



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 34

Auditor's obligations: Reporting to ASIC

May 2013

About this guide

This guide is for auditors, including an individual auditor, members of audit firms and audit companies.

It gives guidance on the obligations for auditors to notify or report to ASIC contraventions and suspected contraventions under s311, 601HG and 990K of the *Corporations Act 2001* (Corporations Act) and s104 of the *National Consumer Credit Protection Act 2009* (National Credit Act).

This guide also includes examples of suspected contraventions and guidance on how an auditor may deal with them for the purposes of the auditor reporting obligations.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This version was issued in May 2013 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 34, issued 21 December 2004, rebadged as a regulatory guide 5 July 2007, updated 20 December 2007
- Superseded Practice Note 34, issued 5 July 1993, updated 6 December 2004.

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

Contents

A	Overview	4
	Auditor reporting obligations	4
	Notification obligation under s311 and 601HG	5
	Contraventions relating to AFS licensees	5
	Contraventions relating to credit licensees	5
	How to lodge notifications and reports	6
B	General obligation under s311 and 601HG	7
	Notifications under s311 and 601HG of the Corporations Act.....	7
	When must an auditor report to ASIC?.....	9
	What are 'reasonable grounds to suspect' a contravention?	9
	What is a 'significant' contravention?	10
	When will a suspected contravention not be 'adequately dealt with'? ..	12
	Protection of auditors: Qualified privilege	12
	What happens when an auditor fails to notify ASIC?	12
C	Contraventions relating to AFS licensees	14
	Notifications under s990K of the Corporations Act.....	14
	What matters must be reported?	15
	Protection of auditors: Qualified privilege	16
	What happens when an auditor fails to report?	16
D	Contraventions relating to credit licensees	17
	Notifications under s104 of the National Credit Act.....	17
	What matters must be reported?	17
	Protection of auditors: Qualified privilege	18
	What happens when an auditor fails to report?	18
E	How to lodge notifications and reports	20
	What information should be included	20
	Where to lodge notifications and reports	20
	Appendix: Examples of suspected contraventions	21
	Suspected contraventions that are likely to be significant.....	21
	Suspected contraventions that are unlikely to be significant.....	25
	Key terms	27
	Related information	28

A Overview

Key points

Auditor reporting obligations have been part of Australian company law for many years. This guide is intended to help auditors to comply with:

- their obligation under s311 and 601HG of the Corporations Act to notify ASIC of suspected contraventions (see Section B);
- the obligation to notify ASIC of contraventions relating to Australian financial services (AFS) licensees (see Section C); and
- the obligation to notify ASIC of contraventions relating to credit licensees (see Section D).

It also explains what we would expect to be included in a notification to ASIC and where to send notifications: see Section E.

Auditor reporting obligations

- RG 34.1 Auditor reporting obligations have been part of Australian company law for many years. They originated from the Company Law Advisory Committee's First Interim Report to the Standing Committee of Attorney-General on Accounts and Audit in 1970 (Eggleston Committee Report). The Eggleston Committee sought to strengthen the position of auditors by requiring timely reporting of infringement of the *Corporations Act 2001* (Corporations Act) to regulatory authorities and affording auditors qualified privilege for such notification.
- RG 34.2 An auditor's obligation for the timely notification of contraventions and suspected contraventions has been strengthened on a number of occasions.
- RG 34.3 In particular, the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (CLERP 9 Act) amended the auditor reporting obligations. Under the amended provisions, with the exception of s990K of the Corporations Act, an auditor is obliged to notify the Australian Securities and Investments Commission (ASIC) directly about a suspected 'significant' contravention of the Corporations Act.
- RG 34.4 The Explanatory Memorandum to the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (CLERP 9 Bill) recognised the important role that auditors play as the principal external check on the veracity of companies' financial statements. Auditors have a particular opportunity to determine whether there has been a contravention

of the law. The auditor reporting obligations encourage the timely disclosure of possible breaches of the law.

Notification obligation under s311 and 601HG

RG 34.5 Under s311 and 601HG of the Corporations Act, auditors are obliged to notify ASIC about matters that they have reasonable grounds to suspect amount to a significant contravention of the Corporations Act. Auditors must also notify ASIC of matters that are not a significant contravention, where they believe that the matter will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors.

RG 34.6 In Section B of this guide, we give guidance to auditors on their general obligation under s311 and 601HG. In particular, we set out our view on:

- (a) what are 'reasonable grounds to suspect' a contravention;
- (b) what is a 'significant contravention'; and
- (c) when a suspected contravention will not be 'adequately dealt with'.

Note: This guide does not discuss auditor obligations to notify us of any circumstances that amount to an attempt to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit and auditor obligations to notify us of any circumstances that amount to an attempt to otherwise interfere with the proper conduct of the audit.

Contraventions relating to AFS licensees

RG 34.7 Section C of this guide discusses an auditor's obligation under s990K of the Corporations Act to notify us of certain matters which constitute or may constitute a contravention of specified provisions of the Corporations Act or a condition of a licensee's Australian financial services (AFS) licence.

Contraventions relating to credit licensees

RG 34.8 Section D of this guide discusses an auditor's obligation under s104 of the *National Consumer Credit Protection Act 2009* (National Credit Act) to report to us certain matters including contraventions and suspected contraventions of specified provisions.

How to lodge notifications and reports

RG 34.9 Section E explains how to lodge notifications and reports, including what information should be included. All notifications and reports should be emailed to auditor.notification.team@asic.gov.au.

B General obligation under s311 and 601HG

Key points

Under s311 and 601HG of the Corporations Act, auditors must notify ASIC if they have reasonable grounds to suspect that there has been or is a significant contravention of the Corporations Act.

This section gives guidance for auditors on complying with this obligation, including:

- what are 'reasonable grounds to suspect' a contravention;
- what is a 'significant' contravention;
- the qualified privilege attaching to notifications made by auditors; and
- the consequences of failure by an auditor to comply with this obligation.

It also explains what an auditor should do when a suspected contravention is not 'significant' but has not been 'adequately dealt with'.

Notifications under s311 and 601HG of the Corporations Act

RG 34.10 Under s311 and 601HG of the Corporations Act, an auditor is obliged, as soon as practicable and in any case within 28 days, to notify ASIC in writing of certain circumstances. In particular, auditors conducting an audit of a company, registered scheme or disclosing entity must notify ASIC if they become aware of circumstances that give them reasonable grounds to suspect that there has been a contravention of the Corporations Act: see RG 34.22–RG 34.28.

Note: This guide does not discuss an auditor's obligation under s311 and 601HG to report an attempt to unduly influence, coerce, manipulate or mislead an auditor.

RG 34.11 This obligation applies if the contravention is:

- (a) significant (see RG 34.29–RG 34.35); or
- (b) not significant, but the auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or by bringing it to the attention of the directors (see RG 34.36–RG 34.39).

RG 34.12 The notification should provide sufficient detail to allow us to understand the nature of the matters which constitute or may constitute a contravention. Details of the content we would expect to be included in a notification are set out in Section E of this guide.

- RG 34.13 We believe that the auditor reporting obligations are a key aspect of the auditor's role in conducting an audit and should be included in the audit plan and program for each entity subject to audit. We expect auditors to be vigilant and to make appropriate inquiries where the circumstances warrant inquiry.
- RG 34.14 While we do not expect auditors to engage in a systemic search for all possible contraventions of the Corporations Act, auditors should be alert to matters that come to their attention that may indicate such contraventions. The auditor reporting obligations are not limited to matters that have arisen from audit or review. Information may come to the auditor's attention during the audit or review, or otherwise, which gives rise to reasonable grounds to suspect that a contravention of the Corporations Act has occurred.
- RG 34.15 In addition, staff reporting to an auditor should be made aware of the extent of the auditor's duty. The auditor reporting obligations apply to:
- (a) the individual auditor, if the auditor is a natural person (including where the audit is conducted by a member of an audit firm);
 - (b) the audit company; or
 - (c) the lead auditor (defined in s324AF).

Audit or review of a financial report under s311

- RG 34.16 The obligation in s311 applies to an audit of a financial report for a financial year and to the audit or review of a half-year financial report conducted for the purposes of the Corporations Act.

Compliance plan audits under s601HG

- RG 34.17 Under Ch 5C of the Corporations Act, all registered managed investment schemes are required to have a compliance plan that meets the requirements of Pt 5C.4. The Corporations Act also requires certain audit work for the compliance plan to be carried out by a registered company auditor (the auditor of the compliance plan).
- RG 34.18 The auditor of the compliance plan has to examine the compliance plan and provide a report to the responsible entity for the scheme within three months after the end of the financial year stating whether, in the auditor's opinion, the responsible entity complied with the scheme's compliance plan and the plan continues to meet the requirements under Pt 5C.4 of the Corporations Act.
- RG 34.19 The auditor of the compliance plan has an obligation under s601HG similar to that applying under s311 to an auditor who conducts an audit or review of a financial report. The auditor must notify us in the circumstances described in RG 34.10–RG 34.11.

When must an auditor report to ASIC?

- RG 34.20 After an auditor becomes aware of a contravention or suspected contravention under s311 or 601HG, notification must be given to ASIC as soon as practicable, and in any case within 28 days of becoming aware of it. An auditor should not wait until the conclusion of an audit to notify us.
- RG 34.21 If, after notifying us of a particular suspected contravention, the auditor has reasonable grounds to suspect other contraventions of the Corporations Act, including new breaches of the same provision, these should also be notified under s311 or 601HG.

What are 'reasonable grounds to suspect' a contravention?

- RG 34.22 Under s311 and 601HG, an auditor is required to notify us if the auditor has 'reasonable grounds to suspect' there has been a significant contravention of the Corporations Act. Establishing 'reasonable grounds to suspect' requires both a suspicion and a just cause for that suspicion.

Note: The auditor reporting obligations require an auditor to notify us of known contraventions as well as those merely suspected on reasonable grounds.

- RG 34.23 In its unanimous judgment in *George v Rockett* (1990) 170 CLR 104 the High Court held (at 112) that:
- When a statute prescribes that there must be "reasonable grounds" for a state of mind—including suspicion and belief—it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.
- RG 34.24 The test is satisfied by circumstances that would create in the mind of a reasonable auditor an actual apprehension or fear that a contravention has occurred. The suspicion has to be honest and reasonable. The suspicion must be based upon facts that would create suspicion in the mind of the reasonable auditor.
- RG 34.25 In *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, Kitto J described a suspicion of something (at 303) as being:
- more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust amounting to a slight opinion, but without sufficient evidence.
- Note: This case was applied by the High Court in *George v Rockett* (1990) 170 CLR 104 at 106.
- RG 34.26 A reasonable suspicion can exist without the auditor having conducted exhaustive and conclusive investigations into the matter. A reasonable suspicion does not have to be based solely on evidence that would be admissible in judicial proceedings. The grounds for suspicion may be based on

the auditor's professional judgment, past experience, knowledge of a particular industry and information collected, or matters that have come to the auditor's attention during the course of the audit. The auditor does not need evidence to satisfy them that a contravention of the Corporations Act has actually occurred. The grounds for suspicion should be documented in the auditor's working papers. If in doubt, the auditor should consider obtaining legal advice before notifying us.

- RG 34.27 Each suspected contravention must be notified to ASIC. However, an ongoing contravention (e.g. the failure to lodge the same specific individual document) only needs to be reported once.
- RG 34.28 Notifications to ASIC under s311 or 601HG are only required if the auditor believes that the suspected contravention is either significant or, if it is not significant, that it has not been or will not be adequately dealt with either by:
- (a) commenting on it in the auditor's report; or
 - (b) notifying the directors of the relevant entity.

What is a 'significant' contravention?

- RG 34.29 The Corporations Act includes factors that an auditor must consider in determining whether a suspected contravention is a significant one for the purposes of s311 and 601HG. These factors are:
- (a) the level of penalty for the contravention;
 - (b) the effect that the contravention has, or may have on:
 - (i) the overall financial position of the company, registered scheme or disclosing entity; or
 - (ii) the adequacy of the information available about the overall financial position of the company, registered scheme or disclosing entity; and
 - (c) any other relevant matter.
- RG 34.30 Contraventions attracting five years' imprisonment or more or any civil penalty provision under the Corporations Act are likely to be significant contraventions. Auditors also need to consider whether other contraventions with shorter penalty periods are significant, given the facts and circumstances, such as any monetary penalty, whether the contravention is recurring, and the impact on other parties.
- RG 34.31 The auditor notification obligations specifically direct the auditor to have regard to any 'other relevant matter' in determining whether a contravention of the Corporations Act is a significant one requiring notification. The

auditor should determine these 'other relevant matters' by considering all the facts and circumstances of the particular situation.

- RG 34.32 The Explanatory Memorandum to the CLERP 9 Bill included some types of suspected contraventions that could be considered by an auditor to be significant. They are:
- (a) insolvent trading;
 - (b) a breach of accounting standards or the 'true and fair view' requirements;
 - (c) a breach of Div 2, Pt 2 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) on unconscionable conduct and consumer protection in relation to financial services;
 - (d) suspected dishonest or misleading or deceptive conduct; and
 - (e) a breach that may cause a significant loss to any person or class of persons.
- RG 34.33 To provide some additional guidance for auditors, we have identified some factors that we believe an auditor could consider in deciding whether a contravention is significant, depending on their relevance in the particular circumstances. These are:
- (a) whether contraventions of the same or similar nature are suspected to have occurred in more than one area of the audited body (e.g. an area might include a discrete department, segment or unit of the entity);
 - (b) whether the suspected contraventions are systemic, multiple or continuing;
 - (c) the seniority of the people involved in the suspected contravening conduct (e.g. officers or senior managers); and
 - (d) whether the audited body or any of its officers or senior managers have previously contravened the Corporations Act by engaging in similar conduct.
- RG 34.34 This list of factors is not exhaustive, and is not a checklist. The auditor notification obligations require the auditor to make their own reasonable judgement about whether a suspected contravention is significant and so should be reported.
- RG 34.35 For examples of suspected contraventions and discussion about whether they would be significant, see the appendix to this guide.

When will a suspected contravention not be 'adequately dealt with'?

- RG 34.36 If the suspected contravention is not significant, s311 and 601HG require an auditor to form a belief about whether the matter will be adequately dealt with by commenting on it in the auditor's report or by bringing the matter to the attention of the directors.
- RG 34.37 While some matters may be noted in the auditor's report to members, and as part of the auditor's feedback to directors, this does not necessarily mean that such matters have been dealt with *adequately*. Thus, where an auditor remains of the belief that a matter will not be dealt with adequately, despite having brought the matter to the attention of the directors and/or noted the matter in the auditor's report, we must be notified.
- RG 34.38 It is a matter of opinion, based on the facts as known to an auditor, whether the contravention will be adequately dealt with by commenting on it in the auditor's report or by bringing the matter to the attention of the directors. As circumstances vary from case to case, it is not possible to lay down definitive rules about how an auditor will decide whether a suspected contravention has been, or will be, adequately dealt with. If the auditor does not believe that the matter has been, or will be, adequately dealt with, the auditor reporting obligations require the auditor to report the matter to us.
- RG 34.39 The auditor should not delay notification for further consultation with the directors if a contravention is such that bringing it to the attention of the directors or commenting on it in the auditor's report will not adequately deal with the matter.

Protection of auditors: Qualified privilege

- RG 34.40 An auditor notifying ASIC under s311 or 601HG has qualified privilege: see s1289 and 601HG(8). Section 89 of the Corporations Act defines 'qualified privilege' as protection from proceedings for defamation. In essence, the protection is available if an auditor has acted in good faith and solely for the purpose of discharging the statutory obligation to notify or report to us. An auditor must not have acted maliciously or for any other improper purpose. Statutory privilege does not displace any privilege that the auditor may be entitled to rely on under the common law.

What happens when an auditor fails to notify ASIC?

- RG 34.41 The reporting of suspected contraventions under s311 or 601HG is an important element of the effective regulation of companies and the

protection of persons who rely on, or transact with or through, these companies. We may take appropriate action in relation to auditors who fail to report a suspected contravention as required by s311 or 601HG.

- RG 34.42 An auditor who fails to comply with s311 or 601HG (as applicable) is guilty of an offence. The relevant criminal penalties (fine and/or term of imprisonment) are set out in the Corporations Act and, in particular, Sch 3.
- RG 34.43 If, in our view, an auditor has failed to adequately and properly carry out or perform their duty to report circumstances to us under s311 or 601HG(4), we may apply to the Companies Auditors and Liquidators Disciplinary Board (CALDB) for the cancellation or suspension of the auditor's registration under s1292(1).

C Contraventions relating to AFS licensees

Key points

This section explains the obligations of an auditor of an AFS licensee under s990K of the Corporations Act to report matters which, among other matters:

- constitute or may constitute contraventions or suspected contraventions of the licensee's AFS licence conditions or specified provisions of the Corporations Act; or
- relate to the licensee's other obligations.

Notifications under s990K of the Corporations Act

- RG 34.44 Section 990K of the Corporations Act requires the auditor of an AFS licensee to report certain matters to ASIC within seven days of becoming aware of the matters.
- RG 34.45 Under s990K(2)(a), an auditor is required only to report a matter that 'has adversely affected, is adversely affecting or may adversely affect the ability of the licensee to meet the licensee's obligations as a licensee' and applies to matters not covered by s990K(2)(b) (such as the obligations in s912A).
- RG 34.46 Matters must be reported to ASIC if they:
- (a) have adversely affected, are adversely affecting or may adversely affect the ability of the licensee to meet their obligations as an AFS licensee; or
 - (b) are contraventions or suspected contraventions specifically itemised in s990K(2)(b), which relate to:
 - (i) dealing with a client's money by the licensee (Subdiv A or B of Div 2 of Pt 7.8);
 - (ii) dealing with other property of a client by the licensee (Div 3 of Pt 7.8);
 - (iii) the financial records of licensees (Subdiv B of Div 6 of Pt 7.8);
 - (iv) the financial statements of licensees (Subdiv C of Div 6 of Pt 7.8); or
 - (v) the conditions of a licensee's AFS licence.

Note: This guide does not discuss an auditor's obligation to report an attempt to unduly influence, coerce, manipulate or mislead an auditor referred to in s990K(2)(c).

RG 34.47 The content of the report on the matter should provide sufficient detail to allow us to understand the nature of the matters which constitute or may constitute a contravention. Details of the content we would expect to be included in a notification are set out in Section E of this guide.

What matters must be reported?

RG 34.48 Unlike s311 and 601HG, s990K(2)(b) does not include a 'significance' test. This means that all matters must be reported to ASIC, irrespective of materiality or significance. Section 990K(2)(b) is, however, a more restricted obligation as the auditor is only obliged to report matters which constitute or may constitute a contravention of specified provisions of the Corporations Act (s990K(2)(b)(i)–(iii)) or of a condition of the licensee's AFS licence (s990K(2)(b)(iv)): see RG 34.49–RG 34.51. In addition, the matters that must be reported under s990K(2)(a) are limited to those that have an 'adverse effect' on the licensee's ability to meet its obligations.

RG 34.49 Under s990K(2)(b)(iv), an auditor must report matters which constitute or may constitute a contravention of the conditions of a licensee's AFS licence. These licence conditions have two sources:

- (a) conditions imposed by us under s914A(1) (see Pro Forma 209 *Australian financial services licence conditions* (PF 209)); and
- (b) conditions included by regulations made under s914A(8).

RG 34.50 Unless the context indicates otherwise, a reference to a condition in relation to an AFS licence includes a restriction: see the definition of 'condition' in s9 of the Corporations Act. However, we consider that merely carrying on a financial service business outside the restrictions to the financial services that the AFS licence permits is not a contravention for the purposes of s990K(2)(b)(iv).

RG 34.51 For example, an AFS licensee may provide a custodial or depository service for an investor directed portfolio service (IDPS) when it is only authorised under its AFS licence to provide a custodial or depository service other than in relation to an IDPS. In this case, the licensee would be contravening the Corporations Act by carrying on an unlicensed financial services business, but there would be no contravention for the purposes of s990K(2)(b)(iv). However, if the auditor is also auditor of the AFS licensee for the purposes of Ch 2M of the Corporations Act, the auditor may regard the contravention of the Corporations Act as significant and be required to notify us about the matter under s311.

RG 34.52 We note that the AFS licensee itself has an obligation to report significant breaches of specific obligations to ASIC under s912D. However, even though a matter may have already been, or appear to have been, adequately

reported to ASIC by the licensee, the Corporations Act does not exempt an auditor from reporting the same matter.

Protection of auditors: Qualified privilege

- RG 34.53 An auditor making a report to us under s990K has qualified privilege: see s990L(1)(a). Section 89 of the Corporations Act defines 'qualified privilege' as protection from proceedings for defamation. In essence, the protection is available if an auditor has acted in good faith and solely for the purpose of discharging the statutory obligation to notify or report to us. An auditor must not have acted maliciously or for any other improper purpose. Statutory privilege does not displace any privilege that the auditor may be entitled to rely on under the common law.

What happens when an auditor fails to report?

- RG 34.54 The reporting of matters which may constitute a contravention under s990K is an important element of the effective regulation of AFS licensees and the protection of persons who rely on, or transact with or through, an AFS licensee. We may take appropriate action in relation to auditors who fail to report matters which constitute or may constitute a contravention as required by s990K.
- RG 34.55 An auditor who fails to comply with s990K of the Corporations Act (as applicable) is guilty of an offence. The relevant criminal penalties (fine and/or term of imprisonment) are set out in the Corporations Act and, in particular, Sch 3.
- RG 34.56 If, in our view, an auditor has failed to adequately and properly carry out or perform their duty to report circumstances to us under s990K(2), we may apply to the CALDB for the cancellation or suspension of the auditor's registration under s1292(1).

D Contraventions relating to credit licensees

Key points

This section explains the obligations of an auditor of a credit licensee under s104 of the National Credit Act to report matters which, among other things:

- constitute or may constitute contraventions of the licensee's credit licence conditions or specified provisions of the National Credit Act; or
- relate to the licensee's other obligations.

Notifications under s104 of the National Credit Act

- RG 34.57 Section 104 of the National Credit Act requires the auditor of a credit licensee to report certain matters within seven days of becoming aware of that matter.
- RG 34.58 Those matters which the auditor must report are specified in s104(2) of the National Credit Act and are matters that, in the opinion of the auditor:
- (a) have adversely affected, are adversely affecting or may adversely affect the ability of the licensee to meet its obligations as a credit licensee; or
 - (b) constitute or may constitute a contravention of:
 - (i) Div 2 or 3 of the National Credit Act (or regulations made under those divisions); or
 - (ii) a condition of the licensee's credit licence.

Note: This guide does not discuss an auditor's obligation under s104(2)(c) to report an attempt to unduly influence, coerce, manipulate or mislead an auditor.

- RG 34.59 The content of the report should provide sufficient detail to allow us to understand the nature of the matters which constitute or may constitute a contravention. Details of the content we would expect to be included in a report are set out in Section E of this guide.

What matters must be reported?

- RG 34.60 Section 104 of the National Credit Act applies to auditors when they are performing their duties under s49(3) (where ASIC has given a written notice to the credit licensee directing it to obtain an audit report) and s100(2) (where the credit licensee must lodge an audit report with a trust account statement).

- RG 34.61 The matters that must be reported under s104(2)(a) are limited to those that have an 'adverse effect' on the licensee's ability to meet its obligations.
- RG 34.62 Unlike s311 and 601HG of the Corporations Act, s104(2)(b) of the National Credit Act does not include a 'significance' test. This means that all matters must be reported to ASIC, irrespective of materiality or significance. However, the auditor is only obliged to report matters which constitute or may constitute a contravention of specified provisions of the National Credit Act (s104(2)(b)(i)), or of a condition of the licensee's credit licence (s104(2)(b)(ii)): see RG 34.63.
- RG 34.63 Under s104(2)(b)(ii), an auditor must report matters that, in the opinion of the auditor constitutes or may constitute a contravention of a condition of a licensee's credit licence. These licence conditions are imposed by us under s45 and 46 of the National Credit Act: see Pro Forma 224 *Australian credit licence conditions* (PF 224).

Protection of auditors: Qualified privilege

- RG 34.64 An auditor making a report to us has qualified privilege: see s105 of the National Credit Act. Section 16 of the National Credit Act defines 'qualified privilege' as protection from proceedings for defamation. In essence, the protection is available if an auditor has acted in good faith and solely for the purpose of discharging the statutory obligation to report to us. An auditor must not have acted maliciously or for any other improper purpose. Statutory privilege does not displace any privilege that the auditor may be entitled to rely on under the common law.

What happens when an auditor fails to report?

- RG 34.65 The reporting of matters which constitute or may constitute contraventions under s104 is an important element of the effective regulation of credit licensees and the protection of persons who rely on, or transact with or through, a credit licensee. The auditor should report all s104 matters to us regardless of whether the matter is noted in the audit report or if the licensee itself reported the matter to us under s53 of the National Credit Act. We may take appropriate action in relation to auditors who fail to report matters which constitute or may constitute a contravention as required by s104.
- RG 34.66 An auditor who fails to comply with s104 is guilty of an offence. The relevant criminal penalties (fine and/or term of imprisonment) are set out in the National Credit Act and, in particular, s104(3).

RG 34.67 If, in our view, an auditor has failed to adequately and properly carry out or perform their duty to report circumstances to us under s104, we may apply to the CALDB for the cancellation or suspension of the auditor's registration under s1292(1) of the Corporations Act.

E How to lodge notifications and reports

Key points

This section explains what information should be included in a notification or report and where to send them.

What information should be included

- RG 34.68 The Corporations Act and National Credit Act require an auditor to notify ASIC in writing of the circumstances giving rise to the suspicion of a contravention, but do not prescribe the content of the notification. We consider that notifications or reports should provide sufficient detail to allow us to understand the nature of the contravention or suspected contravention and should include all relevant facts that may assist us to evaluate the issue.
- RG 34.69 The notification or report should generally include the following matters:
- (a) the name and company number of the entity or entities referred to in the notification (for registered schemes, the Australian Registered Scheme Number (ARSN) should be provided), or the name and licence number of the licensee;
 - (b) the circumstances alerting the auditor to the contravention or suspected contravention including when the auditor became aware of it;
 - (c) the nature of the contravention or suspected contravention including a reference to the relevant section of the Corporations Act or National Credit Act (as applicable); and
 - (d) actions being taken by the entity, directors, licensee or auditor in relation to the contravention or suspected contravention.

Where to lodge notifications and reports

- RG 34.70 All notifications and reports should be emailed to auditor.notification.team@asic.gov.au.

Appendix: Examples of suspected contraventions

- RG 34.71 The examples of suspected contraventions in this appendix would require an auditor to form a view about how to apply the auditor reporting obligations. The examples include suspected contraventions that we consider would, in most situations, be significant and require notification.
- RG 34.72 We have also included examples of other suspected contraventions that we consider would, in most cases, not be significant. An auditor must consider the particular facts and circumstances of each case when deciding whether to notify ASIC about the suspected contravention under s311 or 601HG.

Suspected contraventions that are likely to be significant

- RG 34.73 The following examples relate to:
- (a) insolvent trading;
 - (b) failure to comply with accounting standards;
 - (c) modified audit or review reports;
 - (d) fraud by officers or employees of the entity;
 - (e) related party transactions;
 - (f) composition of the board of directors;
 - (g) failure to keep books and records;
 - (h) non-lodgement of financial reports; and
 - (i) ongoing failures to comply with a compliance plan.
- RG 34.74 Although we note how an auditor may deal with these suspected contraventions, the suggested treatment may not necessarily be the most appropriate in all circumstances. These examples are not a checklist and their inclusion in this guide does not indicate that we will always consider the suggested treatment to be appropriate in all cases. Each case must be considered on its merits.

Insolvent trading

- RG 34.75 Section 588G of the Corporations Act provides that a director of a company may contravene the Corporations Act by failing to prevent the company from incurring a debt when there are reasonable grounds to suspect that the company is insolvent or would become insolvent by incurring the debt. Given the nature of a contravention of s588G and the possible detriment that there may be to creditors or employees, it is unlikely that a suspected contravention would not be significant or could be adequately dealt with by

commenting on it in the auditor's report or bringing it to the attention of the directors.

- RG 34.76 The criteria for determining whether an auditor has an obligation to notify us of suspected insolvent trading under s311 are different from the criteria determining whether an auditor should comment on the uncertainties as to the ability of a company to continue as a going concern in an audit report. Section 311(4)(b) of the Corporations Act directs the auditor to consider the effect that the contravention has, or may have, on the overall financial position of the entity, or on the adequacy of the information available about the overall financial position of the entity, when determining whether the contravention of the Corporations Act is significant.
- RG 34.77 If an auditor has identified going concern issues, the auditor should perform sufficient work to establish whether there are reasonable grounds to suspect insolvent trading. The auditor should not delay notifying us of suspected insolvent trading until they have resolved going concern considerations.
- RG 34.78 Suspected insolvent trading may become apparent at any time during the year, including during the conduct of audit or review procedures after balance date and before the signing of the financial report. Where the auditor's suspicion is aroused, the auditor should perform sufficient work to establish whether there are reasonable grounds for suspicion. However, the auditor does not need to be satisfied that an entity is incurring debts while insolvent before notifying us. The notification should not be delayed in the hope that the company will be able to obtain some new support from financiers or others before the signing of the financial report.
- RG 34.79 Where a financial report has been prepared on a going concern basis and the auditor gives a qualified audit report on the appropriateness of using the going concern basis, there is a significant contravention and ASIC must be notified.

Failure to comply with accounting standards

- RG 34.80 The auditor's report under s308 and 309 of the Corporations Act must deal with certain matters. For example, under s308(2) and 309(2), an auditor must report on and quantify (to the extent that it is practicable) the effect on the financial report of a company's failure to comply with the accounting standards under s296(1).
- RG 34.81 Non-compliance with an accounting standard would in many circumstances be significant. Non-compliance with an accounting standard could require the restatement of a previously issued financial report or the issuance by the auditor of a modified audit or review report. Even if the auditor considers that the non-compliance is not significant, it might not be adequately dealt

with by commenting on it in the auditor's report or drawing it to the directors' attention and so ASIC should be notified.

- RG 34.82 An auditor should notify ASIC about instances in which an entity's financial report fails to comply with the accounting standards under s296 of the Corporations Act and a previously issued financial report was materially misstated. Whether the misstatement is revealed by new information that has come to light or whether the non-compliance was intentional do not change the requirement to notify ASIC about the failure. However, where an entity's financial report complied with the accounting standards when that report was issued, and a restatement is required by the relevant accounting standard due to a change in accounting policy or the adoption of a new accounting standard and does not represent the correction of an error, we do not consider that an auditor would be required to notify ASIC.

Modified audit or review reports

- RG 34.83 Sections 308 and 309 require an auditor who audits or reviews a financial report for a financial year or half-year (respectively) to report to members on whether the auditor is of the opinion that the financial report is in accordance with the Corporations Act. Auditors should notify us of the underlying basis upon which the auditor has issued an audit or review report with a modified opinion (i.e. a qualified opinion, adverse opinion, or disclaimer of opinion).
- RG 34.84 Where an auditor's report is modified in relation to a scope limitation, the auditor should consider whether the circumstances that led to the scope limitation give rise to the auditor having reasonable grounds to suspect a contravention of the Corporations Act in determining whether to notify ASIC.
- RG 34.85 An emphasis of matter paragraph in an unmodified audit report may not necessarily relate to a circumstance that amounts to a significant contravention of the Corporations Act; however, the auditor should consider whether the underlying basis for that emphasis of matter gives rise to an obligation to notify ASIC under s311. An auditor's obligation to report whether a financial report is in accordance with the Corporations Act, in particular whether that report complies with the accounting standards under s296 and gives a true and fair view under s297, does not affect the auditor's obligation to also notify ASIC under s311.

Fraud by officers or employees of the entity

- RG 34.86 If information comes to the attention of an auditor that suggests the possibility of fraudulent conduct by officers or employees of the audited body, the auditor should perform sufficient work to establish whether there are reasonable grounds to suspect a contravention of the Corporations Act.

- RG 34.87 If, after making appropriate inquiries, the auditor has reasonable grounds to suspect that fraudulent conduct has occurred, or is continuing to occur, the auditor should notify ASIC about this conduct as a significant contravention. In considering whether the contravention or suspected contravention is significant, the auditor should have regard to the actual or potential loss resulting from the alleged fraud, number or frequency of the fraudulent events and the seniority of the individual involved.
- RG 34.88 It is unlikely that any suspected fraud by officers or suspected material alleged fraud by employees of the audited body could be adequately dealt with just by commenting on it in the auditor's report or drawing it to the directors' attention. This could only occur if the contravention or suspected contravention is not significant. In particular, if the scale of the alleged fraud is likely to adversely affect the overall financial position of the entity, or the adequacy of the information available about the overall financial position of the entity, ASIC should be notified: see s311(4)(b).
- RG 34.89 The auditor should notify us about a matter of this nature regardless of whether we may already be aware of the alleged fraud (e.g. through media coverage or self reporting by the company).

Related party transactions

- RG 34.90 There is a risk that the interests of a related party may influence the decision-making of directors to the detriment of the interests of members of the entity. Chapter 2E of the Corporations Act includes specific requirements for the approval and disclosure of related party transactions: see Regulatory Guide 76 *Related party transactions* (RG 76) for additional guidance. A contravention associated with related party transactions would generally be considered a significant contravention that would require notification.

Composition of the board of directors

- RG 34.91 Section 201A of the Corporations Act outlines the minimum number of directors that a company must have. A contravention of these requirements would generally be significant as it affects the governance of the company and so ASIC should be notified.

Failure to keep books and records

- RG 34.92 Section 286 of the Corporations Act requires that a company, registered scheme or disclosing entity keep written financial records that correctly record and explain its transactions and financial position and enable true and fair financial statements to be prepared and audited. Failure to maintain adequate books and records would likely be a significant contravention that would require notification.

- RG 34.93 The auditor should notify ASIC about these matters regardless of whether the matter has been reported in the audit report.

Non-lodgement of financial reports

- RG 34.94 Where the auditor suspects a financial report has not been lodged by its due date, in contravention of s319 or 320, this contravention should be considered significant if the entity is a listed entity or a disclosing entity. In other cases, an auditor should consider the circumstances such as the likely users of the financial report and significance of the report to those users, the length of time the report has been late and any other relevant circumstances such as a proposed modification to the auditor's report.

Ongoing failures to comply with a compliance plan

- RG 34.95 The auditor should notify us of ongoing compliance failures identified in an audit relating to a compliance plan. This includes all circumstances where a modified compliance plan audit report is issued.
- RG 34.96 In assessing the significance of instances of non-compliance, an auditor should consider matters such as:
- (a) investor protection issues;
 - (b) any monetary or adverse impact to investors, and
 - (c) whether the breaches identified indicate a systemic failure in the compliance processes of the audited body. Issues for consideration in assessing significance would include the period of time over which the non-compliance occurred, whether the issues were the subject of previous audit findings and have not subsequently been addressed by the entity, and whether the break down in compliance processes may impact on the ability of the entity to achieve any compliance plan objectives and/or statutory obligations.
- RG 34.97 Notification of these matters to ASIC does not change the auditor's obligation to issue a modified audit opinion where the circumstances require.

Suspected contraventions that are unlikely to be significant

Failing to assist the auditor

- RG 34.98 An isolated and relatively minor incident of an officer of the audited body failing to assist an auditor as required by s312 of the Corporations Act is unlikely to be a significant contravention. Bringing the matter to the attention of directors may be an adequate way of dealing with the matter if they take appropriate action.

Failure to correct an extract of particulars

RG 34.99 An auditor might deal adequately with an entity's failure to correct an extract of particulars in contravention of s346C of the Corporations Act by notifying the directors. However, the auditor is on notice of a possible continuing breach. If the failure continues, the auditor should notify ASIC.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an Australian financial services licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
ARSN	Australian Registered Scheme Number (ARSN)
ASIC	Australian Securities and Investment Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Auditor	A registered company auditor or the lead auditor of an authorised audit company
auditor reporting obligations	The obligations to report a contravention or suspected contraventions and other matters to ASIC under s311, 601HG or 990K of the Corporations Act and s104 of the National Credit Act
CALDB	Companies Auditors and Liquidators Disciplinary Board
CLERP 9 Bill	Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purpose of that Act
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
Director	Includes a director of a responsible entity as required
IDPS	An investor directed portfolio service, consisting of a number of functions including a custody, settlement and reporting system Note: A more detailed definition is contained in Class Order [CO 02/294] <i>Investor directed portfolio services</i> .
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
s311 (for example)	A section of the Corporations Act (in this example numbered 311), unless otherwise specified

Related information

Headnotes

AFS licence, auditors' obligations, credit licence, contraventions, licence conditions, qualified privilege, reasonable grounds, significant contravention, suspected contravention

Class orders and pro formas

[CO 02/294] *Investor directed portfolio services*

PF 209 *Australian financial services licence conditions*

PF 224 *Australian credit licence conditions*

Regulatory guides

RG 26 *Resignation of auditors*

RG 76 *Related party transactions*

RG 187 *Auditor rotation*

Legislation

ASIC Act, Pt 2, Div 2

Corporations Act, Chs 2M and 5C, Sch 3, s9, 89, 296, 308, 309, 311, 312, 319, 320, 324AF, 346C, 588G, 601HG, 912D, 990K, 990L, 1289, 1292

Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004

National Credit Act, Ch 2, s16, 45–46, 49(3), 53, 100(2), 104, 105

Cases

George v Rockett (1990) 170 CLR 104

Queensland Bacon Pty Ltd v Rees (1966) 115 CLR 266

Media and information releases

IR 00/12 *Audit of compliance plans of managed investment schemes*

IR 04/33 *Audit notifications under CLERP 9*

IR 07/55 *Audit notifications about AFS licensees*