Clients want to know if the wrongdoing applies to a once off transaction greater than R100 000 or multiple smaller transactions totalling more than R100 000 and, if the latter, whether there is an obligation to report. There is also confusion when the amount cannot be accurately quantified with limited evidence. We suggest that the risk of not reporting, assuming that all other requirements are satisfied, is greater than not making the report.
- What if I don't report? If you take a carefully considered decision not to make a section 34 report, it may lead to the risk of legal claims if that entity or individual involved goes on to commit another crime against another party. In such cases we recommend that you obtain legal advice, though there is no reported case of anyone being prosecuted for not reporting a crime under section 34.

<sup>1</sup> For further information please go to <http://www.saps.gov.za/dpci/reportingguide.php>

- The authorities are under significant resource constraints and the availability of skilled financial crime investigators is limited. Accordingly, the best results are often achieved by being able to present a comprehensive dossier of events to the authorities that contains evidence of the suspected wrongdoing. This approach is supported by law enforcement so that further enquiries can speed up the investigation and decision whether to prosecute. Other benefits of performing a comprehensive investigation include:
  - that action is taken against those responsible;
  - the investigation is controlled;
  - that control failures are addressed on a timely basis; and
  - that any further loss is prevented.
- What about corruption committed in foreign jurisdictions? The extraterritorial jurisdiction provisions of PRECCA are broad and state that even if the offence occurred outside the Republic, a court of the Republic shall, regardless of whether or not the act constitutes an offence at the place of its commission, have jurisdiction in respect of that offence. However, we have not seen widespread use of this provision, usually on the grounds that if the case has been reported to authorities outside the republic then it is not necessary to report again in South Africa. This may require further assessment of the legal requirements in the other jurisdiction.
- It is generally advisable to consult with your advisors should you be faced with reporting a sensitive financial crime matter, especially in instances where corruption is suspected and you fall under the jurisdiction of the UK Bribery Act or the Foreign Corrupt Practices Act (US).
- The positive obligation to report an offence under PRECCA is an encouraging step to fight corruption. However, unlike anti-bribery legislation in the US and UK, PRECCA does not create a requirement for companies to develop an anti-corruption compliance framework. This is an area that is likely to be addressed in future legislation.

## Conclusion

Should you have any queries in respect of making a report in terms of section 34 of PRECCA please do not hesitate to contact us.

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## Appendix 1 - Section 34 Reporting Guide (source: Directorate for Priority Crime Investigation)

### Duty to report:

Section 34 places the duty on certain persons to report certain offences. Failure to report is a criminal offence.

### What to report:

- **Corruption:** Chapter 2 of PRECCA defines corruption as any person who gives or agrees or offers to give or accept any gratification amounting to an unauthorised or improper inducement to act or not to act in a particular manner. The following additional common law offences fall under Section 34.

- **Theft:** The unlawful appropriation of moveable corporeal property belonging to another with intent to deprive the owner permanently of the property.
- **Fraud:** The unlawful and intentional making of a misrepresentation which causes or may cause another to act to their actual or potential prejudice.
- **Extortion:** The taking from another some patrimonial or non-patrimonial advantage by intentionally and unlawfully subjecting that person to pressure which induces him or her to submit to the taking.
- **Forgery:** Unlawfully and intentionally making a false document to the actual or potential prejudice of another.
- **Uttering of forged document:** Uttering consists of unlawfully and intentionally passing off a false document (forged) to the actual or potential prejudice of another.

### Who must report?

According to section 34(1) of the Act, any person who holds a position of authority (defined in section 34(4) of the Act), who knows or ought reasonably to have known or suspected that any other person has committed an offence (of corruption) in terms of sections 3 to 16 or 20 to 21 of the Act or theft, fraud, extortion, forgery or uttering of a forged document involving an amount of R100,000,00 or more, **must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.**

Section 34(2) of the Act provides that any person who fails to report such corrupt activities is guilty of an offence. The following are the people who must report:

- the Director-General or head, or equivalent officer, of a national or provincial department;
- in the case of a municipality, the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);
- any public officer in the Senior Management Service of a public body;
- any head, rector or principal of a tertiary institution;
- the manager, secretary or a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973), and includes a member of a close corporation as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984);
- the executive manager of any bank or other financial institution;
- any partner in a partnership;
- any person who has been appointed as chief executive officer or an equivalent officer of any 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 other person who is responsible for the overall management and control of the business of an employer; or
- any person contemplated in paragraphs mentioned above, who has been appointed in an acting or temporary capacity.

### Where to report:

As amended by the South African Police Service Amendment Act, 2012 (Act 10 of 2012), reporting should be made to a police official in DPCI in terms of Section 34(1) of PRECCA.