

Fraud Notices

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Introduction

We are operating in a climate of increasing international investigations. There are a number of investigative tools available to seek information from Guernsey institutions in support of international investigations. One of the most tried and tested tools are Fraud Investigation Notices, aka Fraud Notices.

This Guide considers how Fraud Notices may be obtained, how to respond to them, and issues which may arise.

Fraud Notices

Fraud Notices were brought into play by The Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991 (**1991 Law**).

A Fraud Notice may be issued where:

- There are reasonable grounds to suspect an offence involving serious or complex fraud (it does not matter if that offence has been committed in the Bailiwick or elsewhere); and
- There is a good reason to issue the Fraud Notice for the purpose of investigating the affairs, or any aspect of the affairs, of any person.

A Fraud Notice may be issued to:

- The subject of an investigation; or
- Any other person who there is reason to believe has information relevant to the investigation.

The Fraud Notice may require the respondent:

- To be questioned; and/ or
- Provide documents on any matter relevant to the investigation, or say where those documents are.
 - 'Documents' in this context is widely defined as information recorded in any form, so would include electronic documents.
 - Information and documents in which there is an obligation of confidence can nevertheless be required to be disclosed, but this needs the specific authority of HM Procureur.
 - Legal professional privilege can be asserted to prevent the disclosure of privileged documents.

Responding to Fraud Notices

A statement in response to a Fraud Notice may be used as evidence against the respondent in proceedings other than criminal proceedings, such as civil or regulatory proceedings.

The response may not be used as evidence against the respondent in criminal proceedings, save for in exceptional circumstances including perjury, perverting the course of justice and breaches of the 1991 Law.

Should a respondent fail to respond, or provide an inadequate response:

- The court may issue a search and seizure warrant in respect of documents. Given the wide definition of documents one can reasonably expect that this would include seizure of IT hardware; and/ or
- The respondent may be found to be guilty of an offence.
 - Non-compliance with a requirement is punishable by up to six months in prison and/ or a fine of up to £ 10,000.
 - Knowingly making a false or misleading statement, or recklessly makes a statement which is false or misleading in a material particular can result in up to two years of prison and/ or an unlimited fine.

If, knowing or suspecting an investigation into serious or complex fraud is being or is likely to be carried out, a person tampers with documents they know or suspect to be relevant, that person may be guilty of an offence. The potential sanctions for this offence are up to seven years in prison and/ or an unlimited fine. There is however a defence where the person can show that they had no intention of concealing the facts disclosed by the documents from investigators.

If, knowing or suspecting an investigation into serious or complex fraud is being or is proposed to be carried out, a person discloses to any other person information or any other matter which is likely to prejudice that investigation, that person may be guilty of a tipping off offence. The potential sanctions for this offence are up to five years in prison and/ or an unlimited fine. There is however a defence where the person can show that they did not know or suspect that an investigation would be prejudiced.

The 1991 Law can require a respondent to be questioned but it does not compel them to provide a witness statement. It is therefore a matter for respondents, having regard to their other obligations, whether or not to provide a witness statement.

Issues

The 1991 Law is not without its difficulties, particularly where recipients are financial services businesses (FSBs) who must have regard to their obligations to customers in addition to the authorities.

What is 'serious or complex fraud'?

On its introduction, the 1991 Law was the first piece of Guernsey legislation providing an investigative power for matters involving serious or complex fraud wherever committed, i.e. including crimes committed outside of the Bailiwick. The 1991 Law followed the implementation of The Criminal Justice Act 1987 in the UK, by which the UK's Serious Fraud Office was established. The Billet preceding the 1991 Law specifically contemplated requests from the Serious Fraud Office, although since its implementation the 1991 Law has been used to assist authorities from a range of jurisdictions outside of the Bailiwick.

The words 'serious or complex fraud' are fundamental to the 1991 Law, but frustratingly have not been defined in the 1991 Law or subsequent case law. The 1991 Law allows for a fraud being serious or complex - it need not be both. But more than mere fraud is required. However the standard to be applied is not clear and it appears that each matter is approached on its own facts.

Factors weighing in favour of seriousness include:

- Value, with higher value frauds being considered more serious;
- Breaches of trust; and
- Matters of substantial public concern.

Factors indicating complexity include:

- The number of financial transactions involved to perpetrate or conceal the fraud;
- Whether such transactions crossed jurisdictions; and
- Most importantly the degree of sophistication in the commission of the offence.

Should the Fraud Notice be challenged?

The giving of assistance is not a mere rubber stamping exercise for HM Procureur. Requests made for Guernsey assistance must be given due consideration. HM Procureur has the power to issue a Fraud Notice; a court order is not required. The 1991 Law contains no power for HM Procureur's decision to be challenged; but the decision may be subject to judicial review.

Deciding whether to challenge a Fraud Notice is difficult as the information provided on the face of the notice is relatively sparse. Where the respondent is not the subject of an investigation, they will typically be a FSB lacking the information as to the context in which the Fraud Notice is issued. The easiest source of information will usually be the subject of the investigation, often the FSB's customer. However, were an FSB to seek to engage with its customer it may risk tipping off.

Where the recipient of the Fraud Notice does have additional information, either due to prior notice or having obtained that information, challenges to the appropriateness of the order may be considered prudent.

Prejudicing an investigation

By contrast to other Guernsey disclosure compulsions, an FSB will not automatically be guilty of tipping off if matters underlying a Fraud Notice are discussed with a third party. The offence requires there to be a risk of prejudicing an investigation.

The threshold is whether the disclosure is likely to prejudice an investigation. As with whether to challenge the Fraud Notice, the lack of information provided to recipients makes it difficult for them to assess whether an investigation may be prejudiced, and even more difficult to decide if that is a *likely* consequence. There is however not a firm prohibition on discussing matters. This is a factor to which FSBs may wish to have regard when considering if they should seek further information to establish whether the Fraud Notice should be challenged.

But FSBs must be especially cautious where money laundering may be involved. In those circumstances tipping off provisions under other Bailiwick laws may be engaged, regardless of whether or not an investigation is prejudiced. While Fraud Notices will state that HM Procureur is satisfied that there are suspected offences of serious or complex fraud within the meaning of the 1991 Law, they do not otherwise state the criminal conduct to which they relate. Respondents should therefore approach the risk of tipping off with considerable caution.

Document retention policies

The potential offence for getting rid of documents is causing particular concern to businesses which have revised their document retention policies to ensure GDPR compliance.

This offence can be committed once a Fraud Notice has been issued, but also if a person suspects that there will be an investigation. The legislation does not articulate a test for suspicion, but in other contexts the bar is set quite low. There is a lack of clarity and a risk of the effect being akin to a back door document preservation order where a party is told that an investigation may be opened.

Again, this is particularly uncomfortable for respondents having regard to their obligations to persons other than law enforcement, in particular to customers and regulators. There is no simple answer as to when documents may safely be retained or disposed of. Decisions will be fact specific. However emphasis is placed upon a party's intentions. It is a defence where there was no intention of concealing the facts disclosed by the documents from investigators. An FSB following its usual document retention procedures would therefore have a far lesser risk than an entity taking a targeted approach to file destruction. However, if an investigation seems like a possibility, this is a matter respondents may wish to review.

Other considerations

If served with a Fraud Notice, FSBs should consider its contents give rise to other reporting obligations. In particular:

- Whether a suspicious activity report (**SAR**) to the Financial Intelligence Unit ought to be raised; and/ or
- If there are matters which ought to be disclosed to the Guernsey Financial Services Commission in accordance with Principle 10 of the Code of Principles of Conduct of Financial Business.

These are not automatic consequences of being served with a Fraud Notice, but aspects which should be considered.

In addition, respondents should consider the adequacy of the Fraud Notice and if they can meaningfully respond to it. By its very nature it is to be assumed that a Fraud Notice is being used because the investigative body's understanding of the matter is incomplete. In preparing the Fraud Notice the

underlying facts may have been misunderstood, or the phrasing of a request may make a useful response impossible. It may therefore be necessary to engage with the authorities to clarify search requests, the terms of which are particularly onerous or which cannot be met, to ensure that responses are effective and the risk of criminal non-compliance due to lack of understanding are avoided. Legal advice to work through the process of interpreting and responding to such Fraud Notice can be particularly beneficial.

Conclusions

The 1991 Law creates a number of potential issues. However it is considered to be an effective tool for enabling the Bailiwick authorities to offer assistance to authorities in other jurisdictions, in keeping with Guernsey's place in tackling international financial crime. It is one of the earlier and better tested mechanisms for providing such assistance. As a consequence, Fraud Notices are issued relatively frequently and challenges have been few and far between, with none surfacing since 2004.

That being the case, recipients of Fraud Notices need not be unduly alarmed. But such notices must be taken seriously, and respondents should keep in mind that their obligations may extend some way beyond what is on the face of the Fraud Notice. If in doubt respondents should obtain legal advice.

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