
**Response to the Sentencing Council consultation paper
Fraud, bribery and money laundering offences guideline**

October 2013

FRAUD, BRIBERY AND MONEY LAUNDERING OFFENCES GUIDELINE

Response submitted on 04 October 2013 by the Fraud Advisory Panel to the Sentencing Council consultation paper ‘fraud, bribery and money laundering offences guideline’ published in June 2013.

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INTRODUCTION

1. The Fraud Advisory Panel (the 'Panel') welcomes the opportunity to comment on the consultation 'fraud, bribery and money laundering offences guidelines', published by the Sentencing Council on 27 June 2013, a copy of which is available from this [link](#).

WHO WE ARE

2. The Fraud Advisory Panel is a registered charity and membership organisation which acts as the independent voice and leader of the anti-fraud community in the United Kingdom.
3. Established in 1998 the Panel works to encourage a truly multi-disciplinary perspective on fraud. It has almost 300 corporate and individual members, drawn from the public, private and voluntary sectors and across a variety of professions.
4. The Panel works to raise awareness of the immense damage fraud does to individual lives, the national economy and society at large and to encourage everyone, in every walk of life, to play their part in reducing it.
5. This response has been prepared on behalf of the Fraud Advisory Panel by a special project group of interested members from the Fraud Investigation and Legal Process Working Group. The Fraud Investigation and Legal Process Working Group brings together individuals from the business community, law enforcement, and the legal and accountancy professions to consider issues relating to the investigation process, criminal and civil procedures, arbitration and mediation.
6. Members of the special project group included David Bacon, John Burbidge-King, David Clark, Hannah Laming, and Satnam Tumani. It was chaired by Rosalind Wright, the chairman of the Fraud Advisory Panel and a former director of the Serious Fraud Office.

GENERAL POINTS

7. The Fraud Advisory Panel has chosen not to comment on all aspects of the consultation, but to restrict itself to those areas that most closely reflect its objectives:

fraud, money laundering, bribery and corporate offenders.

8. In addition, the Panel offers its comments on how the consultation might be affected by Deferred Prosecution Agreements ('DPAs').
9. Please note that the Panel's response does not follow the rigid question structure of the consultation paper.

FRAUD (SECTION THREE: QUESTIONS 1 – 15)

10. The Fraud Advisory Panel is concerned that a single fraud guideline does not reflect the wide range of offending possible under the relevant legislation. The consultation currently proposes that the financial value of the loss is the primary harm factor, and that the impact on the victim is secondary. The Panel proposes that this is reversed: both the harm caused by any loss and the relative impact on an individual or a business of such a loss are key factors.
11. The Panel proposes the following example: a small business with a limited amount of capital to spend on security and anti-fraud measures losing £50,000 to fraud may be put out of business, cost individuals their livelihoods and cause considerable and widespread distress. A similar value fraud on a FTSE 100 company would perhaps have a considerably less significant impact. Similarly, the long-term effects on an (elderly) individual defrauded of their life savings are likely to be incapable of being fully ameliorated.
12. The Panel believes that the aggravating factors should include a separate category of 'fraud committed by a professional person'. While recognising this is partly covered in the 'abuse of trust' factor, the Panel believes a standard abuse of trust case, for example, a family member looking after an elderly parent, should be distinguished from those in a position of trust because of their professional standing. This would of course include solicitors, accountants and professional trustees.
13. The duration of any behaviour should also be taken into account. A one-off 'moment of madness', although capable of considerable harm, needs to be distinguished from a sustained course of behaviour.

14. The Panel suggests the issue of incentivising an individual to plead guilty or make admissions at an early stage should be given consideration. Recognising this is a complex issue, sometimes involving a clash of legal expediency with human rights, the Panel feels the current one-third off for a guilty plea needs review. This may however fall outside the remit of the current consultation.
15. The Panel is concerned that the scope of Table 1 (see page 24 of the consultation) does not accurately reflect the most serious and complex fraud offences. The highest category of loss is £500,000+ which is far below the Serious Fraud Office's £1m limit for acceptance set in 1987. In any case, these guidelines should be appropriate for use in frauds of any size, including the most serious.
16. Finally, the Panel notes that with the exception of corporate offending, there is no reference made to compensation for victims of fraud. Providing financial redress to victims is an important part of the criminal justice process and should be taken into account when considering sentencing in all fraud cases.

MONEY LAUNDERING (SECTION SEVEN: QUESTIONS 39 – 43)

17. The Fraud Advisory Panel proposes that the aggravating factors should include a separate category relating to laundering by professional or regulated persons, particularly those working within financial institutions.
18. The Panel also urges that a distinction be made between the commission of offences as a result of a failure to implement adequate systems and controls (negligence) and offences resulting from having either no controls or a wilful disregard for them. The Panel proposes the example of a firm of solicitors taking on a client with known money laundering issues, and a firm simply not having adequate controls to identify the proceeds of crime.
19. Finally, the Panel questions the appropriateness of the tabulation of offences; in particular, whether tax evasion should be on a par with terrorist financing.

BRIBERY (SECTION EIGHT: QUESTIONS 44 – 47)

20. The Fraud Advisory Panel recognises the inherent difficulties in trying to draft

appropriate guidelines for offences of bribery, considering:

- that there are very few prosecutions to date under the Bribery Act 2010;
- the rather random nature of recent SFO civil settlements and their hitherto lack of any obvious reference points;
- the lack of any consistent formulae – should the starting point be the size of the bribe or the size of the gain? The overall gain or just the profit made?
- the effect of adequate procedures, in particular whether a differential should be made between ‘inadequate procedures’ and ‘no procedures’; and
- the inability to reasonably calculate ‘harm’ caused by bribery.

21. It is therefore proposed that guidance in this area is limited until there is some experience of Bribery Act offences passing through the Courts. Although the individual members of the Panel can provide subjective opinions as to the culpability of individuals and corporations in imagined cases, there is nothing concrete upon which to draft any formal guidelines.

CORPORATE OFFENDERS (SECTION NINE: QUESTIONS 48 – 55)

22. The Fraud Advisory Panel notes that there are likely to be considerable changes to corporate liability over the next few years, including the proposed changes to the law relating to ‘directing minds’, the effect of DPAs (considered below) and the rumoured additions of further laws relating to corporate negligence, for example reckless trading. On that basis, the Panel poses the question whether it would be appropriate to draft any firm guidance at this stage, considering it could be rapidly obsolete.

23. Notwithstanding the above, the Panel makes the following comments:

24. The Panel believes that compensation should be step 1 of the process, on the basis that monies returned to those defrauded in a timely manner is a more effective means of justice than those returned after lengthy proceedings. It is of course acknowledged that this comes with practical difficulties.

25. The consultation is perhaps overly focused on bribery. Wider fraud and money laundering issues need to be considered.
26. The Panel has reservations about the 'step' process. The various steps are overcomplicated and confusing. There were also difficulties in understanding quite how some areas would work in practice, for example the harm figures multiplier.
27. The Panel also identified two possible 'unintended consequences' with the totality principle. As it does not take account of the company size or profits, it would be possible to find smaller, less culpable companies being extinguished, and from a practical point of view having to return to step 1.
28. Further clarity as to terms is needed. The definitions of 'corporate' can be very wide when considering complex business structures, for example what liability would a parent company have for a subsidiary? Or what liability would the non-guilty parts of a Swiss Verein face?

Deferred prosecution agreements

29. Finally, the Panel notes that the forthcoming legislation permitting DPAs under the law of England and Wales should be considered in any sentencing guidance, in particular how calculations would be made for a reduction of penalties for DPAs.

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