

## **ODCE – Auditor Reporting**

**What happens next**

**February 2013**

# ODCE – Auditor Reporting – What happens next

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*The purpose of this document is to explain the structure of the ODCE's process for responding to reports from auditors and to assist in developing time efficient engagement between ODCE staff and auditors so as to reach appropriate conclusions on a timely basis.*

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*ODCE receives reports from auditors under section 194 of the Companies Act 1990, which requires them to report in defined circumstances. Such reports assist the ODCE in achieving its statutory objectives of encouraging compliance with company law and taking action, when appropriate, to prosecute non-compliance or make recommendations to the Director of Public Prosecutions for further action. However, reports from auditors are only one source of information for the ODCE: other sources include liquidators, and any person may choose to bring a matter to its attention. Such 'voluntary' reports account for the majority of cases. Nevertheless, auditors' reports account for the majority of criminal cases.*

## **Background to the ODCE**

The Office of the Director of Corporate Enforcement (ODCE) is governed in carrying out its work primarily by powers and duties imposed by the Company Law Enforcement Act 2001 (as amended). The Act created the ODCE, and also amended other Companies Acts, in particular certain sections of the Companies Act 1990, to impose on the ODCE the obligation to enforce company law, including prosecution by way of summary proceedings.

One of the 2001 Act amendments introduced a new sub-section 194(5) of the 1990 Act, which sets out a mandatory requirement for auditors to report to the ODCE, where information obtained in the course of their audit work leads them to form the opinion that there are reasonable grounds for believing that an indictable offence under the Companies Acts has been committed. To support this new duty, ODCE developed guidance in conjunction with the Auditing Practices Board (APB), issued as APB Bulletin 2007/2 -The Duty of Auditors in the Republic of Ireland to Report to the Director of Corporate Enforcement and Decision Notice D/2006/2 - Revised Guidance on the Duty of Auditors to Report Suspected Indictable Offences to the Office of the Director of Corporate Enforcement.

More recently, CCAB-I Information Sheet 06/2009/ODCE Information Notice I/2009/4 - Reporting Company Law Offences: Information for Auditors, provides a useful tool for auditors to guide them through the auditor's decision-making process, as well as listing 13 offences which auditors may discover as part of their audit work.

By way of putting indictable reports in their broader context, it should be understood that reports from auditors constitute less than 10% of the total volume of reports received each year in the ODCE. The main categories of reports received by the ODCE are (a) those made by liquidators in accordance with section 56 of the 2001 Act, (b) voluntary reports from a variety of sources (mainly complaints from the public) and (c) indictable offence reports from auditors. It is from category (c) that most of the ODCE's criminal prosecutions derive, with the balance coming mainly from the ODCE's own work in detecting offences by, for instance, unregistered auditors and persons acting in breach of High Court restriction/disqualification orders. However, auditors should be aware of the fact that, in a typical year, less than 5% of indictable offence reports from auditors ultimately give rise to criminal prosecutions.

## **Auditors' duties and professional standards**

Auditors fulfil their reporting duty under section 194 in the context of auditing company financial statements in accordance with International Standards on Auditing (UK & Ireland) issued by the APB. Both these and company law focus on the auditor's primary duty of reporting on the truth and fairness of companies' financial statements. However, ISA (UK & Ireland) 250 sets out relevant requirements and guidance for additional reporting when required by law and also considers steps by the auditor if a matter is determined to warrant reporting in the public interest.

Auditors amongst others also have a duty to report offences under the Criminal Justice (Theft & Fraud Offences) Act 2001 and the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. Reporting to the ODCE does not affect these duties.

In certain circumstances, certain company law offences may also be reportable under the Criminal Justice Act 2011.

It should also be noted that under section 192(6) of the Companies Act 1990,

## Legal and operational context

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“Where a disciplinary committee or tribunal (however called) of a body of accountants recognised for the purposes of section 187 [of the 1990 Act] has reasonable grounds for believing that an indictable offence under the Companies Acts may have been committed by a person while the person was a member of the body, the body shall, as soon as possible, provide a report to the Director giving details of the alleged offence and shall furnish the Director with such further information in relation to the matter as the Director may require.”

## Stage 1 – acknowledging and assessing

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***When a report is received, ODCE staff will issue an acknowledgment and start work to make a preliminary assessment of whether the matter reported requires further action. The time required for this initial assessment stage can vary depending on the complexity of issues raised. The ODCE must also ensure that it prioritises use of its resources to best effect. Once the initial assessment is made, ODCE staff will communicate with the auditor, either to ask for further information or to indicate that no further action is planned at this stage. Auditors and directors should note, however, that further information may come to light at a later date which could lead to a case being re-assessed.***

When the ODCE receives a report from an auditor, a case-file is created and the details are entered in the ODCE's database. Reports from auditors, because they disclose, by definition, reasonable grounds for believing that an offence has been committed, are processed in a different manner within the ODCE, as compared to complaints (so-called voluntary reports), which may or may not identify prima facie offences.

As the initial step in its assessment, the ODCE seeks to gather all relevant information on the company and its directors, with a particular emphasis on filings in the Companies Registration Office (related companies, directors' compliance history, etc), a search of the ODCE's own extensive database of cases (to identify other cases involving, for instance, one or more of the directors in the case under examination), a judgment search, a search of the restricted/disqualified persons register, etc, following which a preliminary analysis of the case will be carried out.

This initial process will seek to establish the scale of the company's activities and the apparent seriousness of the offences. Where necessary, additional information may be sought from other sources, such as the Revenue Commissioners (as provided for in the 2001 Act). At that point, if it has been decided that the case merits further scrutiny, it is assigned to a Team, comprising a Case Officer (the case manager) and other ODCE staff: a solicitor, an accountant and a Garda.

No correspondence to the auditor would ordinarily issue in the course of this work. However, the steps taken may identify that specific further details are required to conclude the initial assessment.

A fully completed report by the auditor, providing details of the grounds as set out in section 11 of the APB Bulletin/ ODCE Notice, assists the ODCE team in forming its initial view of the case and, accordingly, speeds up the assessment process. Such reports, in whatever form, should contain whatever information the auditor required in order to form the opinion in relation to the offence. The more information supplied in the initial report, the quicker the ODCE can decide on the appropriate course of action, including deciding no further action is necessary. If the directors of the company also choose to write to the ODCE concerning the matter, this can also be helpful in those cases where the indicated offences are at the less serious end of the scale and/or the matter has been rectified. The information provided by auditors as part of their reports to the ODCE should include the information as set out in Appendix 2.

In many cases, the ODCE team may conclude that no substantive issue arises. Whilst the auditor's duty arises when there are 'reasonable grounds' to conclude that an indictable offence exists without applying legal rules of evidence, the examination addresses whether the circumstances indicate that such evidence exists. Doing so may result in the ODCE reaching a different conclusion to the reporting auditor.

In very straightforward cases, the ODCE may have sufficient information at the end of Stage 1 to determine its course of action (Stage 3). If so, Stage 1 is completed by issue of a letter to the auditor indicating the ODCE's conclusion. More normally, Stage 1 is completed by issue of either:

- a letter to the auditor indicating that no further information is required at this stage but that the matter is still under consideration, or
- a request for further information (Stage 2).

## Stage 2 – seeking additional information

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***Where the ODCE team determines that a case warrants further investigation, it is commonly necessary to seek additional information. This may be obtained using the power given by section 194(5A) of the Companies Act 1990 to request further details from the auditor. There is no set timeframe for requesting further information. However, when a request is issued, the ODCE normally requests the auditor to supply the information within 3 weeks.***

On completion of the initial assessment of a particular case, the ODCE team determines what further information is needed to reach a conclusion .

In many cases, the ODCE will send a letter under section 194(5A), Companies Act 1990 to the auditor (addressed to the practice, unless a designated name is given) requesting additional information, which is necessary to gain a fuller understanding of the report and to assist in determining the appropriate course of action for the ODCE. Such letters specify as clearly as possible what is required of the auditor. Typical contents include:

- Details concerning the appointment of and qualifications of the auditor
- Specific details concerning the commission of the suspected offence
- Whether consideration has been given to any of the exceptions permitted under law in respect of the offence
- Whether the company and its directors have been informed of the report, and if so any response received

In cases of reported breaches of section 202, Companies Act 1990 (keeping of books of account), where a form H4 has been filed with the Companies Registration Office, the letter sent to auditors will be under section 194(3A), Companies Act 1990. The reason for this is that the responses supplied by auditors under this section have particular evidential value in any subsequent court case. As such, in the situation as set out above, and where it has been decided that court action is appropriate, all requests for information will be made of auditors under section 194 (3A), rather than for example from the company or its directors.

The ODCE recognises some of the information that it may wish to obtain, such as detailed information contained in the company's accounting records, is not required to be held by an auditor acting in that capacity, given the requirements of International Standards on Auditing. Where an auditor does not hold company records to which the ODCE wishes to refer, they are not under a legal obligation to obtain them from third parties.

In a minority of cases, section 194(5A) letters will not be sent, possibly because the initial assessment (probably underpinned by an informative report from the auditor) suggests a minor offence in a small-scale company, at which point the case will normally be concluded by taking administrative measures, as set out in Stage 3, or because, perhaps, the company has been wound up and the issues can be better pursued with the liquidator using the process established under section 56 of the Company Law Enforcement Act 2001.

The ODCE also has power to obtain information from the company – for example, by requiring production of books or documents, by inspecting certain records and, in more serious cases, by obtaining a warrant to search the company's premises (see Appendix 1 for further details). Depending on the circumstances of the case, the ODCE may seek to use those powers in addition to requesting information from the auditor. The ODCE will not ordinarily inform the auditor of a decision to seek information from the company or its directors.

When requesting information under section 194(5A), the ODCE normally specifies a response date of three weeks from the date of the request. However the ODCE is amenable to extensions if the auditor contacts the ODCE identifying a particular difficulty with meeting the deadline. The ODCE may also agree to meet to discuss particular aspects of the information requested. However, it is important to appreciate that the ODCE team will need to act with a view to the collation of evidence that is usable in a court. To that end, correspondence would ordinarily be formal in nature.

When the ODCE receives the auditor's response to its request, the team will consider the contents, together with other relevant information collected, and may wish to clarify particular points. Otherwise, this marks the end of Stage 2 insofar as the auditor is concerned.

## Stage 3 – determining the course of action

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*When the ODCE has assembled information needed for a full assessment of a potential indictable offence, it reassesses its initial conclusion as to whether there is prima facie evidence of an indictable offence and where there is the ODCE determines whether to proceed by*

- *Administrative measures, or*
- *Prosecution.*

*It may be necessary to seek further information from the auditor during this process.*

*The timeframe for this stage is determined by the complexity of the issues involved and the need to make best use of its resources.*

*The ODCE may also re-evaluate a decision at a later date if more information comes to light.*

The ODCE has a number of different options available to it in determining how best to deal with a suspected offence which has been the subject of an indictable offence report from an auditor.

As noted earlier, in some cases it may be determined quite quickly that no substantive issue arises and the auditor is accordingly informed of this.

Where a matter is relevant, and appears to constitute a breach of the law, the ODCE may choose to deal with the matter by administrative means, which may include securing rectification and/or issuing a warning letter. A copy of any such letter will also be sent to the auditor.

However, the ODCE always reserves the right, based on an assessment made by the relevant Office staff, to pursue more forceful action if it is decided that this is merited. This includes reassessing an initial assessment if more information has come to light. The law allows an open-ended timeframe for this purpose in respect of offences capable of being prosecuted on indictment (i.e. in the Circuit Court), as the Statute of Limitations does not apply. With regard to summary offences (which are not reportable to the ODCE), in order to comply with section 240(5) Companies Act 1990, a case must be commenced within three years of the date the offence is committed or the date the ODCE becomes aware of the offence, whichever is the later.

Typically, in the minority of cases which result in prosecution, it takes an average of approximately 18 months from the time the Indictable Report is received to the time that the case is concluded in Court. However, this period can vary for a variety of reasons e.g. length of time to gather evidence or to secure a District Court date in a particular court.

It is not Office policy to issue update reports or any other such correspondence to auditors during Stage 3. Once determined, the ODCE team will communicate the outcome to the reporting auditor, normally either

- to indicate that a statement will be required as the ODCE have decided to prosecute

or, in the majority of cases,

- to inform the auditor that the case is being concluded, possibly in conjunction with letters to the directors of the company.

## Stage 4 – taking a prosecution

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*If the ODCE concludes that a prosecution should be undertaken, it will commonly request a formal witness statement from the auditor. It may also be necessary for the auditor to appear in court. The time required to prepare and present a case varies considerably depending on its complexity. In more straightforward cases, the ODCE would expect that the matter will be heard within 18 months. However, the ODCE are also dependent on the availability of court time, in addition to other factors that mean that the time required to prepare a case and the extent of time required in court is considerably longer.*

The ODCE has the option of prosecuting offences itself, at summary level before a District Court, or alternatively to prepare and submit a book of evidence to the Director of Public Prosecutions (DPP) for prosecution on indictment. Ultimately, it is a decision for the DPP as to whether such cases proceed. Almost all ODCE criminal cases to date have been heard in the District Court.

In general, the maximum penalties set out for convictions are:

- For a summary offence, a fine of €2,500 and/or 12 months imprisonment; and
- For an indictable offence, a fine of €22,220 and/or 5 years imprisonment.

However, the Companies Acts also provide for considerably higher sanctions in respect of certain offences, for example section 297 of the 1963 Act (fraudulent trading), which carries a maximum penalty of €63,487 and/or seven years imprisonment, and section 32 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (market abuse), where the courts can impose a fine of up to €10 million and/or a prison sentence of up to 10 years.

### **Witness statements and attendance at court**

In those cases where evidence is being gathered with a view to potential legal proceedings, information from auditors who have made an indictable report can be of considerable importance. As such, ODCE 's normal practice is to request formal statements from reporting auditors. Such statements can play an important role in the successful prosecution of a case. However, because (as stated previously) the criminal prosecution option is exercised relatively rarely, the need for auditor statements and attendance in court is the exception rather than the rule. On the other hand, where it does arise, it may be quite time-consuming but the ODCE's experience to date, in the vast majority of cases is that auditors are prepared to give the necessary time to the process.

Witness statements must be taken in a way that is acceptable as evidence by the courts. Therefore, when making a statement, an auditor should expect an enhanced degree of formality in the process.

Auditor statements are ordinarily taken with a view to confirming the content of the original auditor report and to elaborate on certain points. The auditor involved may wish to take independent legal advice to assist in the preparation of the statement: however, members of the ODCE team will also make themselves available. This is necessary in order to assist the ODCE in framing the content and helping to ensure that the statement is as comprehensive as necessary and that it addresses the issues likely to be of interest to the Court.

In addition to supplying a statement, an auditor will normally need to attend in Court, and a witness summons will be issued. In such cases, the auditor will also be contacted by the ODCE team, who will confirm details of date, location etc. They will also be available to advise on the process should the auditor wish.

The Court does not always require the auditor to take the witness stand, particularly in cases where the defendant(s) has entered a guilty plea. Indeed even where summonses have been issued there may ultimately be no requirement for the auditor to attend the court. In such circumstances the ODCE will inform the auditor that this is the case.

As a witness, in addition to being asked questions on behalf of the ODCE (usually by an ODCE solicitor but occasionally by a barrister), they may also expect to be cross-examined by the legal representative of the defendant(s). It is important that the auditor is fully versed in the details of the case and their own statement in order



## Stage 4 – taking a prosecution

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to deal effectively with this process.

Auditors should also be aware that the ODCE does not pay any fees for court attendance. However, if auditors intend to seek reimbursement they should do so in court on the day in question. Usually, the Judge will address this issue and, if he/she does not, the ODCE solicitor or barrister will mention the matter.

## Stage 5 – case conclusion

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***The ODCE will always inform the reporting auditor when a case is concluded.***

***It also publishes details of prosecutions on the ODCE website and in the Annual Report.***

In cases which result in prosecution, the ODCE publishes on its website the results of all such actions, as well as in its Annual Report. These publications do not refer to the reporting auditor. However, it may sometimes happen that media reports of a case will refer to the reporting auditor, particularly if he/she has given evidence in Court.

Where it is decided that, for whatever reason, the case will not result in legal proceedings (which is what happens with the vast majority of cases), the ODCE may choose to pursue some of the other options outlined in Stage 3 above. These options include the issue of a letter to the directors in relation to the legal provisions governing the issue which gave rise to the indictable offence.

For good administrative reasons, the ODCE records the conclusion of cases when activity on a case-file has come to an end but, as outlined already, the Statute of Limitations or other statutory provisions do not apply to cases which may be the subject of proceedings on indictment. Therefore, the ODCE will always be mindful of the possibility that further relevant evidence may come to light which could lead to a case being re-examined. If that happens, the auditor may be contacted, notwithstanding the fact that the case was the subject of a report some time previously. While ODCE actions have no legal impact on auditors' ordinary obligations as regards the retention of records, auditors may be mindful of this in their archiving processes. However, this occurs only very infrequently.

When a case-file is concluded, for whatever reason, the ODCE informs the reporting auditor.

In relation to Freedom of Information requests made to the ODCE, auditors might wish to note that details of individual cases are not eligible for release.

It is possible, (although, to date, very rare) that the contents of a case-file could be discoverable in the context of other legal proceedings.

## Appendix 1 – ODCE statutory powers

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The Director, and where appropriate his designated officers, have wide and extensive powers under the Companies Acts. These include:

- The power (as more fully outlined in Decision Notice D/2006/2) to demand of auditors who have made an indictable offence report under section 194(5) Companies Act 1990, any further information in their possession or control relating to the matter, as well as access to books and documents in their possession or control relating to the matter, and access to copying facilities for the taking of copies or extracts (Section 194(5A), Companies Act 1990);
- The power, on obtaining a warrant, to enter and search a premises and seize and retain any material information found on the premises or in the custody or possession of any person found on the premises (Section 20, Companies Act 1990);
- The power to apply to the High Court for an order directing a company or any officer to make good any default in compliance with any provision of the Companies Acts (Section 371(1), Companies Act 1963);
- The power, if there are circumstances suggesting that it is appropriate, to require any body to produce such books or documents as may be specified, and where necessary, to take copies or extracts from them (Section 19, Companies Act 1990);
- The power to apply to the High Court for an inspector to be appointed to investigate the affairs of a company (Section 8(1), Companies Act 1990);
- The power to appoint an inspector to investigate and report on the membership of a company (Section 14(1), Companies Act 1990);
- The power to inspect and take copies of the minutes of proceedings of meetings of the company and its directors (Section 145(3A), Companies Act 1963);
- The power to demand production of the register of directors' interests in contracts made by the company (Section 194(5A), Companies Act 1963);
- The power, on application to the court, to inspect the books of any company that is the subject of a winding up order, or in voluntary winding-up (Section 243(1A), Companies Act 1963);
- The power to request the production of a receiver's books (Section 323A(1), Companies Act 1963);
- The power, on showing cause, and on application to the High Court, to obtain an order restraining directors from reducing their assets within or outside the State (Section 55, Company Law Enforcement Act 2001).

Where a company law offence is one listed in Schedule 1 to the Criminal Justice Act 2011, then certain additional powers are also available.

## Appendix 2 – Contents of an indictable offence report

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Section 194(5) states that when an auditor forms an opinion that there are reasonable grounds for believing that an indictable offence has been committed, the auditor shall

*“..provide the Director with details of the grounds on which they have formed that opinion”*

This does not require the auditor to provide sufficient information to reach the test applied by a court – i.e. to conclude, beyond reasonable doubt, that an offence has been committed: rather it indicates that the auditor should provide sufficient relevant information to indicate what facts led to the conclusion and allow the ODCE team to understand the basis on which it was reached.

The APB Bulletin 2007/2 and ODCE Decision Notice D/2006/2 contain the following guidance on ‘providing details’:

11.1 Auditors provide sufficient information in support of their opinion to enable the Director to evaluate properly the circumstances suggesting the commission of an indictable offence. This guidance is supported by ISA (UK and Ireland) 250(B) which requires, *inter alia*, that *the auditor should bring the matter to the attention of the regulator...in a form and manner which will facilitate appropriate action by the* (ISA (UK and Ireland) 250(B) paragraph 50).

11.2 The information provided by auditors as part of their reports to the Director of Corporate Enforcement should include:

- auditor details;
- statutory authority under which the report is being made;
- details of the company/person(s) who are the subject of the report;
- whether the matter has been discussed with the directors and/or relevant officer(s) and/or agent(s) of the company;
- details of the suspected indictable offence(s);
- details of the grounds on which the auditor has formed the opinion that an indictable offence has been committed. Auditors should ensure that this description is of sufficient detail to facilitate appropriate action by the Director;
- the context in which the report is being made. ISA (UK and Ireland) 250(B) offers guidance to auditors as to the type of information that might be included in this regard e.g.
  - the extent to which the auditor has investigated the circumstances giving rise to the matter reported, and
  - whether steps to rectify the matter have been taken (ISA (UK and Ireland) 250(B) paragraph 63).
- any other information considered relevant by the auditor;
- auditor's signature;
- date of report.

ODCE has issued a ‘report form’ which auditors may use if they wish to assist in framing their report which is available on its website at [http://www.odce.ie/en/forms\\_indictable.aspx](http://www.odce.ie/en/forms_indictable.aspx). However, the Act does not specify that the report must be made in a particular form: the overriding obligation is to provide appropriate information following the guidance set out above.